11-55687, 11-55699

IN THE

United States Court Of Appeals

FOR THE NINTH CIRCUIT

MEDIFAST, INC., a Delaware corporation,

Plaintiff-Appellant-Cross-Appellee,

SHIRLEY MACDONALD, as personal representative of BRADLEY MACDONALD,

Plaintiff-Appellant,

-v.-

BARRY MINKOW, an individual; FRAUD DISCOVERY INSTITUTE, INC., a California corporation; TRACY COENEN, an individual; and SEQUENCE, INC., a Wisconsin service corporation,

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

APPELLEE'S REPLY BRIEF ON CROSS-APPEAL

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SUMMARY OF ARGUMENT

In their reply brief, Medifast and MacDonald (together "Medifast" or "Plaintiffs")[1] stretch the law and embellish the record, but their libel *per se* allegations remain a meritless claim calculated to silence free speech critical of Medifast's endless-chain business model Take Shape for Life ("TSFL").

Medifast again rejects entrenched Ninth Circuit law that California's anti-SLAPP provisions apply in federal diversity actions. Instead, it creates a new burden of proof that such motions must be brought under Rule 12(b)(6) and that its allegations must be accepted as true. The law, however, is that a plaintiff in opposing an anti-SLAPP motion must demonstrate a probability of prevailing on its claims. The District Court ruled that Medifast did not do so in its dozens of libel allegations, with the exception of one against FitzPatrick, where the court erred in interpreting California's "endless chain" law.[2]

Medifast continues to dispute the pleading standards that apply in testing the sufficiency of its allegations arguing that only Rule 8 can be used. The Ninth

[1] Bradley MacDonald died April 4, 2012. His estate filed a motion to substitute under Federal Rules of Appellate Procedure, Rule 43(a) on November 21, 2012, which was granted. However, Minkow personally served Shirley MacDonald with a notice of death of a party on July 16, 2012. (Reply Request for Judicial Notice ("RRJN"), Exhibit 1.) Under Federal Rules of Civil Procedure, Rule 25(a), which is incorporated into Rule 43, the action must be dismissed if a motion to substitute is not made within 90 days, which was October 15, 2012.

[2] Robert FitzPatrick ("FitzPatrick") submits this Appellee's Reply Brief on Cross-Appeal as the only cross-appellant. Appellees' Principal and Response Brief was submitted jointly on behalf of FitzPatrick, and on behalf of Barry Minkow ("Minkow") and Fraud Discovery Institute, Inc. (together "Minkow" or "Defendants").

Circuit, however, adopts California's anti-SLAPP procedural rules as not being in conflict with the Federal Rules, so either federal or state pleading rules apply. Consequently, the court did not err in holding that Medifast's libel allegations lacked essential specificity under California law. Regardless, Medifast did not meet the specificity required by federal law either.

Medifast then states once more that, in determining whether FitzPatrick made a provably false statement that TSFL meets California's definition of an endless chain, the FTC Act must be applied. The argument distorts what FitzPatrick actually said, but Medifast persuaded the court to use a narrow FTC-type analysis – not the broad California approach. That was error because Medifast's negative pregnant explanation of its compensation system, at best, excludes only some of the compensation from being part of an endless chain. Medifast does not confront this issue, and simply relies on the court's ruling.

Medifast adds a new argument that because the court held that one allegation survived the anti-SLAPP motion, all of its allegations against FitzPatrick survive. The court, however, ruled on the other libel allegations. Regardless, Medifast does not demonstrate a probability of prevailing on any of its other claims, which this Court can decide *de novo*.

Although FitzPatrick's anti-SLAPP motion should have been granted entirely, the court also did not hold Medifast to the higher standard of proof for a

limited purpose public figure. Medifast is a public figure and has not demonstrated with clear and convincing evidence that any of the allegedly libelous statements were made with malice. For that reason as well, this Court should affirm the part of the order granting FitzPatrick's anti-SLAPP motion and reverse the part denying his motion as to the endless-chain statement.

ARGUMENT

Stripped of its contrived pleading standard and hyperbole, Medifast cannot meet its burden of establishing a probability of success on its libel *per se* claim. Relying on its self-created burden of proof, Medifast again paraphrases Defendants' statements for shock value, as the District Court observed, and continues that practice on appeal by paraphrasing the record.[3] Medifast's theme is that Defendants called it a "criminal enterprise" which is not accurate either. FitzPatrick opined that TSFL meets the definition of an "endless chain" under California Penal Code, section 327. He refused to adopt Medifast's concocted language in his deposition about a "criminal enterprise" [ER 902:17-19], but he was right that TSFL is an endless chain.

[3] FitzPatrick and Minkow document in their principal brief Medifast's penchant for hiding information. Among other things, they explained that Medifast products were sold formerly through Jason Pharmaceutical, Inc., now a Medifast subsidiary. In 1992, the FTC filed a complaint against Jason Pharmaceutical because of misleading publications about Medifast's products, and a consent decree was entered. While the appeal in this case has been pending, the FTC filed another complaint against Jason Pharmaceutical and a second consent decree was entered for continuing violations. The FTC also levied a $3,700,000 fine. (RRJN, Exs. 2 &3.)

