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 STAND (formerly known as FORESTETHICS);  
 TODD PAGLIA

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

RESOLUTE FOREST PRODUCTS, INC.,  
 RESOLUTE FP US, INC., RESOLUTE FP  
 AUGUSTA, LLC, FIBREK GENERAL  
 PARTNERSHIP, FIBREK U.S., INC.,  
 FIBREK INTERNATIONAL INC., and  
 RESOLUTE FP CANADA, INC.

Plaintiffs,

v.

GREENPEACE INTERNATIONAL (aka  
 "GREENPEACE STICHTING  
 COUNCIL"), GREENPEACE, INC.,  
 GREENPEACE FUND, INC.,  
 FORESTETHICS, DANIEL BRINDIS,  
 AMY MOAS, MATTHEW DAGGETT,  
 ROLF SKAR, TODD PAGLIA, and JOHN  
 AND JANE DOES 1-20,

Defendants.

No. 3:17-CV-02824-JST

**DEFENDANTS' NOTICE OF MOTION  
 AND MOTION TO DISMISS PURSUANT  
 TO FRCP 12(b)(6) AND ANTI-SLAPP  
 MOTION TO STRIKE PURSUANT TO  
 CALIFORNIA CODE OF CIVIL  
 PROCEDURE § 425.16**

Date: May 31, 2018  
 Time: 2:00 p.m.  
 Dept.: 9

Complaint Filed: May 31, 2016  
 First Amended Complaint Filed: November 8,  
 2017

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE THAT ON** May 31, 2018 at 2:00 p.m. in Courtroom 9 of the  
 above-entitled Court located at 450 Golden Gate Avenue, San Francisco, CA, Defendants STAND  
 (formerly known as FORESTETHICS) ("Stand") and TODD PAGLIA ("Mr. Paglia") (collectively  
 the "Stand Defendants") will and do hereby move the Court to issue the following orders:

1. Dismissing, without leave to amend, each and every cause of action asserted against

the Stand Defendants in Plaintiffs' First Amended Complaint; and

2. Striking, without leave to amend, each and every state law cause of action (Counts IV-IX) asserted against the Stand Defendants in Plaintiffs' First Amended Complaint.

This Motion is brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP") and on the grounds that each and every cause of action asserted against the Stand Defendants in Plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted.

This Motion is also brought pursuant to California Code of Civil Procedure ("CCP") § 425.16 and on the grounds that each and every state law cause of action (Counts IV-IX) asserted against the Stand Defendants in Plaintiffs' First Amended Complaint (1) arises from acts by the Stand Defendants in furtherance of their right of free speech under the United States Constitution or California Constitution in connection with a public issue and (2) Plaintiffs cannot establish that there is a probability they will prevail on those claims against the Stand Defendants.

This Motion will be based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities, all pleadings and papers on file herein, the Reply the Stand Defendants anticipate filing, and any oral and documentary evidence as may be presented at the hearing of this matter.

Dated: January 29, 2018

BRADLEY, CURLEY, BARRABEE &  
KOWALSKI, P.C.

By: 

ARTHUR W. CURLEY  
Attorneys for Defendants  
STAND (formerly known as FORESTETHICS);  
TODD PAGLIA

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
THE STAND DEFENDANTS' MOTION TO DISMISS AND MOTION TO STRIKE  
PLAINTIFFS' FIRST AMENDED COMPLAINT**

**I. INTRODUCTION**

By Order dated October 16, 2017, this Court granted the Stand Defendants' Motion to Dismiss Plaintiffs' original Complaint, in full, pursuant to FRCP 12(b)(6). [ECF No. 173]. The Court's Order likewise granted the Stand Defendants anti-SLAPP Motion to Strike as to all state law causes of action brought against them in Plaintiffs' original Complaint pursuant to CCP § 425.16. [ECF No. 173]. In doing so, the Court held that many of the alleged publications and statements at issue in the Complaint as to all defendants, including the Stand Defendants, "constituted the expression of opinion, or 'different viewpoints that [are] a vital part of our democracy . . .'" [ECF 173 at 16:3-10]. The Court also determined that Plaintiffs were "limited public figure[s] for the purposes of the claims involved in this case" and therefore were required to plead "actual malice." [ECF 173 at 12:13-14]. Plaintiff had failed to meet the "demanding burden" necessary to allege actual malice against the Stand Defendants, thereby setting forth additional grounds for the insufficiency of their state law claims for defamation, tortious interference with prospective business relations, and tortious interference with contractual relations. [ECF No. 173 at 13:11-13 and 15:26-16:10]. Similarly, the Court found that Plaintiffs had not pled their RICO claims (under both federal and Georgia state law) against the Stand Defendants with the required specificity and failed to adequately allege proximate cause. [ECF No. 173 at 18:9-11]. The Court further ruled it was "clear" that the "few specific allegations" asserted against the Stand Defendants in Plaintiffs' original Complaint arose out of activity made in connection with a public issue in furtherance of their right to free speech under the United States or California Constitution. [ECF No. 173 at 4:2, fn. 3 and 24:11-25:1]. And, since Plaintiffs had not met their burden under FRCP12(b)(6)'s "plausibility" standard, they could not meet the "probability of success on the merits" required to defeat an anti-SLAPP Motion to Strike. [ECF No. 173 at 25:2:16].

