No.

IN THE
Supreme Court of the United States

WILLIAM ANDREOLI ET AL.,
Petitioners,

v.

YOUNGEVITY INTERNATIONAL CORP., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal courts of appeals lack interlocutory appellate jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine to review the denial of a motion to strike under a state anti-SLAPP statute, as the Second Circuit has held, or whether federal appellate courts have such jurisdiction as the Fifth and Ninth Circuits have held.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners and Appellees below are William Andreoli; Blake Graham; Todd Smith; Total Nutrition Team d/b/a TNT; Andrew Vaughn; Wakaya Perfection, LLC; Dave Pitcock; Patti Gardner; Brytt Cloward.

Respondents and Appellants below are Youngevity International Corp.; Joel D. Wallach; Steve Wallach; Michelle Wallach, and Dave Briskie.

Petitioner Total Nutrition Team; and Wakaya Perfection, LLC; and state that they do not have parent companies, and no publicly held company owns ten percent or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reproduced at Pet. App. 94a–97a. The district court's opinion is reproduced at Pet. App. 55a–90a.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2019. Pet. App. 94a–97a. The court of appeals denied a timely petition for rehearing on April 1, 2019. Pet. App. 98a. The jurisdiction of the court below was premised on 28 U.S.C. § 1332. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of 28 U.S.C. § 1291, is reproduced at Pet. App. 99a. The text of Cal. Civ. Proc. Code § 425.16 is reproduced at Pet. App. 100a–103a.

DIRECTLY RELATED CASES

There are no directly related cases as defined in Rule 14(1)(b)(iii).

STATEMENT

1. The interlocutory appellate jurisdiction of federal courts of appeals is constrained by statute. Under 28 U.S.C. § 1291, courts of appeals have "jurisdiction of appeals from all *final decisions* of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." (emphasis added). This Court has held that a "final decision" is typically one in which "a district court disassociates itself from a case." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995). And this Court has repeatedly and consistently "resisted efforts to stretch § 1291 to permit appeals of right that would erode the finality principle and disserve its objectives." *Microsoft Corp. v. Baker*, 137 S.Ct. 1702, 1712 (2017).

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1948), this Court determined that Section 1291 applied not only to judgments that terminate an action, but also to a small class of collateral rulings that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." This Court later refined the collateral order doctrine in *Coopers & Lybrand v. Livesay*, 437 U. S. 463 (1978) holding that to come within the doctrine's ambit an order must satisfy each of three conditions: it must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." 437 U. S. at 468 (footnote omitted).

While recognizing the availability of interlocutory review under the collateral order doctrine, this Court has also acknowledged that "the collateral-order doctrine may have expanded beyond the limits dictated by its internal logic and the strict application of the criteria set out in *Cohen*." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009). The Court has further repeatedly stressed that it is a "'narrow' exception" that must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). The Court has further stated that the application of the analysis set forth in *Cohen* must be "stringent." *Midland Asphalt Corp. v. United States*, 489 U. S. 794, 799 (1989). This is because piecemeal appellate review in advance of a final judgment "undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). Consequently, the Court has held that "[t]he justification for immediate appeal must . . . be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Id.* In addition, the Court has made clear that it will not evaluate the application of the collateral order doctrine on an individualized basis, but must instead determine whether the doctrine applies to an "*entire category* to which a claim belongs." *Digital Equipment*, 511 U.S. at 868 (emphasis added).

The category of orders at issue in this case—denials of motions to strike under state anti-SLAPP statutes—do not warrant the application of the collateral order

doctrine because, under *Cohen*, they do not finally determine claims of right, are not separable from—or collateral to—rights asserted in the action, and are not effectively unreviewable upon entry of final judgment.

2. Petitioners and Respondents are network-marketers—companies and their affiliates that sell and distribute products through a distribution chain of independent sales agents, generally referred to as distributors. Pet. App. 7a. Under a network-marketing model, each distributor recruits other distributors to join his or her organization, building a network of "down-line" distributors, with each distributor purchasing products supplied by the company and selling those products to customers. *Id.*

It is common for distributors to work for multiple network-marketing companies, and Respondent, Youngevity's Policies and Procedures expressly allowed its distributors to do so. *Id.* at 8a. However, cross-recruiting—recruiting certain members of one's organization into another company—is usually contractually prohibited. *Id.* at 9a. The individual Petitioners were all either distributors or employees of Youngevity for a number of years. *Id.* at 3a. Petitioner, Todd Smith, decided to leave Youngevity and form his own business, Wakaya Perfection. *Id.* A number of the individual Petitioners joined Smith in his new venture, either as distributors or employees. *Id.*

Petitioners alleged that upon learning of the existence of Wakaya, Respondents terminated the distributorships of any Youngevity distributor suspected of being affiliated with Wakaya, even though dual affiliation was permitted under Youngevity's policies. *Id.* at 3a–4a. Petitioners further allege that

Respondents then made a series of false and defamatory statements, including to Youngevity's network of distributors, the larger network-marketing community, and other third parties. *Id.* at 22a–28a; 40a–44a. Respondents publicly accused Petitioners of stealing Youngevity's proprietary information, money, and other property in order to build Wakaya. *Id.* And Respondents also publicly accused Petitioners of engaging in widespread cross-recruiting and raiding of Youngevity's distributor networks. Youngevity then filed a complaint (the "Verified Complaint") in the in the United States District Court for the Southern District of California, alleging, among other things that Petitioners had breached their contracts with Youngevity, breached their fiduciary duty, and violated the Lanham Act.

Petitioners brought counterclaims for defamation, false light, business disparagement, and tortious interference and sought redress for the harms caused by Respondents' defamation of Petitioners. *Id.* at 40a–44a. Petitioners alleged six broad categories of Respondents' speech as defamatory: (1) Youngevity's public dissemination of the Verified Complaint and the defamatory statements therein, together with other filings in the litigation below; (2) Youngevity's press release purporting to summarize the Verified Complaint but separately defaming Petitioners; (3) Respondent Joel Wallach's public statements to Youngevity distributors repeating Respondents' false defamatory statements; (4) Respondent, Michelle Wallach's alleged fabrication of emails suggesting Petitioner, Barb Pitcock was engaged in cross-recruiting; (5) an email from Respondent, Steve Wallach, to Youngevity's entire distributor network; and (6) Respondents' creation of the website that included

defamatory statements. *Id.* Petitioners specifically alleged that Respondents' defamatory statements were intended to protect Youngevity's business interests by hampering the launch of a perceived competitor, Wakaya, and to deter Youngevity distributors from joining Wakaya. *Id.* at 32a.

Respondents sought to strike Petitioners' defamation counterclaims on the basis that their public statements were privileged under California's litigation and fair-report privileges. *Id.* at 50a–54a. The District Court denied Respondents' anti-SLAPP motion based on the District Court's examination of the record and the court's determination that the alleged defamatory statements constituted commercial speech—and were therefore exempt from the anti-SLAPP statute—and that the remaining statements were either not privileged or that the evaluation of these statements required further factual development.

On July 16, 2018, the District Court entered a partial stay, halting the adjudication of Petitioners' counterclaims one through four, six, seven, and nine through twelve. *Id.* at 93a. The District Court denied all pending motions for summary judgment as to these claims as premature and granted leave to the parties to resubmit once Respondents' interlocutory appeal had been resolved. *Id.* The adjudication of these counterclaims before the District Court remains stayed.

In the opinion below, the Ninth Circuit panel acknowledged that, as a general matter, the court has jurisdiction to review denials of an anti-SLAPP motion's under Ninth Circuit precedent. *Id.* at 95a (citing *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003)). On this basis the court reviewed and partially reversed

the District Court's denial of the anti-SLAPP motion, including portions of Petitioner's counterclaim based on the republication of the Verified Complaint and a press release extensively summarizing the complaint. *Id.* at 96a. In reaching this conclusion, the court was required to analyze the merits of Respondent's claim that the California litigation privilege applies to the alleged defamatory statements in the Verified Complaint and press release, and was required to determine that the people to whom the press release was directed were those with "a substantial interest in the outcome of the pending litigation" and not merely "the general public." *Id.* at 96a–97a. In short, the court below was forced to squarely address the merits of the case—in contravention of this Court's holding in *Cohen* and the narrow collateral order doctrine it created.

The Ninth Circuit panel's holding below deepens the already existing split between the Ninth and Fifth Circuits on the one hand and the Second Circuit on the other. It serves to compound the uneven application of federal law. As in this case, the continued interlocutory review of denials of anti-SLAPP motions serves as nothing more than a costly detour for the litigants and runs counter to the "narrow and selective" application of the collateral order doctrine contemplated by this Court's precedents. *See Will v. Hallock*, 546 U.S. 345, 350 (2006).

REASONS FOR GRANTING THE PETITION

Congress enacted Section 1291 in order to limit the appellate jurisdiction of federal courts of appeals to the final decisions of lower courts. While this Court has recognized a narrow exception to Section 1291 to allow interlocutory appellate review of certain collateral orders, the Court has explicitly stated that the category

of cases that come within the ambit of the collateral order doctrine must be "small" and that the application of the collateral order doctrine must be "stringent." Federal courts are sharply divided on the question of whether a denial of a motion to strike under a state anti-SLAPP statute may properly fall within the scope of the collateral order doctrine. The Second Circuit has made clear that such orders do not meet the stringent requirements of *Cohen* and its progeny, while the Fifth and Ninth Circuit maintain that interlocutory review of such orders is appropriate. This is an important question with serious consequences for litigants as demonstrated in the present case where the piecemeal adjudication and interlocutory appeal of the denial of an anti-SLAPP motion has led to a significant delay in the proceedings below. The Court should therefore grant the petition, reverse the Ninth Circuit's judgment, and restore the collateral order doctrine to the narrow exception to Section 1291 that is was originally intended to be.

I. THERE IS A DIRECT AND ACKNOWLEDGED SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS

There is no dispute that a split of authority exists among the Circuit Courts of Appeals with respect to the interlocutory reviewability of the denial of anti-SLAPP motions under 28 U. S. C. §1291 and the proper application of the collateral order doctrine to these motions. The Second Circuit recently held that the court "lack[s] appellate jurisdiction to consider [a] district court's order passing on the merits of the defendants' anti-SLAPP motions to strike." *Ernst v. Carrigan*, 814 F.3d 116, 119 (2d Cir. 2016). By contrast, the Fifth and Ninth Circuit Courts of Appeals have both recently made clear that, in their view, federal appellate courts

have jurisdiction to review the denial of an anti-SLAPP motion on an interlocutory basis under the collateral order doctrine. *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 174-75 (5th Cir. 2009). This split of authority leads not only to a lack of uniformity in the application of Section 1291 in federal courts; it also forces parties like Petitioners to halt their litigation in order for an appellate court to review the merits of claims on a piecemeal basis before the proceedings in the case below have reached a final judgment. This is a direct contravention of the requirement for final judgment under 28 U. S. C. §1291 and the purposefully narrow scope of the collateral order doctrine.

In *Ernst v. Carrigan*, 814 F.3d 116 (2d Cir. 2016), the Second Circuit evaluated the denial of an anti-SLAPP motion premised on Vermont's anti-SLAPP statute—which is based on the California statute at issue in the opinion below. *Id.* at 119. In *Ernst*, the plaintiffs alleged that the defendants had circulated a letter to defendants' neighbors stating that the defendants had falsified information, engaged in harassment, lied, and abused the legal process for the extortive purposes. *Id.* at 118. The district court denied in part the anti-SLAPP and declined to certify the opinion for interlocutory appeal. *Id.*

On appeal, the Second Circuit held that "[a]n appeal from an order passing on the merits of a special motion to strike filed under Vermont's anti-SLAPP statute does not fulfill the second requirement for an appealable collateral order: that it 'resolve an important issue completely separate from the merits of

the action.'" *Id.* at 119 (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)). The court reasoned that an issue is completely separate from the merits only if it is "'significantly different' and 'conceptually distinct' from the 'fact-related legal issues that likely underlie the plaintiff's claim on the merits.'" *Id.* (quoting *Johnson v. Jones*, 515 U.S. 304, 314 (1995)). The Second Circuit further noted that, despite claims to the contrary, courts "necessarily evaluate in detail the merits of a plaintiff's claim when considering a defendant's special motion to strike." *Id.* at 119-20. Quoting language from the Vermont anti-SLAPP statute that is similar to that of the California anti-SLAPP statute at issue below, the Second Circuit observed that the "anti-SLAPP statute instructs the court to consider the 'pleadings and supporting and opposing affidavits' when weighing whether the plaintiff has shown that the defendant's conduct or statement was 'devoid of any reasonable factual support' or 'any arguable basis in law' and 'caused actual injury to the plaintiff.'" *Id.* at 120 (quoting 12 V.S.A. § 1041(e)).[1] This sort of analysis, the court reasoned, cannot be reasonably characterized as "completely separate from the merits" of an action. *Id.* (quoting *Will*, 546 U.S. at 349).

The Second Circuit acknowledged that "[o]ther courts to consider the question have concluded otherwise." *Id.* at 120 (citing, among others, *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) and *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 175, 177 (5th

[1] *Compare* Cal. Civ. Proc. Code § 425.16(b)(1)-(3) (requiring courts to evaluate whether "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim" by considering "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based").

Cir. 2009)). However, the court concluded that "[w]e prefer to follow the Supreme Court's holding in *Johnson* that 'completely separate from the merits' means what it says, that is, 'conceptually distinct' and 'significantly different.'" *Id.* at 121 (citing *Johnson*, 515 U.S. at 314).

In stark contrast to the Second Circuit's rejection of interlocutory appellate jurisdiction of anti-SLAPP motion denials, both the Fifth Circuit and the Ninth Circuit have held that such jurisdiction exists under the collateral order doctrine. In *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168 (5th Cir. 2009), the Fifth Circuit evaluated an anti-SLAPP motion filed by a defendant, American Press, seeking to dismiss a defamation claim by a defense contractor who was reported by American Press to have lost a defense contract allegedly selling contractually noncompliant fuel. The district court denied American Press' anti-SLAPP motion and American Press appealed. *Id.* The Fifth Circuit evaluated the appeal under each of the factors identified in *Cohen*—conclusiveness, separateness, and unreviewability—and concluded that "a district court's denial of a motion brought under an anti-SLAPP statute . . . is an immediately-appealable collateral order." *Id.* at 181.

The Ninth Circuit has reached a similar conclusion. As recently as 2018, the Ninth Circuit reaffirmed the court's position that the interlocutory review of denials of motions to strike pursuant to state anti-SLAPP provisions is not barred by the 28 U. S. C. §1291 and the collateral order doctrine. In *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018), the Ninth Circuit reviewed and affirmed a district court's denial of an anti-

SLAPP motion. In that case, Planned Parenthood sued the Center for Medical Progress ("CMP") alleging that CMP "used fraudulent means to enter their conferences and gain meetings with their staff for the purpose of creating false and misleading videos that were disseminated on the internet." *Id.* at 831. CMP moved to dismiss under California's anti-SLAPP statute and the district court denied the motion. *Id.* In reviewing the district court's decision the Ninth Circuit stated emphatically: "We have jurisdiction to review the denial of an anti-SLAPP motion under the collateral order doctrine." *Id.* at 832.

This conclusion was challenged in a concurring opinion by Judge Ronald Gould, who stated that "[a]lthough the procedure followed in this case to allow an interlocutory appeal of a denial of an anti-SLAPP motion is clearly permitted by our past precedent," the interlocutory review of anti-SLAPP motions is nevertheless "incorrect," because it "potentially conflicts with federal procedural rules, and burdens the federal courts with unneeded interlocutory appeals." *Id.* at 836 (Gould, J., concurring). Judge Gould further observed that permitting interlocutory review of anti-SLAPP denials "leads to an absurd result" in which the Ninth Circuit "review[s] *denials* of anti-SLAPP motions but not *grants* of anti-SLAPP motions, although the grant of an anti-SLAPP motion is arguably a more final decision by a district court because it rids the case of the stricken claims." *Id.* (citing *Hyan v. Hummer*, 825 F.3d 1043, 1047 (9th Cir. 2016) (emphasis added)). Judge Gould further observed that the "[d]enial of an anti-SLAPP motion does not meet the normal collateral order standard," which is targeted toward a "'small class' of rulings that do not conclude litigation," because such denials do not "resolve claims separable

from the action." *Id.* at 836. Rather, the denial of an anti-SLAPP motion "in fact requires the court to directly assess the merits of Plaintiffs' complaint." *Id.* at 836. Indeed, California procedure requires courts to determine not only whether a claim is plausible, but whether there is a likelihood of success based on the evidence presented. *Id.* "That question is inextricably intertwined with the merits of the litigation." *Id.*

In spite of this reasoning, the Ninth Circuit has repeatedly held that the court has jurisdiction to review interlocutory appeals of anti-SLAPP denials. *See Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1180-91 (9th Cir. 2016) ("Notwithstanding that the denial of the anti-SLAPP motion did not give rise to what traditionally would be deemed a final judgment (one resolving all claims in a suit), our precedents establish our jurisdiction to consider this appeal.")[2]; *Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003) ("A district court's denial of a claim of immunity, to the extent that it turns on an issue of law, is an appealable final

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[2] *But see, Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1180-91 (9th Cir. 2016) (Kozinski, C.J., concurring):

> "Anti-SLAPP motions have the merits painted all over them. . . . Our experience with these cases has shown us that they require an exhaustive analysis of the merits. An exhaustive (and exhausting) detour is exactly what the final judgment rule is designed to avoid. Interlocutory appeals make it hard for a district court to supervise a trial. They undermine the efficient administration of justice when, as here, a meritless appeal stalls a case for years. And they ask our court to dive headlong into the merits of a case only to swim back, years later, when it's finally appealed from final judgment." (internal citations and quotation marks omitted).

decision within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment. We therefore have jurisdiction to review the district court's denial of [defendants'] anti-SLAPP motion.") (citations omitted); *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015-16 (9th Cir. 2013) (affirming the appealability of the denial of an anti-SLAPP motion is "notwithstanding the absence of a final judgment").

The Ninth Circuit has recognized a narrow exception to its interlocutory jurisdiction over denials of anti-SLAPP motions. This exception came about when the California legislature amended its anti-SLAPP statute, adding a public-interest exception to the right of immediate appeal of orders denying Anti-SLAPP motions. *Breazeale v. Victim Services, Inc.*, 878 F.3 758 (9th Cir. 2017) (citing Cal. Civ. Proc. Code § 425.17(e)). This narrow exception has no bearing on this case because the dispute below was not "brought solely in the public interest or on behalf of the general public." Cal. Civ. Proc. Code § 425.17(e). The existence of this narrow exemption has not prevented the Ninth Circuit from reaffirming its jurisdiction to review interlocutory appeals of anti-SLAPP motions. *Planned Parenthood*, 890 F.3d at 832.

