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ORIGINAL FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

FEB 04 2011

John A. Clarke, Executive Officer/Clerk
BY  Deputy
Shaunya Wealey

6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 COUNTY OF LOS ANGELES
8 CENTRAL DIVISION - STANLEY MOSK COURTHOUSE

9 Colocation America Corporation, Albert Ahdoot,) Case No.: BC448509
10 Albert A. Ahdoot)
11 a Nevada Corporation,) NOTICE OF MOTION AND SPECIAL MOTION
12 Plaintiff,) TO STRIKE THE COMPLAINT PURSUANT
13 vs.) TO CALIFORNIA CODE OF CIVIL
14 ARCHIE GARGA-RICHARDSON dba) PROCEDURE SECTION
15 ScamFraudAlert.com) [CCP § 425.16]
16 Defendants) DECLARATION OF
17) ARCHIE GARGA-RICHARDSON IN
18) SUPPORT THEREOF
19)
20) Before the Honorable
21) Richard Fruin, Judge
22)
23) Department: 15
24) Room: 307
25) Date: April 8, 2011
26) Time: 8:31 A.M.

20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

21 PLEASE TAKE NOTICE that on this 8th Day of April, 2011 at 8:31 a.m., or as soon
22 thereafter as the matter may be heard in Department 15, Room 307 of the above-entitled Court,
23 located at 111 North Hill Street, Los Angeles, California 90012, that Mr. Archie Garga-
24 Richardson dba ScamFraudAlert.com (hereinafter "Garga-Richardson", or his website" Blog" or
25
26

DEFENDANT GARGA-RICHARDSON MOTION TO STRIKE COMPLAINT PURSUANT TO CCP § 425.16 -

1 "Forum" Defendant) will and does hereby move the court for an order striking the complaint
2 brought by the Plaintiff Mr. Albert Ahdoot aka Albert A. Ahdoot aka Albert Arash Ahdoot dba as
3 Colocation America Corporation a Nevada Corporation, for causes of action of trade libel,
4 intentional interferences, and negligent interference pursuant to California Civil Procedure Civil
5 Procedure 425.16 for the following reasons:

- 6
- 7 (1) Defendant Mr. Garga-Richardson's constitutional right of free speech is protected
8 by the State of California Civil Code 425.16(a)(b)(1) and 425.16(e)(2)(3) and the
9 United States Constitution.
- 10
- 11 (2) Mr. Albert Ahdoot dba Colocation America Corporation cannot establish by
12 evidence admissible at trial a reasonable probability of prevailing in their claim
13 base on the merits.
- 14
- 15 (3) Plaintiff continues to harass the Defendant with malicious prosecution despite earlier
16 court rulings on this matter.
- 17

18 The special motion will be based on this Notice, the attached Memorandum of Points and
19 Authorities and Declaration of ARCHIE GARGA-RICHARDSON with exhibits
20 thereto, filed with the motion; the Complaint; and any other pleadings, papers, evidence,
21 and written or oral arguments that either parties may submit.

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I. INTRODUCTION

This lawsuit is a classic SLAPP lawsuit: a case for which a person with the resources to afford legal counsel continues to file lawsuits against a Pro Se Defendant in an attempts to get the Defendant to succumb to his demand of signing a statement of release restricting his ability to comment on Plaintiff business practices. Such attempts to censor the Defendant from exercising his First Amendment rights to inform the public of Plaintiffs' business practices are expressly barred by US Constitution and The California Code of Civil Procedure Section 426.16, "The anti-SLAPP Statue" (hereinafter section 426.16) And like all classic SLAPP actions, this lawsuit is eminently meritless. Each cause of action is based on conduct stemming from the Plaintiffs' own actions.

II. BACKGROUND

The Plaintiffs Albert Ahdoot aka Albert A. Ahdoot and Colocation America, Corporation [Colocation America, Inc. is not a legal entity] and legal counsel Paul Sigelman of Sigelman Law have had a business relationship that exceeds twelve (12) years. During this time they have engaged in several lawsuits and activities so as to prevent comments about Plaintiffs' business practices from every being reported or posted online. Counsel is fully aware of Plaintiffs' questionable business practices and yet continues to bring forth these meritless lawsuits solely as a means of intimidation.

The Plaintiff formerly ran a company called Net Global Marketing that was determined to be a purveyor and distributor of what is commonly known as SPAM.

