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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

j2 GLOBAL COMMUNICATIONS, INC., a Delaware Corporation, AND CALL SCIENCES, INC., a Delaware Corporation,

Plaintiffs/ Counter-Defendants,

v.

ZILKER VENTURES, LLC, a Texas Limited Liability Company, and CHOOSEWHAT.COM, LLC, a Texas Limited Liability Company,

Defendants/ Counter-Plaintiffs.

Case No. 2:08-cv-07470-SJO AJW

BRIEF IN SUPPORT OF MOTION TO DISMISS & STRIKE

MOTION DATE: 03/02/2009
MOTION TIME: 10:00 a.m.

HON. S. JAMES OTERO

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Plaintiffs j2 Global Communications, Inc. ("j2 Global") and Call Sciences, Inc. ("Call Sciences") (collectively referred to as "Plaintiffs") filed a complaint against Zilker Ventures, LLC ("Zilker") and ChooseWhat.com, LLC ("ChooseWhat") (collectively referred to as "Defendants") alleging counts of Trademark Infringement in Violation of the Lanham Act, 15 U.S.C. §1125(a)(1)(A) (Count I), Unfair Competition/False and Misleading Advertising in Violation of the Lanham Act under 15 U.S.C. §1125(a)(1)(B) (Count II), False advertising under California Business and Professions Code §17500 et seq. (Count III), Unfair Competition under California Business and Professions Code §17200 et seq. (Count IV), Common Law Unfair Competition and Trademark Infringement (Count V), and Accounting (Count IV). Defendants filed an answer to the complaint and counterclaim for declaratory judgment. Defendants now move that Plaintiffs' claims be stricken under California's Anti-Strategic Lawsuit Against Public Participation statute, Cal. Civ. Proc. Code § 425.16 ("anti-SLAPP") and dismissed based upon the pleadings pursuant to F.R.C.P. §12(c).

BACKGROUND

Defendant Zilker owns and operates faxcompare.com, which provides consumer information concerning the service offerings of several electronic fax providers, including monthly fees, hidden fees, startup fees, free trial periods and related service terms. *(See Compl. Exhibit E, pp. 34-39, Exhibit F, p. 50.)* Defendant ChooseWhat owns and operates pbxcompare.com, which provides a comparison of the top providers of hosted PBX systems. *(See Compl. Exhibit E, pp. 41-49, Exhibit G, pp. 51-52.)* Consumers are able to provide "User Feedback" concerning vendors and rate vendors on a scale of 1-5 stars. Access to the subject web sites is completely open to the public.

Defendants generate revenue from some vendors with whom they are able to negotiate and execute affiliate contracts. For instance, Plaintiff j2 Global pays a fee to Defendant ChooseWhat for click-throughs from pbxcompare.com for its

voice receptionist service and to Defendant Zilker for click through from faxcompare.com for j2 Global's rapid fax service. This is similar to millions of other web sites who participate in Commission Junction,[1] Google AdSense,[2] Yahoo Overture,[3] Amazon.com affiliate network and countless other "referral" programs.

Neither of the web sites at issue in this lawsuit states to consumers that they should not use Plaintiffs services. Defendants do encourage consumers to consider all their options before making a choice of which vendor they will select and provide links to each service vendor, including Plaintiffs, so that consumers can obtain all necessary information from the vendors themselves before making a decision. However, the side-by-side comparison of pricing on electronic fax services, for instance, shows consumers that eFax is price ~70% higher for ~53% fewer minutes/pages than many of its competitors.[4] Plaintiffs do not want pricing comparisons to be available to consumers since they are not competitive in that regard.

Plaintiffs' statements of fact are set forth as allegations 12 through 37 of their Complaint and supported by exhibits attached thereto. Plaintiffs have brought suit based on two basic theories: (1) that certain product review information about Plaintiffs' products on Defendants' respective web sites were/are false and/or misleading; and (2) that Defendants are infringing on Plaintiffs' trademarks by using the words "eFax" and "Onebox" on Defendants' web sites and, with regard to "eFax", as part of Defendant Zilker's Google AdWords campaign.

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[1] See www.cj.com. CJ is a leading third-party administrator of affiliate programs for vendors such as Plaintiffs and web site developers such as Defendants.
[2] Information about Google AdSense can be found at Google.com\AdSense\.
[3] Information about Yahoo Overture can be found at searchmarketing.yahoo.com.
[4] Plaintiffs do not allege that the pricing information listed on their web sites is either false or misleading.

For the reasons set forth more fully below, Plaintiffs' claims should be stricken under California's Anti-Strategic Lawsuit Against Public Participation statute, Cal. Civ. Proc. Code § 425.16 ("anti-SLAPP") and dismissed based upon the pleadings pursuant to F.R.C.P. §12(c).