In the opinion below, the Ninth Circuit panel acknowledged that, as a general matter, the court has jurisdiction to review denials of an anti-SLAPP motion under Ninth Circuit precedent. Pet. App. 95a (citing *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003)). On this basis the court reversed the district court's decision not to strike portions of Petitioner's counterclaim based on the republication of the Verified Complaint and a press release summarizing the complaint. *Id.* at 96a. The District Court was required to

analyze the merits of Respondent's claim that the California litigation privilege applies to the alleged defamatory statements in the Verified Complaint and press release, and to determine that the people to whom the press release was directed were all people with "a substantial interest in the outcome of the pending litigation" and not merely "the general public." *Id.* at 96a–97a. Such issues are inextricably linked with the merits of the case and the consideration of these issues through an interlocutory appeal directly contravenes this Court's holding in *Cohen* and the narrow collateral order doctrine it created.

As noted above, the Ninth Circuit panel's holding in this case deepens the already existing split between the Ninth and Fifth Circuit on the one hand and the Second Circuit on the other. Petitioners have already been subjected to a costly detour in the adjudication of their dispute—a detour that is not in keeping with the narrow and selective application of the collateral order doctrine contemplated by this Court.

II. THIS CASE RAISES AN IMPORTANT QUESTION CONCERNING THE SCOPE OF THE COLLATERAL ORDER DOCTRINE AND THE FINAL JUDGMENT RULE

This case raises an important question about the jurisdiction of federal courts of appeals over the interlocutory review of orders denying motions to strike pursuant to state anti-SLAPP statutes. In the absence of a clear rule barring the interlocutory review of such orders, litigants will continue to be compelled to litigate and appeal such orders in a piecemeal fashion and expend extraordinary resources on costly detours from the orderly adjudication of their claims.

Mindful of these and similar concerns, this Court has repeatedly and consistently granted petitions for writ of certiorari in cases reviewing the scope and application of the collateral order doctrine—further narrowing the class of cases to which the doctrine is applicable. *See, e.g., Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 105, n. 1 (2009) (holding that decisions regarding the availability of attorney-client privilege rulings do not fall within the collateral order doctrine because "postjudgment appeals generally suffice to protect the rights of litigants"); *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (holding that interlocutory review under the collateral order doctrine was not available for certain orders denying motions for summary judgment); *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 865 (1994) (holding that "an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders"); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (recognizing that "an order denying class certification is subject to effective review after final judgment," and thus "the collateral-order doctrine is not applicable"). This Court has even asked the parties to address the collateral order doctrine *sua sponte*. *See Will v. Hallock*, 545 U.S. 1103 (2005) (granting certiorari; "[i]n addition to the Question presented by the petition, the parties are directed to brief and argue the following Question: 'Did the Court of Appeals have jurisdiction over the interlocutory appeal of the District Courts' order. . . .") *vacated by* 546 U.S. 345 (2006).

These grants of certiorari illustrate this Court's concern with the expansion of the collateral order doctrine beyond the narrow, stringent requirements set forth in *Cohen* and the appropriateness of a grant of certiorari in this case.

III. THE NINTH CIRCUIT'S DECISION BELOW IS IN CONFLICT WITH THIS COURT'S PRECEDENTS AND IS INCORRECT

The Ninth Circuit's purported exercise of jurisdiction over Respondents' appeal of the denial of their anti-SLAPP motion was incorrect and in conflict with the precedents of this Court. This Court has made clear that interlocutory review under the collateral order doctrine is only available for a small class of collateral rulings that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1948). And this Court has previously insisted that the application of these factors must be stringent. Orders denying motions to strike pursuant to state anti-SLAPP statutes to not satisfy any of these criteria.

A. Orders Denying a Motion to Strike under an Anti-SLAPP Statute Are Not Final Decisions

This Court's decision in *Cohen* states that interlocutory review under the collateral order doctrine is only available for final orders—orders that "conclusively determine the disputed question," *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)), and orders that constitute a "fully consummated decision." *Cohen*, 337 U.S. at 546. A class of orders may fall under this category if it constitutes "a complete, formal and, in the trial court, a

final rejection" of the claim. *United States v. MacDonald*, 435 U.S. 850, 858 (1978) (quoting *Abney v. United States*, 431 U.S. 651, 659 (1977)). Orders are final if there are "simply no further steps that can be taken in the District Court." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (quoting *Abney*, 431 U.S. at 659). Orders are also conclusive if "nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion." *Mitchell*, 472 U.S. at 527; 15A Wright & Miller, Federal Practice & Procedure § 3911.1, at 372 (2d ed.) (there is "little justification for immediate appellate intrusion so long as there is a plain prospect that the trial court itself may alter the challenged ruling").

The denial of a motion to strike an anti-SLAPP does not conclusively resolve anything. Such a denial merely leaves to the district court the resolution of the merits of the plaintiff's defamation claims. The court may reconsider the denial of the motion at any point in the proceeding and the court may dispose of the defamation claims at issue through subsequent dispositive motion practice. Because there are numerous further steps a court may take that would alter the challenged ruling, the denial of a motion to strike pursuant to an anti-SLAPP provision does not conclusively determine the disputed question and therefore falls outside of the scope of *Cohen*.

B. Orders Denying Anti-SLAPP Motions Are Intertwined with, and Not Separate from, the Merits of the Underlying Case

Interlocutory appeals under the collateral order doctrine are only appropriate where the order in question is "completely separate from the merits of the action." *Coopers*, 437 U.S. at 468. That requirement

cannot be met where the order is "entangled in the merits of the underlying dispute," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988), or where the adjudication of a given motion "involve[s] an assessment of the likely course of the trial," *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985).

This Court has made clear that even if some cases within the category of cases under review can be reasonably characterized as separate from the merits, and even where an "appeal might result in substantial savings of time and expense," this Court "look[s] to *categories of cases*, not to particular injustices." *Van Cauwenberghe*, 486 U.S. at 529 (emphasis added). As a category, district court orders denying motions to strike pursuant to state anti-SLAPP statutes are necessarily enmeshed the merits of the case.

As noted by the dissenting judge in the Ninth Circuit's *Travelers* case, "[a]nti-SLAPP motions have the merits painted all over them. . . . [And o]ur experience with these cases has shown us that they require an 'exhaustive analysis of the merits.'" *Travelers*, 831 F.3d at 1185 (Kozinski, J., concurring). Indeed, "[t]he denial of an anti-SLAPP motion does not resolve important questions completely separate from the merits, it in fact requires the court to directly assess the merits of Plaintiffs' complaint." *Planned Parenthood*, 890 F.3d at 836 (Gould, J., concurring). This is because, among other things, the procedures required by state anti-SLAPP statutes, like the California statute addressed below, require courts "not only whether the facts alleged articulate a plausible claim, but also whether there is probability of success based on plaintiffs' evidence. That question is inextricably intertwined with the merits of the litigation." *Id.* Because the review of

a denial of an anti-SLAPP necessarily involves an evaluation of the merits of the case, such a review cannot satisfy the requirements of *Cohen*.

C. Orders Denying Anti-SLAPP Motions Are Not Effectively Unreviewable After Final Judgment

A third requirement for the application of the collateral order doctrine to a denial an anti-SLAPP is that the issue must be "effectively unreviewable on appeal from final judgment in the underlying action" and that the rights associated with such orders "would be irretrievably lost." *Digital Equipment*, 511 U.S. at 867, 869. Under the proper application of the collateral order doctrine, failure to grant interlocutory review must "render impossible any review whatsoever," *United States v. Ryan*, 402 U.S. 530, 533 (1971), and "practically defeat the right to any review at all." *Flanagan v. United States*, 465 U.S. 259, 265 (1984).

It is not sufficient that a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment." *Digital Equipment*, 511 U.S. at 872. Instead, the appealing party must show that final judgment "would imperil a substantial public interest" or "some particular value of a high order." *Will*, 546 U.S., at 352-353.

While anti-SLAPP provisions serve an important purpose, the denial of a motion to strike pursuant to an anti-SLAPP statute is not effectively unreviewable and the rights the motion seeks to protect are not irretrievably lost if the motion is denied. Indeed, a reviewing court may be called upon to evaluate the merits of the same defamation claims adjudicated in

the anti-SLAPP motion after final judgment is entered. In this respect, a denial of an anti-SLAPP motion is no less subject to review than a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. "[T]he denial of a 12(b)(6) motion isn't immediately appealable, and Rule 12 and California's anti-SLAPP statute serve a common purpose: eliminating frivolous or bullying claims before the parties pay through the nose in discovery and suffer the other indignities of a trial." *Travelers*, 831 F.3d at 1185 (Kozinski, J., concurring). However, "[n]obody suggests that the district court's decision denying a 12(b)(6) motion is 'effectively unreviewable' at the end of the case because the defendant has to incur an extra cost to get there." *Id.* Because the denial of an anti-SLAPP motion is not unreviewable, such a denial does not fall under the requirements of the collateral order doctrine set forth in *Cohen*.

IV. THIS CASE IS AN IDEAL VEHICLE FOR REVIEW OF THE APPLICATION OF THE COLLATERAL ORDER DOCTRINE TO ANTI-SLAPP MOTIONS

This case is an ideal vehicle for reviewing the question of whether 28 U.S.C. § 1291 and the collateral order doctrine when properly applied allow for the interlocutory review of denials of anti-SLAPP motions. The Petitioners here have suffered precisely the consequences that the final judgment rule and the narrow, stringent application of the collateral order doctrine are intended to prevent—a substantial, costly delay in the adjudication of their rights and obligations before the District Court and the piecemeal adjudication and appeal of their claims. A reversal of the Ninth Circuit's decision in this case would create uniformity in the application of federal law to this question and would

prevent future litigants from facing the delays, costs, and the same piecemeal adjudication and appeal of their claims that Petitioners have been forced to endure

CONCLUSION

For these reasons, the Court should grant the petition.

Respectfully submitted,

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July 1, 2019

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Filed 02/23/17]

Case No. 3:16-CV-00704-L-JLB

YOUNGEVITY INTERNATIONAL CORP. and
JOEL D. WALLACH, DVM, ND,

Plaintiff,

v.

TODD SMITH; WAKAYA PERFECTION;
TOTAL NUTRITION TEAM dba TNT; BLAKE GRAHAM;
WILLIAM ANDREOLI; ANDRE VAUGHN; DAVE PITCOCK;
PATTI GARDNER; and BRYTT CLOWARD,

Defendants.

WAKAYA PERFECTION, LLC; TODD SMITH;
BLAKE GRAHAM; DAVE PITCOCK; BARB PITCOCK;
ANDRE VAUGHN; TOTAL NUTRITION, INC. dba TNT,

Counterclaim Plaintiffs,

v.

YOUNGEVITY INTERNATIONAL, INC.;
DR. JOEL WALLACH; STEVE WALLACH;
MICHELLE WALLACH; DAVE BRISKIE; DOES 1-10,

Counterclaim Defendants.

Judge M. James Lorenz

Magistrate Judge Jill L. Burkhardt

JURY TRIAL REQUESTED

FIRST AMENDED ANSWER
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* * *

COUNTERCLAIM

Plaintiffs Wakaya Perfection, LLC ("Wakaya"), Todd Smith ("Smith"), Blake Graham ("Graham"), Andre Vaughn ("Vaughn"), Dave Pitcock, Barb Pitcock, and Total Nutrition, Inc. ("TNT" or, collectively with Wakaya, Smith, Graham, Vaughn, Dave Pitcock, and Barb Pitcock, "Counterclaim Plaintiffs") hereby allege, aver, and complain of Defendants Youngevity International, Inc. ("Youngevity"), Dr. Joel Wallach, Michelle Wallach, Steve Wallach, and Dave Briskie (collectively, "Counterclaim Defendants") as follows:

INTRODUCTION

1. Counterclaim Plaintiffs assert the claims herein to address Youngevity's breaches of contract, as well as the individual Counterclaim Defendants' independently tortious behavior. Several Counterclaim Plaintiffs are former Youngevity distributors who have dedicated years, even decades, to building successful businesses selling Youngevity products.

2. In response to several instances of serious misconduct by the individual Counterclaim Defendants, Smith left Youngevity, where he had worked to build successful Youngevity distributorships for nearly two decades, to pursue other opportunities. He founded Wakaya in late 2015.

3. Rather than accepting responsibility for their own misdeeds, the individual Counterclaim Defendants—who are all either officers and board members at Youngevity or the founder of the company—through Youngevity, engaged in a concerted campaign to destroy Wakaya in its infancy.

4. Acting out of personal spite and without any legal justification, the individual Counterclaim De-

fendants threatened any Youngevity distributor who expressed an interest in working with Wakaya, either in addition to or instead of working for Youngevity.

5. On information and belief, the individual Counterclaim Defendants' goal was to prevent Smith from successfully launching Wakaya and to punish Smith for his perceived disloyalty to Youngevity—a disloyalty that existed solely in the minds of the individual Counterclaim Defendants.

6. At the same time, the individual Counterclaim Defendants continued to engage in counterproductive and damaging ways, driving away high-ranking Youngevity distributors, as well as members of Youngevity's corporate staff.

7. Not content to allow these distributors to associate with Wakaya—as was their legal right—the individual Counterclaim Defendants, acting through Youngevity and without legal justification, summarily terminated the distributorships of any distributor they believed was associating with Smith or Wakaya, including the distributorships of Vaughn, Dave and Barb Pitcock (the "Pitcocks"), and TNT, which is owned and operated by Graham (collectively, the "Distributor Counterclaim Plaintiffs").

8. The Distributor Counterclaim Plaintiffs, despite dedicating years, even decades, to building successful businesses selling Youngevity Products, found themselves caught up in the individual Counterclaim Defendants' vendetta against Smith and Wakaya. The individual Counterclaim Defendants, acting through Youngevity and without legal justification, arbitrarily and vindictively destroyed the Distributor Counterclaim Plaintiffs' Youngevity businesses and threatened their livelihoods.

9. On information and belief, the individual Counterclaim Defendants have threatened to do the same to any Youngevity distributor they perceive as "disloyal."

10. Thus, this case is about a small group of individuals using their positions within Youngevity to carry out personal vendettas against anyone they perceive as disloyal, even if that perception is totally unfounded.

PARTIES, JURISDICTION, AND VENUE

11. Wakaya was at all relevant times herein a limited liability company duly formed under the laws of the State of Utah. Wakaya was formed by Smith and has its headquarters in Lindon, Utah. It focuses on marketing, among other products, 100% organic and kosher healing products grown and cultivated on a unique 2,200-acre island in the Fiji archipelago called the Wakaya Island ("Wakaya Products").

12. TNT is a corporation incorporated in the State of Utah and a former distributor for Youngevity.

13. Smith is a resident of Utah and the founder of Wakaya.

14. Graham is a resident of Utah and owner of TNT, through which he managed Youngevity distributorships.

15. Vaughn is a resident of Maryland and a former distributor for Youngevity.

16. Dave Pitcock ("Dave") is a resident of Kansas and a former distributor for Youngevity.

17. Barb Pitcock ("Barb") is a resident of Kansas and a former distributor for Youngevity.

18. Counterclaim Plaintiffs are informed, believe, and thereon allege that Youngevity was at all relevant times herein, and still is, a Delaware corporation with its headquarters in Chula Vista, California, that is and has been registered to do business and doing business in the State of Utah during all relevant times hereto. Youngevity touts itself as a nutritional and coffee company offering more than 1,000 products, including nutritional supplements, sports and energy drinks, health and wellness products (e.g., spa, bath, garden, and pet-related products), digital products (including scrapbooks), gourmet coffee, skincare and cosmetics, weight management products, packaged foods, pharmacy discount cards, and apparel/ accessories ("Youngevity Products").

19. Counterclaim Plaintiffs are informed, believe, and thereon allege that Dr. Joel Wallach is a resident of California. Dr. Wallach is founder of Youngevity and remains the driving force behind the company's philosophy. Dr. Wallach frequently visits Utah for business-related activities.

20. Counterclaim Plaintiffs are informed, believe, and thereon allege that Michelle Wallach is a resident of California. Michelle Wallach is married to Steve Wallach and is currently Chief Operating Officer of Youngevity, as well as a member of its board of directors. Michelle Wallach frequently visits Utah for business-related activities.

21. Counterclaim Plaintiffs are informed, believe, and thereon allege that Steve Wallach is a resident of California. Steve Wallach is Dr. Wallach's son and Chief Executive Officer of Youngevity, as well as a member of its board of directors. Steve Wallach frequently visits Utah for business-related activities.

22. Counterclaim Plaintiffs are informed, believe, and thereon allege that Dave Briskie is a resident of California. Briskie is currently President of Youngevity, as well as a member of its board of directors. Briskie frequently visits Utah for business-related activities.

23. Does 1-10 are the owners and/or operators of the website wakayaperfectiontellall.com, which is currently registered through the proxy service Domains by Proxy. Counterclaim Plaintiffs will amend this Counterclaim to name Does specifically and individually upon learning their respective identities.

24. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1332.

25. Counterclaim Defendants have sufficient minimum contacts with the State of California in conducting their business operations with the Counterclaim Plaintiffs herein so as to make the exercise of jurisdiction over Counterclaim Defendants in this state foreseeable and reasonable under the facts and circumstances alleged herein.

GENERAL ALLEGATIONS

Youngevitv Distributor Agreements

26. Youngevity and Wakaya are both multilevel marketing companies. Under this model, products are sold through a distribution chain of independent distributors. Each distributor recruits other distributors to join his or her organization, building their own dedicated network of down-line distributors, with each distributor purchasing products supplied by the company with which they are affiliated and selling those products to others.

27. It is a common practice within the multilevel marketing industry for distributors to have multiple distributorships within different companies.

28. Counterclaim Plaintiffs challenge the interpretation and enforceability of certain purported restrictive covenants entered into between Youngevity and its distributors that the individual Counterclaim Defendants, through Youngevity, are attempting to use as a tool to prevent current Youngevity distributors from becoming Wakaya distributors. Youngevity is attempting to enforce the policies and procedures manual for Youngevity, purported to be the source of such restrictions ("Policies and Procedures"). A copy of the Policies and Procedures is attached as Exhibit A hereto.