The Plaintiffs is part of a network of individuals that rent and lease data spaces in downtown Los Angeles area from companies such as AboveNet Communication, Level 3 Communications, or

1 Digital Trust Data Centers. It has been reported that this group of individuals are responsible for
2 sending out spam-like emails such Canadian pharmacy and herbal penis enlargement spam offers.
3

4 Unaware of these alleged business practices, the Defendant entered into a contractual
5 relationship with Plaintiff-owned Colocation America Corporation on October 29, 2008 in which
6 they were to provide hosting services to ScamFraudAlert.com and protection against Distributed
7 Denial of Service [known as DDOS] attacks. [See Exhibits to Answer]

8 As part of the negotiation for service, two issues were of great concern to the Plaintiff,
9 pricing and protection against DDOS attacks.
10

11 Based on the nature of site, Defendant made it clear to Plaintiff that the site was controversy
12 and needed Ddos protection. Plaintiff assured the Defendant that his company Colocation America
13 could do the job and that Colocation America had never experienced a stoppage or interruption of
14 services due to Ddos attacks. It was at this time that the Plaintiff misrepresented the cost of his
15 service and his company's ability to prevent Ddos attacks.
16

17 On January 28, 2009, Defendant was informed by the Plaintiff that an attack against his
18 website was being launched and thereby impacting other customers on the Colocation America
19 network. As such, the Defendant was told that access to his site was terminated so as to allegedly
20 prevent the entire network from going offline. Defendant inquired as to how soon he should expect
21 his website to be up and running. Plaintiff responded that he had no idea since the attacks were
22 ongoing.

23 After a period of six days, the Plaintiff and Defendant decided to part ways. Unfortunately
24 this is when the Defendant ascertained the true nature of the Plaintiffs' business practices. When the
25 Defendant initially requested access to the Plaintiffs' network so as to retrieve the information from
26

1 his website and database, he was told he would first have to purchase the server that hosted the
2 Defendant's website. Defendant did purchased said server but was then told he must first sign a
3 "Release" prepared by Plaintiffs' Attorney. Defendant refused to do so and thus begin the present
4 series of lawsuits.

5
6 The Defendant filed a Small Claim lawsuit to recovered website database. The Plaintiffs
7 counter by filing a civil lawsuit against the Defendant. [Answer Exhibit]. Plaintiffs have intentionally
8 mislead and restricted access to the Defendant's proprietary information by first claiming it was
9 available and the Defendant had to purchased server and later stated during trial that the database
10 had been destroyed. If the destruction of the data had taken placed, why did he sell the Defendant
11 the server? Essentially Mr. Ahdoot lied.

12
13 Defendant Archie Garga-Richardson dba ScamFraudAlert.com owns and operates a
14 consumer protection and awareness online Forum and Blog. [ScamFraudAlert.com and
15 ScamFraudAlert.wordpress.com-Blog]. These sites warn consumers about deceptive and fraudulent
16 business practices online as well as job seekers against fraudulent jobs being posted online. Due to
17 the prominence and public figure status of the Plaintiffs, the Defendant's hosting experience with
18 them is of public interest and as such, the Defendant decided to post his personal opinions based on
19 factual experience online.

20
21 The Defendant public comments on his experience about the Plaintiff's business practices
22 are posted to inform others. By doing so, the Defendant is preventing the Plaintiff from engaging in
23 such practices as the one the Defendant encountered and to hopefully motivate the Defendant to
24 amend his practices as a good corporate citizen should.

II. STATEMENT OF FACTS

THE anti-SLAPP STATUTE MUST BE INTERPRETED BROADLY SO AS TO PROMOTE THE EXERCISE OF INDIVIDUAL'S FIRST AMENDMENT RIGHTS

- I. To encourage public participation in debates over issues of public interest, the Legislature in 1992 created a procedure to "allow prompt exposure and dismissal" of civil lawsuits based upon a Defendant's exercise of his or her First Amendment rights Wilcox v. Superior Court, 27 Cal App. 4th 809.815-18 (1994), overruled on other grounds by Equilon Enters v Consumer Cause, Inc. 29 Cal. 4th 53, 68 h.5. (2002)
- II. These lawsuits, commonly known as Strategic Lawsuits Against Public Participation (SLAPP), are subject to a special motion to strike in which the merits of the action are brought to the court's attention for early resolution, so as to minimize the disruption to the First Amendment activity caused by prolonged litigation, Code Civil Proc. 425.16 (a)(b)(1).
- III. The statute incorporates the Legislature express declaration that it is in the public interest to encourage public participation in matters of public significance, and that this participation should not be censored through the abuse of the judicial process.

ARGUMENT

A TWO STEP ANALYSIS IS USED TO DETERMINE WHEATHER A CAUSE OF ACTION SHOULD BE STRUCK UNDER THE ANTI-SLAPP STATUTE

Section 425.16 was enacted "to bring about an early test of the merits in actions tending to censor citizen participation in public affairs." (Vogel v. Felice (2005) 127 Cal.App.4th 1006, 1014 (Vogel).) To that end, the statute furnishes a mechanism for quickly identifying and eliminating suits that seek to censor public participation: a special motion to strike, the anti-SLAPP motion. The California Supreme Court recently described that mechanism as "a summary-judgment-like procedure at an early stage of the litigation." (Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal.4th 180, 192 (Varian).) The statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

A special motion to strike triggers a two-step process in the trial court. (Varian, supra, 35 Cal.4th at p. 192.) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity." (City of Cotati v. Cashman (2002) 29 Cal.4th 69, 76 (Cotati), quoting § 425.16, subd. (b)(1).)

As relevant here, the statutory definition of protected activity expressly includes "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..." (§ 425.16, subd. (e)(3).) or "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest" (§ 425.16, subd. (e)(4)).