ARGUMENT

FRCP 12(c) allows a party, after the pleadings are closed but early enough not to delay trial, to move for judgment on the pleadings. F.R.C.P. § 12(c). A Rule 12(c) motion is substantially identical to a Rule 12(b)(6) motion to dismiss in that both permit challenges to the legal sufficiency of the opposing party's pleadings. *See Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1131 (C.D. Cal. 2007); *see also Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). "A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Ownes v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).

The court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *See Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). However, the court may not assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 526 (1983). The court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). A court may dismiss a complaint on a dispositive issue of law. *See Marshall County Bd. Of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). ("A (complaint) may be dismissed on motion if clearly without any merit; and this

want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.) Thus, the Court may delve into some basic facts in reviewing a 12(c) motion.

A) Defendants' Alleged Unlawful Statements Are Protected by California's Anti-SLAPP Statute, Cal. Civ. Proc. Code § 425.16.

Before addressing the substantive arguments under each theory of dismissal, Defendants will analyze the applicability of California's anti-SLAPP provisions to Plaintiffs' state law claims. The anti-SLAPP statute is designed to protect First Amendment speech from strategic lawsuits filed to intimidate and reduce information in a public forum (*i.e.* the internet) about issues which implicate a public interest (*i.e.* consumer information). California's anti-SLAPP statute was enacted in response to the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Civ. Proc. Code § 425.16 (a). While it was impossible for the California Legislature to contemplate all possible statements which might be covered by the Act, courts have made it clear that the statute "shall be construed broadly" in order to achieve its goals, which is to "encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." *Id.* "The statute is designed to allow for early dismissal of non-meritorious cases aimed at chilling First Amendment expression through costly, time-consuming litigation." *New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1098 (C.D. Cal. 2004).

The Anti-SLAPP law applies if the Plaintiffs' suit arises from an act in furtherance of its rights of petition or free speech in connection with a public

issue. *See Wilkerson v. Sullivan*, 99 Cal. App. 4th 443, 446 (2002); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003). An "act in furtherance" includes, but is not limited to, "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest or any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public concern." Cal Civ. Proc. Code §§ 425.16(e)(3), (4).

i) Defendants' Alleged Actionable Statements and Published Content Were In Furtherance of Their Right to Free Speech Protected By the First Amendment to the United States Constitution.

This case is substantially similar to *New.net*, *supra,* wherein the United District Court for the Central District of California considered similar claims of unfair competition and the applicability of California's anti-SLAPP provisions. *New.net*, 336 F. Supp. 2d, 1090. In *New.net*, Plaintiff was a supplier of software which was surreptitiously bundled with unrelated software available for download over the Internet. Defendant's software was described as detecting and removing "the worst that the Internet and shareware/freeware have to offer." *Id.* at 1096-1097. When run by users, Defendant's software detected Plaintiff's software and offered users the opportunity to remove it from their computers. *Id.* The *New.net* Court stated: "Because the issue of public awareness of, and protection from, the unknown are at the heart of the public information service Defendant provides and because that service is of public significance, speech in this area should not be chilled by litigation brought by Plaintiff who seeks to stifle speech to enhance its profits." *Id.* at 1106. The *New.net* Court ultimately stuck Plaintiff's California unfair competition, trade libel and tortious interference claims and granted attorney fees to Defendant, under the anti-SLAPP statute. *Id.* at 1118.

The anti-SLAPP statute's focus is not on the form of the plaintiff's cause of

action but on the defendant's *activity* that gives rise to Defendants' asserted liability and whether that activity constitutes protected speech. *Navellier v. Sletten*, 29 Cal. 4th 82, 92 (2002). Courts have consistently recognized that, by its nature, consumer reporting involves matters of particular interest to the public because such information enables citizens to make better informed purchasing decisions by providing information about consumer products. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3rd Cir.1980). Courts have consistently recognized that the First Amendment protects the free flow of such consumer information. *See Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898 (Cal.App. 1 Dist. 2004) ("Consumer information, however, at least when it affects a large number of persons, also generally is viewed as information concerning a matter of public interest."). Where a website contains information that enables a consumer to better assess the benefits and risks involved in purchasing a particular service, the website concerns an issue of public interest. *See Gilbert v. Sykes*, 147 Cal. App. 4th 13, 23 (Cal. App. 3 Dist. 2007). Moreover, statements made on a website concerning a publicly traded company have been held to be an issue of public interest because they could affect investors and publically traded stocks. *See Global Telemedia Intern., Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal. 2001).