29. The standard distributor agreement used by Youngevity is a one-page document combined with an application document. A copy of what is believed to be the distributor agreement used by Youngevity with all of its distributors is attached as Exhibit B hereto ("Distributor Agreement"). As potentially relevant to this lawsuit, the Policies and Procedures contain the following clause relating to the Youngevity distributors' right and ability to associate with another direct sales company:

> All Distributors are Independent Contractors; the Company [Youngevity] imposes no restrictions on any Distributor's participation or sales activities in other businesses or programs other than Youngevity except as said activities or programs would cause or create a violation of Distributor's agreement with Company or any of these policies and procedures.

[Policies and Procedures at 9, ¶ E6 ("Non-Compete Provision").]

30. The Non-Compete Provision on its face expressly allows Youngevity distributors to affiliate with other companies and other sales programs. Further, nothing in the Distributor Agreement precludes Youngevity distributors from choosing to become Wakaya distributors.

31. As potentially relevant to this lawsuit, the Policies and Procedures contains the following clause relating to the Youngevity distributors' right and ability to recruit other Youngevity distributors to work for another direct sales company:

> Distributors are strictly forbidden from Cross-Recruiting, and shall not sell, recruit, propose, or in any way induce or attempt to induce any other Distributor to purchase any product or service, or to participate in any other income opportunity, investment, venture, or commit any other activity deemed, at the full discretion of [Youngevity], as cross-recruiting. This includes any such activities across any divisions of [Youngevity], should any separate divisions with different compensation plans and or hierarchy exist, unless, and as specifically stated otherwise. The integrity of the hierarchy and the relationships therein is of paramount importance to every Distributor as well as to [Youngevity]. Any Distributor violating this provision may be subject to immediate termination for cause, forfeiting any and all commission due him or her.

[Policies and Procedures at 10-11, ¶ E12 ("Non-Solicitation Provision").]

32. As potentially relevant to this lawsuit, the Policies and Procedures contains the following clause relating to the confidentiality of Youngevity's distributor lists:

> Distributor lists, including downline sales organization information, is proprietary and confidential to [Youngevity], with the exception of first level, personally enrolled Distributors. [Youngevity] may forward genealogical information at a nominal cost to Distributors, in strict and complete confidence, to help them manage their downline sales organization and for no other purpose.
>
> Every Distributor who is provided with such information shall treat it as confidential and take care to maintain its secrecy as well as refrain from making any use thereof for any purpose other than the management of his/her downline sales organization. Without limiting the generality of the foregoing, no such information may be used in cross-recruiting or with the intent to entice Company Distributors into other network marketing organizations.
>
> Any violation of this policy by a Distributor will result in the immediate suspension and/or termination of the offending Distributor. Furthermore, the offending Distributor could be subject to legal action for injunctive relief and/or damages.

[Policies and Procedures at 9-10, ¶ E7 ("Confidential Information Provision").]

33. Youngevity asserts the Non-Solicitation and Confidential Information Provisions as its basis for terminating the Distributor Counterclaim Plaintiffs' distributorships.

34. To the extent that the Non-Compete, Non-Solicitation, and Confidential Information Provisions restrict Counterclaim Plaintiffs' ability to engage in any lawful business, they are void under California law.

35. Youngevity's attempt to enforce invalid contractual provisions is a violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.

The Distributor Counterclaim Plaintiffs

36. Not long after Youngevity was founded, Smith and Graham began working as independent distributors for Youngevity in 1997, building their distributorship downline and contributing to the company.

37. Smith and Graham formed TNT in 1997, through which they operated Youngevity distributorships.

38. Over the years, Smith and Graham, through TNT, became some of Youngevity's most successful distributors, achieving the highest levels and awards offered by Youngevity.

39. Through TNT, Graham created a variety of tools that were both used within TNT's distributorships and sold to other Youngevity distributors. These tools include CDs, DVDs, and literature promoting Youngevity and Dr. Wallach's message, which were marketed through TNT's registered website domains, wallachonline.com and yteamtools.com, and 1-800-WALLACH. All of these tools and avenues were used

with Youngevity's and Dr. Wallach's knowledge, and without objection, for the entirety of TNT's relationship with Youngevity, which has spanned nearly two decades.

40. Vaughn began his relationship with Youngevity when the multilevel marketing company he was working for, FDI, was acquired by Youngevity in 2011.

41. Vaughn spent tremendous efforts working to develop his Youngevity downline distributorships, promoting Youngevity's products and message, becoming one of Youngevity's most successful distributors, and achieving the highest levels and awards offered by Youngevity.

42. In July 2012, Youngevity acquired Livinity Inc., a nutritional and essential oils multilevel marketing company, which was owned and operated by the Pitcocks. As a result of the acquisition, the Pitcocks and most of Livinity's distributors became Youngevity distributors.

43. The Pitcocks spent tremendous efforts working to develop their Youngevity downline distributorships, promoting Youngevity's products and message, becoming some of Youngevity's most successful distributors, and achieving the highest levels and awards offered by Youngevity.

44. Smith, Graham, and Distributor Counterclaim Plaintiffs worked closely together at Youngevity and, over the years, became personal friends.

Youngevitv Misconduct and Its Effect

45. Youngevity is controlled by Steve Wallach, CEO; Michelle Wallach, COO; and Dave Briskie, President, (collectively, "Wallach Group"). Each member of the Wallach Group is on Youngevity's Board

of Directors, and on information and belief they collectively own a controlling majority of Youngevity's publicly traded stock.

46. Together with Youngevity's founder, Dr. Wallach, the Wallach Group engaged in counterproductive behavior, including undermining promising acquisitions, promoting ill-conceived and unprofitable business decisions, concealing certain acts from management, and engaging in inappropriate and dishonest behavior. The following examples, as set forth in Paragraphs 46-58, are illustrative of such behavior:

47. On information and belief, Youngevity's Founder, Dr. Wallach, frequently engaged in a pattern of traveling with and sharing hotel rooms at Youngevity events with a variety of female companions other than his wife, some of whom are Youngevity distributors. This behavior was widely known within the Youngevity community.

48. Taking advantage of the influence he held as founder of Youngevity, Dr. Wallach routinely attempted to coerce distributors, including Vaughn and the Pitcocks, into inserting Dr. Wallach's female companions into favored positions in their distributors' organization. The Wallach Group tolerated, and thereby condoned, this behavior, despite its highly inappropriate nature.

49. When the Distributor Counterclaim Plaintiffs protested about Dr. Wallach's manipulation of their organizational structures, the Wallach Group reacted in vindictive and defensive ways. For example, when any distributor refused to insert Dr. Wallach's companions into his or her organization, Dr. Wallach threatened to never participate in events or otherwise help them promote their business. Often this threat

from the founder of the company was enough to compel compliance.

50. When the Pitcocks objected to Dr. Wallach's attempts to force distributors to insert his companions into their organizations—which the Pitcocks viewed as an abuse of power and highly damaging to the morale of Youngevity's distributors—consistent with their usual practice, the Wallach Group reacted defensively and vindictively.

51. For example, on information and belief, Michelle Wallach fabricated emails accusing Barb of cross-recruiting, which emails were intended to discredit Barb and damage her reputation both within Youngevity and in the larger direct marketing community.

52. Finally losing patience with Youngevity management's unproductive behavior, Dave left Youngevity in the fall of 2014, citing the fabricated emails and Dr. Wallach's practice of coercing distributors to include his female companions into their organizations as his reasons for leaving. Barb remained with Youngevity and managed her distributorships until Youngevity summarily terminated them in March of 2016.

53. Vaughn observed Dr. Wallach and Michelle Wallach yelling at company employees in public, intimidating and bullying distributors, and generally undermining morale. More damning, the Wallach Group engaged in and tolerated cross-line recruiting within Youngevity. Cross-line recruiting involves one party recruiting members of another party's downline, and is prohibited by the Policies and Procedures. The Wallach Group used their personal standing within the company to engage in this prohibited practice to

the benefit of themselves and their favored distributors.

54. Although Vaughn was initially content to work for Youngevity, he became increasingly disillusioned with the company because of inappropriate and unprofessional behavior on the part of senior management, including Dr. Wallach, Michelle Wallach, and Briskie. Fed up with the Wallachs' self-dealing, favoritism, and unprofessional behavior, Vaughn began looking for other opportunities outside of Youngevity.

55. At a Youngevity event in September 2014, Briskie, then Chief Financial Officer and director of international development for Youngevity, and Steve Wallach, then Chief Executive Officer of Youngevity, announced that Youngevity had completed all of the requirements for allowing Youngevity businesses to operate in Mexico. Briskie and Steve Wallach also announced that Youngevity's office in Guadalajara, Mexico was open and that Youngevity's warehouse in Mexico was stocked with product to sell.

56. Smith had lunch with Briskie and Steve Wallach that same day.

57. During that lunch meeting, Smith specifically verified with Briskie and Steve Wallach that Youngevity had obtained the required regulatory approvals to distribute its products in Mexico.

58. During that conversation, Smith informed Briskie and Steve Wallach that he planned to begin establishing Youngevity distributorships in Mexico.

59. At no point did Briskie or Steve Wallach correct Smith's express understanding that Young-evity had

completed all of the requirements to conduct business in Mexico.

60. Based on the public announcement and Briskie and Steve Wallach's private reiteration, Smith began preparations to set up Youngevity distributorships in Mexico. He booked meeting spaces and organized several large events, which cost a substantial amount of money.

61. However, in January 2015, the day before Smith was due to fly to Mexico to begin operations, Briskie informed him that Youngevity had not, in fact, completed the requirements to enter the Mexican market.

62. Upon investigating, Smith discovered Youngevity was nowhere near ready to conduct lawful operations in the country and was, in fact, shipping Youngevity products into Mexico in furniture crates. On information and belief, Youngevity took these measures to avoid customs inspections.

63. The Wallach Group's conduct not only had an adverse effect on Youngevity distributors, but also affected Youngevity corporate employees and their desire to work for Youngevity. For example, Youngevity's former president, William Andreioli, resigned in or about November 2015, citing the following issues with the Wallach Group:

a. The Wallach Group consistently undermined efforts to promote Youngevity by cancelling distributor incentives;

b. The Wallach Group, without consulting the rest of Youngevity management, pursued ill-conceived business ventures, such as a fashion line, with no plan in place for their long-term viability

and no clear connection to Youngevity's other product lines;

c. The Wallach Group announced expansions into international markets—engendering costs associated with "grand openings"—without first obtaining the required regulatory clearances for Youngevity products;

d. The Wallach Group approved of and supported extra bonuses, commissions, and overrides for favored distributors, thereby treating those favored distributors differently than other distributors;

e. The Wallach Group allow certain favored distributors to acquire product significantly below the usual distributor pricing and to sell that product on Ebay and Amazon at below distributor pricing, thereby undermining the closed distributor network on which the other distributors depend;

f. The Wallach Group approved of, or at least did nothing to stop, the smuggling of Youngevity products into Mexico. On information and belief, the Wallach Group authorized the smuggling operation because Youngevity had yet to obtain the necessary regulatory approvals to import its products into Mexico;

g. The Wallach Group authorized exorbitant expenditures of Youngevity funds, such as spend-ing $800,000 on a K cup coffee machine.

The Founding of Wakava & Wakava's Lawful Interaction with Younaevitv Distributors & Employees

64. Following the Mexico debacle, Smith decided to leave Youngevity to pursue other opportunities,

including founding a line of healthy, Asian-inspired restaurants.

65. In or about the fall of 2015, Smith was presented with the opportunity to acquire Wakaya. Seeing the potential to turn Wakaya into a successful multi-level marketing company, Smith acquired Wakaya in October 2015. Smith specifically chose Wakaya because it did not market products that competed with Youngevity's.

66. Graham was not involved with the purchase of Wakaya, or its conversion to a multi-level marketing company. At no time prior to March 21, 2016, was Graham a distributor for or otherwise involved in Wakaya.

67. On or about December 31, 2015, Smith sold his interest in TNT and all its assets to Graham, leaving Graham to operate the TNT Youngevity distributorships.

68. Graham remained with Youngevity and continued to operate TNT, wallachonline.com, yteamtools.com, and 1-800-WALLACH.

69. After hearing through the grapevine that Smith was starting another company, Vaughn approached Smith about becoming a Wakaya distributor. At all times, Vaughn wanted to and intended to retain his Youngevity business while also pursuing other opportunities, as was his legal right.

70. Upon learning of Wakaya, Dave approached Smith about becoming a distributor for Wakaya. It was always the Pitcocks' intention that Barb would remain a Youngevity distributor, devoting her time and energy into the building of her Youngevity distributorship.

71. Barb initially refused to have anything to do with Wakaya, preferring to avoid even the appearance of impropriety. At all times, Barb wanted to and intended to retain her Youngevity business and continue to operate her Youngevity distributorship and work to promote Youngevity.

72. At no point prior to March of 2016 was Barb involved with Wakaya.

73. At no point did Smith or anyone else at Wakaya approach the Distributor Counterclaim Plaintiffs or any other Youngevity distributor about joining Wakaya.

74. None of the Distributor Counterclaim Plaintiffs engaged in any cross-recruiting or made use of any Youngevity proprietary information to contact anyone concerning Wakaya. To the extent any Youngevity distributors have become Wakaya distributors, it is as a result of those distributors approaching the Distributor Counterclaim Plaintiffs and inquiring about Wakaya.

75. Given the toxic environment within Youngevity as a result of the Wallach Group's influence, several Youngevity employees, upon learning about Wakaya, approached Smith about employment opportunities. Neither Wakaya nor Smith initiated any contact to hire Youngevity employees.

Youngevity's Wrongful Termination and Retaliatory Conduct against Counterclaim Plaintiffs

76. Because other Youngevity distributors have expressed interest in Wakaya, Youngevity has engaged in or threatened litigation against both the Distributor Counterclaim Plaintiffs (or current distributors with the intent of trying to intimidate them

and thereby prevent distributors from leaving to join Wakaya) and against Wakaya, claiming the Youngevity Policies and Procedures prevent Youngevity distributors from distributing the Wakaya Products instead of, or in addition to, the Youngevity Products.

77. In or about February of 2016, Youngevity summarily suspended the TNT distributorships and began to withhold TNT's commission payments. Youngevity subsequently terminated the TNT distributorships in March 2016. On information and belief, Youngevity's decision to terminate the TNT distributorships was driven by Smith's founding of Wakaya, which Youngevity viewed as a threat.

78. In or about February of 2016, Youngevity summarily suspended Barb's distributorships and began to withhold her commission payments. Youngevity terminated Barb's distributorships in March 2016. On information and belief, Youngevity's decision to terminate the Barb Pitcock's distributorships was driven by the fact that Dave Pitcock had become a Wakaya distributor.

79. In or about February of 2016, Youngevity suspended Vaughn's distributorship and withheld his commission payments when it learned of his interest in Wakaya. Youngevity terminated Vaughn's distributorships in March 2016. On information and belief, Youngevity's decision to terminate Vaughn's distributorships was driven by his interest in becoming a distributor for Wakaya.

80. Notwithstanding the fact that Youngevity's Policies and Procedures allow Youngevity distributors to work for multiple companies, and have distributorships within competing MLM companies, Youngevity

claims that the Distributor Counterclaim Plaintiffs are in violation.

81. Youngevity's Policies and Procedures also allow for multiple members of the same household to work for different companies and even have distributorships within competing MLM companies.

82. In terminating the Distributor Counterclaim Plaintiffs, Youngevity is attempting to selectively enforce certain provisions that are neither legally enforceable nor have they been enforced in the past. For example, Youngevity has allowed and continues to allow distributors to work for multiple companies or operate multiple distributorships with multiple companies within the same household, including but not limited to the following current Youngevity distributors: Kurt and Theresa Venekamp, Scott and Juliette Fardulis, Iggy and Victoria Baran, Dr. Luis and Evelia Arriaza, Tom and Denice Chenault, and many others.

83. Following the termination of the TNT distributorships and Youngevity's decision to withhold the commission checks, Graham was approached by another Youngevity distributor with an offer to purchase wallachonline.com, 1-800-WALLACH, and the media items Graham had created.

84. On information and belief, Youngevity, through Steve Wallach and Briskie, told the buyer it would not approve of the sale if any of the profits would flow to Graham or Smith. Fearful of reprisal from Youngevity, the buyer backed out. On information and belief, Briskie and Steve Wallach interfered with the sale of TNT's assets in an effort to punish and intimidate Graham and any other distributor perceived to be associated with Wakaya and/or Smith.

85. In another situation involving the potential sale of TNT assets, partners in Heirloom Enterprises, which has multiple Youngevity distributor positions and is owned by TNT, Sam Steele, and Michael Weeks, wanted to buy TNT's interest in Heirloom. Youngevity, again through Briskie and Steve Wallach, interfered with the transaction, claiming that they would not approve of the sale or pay commissions to Heirloom Enterprises if one penny went to Graham. On information and belief, Briskie and Steve Wallach threatened the Heirloom Enterprises partners as part of a scheme to punish and intimidate Graham and any other distributors perceived to be associated with Wakaya and/or Smith.

86. Among other things, Youngevity, through the Wallach Group and Dr. Wallach, have informed Youngevity distributors wishing to join Wakaya that they would be "pursued and crushed," or words to that effect.

87. On information and belief, Youngevity has, without any legal justification, terminated and/or threated to terminate the distributorships of and/or withhold Youngevity commission checks from distributors who expressed an interest in working with Wakaya.

Counterclaim Defendants' Conspiracy to Defame Counterclaim Plaintiffs

88. Counterclaim Defendants, together with all other individuals revealed through discovery, have engaged in a concerted effort to defame Counterclaim Plaintiffs.

89. After terminating the Distributor Counterclaim Plaintiffs, Youngevity, through Dr. Wallach and the Wallach Group, have made a series of false and

defamatory statements concerning the Distributor Counterclaim Plaintiffs.

90. For example, Dr. Wallach has stated that Smith and Graham stole Youngevity distributors; they stole money; they stole our staff; they stole thumb drives with people's names, numbers and emails; stating that he knew for a fact that they were contacting and took people who are certain ranks within Youngevity. Dr. Wallach stated that Smith and Graham have perpetrated crime and compared them to rapists.

91. Dr. Wallach further stated that Smith stole business opportunities from Youngevity and that he did it because he was desperate for money, making disparaging remarks about Smith's family and his finances and business, stating that Smith was going bankrupt and was going to lose his house because his restaurants weren't doing well.

92. These statements are false, defamatory per se, personally hurtful, and threaten to harm Smith's and Graham's reputations in the network marketing community.