1 "If the court finds such a showing has been made, it then must consider whether the
2 plaintiff has demonstrated a probability of prevailing on the claim." (Cotati, at p. 76.)

3 In each part of the two-step process, the party with the burden need only make a threshold,
4 prima facie showing. (Cotati, supra, 29 Cal.4th at p. 76.)

5
6 "In order to establish a probability of prevailing on the claim (§425.16, subd. (b)(2)); though
7 the court does not weigh the credibility or comparative probative strength of competing evidence, it
8 should grant the motion if, as a matter of law, the defendant's evidence supporting the motion
9 defeats the plaintiff's attempt to establish evidentiary support for the claim." (Wilson v. Parker,
10 Covert & Chidester (2002) 28 Cal.4th 811, 821, internal citations and quotation marks omitted.)

11 12 B. Types of Claims

13 The range of legal actions that might qualify as strategic lawsuits against public participation is
14 broad. As relevant here, defamation is among the "favored causes of action in SLAPP suits..."
15 (Wilcox, supra, 27 Cal.App.4th at p. 816.)

16 The statute also may apply to a "cause of action ... for unlawful business practices pursuant
17 to Business & Professions Code section 17200" so long as the plaintiff is "seeking damages personal
18 to himself." (Ingels v. Westwood One Broadcasting Services, Inc. (2005) 129 Cal.App.4th 1050,
19 1067, fn. omitted; see § 425.17, subd. (b) [exempting specified public benefit actions from the
20 operation of § 425.16].)

21 22 Defamation Law

23 The plaintiff's causes of action are all centered on the tort of defamation although masked as
24 trade libel, intentional interference and negligent interference.
25
26

1 "Defamation and trade libel both require the intentional publication of a false and
2 unprivileged statement of fact." (Mann, supra, 120 Cal.App.4th at p. 104.) Even so, courts have
3 recognized defamation and trade libel as two distinct torts. (See Barnes-Hind, Inc. v. Superior Court
4 (1986) 181 Cal.App.3d 377, 381 (Barnes-Hind); Polygram Records, Inc. v. Superior Court (1985) 170
5 Cal.App.3d 543, 548-550 (Polygram Records).

6 "Defamation is an invasion of the interest in reputation. The tort involves the intentional
7 publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or
8 which causes special damage." (Smith v. Maldonado (1999) 72 Cal.App.4th 637, 645.)

9 As the California Supreme Court has long recognized, libel includes "almost any language
10 which, upon its face, has a natural tendency to injure a person's reputation." (Forsher v. Bugliosi
11 (1980) 26 Cal.3d 792, 803.) "Libel is recognized as either being per se (on its face), or per quod
12 (literally meaning, 'whereby'), and each requires a different standard of pleading." (Palma Springs
13 Tennis Club v. Rangel (1999) 73 Cal.App.4th 1, 5; see also MacLeod v. Tribune Publishing Co.
14 (1959) 52 Cal.2d 536, 549; Civ. Code, § 45a.)

16 1. Requirement of Falsity

17 "There can be no recovery for defamation without a falsehood." (Seelig v. Infinity
18 Broadcasting Corp. (2002) 97 Cal.App.4th 798, 809) "Thus, to state a defamation claim that survives
19 a First Amendment challenge, plaintiff must present evidence of a statement of fact that is provably
20 false." (Seelig, at p. 809, citing Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 20 (Milkovich).)
21 Truth is a complete defense to defamation. (Smith v. Maldonado, supra, 72 Cal.App.4th at p. 646.)
22 "However, the defendant need not justify the literal truth of every word of the allegedly defamatory
23 matter. It is sufficient if the defendant proves true the substance of the charge...." (Id. at pp. 646-
24 647.)

1 In this case, Garga-Richardson feels that he can, on the balance of probabilities, substantiate
2 the substance of the allegedly defamatory allegations attributed to him or others should he be
3 required to do so. That the Defendant and the Plaintiff had a business relationship is without
4 question. That the Plaintiff made assurances, regarding the ability to protect the integrity of the
5 Defendant's hosting service against outside attacks that were not fulfilled is without question. That
6 the Plaintiff has brought several actions against the Defendant is without question. That the Plaintiff
7 has withheld access to the Defendant's database despite assurances to the contrary is without
8 question.

10 2. Facts versus Opinions

11 "It is an essential element of defamation that the publication is of a false statement of fact
12 rather than opinion." (Ringler Associates Inc. v. Maryland Casualty Co. (2000) 80 Cal.App.4th 1165,
13 1181.) "In this context courts apply the Constitution by carefully distinguishing between statements
14 of opinion and fact, treating the one as constitutionally protected and imposing on the other civil
15 liability for its abuse." (Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596, 601.) Like other
16 forms of opinion, hyperbole and insults are expressions that typically receive constitutional
17 protection. (Seelig v. Infinity Broadcasting Corp., supra, 97 Cal.App.4th at p. 809.)

18 Parody and satire fall within the same constitutionally protected category. (Franklin v.
19 Dynamic Details, Inc. (2004) 116 Cal.App.4th 375, 385 (Franklin).)