Whether particular statements made by consumer reporters are precisely accurate, it is necessary to insulate them from the vicissitudes of ordinary civil litigation in order to foster the First Amendment goals mentioned above. As the Supreme Court recognized in *New York Times Co. v. Sullivan*, "would-be critics ... may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times Co. v. Sullivan,* 376 U.S. 254, 279 (1964). If absolute accuracy of information was required,

consumers would be less informed, less able to make effective use of their purchasing power, and generally less satisfied in their choice of goods. *See Steaks Unlimited, Inc.*, 623 F.2d at 280.

ii) Information on the Internet Qualifies as Speech in a Public Forum under Cal Civ. Proc. Code § 425.16.

It is clear that Defendants allegedly actionable statements on their web sites took place in a "pubic forum" as that term is used under the Anti-SLAPP statute. California courts have held numerous times that web sites accessible to the public are "public forums" or a place "open to the public" within the meaning of section 425.16 for purposes of the anti-SLAPP statute. *See Gilbert,* 147 Cal. App 4th at 23*, Global Telemedia* 132 F. Supp. 2d at 1264; *See also Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1247 (Cal. App. 4 Dist. 2005); *Wilbanks v. Wolk*, 121 Cal. App. 4th at 895.

iii)The Exceptions of Cal. Civ. Proc. Code § 425.17 Do Not Apply.

It is expected that Plaintiffs will argue that the exceptions to California's anti-SLAPP statute under Cal. Civ. Proc. Code § 425.17 apply. In relevant part, section 425.17(c) states:

> Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:
>
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for,

promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer… and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

Cal. Civ. Proc. Code § 425.17 (c) (emphasis added). The exceptions found in § 425.17(c) get to the heart of an important threshold issue in this dispute across the analysis of both the anti-SLAPP statue and the Lanham Act, whether the Defendants are 'primarily engaged' in selling services 'as competitors' of Plaintiffs' services.

(a) Defendants are not "primarily" engaged in the business of selling goods or services.

Defendants' web sites make it clear that they research, collect, consolidate, organize, and present "apples for apples" consumer information, free of charge, about competing third-party service providers for comparison and review. Defendants do not bill, sell or support any good or service to any end-user of such services. While it is expected that Plaintiffs will argue that affiliate contracts with certain vendors somehow strip Defendants of their status as consumer information websites, this line of reasoning was specifically rejected in *New.net.*

In an attempt to show that Defendant primarily engages in the business of selling products, Plaintiff refers to Defendant's website which posts job

> listings for sales assistants and other sales positions. In an analogous context, however, the Consumer Reports website also lists a number of positions related to sales and/or servicing Consumer Reports customers and the website further lists various products for sale such as its well-known magazine subscription and internet version of that subscription. Thus, if the Court adopted Plaintiff's construction, Consumer Reports would be "primarily engaged in the business of selling ... goods or services," thus making Consumer Reports ineligible for the protection of the anti-SLAPP statute. The Court cannot and does not adopt such an untenable interpretation of California's newly enacted statute.

See New.net, 356 F. Supp. 2d at 1104. Quite simply, neither affiliate fees nor revenue change the essential nature of Defendants' 'consumer information' business model. Stated another way, there is no legal support for the proposition that affiliate contracts magically turn Defendants into companies which are in the business of primarily selling end-user fax or pbx services.

(b) *Zilker Is Not Making Statements About Its Own Product Nor Are Plaintiffs a Business Competitor of Zilker*

"In order to satisfy the required conditions of section 425.17(c), Plaintiffs must also show that Defendant is making statements about its own product or a competitor's business operations, goods or services." *See New.net,* 356 F. Supp. 2d at 1104 (emphasis added). Plaintiffs' Complaint allegations make it clear that Defendant's alleged statements are not about "[Defendants'] own" product or services. Instead, Defendants' statements are clearly about Plaintiffs' services. (*Compl.* ¶¶ 25-29, 49, 53, 58).

As importantly, Plaintiffs and Defendants are not 'competitors' as defined

under § 425.17. In *New.net,* the Court rejected Plaintiffs arguments that Defendants acts of describing Plaintiffs product as the 'worst of the worst' on the internet and providing software allowing consumers to delete Plaintiffs software made them competitors. The Court, based on the same legal authority, also rejected Plaintiffs; argument that the parties were competitors under the unfair competition provisions of the Lanham Act. *New.net,* 356 F. Supp. 2d at 1104. In order to determine whether Plaintiffs and Defendants are "competitors", Courts look at a variety of factors such as whether:

1. Defendants are endeavoring to perform the same services as Plaintiffs;
2. Defendants are offering to perform those same services better or cheaper than Plaintiffs;
3. Defendants are vying for the same consumer dollars as Plaintiffs; and
4. Defendants and Plaintiffs are competing for those dollars from the same consumer group.

