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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

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

Plaintiffs/
Counter-
Defendants,

v.

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

Defendants/
Counter-Plaintiffs.

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

**BRIEF IN SUPPORT OF MOTION
TO DISMISS & STRIKE**

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

16 **BACKGROUND**

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

26 Defendants generate revenue from some vendors with whom they are able
27 to negotiate and execute affiliate contracts. For instance, Plaintiff j2 Global pays
28

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

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

17 Plaintiffs' statements of fact are set forth as allegations 12 through 37 of
18 their Complaint and supported by exhibits attached thereto. Plaintiffs have
19 brought suit based on two basic theories: (1) that certain product review
20 information about Plaintiffs' products on Defendants' respective web sites
21 were/are false and/or misleading; and (2) that Defendants are infringing on
22 Plaintiffs' trademarks by using the words "eFax" and "Onebox" on Defendants'
23

24
25 ¹ See www.cj.com. CJ is a leading third-party administrator of affiliate programs
26 for vendors such as Plaintiffs and web site developers such as Defendants.

27 ² Information about Google AdSense can be found at Google.com\AdSense.

28 ³ Information about Yahoo Overture can be found at searchmarketing.yahoo.com.

⁴ Plaintiffs do not allege that the pricing information listed on their web sites is
either false or misleading.

1 web sites and, with regard to “eFax”, as part of Defendant Zilker’s Google
2 AdWords campaign.

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

7 **ARGUMENT**

8 FRCP 12(c) allows a party, after the pleadings are closed but early enough
9 not to delay trial, to move for judgment on the pleadings. F.R.C.P. § 12(c). A
10 Rule 12(c) motion is substantially identical to a Rule 12(b)(6) motion to dismiss in
11 that both permit challenges to the legal sufficiency of the opposing party’s
12 pleadings. *See Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1131 (C.D. Cal.
13 2007); *see also Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir.
14 1989). “A judgment on the pleadings is properly granted when, taking all the
15 allegations in the pleadings as true, the moving party is entitled to judgment as a
16 matter of law.” *Ownes v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th
17 Cir. 2001).

18 The court is bound to give plaintiff the benefit of every reasonable
19 inference to be drawn from the “well-pleaded” allegations of the complaint. *See*
20 *Retail Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963).
21 However, the court may not assume that the plaintiff “can prove facts which it has
22 not alleged or that the defendants have violated the . . . laws in ways that have not
23 been alleged.” *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council*
24 *of Carpenters*, 459 U.S. 519, 526 (1983). The court “need not assume the truth of
25 legal conclusions cast in the form of factual allegations.” *United States ex rel.*
26 *Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). A court may dismiss a
27 complaint on a dispositive issue of law. *See Marshall County Bd. Of Educ. v.*
28

1 *Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). (“A
2 (complaint) may be dismissed on motion if clearly without any merit; and this
3 want of merit may consist in an absence of law to support a claim of the sort
4 made, or of facts sufficient to make a good claim, or in the disclosure of some fact
5 which will necessarily defeat the claim.) Thus, the Court may delve into some
6 basic facts in reviewing a 12(c) motion.

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

9
10 Before addressing the substantive arguments under each theory of
11 dismissal, Defendants will analyze the applicability of California’s anti-SLAPP
12 provisions to Plaintiffs’ state law claims. The anti-SLAPP statute is designed to
13 protect First Amendment speech from strategic lawsuits filed to intimidate and
14 reduce information in a public forum (*i.e.* the internet) about issues which
15 implicate a public interest (*i.e.* consumer information). California’s anti-SLAPP
16 statute was enacted in response to the “disturbing increase in lawsuits brought
17 primarily to chill the valid exercise of the constitutional rights of freedom of
18 speech and petition for the redress of grievances.” Cal. Civ. Proc. Code §
19 425.16(a). While it was impossible for the California Legislature to contemplate
20 all possible statements which might be covered by the Act, courts have made it
21 clear that the statute “shall be construed broadly” in order to achieve its goals,
22 which is to “encourage continued participation in matters of public significance,
23 and that this participation should not be chilled through abuse of the judicial
24 process.” *Id.* “The statute is designed to allow for early dismissal of non-
25 meritorious cases aimed at chilling First Amendment expression through costly,
26 time-consuming litigation.” *New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1098
27 (C.D. Cal. 2004).