20 The determination of whether a statement expresses fact or opinion is a question of law for the
21 court, "unless the statement is susceptible of both an innocent and a libelous meaning, in which
22 case the jury must decide how the statement was understood [citations]." (Franklin, supra, 116
23 Cal.App.4th at p. 385.) Ultimately, "the dispositive question is whether a reasonable fact finder
24 could conclude the published statement declares or implies a provably false assertion of fact."
25 (Ibid.)

1
2
3 **3. Malice Requirement for Public Figures**
4

5 In addition to the other elements of the tort, a public figure suing for defamation must show
6 "actual" or "constitutional" malice, defined for these purposes as knowledge of falsity or reckless
7 disregard for the truth. (See New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280; Khawar
8 v. Globe Internet, Inc. (1998) 19 Cal.4th 254, 275.)

9 "The characterization of 'public figure' falls into two categories: the all-purpose public
10 figure, and the limited purpose or 'vortex' public figure. The all-purpose public figure is one who has
11 achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes
12 and contexts. The limited purpose public figure is an individual who voluntarily injects him or
13 herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited
14 range of issues." (Ampex Corp. v. Cargle, 128 Cal.App.4th at p. 1577.)

15 There is a higher standard of proof for public-figure defamation plaintiffs, who "must prove
16 by clear and convincing evidence that the defamatory statement was made with knowledge that it
17 was false, or with reckless disregard of whether it was false or not." (Walker v. Kioussis (2001) 93
18 Cal.App.4th 1432, 1445-1446.) "This heightened standard of proof must be taken into account in
19 deciding a defendant's motion to strike a claim for defamation under section 425.16." (Id. at p. 1446;
20 see also, McGarry v. University of San Diego (2007) 154 Cal.App.4th 97, 113 (McGarry);
21 Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal.App.4th 688, 700 (Overstock).)
22

23 **Analysis: Plaintiff's Status as a Limited Purpose Public Figure**
24

25 "A threshold determination in a defamation action is whether the plaintiff is a 'public figure.'"
26 (McGarry, supra, 154 Cal.App.4th at p. 113.)

1 As developed in the case law, there are three "elements" that must be present in order to
2 characterize a plaintiff as a limited purpose public figure. First, there must be a public
3 controversy, which means the issue was debated publicly and had foreseeable and substantial
4 ramifications for non-participants. Second, the plaintiff must have undertaken some voluntary
5 act through which he or she sought to influence resolution of the public issue. In this regard it is
6 sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, the
7 alleged defamation must be germane to the plaintiff's participation in the controversy." (Ampex,
8 supra, 128 Cal.App.4th at p. 1577, citing Copp v. Paxton (1996) 45 Cal.App.4th 829, 845-846.) I
9 shall consider each element in turn.

10
11
12 **Public Controversy:** "To characterize a plaintiff as a limited purpose public figure, the
13 courts must first find that there was a public controversy." (Copp v. Paxton, supra, 45 Cal.App.4th
14 at p. 845.) "A public controversy is not simply a matter of interest to the public; it must be a real
15 dispute, the outcome of which affects the general public or some segment of it in an appreciable
16 way." (Waldbaum v. Fairchild Publications, Inc. (C.A.D.C. 1980) 627 F.2d 1287, 1296.) "To
17 determine whether a controversy indeed existed and, if so, to define its contours, the judge must
18 examine whether persons actually were discussing some specific question." (Id. at p. 1297, fn.
19 omitted.)

20 This case is factually similar to Ampex, where the court found a public controversy based on
21 "the public dimension of the [internet] exchanges." (Ampex, supra, 128 Cal.App.4th at p. 1578.)
22 First, the Ampex court noted, "a number of postings on the Yahoo! Message board" – a public
23 forum – had criticized the plaintiff and its management, even prior to the specific postings at issue.
24 (Ibid.) Second, the court observed, the content of the challenged postings showed that they were in
25 response to other messages circulating about plaintiff. (Ibid.) "Third, with 59,000 shares outstanding,
26

1 the causes and consequences of discontinuing Ampex's multimillion-dollar venture into the Internet
2 television business had foreseeable and substantial ramifications for nonparticipants." (Ibid.) In sum,
3 the court concluded, "Ampex's decision and action in discontinuing iNEXTV amounted to a public
4 controversy that elicited concerns about the management of Ampex." (Ibid.)

5 Here, there was a similar "public dimension" to the challenged postings, as demonstrated by
6 the three factors cited in the Ampex case. (Ampex, supra, 128 Cal.App.4th at p. 1578.) First, in
7 addition to several press releases, there have been a number of postings on numerous websites,
8 blogs and forums, dating back several years, which discuss and provide "reviews" of the Plaintiff
9 companies. (Decl. pg. 2 line 14 ¶ Exhibit 3.)

10 Second, these evaluations elicited numerous follow-up postings from the general public by
11 way of blog and forum postings. (Ibid.)