Undeterred, Plaintiffs filed their expansive First Amended Complaint ("FAC"), which encompasses 498 paragraphs over 190 pages, *plus* an additional 34 pages of appendices. [ECF No. 185]. Yet, despite its amazing girth, the FAC – like its predecessor – says very little of substance as

1 against the Stand Defendants. In fact, the cameo appearance the Stand Defendants made in  
 2 Plaintiffs' original Complaint has *shrunk* in the FAC. The FAC's body, tables, and appendices  
 3 remove several of the alleged defamatory statements and/or specific acts that Plaintiffs had  
 4 attributed to the Stand Defendants in their original Complaint, including, ironically, the one  
 5 statement from the original Complaint that was not barred by California's one-year statute of  
 6 limitations for defamation. CCP § 340(c).<sup>1</sup> Quite remarkably, the voluminous tables and  
 7 appendices to the FAC only list 3 alleged statements by the Stand Defendants, which are dated  
 8 September 17, 2012, September 18, 2012, and May 21, 2013 – each of which is facially non-  
 9 defamatory and unambiguously time-barred, even under the two-year statute of limitations  
 10 enumerated by CCP § 339(1) applicable for trade libel, tortious interference with prospective  
 11 business relations, and tortious interference with contractual relations.<sup>2</sup>

12 The remaining limited specific conduct of the Stand Defendants enumerated in the FAC  
 13 was almost entirely *already* alleged in Plaintiffs' original Complaint. [Compare ECF 185 at ¶ 132-  
 14 134 with ECF 1 at ¶ 193; ECF 185 at ¶ 224 with ECF 1 at ¶ 145; ECF 185 at ¶ 227 with ECF 1 at ¶  
 15 148; ECF 185 at ¶ 240 with ECF 1 at ¶ 157; ECF 185 at ¶¶ 247-248 with ECF 1 at ¶¶ 165-166;  
 16 ECF 185 at ¶ 258 with ECF 1 at ¶ 175; ECF 185 at ¶ 288 with ECF 1 at ¶ 187; and ECF 185 at ¶  
 17 297 with ECF 1 at ¶ 196]. That conduct was found insufficient the first time around. The same  
 18 must hold true here. The very few additions made by Plaintiffs are equally time-barred and/or non-  
 19 actionable on their face.

20 Plaintiffs then couple their narrow allegations against the Stand Defendants with their  
 21 conclusory allegation – repeated from their original Complaint – that the Stand Defendants' have a  
 22 "close all[iance]" and "long history of collaborating on campaigns" with the Greenpeace  
 23

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24 <sup>1</sup> This was the December 18, 2015 "tweet" by Mr. Paglia: "#Forest Products shows collaboration is foreign  
 25 concept, rejects calls for mediation, go it alone or die?" [ECF No. 1 at 100, Table B]).

26 <sup>2</sup> These are: (1) a September 17, 2012 letter to member companies of the Forest Product Association of  
 27 Canada: "[W]e *understand* active logging and road building is occurring in areas originally designated off limits  
 28 within the CBFA, including by Resolute in the Quebec region under priority CBFA planning." [italics added] [ECF  
 185-4 #36]; (2) a September 18, 2012 email "[a]ccusing Resolute of violating the CBFA" (the actual contents of the  
 email are not asserted in the FAC) [ECF 185 Table A at 151:28-152-2]; and (3) a May 21, 2013 Tweet by Stand:  
 "@ResoluteFP won't do anything close to what science warrants to protect our #forest and threatened #caribou."  
 #CSR" [ECF 185-2 No. 46].

Defendants in a meek effort to assert a RICO “criminal enterprise” and civil conspiracy. [Compare ECF 185 at ¶ 41(m) with ECF 1 at ¶ 41(m)]. Their attempt to do so remains woefully insufficient. The FAC continues to fail to plead the elements of RICO violations with the required specificity. By way of example, Plaintiff do not – and cannot – allege that the Stand Defendants participated in the operation or management of the “enterprise,” particularly given the extremely limited allegations actually asserted against them. In addition, alleged defamatory statements are not predicate acts under RICO. It is also evident throughout the FAC that proximate cause remains wanting. As in the original Complaint, “the only persons who could have been defrauded [by the Stand Defendants’ alleged conduct] were the *donors* who gave the money [to the Stand Defendants based upon the claimed misrepresentations].” [ECF 173 at 20:13-15 (*italics added*)]. Furthermore, Plaintiffs’ claims of “extortion” by the Stand Defendants, which are essentially the same allegations as those asserted in the original Complaint (compare ECF 185 at ¶¶ 131-134 and 420-423 with ECF 1 at ¶¶ 193 and 196), remain defective because “[t]here was no alleged property transfer between [the Stand Defendants] and Resolute.” [ECF 173 at 21:1-18].

The FAC does eliminate several claims (violations of Georgia RICO statute, trademark dilution, and attorney’s fees) that had been included in the original Complaint. But it also adds two new causes of action for trade libel (Count V) and unfair business practices (Count IX). Those new causes of action are wholly derivative, dependent upon, and/or duplicative of Plaintiffs’ other defective claims. [Compare ECF 185 at ¶¶ 455-462 (defamation count) with 464-469 (trade libel count) and 493-497 (unfair business practices count)]. Just as Plaintiffs’ defamation claim fails, so too do their trade libel and unfair business practices’ causes of action.