93. On information and belief, Dr. Wallach made these statements in order to discredit Smith and Graham and deter Youngevity distributors from working with Wakaya.

94. Dr. Wallach further asserted that the Pitcocks had raided and destroyed four prior multilevel marketing companies. He stated that Youngevity was the fourth company in ten years that the Pitcocks destroyed.

95. These statements are false.

96. Such false statements, which suggest the Pitcocks intentionally raided the multilevel marketing

companies they worked with in the past, are extremely harmful to Barb's business as a consultant within the larger direct-sales community.

97. On March 21, 2016, Steve Wallach sent an email to the Youngevity network of distributors ("Wallach Email"). A copy of the Wallach Email is attached hereto as Exhibit C.

98. The Wallach Email accuses Smith, Wakaya, and, on information and belief, the Distributor Counterclaim Plaintiffs, of engaging in theft, misappropriation of confidential information, and breaching various provisions of the Youngevity Policies and Procedures.

99. These accusations are entirely false, defamatory per se, and harmful to Counterclaim Plaintiffs' reputations in the network-marketing community—in which personal reputation and relationships are extremely important—and/or have the tendency to injure Counterclaim Plaintiffs' businesses.

100. One of Youngevity's top distributors is Sheryl Emord, wife of Plaintiffs' counsel in this matter, Jonathan W. Emord.

101. Prior to Counterclaim Defendants' wrongful termination of TNT's distributorships, Sheryl Emord was in TNT's direct "upline."

102. When Counterclaim Defendants terminated TNT's distributorships, the commissions that were supposed to have been paid to TNT rolled up to those in its upline, including Sheryl Emord.

103. Thus, Sheryl Emord—and by extension Jonathan W. Emord—were personally enriched by TNT's wrongful termination and by the Counterclaim De-

fendant's subsequent intimidation of Youngevity distributors.

104. On March 23, 2016, Plaintiffs filed a Verified Complaint for Damages and Injunctive Relief in this matter against Counterclaim Plaintiffs and others, alleging a variety of contract and tort claims ("Verified Complaint"). [Dkt. 1.]

105. The Verified Complaint was signed by Steve Wallach, through which he certified under penalty of perjury that he had read the Verified Complaint and that the contents of that complaint were true and accurate.

106. In the Verified Complaint, Counterclaim Defendants repeat many of the same false allegations contained in the Wallach Email.

107. In addition to the false and defamatory statements echoing those in the Wallach Email, the Verified Complaint contains numerous additional allegations that are false and defamatory.

108. By way of example, among the most serious of the defamatory statements, the Verified Complaint alleges that Smith unlawfully engaged in the sale of Youngevity products in Mexico without authorization from Youngevity and without required approvals from Mexican authorities. [Dkt.1 at ¶ 32.]

109. These allegations, which accuse Smith of committing a crime across international borders, are entirely false.

110. As described in paragraphs 54 through 57 above, Youngevity was smuggling product into Mexico with, on information and belief, Steve Wallach's full knowledge and approval.

111. The Verified Complaint also falsely alleged that Andreoli, Gardner, and Cloward engaged in criminal conduct. [Dkt. 1 at ¶¶ 62-63, 66-69.]

112. These and other defamatory allegations are entirely false.

113. Despite the fact that the Verified Complaint falsely accused Counterclaim Plaintiffs of engaging in a variety of criminal acts, on information and belief, Youngevity has deliberately published and publicized the Verified Complaint—as well as other filings in this and related litigation—to Youngevity distributors, the media, and the broader network-marketing community.

114. Specifically, counsel for Plaintiffs, Jonathan Emord and Peter Arhangelsky, issued a press release on March 23, 2016, summarizing the Verified Complaint. ("Emord Press Release"). A copy of the Emord Press Release is attached hereto as Exhibit D.

115. The Emord Press Release was issued on the same day as the Verified Complaint was filed and expressly stated: "Copies of the [Verified] Complaint and related pleadings are available upon request." [Ex. D.]

116. The Emord Press Release also invited readers to contact Jonathan W. Emord or Peter A. Arhangelsky for more information about the case. [Ex. D.]

117. Subsequently, Counterclaim Defendants' false and defamatory allegations in this and related litigation have been republished by various blogs associated with the network-marketing community ("Blog Posts"). A copy of the Blog Posts is attached hereto as Exhibit E.

118. As licensed attorneys, counsel for Plaintiffs knew or should have known that publishing or publicizing the Verified Complaint—or any other filing—beyond the scope of the applicable proceedings waived any privilege that would otherwise work to shield such allegations.

119. In addition to the defamatory statements published and publicized by the Wallach Group and Dr. Wallach, on information and belief, Plaintiffs' counsel in this matter have stepped beyond their role as advocates and have personally participated in the Counterclaim Defendants' conspiracy to defame the Counterclaim Plaintiffs. Counterclaim Plaintiffs are currently investigating the possibility of naming Plaintiffs' counsel individually as co-conspirators in this action and reserve the right to amend this Counterclaim as further information is discovered.

120. On information and belief, Counterclaim Defendants, and any other individuals revealed in discovery, have continued to publicize and publish filings in this and related litigation, which contain additional defamatory statements. *See* Ex. E (blog posts quoting from Counterclaim Defendant's amended complaint and other filings).

121. Many of the allegations contained in the Verified Complaint and other filings are defamatory per se in that they accuse Counterclaim Defendants of criminal activities.

122. Notably, many of the most defamatory statements contained in the Verified Complaint have since disappeared from Counterclaim Defendants' filings in this matter—after those statements were disseminated to third parties—and the Counterclaim Defendants' subsequent amended complaints are no

longer verified. [*Compare* Dkt. 1 *with* Dkt. 25; Dkt. 47; *and* Dkt. 64.]

123. On or about June 2016, the website wakaya perfectiontellall.com (the "Website") was registered through the proxy service Domains by Proxy, LLC ("Domains by Proxy").

124. Domains by Proxy allows its users to register a website domain anonymously.

125. The Website purports to tell "The Truth Behind Wakaya Perfection," accuses Wakaya and related individuals of engaging in questionable business practices, and republishes and republicizes many of the same defamatory statements contained in the Verified Complaint.

126. The Website also hosts a copy of the Emord Press Release, which invites readers to contact Emord or Arhangelsky for copies of the Verified Complaint and other filings in this and related litigation.

127. The Website also contains a link to Youngevity's Second Amended Complaint in this action.

128. On information and belief, Youngevity, its agents, and all others found through discovery are responsible for the Website and its defamatory content.

Counterclaim Defendants' Tortious Interference with Wakava

129. Even after this Action was initiated, Youngevity and its agents have continued to interfere with Wakaya's business.

130. Since February, 2016, Wakaya has had a business relationship with LiveWell, L.L.C. ("Live Well"), an Idaho limited liability company.

131. As part of this business relationship, Wakaya and LiveWell entered into a license agreement (the "License Agreement") wherein Wakaya would license, and eventually acquire, all rights to technology and intellectual property owned and developed by Live Well.

132. Under the License Agreement, Wakaya was granted an irrevocable, exclusive license to all of LiveWell's technology and accompanying intellectual property.

133. Wakaya was to pay a royalty percentage on all sales of the LiveWell technology.

134. After Wakaya's royalty payments reached a contractually determined limit, Wakaya was to obtain all rights to the technology and accompanying intellectual property.

135. The LiveWell technology became an integral part of the Bula Bottle, a flagship Wakaya product.

136. As a corollary to the License Agreement, Wakaya entered into a separate royalty agreement (the "Royalty Agreement") with Rick Anson ("Anson"), who assisted with the development of the LiveWell technology.

137. In recognition of Anson's role in developing the LiveWell technology, Wakaya agreed to pay Anson a royalty percentage of all sales of the LiveWell technology.

138. Under the Royalty Agreement, Anson agreed not to disclose any of Wakaya's confidential information.

139. Anson also covenanted that—while the Royalty Agreement was in effect and for one year thereafter—he would not engage in any competing business as proprietor, partner, employee, agent, consultant, or shareholder.

140. The Royalty Agreement expressly defined a competing business as any business that offers its products or services through a multilevel marketing model.

141. In addition to the Royalty Agreement, Anson took a position as Vice President of Product Development at Wakaya.

142. As a vice president of Wakaya, Anson owed fiduciary duties to Wakaya independent of any contractual obligation.

143. On information and belief, Youngevity and its agents were aware of Wakaya's relationship with LiveWell and Anson.

144. On information and belief, Youngevity and its agents were in contact with Anson at least as early as October 2016.

145. On information and belief, Youngevity worked to convince Anson to breach his contractual and fiduciary obligations to Wakaya by further publishing and publicizing the defamatory material Youngevity had already included in its Verified Complaint and other filings.

146. Anson breached his fiduciary obligations to Wakaya by misappropriating Wakaya's confidential information and using that confidential information to convince LiveWell to terminate its contractual relationship with Wakaya.

147. On information and belief, Anson took those actions at Youngevity's request and encouragement.

148. LiveWell and Anson terminated their contractual relationship with Wakaya in January 2017.

149. On February 7, 2017—only a month after terminating his relationship with Wakaya—Anson appeared at a Youngevity event in the Dominican Republic at which he announced the launch of a new Youngevity product line featuring the LiveWell technology.

150. Youngevity's new product line is substantially identical to Wakaya's Bula Bottle.

151. On information and belief, Anson is now a vice president at Youngevity.

152. As a result of Youngevity's interference, Wakaya has lost a valuable business relationship, as well as a flagship product.

153. Wakaya has also lost the potential long-term benefits of the License Agreement, under which Wakaya was working to eventually acquire all rights to the LiveWell technology.

Counterclaim Defendants' Actions Have Harmed Counterclaim Plaintiffs

154. Counterclaim Defendants' actions have harmed Counterclaim Plaintiffs in numerous ways.

155. When Counterclaim Defendants summarily terminated the Distributor Counterclaim Plaintiffs' distributorships without legal justification, the Distributor Counterclaim Plaintiffs' current and future livelihoods were jeopardized. Despite committing years, even decades, to building their Youngevity businesses—which benefitted Youngevity—the Dis-

tributor Counterclaim Plaintiffs were terminated without warning to, on information and belief, retaliate against Smith, Wakaya, and anyone perceived to have associated with them.

156. Beyond the retaliatory termination of the Distributor Counterclaim Plaintiffs, Counterclaim Defendants threatened to, and did, terminate the distributorships of any Youngevity distributor who expressed interest in or support for Smith, Wakaya, or anyone perceived to have associated with them. This had the effect of deterring qualified distributors from associating with Wakaya.

157. Counterclaim Defendants have defamed Counterclaim Plaintiffs with the intent of harming Counterclaim Plaintiffs' standing in the network marketing community, and such statements have, in fact, harmed Counterclaim Plaintiffs' reputations and damaged their businesses.

158. Acting out of personal spite, Counterclaim Defendants have unlawfully interfered with the sale of TNT's valuable intellectual property.

159. Although Counterclaim Plaintiffs do not yet know the full extent of the damages they have suffered because of Counterclaim Defendants' unlawful actions, their initial calculations estimate damages of not less than tens of millions of dollars.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment – Youngevity)

160. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 159 of this Counterclaim by reference, as if fully set forth herein.

161. A dispute has arisen concerning the rights, status, and legal relations between Distributor Counterclaim Plaintiffs and Youngevity.

162. Specifically, Youngevity has interpreted its Policies and Procedures to prevent its distributors, including Distributor Counterclaim Plaintiffs, from exercising their freedom to work as distributors for Wakaya or to join Wakaya and continue to work as Youngevity distributors.

163. The Distributor Counterclaim Plaintiffs believe and assert that there is no valid contractual or legal basis to support Youngevity's conduct in attempting to intimidate and coerce its distributors from leaving to become Wakaya distributors or to join Wakaya and continue to work as Youngevity distributors.

164. Pursuant to 28 U.S.C. § 2201, the Distributor Counterclaim Plaintiffs are entitled to a declaratory judgment, determining and declaring the rights, status, and legal relations of the parties hereto, at least as follows: (1) determining that California law applies to the instant dispute between the parties; (2) declaring that the Policies and Procedures does not preclude any of Youngevity's distributors, including Distributor Counterclaim Plaintiffs, from becoming distributors of Wakaya; (3) alternatively, determining the Policies and Procedures, and/or Distributor Agreement, if interpreted to restrict or prevent Youngevity distributors from becoming Wakaya Distributors (as Youngevity seeks) is unenforceable pursuant to applicable California law, particularly California Business and Professions Code section 16600, which states that "every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void"; and

(4) for any additional relief consistent with the above declarations.

165. Counterclaim Plaintiffs are entitled to recover their attorney fees and court costs incurred herein.

SECOND CLAIM FOR RELIEF

(Breach of Contract – Youngevity)

166. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 165 of this Counterclaim by reference, as if fully set forth herein.

167. Distributor Counterclaim Plaintiffs entered into valid contracts with Youngevity. Specifically, the Distributor Counterclaim Plaintiffs' relationships with Youngevity are governed by the Policies and Procedures and/or the Distributor Agreement.

168. Distributor Counterclaim Plaintiffs have performed all obligations required under the Policies and Procedures and the Distributor Agreement.

169. Youngevity has breached the Policies and Procedures and/or the Distributor Agreement by summarily terminating the Distributor Counterclaim Plaintiffs' distributorships without legal justification and unlawfully withholding Distributor Counterclaim Plaintiffs' commission payments as set forth in paragraphs 71 through 82 above.

170. Youngevity's breach has harmed the Distributor Counterclaim Plaintiffs. Youngevity's actions have damaged the Distributor Counterclaim Plaintiffs' businesses, which were built over years and decades with Youngevity. As a result, the Distributor Counterclaim Plaintiffs have suffered financial hardship because Youngevity has wrongfully withheld payments to which the Distributor Counterclaim Plaintiffs are entitled, leading to direct and consequential

damages in an amount to be proven at trial. Moreover, Youngevity's breach has deprived the Distributor Counterclaim Plaintiffs of future income streams from their Youngevity businesses in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF

(Breach of the Covenant of Good Faith and Fair Dealing – Youngevity)

171. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 170 of this Counterclaim by reference, as if fully set forth herein.

172. The Distributor Counterclaim Plaintiffs entered into valid contracts with Youngevity.

173. The Distributor Counterclaim Plaintiffs performed all of their obligations arising from their contracts with Youngevity.

174. All conditions required for Youngevity's performance have already occurred.

175. Youngevity unfairly interfered with the Distributor Counterclaim Plaintiffs' rights to receive the benefits of their contracts when it summarily terminated their distributorships without legal justification and withheld their commission payments.

176. As a result, the Distributor Counterclaim Plaintiffs have been damaged in an amount to be proven at trial.

FOURTH CLAIM FOR RELIEF

(Conversion – Youngevity)

177. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 176 of this Counterclaim by reference, as if fully set forth herein.

178. The Distributor Counterclaim Plaintiffs had a property interest in their Youngevity businesses and the income derived therefrom. Specifically, the Distributor Counterclaim Plaintiffs spent years, even decades, building their Youngevity businesses and have successfully built substantial downlines.

179. Youngevity wrongfully terminated the Distributor Counterclaim Plaintiffs' distributorships and has withheld the Distributor Counterclaim Plaintiffs' commission checks, thereby converting the Distributor Counterclaim Plaintiffs' property for Youngevity's use. Moreover, the Distributor Counterclaim Plaintiffs' downlines continue to produce substantial commissions, which rightfully belong to the Distributor Counterclaim Plaintiffs. Instead of making payments to the Distributor Counterclaim Plaintiffs, Youngevity has converted all of the continuing profits for its own use and/or has diverted these commissions to other favored Youngevity distributors, including, but not limited to, Sheryl Emord.

180. The Distributor Counterclaim Plaintiffs have been damaged in an amount to be proven at trial through Youngevity's conversion of the past, current, and future commission payments derived from the Distributor Counterclaim Plaintiffs' downlines.

FIFTH CLAIM FOR RELIEF

(Tortious Interference with
Existing Economic Relations – Youngevity)

181. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 180 of this Counterclaim by reference, as if fully set forth herein.

182. The Distributor Counterclaim Plaintiffs have valid economic relationship with the distributors in their downlines.

183. Youngevity knew of the economic relationship between the Distributor Counterclaim Plaintiffs and the distributors in their downlines.

184. Youngevity intentionally interfered with that economic relationship when it wrongfully terminated the Distributor Counterclaim Plaintiffs' distributorships.

185. The wrongful termination of the Distributor Counterclaim Plaintiffs did, in fact, disrupt their contractual relationship with the distributors in their downline.

186. As a result, the Distributor Counterclaim Plaintiffs have been damaged in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF

(Tortious Interference with Existing Economic Relations – Youngevity)

187. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 186 of this Counterclaim by reference, as if fully set forth herein.

188. Wakaya had a valid economic relationship with LiveWell and Anson.

189. Youngevity knew of that relationship.

190. Youngevity and its agents intentionally interfered with that relationship when, on information and belief, it contacted Anson—then Vice President of Product Development at Wakaya—and republished or republicized its defamatory allegations, thereby

convincing Anson to terminate his and LiveWell's relationship with Wakaya.

191. This interference did, in fact, cause Anson and LiveWell to terminate that relationship.

192. As a result, Wakaya has lost a valued business relationship, a flagship product, and its future rights to the LiveWell technology.

SEVENTH CLAIM FOR RELIEF

(Tortious Interference with Prospective Economic Advantage – Youngevity)

193. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 192 of this Complaint by reference, as if fully set forth herein.

194. As detailed in paragraphs 71 through 82 above, Youngevity distributors, including some Distributor Counterclaim Plaintiffs, expressed interest in joining Wakaya as distributors, in addition to maintaining their Youngevity businesses as allowed for by the Policies and Procedures.

195. Youngevity knew its distributors, including some Distributor Counterclaim Plaintiffs, were interested in joining Wakaya.

196. In an effort to intimidate and coerce Youngevity distributors from joining Wakaya, Youngevity terminated the Distributor Counterclaim Plaintiffs' distributorships and withheld their commission checks. Youngevity also threatened its other distributors, implying that their distributorships—and thus the distributors' livelihoods—would be terminated if they contemplated joining Wakaya.

197. Moreover, Youngevity and its agents have engaged in a concerted campaign to smear and defame

Wakaya in an effort to deter potential distributors from joining Wakaya, either in addition to or instead of acting as distributors for Youngevity.

198. Youngevity distributors who had expressed interest in joining Wakaya have been intimidated and deterred from becoming Wakaya distributors.