12 Third, the alleged defamatory postings were germane to the discussions occurring in the
13 public forum in so far as they related to services provided to the public by the Plaintiffs.

14 **Voluntary Act:** "Once the court has defined the controversy, it must analyze the plaintiff's
15 role in it. Trivial or tangential participation is not enough." (Waldbaum v. Fairchild Publications,
16 Inc., supra, 627 F.2d at p. 1297.) In making "a determination of public figure status, courts should
17 look for evidence of affirmative actions by which purported 'public figures' have thrust themselves
18 into the forefront of particular public controversies." (Reader's Digest Assn. v. Superior Court,
19 supra, 37 Cal.3d at pp. 254- 255.)

20 On this question, too, this case is factually similar to Ampex. As the court stated there:
21 "Although respondents deny inserting themselves into the controversy, they did, by way of press
22 releases and letters posted on their Web site." (Ampex, supra, 128 Cal.App.4th at p. 1578).

23 As with the corporate plaintiff in Ampex, Plaintiffs have openly sought to counter these
24 discussions through repetitious litigation and the suppression of forum postings through
25 intimidation tactics such as cease and desist letters. (Decl. ¶ pg. 2 line 8)

1 **Germane Statements:** “Finally, the alleged defamation must have been germane to the
2 plaintiff’s participation in the controversy.” (Waldbaum v. Fairchild Publications, Inc., supra, 627
3 F.2d at p. 1298.)

4 Again, as to this third element, this case shares factual similarities with Ampex. There, the
5 court found that the challenged communications “were germane to [plaintiffs] participation in the
6 controversy. These comments were counter to [its] version of events.” (Ampex, supra, 128
7 Cal.App.4th at p. 1578.)

8 In this case, Defendant Garga-Richardson’s generic posting politely opined that anyone
9 “dealing with the Plaintiffs should exercise caution and care as Mr. Ahdoot is not a man of his
10 word.” (Complaint at 7) Thus, like the Internet messages in Ampex, Garga-Richardson’s statements
11 were germane to the public debate over plaintiff’s business practices and based on factual events.

12 For the foregoing reasons, plaintiff is a “limited purpose public figure.”

13 **4. Analysis: Plaintiff’s Insufficient Showing of Malice**

14 As a public figure, plaintiff must demonstrate that Garga-Richardson acted with actual malice in
15 making the challenged “man of his word” statements.

16 Legal standard: To demonstrate actual malice, plaintiff “must establish a probability that [it]
17 can produce clear and convincing evidence that the allegedly defamatory statements were made with
18 knowledge of their falsity or with reckless disregard of their truth or falsity.” (Ampex, supra, 128
19 Cal.App.4th at p. 1578.) “The clear and convincing standard requires that the evidence be such as to
20 command the unhesitating assent of every reasonable mind.” (Beilenson v. Superior Court (1996) 44
21 Cal.App.4th 944, 950; McGarry, supra, 154 Cal.App.4th at p. 114.) “The reckless disregard test
22 requires a high degree of awareness of the probable falsity of the defendant’s statement.” (Ampex, at
23 p. 1579.)

24 “Actual malice under the New York Times standard should not be confused with the
25 concept of malice as an evil intent or a motive arising from spite or ill will.” (Masson v. New Yorker
26

1 Magazine, Inc. (1991) 501 U.S. 496, 510.) This is “a subjective test, under which the defendant’s
2 actual belief concerning the truthfulness of the publication is the crucial issue.” (Reader’s Digest
3 Assn. v. Superior Court, supra, 37 Cal.3d at p. 257.)

4 The key question is whether the defendant actually entertained serious doubts about the truth of
5 his statements. (See Khawar v. Globe Internat., Inc., supra, 19 Cal.4th at p. 275.)

6 “However, we will not infer actual malice solely from evidence of ill will, personal spite or
7 bad motive.” (Ampex, supra, 128 Cal.App.4th at p. 1579.) Likewise, a defendant’s “failure to
8 conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor
9 even necessarily raise a triable issue of fact on that controversy.” (Reader’s Digest Assn. v. Superior
10 Court, supra, 37 Cal.3d at p. 258.) Furthermore, the defendant “does not have to investigate
11 personally, but may rely on the investigation and conclusions of reputable sources.” (Id. at p. 259.)
12 “Neither is there a duty to write an objective account.” (Ibid.) “So long as he has no serious doubts
13 concerning its truth, [the defendant] can present but one side of the story.” (Ibid.)

14 Here, the declaration of Garga-Richardson clearly disputes the notion of malice and asserts his
15 belief that the statements were true. (Decl. ¶ pg. 1 line 2) His website is a collection of warnings
16 and advisories about numerous companies, only a few of which pertain to the Plaintiff.