By definition, the failure of Plaintiffs to plead facts sufficient to constitute any claim against the Stand Defendants under FRCP 12(b)(6) means Plaintiffs cannot meet their heavier burden under California’s anti-SLAPP statute to demonstrate a probability of prevailing on the merits of any of their state law claims. [ECF 173 at 25:2-16].

Based on the foregoing reasons, the Stand Defendants bring this Motion, respectfully requesting the Court to issue the following orders:

///

1. Dismissing, without leave to amend, each and every cause of action asserted against the Stand Defendants in Plaintiffs' FAC pursuant to FRCP 12(b)(6); and
2. Striking, without leave to amend, each and every state law cause of action (Counts IV-IX) asserted against the Stand Defendants in Plaintiffs' FAC pursuant to CCP § 425.16.

## **II. THE SPECIFIC ALLEGATIONS IN THE FAC AGAINST THE STAND DEFENDANTS**

The Stand Defendants play a microscopic role in Plaintiffs' massive 224 pages of allegations. Accordingly, for ease of reference, the Stand Defendants enumerate the limited specific facts actually attributed to them in the FAC, in chronological order, with citations to where they are located in the FAC *and* in Plaintiffs' original Complaint, as the vast majority are not new:

1. In 2009, Stand issued a series of reports that accused 3M of sourcing materials from the last remaining endangered forests, including Canada's Boreal Forest. [ECF 185 at ¶ 247; ECF 1 at ¶ 165].
2. On September 17, 2012, Mr. Paglia wrote to member companies of the Forest Product Association of Canada: "[W]e *understand* active logging and road building is occurring in areas originally designated off limits within the CBFA, including by Resolute in the Quebec region under priority CBFA planning." [italics added] [ECF 185 at ¶ 224 and ECF 185-4 #36; ECF 1 at ¶ 145 and ECF 1-1 Appendix F #41].
3. On September 18, 2012 Mr. Paglia wrote an email to Axel Springer "[a]ccusing Resolute of violating the CBFA." [ECF 185 Table A at 151:28-152-2].<sup>3</sup>
4. On April 25, 2013, Mr. Paglia wrote to Resolute about the potential for "very active campaigning" against it if Resolute did not honor the protected woodland caribou habitat. [ECF 185 at ¶ 131].
5. At a meeting at Resolute's office on May 7, 2013, Mr. Paglia stated that Stand and other ENGOS would advocate against Resolute's brand among its market constituents if Resolute did not forego harvesting rights. [ECF 185 at ¶¶ 132-133; ECF 1 at ¶ 193].
6. Between May 10, 2013 and May 14, 2013, Mr. Paglia communicated with Resolute's CEO that Stand intended to conduct a "coordinated campaign" against Resolute regarding its Forrest Stewardship Council certificates. [ECF 185 ¶ 134].
7. On May 21, 2013 Stand issued the following Tweet: "'@ResoluteFP won't do anything close to what science warrants to protect our #forest and threatened #caribou.' #CSR." [ECF 185-2 #46; ECF 1-1 Appendix C #42].

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<sup>3</sup> Plaintiffs fail to plead the actual contents of the email in the FAC, rendering it impossible to evaluate this email. Regardless, it is time-barred. CCP §§ 340(3) and 339(1).

- 8 In a May 2013 interview with the Globe and Mail concerning the CBFA negotiations, Mr. Paglia stated: “Getting environmentalists and logging companies to come to an agreement is not easy. We feel like Resolute is the bad apple, and that the rest of the bushel is in very good shape.” [ECF 185 at ¶ 227; ECF 1 at ¶ 148].
9. On December 17, 2013, Stand issued the following Tweets: (1) “Canada’s largest forest company, Resolute Forest Products, loses several ecocertifications #FSC” and (2) “Grand Council of the Crees wins suspension of Resolute Forest Products’ #FSC Certification.” [ECF 185 at ¶ 288; ECF 1 at ¶ 187].
10. After Best Buy announced on December 8, 2014 that it would shift business away from Resolute, Stand stated “Best Buy is just the beginning” and issued the following Tweet on January 13, 2015: “In 2015 is some of the biggest brands in the world are going to get as far away frm #Resolute as they can.” (sic) [ECF 185 at ¶ 258; ECF 1 at ¶ 175].
11. In August 2015, Stand wrote a letter to Resolute’s CEO stating that Resolute was “refusing to co-operate” in the CBFA.” [ECF 185 at ¶ 297; ECF 1 at ¶ 196].
12. On May 18, 2017, Mr. Paglia wrote a blog post questioning why different publishers were “still doing business with Resolute despite the company’s destructive logging” and explaining that “other big brands will be increasingly faced with choosing between being loyal to a company like Resolute or living up to their values.” [ECF 185 at ¶ 310].