1 The Anti-SLAPP law applies if the Plaintiffs’ suit arises from an act in
2 furtherance of its rights of petition or free speech in connection with a public
3 issue. *See Wilkerson v. Sullivan*, 99 Cal. App. 4th 443, 446 (2002); *see also Vess*
4 *v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003). An “act in
5 furtherance” includes, but is not limited to, “any written or oral statement or
6 writing made in a place open to the public or a public forum in connection with an
7 issue of public interest or any other conduct in furtherance of the exercise of . . .
8 the constitutional right of free speech in connection with a public issue or an issue
9 of public concern.” Cal Civ. Proc. Code §§ 425.16(e)(3), (4).

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

13 This case is substantially similar to *New.net, supra*, wherein the United
14 District Court for the Central District of California considered similar claims of
15 unfair competition and the applicability of California’s anti-SLAPP provisions.
16 *New.net*, 336 F. Supp. 2d, 1090. In *New.net*, Plaintiff was a supplier of software
17 which was surreptitiously bundled with unrelated software available for download
18 over the Internet. Defendant’s software was described as detecting and removing
19 “the worst that the Internet and shareware/freeware have to offer.” *Id.* at 1096-
20 1097. When run by users, Defendant’s software detected Plaintiff’s software and
21 offered users the opportunity to remove it from their computers. *Id.* The
22 *New.net* Court stated: “Because the issue of public awareness of, and protection
23 from, the unknown are at the heart of the public information service Defendant
24 provides and because that service is of public significance, speech in this area
25 should not be chilled by litigation brought by Plaintiff who seeks to stifle speech
26 to enhance its profits.” *Id.* at 1106. The *New.net* Court ultimately struck Plaintiff’s
27 California unfair competition, trade libel and tortious interference claims and
28

1 granted attorney fees to Defendant, under the anti-SLAPP statute. *Id.* at 1118.

2 The anti-SLAPP statute's focus is not on the form of the plaintiff's cause of
3 action but on the defendant's *activity* that gives rise to Defendants' asserted
4 liability and whether that activity constitutes protected speech. *Navellier v.*
5 *Sletten*, 29 Cal. 4th 82, 92 (2002). Courts have consistently recognized that, by its
6 nature, consumer reporting involves matters of particular interest to the public
7 because such information enables citizens to make better informed purchasing
8 decisions by providing information about consumer products. *See Steaks*
9 *Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3rd Cir.1980). Courts have
10 consistently recognized that the First Amendment protects the free flow of such
11 consumer information. *See Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898
12 (Cal.App. 1 Dist. 2004) ("Consumer information, however, at least when it affects
13 a large number of persons, also generally is viewed as information concerning a
14 matter of public interest."). Where a website contains information that enables a
15 consumer to better assess the benefits and risks involved in purchasing a particular
16 service, the website concerns an issue of public interest. *See Gilbert v. Sykes*, 147
17 Cal. App. 4th 13, 23 (Cal. App. 3 Dist. 2007). Moreover, statements made on a
18 website concerning a publicly traded company have been held to be an issue of
19 public interest because they could affect investors and publically traded stocks.
20 *See Global Telemedia Intern., Inc. v. Doe 1*, 132 F. Supp. 2d 1261 (C.D. Cal.
21 2001).

22 Whether particular statements made by consumer reporters are precisely
23 accurate, it is necessary to insulate them from the vicissitudes of ordinary civil
24 litigation in order to foster the First Amendment goals mentioned above. As the
25 Supreme Court recognized in *New York Times Co. v. Sullivan*, "would-be critics ...
26 may be deterred from voicing their criticism, even though it is believed to be true
27 and even though it is in fact true, because of doubt whether it can be proved in
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1 court or fear of the expense of having to do so.” *New York Times Co. v. Sullivan*,
2 376 U.S. 254, 279 (1964). If absolute accuracy of information was required,
3 consumers would be less informed, less able to make effective use of their
4 purchasing power, and generally less satisfied in their choice of goods. *See Steaks*
5 *Unlimited, Inc.*, 623 F.2d at 280.