17 (Decl. ¶ pg. 2 line 6)

18 Defendant has relied upon valid, reputable sources along with his own personal experiences as
19 verification of the veracity of his postings.
20
21

22 B. Trade Libel

23 “Trade libel is the publication of matter disparaging the quality of another’s property, which the
24 publisher should recognize is likely to cause pecuniary loss to the owner.” (ComputerXpress Inc. v.
25 Jackson, 93 Cal.App.4th 993 (2001) at p. 1010.) “To prevail in a claim for trade libel, a plaintiff must
26

1 demonstrate that the defendant: (1) made a statement that disparages the quality of the plaintiff's
2 product; (2) that the offending statement was couched as fact, not opinion; (3) that the statement
3 was false; (4) that the statement was made with malice; and (5) that the statement resulted in
4 monetary loss." (Optintrealbig.com, LLC v. Ironport Systems, Inc. (N.D.Cal. 2004) 323 F.Supp.2d
5 1037, 1048, citing *Guess, supra*, 176 Cal.App.3d at p. 479)
6

7 8 **1. Nature of the Tort as Trade Disparagement, Not Injury to Reputation**

9 With trade libel, the focus is on statements concerning the plaintiff's property or business. This is in
10 contrast to "common law defamation," which "relates to the standing and reputation of the
11 businessman as distinct from the quality of his or her goods." (*Barnes-Hind, supra*, 181 Cal.App.3d
12 at p. 381; see generally, 5 Witkin, *Summary of Cal. Law* (10th ed. 2005) Torts, § 640, p. 945; *id.* (2007
13 supp.), p. 73.)

14 In *Polygram Records*, a case decided in 1985, the court described trade libel as "a confusing
15 concept that has not been subjected to rigorous judicial analysis in California." (*Polygram Records*,
16 *supra*, 170 Cal.App.3d at p. 548, fn. omitted.) In the court's view, this "confusion arises primarily
17 from uncertainty whether 'trade libel' should be treated as a species of defamation, or instead
18 constitutes the distinct tort of injurious falsehood...." (*Ibid.*) After analyzing the question, the court
19 held that "the two torts are distinct; that is, 'trade libel' is not true libel and is not actionable as
20 defamation." (*Id.* at p. 549.) Other California courts have reached the same conclusion. (See, e.g.,
21 *Leonardini, supra*, 216 Cal.App.3d at p. 573; *Guess, supra*, 176 Cal.App.3d at p. 479.) However, as
22 recognized in *Polygram Records*, "the distinction between personal aspersion and commercial
23 disparagement will sometimes be difficult to draw, because statements may effectuate both harms."
24 (*Polygram Records*, at p. 550.)
25
26

1 Plaintiff in this case lists only one allegedly defamatory statement, which does not appear to
2 pertain to any of the Plaintiff's services or products being offered to the general public but to
3 Plaintiff Ahdoot. (Complaint at ¶7).

4 5 2. Requirement of False Statement of Fact

6 "To constitute trade libel, a statement must be false." (ComputerXpress, supra, 93
7 Cal.App.4th at p. 1010.) "Since mere opinions cannot by definition be false statements of fact,
8 opinions will not support a cause of action for trade libel." (Id. at pp. 1010-1011.)

9 Defendant indicates in his declaration that the disputed statement is an opinion based on the
10 facts of his personal dealings with the Plaintiff. (Decl. ¶ pg. 2 line 6)

11 12 3. Malice Element

13 As thoroughly analyzed in the Melaleuca case, various reasons support the imposition of a
14 malice requirement for trade libel claims. (Melaleuca, Inc. v. Clark 66 Cal.App.4th 1344, 1360-1362
15 (1998). They include policy justifications based on differing societal values placed on reputation
16 versus commerce, historical common law distinctions, and constitutional precepts. (Ibid. see 5
17 Witkin, Summary of Cal. Law, supra, Torts, § 642, p. 948, discussing Melaleuca on this point.)

18 In view of the differences between defamation and trade libel, the better reasoned authority
19 recognizes malice as a required element of trade libel. Defendant clearly refutes all aspects of
20 malice in his declaration. (Decl. ¶ pg. 2 line 7) Plaintiffs allege that Defendant's statement "please
21 exercise CAUTION AND CARE when dealing with Mr. Albert Ahdoot as Mr. Ahdoot as Mr.
22 Ahdoot is not a man of his word" was and is morally repugnant. [Complaint at 23(e)]
23 Defendant suggests it is the Complaint itself that should bear this distinction given that it
24 appears by all accounts to be a boilerplate filing devoid of particulars or substantiation.
25
26

1 **4. No Special Damages For Non-identified Monetary Loss**

2 Moreover, plaintiff's trade libel claims fail on another ground, the failure to allege and
 3 substantiate special damages. A plaintiff seeking damages for trade libel must "allege special damages
 4 specifically, by identifying customers or transactions lost as a result of disparagement, in order to
 5 state a prima facie case." (Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., supra, 12 F.Supp.2d
 6 at p. 1043; see also, Mann, supra, 120 Cal.App.4th at p. 109.) Plaintiff has not done so here.
 7 (Complaint at ¶ 14.) The Plaintiffs have not provided this court with no evidence of damages,
 8 customers or transactions lost, nor did the Plaintiffs do so in the previous lawsuit.