See Summit Tech v. High-line Med. Instruments Co., 933 F. Supp. 918, 937 (C.D. Cal. 1996) (Competitors are "persons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the services better or cheaper than his rival."); *Lipson v. Socony Vacuum Corp.*, 87 F.2d 265, 270 (1st Cir. 1937) ("The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms. The struggle between rivals for the same trade at the same time.").

Plaintiffs have not alleged that Defendants' are competitors anywhere in their Complaint. In fact, Plaintiffs allegations state that Defendants have

contracts with their competitors, not consumers themselves.[5] *(See Compl.* ¶ 22.*)* ("Defendants have agreements with Plaintiffs' competitors . . ."). One need only review the way each party describes their services on their web sites to know that Defendants are not 'competitors' with Plaintiffs. *Exhibit A,* Printouts from the parties' web sites describing services. Plaintiffs develop web based software and offer it directly to consumers for a fee, providing all the network infrastructure, customer support, product development, patents development, patent licenses, research and development, billing, collection, customer terms and conditions, cancelation policies, etc. Defendants do none of these things.

Plaintiffs essentially argue for a definition of 'competitors' which is so broad that it would include every affiliate marketer, on-line advertisement company (Google, Yahoo) and every other person allowing advertisements on their web sites. Because of the similarity between the anti-SLAPP definition of 'competitor' with state and federal unfair competition laws, such a broad definition would also subject a broad swath of on-line web sites, search engines, blogger sand service providers to liability under unfair competition statutes.[6] Such a broad definition would undermine the First Amendment's protections of free and vigorous speech about companies and their services. Moreover, it is unnecessary. Plaintiffs are appropriately protected by a higher standard of proof in suits against non-competitors under business libel laws. Plaintiffs have taken

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[5] Plaintiffs fail to disclose that they have contracts with Defendants as well on certain products reviewed on Defendants web sites. *(Exhibit B; Kilpatrick Affidavit.)*

[6] Just as Google is not a competitor of Plaintiffs by allowing Plaintiffs' competitors to advertise their competing electronic fax services on their web pages for a fee, Defendants in this case who publish information about Plaintiffs services are not competitors. Put another way, Meijer is not a competitor of Kellogg's by allowing General Mills to provide their cereal on their store shelves.

obvious pains to avoid those causes of actions because they know they cannot prove them.[7]

Before addressing the evidentiary issues raised by Plaintiffs' state law claims under anti-SLAPP, Defendants will address whether Plaintiffs' allegations state federal claims under Counts I, II and III.

B) Plaintiffs Federal Trademark Claims Should Be Dismissed On the Pleading Pursuant to F.R.C.P. 12(c).

EFAX Allegations: There are essentially two categories of allegations made by Plaintiffs against Defendant Zilker. First, Plaintiffs allege trademark infringement against Defendant Zilker's for its use of "E Fax" in its bidding on a keyword (*See Compl.* ¶ 23), the display of "E Fax" in the text and header of online keyword advertisements (*See Compl.* ¶ 24), and the use of "eFax" on its website to identify Plaintiff's service (*See Compl.* ¶ 25). Second, Plaintiffs complain that Defendant Zilker has made false and/or misleading statements about Plaintiff's eFax services and misrepresented that it is 'unbiased' in its vendor reviews.

Onebox Allegations: Plaintiffs allege trademark infringement against Defendant ChooseWhat for its use of "Onebox" on its website to identify Plaintiffs' service (*See Compl.* ¶ 31, 35). Plaintiffs further complain that Defendant ChooseWhat has made false and/or misleading statements about Plaintiffs' Onebox services and misrepresented that it is 'unbiased' in its vendor reviews.

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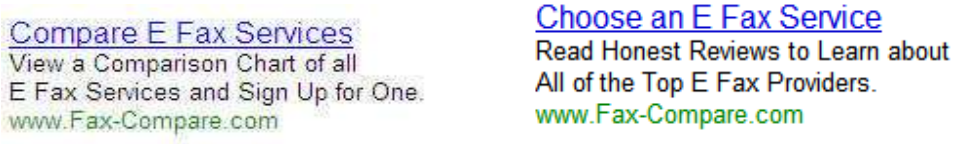
[7] As noted in the *New.net* case, to prove trade libel, Plaintiff must show (1) a statement that (2) was false, (3) disparaging, (4) published to others in writing, (5) induced others not to deal with it, and (6) caused special damages. As for the element of falsity, as noted above, there is a dearth of persuasive evidence that Defendant made any false statement about Plaintiff's software or that it is being defamed by innuendo. *New.net*, *supra*, 346 F. Supp. 2d at 1113.

