

Case No. 09-16809
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEDGWICK CLAIMS
MANAGEMENT SERVICES, INC.,

Plaintiff-Appellant,

vs.

ROBERT A. DELSMAN,

Defendant-Appellee.

Appeal from the
U.S. District Court for the Northern
District of California
(No. 4:09-cv-01468-SBA)

PLAINTIFF-APPELLANT'S OPENING BRIEF

HARVEY SISKIND LLP
IAN K. BOYD (California Bar No. 191434)
SETH I. APPEL (California Bar No. 233421)
Four Embarcadero Center, 39th Floor
San Francisco, CA 94111
Telephone: (415) 354-0100
Facsimile: (415) 391-7124

LOCKE LORD BISSELL & LIDDELL LLP
GREGORY T. CASAMENTO (New York Reg. No. 2890671)
R. JAMES DEROSE III (New York Reg. No. 4241683)
Three World Financial Center
New York, NY 10281
Telephone: (212) 415-8600
Facsimile: (212) 203-2754

Attorneys for Plaintiff-Appellant
Sedgwick Claims Management Services, Inc.

CORPORATE DISCLOSURE STATEMENT

Sedgwick Claims Management Services, Inc. is a wholly owned subsidiary of Sedgwick CMS Holdings, Inc., which is not a publicly held corporation. Sedgwick Claims Management Services, Inc.'s ultimate corporate parent, Fidelity Sedgwick Holdings, Inc. is not a publicly held corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
SUMMARY OF THE ARGUMENT	9
ARGUMENT	10
I. Standard of Review	11
II. The District Court Erred As A Matter Of Law In Dismissing Sedgwick’s Claims Under The Anti- SLAPP Statute.....	11
A. Defendant’s Demonstrably False Assertion That Sedgwick Is A Ponzi Scheme Is Not An Act In Furtherance Of Free Speech.....	13
1. In Determining That Defendant Was Exercising His Right To Free Speech, The District Court Did Not Properly Analyze The Complained Of Statements And Causes Of Action.....	14
2. Provably False Accusations Of A Crime Are Not Free Speech Under Any Circumstance	22
B. The Court Was Incorrect In Determining That Sedgwick Would Not Prevail On The Merits.....	24
CONCLUSION.....	28
STATEMENT OF RELATED CASES	28

TABLE OF AUTHORITIES

FEDERAL CASES

Alexander v. Compton (In re Bonham),
229 F.3d 750 (9th Cir. 2000)20

Beauharnais v. Illinois,
343 U.S. 250 (1952)23

Condit v. National Enquirer, Inc.,
248 F.Supp.2d 945 (E.D. Cal. 2002) 18, 19

Crowe v. County of San Diego,
303 F.Supp.2d 1050 (S.D.Cal. 2004)23

Manufactured Home Communities, Inc. v. County of San Diego,
544 F.3d 959 (9th Cir. 2008) 11, 12, 14

Milkovich v. Lorain Journal Co.,
497 U.S. 1 (1990)25

Neilson v. Union Bank of California, N.A.,
290 F.Supp.2d 1101 (C.D.Cal. 2003).....22

Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman,
55 F.3d 1430 (9th Cir. 1995)25

U.S. v. Moloney,
287 F.3d 236 (2d Cir. 2002)22

Warfield v. Alaniz,
569 F.3d 1015 (9th Cir. 2009)20

Wolston v. Reader's Digest Assn., Inc.,
443 U.S. 157 (1979)21

STATE CASES

Damon v. Ocean Hills Journalism Club,
85 Cal.App.4th 468 (2000)17

<u>Franklin v. Dynamic Details, Inc.</u> , 116 Cal.App.4th 375 (2004).....	25
<u>Gallagher v. Connell</u> , 123 Cal, App. 4th 1260 (2005).....	26
<u>Hailstone v. Martinez</u> , 169 Cal.App.4th 728 (2008).....	13
<u>Mann v. Quality Old Time Service, Inc.</u> , 120 Cal.App.4th 90 (2004).....	14, 27
<u>McGarry v. University of San Diego</u> , 154 Cal.App.4th 97 (2007).....	23
<u>Navellier v. Sletten</u> , 29 Cal.4th 82 (2002).....	13
<u>Nygaard, Inc., v. Uusi-Kerttula</u> , 159 Cal.App.4th 1027 (2008).....	17
<u>Soukup v. Law Offices of Herbert Hafif</u> , 39 Cal.4th 260 (2006).....	11
<u>Tichinin v. City of Morgan Hill</u> , 177 Cal.App.4th 1049 (2009).....	11, 25
<u>Weinberg v. Feisel</u> , 110 Cal.App.4th 1122 (2003).....	12, 21, 23, 24
<u>Wilbanks v. Wolk</u> , 121 Cal.App.4th 883 (2004).....	17, 25
<u>STATE STATUTES</u>	
California Code of Civil Procedure § 425.16	9, 11, 12
California Civil Code § 45.....	23
California Civil Code § 45a.....	23
California Civil Code § 46.....	23

Plaintiff-Appellant Sedgwick Claims Management Services, Inc. (“Sedgwick”), by its undersigned attorneys, submits this brief in support of its appeal from an order of the United States District Court for the Northern District of California (Hon. Sandra Brown Armstrong, U.S.D.J.), which dismissed Plaintiff-Appellant’s claims pursuant to Fed. R. Civ. P. 12(b)(6) and California Code of Civil Procedure § 425.16.