9
 10 **1. Colocation America Corporation Actions Are Based on Defendant Garga-
 11 Richardson's Rights of Free Speech**

12 Section 425.16(e)(3) defines acts in furtherance of free speech or petition as including statements
 13 that are made (1) in a public forum and (2) accessible to the public. Websites accessible to the
 14 public are "public forum" for purposes of the anti-SLAPP statute. Barrett v. Rosenthal, 40 Cal.
 15 4th 33, 41 n.4 (2006); Nygaard, Inc v. Uusi-Kerttula, 159 Cal App. 4th 1027, 1039 (2008);
 16 Wilbanks v. Wolk, 42 Cal App. 4th 1170 pg (2006).

17
 18 **a. Defendant's Website Is a Public Forum**

19 The California Supreme Court and the Courts of Appeal repeatedly have held that a Web site
 20 accessible to the public is a public forum for purposes of Section 425.16. Kronemyer v. Internet
 21 Movie Data Base, Inc., ISO Ca1.App.4th 941 (2007); Huntingdon Life Sciences, Inc. v. Stop
 22 Huntingdon Animal Cruelty USA, Inc., 129 Cal.App.4th 1228, 1247 (2005). As observed by the
 23 court in Huntingdon Life Sciences, Inc., 129 Cal.App.4th at p. 1247 (citation omitted), "Statements
 24 on [defendant's] Web site are accessible to anyone who chooses to visit the site, and thus they
 25 'hardly could be more public.'

1 Defendant's website meets all the requirements of a public forum. The website is accessible
2 free of charge to any member of the public. (*Decl.*, [page 2 line 5). Readers of the Website members,
3 visitors and guests may review the opinions and commentary of Defendant as well as other
4 members of the public. *Id.* Members may also post their opinions. *Id.*

5
6 **b. The Services Offered by the Plaintiffs Are Matters of Public Interest.**

7 A statement or other conduct is "in connection with an issue of public interest . . . if the
8 statement or conduct concerns a topic of widespread public interest and contributes in some
9 manner to a public discussion of the topic." *Hall v. Time Warner, Inc.*, 153 Cal.App.4th 1337, 1347
10 (2007). An event that is of "significant interest to the public and the media" satisfies the public
11 interest requirement for purposes of Section 425.16(e)(3). *Seelig v. Infinity Broadcasting Corp.*, 97
12 Cal.App.4th 798, 807-808 (2002).

13 The public interest requirement of Section 425.16(e)(3) must be construed broadly so as to
14 encourage participation by all segments of our society in vigorous public debate of issues of public
15 interest. *Gilbert v. Sykes*, 147 Cal.App.4th 13, 23 (2007). Additionally, in deciding whether a matter
16 is one of public interest, courts should "err on the side of free speech." *Gallagher v. Connell*, 123
17 Cal.App.4th 1260, 1275 (2004),

18 Here, the Plaintiffs routinely issue press releases to the general public about the services they
19 provide to the world at large. Therefore it is quite clearly a matter of public interest. [*Decl pg 2, line 14*
20 *Exhibits 3*]

21 **c. Questionable Service Claims and Unfulfilled Contractual Promises Are Matters of**
22 **Public Interest**

23 Where a statement or activity precipitating the claim involves conduct that could affect a
24 large numbers of people beyond the direct participants, the claim is subject to Section CCP§ 415.16
25 *Commonwealth Energy Corp v. Investor Data Exchange*, 110 Cal.App.4th at 33 (2003). There can
26

1 be little doubt that the alleged unsatisfactory business dealings experienced by the Defendant are
 2 matters that have potential impact on a wide segment of society and receive widespread public
 3 attention.

4 Commenting on a matter of public concern is fundamental to the right of free speech.

5 Annette F. v. Sharon S., 119 Cal.App.4th 1146, 1162 (2004).

6
 7 **B. Plaintiffs Cannot Show a Reasonable Probability of Prevailing on Its Defamation**
 8 **Claim or Trade Libel**

9 Once the defendant has met its burden of establishing that the complaint falls within the anti-
 10 SLAPP statute, the burden shifts to the plaintiff to establish a "reasonable probability" that he
 11 will prevail at trial. Section 425.16(b). To establish a "probability" of prevailing, the plaintiff must
 12 show (1) a legally sufficient claim; and (2) that the claim is supported by competent, admissible
 13 evidence sufficient to sustain a judgment in the plaintiffs favor. Fashion 21 v. Coalition for
 14 Humane Immigrant Rights of Los Angeles, 117 Cal.App.4th 1138, 1147 (2004). ISC cannot meet
 15 this burden.

16 Plaintiffs' defamation claim of trade libel is based on Defendant's subjective statements of
 17 opinion about his experiences with them. As demonstrated below, they cannot show a reasonable
 18 probability of prevailing on their claim because it cannot prove that Defendant's subjective
 19 statements of opinion about it were provably false statements.