i) Plaintiffs Trademark Allegations Fail to State an Actionable Claim and Are Otherwise Without Merit

Defendants use of 'Onbox' and "eFax" on their respective web sites to describe Plaintiffs services is classic fair use since: (1) the services in question are not readily identifiable without use of the trademark; (2) only so much of the marks are used as is reasonably necessary to identify Plaintiffs' services; and (3) Defendants have done nothing that would, in conjunction with the use of the mark, suggest sponsorship or endorsement by the Plaintiffs. *See New Kids on the Block v. News America Pub., Inc.*, 971 F.2d 302, 308 (9th Cir. 1992). "Nominative fair use also occurs if the only practical way to refer to something is to use the trademarked term." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 328 F.3d 1061, 1072 (9th Cir. 2003); s*ee also Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1150 (9th Cir. 2002) (holding that nominative fair use occurs when the alleged infringer uses "the [trademark holder's] mark to describe the [trademark holder's] product.").

The real issue driving this lawsuit is Defendant Zilker's use of "EFAX" as a keyword to trigger advertisements through Google's AdWords program which, upon a user's search for "efax' or "e fax" return Sponsored Links paid for by Zilker which display as follows:



(See Compl., ¶¶ 23, 24, and *Exhibit D, pp. 25-32.)* Plaintiffs themselves admitted through multiple trademark filings that the words 'e fax' and 'efax' are merely descriptive of "electronic fax" or "email fax" services. This is why Plaintiff j2 is, to-date, relegated to the Supplement Register with the USPTO.

Even if Plaintiffs were able to prove that 'e Fax' has achieved secondary meaning status, Defendant Zilker's use is still consistent with the oft-used dictionary definitions of the terms and is a fair use of such words in their descriptive sense. *See KP Permanent Make-Up, Inc., supra,* 543 U.S., 111, 118 (2004). In fact, the USPTO itself has recognized the "e fax" means "electronic facsimile." *See Exhibit C, Printout of Serial No. 75/656,348 March 19, 2004 Office Action* ("E-FAX is likely to be perceived as meaning "electronic facsimile" and electronic facsimile transmission appears to be the precise nature of the applicant's services."); *see also Exhibit D, Printout of Serial No. 76/524244 October 24, 2003 Office Action citing dictionary.cambridge.com* (defining "e" as an "abbreviation for electronic")

The Supreme Court has made it clear that "trademark infringement law prevents only unauthorized uses of a trademark in connection with a commercial transaction in which the trademark is being used to confuse potential consumers." *See Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005) (emphasis added); *see also Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924) ("A trademark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his."); *see also Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (noting that the Lanham Act's purpose is to prevent the use of trademarks in such a way that it confuses the public about the actual source of goods and services). Defendant Zilker's Google ad text (using words such as "Compare" and "Reviews"), its domain name "fax-compare.com" and its fax comparison web make Plaintiffs' allegations of likely customer confusion untenable.

C) Plaintiffs Allegations of Federal & State Unfair Competition/False & Misleading Advertising Fail to State a Claim and Are Otherwise Without Merit.

Section 15 U.S.C. § 1125(a)(1)(B) of the Lanham Act states:

> (a) Civil action. (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
>
> ...
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(Emphasis Added). Representations constitute "commercial advertising or promotion" under 15 U.S.C. § 1125(a)(1)(B), if they are: (1) commercial speech [as defined by the Lanham Act]; (2) by a defendant who is in commercial competition with the plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; and (4) disseminated sufficiently to the relevant purchasing public to constitute advertising within the industry. *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003) (emphasis added); *see also New.net,* 356 F. Supp. 2d at p 117 (citing *Rice, supra* with approval). As set forth below, Plaintiffs' own allegations make it clear that they cannot satisfy elements (1), (2) or (4) in order to bring the complained of language within "commercial advertising or promotion."

The difference between strictly advertising speech and other speech in a commercial context is an important First Amendment protection since it precludes

claims against another "who is communicating ideas or expressing points of view." *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900, 905 (9th Cir. 2002) (noting the legislative history makes it clear consumer product reviews were specifically mentioned as examples of non-commercial use). "[T]he category of commercial speech consists at its core of 'speech proposing a commercial transaction.'" *Kasky v. Nike Inc.*, 27 Cal. 4th 939, 956, 45 P.3d 243 (2002); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993). Generally, speech does not meet the test of being "commercial" where "[t]he statements are similar to those that would appear in a review published in a magazine whose focus is the evaluation of consumer goods," and where the speech does not result in an economic transaction between the defendant and the end user. *Id.* "Speech is not advertising speech where it does not promote the speaker's product for sale or encourage a commercial transaction with the user." *New.net, Inc.*, 356 F. Supp. 2d. at 1111.