I. California's anti-SLAPP Law is "Substantive" and Applies in Federal Diversity Cases

The Ninth Circuit recognizes the importance California law places on pre-trial dismissals of meritless claims that masquerade as ordinary lawsuits, but are intended to chill free speech. *Batzel v. Smith*, 333 F.3d 1018, 1025-1026 (9th Cir. 2003). Medifast's lawsuit is a prime example. Medifast has generated abnormal profitability through a multi-level marketing scheme and its executives at the top of the pyramid have strong incentive to financially bully anyone who questions it.

"Because California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well." *Id.,* citing*, Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). To defeat an anti-SLAPP motion to strike, a plaintiff must establish "that there is a probability that the plaintiff will prevail on the claim" subject to the motion. (Code of Civ. Proc. § 425.16 (b)(1).)

The Ninth Circuit has considered whether application of these provisions of the anti-SLAPP statute would result in a "direct collision" with the Federal Rules and concluded it would not. *United States v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999). "These provisions and Rules 8, 12 and 56 'can

exist side by side … each controlling its own intended sphere of coverage without conflict'." *Id.,* citing, *Walker v. Armco Steel,* 446 U.S. 740, 752 (1980).[4]

Consequently, a defendant may bring a special motion to strike pursuant to section 425.16(b) and if that is unsuccessful, "remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Lockheed,* at 972. The anti-SLAPP provisions do not interfere with the operation of Rules 8, 12 or 56. "In summary, there is no 'direct collision' here." *Id.* "A special motion to strike under § 425.16 can be based on any defect in the Complaint …" *Condit v. National Inquirer, Inc.,* 248 F.Supp.2d 945, 953 (E.D. Cal. 2002).

In the face of this authority, Medifast argues that *Lockheed* is no longer the law because a district court held that a 425.16 motion must be treated as one made under either Rule 12(b)(6) or Rule 56). (Appellants' Reply and Response Brief ("ARRB"), p.9, citing, *Rogers v. Home Shopping Network, Inc.*, 57 F.Supp.2d 973, 976 (C.D. Cal. 1999).) Medifast is simply wrong as confirmed in the Ninth Circuit's more recent *Batzel* case. *Batzel,* 333 F.3d at 1025-1026.

Not content with asserting that a district court has overruled the Ninth Circuit, Medifast then *misquotes* another case for a proposition the court did not make, italicizes its misquote for emphasis, and deletes the critical first part of the

[4] The discovery-limiting subsections of the anti-SLAPP law (§ 425.16 (b) and (c)) do collide with the discovery-allowing parts of Rule 56 and, therefore, do not apply in federal court. *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1109 (9th Cir. 2003).

quote. (AARB, p.9, citing, *Condit,* 284 F.Supp.2d at 953). The *Condit* court accurately stated the law as follows:

> A special motion to strike under section 425.16 can be based on any defect in the Complaint, including legal deficiencies addressable on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), or a failure to support a stated claim with evidence, analogous to a motion for summary judgment under Fed. R. Civ. P. 56.

Id., at 953. Medifast disregards the first part of the quote that an anti-SLAPP motion can challenge any pleading defect, and then changes the word "or" to "*not* for" so it reads that an anti-SLAPP motion to strike 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 …" (Emphasis in Medifast's text.)

Medifast then summarizes its misinterpretation to mean that in deciding anti-SLAPP motions, district courts "must apply the standards that govern a Rule 12(b)(6) motion to dismiss." (ARRB, p.9.) That is not the law. The law is that an anti-SLAPP motion can be based on any defect in the complaint, not just those challenged by a 12(b)(6) motion.

A. California or Federal Pleading Rules May be Applied in Deciding an anti-SLAPP Motion to Strike a Libel p*er se* Claim

Medifast argues not only that Rule 12(b)(6) must be used in deciding an anti-SLAPP motion, but also that the pleading standards of Rule 8 must be used in testing its libel *per se* claim. That is not the law either. In *Lockheed,* this Court instructed that the anti-SLAPP statute and Rule 8 exist "side by side." *Lockheed,*

190 F.3d at 972. Consequently, either California's pleading laws, or Rule 8, or both, can be used in challenging the sufficiency of Plaintiffs' claims.

The District Court did not err in ruling that Medifast failed to plead libel with required specificity. Citing, *Christakis v. Mark Burnett Prods.,* 2009 WL 1248947, at *4 (C.D. Cal. April 27, 2009). *Christakis* held that a complaint for libel must plead the exact words, and it relied on both California and Ninth Circuit authority. See, *Franchise Realty Interstate Corp. v. San Francisco Local Jt. Executive Bd. of Culinary Workers,* 542 F.2d 1076, 1082-83 (9th Cir. 1976) (when First Amendment rights are implicated, the danger that the action will chill free speech, requires specific allegations).[5]

B. Medifast's Allegations Do Not Satisfy California's Pleading Standards for Libel *per se*

The defects in Plaintiffs' complaint go deeper than their failure to plead exact words and their misplaced reliance on exhibits to provide essential facts. The critical problem is that the exhibits neither support Medifast's embellishments, nor constitute defamation.