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

8
9 It is clear that Defendants allegedly actionable statements on their web sites
10 took place in a “pubic forum” as that term is used under the Anti-SLAPP statute.
11 California courts have held numerous times that web sites accessible to the public
12 are “public forums” or a place “open to the public” within the meaning of section
13 425.16 for purposes of the anti-SLAPP statute. *See Gilbert*, 147 Cal. App 4th at
14 23, *Global Telemedia* 132 F. Supp. 2d at 1264; *See also Huntingdon Life*
15 *Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th
16 1228, 1247 (Cal. App. 4 Dist. 2005); *Wilbanks v. Wolk*, 121 Cal. App. 4th at 895.

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

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

21 Section 425.16 does not apply to any cause of action brought against a
22 person primarily engaged in the business of selling or leasing goods or
23 services, including, but not limited to, insurance, securities, or financial
24 instruments, arising from any statement or conduct by that person if both of
25 the following conditions exist:

26
27 (1) The statement or conduct consists of representations of fact about
28

1 that person's or a business competitor's business operations, goods,
2 or services, that is made for the purpose of obtaining approval for,
3 promoting, or securing sales or leases of, or commercial transactions
4 in, the person's goods or services, or the statement or conduct was
5 made in the course of delivering the person's goods or services.

6
7 (2) The intended audience is an actual or potential buyer or customer,
8 or a person likely to repeat the statement to, or otherwise influence,
9 an actual or potential buyer or customer... and is the subject of a
10 lawsuit brought by a competitor, notwithstanding that the conduct or
11 statement concerns an important public issue.

12
13 Cal. Civ. Proc. Code § 425.17(c) (emphasis added). The exceptions found in §
14 425.17(c) get to the heart of an important threshold issue in this dispute across the
15 analysis of both the anti-SLAPP statute and the Lanham Act, whether the
16 Defendants are 'primarily engaged' in selling services 'as competitors' of
17 Plaintiffs' services.

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

20
21 Defendants' web sites make it clear that they research, collect, consolidate,
22 organize, and present "apples for apples" consumer information, free of charge,
23 about competing third-party service providers for comparison and review.
24 Defendants do not bill, sell or support any good or service to any end-user of such
25 services. While it is expected that Plaintiffs will argue that affiliate contracts with
26 certain vendors somehow strip Defendants of their status as consumer information
27 websites, this line of reasoning was specifically rejected in *New.net*.

1 In an attempt to show that Defendant primarily engages in the business of
2 selling products, Plaintiff refers to Defendant's website which posts job
3 listings for sales assistants and other sales positions. In an analogous
4 context, however, the Consumer Reports website also lists a number of
5 positions related to sales and/or servicing Consumer Reports customers and
6 the website further lists various products for sale such as its well-known
7 magazine subscription and internet version of that subscription. Thus, if the
8 Court adopted Plaintiff's construction, Consumer Reports would be
9 "primarily engaged in the business of selling ... goods or services," thus
10 making Consumer Reports ineligible for the protection of the anti-SLAPP
11 statute. The Court cannot and does not adopt such an untenable
12 interpretation of California's newly enacted statute.

13
14 *See New.net*, 356 F. Supp. 2d at 1104. Quite simply, neither affiliate fees nor
15 revenue change the essential nature of Defendants' 'consumer information'
16 business model. Stated another way, there is no legal support for the proposition
17 that affiliate contracts magically turn Defendants into companies which are in the
18 business of primarily selling end-user fax or pbx services.

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

21
22 "In order to satisfy the required conditions of section 425.17(c), Plaintiffs
23 must also show that Defendant is making statements about its own product or a
24 competitor's business operations, goods or services." *See New.net*, 356 F. Supp.
25 2d at 1104 (emphasis added). Plaintiffs' Complaint allegations make it clear that
26 Defendant's alleged statements are not about "[Defendants'] own" product or
27 services. Instead, Defendants' statements are clearly about Plaintiffs' services.