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of California exercised subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1332.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, because Plaintiff-Appellant is appealing a final dismissal of its action by the District Court pursuant to Fed. R. Civ. P. 12(b)(6) and California Code of Civil Procedure § 425.16.

The Order appealed from was entered on July 17, 2009.

Plaintiff-Appellant filed its Notice of Appeal on August 17, 2009.

This appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in dismissing, pursuant to California's Anti-SLAPP Statute, Sedgwick's Defamation and Trade Libel Claims against Defendant when it failed to consider independently all of the defamatory statements that Defendant is accused of making, especially given that Defendant's statements that Sedgwick and its employees are engaged in a "Ponzi Scheme" were defamatory per se?

2. Did the District Court err in dismissing, pursuant to California's Anti-SLAPP Statute, Sedgwick's Defamation and Trade Libel Claims against Defendant because it failed to consider the evidence submitted by Sedgwick in support of its causes of action?

STATEMENT OF THE CASE

The underlying dispute at issue arises from Defendant's campaign to harass, intimidate and defame Sedgwick. Specifically, Defendant has been posting claims about Sedgwick on his various blogs, has been sending threatening e-mails and has been mailing postcards with defamatory statements to various companies and people. These materials contained images to which Sedgwick owns the copyright.

Sedgwick brought suit against Defendant in light of his campaign. As a result of Defendant's postings and mailings, Sedgwick asserted claims for

copyright infringement and various state law causes of action, including defamation and trade libel.

Subsequent to Sedgwick filing its Amended Complaint, Defendant made a motion styled Motion for Summary Judgment, Improper Venue, and Failure to Join an Indispensable Third Party under the Federal Rule of Civil Procedure 19. Sedgwick opposed this motion. Sedgwick submitted the Declaration of Frank Huffman in support of its opposition. This declaration provided evidence in support of Sedgwick's position and verified the allegations contained in Sedgwick's Amended Complaint.

The District Court, without notice to Sedgwick, converted Defendant's motion to a motion to dismiss pursuant to Fed. R. Civ. P. 12. The District Court dismissed all of Sedgwick's claims, deciding that the copyright violations were fair use and that the state law claims were a strategic lawsuit against public participation. The District Court reached this decision after performing a flawed analysis that did not take into account the distinctions between the various defamatory and libelous statements that Defendant made about Sedgwick.

STATEMENT OF FACTS

Sedgwick, a Tennessee based company, provides insurance claims management services to its customers and their employees. [ER, 53, ¶8] Sedgwick's consumers are large corporations and other businesses that provide

insurance plans to their respective employees and need assistance in managing those plans. [ER, 53, ¶8] Sedgwick does not provide services to individual consumers in the sense that individuals do not hire Sedgwick to manage claims on their behalf.

Defendant-Appellee Robert A. Delsman Jr., a resident of California, was an employee of General Electric Company, one of Sedgwick's customers. [ER, 53-55, ¶¶3, 11, 16] GE provided its employees, including Delsman, long-term disability insurance through MetLife, Inc. [ER, 54, ¶10] Sedgwick administered GE's long-term disability plan. [ER, 54, ¶10] Delsman filed a claim for long-term disability benefits under this plan. [ER, 54, ¶11]

Delsman was subsequently terminated from his employment by GE. [ER, 54, ¶11] Delsman became highly displeased as a result of his termination. [ER, 54, ¶11, 12] He was also unhappy with his long term disability plan. [ER, 54, ¶11] And, he was unhappy with Sedgwick's management of his claim for disability benefits filed against the GE/MetLife plan. [ER, 54, ¶11]

As part of his displeasure, Defendant began a systematic plan to harass, intimidate and defame Sedgwick. [ER, 54, ¶12] He began posting defamatory materials on his blog websites. [ER, 54, ¶12] This included using the copyrighted photographs of Sedgwick's Chief Executive Officer ("CEO") and Chief Operating Officer ("COO") and morphing them into images of Adolph Hitler and Heinrich

Himmler. [ER, 57, ¶24] He also referred to Sedgwick and its employees as “Sedgthugs” and unjustly accused Sedgwick of committing criminal activity. [ER, 54, ¶12] Beyond these postings, Defendant began sending unwanted and harassing e-mails to Sedgwick employees. [ER, 57, ¶27]