199. Wakaya has been damaged in an amount to be proven at trial because Youngevity has prevented qualified distributors from joining Wakaya's sales force.

EIGHTH CLAIM FOR RELIEF

(Tortious Interference with Prospective Economic Advantage – Youngevity, Briskie, Steve Wallach)

200. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 199 of this Complaint by reference, as if fully set forth herein.

201. As detailed in paragraphs 39 and 83-85 above, Graham, through TNT, is owner of a website, phone number, and other intellectual property that he and Smith developed while distributors at Youngevity. Following the termination of his distributorship by Youngevity, Graham received an offer to purchase these valuable assets from a Youngevity distributor in good standing.

202. Youngevity knew of the possible sale.

203. Briskie and Steve Wallach vindictively informed the buyer that they would not approve of the sale if any proceeds from the sale would flow to either Graham or Smith.

204. As a result, the buyer withdrew his offer, and Graham has been unable to sell his interest in the

website, phone number, and other copyrighted materials owned by Graham and TNT.

205. Graham and TNT have been harmed by Youngevity's actions because they were unable to complete the sale of their assets and because Briskie and Steve Wallach have indicated they will not approve ANY sale of the assets.

NINTH CLAIM FOR RELIEF

(Defamation – Youngevity, Dr. Wallach, Michelle Wallach, Steve Wallach)

206. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 205 of this Complaint by reference, as if fully set forth herein.

207. In a public conversation with several Youngevity distributors, Dr. Wallach falsely accused Smith and Graham of crimes, including theft and industrial espionage. Dr. Wallach also falsely accused Dave and Barb of destroying several multilevel marketing companies with which they had previously worked.

208. Michelle Wallach fabricated emails accusing Barb of cross-recruiting with the intent of harming Barb's reputation within the direct-sales community.

209. In an email widely disseminated to Youngevity distributors, Steve Wallach accused Smith, Wakaya, and the Distributor Counterclaim Plaintiffs of engaging in theft, misappropriation of confidential information, and other acts incompatible with the operation of Counterclaim Plaintiffs' lawful businesses.

210. Counterclaim Defendants alleged numerous false and defamatory statements in the Verified Complaint, as described in paragraphs 100 through 127 above, which counsel for Plaintiffs' subsequently

publicized and published widely within the network-marketing community. On information and belief, Counterclaim Defendants have publicized and published other filings in this and related litigation, which contain similar false or defamatory material.

211. Counterclaim Defendants knew their statements were false, or in the alternative, recklessly disregarded the falsity of their statements.

212. These statements were not privileged and/or Counterclaim Defendants have waived any privilege through excessive publication.

213. Counterclaim Plaintiffs' reputations and businesses have been harmed and Counterclaim Plaintiffs are entitled to an award of actual, special, and exemplary damages in an amount to be determined at trial.

TENTH CLAIM FOR RELIEF

(False Light – Youngevity, Dr. Wallach, Michelle Wallach)

214. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 213 of this Complaint by reference, as if fully set forth herein.

215. Dr. Wallach publicly and falsely accused Smith and Graham of engaging in criminal activity and falsely accused Dave and Barb of raiding and destroying four businesses with which they had previously worked.

216. Michelle Wallach fabricated emails purporting to show that Barb cross-recruited.

217. In a widely publicized email, Steve Wallach falsely accused Smith, Wakaya, and the Distributor Counterclaim Plaintiffs of engaging in theft, misap-

propriation of confidential information, and other acts of dishonesty.

218. In the Verified Complaint, Youngevity falsely accused Smith of committing international crimes.

219. Counterclaim Defendants, through their legal counsel and other agents, subsequently publicized and published the Verified Complaint and, on information and belief, other filings in this and related litigation, which contain similar false or defamatory material.

220. These statements would be highly offensive to a reasonable person.

221. Counterclaim Defendants knew their statements were false, or in the alternative, recklessly disregarded the falsity of their statements.

222. Counterclaim Plaintiffs' reputations and businesses have been harmed by Counterclaim Defendants statements and Counterclaim Plaintiffs are entitled to an award of actual, special, and exemplary damages in an amount to be determined at trial.

ELEVENTH CLAIM FOR RELIEF

(Business Disparagement – Youngevity)

223. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 222 of this Complaint by reference, as if fully set forth herein.

224. Counterclaim Defendants have publicized and published numerous statements relating to Wakaya's products and business activities, including those contained in the Verified Complaint and other filings in this and related litigation.

225. These statements are false or highly offensive to a reasonable person.

226. As a result of Counterclaim Defendants' false statements, Wakaya has suffered economic losses due to decreased sales and distributors who were deterred from associating with Wakaya.

227. Counterclaim Defendants intended to harm Wakaya's business when they made these false statements.

228. Wakaya has suffered damages in an amount to be proven at trial. TWELFTH CLAIM FOR RELIEF (Unfair Competition – all Counterclaim Defendants) (Cal. Bus. & Prof. Code § 17200 et seq.)

229. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 228 of this Complaint by reference, as if fully set forth herein.

230. California's Unfair Competition Law ("UCL") borrows violations from other laws by making them independently actionable as unfair competitive practices.

231. Virtually any violation of federal, state, or local law can form the predicate offense under California's UCL.

232. Counterclaim Defendants' actions in summarily terminating the Distributor Counterclaim Plaintiffs' distributorships without cause constitutes unfair competition under California law.

233. Counterclaim Defendants' attempts to enforce unlawful noncompete and nonsolicitation provisions constitutes unfair competition under California law.

234. Counterclaim Defendants' actions in threatening and intimidating Youngevity distributors, including the Distributor Counterclaim Plaintiffs, in an attempt to prevent distributors from working for

Wakaya constitutes unfair competition under California law.

235. Counterclaim Defendants' conversion of the Distributor Counterclaim Plaintiffs' businesses, and the profits derived therefrom, constitutes unfair competition under California law.

236. Counterclaim Defendants' interference in the sale of Graham's interest in the wallachonline.com, 1-800-WALLACH, and assorted media items constitutes unfair competition under California law.

237. Counterclaim Defendants' actions in conspiring to interfere with Wakaya's and the Distributor Counterclaim Plaintiffs existing and prospective economic relations constitutes unfair competition under California law.

238. Counterclaim Defendants' conspiracy to publish and publicize defamatory statements constitute unfair competition under California law.

239. As a result of Counterclaim Defendants' unlawful, unfair, or fraudulent practices, Counterclaim Plaintiffs have suffered and continue to suffer damages in an amount to be proved at trial.

THIRTEENTH CLAIM FOR RELIEF

(Fraud/Negligent Misrepresentation – Youngevity and Briskie)

240. Counterclaim Plaintiffs hereby incorporate paragraphs 1 through 239 of this Complaint by reference, as if fully set forth herein.

241. As detailed in paragraphs 55 through 62 above, in his capacity as Chief Financial Officer of Youngevity, Briskie represented to Smith and other Youngevity distributors at a public Youngevity event that

Youngevity had complied with all of the necessary legal requirements to open Youngevity businesses in Mexico.

242. At the time he made these statements, Briskie knew they were false. Alternatively, Briskie made the statements without a reasonable basis for believing them to be true.

243. Nevertheless, Briskie intended Smith and the other Youngevity representatives present at the meeting to rely on his statements.

244. Based on Briskie's position as Chief Financial Officer of Youngevity, and the officer in charge of international expansion, Smith's reliance on Briskie's statement that Mexico was "open for business" was reasonable.

245. In reliance on Briskie's statements, Smith expended spent significant time and money on preparations for opening Youngevity businesses in Mexico.

246. Accordingly, Smith was damaged in an amount to be proved at trial.

PRAYER FOR RELIEF

WHEREFORE, Counterclaim Plaintiffs pray for judgment against Counterclaim Defendants as follows:

1. UNDER THE FIRST CLAIM FOR RELIEF, for declaratory relief as set forth in such claim plus reasonable attorney fees and costs incurred in this manner;

2. UNDER THE SECOND CLAIM FOR RELIEF, for judgment against Youngevity for all damages suffered by the Distributor Counterclaim Plaintiffs related to Youngevity's breach of contract plus reasonable attorney fees and costs incurred in this matter;

3. UNDER THE THIRD CLAIM FOR RELIEF, for judgment against Youngevity for all damages suffered by the Distributor Counterclaim Plaintiffs related to Youngevity's breach of the implied covenant of good faith and fair dealing plus reasonable attorney fees and costs incurred in this matter;

4. UNDER THE FOURTH CLAIM FOR RELIEF, for judgment against Youngevity for all damages suffered by the Distributor Counterclaim Plaintiffs related to Youngevity's conversion of the Distributor Counterclaim Plaintiffs' property, including their Youngevity businesses and all associated profits, and an award of exemplary damages pursuant to California Civil Code section 3294, plus reasonable attorney fees and costs incurred in this matter;

5. UNDER THE FIFTH CLAIM FOR RELIEF, for judgment against Youngevity for all damages suffered by the Distributor Counterclaim Plaintiffs related to Youngevity's tortious interference with the Distributor Counterclaim Plaintiffs' economic relationships with their distributor networks and an award of exemplary damages pursuant to California Civil Code section 3294, plus reasonable attorney fees and costs incurred in this matter;

6. UNDER THE SIXTH CLAIM FOR RELIEF, for judgment against Youngevity for all damages suffered by Wakaya related to Youngevity's tortious interference with Wakaya's economic relationships with Live Well and Anson; disgorgement of all profits related to Youngevity's new Bula Bottle-like product, which was obtained through such tortious interference; an award of exemplary damages pursuant to California Civil Code section 3294; and reasonable attorney fees and costs incurred in this matter;

7. UNDER THE SEVENTH CLAIM FOR RELIEF, for judgment against Youngevity for all damages suffered by Wakaya related to Youngevity's tortious interference with Wakaya's prospective economic relationships with qualified distributors and an award of exemplary damages pursuant to California Civil Code section 3294, plus reasonable attorney fees and costs incurred in this matter;

8. UNDER THE EIGHTH CLAIM FOR RELIEF, for judgment against Youngevity, Steve Wallach, and Briskie for all damages suffered by Graham and TNT related to Youngevity's tortious interference in the sale of the Counterclaim Plaintiffs' valuable assets and an award of exemplary damages pursuant to California Civil Code section 3294, plus reasonable attorney fees and costs incurred in this matter;

9. UNDER THE NINTH CLAIM FOR RELIEF, for judgment against Youngevity, Dr. Wallach, Michelle Wallach, and Steve Wallach for all damages suffered by Counterclaim Plaintiffs related to Counterclaim Defendants' defamatory statements and an award of exemplary damages pursuant to California Civil Code section 3294, plus reasonable attorney fees and costs incurred in this matter;

10. UNDER THE TENTH CLAIM FOR RELIEF, for judgment against Youngevity, Dr. Wallach, Michelle Wallach, and Steve Wallach for all damages suffered by Counterclaim Plaintiffs related to Counterclaim Defendants' false statements and an award of exemplary damages pursuant to California Civil Code section 3294, plus reasonable attorney fees and costs incurred in this matter;

11. UNDER THE ELEVENTH CLAIM FOR RELIEF, for judgment against Youngevity for all dam-

ages suffered by Wakaya as a result of Counterclaim Defendants' false statements and an award of exemplary damages pursuant to California Civil Code section 3294, plus reasonable attorney fees and costs incurred in this matter;

12. UNDER THE TWELFTH CLAIM FOR RELIEF, judgment against all Counterclaim Defendants and an injunction requiring Counterclaim Defendants to (1) cease their attempts at enforcing invalid and unlawful contractual provisions; (2) cease their efforts at threatening and intimidating existing Youngevity distributors from working with Wakaya, as is their legal right; (3) cease publicizing and publishing false and defamatory material about Counterclaim Plaintiffs; and (4) cease their efforts to interfere with Wakaya and the Distributor Counterclaim Plaintiffs' existing and prospective economic relations, as described in this Counterclaim;

13. UNDER THE THIRTEENTH CLAIM FOR RELIEF, judgment against Youngevity and Briskie for all damages suffered by Smith as a result of Briskie's fraudulent announcement that Youngevity distributors could operate in Mexico and an award of exemplary damages pursuant to California Civil Code section 3294, plus reasonable attorney fees and costs incurred in this matter;

14. UNDER ALL CLAIMS, for any additional relief deemed proper by the Court.

JURY DEMAND

Counterclaim Plaintiffs respectfully request a jury as to all claims so triable.

Respectfully Submitted this 23rd day of February 2017.

PARR BROWN GEE & LOVELESS

/s/ *Jonathan R. Schofield*
Jonathan O. Hafen
Jonathan R. Schofield

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

[Filed 03/09/17]

Case No.: 16-CV-704-BTM-JLB

YOUNGEVITY INTERNATIONAL CORP.,
a Delaware corporation; and
JOEL D. WALLACH, DVM, ND, a California resident,

Plaintiffs,

v.

TODD SMITH, *et al*.,

Defendants.

TODD SMITH; WAKAYA PERFECTION; TOTAL NUTRITION TEAM dba TNT; BLAKE GRAHAM; ANDRE VAUGHN; DAVE PITCOK; and BARB PITCOCK,

Counterclaim Plaintiffs,

v.

YOUNGEVITY INTERNATIONAL, INC.;
DR. JOEL WALLACH; STEVE WALLACH;
MICHELLE WALLACH; DAVE BRISKIE,

Counterclaim Defendants.

Date: May 5, 2017

Judge: Hon. Barry T. Moskovitz

Magistrate Judge: Jill L. Burkhardt

PER CHAMBERS, NO ORAL ARGUMENT
UNLESS REQUEST BY THE COURT

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COUNTERCLAIM DEFENDANTS'
NOTICE OF MOTION AND SPECIAL MOTION
TO STRIKE (Cal. Code Civ. Proc. § 425.16)
AND MOTION TO DISMISS
PURSUANT TO FRCP 12(b)(6)

Counterclaim defendants Youngevity International Corp., Dr. Joel D. Wallach, Steve Wallach, Michelle Wallach, and Dave Briskie (collectively "Youngevity") hereby move for an Order Striking under Cal. Code. Civ. Proc. § 425.16 (the California anti-SLAPP statute) all of Counts 6, 7, 9, 10, 11, and part of 12 (collectively, "the Defamation Counts") in the Counterclaims filed by Wakaya Perfection, LLC, Todd Smith, Total Nutrition Inc., Blake Graham, Andre Vaughn, Dave Pitcock, and Barb Pitcock's (collectively "Counterclaimants").

See Dkt. 83 at ¶¶ 37–69. Youngevity also requests that this Court dismiss with prejudice Counts 1, 2, 3, 4, and 5, 7 and 8; part of Count 12; and part of Count 13 of the Counterclaim under the "first to file" rule. In the alternative, Youngevity requests that this Court dismiss Counts 1–5 of the Counterclaims because those claims are subject to binding arbitration; and/or dismiss Counts 1, 4-11, and 13 pursuant to Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6).

Cal. Code Civ. Proc. § 425.16 is California's Anti-SLAPP statute. That statute requires prompt dismissal of claims that seek to chill litigants' constitutional right to free speech and petition. *See* Cal. Civ. Proc. Code § 425.16(b)(1). To determine whether the statute applies, the Court first determines whether Youngevity has made a prima facie showing that Counterclaimants' claims arise from a protected act under the statute. If the content is protected, the burden then shifts to the Counterclaimants to demonstrate a probability that they will prevail on the claim. Counterclaimants' Defamation Counts (i.e., Counts 6, 7, 9, 10, 11, and part of 12) all arise out of protected activity because they are all based on Youngevity's litigation activity. Further, Counterclaimants have no likelihood of success on the merits of the Defamation Counts because Youngevity's statements on which those Counts are based are privileged and therefore cannot form a basis of a tort claim.

In addition, this Court should dismiss Counts 1, 2, 3, 4, 5, 7, 8, and parts of 12 and 13 because Counterclaimants have already filed substantively identical claims against identical parties in the United States District Court for the District of Utah. On March 17, 2016, Wakaya Perfection filed a lawsuit against Youngevity in the United States District Court

for the District of Utah. *See Wakaya Perfection, LLC v. Youngevity International, Inc.*, Case No. 2:16-cv-00315-DN (D. Utah). On April 15, 2016, the Counterclaimants in this case filed an Amended Complaint in that Case against the same parties who are now Counterclaim defendants in this case. That Amended Complaint advanced claims substantively identical to Counts 1, 2, 3, 4, 5, 7, 8, and parts of 12 and 13 in the Counterclaim at issue here. Youngevity's Motion to Dismiss the Amended Utah Complaint is fully briefed and the parties await a decision. All of the factors in the first-to-file analysis (chronology of the actions, similarity of the parties, and similarity of the issues) are present and require dismissal of Counts 1, 2, 3, 4, 5, 7, 8, and parts of 12 and 13.

In the alternative, Youngevity requests that this Court dismiss Counts 1–5 because those Counts are subject to binding arbitration. Those Counts rely upon an Agreement the Counterclaimants allege is valid and binding between the parties. That same Agreement, attached to their Counterclaim, contains an arbitration clause mandating that the parties submit all distributor disputes to binding arbitration. Dkt. 83, at Exh. A, § J 9.

Also in the alternative, Youngevity requests that this Court dismiss Counts 1 and 4, 5, 6, 7, 8, 9, 10, 11, and 13 under Federal Rules of Civil Procedure 8(a) and 12(b)(6). Counterclaimants fail to sufficiently plead each of those claims. In Count 1 they seek declaratory relief without establishing the existence of any case or controversy. In Count 4, they allege that Youngevity converted their property without sufficiently identifying the property said to be converted. In Count 5, their allegation that Youngevity tortiously interfered with their contractual relations merely recasts their breach

of contract claim from Count 2 as a tort claim. Their claims for tortious interference with prospective economic relations in Counts 6, 7 and 8 fails to provide notice of those claims to Youngevity to allow Youngevity to marshal a defense In the Defamation Counts they allege that Youngevity defamed, but the speech complained of is not defamatory and is absolutely privileged under California law. In Count 13, they fail to allege with sufficient specificity how Youngevity intended for Defendant Smith to rely on the allegedly fraudulent statements.

In sum, as explained in the attached memorandum of law, this Court should strike Counts 6, 7, 9, 10, 11, and part of 12, and dismiss with prejudice Counts 1, 2, 3, 4, and 5, 7 and 8, part of 12, and 13.