1 (Compl. ¶¶ 25-29, 49, 53, 58).

2 As importantly, Plaintiffs and Defendants are not ‘competitors’ as defined
3 under § 425.17. In *New.net*, the Court rejected Plaintiffs arguments that
4 Defendants acts of describing Plaintiffs product as the ‘worst of the worst’ on the
5 internet and providing software allowing consumers to delete Plaintiffs software
6 made them competitors. The Court, based on the same legal authority, also
7 rejected Plaintiffs; argument that the parties were competitors under the unfair
8 competition provisions of the Lanham Act. *New.net*, 356 F. Supp. 2d at 1104. In
9 order to determine whether Plaintiffs and Defendants are “competitors”, Courts
10 look at a variety of factors such as whether:

- 11 1. Defendants are endeavoring to perform the same services as
12 Plaintiffs;
- 13 2. Defendants are offering to perform those same services better or
14 cheaper than Plaintiffs;
- 15 3. Defendants are vying for the same consumer dollars as Plaintiffs; and
16 4. Defendants and Plaintiffs are competing for those dollars from the
17 same consumer group.

18
19 *See Summit Tech v. High-line Med. Instruments Co.*, 933 F. Supp. 918, 937 (C.D.
20 Cal. 1996) (Competitors are “persons endeavoring to do the same thing and each
21 offering to perform the act, furnish the merchandise, or render the services better
22 or cheaper than his rival.”); *Lipson v. Socony Vacuum Corp.*, 87 F.2d 265, 270 (1st
23 Cir. 1937) (“The effort of two or more parties, acting independently, to secure the
24 custom of a third party by the offer of the most favorable terms. The struggle
25 between rivals for the same trade at the same time.”).

26 Plaintiffs have not alleged that Defendants’ are competitors anywhere in
27 their Complaint. In fact, Plaintiffs allegations state that Defendants have
28

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

10 Plaintiffs essentially argue for a definition of ‘competitors’ which is so
11 broad that it would include every affiliate marketer, on-line advertisement
12 company (Google, Yahoo) and every other person allowing advertisements on
13 their web sites. Because of the similarity between the anti-SLAPP definition of
14 ‘competitor’ with state and federal unfair competition laws, such a broad
15 definition would also subject a broad swath of on-line web sites, search engines,
16 blogger sand service providers to liability under unfair competition statutes.⁶
17 Such a broad definition would undermine the First Amendment’s protections of
18 free and vigorous speech about companies and their services. Moreover, it is
19 unnecessary. Plaintiffs are appropriately protected by a higher standard of proof
20 in suits against non-competitors under business libel laws. Plaintiffs have taken
21

22
23 ⁵ Plaintiffs fail to disclose that they have contracts with Defendants as well on
24 certain products reviewed on Defendants web sites. (*Exhibit B; Kilpatrick*
25 *Affidavit.*)

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

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

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

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

8
9 **EFAQ Allegations:** There are essentially two categories of allegations
10 made by Plaintiffs against Defendant Zilker. First, Plaintiffs allege trademark
11 infringement against Defendant Zilker's for its use of "E Fax" in its bidding on a
12 keyword (*See Compl.* ¶ 23), the display of "E Fax" in the text and header of online
13 keyword advertisements (*See Compl.* ¶ 24), and the use of "eFax" on its website
14 to identify Plaintiff's service (*See Compl.* ¶ 25). Second, Plaintiffs complain that
15 Defendant Zilker has made false and/or misleading statements about Plaintiff's
16 eFax services and misrepresented that it is 'unbiased' in its vendor reviews.