### III. ARGUMENT

#### A. Motion to Dismiss

##### 1. Legal Standards

##### i. General Principles

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678. “Dismissal under Rule 12(b)(6) is appropriate . . . where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hospital Medical Center* (9th Cir. 2008) 521 F.3d 1097, 1104. A plaintiff must demonstrate “a right to relief above a speculative level . . . .” *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 555. This requires more than “[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements . . . .” *Ashcroft*, 556 U.S. at 678. Moreover, legal conclusions need not be taken as true merely because they are cast in the form of factual

allegations. *Roberts v. Corrothers* (9th Cir. 1987) 812 F.2d 1173, 1177; *W. Mining Council v. Watt* (9th Cir. 1981) 643 F.2d 618, 624. Stated otherwise, the complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

ii. **Actual Malice Standard for Defamation, Trade Libel, Tortious Interference with Prospective Business Relations, and Tortious Interference with Contractual Relations**

In order to state a cause of action for defamation, a plaintiff who is a public figure (or a limited public figure as is the case herein [see ECF 173 at 12:13-14]) must establish actual malice as to *each* defendant as to *each* purported defamatory statement. *Dodds v. American Broadcasting Company* (9th Cir. 1998) 145 F.3d 1053, 1059; *Murray v. Bailey* (N.D. Cal. 1985) 613 F.Supp. 1276, 1281. Indeed, the actual malice standard, which is a critical component of First Amendment protections for participation in public discourse (*New York Times Company v. Sullivan* (1964) 376 U.S. 254, 279-280), is “applicable to all injurious falsehood claims and not solely to those labeled ‘defamation.’” As such, a plaintiff cannot circumvent the actual malice element by “creative pleading” that “affix[es] labels other than ‘defamation’ to injurious falsehood claims.” *Blatty v. New York Times Company* (1986) 42 Cal.3d 1033, 1043 and 1045.

Thus, in *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.* (9th Cir. 2002) 306 F.3d 806, 821, the Ninth Circuit applied First Amendment limitations to claims for tortious interference with contractual relations and prospective economic relations that were based upon alleged injurious falsehoods, much like those brought by Plaintiffs here.<sup>4</sup> Similarly, in *Hoffman v. Capital Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d 1180, 1187, the Ninth Circuit provided constitutional protections to a defendant being sued for violations of common law and statutory rights of publicity, unfair competition, and the federal Lanham Act (trademark infringement). And in *Unelko Corporation v. Rooney* (9th Cir. 1990) 912 F.2d 1049, 1057-1058, the Ninth Circuit affirmed the dismissal of claims for product disparagement and

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<sup>4</sup> Plaintiffs’ causes of action against the Stand Defendants for tortious interference with prospective business relations and tortious interference with contractual relations (Counts VI and VII) are premised on the Stand Defendants’ “dissemination of false, misleading and defamatory statements concerning Plaintiffs’ business.” [ECF 185 at ¶¶ 473 and 482]. Stated otherwise, the alleged wrongful conduct that forms the basis of these claims is the same alleged injurious falsehoods that comprise the defamation and trade libel claims (Counts IV and V).

1 tortious interference with business relationships because the plaintiff could not meet “the same first  
 2 amendment requirements that govern actions for defamation.” First Amendment limitations,  
 3 including the actual malice standard, are equally applicable to a claim for trade libel. *Hofmann*  
 4 *Company v. E.I. du Pont de Nemours & Company* (1988) 202 Cal.App.3d 390, 397; *J-M*  
 5 *Manufacturing Company, Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97.<sup>5</sup>

6 To adequately plead actual malice, a plaintiff must demonstrate the alleged “statement was  
 7 made with knowledge of its falsity or reckless disregard for whether it was false, and that the  
 8 statement was materially false.” [ECF 173 at 12:14-17]. As this Court has explained, the actual  
 9 malice standard is a “demanding” one. [ECF 173 at 13:11-13]. The “complaint or counterclaim  
 10 may not simply recite the elements of a cause of action, but must contain sufficient allegations of  
 11 underlying facts to give fair notice and to enable the opposing party to defend itself effectively.”  
 12 *Eclectic Properties East, LLC v. Marcus & Millichap Company* (9th Cir. 2014) 751 F.3d 990, 996.  
 13 The plaintiff must show that the speakers “entertained serious doubts as to the truth” of their  
 14 statements. *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 324 at fn 6. This means that when an  
 15 organizational defendant is involved, such as Stand, “the state of mind required for actual malice  
 16 would have to be brought home to the persons in the [defendant’s] organization having  
 17 responsibility for the publication of the [statement].” *New York Times Company*, 376 U.S. at 287  
 18 [see also, ECF 173 at 13:25-14:3]. Moreover, ill will or bad faith is not enough. [ECF 173 at  
 19 15:13-14]. Neither is a profit-driven motive for publication. [ECF 173 at 15:21-25].

20 Consistent with these principles, the courts in the Ninth Circuit have carefully scrutinized  
 21 the sufficiency of allegations in complaints that implicate First Amendment protections. *Franchise*  
 22 *Realty Interstate Corporation v. San Francisco Local Joint Executive Board of Culinary Workers*  
 23 (9th Cir. 1976) 542 F.2d 1076, 1082-1086 [applying heightened pleading standard in recognition of  
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25 <sup>5</sup> Trade libel is simply defamation of a product or service. Whereas defamation “concerns the person or  
 26 reputation of plaintiff,” trade libel “relates to his goods.” *Shores v. Chip Steak Company* (1955) 130 Cal.App.2d 627,  
 27 630. Unsurprisingly then, Plaintiffs’ cause of action for trade label is virtually copy-and-pasted from their defamation  
 28 claim. [Compare ECF 185 at ¶¶ 455-462 (defamation count) with 464-469 (trade libel count)]. No new facts are  
 asserted against any of the defendants, let alone the Stand Defendants. To the contrary, one of the “categories” of  
 alleged false statements enumerated in the defamation claim is removed from the trade libel cause of action. [Compare  
 ECF 185 at ¶ 455(a)-(f) with ¶ 464(a)-(e)].