Dated: March 9, 2017

Respectfully submitted,

Plaintiffs/Counter-Defendants

By: s/ Peter A. Arhangelsky

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APPENDIX C

2017 WL 6389776

UNITED STATES DISTRICT COURT,
S.D. CALIFORNIA

Case No.: 16-cv-704-BTM-JLB

YOUNGEVITY INTERNATIONAL CORP., *et al*.,

Plaintiffs,

v.

TODD SMITH, *et al*.,

Defendants.

WAKAYA PERFECTION, LLC, *et al*.,

Counter Claimants,

v.

YOUNGEVITY INTERNATIONAL CORP.,

Counter Defendants.

Signed 12/13/2017

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ORDER DENYING AND GRANTING IN PART COUNTERCLAIM DEFENDANTS' ANTI-SLAPP MOTION TO STRIKE AND MOTION TO DISMISS [ECF No. 90]

Barry Ted Moskowitz, Chief Judge

On March 9, 2017, Plaintiffs and Counterclaim Defendants Youngevity International Corp. ("Youngevity"), Dr. Joel D. Wallach, Steve Wallach, Michelle Wallack, and Dave Briskie (collectively "Counterclaim Defendants") filed a special motion to strike pursuant to California Code of Civil Procedure § 425.16 and/or dismiss the Counterclaim ("CC") filed by Wakaya Perfection, LLC ("Wakaya"), Todd Smith, Total Nutrition Inc. ("TNT"), Blake Graham, Andre Vaughn, Dave Pitcock, and Barb Pitcock (collectively "Counterclaimants"). (Countercl. Defs.' Mot. to Strike, ECF No. 90.)

I. BACKGROUND

On February 23, 2017, Counterclaimants filed a First Amended Answer and Counterclaim ("CC") against Counterclaim Defendants alleging the following causes of action: (1) Declaratory Judgment

against Youngevity; (2) breach of contract against Youngevity; (3) breach of the covenant of good faith and fair dealing against Youngevity; (4) conversion against Youngevity; (5) tortious interference with existing economic relations against Youngevity; (6) tortious interference with existing economic relations against Youngevity; (7) tortious interference with prospective economic advantage against Youngevity; (8) tortious interference with prospective economic advantage against Youngevity, Briskie, and Steve Wallach; (9) Defamation against Youngevity, Dr. Wallach, Michelle Wallach, and Steve Wallach; (10) False Light against Youngevity, Dr. Wallach, and Michelle Wallach; (11) Business Disparagement against Youngevity; (12) Unfair Competition, Cal. Bus. & Prof. Code § 17200 et seq. against all Counterclaim Defendants; and (13) Fraud/Negligent Misrepresentation against Youngevity and Briskie. (ECF No. 83.)

II. DISCUSSION

A. California Code of Civil Procedure § 425.16, Anti-SLAPP Motion

California Code of Civil Procedure § 425.16, the Anti-Strategic Lawsuits Against Public Participation[1] ("Anti-SLAPP") law, provides in relevant part:

> (b)(1) 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 Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court

[1] SLAPP stands for "Strategic Lawsuits Against Public Participation."

> determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

Courts apply a two-part test to determine whether an action is subject to an anti-SLAPP special motion to strike. *Navellier v. Sletten*, 29 Cal.4th 82, 85, 88, 124 Cal.Rptr.2d 530, 52 P.3d 703 (2002). First, the defendant must establish that "the challenged cause of action is one arising from protected activity." *Id.* at 88, 124 Cal.Rptr.2d 530, 52 P.3d 703. Once a defendant makes a threshold showing that the act in question is protected, the burden shifts to the plaintiff. To resist the special motion to strike, the plaintiff must establish "a probability of prevailing on the claim." *Navellier*, 29 Cal.4th at 88, 124 Cal.Rptr.2d 530, 52 P.3d 703. In federal court, "the claim should be dismissed if the plaintiffs presents an insufficient legal basis for it, or if, on the basis of the facts shown by the plaintiff, 'no reasonable jury could find for the plaintiff.' " *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013) (citing *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001)). For a "mixed cause of action," a court may rule on a plaintiff's specific allegations of protected activity "rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." *Baral v. Schnitt*, 1 Cal.5th 376, 393, 205 Cal.Rptr.3d 475, 376 P.3d 604 (2016).

Counterclaim Defendants move to strike counterclaims six, seven, nine, ten, eleven, and part of twelve, arguing that the conduct on which they are based

constitutes protected activity because it directly relates to litigation activity and is absolutely privileged under California Civil Code section 47. Counterclaimants, on the other hand, argue that the alleged false defamatory statements are exempt from the anti-SLAPP statute because they constitute commercial speech. The Court addresses each of these arguments below.

1. "Arising From" Requirement

First, Counterclaim Defendants must demonstrate that the challenged causes of action "'aris[e] from' protected activity in which the defendant has engaged." *Park v. Bd. of Trs. of Cal. State Univ.*, 2 Cal.5th 1057, 1061, 217 Cal.Rptr.3d 130, 393 P.3d 905 (2017) (quoting Cal. Civ. Proc. Code § 425.16(b)). The anti-SLAPP statute defines protected activity as:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) 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 (4) 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.

Cal. Civ. Proc. Code § 425.16(e).

"A claim arises from protected activity when that activity *underlies* or *forms the basis* for the claim." *Park*, 2 Cal.5th at 1062 (emphasis added). Courts ruling on anti-SLAPP motions must determine "what the defendant's activity is that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." *Id.* at 1063 (citations omitted). The mere fact that an action was triggered by protected activity does not mean that it "arose from that activity for the purposes of the anti-SLAPP statute." *Id.* at 1063; *see City of Cotati v. Cashman*, 29 Cal.4th 69, 78, 124 Cal.Rptr.2d 519, 52 P.3d 695 (2002) ("[A] claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic."). Thus, the only means by which a defendant can meet its burden under the anti-SLAPP statute is by demonstrating "that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in [Cal. Civ. Proc. Code § 425.16(e)]." *Parks*, 2 Cal.5th at 1063.

Counterclaimants' sixth, seventh, ninth, tenth, eleventh, and in part, twelfth causes of action all appear to depend, in part, on the following speech and conduct: (1) allegations contained within the Verified Complaint; (2) Youngevity's press release announcing the initiation of this action, which was sent to a trade publication; (3) republication of the Verified Complaint to nonparticipating third parties including Rick Ansen; (4) Dr. Wallach's oral statements to Youngevity distributors about Smith, Graham, and the Pitcocks; (5) Michelle Wallach's fabricated emails accusing Barb Pitcock of cross-recruiting; and (6) Steve Wallach's email to Youngevity distributors. (CC ¶¶ 88–128.) The Court discusses each below to

determine whether any of these activities constitute protected speech or petitioning under the anti-SLAPP statute. *See Park*, 2 Cal.5th at 1063. The Court finds that the first three types of statements are protected under the anti-SLAPP statute.

First, the allegations contained within the Verified Complaint constitute protected speech because they are statements made before a judicial proceeding. *See* Cal. Civ. Proc. Code § 425.16(e)(1); *see also Navellier*, 29 Cal.4th at 90, 124 Cal.Rptr.2d 530, 52 P.3d 703 ("A claim for relief filed in a federal district court indisputably is a 'statement or writing made before a ... judicial proceeding.'"). Second, the press release that Youngevity forwarded to a trade publication, businessforhome.org ("BFH"), constitutes protected speech because it is a statement made "in connection" with this action. *See Fremont Reorg. Corp. v. Faigin*, 198 Cal. App. 4th 1153, 1167, 131 Cal.Rptr.3d 478 (2011) ("A statement is 'in connection with' an issue under consideration by a court in a judicial proceeding ... if it relates to a substantive issue in the proceeding and is directed to a person having some interest in the proceeding."). The Court finds that it was directed at people with "some interest in the proceeding," as Youngevity is a publicly traded corporation and the press release was sent to a trade publication and read by individuals in the multi-level marketing community.

Finally, the republication of the Verified Complaint to non-participating third parties, including Rick Ansen, is also protected under the anti-SLAPP statute as a statement made "in connection" with this action and directed at someone with some interest in the matter.

Counterclaim Defendants have thus met their burden as to step one. As to the remaining statements, the Court agrees with Counterclaimants that they constitute commercial speech and are thus exempt from the anti-SLAPP statute.

2. Commercial Speech Exemption

Counterclaimants argue that the statements underlying the causes of action are commercial speech not protected within the anti-SLAPP statute.

California Civil Procedure Code § 425.17 lays out numerous exemptions from the anti-SLAPP statute, including the commercial speech exemption. Cal. Civ. Proc. Code § 425.17(c). The commercial speech exemption applies when:

> (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either 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 in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2).

Simpson Strong-Tie Co., Inc. v. Gore, 49 Cal. 4th 12, 30, 109 Cal.Rptr.3d 329, 230 (P.3d 1117 2010).

Here, Counterclaimants allege three types of speech that fall within the commercial speech exemption. First, they allege that Dr. Wallach made several defamatory oral statements to Youngevity distributors accusing Smith and Graham of stealing Youngevity's distributors, money, and property, and the Pitcocks of "raiding" multi-level marketing companies. Second, they allege that Michelle Wallach fabricated emails accusing Barb Pitcock of cross-recruiting. Though the Counterclaim is less specific as to who these emails were directed to, a reasonable inference from the pleadings reveals that they were directed to Youngevity distributors, as it is alleged that they "were intended to discredit Barb and damage her reputation both within Youngevity and in the larger direct marketing community." (CC ¶ 51.) Finally, Counterclaimants allege that Steve Wallach's email to the Youngevity network of distributors accusing Smith, Wakaya, and distributor Counterclaimants of "engaging in theft, misappropriation of confidential information, and breaching various provisions of the Youngevity Policies and Procedures" is exempt from the anti-SLAPP statute. (CC ¶ 98.) The Court relies on the four *Simpson* factors in concluding that these statements constitute commercial speech.

First, the causes of action grounded in these statements, counts seven, nine, ten, and eleven in particular, are all against Youngevity and its top officers. They all qualify as "persons primarily engaged in the business of selling or leasing goods or services." *Simpson*, 49 Cal. 4th at 30, 109 Cal.Rptr.3d 329, 230 P.3d 1117. Youngevity and its officers are in the business of selling Youngevity products. (Pl.s' Fourth Amended Complaint ("FAC"), ECF No. 269, ¶ 2–11.)

Second, the counterclaims arise out of statements of fact about Wakaya, its founder and employees, and operations. Counterclaim Defendants argue that these statements cannot constitute commercial speech because they concern individual characters and actions and not business operations, goods, or services...." (Countercl. Def.s' Reply, ECF No. 112, 3.) However, both Youngevity and Wakaya's business models depend on the distribution of its consumer products through independent direct-sellers known as "distributors" who serve as the companies' agents. The representations of fact the Wallachs made about Wakaya being established as a result of cross-recruiting or Smith's alleged misappropriation of Youngevity's property, all constitute representations of fact about "a business competitor's business operations, goods, or services." *See id.* at 30, 109 Cal.Rptr.3d 329, 230 P.3d 1117.

Third, and arguably the most disputed factor, is whether the statements at issue were "made either 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 in the course of delivering the person's goods or services...." *Simpson*, 49 Cal.4th at 30, 109 Cal.Rptr.3d 329, 230 P.3d 1117. The Court finds that these statements were made for the purposes of promoting or securing the sale of Youngevity's goods. As already discussed, Youngevity's business and profitability depends on the preservation of its distributors and their respective "uplines" and "downlines." (FAC ¶ 5.) As Youngevity pleads, "[t]he integrity of the Youngevity genealogies is essential to Youngevity's business model." (*Id.*) The clearest example is perhaps Steve Wallach's email to Youngevity distributors. It begins by addressing it to "All Our Loyal Distributors and Friends." (CC, Ex. C.)

The email then dedicates the next three pages to, on the one hand, accusing Counterclaimants of violating Youngevity's company rules and poaching downlines, and on the other, reassuring those loyal distributors that Youngevity is committed to protecting their business and livelihoods. The email states in relevant part:

> Those loyal to Youngevity, who faithfully uphold the company's rules, may rest assured that the company will protect their interests from those whose acts of betrayal would otherwise steal their downlines. Those disloyal to Youngevity, who recruit the company's distributors to competing companies, should be aware that the company will enforce its rules and end their distributorships, causing their commissions to be forfeited permanently.

(*Id.*)

Though perhaps not a conventional sale presentation, it is reasonable to infer that the Wallachs made these statements in an effort to preserve their downlines and business. *See E.D.C. Techs. v. Seidel*, 225 F.Supp.3d 1058, 1066 (N.D. Cal. 2016) (finding commercial speech where the "emails were undoubtedly written to 'reassure customers' and 'to dispel confusion.'"); *see also Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, LLC*, 814 F.Supp.2d 1033, 1039 (S.D. Cal. 2011) (finding that plaintiff's oral statement to defendant's potential customers constituted commercial speech where it communicated that they could be sued if they purchased defendant's products).

Lastly, the Court finds that the intended audience, Youngevity distributors, were "an actual or potential buyer[s] or customer[s], or ... person[s] likely to repeat the statement to, or otherwise influence an actual potential buyer or customer." *Simpson*, 49 Cal.4th at 30, 109 Cal.Rptr.3d 329, 230 P.3d 1117.

The Court therefore concludes that counterclaims seven, nine, ten, and eleven based on Dr. Wallach's oral statements, Michelle Wallach's email, and Steve Wallach's email are exempt from anti-SLAPP procedure under the commercial speech exemption.

3. Counterclaimants' Probability of Prevailing on the Merits

Having determined what alleged speech and conduct is protected under the anti-SLAPP statute, the Court next turns to Counterclaimants' probability of prevailing on the merits. As the Supreme Court of California has held, a plaintiff cannot defeat an anti-SLAPP motion by merely establishing a probability of prevailing on *any part* of a pleaded cause of action. *Baral*, 1 Cal.5th at 392. Instead, "the plaintiff must make the requisite showing as to each challenged claim that is based on allegations of protected activity." *Id.* Though how a plaintiff meets this standard varies with every case, "when the defendant seeks to strike particular claims supported by allegations of protected activity that appear alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising from unprotected activity." *Id.* Because some of the counterclaims are based on both protected and unprotected activity, the Court for the purposes of this analysis focuses on the sufficiency of the claims arising from protected activity. Counterclaim Defendants argue that Counterclaimants cannot prevail on

their claims because they are barred by California's litigation and fair reporting privileges under California Civil Code section 47.

i. Application of California Privilege Law

It is worth noting at the outset that Counterclaimants dispute the application of California's privileges, arguing that federal common law controls here. Federal Rule of Evidence 501 states that "in a civil case, state law governs privileges regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. Pursuant to Federal Rule of 501, assertion of privileges in federal question cases are governed by federal law, while state privilege law applies to purely state claims brought under diversity jurisdiction. *Id.* Counterclaimants argue that because this is a federal question action, federal common law of privileges should govern these claims.

The Court holds that Federal Rule of Evidence 501 does not preclude application of Civil Code section 47 because section 47 is not an *evidentiary privilege.* Rule 501 applies to *evidentiary privileges. See Dole v. Milonas*, 889 F.2d 885, 889 n.6 (9th Cir. 1989) ("F.R. Evid. 501 provides that questions of *evidentiary privileges* in federal cases are governed by federal common law."). Though California Civil Code section 47 refers to "privileges," its effect is to provide immunity from tort liability based on certain protected conduct or speech. *See Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996) (refusing to apply Cal. Civ. Code § 47(b) to a plaintiff's § 1983 claim because state laws that immunize government conduct are preempted); *Schneider v. Cnty of Sacramento*, No. S-12-2457-KJM, 2013 WL 6623873, at *6–7 (E.D. Cal. Dec. 16, 2013) ("Although short-hand reference to Civil Code § 47(b) denominates it as a privilege, its effect is to limit

liability or provide immunity from suits if its requirements are met.").

Counterclaimants also argue that even if federal common law does not control here, California law does not apply to their counterclaims because in cases of federal question jurisdiction, federal common law applies to choice of law determinations. However, the Court exercises federal question and supplemental jurisdiction. The Court applies California's choice of law rules because in federal question actions that involve supplemental jurisdiction over state law claims, courts apply the choice of law rules of the forum state. *Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1080 (9th Cir. 2009). California follows a three-step analysis in determining the correct choice of law:

> First, we determine whether the two concerned states have different laws. Second, we consider whether each state has an interest in having its law applied to this case. Finally, if the laws are different and each state has an interest in having its own law applied, we apply the law of the state whose interests would be more impaired if its policy were subordinated to the policy of the other state.

Id. (citing *Havlicek v. Coast-to-Coast Analytical Servs.*, 39 Cal. App. 4th 1844, 1851 (1995)).

Here, Counterclaimants have not established which foreign law should apply, how those laws may differ from California's, or whether those states have an interest in having their own laws applied to this case. Because California has a paramount interest in the freedom of speech uttered by its citizens within its territory, the Court applies California's privilege law.

ii. Count Six

In count six, Wakaya alleges that Youngevity tortuously interfered with contracts it maintained with Rick Ansen and LiveWell by republishing its defamatory allegations and thereby convincing them to terminate their contracts. Youngevity argues Wakaya cannot succeed on this claim because the republication of the Verified Complaint is absolutely protected speech under California's litigation privilege.

The litigation privilege, California Civil Code § 47(b)(2), provides an absolute defense to defamation and all other torts except malicious prosecution. *Silberg v. Anderson*, 50 Cal.3d 205, 212, 266 Cal.Rptr. 638, 786 P.2d 365 (1990). The privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Id.*

The privilege exists "to afford litigants and witnesses ... the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Id.* at 213, 266 Cal.Rptr. 638, 786 P.2d 365 (citations omitted). Notably, the privilege "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved." *Id.* at 212, 266 Cal.Rptr. 638, 786 P.2d 365.

Additionally, the requisite "connection or logical relation" between the communication and the litigation must be a "functional connection." *Rothman v.*

Jackson, 49 Cal.App.4th 1134, 1146, 57 Cal.Rptr.2d 284 (1996). The communication, whether it takes the form of a court document, a letter from an attorney, or a public statement, "must function as a necessary or useful step in the litigation process and must serve its purposes." *Id.* Thus, the party asserting the privilege must do more than show that the statement's content is related to the subject of the litigation. *Id.*

Moreover, the "objects of litigation" prong is limited to legally cognizable ends and does not include a general "desire to be vindicated in the eyes of the world." *Id.* at 1147–48, 57 Cal.Rptr.2d 284. Accordingly, "the litigation privilege should not be extended to 'litigating in the press' " because it does not advance the purpose of the privilege—uninhibited access to the courts—and it damages the justice system by poisoning jury pools and bringing the bench and bar into disrepute. *Id.* at 1149, 57 Cal.Rptr.2d 284 (denying application of the litigation privilege to attorney's statement made at a press conference accusing opposing counsel of engaging in extortion); *see also Susan A. v. County of Sonoma*, 2 Cal.App.4th 88, 92, 95-96, 3 Cal.Rptr.2d 27 (1991) (denying application of the litigation privilege to psychologist's disclosure of his impressions of his patient to a reporter).