Medifast does not dispute that it failed to plead the words it claims are defamatory, and concedes that it "outlines" the statements. (ARRB, p.12.)

[5] Medifast mistakenly relies on two cases to support its position that specific allegations are not required. Neither case involved an anti-SLAPP motion and they were decided under Rule 12(b)(6). *Toth v. Guardianship Industries Corp.*, 2012 WL 1076213 (E.D. Cal. March 29, 2012); *Newfarmer-Fletcher v. County of Sierra*, 2012 WL 2839850 (E.D. Cal. July 10, 2012).

Medifast just disagrees with the law. It also misses the point in arguing that Judge Sammartino should have considered the entire complaint, including the exhibits.[6] She did consider Medifast's exhibits – that's how she knew Medifast was inaccurately paraphrasing them.

Medifast also implies that its exhibits support its allegations by offering quotes. However, the quotes cite to its allegations, not the exhibits. (E.g., ARRB, p.12.) As Judge Sammartino concluded, the vast majority of the 37 allegedly false statements were comments about the structure and function of TSFL's compensation system that could not be defamatory without explanatory matter.

Medifast now argues that its complaint meets California's pleading standards, citing, *Gilbert v. Sykes,* 147 Cal.App.4th 13, 31 (2007). That case, however, is consistent with *Christakis* and holds that "words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint." *Id.,* (internal citations omitted). Medifast did not plead the alleged defamation verbatim, and did not specifically identify it either, but chose to

[6] Medifast relies on *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1998), but that case involved a motion to dismiss under Rule 12(b)(6), and an alternative motion for summary judgment under Rule 56, where an appendix of exhibits had been submitted. The plaintiffs there alleged securities fraud, not libel *per se,* and no anti-SLAPP motion had been filed.

hyperbolize what was said. Consequently, the exhibits could not remedy the defective allegations.[7]

C. Medifast's Allegations Also Do Not Satisfy Federal Pleading Standards

Assuming only federal pleading standards apply in evaluating the sufficiency of a libel *per* se claim, Medifast did not meet them either. First, Medifast mistakenly asserts that the notice-pleading of Rule 8 governs. As discussed above, however, specific allegations are essential when First Amendment rights are implicated. *Franchise Realty Interstate Corp.,* 542 F.2d at 1082-83. If a plaintiff seeks damages for conduct protected by the First Amendment "the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Id.*

The same approach has been followed by district courts. *Chabra v. Southern Monterey County Memorial Hospital, Inc.*, 1994 WL 564566 (N.D. Cal. Oct. 3, 1994) (words constituting libel must be specifically identified if not pled verbatim); *Jacobson v. Schwarzenegger*, 357 F.Supp. 2d 1198 (C.D. Cal. 2004) (allegedly defamatory statement must be specifically identified).

[7] Medifast cites California cases for its contention that where written instruments form the basis of a claim, they may be pled *in hac verba.* Those cases, however, pertain to contract-based claims, not libel. See, *Holly Sugar Corporation v. McColgan,* 18 Cal.2d 218, 225 (1941); *Hoffman v. Smithwoods RV Park, LLC,* 179 Cal.App.4th 390, 400 (2009).

Medifast also relies on a case that has been abrogated by the United States Supreme Court. Medifast cites *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), and argues that 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." (ARRB, p.12.) More recently, the Supreme Court acknowledged that the "no set of facts" language "has been questioned, criticized and explained away long enough [and] … is best forgotten as an incomplete, negative gloss on an accepted pleading standard …" *Bell Atlantic Corporation v. Twombly,* 550 U.S. 544, 562-563 (2007). Although this case cannot be analyzed under Rule 8 because of Defendants' First Amendment rights, Medifast's reliance on *Conley* reflects its loose interpretation of the law.

II. Medifast Has Not Established a Probability of Prevailing on its Libel *per se* Claim

Medifast did not plead libel with required specificity. However, Medifast must not only plead a valid claim, it must also *substantiate* its claim with admissible facts. "[T]o establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must 'state [ ] and substantiate [ ] a legally sufficient claim.'" *Wilson v. Parker, Covert & Chidester,* 28 Cal.4th 811, 821 (2002), *superseded in part by statute*, citing, *Briggs v. Eden Council for Hope & Opportunity,* 19 Cal.4th 1106, 1123 (1999).

A plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts that would sustain a judgment if plaintiff's evidence is credited. The court considers the pleadings and evidence, and although it does not weigh the strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence defeats the plaintiff's attempt to establish evidentiary support for the claim. *Ibid.* (internal citations and quotations omitted). The Ninth Circuit has adopted this approach. *Manufactured Home Communities, Inc. v. County of San Diego,* 655 F.3d 1171 (9th Cir. 2011).