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

23
24 ⁷ As noted in the *New.net* case, to prove trade libel, Plaintiff must show (1) a
25 statement that (2) was false, (3) disparaging, (4) published to others in writing, (5)
26 induced others not to deal with it, and (6) caused special damages. As for the
27 element of falsity, as noted above, there is a dearth of persuasive evidence that
28 Defendant made any false statement about Plaintiff's software or that it is being
defamed by innuendo. *New.net, supra*, 346 F. Supp. 2d at 1113.

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

3
4 Defendants use of ‘Onbox’ and “eFax” on their respective web sites to
5 describe Plaintiffs services is classic fair use since: (1) the services in question are
6 not readily identifiable without use of the trademark; (2) only so much of the
7 marks are used as is reasonably necessary to identify Plaintiffs’ services; and (3)
8 Defendants have done nothing that would, in conjunction with the use of the
9 mark, suggest sponsorship or endorsement by the Plaintiffs. *See New Kids on the*
10 *Block v. News America Pub., Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

11 “Nominative fair use also occurs if the only practical way to refer to something is
12 to use the trademarked term.” *KP Permanent Make-Up, Inc. v. Lasting*
13 *Impression I, Inc.*, 328 F.3d 1061, 1072 (9th Cir. 2003); *see also Cairns v.*
14 *Franklin Mint Co.*, 292 F.3d 1139, 1150 (9th Cir. 2002) (holding that nominative
15 fair use occurs when the alleged infringer uses “the [trademark holder’s] mark to
16 describe the [trademark holder’s] product.”).

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

21 [Compare E Fax Services](#)
22 View a Comparison Chart of all
23 E Fax Services and Sign Up for One.
24 www.Fax-Compare.com

21 [Choose an E Fax Service](#)
22 Read Honest Reviews to Learn about
23 All of the Top E Fax Providers.
24 www.Fax-Compare.com

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

1 Even if Plaintiffs were able to prove that ‘e Fax’ has achieved secondary
2 meaning status, Defendant Zilker’s use is still consistent with the oft-used
3 dictionary definitions of the terms and is a fair use of such words in their
4 descriptive sense. *See KP Permanent Make-Up, Inc., supra*, 543 U.S., 111, 118
5 (2004). In fact, the USPTO itself has recognized the “e fax” means “electronic
6 facsimile.” *See Exhibit C, Printout of Serial No. 75/656,348 March 19, 2004*
7 *Office Action* (“E-FAX is likely to be perceived as meaning “electronic facsimile”
8 and electronic facsimile transmission appears to be the precise nature of the
9 applicant’s services.”); *see also Exhibit D, Printout of Serial No. 76/524244*
10 *October 24, 2003 Office Action citing dictionary.cambridge.com* (defining “e” as
11 an “abbreviation for electronic”)

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

25 **C) Plaintiffs Allegations of Federal & State Unfair Competition/False &**
26 **Misleading Advertising Fail to State a Claim and Are Otherwise**
27 **Without Merit.**
28

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

3 (a) Civil action. (1) Any person who, on or in connection with any goods or
4 services, or any container for goods, uses in commerce any word, term,
5 name, symbol, or device, or any combination thereof, or any false
6 designation of origin, false or misleading description of fact, or false or
7 misleading representation of fact, which--

8 ...

9 (B) in commercial advertising or promotion, misrepresents the nature,
10 characteristics, qualities, or geographic origin of his or her or another
11 person's goods, services, or commercial activities, shall be liable in a civil
12 action by any person who believes that he or she is or is likely to be
13 damaged by such act.

14
15 (Emphasis Added). Representations constitute "commercial advertising or
16 promotion" under 15 U.S.C. § 1125(a)(1)(B), if they are: (1) commercial speech
17 [as defined by the Lanham Act]; (2) by a defendant who is in commercial
18 competition with the plaintiff; (3) for the purpose of influencing consumers to buy
19 defendant's goods or services; and (4) disseminated sufficiently to the relevant
20 purchasing public to constitute advertising within the industry. *Rice v. Fox*
21 *Broadcasting Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003) (emphasis added); *see also*
22 *New.net*, 356 F. Supp. 2d at p 117 (citing *Rice, supra* with approval). As set forth
23 below, Plaintiffs' own allegations make it clear that they cannot satisfy elements
24 (1), (2) or (4) in order to bring the complained of language within "commercial
25 advertising or promotion."