Not content to harass Sedgwick and its employees through his internet campaign, Delsman moved his campaign from the internet to the U.S. Postal System, in what he described as “Operation Going Postcard.” [ER, 58, ¶29] Operation Going Postcard is a campaign to send postcards to various people to harass Sedgwick and its employees, or as Mr. Delsman stated on his blog while apparently addressing certain Sedgwick employees: “when I find out where you live, I am going to send postcards to all of your neighbors telling them what a piece of [excrement] you are...” [ER, 58, ¶29] This entailed Delsman misappropriating Sedgwick’s copyrighted images of Sedgwick’s CEO and COO from the internet, then printing and mailing postcards with these copyrighted images under the heading “WANTED FOR HUMAN RIGHTS VIOLATIONS.” [ER, 55, ¶13] It also involved Delsman accusing Sedgwick of engaging in criminal activity by referring to the COO as Paul “Ponzi” Posey and falsely stating that Sedgwick and its employees are engaged in a Ponzi scheme. [ER, 65-66, ¶34]

Sedgwick is aware of several different types of postcards that have been sent during Operation Postcard. [ER, 58-68, ¶¶30-35] Copies of these postcards were

included in the Amended Complaint at paragraphs 30, 31, 33, 34 and 35. [ER, 58-68, ¶¶30-35] Most relevant to this appeal, is the postcard dated February 9, 2009 (“February 9 Postcard”) which states on the front: “Just Say No to Sedgwick’s latest Ponzi Scheme.” [ER, 65-66, ¶34] Calling Sedgwick a Ponzi scheme is a false factual assertion. Sedgwick is not certain how many of each postcard was sent since no discovery has taken place, but given that Sedgwick has received inquiries based on these postcards and that Sedgwick, or its employees, has received copies of them in the mail it is clear that they have been sent.

On April 10, 2009 Sedgwick filed a First Amended Complaint against Delsman alleging Trespass to Chattels, Copyright Infringement, Interference with Prospective Economic Advantage, Trade Libel, Defamation and Libel and Unfair Competition. [ER, 55-76] These claims were made pursuant to the District Court’s original jurisdiction over federal questions and diversity jurisdiction. [ER, 53, ¶¶4-5] The basis of the Amended Complaint was Delsman’s defamatory, false, harassing, and threatening campaign against Sedgwick and its employees primarily through internet postings and postcard mailings. [ER, 55-76]

In response to the Appellant’s Amended Complaint, Defendant, acting *pro se*, filed a Motion for Summary Judgment, Improper Venue, and Failure to Join an Indispensable Third Party under the Federal Rule of Civil Procedure 19. [ER, 40-51] The legal bases for this motion are unclear. There was some passing reference

in this motion to Sedgwick's also being a strategic lawsuit against public participation. [ER, 41, 51] There was no attempt on Defendant's part to demonstrate that his attacks on Sedgwick were him exercising his right to free speech. [ER, 40-51] Delsman further intimated that the use of the COO's and CEO's copyrighted photographs was fair use under 17 U.S.C. §107. [ER, 42]

Sedgwick opposed this motion. In its Opposition to Defendant's Motion Sedgwick argued that the Anti-SLAPP Statute does not apply in this case because: 1) Delsman failed to make a prima facie showing that his actions "arise[s] from an act in furtherance of the [his] rights of petition or free speech"; and 2) that the defamatory statements propagated by Delsman are not constitutionally protected. Furthermore, Sedgwick argued that Delsman's loosely construed Anti-SLAPP motion should be denied because Sedgwick demonstrated a probability of prevailing on the challenged claims. Specifically, Sedgwick's Amended Complaint was legally sufficient and each claim was substantiated by a prima facie showing of the facts to sustain a favorable judgment.¹ This was evidenced by Delsman's unauthorized use of the copyrighted photographs of Sedgwick's COO and CEO and his postcard mailings with the provably false statements that Sedgwick engaged in a Ponzi scheme. In support of its opposition Sedgwick

¹ Sedgwick submitted the Declaration of Frank Huffman, which also verified the allegations of Sedgwick's First Amended complaint. Apparently the District Court ignored this because it referred to "Sedgwick's unverified pleading" in its decision.

submitted the Declaration of Frank Huffman, which verified the Amended Complaint and submitted various pieces of evidence. [ER, 20-39]

In the Order Granting the Defendant's Motion to Dismiss, without notice to Sedgwick, the Court "liberally construe[d] [Delsman's] motion as one to dismiss the copyright infringement claim under Federal Rule of Civil Procedure 12(b)(6) and an anti-SLAPP motion to strike under the California Code of Civil Procedure section 425.16 as to the remaining state law claims." [ER, 1] On the copyright claim, the Court analyzed the factors for the fair use exception as codified in 17 U.S.C. § 107. The Court reasoned that "[Delsman's] uses of the photographs of [the COO and CEO] are highly transformative and serve an entirely different function than originally intended" and dismissed Sedgwick's claim for copyright infringement. [ER, 10-11] As to Defendant's anti-SLAPP arguments, the Court first found that the defendant's statements "are precisely the type of speech that presents a matter of public interest." [ER, 13] Additionally the Court concluded, apparently ignoring the declaration and its attachments submitted by Sedgwick, that "Sedgwick fail[ed] to adduce any evidence to meet its burden of showing a probability of prevailing on any of its claims."² [ER, 15] The Court thereby dismissed Sedgwick's Amended Complaint without a hearing.