1 “the sensitivity of First Amendment guarantees to the threat of harassing litigation.”]; *Wynn v.*  
 2 *Chanos* (N.D. Cal. 2014) 75 F.Supp.3d 1228, 1239 [“The complaint’s allegations that [defendant]  
 3 ‘published [the statements] with reckless disregard for the truth’ . . . is conclusory, as it merely  
 4 recites an element of slander and does not present any potential supporting facts. This is  
 5 insufficient to satisfy the ‘demanding burden’ for pleading actual malice in defamation actions.”];  
 6 *Nicosia v. De Rooy* (N.D. Cal. 1999) 72 F.Supp.2d 1093, 1109 [granting motion to dismiss for  
 7 failure to state a claim and anti-SLAPP motion to strike brought under California law, noting that  
 8 “conclusory statements [in a pleading] that [the defendant] should have known the truth does not  
 9 satisfy the heightened pleading standard” and recognizing that “[e]conomic interests of the  
 10 defendant and animus toward the plaintiff cannot serve as a basis for actual malice.”]; *Barry v.*  
 11 *Time, Inc.* (N.D. Cal. 1984) 584 F.Supp. 1110, 1121-1122 [“[D]ismissal of the first amended  
 12 complaint for failure to plead actual malice with sufficient particularity is therefore required.”];  
 13 *Barger v. Playboy Enterprises, Inc.* (N.D. Cal. 1983) 564 F. Supp. 1151, 1156-1157 [dismissing  
 14 action based, in part, on inadequate allegations of actual malice, observing that “[t]he danger that  
 15 suits based on such flimsy allegations would pose to freedom of speech and of the press if allowed  
 16 to proceed is only too clear.”].

### 17 **iii. Specificity Requirements for RICO Claims Sounding in Fraud**

18 Generally, FRCP 8(a)(2) requires only “a short and plain statement of the claim showing  
 19 that the plaintiff is entitled to relief . . . [to] give the defendant fair notice of what the claim is and  
 20 the grounds upon which it rests.” *Id.* at 555. However, as this Court has noted, claims sounding in  
 21 fraud, such as Plaintiffs’ RICO counts, “are subject to a higher pleading standard” under FRCP  
 22 9(b). [ECF 173 at 9:8-11]. See also, *Edwards v. Marin Park, Inc.* (9th Cir. 2004) 356 F.3d 1058,  
 23 1066; *Mostowfi v. i2 Telecom International, Inc.* (9th Cir. 2008) 269 Fed.Appx. 621, 623-624  
 24 [applying Rule 9(b) to RICO claim, noting that “we have recognized that Rule 9(b) may apply to  
 25 claims – that although lacking fraud as an element – are ‘grounded’ or ‘sound’ in fraud” such as  
 26 when they allege “a uniform course of fraudulent conduct.”]. Pursuant to FRCP 9(b), a plaintiff  
 27 must “state with particularity the circumstances constituting fraud or mistake.” This “requires a  
 28 pleader of fraud [or RICO] to detail with particularity the time, place, and manner of each act of

1 fraud, plus the role of each defendant in each scheme.” *Lancaster Community Hospital v. Antelope*  
 2 *Valley Hospital District* (9th Cir. 1991) 940 F.2d 397, 405. In addition, the pleader must ““set forth  
 3 an explanation as to why the statement or omission complained of was false and misleading.””  
 4 *Mostowfi*, 269 Fed.Appx. at 624. “[G]eneral statements about actions committed by the  
 5 defendants,” failure to “specify who committed the violation” that serves the basis of each  
 6 predicate act, and “lump[ing] together the defendants without identifying the particular acts or  
 7 omissions that each defendant committed” is squarely insufficient and mandates dismissal. *Id.*

## 8 2. Analysis

### 9 i. Plaintiffs’ State-Law Causes of Action for (a) Defamation, 10 (b) Trade Libel, (c) Tortious Interference with Prospective 11 Business Relations, and (d) Tortious Interference with 12 Contractual Relations All Fail Because The Stand Defendants’ Alleged Statements are Time-Barred, Non- Defamatory on their Face, Constitute Protected Opinion, and/or Actual Malice is Not Adequately Pled

#### 13 A. Statute of Limitations

14 The California statute of limitations for defamation is one year. CCP § 340(3). The  
 15 California statute of limitations for trade libel (*Guess, Inc. v. Superior Court* (1986) 176  
 16 Cal.App.3d 473, 479), tortious interference with prospective business relations (*Knoell v.*  
 17 *Petrovich* (1999) 76 Cal.App.4th 164, 168; *Perfect 10, Inc. v. Visa International Service*  
 18 *Association* (9th Cir. 2007) 494 F.3d 788, 809-810), and tortious interference with contractual  
 19 relations (*Knoell*, 76 Cal.App.4th at 168) is two-years under CCP § 339(1). Plaintiffs commenced  
 20 this action on May 31, 2016. [ECF 1].