20
 21 **Colocation America Cannot Demonstrate that Defendant Made Provably False**
 22 **Statements**

23
 24 The tort of defamation involves (a) a publication that is (h) false, (c) defamatory, and (d)
 25 unprivileged, and that (e) has a natural tendency to injure or that causes special damage. Civ. Cod; §§
 26

1 45-46; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 529, p. 782 (citing Civ. Code, §§ 45-
2 46 and cases). To prevail on her defamation claim, Colocation America has the burden of presenting
3 evidence of a statement of fact that is provably false. See Seelig, 97 Cal.App.4th at 809. Statements
4 that cannot be reasonably interpreted as stating "actual facts" about an individual cannot form the
5 basis of a defamation action. Id. Additionally, expressions of opinion are not actionable. Savage v.
6 Pacific Gas & Elec. Co., 21 Cal.App.4th 434, 445 (1993). Thus, "rhetorical hyperbole," "vigorous
7 epithets," "lusty and imaginative expressions of contempt," and language used "in a loose, figurative
8 sense" have all been accorded constitutional protection. Seelig, 97 Cal.App.4th at 809. Additionally,
9 epithets and subjective disapproval of the "sticks and stones will break my bones" variety are not
10 actionable. Ferlauto v. Hanisher, 74 Cal.App.4th 1394, 1404 (1999).

11 The critical determination of whether an allegedly defamatory statement constitutes fact or
12 opinion is a question of law for the court. Ferlauto, 74 Cal.App.4th at 1401. In making this
13 determination, California courts apply the totality of the circumstances test. Id.; see also Seelig, 97
14 Cal.App.4th at 809. Under this test, the court first examines the language of the statement. Next, the
15 context in which the statement was made must be considered. The "contextual analysis demands
16 that the courts look at the nature and full content of the communication and to the knowledge and
17 understanding of the audience to whom the publication was directed." Seelig, 97 Cal.App.4th at 809-
18 810. Under this test, "editorial context is regarded by the courts as a powerful element in construing
19 as opinion what might otherwise be deemed fact." Ferlauto, 74 Cal.App.4th at 1401 (citation
20 omitted).

21 Applying this test, the following statements have been found to be not to be actionable:

- 22 • Statements by radio hosts that plaintiff was a "local loser," "chicken butt," and "big
23 skank," were "unquestionably" statements of the speaker's subjective judgment.

24 Seelig, 97 Cal.App.4th at 810.

- 1 • Statements that the plaintiff was a "creepazoid attorney" and "loser wannabe lawyer"
2 were "classic rhetorical hyperbole which 'cannot reasonably [be] interpreted as stating
3 actual facts." Ferlauto, 74 Cal.App.4th at 1404.
- 4 • Metaphoric expressions such as "keep him honest," "booby," and "baying in the
5 ocean breezes," was subjective expressions of negative opinion with no disprovable
6 factual content. Copp v. Paxton, 45 Cal.App.4th 829, 838 (1996).
- 7 • Statements that an attorney used "sleazy tactics" and engaged in a "fishing
8 expedition," and the supposition that the judge had a "dim view of the defense
9 tactics," merely opinion only. James v. San Jose Mercury News, Inc., 17 Cal.App.4th
10 1, 7-8 (1993).
- 11 • Use of the words "liar" and "thief" by a political foe was constitutionally protected
12 hyperbole. Rosenaur v. Scherer, 88 Cal.App.4th 260, 280 (2001).

13
14 As such, the disputed statements cannot be reasonably interpreted as stating "actual facts" about the
15 Plaintiff specifically. In any event, the defendant is able to reasonably prove true the substance of the
16 charges implied in the disputed statements.

17
18 **The Context of Defendant's Statements:** The Website is a consumer awareness forum
19 created to inform the general public about fraudulent jobs and general consumer issues. (Decl. ¶
20 XX). Almost all forum postings topic include Defendant's editorial commentary and his personal
21 opinion regarding business practices gathered from online job search engines such as Monster.com,
22 Careerbuilder.com; regulatory agencies The Securities and Exchange Commission [SEC], Federal
23 Trade Commission [FTD], Federal Food & Drug Administration [FDA], and other consumer
24 advocate websites.

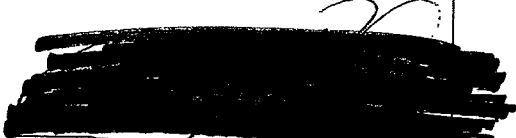
1
2 **C. Defendant Is Entitled to Recover Attorney Fees and Costs In Connection**
3 **with this Motion**

4 "Any Defendant who brings a successful motion to strike is entitled to mandatory attorneys fees."
5 Ketchum v. Moses, 24 Ca1.4th 1122, 1131 (2001); see also Section 425.16(c) (the "prevailing
6 defendant" on a motion to strike "shall be entitled" to recover his attorneys' fees and costs). If the
7 Court grants Mr. Garga-Richardson's Motion, he will submit a noticed motion for his fees.

8
9
10 **IV. CONCLUSION**

11
12 For all of the foregoing reasons, Defendant Mr. Garga-Richardson respectfully requests that the
13 Court grant his Motion in its entirety, strike the Complaint brought by Plaintiffs, and award
14 Defendant his attorneys' fees and costs associated with this Motion.

15
16
17
18 Dated this 4th day of February, 2011

19
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