With one exception, the District Court found that Medifast's numerous allegations either did not state legally sufficient claims, or were not supported by a sufficient prima facie showing of admissible facts. The one exception was FitzPatrick's opinion about TSFL being an endless chain, and in that regard the court erred by misconstruing the applicable law, which was obscured by Medifast's manipulation of data.

A. Medifast's Evidence Does Not Prima Facie Show That FitzPatrick's "Endless Chain" Statement is Provably False

Medifast's reply again does not demonstrate that FitzPatrick's endless-chain statement is false. Because Medifast has alleged libel, it must make a prima facie showing that challenged statements are untrue. *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 516 (1991). Courts also evaluate whether an average reader

would consider the statement to be fact or protected opinion. *Carver v. Bonds*, 135 Cal.App.4th 328, 344 (2005).[8]

Medifast disregards its prima facie showing obligation, arguing that the Court must accept the declaration of its witness Daniel Bell ("Bell") as true and cannot weigh FitzPatrick's credibility against Bell's. (ARRB, p.25.) This ignores Medifast's threshold duty to establish that FitzPatrick's statement, about TSFL being an endless chain under California law, is provably false. Indeed, Medifast still contends that it correctly cited to the FTC's definition of what constitutes a "pyramid scheme" – not California's definition of an "endless chain." (ARRB, p. 29.) FitzPatrick, however, states that "my report examines and offers an opinion whether *Take Shape for Life* operates as an 'endless chain' as defined in the California Penal Code." [ER 54.]

Because Medifast is relying on the wrong definition, it cannot establish that FitzPatrick's statement is provably false. Even after FitzPatrick emphasized in his principal brief the differences between the California definition and the FTC Act definition, Medifast offered no analysis of its own. It only states that "no analysis was necessary as Sammartino already determined such a statement was provably-

[8] Medifast incorrectly claims that FitzPatrick does not contend his statements were opinions. (Appellees' Principal Brief ("APB"), p. 52-53 & 58-61.) Given the obscurity of multi-level marketing and evolving law that applies to it, any analysis should be considered opinion.

false." (ARRB, p.29.) Because this Court's review is *de novo*, Medifast's failure to refute FitzPatrick's analysis warrants reversal.

Although Judge Sammartino quoted Penal Code section 327 and cited to the California case *People v. Bestline Products, Inc.,* 61 Cal.App.3d 879, 914 (1976), her analysis was based on Bell's declaration. She accepted Bell's equivocation that under TSFL's plan no compensation is paid "merely" for recruiting, that bonuses are not paid "simply" for introducing new participants, and that "the vast majority of orders" are placed by clients who are not participants. [ER 16.]

However, Bell's negative pregnant explanation did not disclose all elements of TSFL's compensation system, which itself establishes that FitzPatrick's statement is not provably false. If participants are not paid "merely" for recruiting or "simply" for introducing new participants, clearly part of their compensation is for recruiting and introducing new participants. That violates California's endless chain law, and Medifast failed its burden. These new recruits, who themselves recruit, purchase inventory through internal money transfers, which generates up-line commissions and also violates California's law.

Under section 327, it makes no difference whether participants receive part of their compensation from sales to non-participants; the crucial consideration is whether participants receive *any* compensation for introducing new members. *Bestline* reached the same conclusion that it is only pyramid sales plans, under

which compensation "is limited" to payment for sales to persons who are not participants that are outside the definition of an endless chain. *Ibid.,* 61 Cal.App.3d at 914. This point was emphasized again in *Bounds v. Figurettes, Inc.*, 135 Cal.App.3d 1, 18-19 (1982), which discussed *Bestline* at length. *Figurettes* explained that pointing to the importance of non-participant "retail sales" did not matter because "retail sales do not legalize the pyramid marketing scheme which violates Penal Code section 327." *Id.* "The fact that some retail sales occur does not mitigate the unlawful nature of the recruiting." *Id.*

Bell admits that in TSFL's scheme, participants pay to become members [ER 1014], with charges for semi-annual renewals, which gives them the chance to receive compensation for introducing new participants. [ER 1005, ¶21]. "Bonuses" also are paid, including: "client assist bonuses" when a participant (coach) sponsors another participant; and, "growth bonuses" paid to senior participants who grow their business. [ER 1016-1020.] Indeed, Medifast's complaint confirms that TSFL is an endless chain. "Health coaches (participants) receive commissions based upon … products they sell *either to non-health-coach clients, or to other health coaches… The only benefit that health coaches receive from recruiting additional health coaches is a residual commission …"* [ER 32, ¶¶ 32-33, emphasis added.]

All of this meets the definition of an endless chain under section 327 ("an 'endless chain' means a scheme … whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation …"). By paying to become participants, Medifast's health coaches receive "the chance to receive compensation" for recruiting new participants through commissions as well as bonuses.

Medifast cannot show that FitzPatrick's statement about TSFL being an endless chain is provably false. Accordingly, Medifast failed to meet its burden of establishing a probability that it will prevail on its libel claim.