² This is not an instance where the District Court simply reached a finding contrary to Plaintiff's wishes and Plaintiff believes that the court did so because it ignored the Plaintiff's evidence. Here, it is a factual certainty that the District

Sedgwick now appeals the Court's decision pursuant to the Federal Rules of Appellate Procedure.

SUMMARY OF THE ARGUMENT

Sedgwick seeks the restoration of its action against the Defendant because the District Court erroneously dismissed this action under California Code of Civil Procedure § 425.16 (“Anti-SLAPP Statute”), which bars strategic lawsuits against public participation; specifically Sedgwick seeks restoration of its claims for Trade Libel (count 4) and Defamation and Libel (count 5). The District Court dismissed Sedgwick's Amended Complaint pursuant to the Anti-SLAPP Statute without independently considering all of the defamatory and libelous statements of which Sedgwick complained. The District Court did not consider that Defendant's false accusations that Sedgwick and its employees are engaged in a “Ponzi Scheme” are defamatory per se, and thus not free speech. Nor are these false accusations speech that is in the public interest. Thus, Sedgwick's defamation and trade libel claims should have survived the Anti-SLAPP motion.

The District Court also failed to consider that the allegations of Sedgwick's Complaint were verified, and that Sedgwick had thus provided evidence in support of Sedgwick's claims. The District Court failed to consider this evidence, as

Court ignored Plaintiff's evidence, referring to Sedgwick's reliance on its unverified complaint when in fact the Declaration of Frank Huffman did verify that complaint.

demonstrated by its reliance on “Sedgwick’s unverified pleading” as a basis for dismissal, and failed to perform any analysis on Sedgwick’s state law claims.

ARGUMENT

The District Court’s decision dismissing Sedgwick’s claims for defamation and trade libel pursuant to California’s Anti-SLAPP Statute was erroneous as a matter of law. In reaching its decision, the District Court ignored the differences between the various statements complained of by Sedgwick, and did not view each statement independently. Instead it viewed them all as a single statement. Specifically, the District Court ignored that, among the complained of communications, Defendant made provably false statements accusing Sedgwick of being a Ponzi scheme, and that Sedgwick’s employees were engaged in the furtherance of that Ponzi scheme. Because it ignored these statements, the District Court incorrectly determined that all of the Defendant’s actions were free speech so as to warrant an application of the Anti-SLAPP Statute. In fact, Defendant’s statements about Sedgwick being a Ponzi scheme are defamatory on their face.

The District Court also incorrectly determined that Sedgwick did not have a probability of prevailing on the merits. Sedgwick has demonstrated that it may prevail and therefore Defendant is not entitled to the protections afforded the Anti-SLAPP Statute on Sedgwick’s defamation and trade libel claims. The District Court ignored the verification of Sedgwick’s First Amended Complaint and

engaged in no analysis on whether or not Sedgwick, based on those verified allegations, had made a showing that it could prevail on the merits of its state law claims against Delsman.

I. Standard of Review

An appellate court reviews a trial court's ruling granting an Anti-SLAPP motion to strike *de novo*. See Tichinin v. City of Morgan Hill, 177 Cal.App.4th 1049, 1061 (2009). In evaluating the motion, the appellate court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (§ 425.16, subd. (b)(2).) However, [an appellate court does] not weigh credibility or compare the weight of the evidence. (Soukup v. Law Offices of Herbert Hafif, 39 Cal.4th 260, 269, fn. 3, (2006)) Rather, [it] accept[s] as true evidence favorable to the plaintiff, determine[s] whether the plaintiff has made a prima facie showing of facts necessary to establish its claim at trial, and evaluate[s] the defendant's evidence only to determine whether it defeats that submitted by the plaintiff as a matter of law." Tichinin, 177 Cal.App.4th at 1061.

II. The District Court Erred As A Matter Of Law In Dismissing Sedgwick's Claims Under The Anti-SLAPP Statute

California Code of Civil Procedure § 425.16, California's Anti-SLAPP Statute, was enacted in reply to a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech." Manufactured Home Communities, Inc. v. County of San Diego, 544 F.3d 959,

963 (9th Cir. 2008)(citing Cal. Civ. Proc. Code § 425.16(a)). The statute is designed only to allow the dismissal of “meritless claims that are aimed not at remedying legally cognizable harms but at chilling expression.” Id. Sedgwick’s claims for defamation and trade libel should not have been dismissed because, given that Defendant has made verifiably false statements that are defamatory on their face, Sedgwick has asserted legally cognizable claims for defamation and trade libel.

In order to dismiss a cause of action pursuant to California’s Anti-SLAPP Statute two determinations must be made. “First, the court must decide whether the defendant has made a sufficient threshold showing that the challenged cause of action is subject to a special motion to strike. Second, if the threshold showing has been made, the court must determine whether the plaintiff has demonstrated sufficient minimal merit to be allowed to proceed ... Nothing outside of this two-step process is relevant.” Weinberg v. Feisel, 110 Cal.App.4th 1122, 1130 (2003)(citations omitted). In the present instance, the District Court determined that Sedgwick’s claims were subject to an Anti-SLAPP dismissal because the complained of conduct fell within Defendant’s “constitutional right to criticize Sedgwick,” [ER, 14] and because Plaintiff provided no “evidence to meet its burden of showing a probability of prevailing on any of its claims.” [ER, 14]. Both of these determinations were incorrect.