Clearly, Defendants web sites do much more "than propose a commercial transaction" and in that they provide consumer information, comparison reviews of various vendors and allow of consumer comments of competing vendors. Moreover, the specific speech complained of in this lawsuit concerning free trials and free 800 numbers does not propose any commercial transaction at all.

Even if plaintiffs could establish the elements of commercial advertising, Defendants' statements are not actionable as false or misleading advertising. Actionable false advertising claims under Section 43(a) of the Lanham Act usually fall into one of two categories: a representation that is literally false, or one that consumers are likely to find misleading but that is not literally false. Although either type of misrepresentation can violate Section 43(a), the practical difference is that literal falsehoods, those which are false on their face, are actionable without proof of public reaction. *See Santana Prods., Inc. v. Bobrick*

Washroom Equipment, Inc., 401 F.3d 123, 136 (3d Cir. 2005). By contrast, to be actionable, misleading representations must be accompanied by an allegation and proof of consumer deception. *See Hickson Corp. v. Northern Crossarm Co.*, 357 F.3d 1256, 1261 (11th Cir. 2004) ("A plaintiff attempting to establish ... that an advertisement is literally true but misleading ... must 'present evidence of deception' in the form of consumer surveys, market research, expert testimony, or other evidence.").

j2 Global's allegations of unfair competition and deceptive trade practices against Defendant Zilker involve the following language on the faxcompare.com website:

(a) "faxcompare.com states that EFAX is one of the few carriers that charge extra for a toll free number" *(Compl. ¶ 27.)*; and

(b) "that EFAX does not provide a 30 day trial period." *(Compl. ¶ 29.)*

Plaintiff j2 Global does admit that Defendant specifically states on its website that "EFAX sometimes offers a 30 day trial," and instructs consumers how to obtain a free trial by doing a search for "EFAX free trial" in Google. *(Compl. ¶29.)* Plaintiff j2 Global states that this statement is false and misleading, alleging that the 30 day free trial is available through other marketing avenues such as affiliate programs, internet banners, and radio advertisements. (Id.) These statements are objectively true. *See Exhibit B; Kilpatrick Affidavit.* As noted in *New York Tiers, supra,* and *Steaks Unlimited, supra,* statements on consumer web sites need only to substantially true to avoid liability.

Because faxcompare.com instructed consumers how to get a free trial by searching for "eFax" and "free trial", it is impossible for Plaintiff to prove 'competitive injury,' an element of unfair competition that has not even been pled.

Hy Cite Corp. v. Badbusinessbureau, 418 F. Supp. 2d 1142 (2005, DC Ariz) (where cookware manufacturer alleged that website operators solicited and created so-called "rip-off reports" with false and defamatory content, manufacturer's claims under Lanham Act were subject to dismissal because criticism of manufacturer's business appearing on website was not actionable competitive injury.).

There is only one specific allegation of a false statement concerning Onebox. Plaintiffs allege in Paragraph 28 that:

> "The statement that Onebox® does not provide a free trial is, false and/or misleading. Onebox® provides a free trial for its base plan that includes four extensions. See Exhibit H. The review on pbxcompare.com is of a ten-extension Onebox® plan which is more expensive than the base plan." *(Compl. ¶28).*

Plaintiffs admit in Paragraph 28 that the complained of statement is true with regard to its Onebox Corporate (i.e. ten extension) plan. The Onebox "Corporate Plan" is clearly identified in extra-large red font on the pbxcompare.com web site. Plaintiffs' allegation that ChooseWhat is liable for "false and misleading advertising" for failure to review its Onebox basic plan is frivolous on its face.

Paragraph 23 of Plaintiffs' Complaint alleges that Defendant Zilker uses the word "unbiased" in its Google AdWords campaigns, referring to Exhibit D as proof. However, Exhibit D to the Complaint contains no examples of use of the word "unbiased" in advertisements. Paragraph 37 of Plaintiff's Complaint alleges that Defendants' use of the word "unbiased" on their respective web sites is false and misleading statement of fact. Defendants' statements on their websites that: "We are committed to providing a quality unbiased resource to individuals and

small business owners that will save time and alleviate the frustration we went through in selecting an internet fax service provider for ourselves" are not actionable. There is no duty under 15 U.S.C. § 1125(a) to make affirmative disclosures. As noted in *Alfred Dunhill, Ltd. v Interstate Cigar Co.*, 499 F2d 232 (2nd Cir. 1974), a failure to disclose material facts is not "false representation." It is impossible for Plaintiffs to prove that Defendants are not committed to providing an unbiased review.