B. As a Matter of Law, FitzPatrick's Evidence Supporting His anti-SLAPP Motion Defeats Medifast's Evidence

Because Medifast did not make a prima facie showing that FitzPatrick's statement is provably false, this Court does not have to consider whether his evidence defeats Medifast's as a matter of law. However, as an alternative reason for reversing the District Court's ruling, he also showed that his statement is true.

In his declaration, FitzPatrick discusses that in 2011, the SEC required Medifast to restate its 2009 10K filing and make additional disclosures. Among them were that Medifast also markets "income opportunities" through TSFL, which includes financial rewards tied to an expanding sales force. [SER 731.] Medifast states further that it distributes its products through "the Take Shape for Life network of independent health coaches … that buy products themselves" and

are "distributors" in a "network marketing system." [SER 734, ¶18 and fn. 6.] This was followed by the admission to its shareholders that "[o]ur direct selling distribution channel is subject to risk of interpretation of certain laws pertaining to the prevention of 'pyramid' or 'chain sale' schemes." [SER 736, ¶25.]

As discussed above, FitzPatrick showed through Medifast's materials, that participants in TSFL pay for the ability to participate in the scheme [ER 1013-14]; and that they, then, have the chance to receive compensation by introducing others into the scheme [ER 1006-1007] though commissions and bonuses [ER 1016-1017]. This evidence alone defeats Medifast's as a matter of law in confirming that TSFL is an endless chain.

FitzPatrick also used information from Medifast's website to show that over time, health coaches using the pyramid structure would exponentially out-earn those who relied on client sales. [ER 78.] That was the incentive to recruit and not rely on retail sales.

FitzPatrick further exposed a primary indicia of an endless chain by calculating the attrition rate of health coaches. Bell concealed the rate by revealing only the overall increase in coaches and not disclosing how many quit. FitzPatrick used Medifast's SEC reports in conjunction with Bell's comments to calculate a 60% attrition rate. [SER 746.]

FitzPatrick defeated Medifast's evidence as a matter of law. In doing so, FitzPatrick also revealed how insidious pyramid schemes are and that Medifast has been manipulating data to conceal the telltale signs of TSFL's endless chain – the high attrition rate of those at the bottom of the pyramid.

C. Medifast Did Not State or Substantiate Claims for Libel *per se* as to Any of FitzPatrick's Other Statements

Medifast asks this Court to preserve all of its other libel *per se* allegations arguing that because Judge Sammartino held Medifast had shown a probability of prevailing on the "endless chain" statement, she did not need to consider its other allegations. (ARRB, p.30.)

The judge, though, did analyze Medifast's other libel allegations and concluded that all but three did not even meet the pleading standards for libel. [ER 15.] She found that Medifast did not plead libel with specificity and that most of its allegations were not defamatory without explanatory matter.

The three statements that required more analysis were: (1) TSFL's compensation system meets the definition of an endless chain, as discussed above; (2) the comparison of Medifast to Bernie Madoff; and (3) Medifast's auditor pumped its stock to clients. Other than the "endless chain" statement, Medifast's opening brief only disputed the court's ruling on the comparison to Madoff, and

only as to Minkow.[9] (Appellants' Opening Brief ("AOB"), pp.43-45.) In its reply brief, however, Medifast contends that FitzPatrick actually authored Minkow's comparison of Medifast to Madoff, and that FitzPatrick defamed it by referring to TSFL as a "pyramid" and "pump and dump" scheme.

Medifast now seems to be arguing that if FitzPatrick fails on his cross-appeal, its other claims against him remain too. Assuming FitzPatrick's cross-appeal were unsuccessful, Medifast's approach would lead to another anti-SLAPP motion, forcing the District Court to repeat its work. That would conflict with the anti-SLAPP statute's fundamental purpose, which is prompt review of cases brought to chill free speech.

Medifast cites *Oasis West Realty, LLC v. Goldman,* 51 Cal.4th 811 (2011) to support its contention that if a plaintiff shows a probability of prevailing on any part of its cause of action, the entire cause of action stands. *Id.,* at 820. Medifast reads too much into *Oasis*. There, the court considered all three of the plaintiff's causes of action as having arisen out of the defendant attorney's breach of fiduciary duty. Because the court concluded that the plaintiff had demonstrated a probability of establishing a breach, there was a probability of prevailing on each cause of action. *Id.,* at 821-822. This case is different because only Medifast's

[9] The comparison of Medifast to Madoff is not among the "most egregious statements" that Medifast argued were defamatory in its opposition to Defendants' anti-SLAPP motions. [ER 429-432.]

libel claim is being considered, and it alleges dozens of separate counts, all of which were considered by the District Court.

This case squares better with *Taus v. Loftus,* 40 Cal.4th 683 (2007). In *Taus,* the plaintiff alleged four causes of action against multiple defendants. The Court of Appeal held that the plaintiff failed to establish a prima facie case "with regard to the bulk of defendants' conduct" and only defeated the anti-SLAPP motion as to "one facet of one of numerous causes of action." *Id.*, at 715, 743-743. Upon further review, the Supreme Court reasoned that because "the overwhelming majority of plaintiff's claims should have been struck" the case was remanded for further proceedings consistent with the opinion, and defendants were awarded costs on appeal. *Id.,* at 742-743. See also, *Wallace v. McCubbin,* 196 Cal.App.4th 1169 (2011) (thorough analysis of the anti-SLAPP legislation, *Oasis* and *Taus*).