21 All of the statements alleged in Plaintiffs’ FAC against the Stand Defendants that occurred  
 22 prior to May 31, 2015 are unequivocally barred by CCP § 340(3). This would apply to #s 1-10 in  
 23 Section II of this brief. Similarly, all of the statements that took place before May 31, 2014 are  
 24 undisputably barred by CCP § 339(1). This would apply to #s 1-9 in Section II of this brief.

#### 25 B. Facially Non-Defamatory

26 Several of the statements attributed to the Stand Defendants merely express an intention to  
 27 engage in advocacy (i.e., “very active campaigning” and a “coordinated campaign” [see #s 4-6 in  
 28 Section II]) that may result in some brands having to evaluate their ethical values (see #s 10 and 12

in Section II). There is nothing improper, illegal, or inherently wrong about the Stand Defendants stating that an advocacy campaign may be undertaken to try and convince companies to take a closer look at environmental practices. Advocacy on an environmental issue is manifestly protected by the First Amendment. So too is the right of association. Certainly, nothing *defamatory* (or even false) regarding Plaintiffs is stated when the Stand Defendants say they will be campaigning against Plaintiffs' logging practices. Plaintiffs' attempt to characterize the Stand Defendants' conduct as "extortion" is unavailing as Plaintiffs admit – as they must – that "Resolute refused to acquiesce." [ECF 185 at ¶ 135]. Thus, as the Court already ruled, Plaintiffs' allegations do not meet the statutory definition for "extortion" under 18 U.S.C. § 1951(b)(2). [ECF 173 at 21:1-18].

Furthermore, truth is an absolute defense to defamation. *Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 581. The Stand Defendants' Tweets that Plaintiffs lost FSC certifications (see #9 in Section II) is admittedly true. Plaintiffs concede that some of their FSC certifications were suspended. [See, i.e., ECF 185 at ¶¶ 188, 194, 196, 288, and 482(m) and ECF 1 at ¶¶ 126, 132, 134, 187, and 300(d)].

### C. Protected Opinion

"The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damages." *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369 Only statements of fact – not opinions or "rhetorical hyperbole" – are actionable. CACI 1707; *Felauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401. California courts recognize that *context* is important in determining whether a statement is one of fact or opinion. Thus, "where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260; *Gregory v. McDonnell Douglas Corporation* (1976) 17 Cal.3d 596, 601. The Ninth Circuit recognizes that the expression of "different viewpoints . . . [is] a vital part of our democracy . . . ." *Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1154 [see also, ECF 173 at 16:7-10]. The

1 United States Supreme Court has likewise observed that “debate on public issues should be  
2 uninhibited, robust, and wide-open.” *New York Times Company*, at 270.

3 In *Baker*, the court held that an alleged defamatory statement that began with the phrase,  
4 “My impression is,” was a statement of opinion, not fact, noting that “[w]here the language of the  
5 statement is ‘cautiously phrased in terms of apparency,’ the statement is less likely to be reasonably  
6 understood as a statement of fact rather than opinion.” *Baker*, 42 Cal.3d at 256 and 260-262.  
7 Comparably, in *Gregory*, the court determined that an alleged defamatory company bulletin and  
8 letter that stated things like “we are seriously concerned with their *apparent* eagerness to prevent  
9 eligible employees from receiving their approved payments in a timely fashion,” “[t]he payment to  
10 eligible employees is far more important than the political aspirations and personal ambitions of  
11 local union leads who *apparently* are willing to sacrifice such payment,” and “[i]t is, indeed,  
12 unfortunate that our employees have had to wait so long because of *apparent* self-interest of a few  
13 leaders within UAW Local 148” when there was “[a]pparently . . . some internal politics,” was  
14 non-actionable opinion because it was “cautiously phrased in terms of apparency.” *Gregory*, 17  
15 Cal.3d at 599 and 603 (Italics added).

16 This reasoning applies with equal force to the September 17, 2012 letter attributed to Mr.  
17 Paglia that was sent to member companies of the Forest Product Association of Canada, where he  
18 stated “we *understand* active logging and road building is occurring in areas originally designated  
19 off limits within the CBFA.” [See #2 in Section II]. Indeed, the letter voicing Mr. Paglia’s  
20 “understanding” was made in the context of a public debate over the CBFA and to companies of  
21 the Forest Product Association of Canada who were directly involved in that debate.

22 The following statements are also unequivocal expressions of opinion, not statements of  
23 fact:

- 24 • “‘@ResoluteFP won't do anything close to what science warrants to  
25 protect our #forest and threatened #caribou.’ #CSR.” [See #7 in  
Section II].
- 26 • “Getting environmentalists and logging companies to come to an  
27 agreement is not easy. We feel like Resolute is the bad apple, and that  
the rest of the bushel is in very good shape.” [See #8 in Section II].

28 ///

- “Best Buy is just the beginning . . . In 2015 is some of the biggest brands in the world are going to get as far away from #Resolute as they can.” (sic) [See #10 in Section II].
- Resolute was “refusing to co-operate” in the CBFA.” [See #11 in Section II].
- Publishers that were “still doing business with Resolute despite the company’s destructive logging” and “other big brands will be increasingly faced with choosing between being loyal to a company like Resolute or living up to their values.” [See #12 in Section II].