26 The difference between strictly advertising speech and other speech in a
27 commercial context is an important First Amendment protection since it precludes
28

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

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

20 Even if plaintiffs could establish the elements of commercial advertising,
21 Defendants’ statements are not actionable as false or misleading advertising.
22 Actionable false advertising claims under Section 43(a) of the Lanham Act
23 usually fall into one of two categories: a representation that is literally false, or
24 one that consumers are likely to find misleading but that is not literally false.
25 Although either type of misrepresentation can violate Section 43(a), the practical
26 difference is that literal falsehoods, those which are false on their face, are
27 actionable without proof of public reaction. *See Santana Prods., Inc. v. Bobrick*
28

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

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

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

13
14 (b) "that EFAX does not provide a 30 day trial period." (*Compl.* ¶ 29.)

15
16 Plaintiff j2 Global does admit that Defendant specifically states on its
17 website that "EFAX sometimes offers a 30 day trial," and instructs consumers
18 how to obtain a free trial by doing a search for "EFAX free trial" in Google.
19 (*Compl.* ¶29.) Plaintiff j2 Global states that this statement is false and misleading,
20 alleging that the 30 day free trial is available through other marketing avenues
21 such as affiliate programs, internet banners, and radio advertisements. (*Id.*) These
22 statements are objectively true. *See Exhibit B; Kilpatrick Affidavit.* As noted in
23 *New York Tiers, supra*, and *Steaks Unlimited, supra*, statements on consumer web
24 sites need only to be substantially true to avoid liability.

25 Because faxcompare.com instructed consumers how to get a free trial by
26 searching for "eFax" and "free trial", it is impossible for Plaintiff to prove
27 'competitive injury,' an element of unfair competition that has not even been pled.
28

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

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

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

14
15 Plaintiffs admit in Paragraph 28 that the complained of statement is true
16 with regard to its Onebox Corporate (i.e. ten extension) plan. The Onebox
17 “Corporate Plan” is clearly identified in extra-large red font on the
18 pbxcompare.com web site. Plaintiffs’ allegation that ChooseWhat is liable for
19 “false and misleading advertising” for failure to review its Onebox basic plan is
20 frivolous on its face.

21 Paragraph 23 of Plaintiffs’ Complaint alleges that Defendant Zilker uses the
22 word “unbiased” in its Google AdWords campaigns, referring to Exhibit D as
23 proof. However, Exhibit D to the Complaint contains no examples of use of the
24 word “unbiased” in advertisements. Paragraph 37 of Plaintiff’s Complaint alleges
25 that Defendants’ use of the word “unbiased” on their respective web sites is false
26 and misleading statement of fact. Defendants’ statements on their websites that:
27 “We are committed to providing a quality unbiased resource to individuals and
28

1 small business owners that will save time and alleviate the frustration we went
2 through in selecting an internet fax service provider for ourselves” are not
3 actionable. There is no duty under 15 U.S.C. § 1125(a) to make affirmative
4 disclosures. As noted in *Alfred Dunhill, Ltd. v Interstate Cigar Co.*, 499 F2d 232
5 (2nd Cir. 1974), a failure to disclose material facts is not "false representation." It
6 is impossible for Plaintiffs to prove that Defendants are not committed to
7 providing an unbiased review.

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

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

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

20
21 Because Defendants have made such a prima facie showing under
22 California’s anti-SLAPP statute, the burden shifts to the Plaintiffs to demonstrate
23 a probability of prevailing on the merits of the complaint with regard to their state
24 law claims. *Vess*, 317 F.3d at 1109. Much like the burden in determining a
25 motion for summary judgment, the plaintiff must demonstrate that the “complaint
26 is legally sufficient and supported by a prima facie showing of facts to sustain a
27 favorable judgment if the evidence submitted by the plaintiff is credited.” *See*
28

1 *ComputerXpress, Inc*, 93 Cal. App. 4th at 999; *Wilcox*, 27 Cal. App. 4th at 823.