Where, as here, the other multiple acts alleged were considered and decided by the court, the claims cannot be resurrected. The District Court's rulings are law of the case. *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). FitzPatrick's motion challenged Medifast's entire complaint and all of the allegedly defamatory statements – and the court ruled on them. The holding in *Oasis* has no application under these facts. Regardless, Medifast invites this Court to consider whether Judge Sammartino erred in striking the libel allegations.

1. The Madoff Comparisons are not Provably False

As to the contention that FitzPatrick authored Minkow's posts about the comparisons of Medifast to Madoff (ARRB, p.30), Medifast did not state or substantiate a viable libel claim. As Judge Sammartino held, Medifast's allegations have a fatal flaw because they cannot reasonably be understood as implying a provably false assertion. [ER 19.] Identifying points of similarity between TSFL and Madoff [ER 88] does not mean they are the same, much less accuse Medifast of a crime. Whether FitzPatrick authored the comparisons is inconsequential. That aside, the record Medifast cites contradicts its contention that FitzPatrick "authored" the comparison. Minkow authored it, he just used part of FitzPatrick's work. [ER 929, 1102:7-12 ("my idea, his foundation").]

2. The Pyramid Scheme Statements are not Provably False

Medifast's next argument that FitzPatrick falsely accused it of running a pyramid scheme adds nothing new. (ARRB, p.31.) As FitzPatrick explains, endless chains are a type of pyramid. [ER 1040.] However, not all pyramid schemes are illegal under California law. He just said TSFL meets the definition of a pyramid [ER 1299] and he is right. (See, APB, p.3.) Medifast's Income Disclosure Statement shows the pyramid in its ten ranks of coaches and the disproportionate upward follow of commission income. [SER 337.]

3. The "Pump and Dump" Statements Are not Provably False

Medifast's new argument, that it was defamed by a paragraph in FitzPatrick's updated report entitled "Pyramid Meets Pump-and-Dump," does not change the analysis. [See, ER 1300.] Medifast did not specifically plead what is libelous in the paragraph. [See, ER 39:18-19.] Moreover, a reasonable person could not read it as being provably false, certainly not without more information. FitzPatrick's linking TSFL's abnormal growth to an inflation in Medifast's stock price is not libel *per se.* Nothing expressly or impliedly accuses Medifast of a crime.

By all appearances, Medifast was pumping its stock and dumping it. Medifast does not dispute that, at the time, its stock had a higher price-to-earnings ratio than Apple Computer, and was four-times higher than the industry leader, Weight Watchers. [ER 1300.] Yet, Medifast insiders sold off $6 million of stock in the previous two months, and they had not purchased any stock in the previous six months. Plaintiffs do not dispute this either. [ER 1300.]

Medifast did not state or substantiate a legally sufficient defamation claim as to any of the statements alleged. Its complaint did not plead libel *per se* with specificity and it did not demonstrate that its claim is supported by a sufficient prima facie showing of facts to support a judgment.

III. The District Court Erred in Not Finding Medifast to be a Limited Purpose Public Figure

All of Plaintiffs' libel allegations also fail when the burden of proof for public figures is applied. Unlike other plaintiffs, public figures and limited purpose public figures must prove by clear and convincing evidence that allegedly defamatory statements were made with malice or reckless disregard of the truth or falsity. *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-280 (1964). Therefore, when faced with an anti-SLAPP motion, these plaintiffs must establish a probability that they can produce clear and convincing evidence that the allegedly libelous statements were made with malice or reckless disregard. *Ampex Corp. v. Cargle*, 128 Cal.App.4th 1569, 1579 (2005).

The District Court identified the elements of a limited purpose public figure: (1) there must be a public controversy that was publically debated and had substantial ramifications for non-participants; (2) the plaintiff must have voluntarily acted to influence the issue or thrust itself into the public eye; and (3) the alleged defamation must be germane to the plaintiff's participation. [ER 8, citing, *Ampex Corp.,* 128 Cal.App.4th at 1577.]

In considering these elements, the court found that the debate over the "obesity epidemic" and "personal finance crisis" were not public controversies. However, it is not the "personal finance crisis" that Defendants contend is controversial; it is the TSFL multi-level marketing scheme that Medifast was

touting as a successful new approach to obesity treatment as well as a business opportunity. [ER 477 (FitzPatrick); ER 457 (Minkow); CSER 744 (Coenen).]

A. Miracle Diets Sold through Multi-Level Marketing Coupled with Business Opportunities is a Public Controversy

A public controversy is implicated if the subject of the statement was in the public eye, could affect a large number of people beyond the participants, and involved a topic of widespread interest. *Harkonen v. Fleming,* 2012 WL 3026400, *6 (N.D. Cal. July 24, 2012) (defendant's comments on plaintiff's press releases of clinical drug trial results involved widespread interest and were part of a public controversy).