In reaching its decision the District Court failed to consider that in certain of the complained of publications, Defendant made provably false assertions that Sedgwick had committed a particular crime. These false factual statements – that Sedgwick is perpetrating a Ponzi scheme – are unrelated to any criticism of Sedgwick’s claims handling, are defamatory on their face and are not subject to the protections of free speech. Moreover, that these statements are provably false demonstrates that Sedgwick’s defamation and trade libel claims have merit. As such, there was no basis to dismiss Sedgwick’s claims pursuant to California’s Anti-SLAPP Statute.

A. Defendant’s Demonstrably False Assertion That Sedgwick Is A Ponzi Scheme Is Not An Act In Furtherance Of Free Speech

As a threshold issue, and as stated above, in order to be entitled to an Anti-SLAPP dismissal, the moving defendant “must demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of [defendant’s] right of petition or free speech under the United States or California Constitution in connection with a public issue.” Hailstone v. Martinez, 169 Cal.App.4th 728, 735 (2008)(internal quotation omitted); see also Navellier v. Sletten, 29 Cal.4th 82, 89 (2002)(stating that “in the Anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity”). There has been no such demonstration here regarding the statements that Defendant has made accusing Sedgwick of being a Ponzi scheme.

Instead, without analyzing how Defendant demonstrated that these statements were made in furtherance of his right to free speech, the District Court simply held that the “statements in the Amended Complaint attributed to Defendant show that their purpose is to enlighten potential consumers of Sedgwick’s allegedly questionable claims practices and to avoid using the company’s services.” [ER, 13] Falsely accusing Sedgwick of a crime is unrelated to enlightening potential consumers about anything relating to claims management and is not free speech protected under the Anti-SLAPP Statute.

1. In Determining That Defendant Was Exercising His Right To Free Speech, The District Court Did Not Properly Analyze The Complained Of Statements And Causes Of Action

In determining that the Anti-SLAPP Statute applied to Sedgwick’s claims for defamation and trade libel arising out of Defendant’s statements, the District Court was required to determine that each complained of statement fit within the free speech requirement of the statute. See, e.g., *Manufactured Home Communities, Inc. v. County of San Diego*, 544 F.3rd 959 (9th Cir. 2008)(performing a statement by statement analysis of allegedly defamatory statements in denying SLAPP dismissal); see also *Mann v. Quality Old Time Service, Inc.*, 120 Cal.App.4th 90 (2004) (performing a separate SLAPP analysis for each different assertion of defamatory conduct and holding that once a plaintiff shows a likelihood of success on any of its causes of action the suit is not subject to

an Anti-SLAPP dismissal). The District Court did not do that. Instead, even though Defendant's statements on its various postcards were qualitatively different from each other, and were made at different times to different audiences, the District Court grouped all of the complained of statements together, treated them as if they were a single communication, and stated without further analysis that the "statements in the Amended Complaint attributed to Defendant show that their purpose is to enlighten potential consumers of Sedgwick's allegedly questionable claims practices and to avoid using the company's services." [ER, 13] If the District Court would have examined each statement on its own, it would have seen that not all of Defendant's statements can be understood to share this purpose, not all were made at the same time, and not all were made to the same audience. Therefore, dismissal of all of Sedgwick's defamation and trade libel claims was not warranted.

There is no basis for the District Court to have considered all of Defendant's complained of mailings as one. Sedgwick brought suit alleging, among other claims, causes of action for defamation and trade libel based on a series of statements that Defendant made, both on his websites and in certain postcards that he sent, or caused to be sent, to various individuals and companies. The Amended Complaint alleges that 5 different types of postcards were sent. Each one of these

postcards contained various statements about Sedgwick. In its Amended Complaint, Sedgwick complained about each and every one of these statements.

While some of the same statements appeared over and over again on these mailings (the backs of each were similar) and the website, there was some variation between the cards. Specifically, one of the mailings, the February 9 Postcard, makes the factual assertion that Sedgwick is a Ponzi scheme, stating: “Just Say No to Sedgwick’s latest Ponzi Scheme.” Nowhere on either side of this mailing, unlike on the others, is there any reference to Sedgwick’s claims management practices. None of the other mailings assert that Sedgwick is a Ponzi scheme. Because not every mailing was sent to the same person or place, recipients may have received the February 9 Postcard and no others.³ These recipients would not have any of context from any of the other communications; the District Court appears to have read all of the mailings together, supplying context from one type of card, which may have referred to Sedgwick’s claims management, to all of the others.

Because it lumped all of the statements together, the District Court ended up performing a flawed analysis as to whether Defendant was exercising his free speech. This analysis extended only to those statements, contained in certain of the mailings, which requested that persons, who felt that they had been mistreated by

³ At this early stage in the litigation no discovery has taken place.

Sedgwick during the claims handling process, take action. The February 9 Postcard makes no such request.