The only evidence support for the allegation that Defendants "slanted" customer reviews of certain unspecified vendors was a onetime offer made in settlement to j2 Global in April 2008, which is inadmissible under F.R.E. § 408. *(See Compl. Exhibit J, pp. 57-58.)* ("I will propose a mutually beneficial compromise in response to trademark claims").

Consistent with *Steaks Unlimited, supra,* Defendants' First Amendment rights are protected even if they were not "precisely accurate." 623 F. 2d at 280. This is especially true in this case since Defendants' statements are one of thousands of data points available on the internet and Defendants' link to plaintiffs' websites directly so consumers can conduct further research.

D) To the Extent This Court Finds The anti-SLAPP Law Applicable, Plaintiffs Can Not Establish Likelihood of Success on the Merits.

Because Defendants have made such a prima facie showing under California's anti-SLAPP statute, the burden shifts to the Plaintiffs to demonstrate a probability of prevailing on the merits of the complaint with regard to their state law claims. *Vess*, 317 F.3d at 1109. Much like the burden in determining a motion for summary judgment, the plaintiff must demonstrate that the "complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *See*

ComputerXpress, Inc, 93 Cal. App. 4th at 999; *Wilcox*, 27 Cal. App. 4th at 823. A court should dismiss Plaintiffs' Complaint with prejudice under the anti-SLAPP statute when Plaintiffs fail to present a sufficient legal basis for the claims or "when no evidence of sufficient substantiality exists to support a judgment for the plaintiff." *Id.* 4th at 828; *see also New.net, Inc.*, 356 F. Supp. 2d at 1108.

Plaintiffs insufficiently attempt to hold each Defendant LLC accountable for the acts of the other, alleging summarily in Para. 5 that "Defendants Zilker and ChooseWhat have each acted as an agent for the other and that the acts complained of were committed within the scope of such agency" and in Para. 22 that Defendants are "acting in concert with each other." Plaintiffs have not pled the necessary elements under common law or California state statute, Cal. Civ. Code § 2334,[8] to establish that Zilker and ChooseWhat are in an "agency" relationship with each other. Moreover, the affidavit of Gaines Kilpatrick makes it clear that the two Defendants are separate legal entities and are not owned by the same people. *See Exhibit B, Kilpatrick Affidavit.* Accordingly, the allegation of agency should be dismissed as a matter of law and the allegations against each Defendant should be treated separately.

Much of the same analysis establishing the applicability of the anti-SLAPP statute also defeats Counts III, IV, V and VI of Plaintiffs' Complaint. California Business and Professions Code section 17200 et seq. prohibits any person from

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[8] *See Mejia v. Community Hospital of San Bernardino*, 99 Cal. App. 4th 1448, 1456-57 (Cal. App. 4 Dist. 2002) ("Civil Code section 2334 further provides: "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." Nominally, these statutes require proof of three elements: "'[First] [t]he person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person in relying on the agent's apparent authority must not be guilty of negligence.'").

engaging in "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising ...." Cal. Bus. & Prof. Code § 17200.[9] Lawsuits premised on section 17200 are subject to being stricken because they are barred by the First Amendment where the speech complained of is not commercial speech. *New.net,* 356 F.Supp.2d at 1110 (citing *Kasky v. Nike, Inc.,* 79 Cal. App. 4th 165, 178, Cal. App. 4 Dist. (2000)). For the reasons noted above, the complained of speech was not 'commercial' and thus not actionable under Cal. Bus. & Prof. Code § 17200.

Further, state common law claims for unfair competition are "substantially congruent" to claims under the Lanham Act. *Cleary v. News Corp.*, 30 F.3d 1255, 1262 -63 (9th Cir. 1994) ("This Circuit has consistently held that state common law claims of unfair competition and actions pursuant to California Business and Professions Code § 17200 are "substantially congruent" to claims made under the Lanham Act."). Thus, if the court grants Defendants Motion under F.R.C.P. § 12(c), then the state law claims must be dismissed as well. Finally, claims for unfair competition under state law requires a showing of "competitive injury." *Committee On Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 209, 673 P.2d 660 (1983) (overturned by statute on other grounds). Therefore, the recovery of damages under the common law tort requires actual competition between the two parties. *Trovan, LTD. v. Pfizer*, 2000 U.S. Dist. LEXIS 7522 (C.D. Cal. May 23, 2004) ("Here, the undisputed evidence shows that plaintiffs do

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[9] Since California's unfair competition statute is equitable in nature, plaintiffs can generally only receive an injunction or restitution as relief. *Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 4th 1134, P.3d 937 (Cal. 2003). The Supreme Court of California has said that the unfair competition statute "cannot be equated with the common law definition of 'unfair competition,' but instead specifies that, for the purposes of its provisions, unfair competition 'shall mean and include Unlawful, unfair or fraudulent business practice. . . ." *Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 109, 496 P.2d 817, 828, (Cal. 1972).

not currently sell antibiotics, and that the defendant does not currently sell transponders (or any other products manufactured by plaintiffs). Thus, there being no competition, the Court does not believe that California courts would allow the recovery of damages for the current claim.").