Medifast argues that there was no pre-existing public controversy that would make it a limited purpose public figure because Defendants created the controversy. However, the California Attorney General, the FTC and the U.S. Postal Service have cautioned consumers about pernicious multi-level marketing companies. Consumers have been specifically warned to use a "healthy dose of caution" before buying products that offer health miracles especially when coupled with "opportunities" to become distributors. [SER 552 & 560.] The controversy existed before TSFL was introduced in 2002 as reflected in the 1998 FTC statement on "Pyramid Schemes" [SER 580-588], and the January 2000 "FTC Consumer Alert" [SER 552]. The debate has become more widespread since then. [SER 555-558; SER 560-561; SER 563-564; SER 566-567; SER 569.]

The controversy impacts non-participants because family and friends are typical targets for recruitment, and shareholders suffer financial consequences when pyramids collapse and endless chains break. Banking systems are affected too, as money is diverted from traditional investments. [SER 584.]

B. Medifast Voluntarily Sought to Influence the Controversy, and Thrust Itself Into the Public Eye

A plaintiff inserts itself into the public eye by voluntarily acting to influence the public debate. "It is not necessary to show that a plaintiff actually achieves prominence in the debate; it is sufficient that '[a plaintiff] attempts to thrust himself into the public eye' (citation) or to influence a public decision (citation)." *Copp v. Paxton,* 45 Cal.App.4th 829, 845-846 (1996) (earthquake mitigation expert who passed out flyers and organized conference was limited purpose public figure). See also, *Harkonen,* 2012 WL 3036400 at *7 (CEO of biotechnology company who issued press release on clinical data was limited purpose public figure); *Ampex Corp.,* 128 Cal.App.4th at 1578 (corporation and chairman were limited purpose public figures based on press releases and postings on web site).

Medifast issues regular press releases, holds recruiting conferences, and makes government disclosures. Its existence depends upon publicity. Medifast spends tens of millions annually on advertising to convince the public that it has an effective way to treat obesity, recently through its controversial TSFL multi-level marketing scheme.

It knew TSFL was controversial and hired veterans of other multi-level marketing programs to set it up. Bell was TSFL's architect and a 20-year distributor for Amway, which the FTC previously investigated. Medifast hired Bell when it acquired TSFL's predecessor, Health Inventions, Inc., whose president later founded BurnLounge, Inc., another pyramid scheme prosecuted by the FTC. [Appellees' RJN, Exs. 5 & 6; ER 1000-1001.]

Medifast focused on TSFL in its mid-2008 report to the SEC as a primary reason for its 25% increase in revenue. [SER 899.] By 2009, Medifast publically reported that it was bucking industry trends with TSFL's revenue up 107% and was "extremely pleased" with its business model. [SER 593.] Medifast invited scrutiny of its operations and its new TSFL multi-level marketing program that had generated abnormal growth during a severe recession. It also knew TSFL might be identified as a pyramid or endless-chain scheme, and acknowledged that in its restated 2009 annual report to the SEC. [SER 1021.]

Medifast attracted attention to TSFL, accepting the consequence that its business model could be challenged under various laws. It was not just advertising its product, it was "bucking a trend" and doing so with a business plan that federal and state authorities see as a serious risk to consumers.

C. The Alleged Defamation Was Germane to Medifast's Participation in the Public Controversy

Medifast characterizes the controversy as relating only to it, and contends that Defendants initiated the discussion in February 2009. (ARRB, p.49.) However, as discussed above, miracle weight-loss programs sold through multi-level marketing that offer business opportunities were well-known pyramid schemes when Medifast introduced TSFL. Before Defendants' alleged "first attack," Medifast emphasized in a 2008 press release its record sales that "continued to show validation of [its] business model" driven by its TSFL coaches. [SER 602.]

The attention Medifast was soliciting for TSFL got the press's attention before Defendants said anything (e.g., CNN Money, 6/12/08 [SER 310]), and again shortly thereafter (e.g., BNET Health Care, 9/11/09 [SER 623]; CNN Money, 7/6/09 [SER 608]).

FitzPatrick and Minkow had investigated other pyramid and endless chain schemes before their attention was drawn to Medifast. Their reporting about TSFL was consistent with the pre-existing controversy and was based on their past experience as applied to Medifast's own disclosures. Their publications related to the existing commentary about TSFL as a controversial business model, and were germane to it.

Medifast emphasized TSFL's aberrant growth, in a declining product sector, as proof it held the secret to both financial success and weight loss. Those, such as Defendants, who have studied endless-chains saw the multi-level marketing scheme as the real answer. Consumers deserved an explanation to counter Medifast's opaque pronouncements and Defendants provided it.