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

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

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

21 _____
22 ⁸ *See Mejia v. Community Hospital of San Bernardino*, 99 Cal. App. 4th 1448,
23 1456-57 (Cal. App. 4 Dist. 2002) ("Civil Code section 2334 further provides: "A
24 principal is bound by acts of his agent, under a merely ostensible authority, to
25 those persons only who have in good faith, and without want of ordinary care,
26 incurred a liability or parted with value, upon the faith thereof." Nominally, these
27 statutes require proof of three elements: "[First] [t]he person dealing with the
28 agent must do so with belief in the agent's authority and this belief must be a
reasonable one; [second] such belief must be generated by some act or neglect of
the principal sought to be charged; [third] and the third person in relying on the
agent's apparent authority must not be guilty of negligence."").

1 engaging in “any unlawful, unfair or fraudulent business act or practice and unfair,
2 deceptive, untrue or misleading advertising” Cal. Bus. & Prof. Code § 17200.⁹
3 Lawsuits premised on section 17200 are subject to being stricken because they are
4 barred by the First Amendment where the speech complained of is not commercial
5 speech. *New.net*, 356 F.Supp.2d at 1110 (citing *Kasky v. Nike, Inc.*, 79 Cal. App.
6 4th 165, 178, Cal. App. 4 Dist. (2000)). For the reasons noted above, the
7 complained of speech was not ‘commercial’ and thus not actionable under Cal.
8 Bus. & Prof. Code § 17200.

9 Further, state common law claims for unfair competition are “substantially
10 congruent” to claims under the Lanham Act. *Cleary v. News Corp.*, 30 F.3d 1255,
11 1262 -63 (9th Cir. 1994) (“This Circuit has consistently held that state common
12 law claims of unfair competition and actions pursuant to California Business and
13 Professions Code § 17200 are “substantially congruent” to claims made under the
14 Lanham Act.”). Thus, if the court grants Defendants Motion under F.R.C.P. §
15 12(c), then the state law claims must be dismissed as well. Finally, claims for
16 unfair competition under state law requires a showing of “competitive injury.”
17 *Committee On Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197,
18 209, 673 P.2d 660 (1983) (overturned by statute on other grounds). Therefore, the
19 recovery of damages under the common law tort requires actual competition
20 between the two parties. *Trovan, LTD. v. Pfizer*, 2000 U.S. Dist. LEXIS 7522
21 (C.D. Cal. May 23, 2004) (“Here, the undisputed evidence shows that plaintiffs do
22

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

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

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

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

21
22 ¹⁰ In fact, the first notice Plaintiffs gave to Defendants that they had any issue
23 with the description of services was this lawsuit, despite negotiations between the
24 parties over the use of “eFax” in Google AdWords for six months prior to filing.

25 ¹¹ Regardless of whether the allegations are meritorious, the Complaints are public
26 record and subject to publication and commentary. *See Integrated Global*
27 *Concepts, Inc. v. j2 Global Communications, Inc. et al*, Case Number:
28 1:2007cv03494 (Illinois Northern District Court) (allegations of Racketeering in
in order to gain unlawful business advantage, establish a monopoly in the
electronic fax market and related claims); as reported on sec-edgar-online.com we
site; “On October 17, 2006, Go Daddy filed suit against us and our affiliate in the

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

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

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

17
18 *New.net, supra* at 1115. (citations omitted.)

19 CONCLUSION

20 The true nature of Plaintiffs’ claims are not as competitors under unfair
21 competition law but as non-competitors. Claims between non-competitors are
22 only cognizable as business libel and related actions, which Plaintiffs have
23 avoided knowing they cannot establish the necessary elements. This case is about
24

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

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

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Respectfully submitted,
TRAVERSE LEGAL, PLC

Dated: January 12, 2009

/s/
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*Attorneys for Defendants Zilker Ventures,
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2009, I electronically filed the foregoing Counterclaim for Declaratory Judgment with the Clerk of the Court using the CM/ECF System.

/s/

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