#### D. No Actual Malice

The FAC fails to satisfy Plaintiffs’ “demanding burden” of pleading actual malice against the Stand Defendants. At most, Plaintiffs only include rote allegations that the Stand Defendants “falsely accused” Resolute (or 3M) of doing something. (See #s 1-3 of Section II). This is insufficient as a matter of law. The actual malice standard mandates more than just an allegation of falsity.

Moreover, many of the statements are alleged publications by Stand, the entity. (See #s 1, 7, 9, 10, and 11 of Section II). As this Court has previously explained:

One such detail regarding state of mind that must be pled is that the speaker itself held the requisite state of mind. “When there are multiple actors involved in an organizational defendant’s publication of a defamatory statement, the plaintiff must identify the individual responsible for publication of a statement, and it is that individual the plaintiff must prove acted with actual malice.” [Citation omitted.] “[T]he state of mind required for actual malice would have to be brought home to the persons in the [defendant’s] organization having responsibility for the publication of the [statement].” [Citation omitted.]

[ECF 173 at 13:25-14:3]. Plaintiffs were required to identify the individual at Stand responsible for the publications and specify his or her knowledge and state of mind. They do not do so.

Plaintiffs chiefly rest their actual malice theory against the Stand Defendants on some nefarious “operational memorandum” that was supposedly agreed upon by the Stand Defendants and other “enterprise” members to engage in a public campaign to falsely attack Plaintiffs. [ECF 185 at ¶¶ 76-79]. However, the actual quotations from the alleged “operational memorandum” simply indicate that the Stand Defendants intended to advocate their viewpoint that Plaintiffs’ forestry practices were not up to par with their environmental standards. Such advocacy is

1 quintessential conduct regarding a public issue that is protected by the First Amendment.  
 2 Throughout the FAC, *it is Plaintiffs* who editorialize this supposed “operational memorandum” by  
 3 adding words and phrases like “falsely” and “intentionally misrepresented” *in front* of the  
 4 purported quotations from the document. While it is clear that Plaintiffs disagree with the  
 5 defendants’ conclusions and *manner* of advocacy (i.e., in the Court’s phrase, their “choice of  
 6 tactics” [see ECF 173 at 4:3]), it is just as evident – as this Court has already advised – that “[t]he  
 7 academy, and not the courthouse, is the appropriate place to resolve scientific disagreements of this  
 8 kind.” [ECF 173 at 18:2-7].

9 Moreover, a cursory review of the alleged statements Plaintiffs take issue with, most  
 10 prominently (but not limited to) the “Exposed Report” and its accompanying photographs and  
 11 videos and the related “Backgrounder” [ECF 185 at ¶¶ 89-104], establish that it was *Greenpeace*  
 12 *Canada* (a non-party) and *Greenpeace USA* (or individuals from those entities) – not the Stand  
 13 Defendants – who were responsible for their dissemination. There is not a single factual allegation  
 14 demonstrating or plausibly implying that *the Stand Defendants* had any role in the publication of  
 15 those statements, which, in any event, *were retracted*. [ECF 185 at ¶ 114]. Even if Plaintiffs *could*  
 16 show the Stand Defendants’ involvement in publication, this Court previously noted that “[t]he  
 17 plausible inference from this allegation [the retraction] is that Greenpeace made a mistake, not that  
 18 it acted with malice.” [ECF 173 at 14:13-20]. Nor are there any specific allegations supplying facts  
 19 that the *Stand Defendants* had any knowledge that the information contained in the publications  
 20 was false, other than the conclusory, boilerplate “me too” allegation that the “Enterprise,”  
 21 including the Stand Defendants knew the material was false. “This is, at most, ‘a formulaic  
 22 recitation of the elements of a cause of action,’ which the Supreme Court has made clear ‘will not  
 23 do.’” [ECF 173 at 14:8-9]. Indeed, “the court must ‘disregard the portions of the complaint where  
 24 [the Plaintiff] alleges in a purely conclusory manner that the defendants had a particular state of  
 25 mind in publishing the statements . . . .” [ECF 173 at 12:27-13:1].

#### 26 E. Summation

27 Each of the few statements specifically attributable to the Stand Defendants asserted in  
 28 Plaintiffs’ FAC is not actionable. Virtually all of them are barred by both the one-year statute of

1 limitations for defamation (CCP § 340(3)) and two-year statute of limitations for trade libel,  
 2 tortious interference with prospective business relations, and tortious interference with contractual  
 3 relations (CCP § 339(1)). Many of the statements are not defamatory on their face. Similarly, the  
 4 statements advocate viewpoints (opinions) on environmental issues that are protected by the First  
 5 Amendment. When a factual statement is asserted, such as Resolute losing FSC certificates, it is  
 6 admittedly accurate. Plaintiffs have not addressed this Court's concerns with actual malice as  
 7 applied to the Stand Defendants. Because there was no underlying wrongful conduct (i.e.,  
 8 defamation or trade libel), there can be no tortious interference with prospective business relations  
 9 or contractual relations.

10 For each of these reasons, Plaintiffs' state law claims for (1) defamation, (2) trade libel, (3)  
 11 tortious interference with prospective business relations, and (4) tortious interference with  
 12 contractual relations fail to state a claim upon which relief can be granted.