In doing its analysis, the District Court relied on two cases to determine that Defendant's statements were free speech subject to the Anti-SLAPP Statute: Wilbanks v. Wolk, 121 Cal.App.4th 883 (2004) and Damon v. Ocean Hills Journalism Club, 85 Cal.App.4th 468 (2000). In both of these cases, the respective state appellate courts dealt with allegedly defamatory statements that were expressions of opinion as opposed to statements of provable fact. See Wilbanks, 121 Cal.App.4th at 894-895 (considering statements accusing plaintiff of unethical and questionable business practices); Damon, 85 Cal.App.4th at 480 (considering statements of opinion critical of manager's performance). The District Court never addressed the issue that the February 9 Postcard does not on its face make reference to Sedgwick's claims handling, but instead states that Sedgwick is a Ponzi scheme. This is a factual assertion. As such, it differs materially from the statements in Defendant's other mailings and on his web-site which the District Court did consider. Those other statements could conceivably be read to criticize Sedgwick's handling of benefits; these statements are not provably false and depend on the opinion of the recipient and whether they felt or believed that they had been mistreated. Other courts have found this distinction between fact and opinion to be dispositive. See, e.g., Nygaard, Inc., v. Uusi-Kerttula, 159 Cal.App.4th

1027, 1052 (2008) (analyzing the difference between non-actionable statements of opinion and verifiable statements of fact on Anti-SLAPP dismissal for defamation claims).

And, in fact, with respect to defamation claims and an Anti-SLAPP analysis, there is a qualitative difference between Defendant's call to an individual to report if he or she feels that they have been mistreated or terrorized and the factual assertion that Sedgwick's business is a Ponzi scheme. The District Court never analyzed whether Defendant's baseless factual statement that Sedgwick is a Ponzi scheme fits within that same category as the other complained of statements or warrants the same result. It is likely that it does not warrant the same result because it falls outside of the logical justification that the District Court provided for why Defendant's conduct was free speech, *i.e.* Defendant's speech was protected because it sought to "enlighten[] potential consumers," since false accusations that Sedgwick is a Ponzi scheme do not enlighten anyone.

On the present issues, Condit v. National Enquirer, Inc., 248 F.Supp.2d 945 (E.D. Cal. 2002), is more instructive than the Damon and Wilbanks decisions upon which the District Court relied. In Condit the court refused to dismiss the Anti-SLAPP Statute defamation claims brought by a congressman's wife. 248 F.Supp.2d at 954. Like the complained of accusation of being a Ponzi scheme here, in Condit the accusations of wrongdoing were factual assertions that were

provably false. See id. The court held that the complaint appeared to be an attempt to vindicate plaintiff's right not to be falsely accused of wrongdoing in a major publication; this alleged wrongdoing included attacking a woman shortly before that woman's disappearance and hiding material information about that disappearance from police. Id. The Condit court noted that defendant was seeking to utilize the Anti-SLAPP Statute to gain immunity from an alleged defamation (with its attendant false factual assertions), not to be free of a meritless lawsuit. Id.

If the District Court had done the proper analysis here, it would have found that not all of the statements should have been treated the same, and not all of them constitute free speech so as to justify an Anti-SLAPP dismissal. Because the defamation and libel claims are based on a series of statements that Defendant made against Sedgwick in his mailings and on his website, each postcard, and the statements contained therein, is the basis for its own cause of action. Assuming that the intent to "enlighten[] potential consumers" of supposedly questionable claims practices is enough to demonstrate that Defendant is exercising his right to free speech, the analysis then becomes one of whether the statements on the February 9 Postcard enlighten potential consumers, so as to potentially bar causes of action based on those statements. It is difficult to see how a false accusation that Sedgwick is a Ponzi scheme fits within the District Court's rubric because this false accusation does not "enlighten[] potential consumers" about Sedgwick's

claim practices, because Ponzi schemes have nothing to do with claims management.

A Ponzi scheme is “a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.” Warfield v. Alaniz, 569 F.3d 1015, 1018 n.2 (9th Cir. 2009)(citing Alexander v. Compton (In re Bonham), 229 F.3d 750, 759 n. 1 (9th Cir. 2000)). A Ponzi scheme, which relies on soliciting investments and involves paying returns, has nothing to do with the business of managing insurance claims, which is unrelated to soliciting investors but simply deals with administering existing insurance programs. In fact, the February 9 Postcard makes no reference to Sedgwick’s claims management practices.

Furthermore, any connection between Defendant’s false accusations that Sedgwick is a Ponzi scheme and his supposed goal of enlightening “potential consumers” falls apart upon consideration of Sedgwick’s business. Individuals do not hire or retain Sedgwick. They do not pay premium to it or make investments with it. No payment for service changes hands between Sedgwick and the people whose claims it handles. Instead, Sedgwick provides its service to the companies that provide insurance to those individuals. In other words, an individual insured has no choice in whether or not his claim is managed by Sedgwick; that choice lies with his or her employer. As such, falsely notifying individual “potential

consumers” about a supposed financial crime is not free speech in connection with a public issue those individuals have any interest in. Weinberg, 110 Cal.App.4th at 1136 (“Simply stated, causes of action arising out of false allegations of criminal conduct, made under circumstances like those alleged in this case, are not subject to the anti-SLAPP statute. Otherwise, wrongful accusations of criminal conduct, which are among the most clear and egregious types of defamatory statements, automatically would be accorded the most stringent protections provided by law...”); see also Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157, 168-169 (1979). That there is no enlightenment, intentional or otherwise, is underscored by Defendant’s avowed purpose of “send[ing] postcards to all of your neighbors telling them what a piece of [excrement] you are...”