The Court finds that the litigation privilege does not apply to the republication of the Verified Complaint to non-participating third parties. Here, the Counterclaim alleges that Youngevity republished its defamatory allegations to Rick Ansen. Though out-of-court statements may fall within the protections of the litigation privilege, here, there is no indication that the republication to a non-participating party functioned as a necessary step in the litigation process. As such, the litigation privilege does not apply to the

republication of the Verified Complaint to non-participating third parties. The Court, therefore, turns to Wakaya's probability of prevailing.

Youngevity challenges this claim, arguing that Wakaya has failed to plead an independent wrong. However, Wakaya does not need to plead an independent wrong because it appears to be moving against Youngevity for its alleged tortious interference with contracts it had with Rick Ansen and LiveWell. The Supreme Court of California has made it clear that intentionally interfering with an existing contract is a "wrong in of itself." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1158, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003) (internal citations omitted). As such, unlike the tort of intentional interference with a prospective economic advantage, which requires pleading an independently wrongful act, the tort of intentional interference with an existing contract does not. *Id.* Accordingly, Wakaya has adequately pled Youngevity's tortious interference with existing contracts. *See Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 27, 77 Cal.Rptr.2d 709, 960 P.2d 513 (1998). Moreover, to the extent that Wakaya is intending to plead a tortious interference with prospective economic advantage, because the republication of defamatory statements is not protected by any privilege, it constitutes an independently wrongful act. Therefore, Youngevity's anti-SLAPP motion to strike is DENIED as to count 6.

iii. Count Seven

Count seven depends, in part, on statements made within the Verified Complaint, the press release, and the republication of the Verified Complaint to non-participating third parties.

To the extent the cause of action depends on the actual statements made within the Verified Complaint, there is no dispute that they are protected under the litigation privilege. Thus, Counterclaimants could not prevail on these allegations and the Court GRANTS Counterclaim Defendants' anti-SLAPP motion to strike any allegations regarding the statements directly made within the Verified Complaint.

As to the press release, Youngevity argues that Counterclaimants cannot prevail because the press release is protected under California's litigation privilege and fair reporting privilege. The Court finds that the press release is not protected by the litigation privilege because immunity should not be extended to "litigation in the press." *See Rothman*, 49 Cal.App.4th at 49, 56 Cal.Rptr.2d 595; *see also GetFugu, Inc. v. Patton Boggs, LLP*, 220 Cal. App.4th 141, 154, 162 Cal.Rptr.3d 831 (2013) ("Dissemination of these publications to a segment of the population as large as the 'investment community' is essentially the same as disclosure to the general public. If anyone with an interest in the outcome of the litigation is a person to whom a privileged communication could be made, *Silberg* and *Rothman* would be eviscerated."). As to the fair reporting privilege, the Court finds that there is a factual dispute that controls whether the privilege applies. The fair reporting privilege provides a defense for "a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued." Cal. Civil Code § 47(d)(1). A newspaper and its website are "'public journal[s]' within the meaning of this statute." *Carver v. Bonds*, 135 Cal.App.4th 328, 351, 37

Cal.Rptr.3d 480 (2005) (citing *Colt v. Freedom Communications, Inc.*, 109 Cal.App.4th 1551, 1555, 1558, 1 Cal.Rptr.3d 245 (2003)). On October 18, 2017, Counterclaimants filed a motion for leave to file a sur-reply brief. (ECF No. 238). In its papers, Counterclaimants allege that discovery has revealed that the trade publication Youngevity forwarded its press release to, BFH, is not a "public journal" within the meaning of section 47(d). Counterclaimants argue that because "Youngevity and BFH formed an ongoing contractual relationship to promote Youngevity shortly before Wallach sent the Verified Complaint to BFH," BFH cannot constitute a "public journal." (*Id.* at 2.) Because this is a factual dispute that requires additional briefing and in light of forthcoming motions for summary judgment, the Court DENIES without prejudice Counterclaim Defendant's anti-SLAPP motion as to the press release. The Court grants leave to raise the issue in a motion for summary judgment.

Finally, as discussed above, the republication of the Verified Complaint to non-participating parties is not protected by the litigation privilege. Thus, the Court turns to Counterclaimants' probability of success.

To adequately state a claim for intentional interference with prospective economic advantage, a plaintiff must plead: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of that relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Korea Supply Co.*, 29 Cal.4th at 1153, 131 Cal.Rptr.2d 29, 63 P.3d 937. To recover, a plaintiff must also plead

that the "defendant's conduct was 'wrongful' by some legal measure other than the fact of interference itself." *Id.* (citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal.4th 376, 393 (1995)). As to the intent element, a plaintiff need only allege that the defendant "knew that the interference was certain or substantially certain to occur as a result of its action." *Id.* at 1154, 131 Cal.Rptr.2d 29, 63 P.3d 937.

Here, Counterclaimants allege that "Youngevity and its agents have engaged in a concerted campaign to smear and defame Wakaya...." (CC ¶ 197.) Defamation is an independently wrongful act. Therefore, Youngevity's anti-SLAPP motion to strike is DENIED as to the allegations of republishing the Verified Complaint to non-participating parties.

iv. Counts Nine and Ten

Similar to count seven, counts nine and ten for defamation and false light are based on statements made within the Verified Complaint, the press release, and the republication of the Verified Complaint among other things. As discussed above, only the statements directly contained within the Verified Complaint are protected by California's litigation privilege. As such, to the extent these causes of action depend on those allegations, Counterclaim Defendants' anti-SLAPP motion to strike is GRANTED. In regards to the press release, for the same reasons stated above, the anti-SLAPP motion is DENIED without prejudice as to those allegations.

Finally, as to allegations concerning the republication of the Verified Complaint, the Court turns to Counterclaimants' probability of success.

Because when pleaded together, a false light claim and defamation claim stand or fall together, the Court

analyzes the sufficiency of these claims jointly. *See Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App.4th 1359, 1385 n.13, 88 Cal.Rptr.2d 802 (1999) ("When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action.").

Defamation "involves (1) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." *Taus v. Loftus*, 40 Cal.4th 683, 720, 54 Cal.Rptr.3d 775, 151 P.3d 1185 (2007).

An action for false light invasion of privacy exists when defendant "gives publicity to a matter concerning another that places the other before the public in a false light ... if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Restatement Second of Torts § 652E; *see also Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 24, 26 Cal.Rptr.2d 834, 865 P.2d 633 (1994) ("California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement."); *Fellows v. National Enquirer, Inc.*, 42 Cal.3d 234, 238-39, 228 Cal.Rptr. 215, 721 P.2d 97 (1986) (recognizing the false light tort in California and noting that the publication at issue need not be defamatory, but often will be).

Here, the Counterclaimants have sufficiently alleged their claims and the Court cannot find as a matter of law that Counterclaimants could not succeed on their merits. Therefore, the anti-SLAPP motion is DENIED as to the allegations concerning the repub-

lication of the Verified Complaint to non-participating parties.

v. Count Eleven

Count eleven is a cause of action for business disparagement. To the extent this claim is based on allegations concerning statements directly made within the Verified Complaint, the anti-SLAPP motion is GRANTED and the allegations must be stricken. With regard to the press release, for reasons already stated, the anti-SLAPP motion is DENIED without prejudice.

Lastly, with reference to the allegations that Youngevity republished the Verified Complaint to non-participating parties, Wakaya is unable to show a probability of success because it has failed to plead special damages. *See Choose Energy, Inc. v. API*, 87 F.Supp.3d 1218, 1225 (N.D. Cal. 2015) ("If Plaintiffs cannot plead a plausible cause of action under the Fed. R. Civ. P. 12(b)(6) standard, then Plaintiffs as a matter of law cannot meet the probability of success on the merits standard under C.C.P. § 425.16." (internal citations omitted)).

Under California law, commercial disparagement or trade libel "is defined as an intentional disparagement of the quality of property, which results in pecuniary damage to plaintiff.... Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general...." *Nichols v. Great Am. Ins. Cos.*, 169 Cal. App.3d 766, 773, 215 Cal.Rptr. 416 (1985) (internal citations omitted). A cause of action for trade libel requires pleading and showing special damages in the form of pecuniary loss. *Leonardini v. Shell Oil, Co.*, 216 Cal. App.3d 547, 572, 264 Cal.Rptr. 883 (1989). Addition-

ally, under Federal Rule of Civil Procedure 9(g) a plaintiff must state special damages with specificity. A plaintiff must "identify particular customers and transactions of which it was deprived as a result of the libel." *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App.4th 90, 109, 15 Cal.Rptr.3d 215 (2004). Wakaya contends that it has specifically pled special damages, in particular as to the loss of its valuable business relationship with LiveWell. While the claim does incorporate by reference all 223 paragraphs that precede it, the Court finds that this is insufficient to satisfy the heightened pleading standard set forth under Rule 9(g). Moreover, the claim complains of "economic losses due to decreased sales and distributors who were deterred from associating with Wakaya." (CC ¶ 226.) This too is insufficient to satisfy the heightened pleading standard. Therefore, Youngevity's anti-SLAPP motion is GRANTED as to Count 11.

vi. Count Twelve

For the reasons already articulated above, to the extent the twelfth cause of action under California's Unfair Competition laws is premised on statements made directly within the Verified Complaint, the anti-SLAPP motion is GRANTED and the allegations must be stricken. As to the press release, the motion is DENIED without prejudice. Finally, because the allegations concerning the republications of the Verified Complaint survive in relation to the other claims, they survive as to this claim and the motion is DENIED.

B. Arbitration[2]

The Federal Arbitration Act ("FAA") permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court ... for an order directing that ... arbitration proceed in the manner provided for in [the arbitration] agreement. 9 U.S.C. § 4. "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (emphasis in original). Thus, arbitration agreements "must be enforced, absent a ground for revocation of the contractual agreement." *Id.* A court's role is limited to "determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (citing *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).

Youngevity moves to dismiss counterclaims one through five in favor of arbitration. Underlying these counterclaims is the Distributor Agreement entered between Youngevity and former distributor Counterclaimants. Each Distributor Agreement contains an arbitration provision that states:

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[2] Counterclaim Defendants also move to dismiss numerous counterclaims because they were first filed in the District of Utah. Because that court recently dismissed the complaint, this argument is now moot. (*See ECF No.* 274, Ex. 1.)

> In the event of *a* dispute with the Company, Distributor and the Company agree to participate in mediation in an earnest attempt to resolve the dispute prior to submitting it to binding arbitration pursuant to the Commercial Arbitration Rules then in effect of the American Arbitration Association, provided, however, that injunctive relief sought by the Company against any party shall be excluded from this clause. Such Arbitration shall occur in San Diego, California. Louisiana Distributors, however, may arbitration in New Orleans, Louisiana.

(CC, Ex. A, § J9.)

Counterclaimants argue that Youngevity cannot now compel arbitration because the request is procedurally improper and alternatively, Youngevity has waived its right to compel arbitration. The Court discusses each argument below.

1. Notice

First, Counterclaimants argue that Youngevity's motion to compel arbitration should be denied because it is procedurally improper as it did not comply with the FAA's notice requirements. Under section 4 of the FAA, a "party aggrieved" by another's failure to arbitrate can petition the district court "for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default." 9 U.S.C. § 4.

Here, Counterclaimants argue that Youngevity has failed to initiate arbitration or serve a proper demand for arbitration in writing. However, in filing this motion and allowing Counterclaimants more than five

days to respond to the request for arbitration before the motion's hearing date, May 5, 2017, Youngevity has complied with the procedures outlined by the FAA. *See Bridgeport Mgmt. v. Lake Mathews Mineral Props.*, No. 14-cv-00070-JST, 2014 U.S. Dist. LEXIS 29813 at *6, 2014 WL 953831, at *3 (N.D. Cal. March 6, 2014) ("[T]he function of the FAA's five-day notice provision is to prevent courts from issuing an order compelling arbitration without first affording the respondent five days' notice of the hearing."); *see also Roque v. Applied Materials, Inc.*, No. 03-cv-1564-ST, 2004 U.S. Dist. LEXIS 10477 at *11, 2004 WL 1212110, at *4 (D. Or. Feb. 20, 2004) ("[T]he five day notice period in § 4 of the FAA requires the party opposing arbitration to be given five days' notice before a hearing is held regarding the application for arbitration. It does not require that the party be given give days' notice from the date the application is made.").

2. Waiver

Alternatively, Counterclaimants argue that Youngevity has waived its right to arbitrate by initiating this action and actively litigating for more than 18 months.

In the Ninth Circuit, "[t]he party arguing waiver of arbitration bears a heavy burden of proof." *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) (internal citations omitted). To carry this burden, the opposing party must show that the other party (1) had knowledge of the right to compel arbitration; (2) acted inconsistently with that right; and (3) resulting prejudice. *Id.* Here, there is no dispute that Youngevity had knowledge of its right to compel arbitration. As such, the Court will focus on the second and third elements.

Counterclaimants argue that Youngevity has acted inconsistently with the right to compel arbitration by initiating this litigation. Youngevity, on the other hand, argues that its initiation of this action does not constitute waiver because its causes of action are not covered by the arbitration provision, as they do not require any construction of the Distributor Agreement. However, the language of the arbitration provision is quite broad. Rather than limit arbitrable claims to just those arising under the Distributor Agreement, it instead calls for arbitration "[i]n the event of *a* dispute with [Youngevity]...." (CC, Ex. A, § J9) (emphasis added). Unlike arbitration clauses that are limited to claims "arising hereunder" or "arising under the Agreement," the arbitration provision at issue here is not narrowly written. *See Mediterranean Enters. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) ("We have no difficulty finding that 'arising hereunder' is intended to cover a much narrower scope of the disputes, *i.e.*, only those relating to the interpretation and performance of the contract itself."). On its face, it appears to call for arbitration in the event of any dispute with Youngevity. While not all of Youngevity's causes of action fall within the scope of the arbitration clause, certainly those claims that rest on the alleged wrongful conduct of Counterclaimants within their capacity as Youngevity distributors would constitute arbitrable claims.

The more difficult question then becomes whether in filing these arbitrable claims did Youngevity act inconsistent with its right to arbitrate Counterclaimants' causes of action. Courts deciding whether a plaintiff who brings suit on potentially arbitrable claims waives his right to arbitrate a defendant's counterclaims have generally only found waiver where the

legal and factual issues in the original claims and counterclaims are the same. *See* Gidatex, S.r.L. v. Campaniello Imports, Ltd., 13 F.Supp.2d 420, 427–28 (S.D. N.Y. 1998) ("[A] plaintiff asserting an arbitrable claim in federal court waives his right to demand arbitration of an adversary's counterclaims only if the parties' claims present the 'same legal and factual issues.' " (citing *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 133 (2d. Cir. 1997)); *see also MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2001) (finding no waiver where defendant's previous claims were "distinct, both factually and legally" from plaintiff's current claims); *RISO, Inc. v. Witt Co.*, 13-cv-02064, 2014 U.S. Dist. LEXIS 9297 at *23, 2014 WL 3371731, at *9 (D. Or. July 9, 2014) (finding no waiver where prior claims were related to violations of federal antitrust laws and current claims concerned fraudulent conduct). Underlying many of Youngevity's claims and the counterclaims at issue is whether former distributor Counterclaimants engaged in cross-recruiting. With respect to both parties' claims, a trier of fact will have to ultimately resolve whether former distributor Counterclaimants engaged in cross-recruiting and therefore unlawfully interfered with Youngevity's business relationships or whether they did not and Youngevity wrongfully terminated their distributorships. Accordingly, by filing this action Youngevity acted inconsistent with its right to compel arbitration.

Finally, the Court finds that Counterclaimants have met their burden of establishing prejudice. *See Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016) ("[I]n order to establish prejudice, the plaintiffs must show that, as a result of the defendants having delayed seeking arbitration, they have incurred costs they would not otherwise have incurred ... or that the defendants have received an advantage from litigating

in federal court that they would not have received in arbitration."). As Counterclaimants note, Youngevity has been litigating both its own claims and the counterclaims for more than 18 months, engaging in extensive discovery and petitioning the Court for a wide range of remedies. Undoubtedly, Youngevity has benefited from discovery that it would not otherwise have had automatic access to in arbitration. Thus, the Court finds that Youngevity has waived its right to arbitrate the first five counterclaims. As such, its motion to dismiss is DENIED on this ground.

C. Motion to Dismiss

Counterclaim Defendants move dismiss counterclaims one, four, five, eight, eleven, and thirteen under Federal Rule of Civil Procedure 12(b)(6)[3]. The Court addresses each cause of action below.

1. Count One—Declaratory Judgment

Youngevity contends that the counterclaim for declaratory judgment is moot and a request for an impermissible advisory opinion. A court may only enter declaratory judgment if there is an actual controversy between the parties. *See* 28 U.S.C. § 2201; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 81 L.Ed. 617 (1937). Thus, a district court has no jurisdiction where there is no actual controversy. *Id.*

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[3] Counterclaim Defendants also make 12(b)(6) arguments for counts six, seven, nine and ten. However, because the Court has already determined above that these claims have been sufficiently pled at least as to the "protected activity," the Court need not address the sufficiency of the merits as to the "unprotected activity" allegations at this time. The issues may be raised in a motion for summary judgment.

While Youngevity submits that it no longer disputes the application of California law and admits that its policies and procedures allow individuals to be both Youngevity and Wakaya distributors, its own pleadings create controversy. As Counterclaimants highlight, Youngevity grounds its own tortious interference claim on allegedly inviting Youngevity distributors "to consider becoming Wakaya distributors while retaining their Youngevity distributor positions...." (FAC ¶ 248.) Whether Counterclaimants did in fact induce breaches of contract therefore turns on the interpretation of these policies and procedures. Therefore, at least as to this issue a controversy still exists. As such, Youngevity's motion to dismiss the first counterclaim is DENIED.

2. Count Four—Conversion

Youngevity moves the Court to dismiss Counterclaimants' fourth claim for conversion, arguing that they have insufficiently identified a specific, identifiable sum of money.