Plaintiffs have not alleged and cannot show any competitive injury in this case. *New.net, supra,* 356 F.Supp.2d at 1116. The Affidavit of Gaines Kilpatrick confirms that the statement contained in Paragraph 27 of Plaintiffs' Complaint that eFax is one of the few carriers that charge extra for a toll free number is in fact true. Moreover, the allegation complained of in Paragraph 29 that eFax did not always provide a free trial is also true. Until filing this lawsuit, Defendants ran an algorithm on its homepage which sometimes offered a free trial and sometimes did not. *See Exhibit B, Kilpatrick Affidavit.* It should also be noted that with regards to both the pbxcompare.com and faxcompare.com websites, Defendants ChooseWhat and Zilker provided the language now complained of to Plaintiffs for review and comment, although no response was provided by either company. *Exhibit B, Kilpatrick Affidavit.*[10]

Plaintiffs' have been subject to numerous consumer complaints concerning egregious customer service, potentially fraudulent billing practices (inability to cancel service) and allegations of anti-trust violations in order to maintain market dominance and alleged monopoly status.[11] Plaintiffs are the subject of an

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[10] In fact, the first notice Plaintiffs gave to Defendants that they had any issue with the description of services was this lawsuit, despite negotiations between the parties over the use of "eFax" in Google AdWords for six months prior to filing.

[11] Regardless of whether the allegations are meritorious, the Complaints are public record and subject to publication and commentary. *See Integrated Global Concepts, Inc. v. j2 Global Communications, Inc. et al*, Case Number: 1:2007cv03494 (Illinois Northern District Court) (allegations of Racketeering in in order to gain unlawful business advantage, establish a monopoly in the electronic fax market and related claims); as reported on sec-edgar-online.com we site; "On October 17, 2006, Go Daddy filed suit against us and our affiliate in the

inordinate number of consumer complaints and suffer extremely poor better business ratings *See Exhibit B, Kilpatrick Affidavit.* Regardless of Plaintiffs questionable business practices, Defendants provide relatively 'bland' information about Defendants' services focused on objective 'apples for apples' comparison of price and other terms of service. Moreover, Defendants 'reviews' of Plaintiffs products stay well clear of the more troubling allegations made against them by consumers, Better Business Bureaus and other third parties.

In dismissing Plaintiffs' state law claims under the anti-SLAPP provisions, this Court should grant leave to Defendants to submit their fees and costs associated in defending this action. As noted in *New.net, supra:*

> "Under section 425.16(c), a defendant who prevails on an anti-SLAPP motion to strike is entitled to recover his or her attorney fees. The statute is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extricating him or herself from a baseless lawsuit. An award is proper even if the anti-SLAPP motion is granted as to only some of a plaintiff's claims

New.net, supra at 1115. (citations omitted.)

CONCLUSION

The true nature of Plaintiffs' claims are not as competitors under unfair competition law but as non-competitors. Claims between non-competitors are only cognizable as business libel and related actions, which Plaintiffs have avoided knowing they cannot establish the necessary elements. This case is about

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United States District Court for the District of Arizona. In its complaint, Go Daddy alleges several violations of antitrust law, both federal and Arizona (fraudulent procurement of patents, fraudulent enforcement of patents, conspiracy to monopolize, monopolization and attempted monopolization) as well as unfair competition, and seeks declaratory judgments of invalidity and non-infringement."

Plaintiffs' use of economic leverage to ensure that all side-by-side, or apples-to-apples, comparison of their non-competitive pricing with other vendors do not show up as top level Google search returns or AdWords advertisements. Plaintiffs seek to prevent Defendants' from exercising their First Amendment rights to provide consumer information. Plaintiffs have failed to state claims upon which relief may be granted under either state or federal law. California's anti-SLAPP statute is additional support for dismissal of Plaintiffs' state law claims. Defendants seek an award of attorney fees and other relief as provided under law.

Respectfully submitted,

TRAVERSE LEGAL, PLC

Dated: January 13, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2009, I electronically filed the foregoing Counterclaim for Declaratory Judgment with the Clerk of the Court using the CM/ECF System.

/s/

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