Ultimately, if one were to extend the logic the District Court appears to have followed in dismissing Sedgwick’s defamation and trade libel claims, a defendant could be entitled to an Anti-SLAPP dismissal no matter how many defamatory statements he or she made so long as the offender could demonstrate that one of the complained of statements was free speech, even if that statement was made at a different time from the protected speech, in a different place and to different people. There is no authority to support such a broad reading of the Anti-SLAPP Statute. The District Court does not appear to have considered any of the above issues in determining that the Defendant was exercising free speech and in

dismissing Sedgwick's defamation and trade libel causes of action. It erred as a matter of law because of this deficiency.

2. Provably False Accusations Of A Crime Are Not Free Speech Under Any Circumstance

Outside the flaws in the District Court's analysis, Defendant's false accusation that Sedgwick is a Ponzi scheme should not have been treated as free speech under any circumstance. Defendant's statements on this point are defamatory on their face and not subject to the protections of the First Amendment.

Essentially Defendant has been asserting that Sedgwick is a criminal enterprise without any evidence to support his assertions. Defendant has stated that Sedgwick is a Ponzi scheme. [ER, 65-66, ¶34] A Ponzi scheme is by definition a crime. See Neilson v. Union Bank of California, N.A., 290 F.Supp.2d 1101, 1120 (C.D.Cal. 2003); see also U.S. v. Moloney, 287 F.3d 236, 241 (2d Cir. 2002)(“A Ponzi scheme by definition uses the purportedly legitimate but actually fraudulently obtained money to perpetrate the scheme, thus attracting both further investments and, in many cases, new investors to defraud.”). Thus, in accusing Sedgwick of being a Ponzi scheme without having any basis to do so, Defendant is accusing Sedgwick of criminal activity. Not only has Defendant accused Sedgwick of a crime, but a crime that resonates particularly in today's environment; this point is especially clear given the attention that Bernard

Madoff's scheme has gotten over the past year. Defendant's assertions are, of course, false.

California courts and California statutory law clearly state that a statement falsely charging a person with a crime is defamation per se. See Crowe v. County of San Diego, 303 F.Supp.2d 1050, 1114 (S.D.Cal. 2004); WEST'S ANN. CAL. CIV. CODE §§ 45, 45a, and 46 (2007)(Falsely charging "any person with crime, or with having been indicted, convicted, or punished for crime" is defamatory per se); see also McGarry v. University of San Diego, 154 Cal.App.4th 97, 112 (2007)(stating any statement which is false, unprivileged and "exposes the plaintiff to hatred, contempt ridicule or obloquy, or which causes him to be shunned or avoided, or which had a tendency to injure him in his occupation" is a defamation). And, it is a well established principle of law that defamation is not protected by the constitutional right of free speech. See Weinberg, 110 Cal.App.4th at 1131 (citing Beauharnais v. Illinois, 343 U.S. 250 (1952)).

Sedgwick is not a Ponzi scheme and any assertion otherwise is untrue. While it is generally very difficult to prove a negative proposition – in this instance that Sedgwick is not a Ponzi scheme – Defendant has made his false assertions on this point without one whit of evidence to support his assertion. In fact, there is none. As alleged in the complaint, Sedgwick is a claims management service. The District Court accepted that Sedgwick is a claims management service. As such,

Sedgwick's business does not fulfill any of the criteria necessary to be a Ponzi scheme. It does not attract investments or investors, or pay out moneys to perpetrate an investment scheme. For these reasons, it is clear that Defendant's statements should not have been presumed to be free speech.

Ultimately, this also goes to the question of whether Defendant has demonstrated that he is exercising his free speech. Defendant has definitively not made this demonstration with respect to his assertion that Sedgwick is a Ponzi scheme. These statements are provably false and Defendant has done nothing to show that this is not the case.⁴

B. The Court Was Incorrect In Determining That Sedgwick Would Not Prevail On The Merits

If a court does determine that a defendant has met the threshold showing that the complained of actions are free speech, the court must then "determine whether the plaintiff has demonstrated sufficient minimal merit to be allowed to proceed." Weinberg, 110 Cal.App.4th at 1130. Here, besides incorrectly determining that Defendant's actions were free speech as discussed *supra*, the District Court also erred in finding that Sedgwick had not demonstrated that its claims had sufficient merit to survive an Anti-SLAPP dismissal.

⁴ That Defendant's statements are defamatory per se also are relevant with respect to the question of whether it was fair use for Defendant to use Sedgwick's copyrighted materials in the way that he did. It is questionable whether a defendant may claim the defense of fair use if that supposed fair use is to make defamatory statements.