D. Defendants' Statements Were Not Made with Actual Malice

Other than acknowledge that malice is part of a public figure's burden of proof, Medifast did not identify evidence to support the element in its opposition to Defendants' anti-SLAPP motions. It did not address the issue either in its opening brief. However, Medifast belatedly dedicates eight pages in its reply brief to the malice element, apparently recognizing that if it were found to be a limited purpose public figure, it could not possibly prevail. On the other hand, each Defendant addressed the malice element in their anti-SLAPP motions [ER 352-353 (FitzPatrick); ER 376-377 (Minkow); ER 318-319 (Coenen)], and in their principal briefs on appeal.

In opposing an anti-SLAPP motion, a limited purpose public figure also must demonstrate a probability that the allegedly defamatory statements were made with knowledge of their falsity or reckless disregard of their truth. (*Ampex Corp.*, 128 Cal.App.4th at 1578.) This is a subjective test of the defendant's actual belief. *Reader's Digest Assn., Inc. v. Superior Court*, 37 Cal.3d 244, 256-257

(1984). "[T]he defendant must have made the false publication with a 'high degree of awareness of … probable falsity' (citations) or must have 'entertained serious doubts as to the truth of the publications' (citations)." *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 666 (1989).

Medifast's argument that FitzPatrick is "biased" disregards the *Harte-Hanks*' standard. Apart from that, the record does not support its paraphrase that FitzPatrick as an expert has found that all multi-level marketing companies are pyramid schemes. He only testified in deposition that of the six investigations Medifast's counsel identified, he believed they were either a pyramid or an endless chain. [ER 787-788.] Medifast also states that FitzPatrick made only one "pretext" call to a health coach, although he testified it was *not* pretextual and that he spoke with other coaches. [ER 792:13-187; ER 801:19-21.] Medifast argues further that FitzPatrick made no objective investigation, notwithstanding that his report is based on Medifast's own records, including its website, TSFL's compensation plan, and SEC filings. [ER 791:3-13; ER 798:1-25.] FitzPatrick's report itself cites and footnotes his source information. [ER 52 - ER 81.]

Medifast also contends that FitzPatrick's testimony establishes he has no understanding of how TSFL's compensation system works. (ARRB, p.61, citing over 30 pages of transcript.) Assuming that were true, it would not show malice. However, it is not true as even a cursory review of the transcript, replete with

objectionable questions and incomplete excerpts, reveals. He explained TSFL's former two-track compensation plan where participants who paid more got higher commissions [ER 839:19-11] and the subsequent change to a single fee [ER 840:16-25]; he discussed how bonuses work [ER 843:4-23]; and, he seemed to know more than Medifast's counsel about the renewal fees [ER 842:1-25].

Finally, Medifast argues that FitzPatrick's statements were reckless because he received an opinion from an attorney "indicating" his conclusions "were unsupported and possibly wrong." (ARRB, p.62.) Again, assuming that were true, it does not show malice; but once more it is not true. The attorney said the analysis "was a bit more difficult than [he] expected" and he had been "absolutely slammed" with work. [ER 1067.]

Medifast failed its burden of showing that FitzPatrick made false statements with actual malice. Rather, FitzPatrick always believed his opinions were the truth and Medifast did not identify evidence in its after-thought argument to prove otherwise.

IV. MacDonald Did Not Have Standing to Bring a Defamation Claim

Medifast argues that FitzPatrick's and Minkow's statements must have been intended to reflect on MacDonald because they include a section on him in their principal brief's statement of facts. However, the factual statement does not

address the libel *per se* allegations and is not the evidence MacDonald needed to establish a probability of success on his claims.

More to the point, Plaintiffs have not shown that any of the allegedly libelous statements referred to MacDonald or were "of and concerning" him. The only additional argument in Plaintiffs' reply brief is that FitzPatrick and Minkow knew their statements concerned MacDonald because according to another of Plaintiffs' paraphrased interpretations "MacDonald was Madoff." There is no citation to the record for this new exaggeration because it was never said. Nevertheless, Plaintiffs again speculate that readers of Yahoo's finance blogs must have understood the analogy and could not have come up with it on their own. This speculation does not support a claim.

None of this is admissible evidence and, consequently, MacDonald did not substantiate a legally sufficient claim as required in opposing an anti-SLAPP motion.

CONCLUSION

Medifast adds nothing in its reply brief that would establish a probability of prevailing on its claims. Its failure to acknowledge that California's definition of an endless chain must be analyzed in determining whether the District Court erred in denying FitzPatrick's anti-SLAPP motion is critical because Medifast offers no analysis of its own. Regardless, Medifast again does not demonstrate that

FitzPatrick's opinion about TSFL meeting the endless chain definition is provably false. Moreover, FitzPatrick establishes that his statement was true as a matter of law. For these reasons, FitzPatrick and Minkow respectfully ask this Court to affirm the District Court's order granting their anti-SLAPP motions, and to reverse the order partially denying FitzPatrick's anti-SLAPP motion.

Respectfully submitted,

Dated: December 20, 2012

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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 Appellee's Brief on Cross-Appeal is proportionately spaced, has a typeface of 14 points or more, and contains 6,945 words excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: December 20, 2012

MULVANEY BARRY BEATTY LINN & MAYERS LLP

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

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