Under California law, "[c]onversion is the wrongful exercise of dominion over the property of another." *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 601 (9th Cir. 2010). To establish conversion, a plaintiff must demonstrate: "(1) [his or her] ownership or right to possession of the property at the time of the conversion; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." *Id.* "Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved...." *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLC*, 150 Cal. App.4th 384, 395, 58 Cal.Rptr.3d 516 (2007). However, it is unnecessary that "each coin or bill be earmarked." *Fischer v. Machado*, 50 Cal. App.4th

1069, 1072, 58 Cal.Rptr.2d 213 (1996). At the pleading stage in federal court, it is only necessary for a plaintiff to allege an amount of money that is "capable of identification," rather than specifically identify the sum that would be required to prove the claim in a motion for summary judgment. *Natomas Gardens Inv. Group v. Sinadinos*, 710 F.Supp.2d 1008, 1019–20 (E.D. Cal. 2010). Here, Counterclaimants have alleged that Youngevity wrongfully terminated distributor Counterclaimants and has withheld their commission checks. Counterclaimants have, therefore, sufficiently pled an amount of money that is capable of identification. Thus, Youngevity's motion to dismiss this claim is DENIED.

3. Count Five—Tortious Interference with Existing Economic Relations

As to count five, Youngevity argues that to the extent Counterclaimants wish to plead tortious interference with contractual relations, the Court should dismiss the claim because a party to the contract cannot be liable for interfering with its own contract. To the extent that this is the harm Counterclaimants seek to redress, the Court agrees. *See Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 521, 28 Cal.Rptr.2d 475, 869 P.2d 454 (1994) ("One contracting party owes no general tort duty to another not to interfere with performance of the contract; its duty is simply to perform the contract according to its terms. The tort duty not to interfere with the contract falls only on strangers—interlopers who have no legitimate interest in the scope or course of the contract' performance.").

However, Counterclaimants contend that Youngevity is misconstruing the claim because they instead seek to recover for the alleged interference with the

economic relationships they had established with distributors in their downlines. While the tort is generally known as intentional interference with prospective contractual relationships or economic advantage, courts have sometimes referred to it as "interference with economic relations." *See Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal.4th 376, 381, n.2, 45 Cal.Rptr.2d 436, 902 (P.2d 740 1995). At its core the tort seeks to protect economic relationships short of contractual that contain a probable future economic benefit. *See Korea Supply Co.*, 29 Cal.4th at 1153, 131 Cal.Rptr.2d 29, 63 P.3d 937. Nevertheless, the claim fails because it sounds in contract, not tort.

The Court in *JRS Products, Inc. v. Matsushita Electric Corp. of America*, 115 Cal. App.4th 168, 179, 8 Cal.Rptr.3d 840 (2004), addressed this exact issue—"whether damages can be recovered for interference with prospective economic advantage by one contracting party against another based on conduct that would otherwise constitute a breach of the parties' contract." The court answered in the negative grounding its reasoning in the principle that "a party to a contract cannot recover damages in tort for breach of contract." *Id.* In evaluating these claims, the proper question for courts to determine is "whether the essence of the claim is fundamentally based on conduct that sounds in contract or in tort." *Id.* at 181, 8 Cal.Rptr.3d 840. Here, the Court finds that "the essential nature of the conduct sounds in contract," as the principal conduct Counterclaimants complain of is Youngevity wrongfully terminating their distributorships. *See id.* at 182, 8 Cal.Rptr.3d 840. Youngevity's motion to dismiss this claim is, therefore, GRANTED.

4. Count Eight—Tortious Interference with Prospective Economic Advantage

Counterclaim Defendants move to dismiss count eight for tortious interference with prospective economic advantage, arguing that Counterclaimants have failed to plead a wrongful act independent of the interference itself. Counterclaimants, on the other hand, argue that Briskie and Steve Wallach's misrepresentation to the prospective buyer of Graham and TNT's media assets was independently wrongful. The Counterclaim alleges that Briskie and Steve Wallach, without having a legal right to do so, "informed the buyer that they would not approve of the sale if any proceeds from the sale would flow to either Graham or Smith." (CC ¶ 204.) This alleged misrepresentation to the prospective buyer constitutes an independently wrongful act. In its reply, Counterclaim Defendants argues that Steve Wallach's and Briskie's representation to a potential purchaser is not independently wrongful because "the Court already held that TNT cannot make commercial use of those assets without Youngevity's consent...." (Countercl. Def.s' Reply, 10.) Counterclaim Defendants mischaracterize the Court's holding. First, a Court's ruling in an order granting preliminary injunction is not a final determination of rights. Second, the Court never held that TNT cannot make a sale without Youngevity's consent[4]. As such, Counterclaim Defendants' motion to dismiss this claim is DENIED.

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[4] "If Defendants notify any purchaser of this litigation and receive written assurances from the purchaser that its operation of the Assets would be lawful, then equity would require allowing such a sale. Therefore, any sale and/or transfer that conforms with this order is not prohibited by the Injunction. Any non-complaint sale will be grounds for contempt." (Ct. Order, ECF No. 53.)

5. Count Eleven—Business Disparagement

Because in evaluating the anti-SLAPP motion above the Court only focused on the sufficiency of the claim in regard to allegations based on "protected activity," the Court here looks to the sufficiency of the claim as it relates to "unprotected activity," such as trade libel based on Dr. Wallach's statements about Smith and Graham and Steve Wallach's email. Nevertheless, the Court GRANTS Youngevity's motion to dismiss this claim because it insufficiently alleges special damages under Rule 9(g). However, the Court grants Wakaya leave to amend its pleadings so as to comply with the heightened pleading standards.

6. Count Thirteen—Fraud/Negligent Misrepresentation

Lastly, Counterclaim Defendants move to dismiss the counterclaim for fraudulent and negligent misrepresentation.

To state a claim for fraudulent misrepresentation, a plaintiff must allege: (1) a misrepresentation; (2) knowledge of falsity; (3) intent to defraud or induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 (1996). Federal Rule of Civil Procedure 9(b) requires that these facts be alleged with particularity. Fed. R. Civ. Proc. 9(b). "The elements of negligent misrepresentation are similar to intentional fraud except for the requirement of scienter; in a claim for negligent misrepresentation, the plaintiff need not allege the defendant made an intentionally false statement, but simply one as to which he or she lacked any reasonable ground for believing the statement to be true." *Charnay v. Cobert*, 145 Cal. App.4th 170, 184, 51 Cal.Rptr.3d 471 (2006).

Counterclaim Defendants argue that Counterclaimants fail to plead intent and reliance. As to intent, Counterclaimants allege that "Smith specifically verified with Briskie and Steve Wallach that Youngevity had obtained the required regulatory approvals to distribute its product in Mexico." (CC ¶ 57.) They further allege that Smith informed Briskie and Steve Wallach of his intentions to begin establishing Youngevity distributorships in Mexico and that at no point did they correct his "express understanding that Youngevity had completed all of the requirements to conduct business in Mexico." (*Id.* at ¶¶ 58–59.) Counterclaimants allege that Briskie intended for Smith and other Youngevity distributors to rely on his statements. (*Id*. at ¶ 243.) As to the reliance element, Counterclaimants allege that the misrepresentation was reasonably relied upon given Briskie's position as Chief Financial Officer of Youngevity and the officer in charge of international expansion. (*Id.* at ¶ 244.) Construing the facts in the light most favorable to Counterclaimants, the Court finds that both intent and reliance are adequately pled. Accordingly, Counterclaim Defendants' motion to dismiss this claim is

III. CONCLUSION

For the reasons discussed above, Counterclaim Defendants' anti-SLAPP motion is GRANTED in part and DENIED in part. To the extent claims six, seven, and nine through twelve are based on allegations concerning statements directly made within the Verified Complaint, the motion is GRANTED and those allegations are ordered to be stricken. The anti-SLAPP motion is also granted as to count eleven, which must also be stricken from the Counterclaim.

Counterclaim Defendant's 12(b)(6) motion to dismiss is GRANTED as to counts five and eleven and

DENIED as the remaining causes of action. Counterclaimants are granted leave to amend counts five and eleven. Counterclaimants must file an amended counterclaim within 14 days of the entry of this order. Finally, Counterclaimants' motion to file a sur-reply brief (ECF No. 238) is DENIED but the Court has considered the motion herein.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Filed 07/16/18]

Case No.: 16-CV-704-BTM-JLB

YOUNGEVITY INTERNATIONAL, *et al*.,

Plaintiff,

v.

TODD SMITH, *et al*.,

Defendant.

ORDER GRANTING MOTION FOR PARTIAL STAY [ECF No. 412]

On January 4, 2018, Plaintiffs and Counterclaim Defendants Youngevity International, Inc., Steve Wallach, Michelle Wallach, Dave Briskie, and Dr. Joel D. Wallach (collectively "Counterclaim Defendants") filed a motion for a partial stay of the proceedings pending their interlocutory appeal of this Court's December 13, 2017 decision. (ECF No. 412) The Court grants the motion to stay for the reasons discussed below.

DISCUSSION

Both parties agree that under California law, an appeal of a denial of an anti-SLAPP motion automatically stays further trial court proceedings on causes of action related to the motion. *Varian Med. Sys. v. Delfino*, 35 Cal.4th 180, 186 (2005). However, there is no automatic stay for "ancillary or collateral matters

which do not affect the judgment or order on appeal even though the proceedings may render the appeal moot." *Makaeff v. Trump Univ., LLC*, 10-cv-940-IEG, 2011 WL 613571, at *2 (S.D. Cal. Feb. 11, 2011) (citing *Varian Med. Sys.*, 35 Cal.4th at 191). Thus, the Court grants Counterclaim Defendants' motion and hereby immediately stays counterclaims six, seven, nine, ten, eleven, and twelve. As to the remaining counterclaims and affirmative causes of action, Counterclaim Defendants are not entitled to an automatic stay because they are not subject to an anti-SLAPP appeal.

Nevertheless, it remains within the Court's discretion to grant a stay for the remaining claims. *See Leyva v. Certified Grocers of Ca., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). While the filing of an interlocutory appeal does not automatically stay the proceedings, a district court has broad discretion to decide whether a stay is appropriate to "promote economy of time and effort for itself, for counsel, and for litigants." *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972). "A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva*, 593 F.2d at 863.

Counterclaim Defendants urge the Court to stay the remaining counterclaims, or at the very least, counterclaims one through four which are also at issue in the interlocutory appeal because they are allegedly subject to arbitration. The Ninth Circuit's ruling may have a significant effect on this Court's disposition of those counterclaims and a stay may save the Court and the parties from unnecessary litigation. Additionally, because an interlocutory appeal is already pending, the Court does not find that a stay of claims one

through four would cause Counterclaimants any prejudice. Accordingly, the Court grants Counterclaim Defendants an immediate stay of claims one through four.

The Court will rule on the remaining motions for summary judgment for Plaintiffs' and Counterclaim Defendants' affirmative claims and counterclaims eight and thirteenth However pursuant to this Court's power to control its own docket and with considerations of judicial economy in mind, the Court will then stay the entire case until the Ninth Circuit's resolution so that all causes of action proceed to trial together. *See Leyva*, 593 F.2d at 864.

CONCLUSION

For the reasons discussed above, the Court GRANTS Plaintiffs' and Counterclaim Defendants' motion for a partial stay of the proceedings. (ECF No. 412.) The motions for summary judgment for counterclaims one through four, six, seven, and nine through twelve are DENIED as premature, as well as the related *Daubert* motions. (ECF Nos. 418–419, 421–431, 433, 435, 437–438, 441, 444–445.) The parties are granted leave to resubmit their motions depending on the judgment of the Ninth Circuit. Within thirty days of the Ninth Circuit's resolution of the appeal, the parties shall file a joint status report informing the Court of the status of this matter.

IT IS SO ORDERED.

Dated: July 16, 2018

/s/ Barry Ted Moskowitz
Barry Ted Moskowitz, Chief Judge
United States District Court

APPENDIX E

749 Fed.Appx. 634 (Mem)

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

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No. 18-55031

———

YOUNGEVITY INTERNATIONAL CORP.; *et al*.,

Plaintiffs-counter-claim-defendants-Appellants,

v.

WILLIAM ANDREOLI; *et al.,*

Defendants-counter-claimants-plaintiffs-Appellees.

———

Appeal from the United States District Court for the Southern District of California,
Barry Ted Moskowitz, Chief Judge, Presiding,
D.C. No. 3:16-cv-00704-BTM-JLB

———

Argued and Submitted December 3, 2018
Pasadena, California

Filed January 24, 2019

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Jonathan O. Hafen, Cynthia Love, Parr Brown Gee & Loveless, PC, Salt Lake City, UT, Kyle Van Dyke, Attorney, Van Dyke Law, San Diego, CA, for Defendants-counter-claimant-plaintiffs-Appellees

MEMORANDUM**

Before: TASHIMA and IKUTA, Circuit Judges, and KENNELLY,* District Judge.

Youngevity International Corporation appeals the partial denial of its special motion to strike some of Wakaya Corporation's counterclaims to Youngevity's complaint. *See* Cal. Civ. Proc. Code § 425.16. Youngevity also appeals the district court's denial of Youngevity's motion to dismiss certain counterclaims on the ground they are subject to an arbitration provision in Youngevity's distributor agreement. We have jurisdiction under 28 U.S.C. § 1291, *see Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003) (holding that the denial of an anti-SLAPP motion is appealable under § 1291) and 9 U.S.C. § 16(a)(1) (permitting appeal from the denial of a motion to compel arbitration).[1]

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

[1] Because exhibits one through six of Wakaya's supplemental excerpts of record were not before the district court at the time of its December 13, 2017 order, *see Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003), we GRANT Youngevity's motion to strike those exhibits. To the extent Youngevity moves to strike arguments in Wakaya's pleadings, however, that motion is

We reject Youngevity's argument that Wakaya's counterclaims must be struck in their entirety because they are based on statements by Youngevity that are protected by section 425.16. Because California courts review each statement within a pleading, and strike only protected statements, *see Baral v. Schnitt*, 1 Cal. 5th 376, 390–92, 205 Cal.Rptr.3d 475, 376 P.3d 604 (2016), we separately consider each statement that Youngevity argues is protected under section 425.16.

We lack jurisdiction to review the district court's determination that Joel Wallach's oral statements, Steve Wallach's email, and Michelle Wallach's alleged emails constitute commercial speech and therefore are not protected by the anti-SLAPP statute. *See* Cal. Civ. Proc. Code § 425.17(c). Such a determination is not subject to interlocutory review. *See* Cal. Civ. Proc. Code § 425.17(e); *Breazeale v. Victim Servs.*, 878 F.3d 759, 766 (9th Cir. 2017).

We reverse the district court's decision not to strike those portions of Wakaya's counterclaims based on the republication of the Verified Complaint and the Youngevity press release, which summarized the substance of the Verified Complaint. California's litigation privilege applies to communications made in judicial proceedings, *see* Cal. Civ. Code § 47(b), and extends to communications regarding such judicial proceedings made to people with "a substantial interest in the outcome of the pending litigation," *see Abraham v. Lancaster Cmty. Hosp.*, 217 Cal. App. 3d 796, 823, 266 Cal.Rptr. 360 (1990); *see also Argentieri v. Zuckerberg*, 8 Cal. App. 5th 768, 783–84, 214

DENIED. We also DENY Wakaya's motion to supplement the record on appeal with excerpts from a deposition that were not before the district court. *See id.*

Cal.Rptr.3d 358 (2017) (indicating that the litigation privilege protects statements made to persons with a "substantial interest" in the litigation, but not statements made to "the general public through the press"). For this reason, the republication of the Verified Complaint and the dissemination of the Youngevity press release to its distributors and the marketing community (which had such a substantial interest) constitute protected speech.[2] Therefore, to the extent Wakaya's counterclaims are based on the republication of the Verified Complaint and Youngevity's press release, Wakaya cannot carry its burden of showing there is a probability that it will prevail on those claims, *see* Cal. Civ. Proc. Code § 425.16(b).

Finally, we affirm the district court's denial of Youngevity's motion to dismiss or compel arbitration. Youngevity litigated its own claims that were based on the same factual nexus as Wakaya's claims for eighteen months before seeking to compel arbitration. Because Youngevity acted inconsistently with the arbitration provision in its distributor agreement, and this inconsistent conduct was prejudicial to Wakaya, Wakaya carried its burden of proving that Youngevity waived its right to arbitrate. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990).

Each party shall bear its own costs on appeal.

DISMISSED IN PART, AFFIRMED IN PART, REVERSED IN PART.

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[2] Because we decide on this ground, we do not reach the district court's ruling that there is a factual dispute as to whether BFH constituted a "public journal" for purposes of the fair reporting privilege, *see* Cal. Civ. Code § 47(d), nor do we need define the term "public journal" under California law.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 4/1/2019]

No. 18-55031

YOUNGEVITY INTERNATIONAL CORP.*; et al.*,

Plaintiffs-counter-claim-defendants-Appellants,

v.

WILLIAM ANDREOLI; *et al.*,

Defendants-counter-claimants-plaintiffs-Appellees.

D.C. No. 3:16-cv-00704-BTM-JLB
Southern District of California, San Diego

ORDER

Before: TASHIMA and IKUTA, Circuit Judges, and KENNELLY,* District Judge.

Judge Ikuta voted to deny the petition for rehearing en banc and Judge Tashima and Judge Kennelly so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing en banc (Doc. 49) is DENIED.

* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

APPENDIX G

United States Code Annotated
Title 28. Judiciary and Judicial Procedure
(Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)
28 U.S.C.A. § 1291
Currentness

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

APPENDIX H

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 6. Of the Pleadings in Civil Actions
Chapter 2. Pleadings Demanding Relief (Refs & Annos)
Article 1. General Provisions (Refs & Annos)
West's Ann.Cal.C.C.P. § 425.16
Effective: January 1, 2015
Currentness

§ 425.16. Anti-SLAPP motion

(a) The Legislature finds and declares that there has been a 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) 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 Constitution or the 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.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing

affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) 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 (4) 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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

Credits

(Added by Stats.1992, c. 726 (S.B.1264), § 2. Amended by Stats.1993, c. 1239 (S.B.9), § 1; Stats.1997, c. 271 (S.B.1296), § 1; Stats.1999, c. 960 (A.B.1675), § 1, eff. Oct. 10, 1999; Stats.2005, c. 535 (A.B.1158), § 1, eff. Oct. 5, 2005; Stats.2009, c. 65 (S.B.786), § 1; Stats.2010, c. 328 (S.B.1330), § 34; Stats.2014, c. 71 (S.B.1304), § 17, eff. Jan. 1, 2015.)