Because Defendant's assertion that Sedgwick is a Ponzi scheme is defamatory per se, Sedgwick's defamation and trade libel claims should not have been dismissed. However, the District Court decided that Sedgwick could not demonstrate that Defendant's actions were defamatory per se. It required that Sedgwick affirmatively put forth evidence that would be admissible at trial to make a prima facie showing that would support a judgment. Beyond applying an overly stringent standard, the District Court erroneously held that Sedgwick had not adduced any evidence; in fact, Sedgwick has put forth such evidence.

For Sedgwick to meet its burden to demonstrate that its claims have sufficient merit, "[it] need not produce evidence that he or she can recover on every possible point urged. It is enough that the plaintiff demonstrates that the suit is viable." Wilbanks, 121 Cal.App.4th at 905. "A motion to strike under section 425.16 is not a substitute for a motion for a demurrer or summary judgment." Tichinin, 177 Cal.App.4th at 1062 (quoting Wilbanks, 121 Cal.App.4th at 905). In the present instance involving defamation and trade libel claims, this means "the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." Franklin v. Dynamic Details, Inc., 116 Cal.App.4th 375, 385 (2004)(citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990); Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1438-1439 (9th

Cir. 1995)). Moreover, Courts have held that “[i]n order to satisfy due process, the burden placed on the plaintiff to show a reasonable probability of success on the merits must be compatible with the early stage at which the motion is brought and heard and the limited opportunity to conduct discovery,” and therefore only a “minimal showing of merit is necessary in order for the plaintiff to proceed with his suit.” Gallagher v. Connell, 123 Cal, App. 4th 1260, 1275-1276 (2005)(internal citations and quotations omitted).

Sedgwick has met this burden. It has demonstrated that Defendant made a statement that accused Sedgwick of being a Ponzi scheme. It has demonstrated that this statement is false and that Sedgwick’s business is claims management. Thus, a reasonable finder of fact could conclude the published statement declares or implies a provably false assertion of fact. As such, Sedgwick has demonstrated that Defendant has committed defamation per se, and that Sedgwick will likely prevail on this claim.

Moreover, contrary to the District Court’s statement that Sedgwick relied on the “conclusory allegations in [its] unverified pleading,” Sedgwick did in fact submit the Declaration of Frank Huffman to support its causes of action. Mr. Huffman’s Declaration verified Sedgwick’s First Amended Complaint, including the statement that Sedgwick “is a company that provides insurance claims management services to its customers and their employees,” not a Ponzi scheme.

[ER, 21, ¶2] It verified that these statements had been published, and provided e-mail correspondence from customer institutions that resulted from Defendant's publication. It also verified that Sedgwick has been damaged by Defendant's assertions. Sedgwick has not only met its burden to demonstrate that Defendant has committed defamation per se, it did so by adducing admissible evidence; Sedgwick has shown that it has falsely been accused of a crime, that this accusation has been published and that it has suffered damages as a result of the same. See Mann, 120 Cal.App.4th at 106-107 ("To establish a prima facie case for slander, a plaintiff must demonstrate an oral publication to third persons of specified false matter that has a natural tendency to injure or that causes special damage. Certain statements are deemed to constitute slander per se, including statements (1) charging the commission of crime...")(internal citations omitted).

Finally, this Court must consider the procedural landscape wherein the District Court issued its dismissal. The District Court converted Defendant's motion for summary judgment into a motion to dismiss and for a motion to strike pursuant to the Anti-SLAPP Statute. It did this on its own and without providing Sedgwick an opportunity to put in any evidence responding to what became the Anti-SLAPP motion. As part of this conversion, the burdens associated with the motion changed. By doing this, and applying the standard that it did, the Court impermissibly shifted Defendant's burden on his motion for summary judgment

onto Sedgwick. Essentially, the District Court required Sedgwick to prove its case before it had an opportunity for discovery. This is contrary to the admonition that a motion to strike is not a substitute for summary judgment. It is also grossly inequitable and a denial of Sedgwick's right to due process.

CONCLUSION

For the reasons stated above, Sedgwick requests that this Court overturn the decision of the District Court dismissing Sedgwick's claims.

STATEMENT OF RELATED CASES

Pursuant to Local Rule 28-2.6, Sedgwick states that there are no known related cases pending in this Court.

Dated: December 16, 2009

Respectfully submitted,
HARVEY SISKIND LLP
IAN K. BOYD
SETH I. APPEL

By: s/ Seth I. Appel
Four Embarcadero Center, 39th Floor
San Francisco, CA 94111

LOCKE LORD BISSELL
& LIDDELL, LLP
GREGORY T. CASAMENTO
R. JAMES DeROSE, III
3 World Financial Center
New York, New York 10281

Attorneys for Appellant
SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC.

9th Circuit Case Number(s) 09-16809

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date) Dec 16, 2009 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

s/ Seth I. Appel

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

[Empty box for listing non-CM/ECF participants]

Signature (use "s/" format)

[Empty box for signature]