13  
 14 **ii. Plaintiffs' Causes of Action for RICO Violations Fail Because**  
**They Do Not Adequately Plead the Required Elements**

15 **A. RICO Elements**

16 The federal RICO statute makes it illegal to conduct, participate in, or invest in a *criminal*  
 17 enterprise that engages in a pattern of racketeering activity. 18 U.S.C. § 1962. It is also illegal to  
 18 conspire to do any of those things. 18 U.S.C. § 1962(d). The Ninth Circuit recognizes that RICO  
 19 was "intended to combat organized crime, not to provide a federal cause of action and treble  
 20 damages to every tort plaintiff." *Oscar v. University Students Co-operative Association* (9th Cir.  
 21 1992) 965 F.2d 783, 786 (abrogated on other grounds by *Diaz v. Gates* (9th Cir. 2005) 420 F.3d  
 22 897). Yet this is precisely what Plaintiffs have attempted (unsuccessfully) to do here by re-labeling  
 23 their defunct tort claims as the affairs of a vague racketeering enterprise.

24 To show a RICO violation, a plaintiff must allege "(1) conduct (2) of an enterprise (3)  
 25 through a pattern (4) of racketeering (known as 'predicate acts') (5) causing injury to the plaintiff's  
 26 'business or property.'" *Grimmet v. Brown* (9th Cir. 1996) 75 F.3d 506, 510; *Odom v. Microsoft*  
 27 *Corporation* (9th Cir. 2007) 486 F.3d 541, 547 [see also, ECF 173 at fn. 12].

28 ///

## 1. Conduct

The “conduct” element mandates that the defendant have some part in directing the affairs of the enterprise. This requires actual participation in the operation or management of the enterprise itself. *Reves v. Ernst & Young* (1993) 507 U.S. 170, 179. In determining whether the conduct element has been satisfied, factors examined include whether the defendant “occup[ies] a position in the ‘chain of command,’” “knowingly implements [the enterprise’s] decisions,” or is “indispensable to achievement of the enterprise’s goal.” *Walter v. Drayson* (9th Cir. 2008) 538 F.3d 1244, 1249. “One can be ‘part’ of an enterprise without having a role in its management and operation. Simply performing services for the enterprise does not rise to the level of direction, whether one is ‘inside’ or ‘outside’ of the alleged corporate enterprise.” *Id.* And “merely alleging the ‘formulaic recitation of the elements of a cause of action,’ such as ‘Defendants conduct, participate in and are members of the . . . Enterprise,’ is inadequate.” *Gaines v. Home Loan Center, Inc.* (C.D. Cal. 2010) 2010 WL 11506442, at \*14.

## 2. Enterprise

The RICO statute defines the term “enterprise” to be either a formal association of entities or “any union or group of individuals [or entities] associated in fact.” 18 U.S.C. § 1961(4). A single individual or entity cannot be both the RICO enterprise and an individual defendant. *Rae v. Union Bank* (9th Cir. 1984) 725 F.2d 478, 481. Thus, to establish an enterprise, the plaintiff must “show[] that the defendants conducted or participated in the enterprise’s affairs, not just their *own* affairs.” *Reves*, 507 U.S. at 185 (emphasis in original). “The ‘enterprise’ is not the ‘pattern of racketeering activity’; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved.” *United States v. Turkette* (1981) 452 U.S. 576, 583. Allegations that different entities or individuals engaged in parallel conduct do not plausibly establish a RICO “enterprise.” *Mazur v. eBay, Inc.* (N.D. Cal. 2008) 2008 WL 2951351 at \*6-7 [“plaintiff’s argument that eBay’s knowledge of the misconduct, its inaction in light of such misconduct, its own fraudulent statements, and the co-defendants’ parallel behavior are all, even when taken together, insufficient to survive this motion to dismiss.”]; *Vertkin v. Wells Fargo Home Mortgage* (N.D. Cal. 2011) 2011

WL 175518 at \*4 [dismissing RICO claim, noting that “[a]ll [plaintiff] has done is locate parallel conduct.”]; *American Dental Association v. Cigna Corporation* (11th Cir. 2010) 605 F.3d 1283, 1292-1293. In addition, a defendant in a RICO action must have had “some knowledge of the nature of the enterprise . . . to avoid an unjust association of the defendant[s] with the crimes of others.” *United States v. Christensen* (9th Cir. 2015) 828 F.3d 763, 780.

### 3. Pattern of Racketeering Activity

A “pattern of racketeering activity” means “at least two acts of racketeering activity” occurring within ten years. 18 U.S.C. § 1961(5). The RICO statute lists dozens of acts that constitute “racketeering activity” (generally referred to as “predicate acts”). 18 U.S.C. § 1961(1). However, as a matter of law, defamation is not one of them. *Harris v. City of Seattle* (W.D. Wa. 2004) 315 F.Supp.2d 1112, 1121; *Hourani v. Mirtchev* (D.C. Cir. 2015) 796 F.3d 1, 10 at fn. 3; *Kimberlin v. National Bloggers Club* (D. Md. 2015) 2015 WL 1242763 at \*9; *Kimm v. Lee* (S.D. N.Y. 2005) 2005 WL 89386 at \*5; *Creed Taylor, Inc. v. CBS, Inc.* (S.D. N.Y. 1989) 718 F.Supp. 1171, 1180 “[Plaintiff’s] attorney came perilously close to violating Rule 11 in his pleading of [plaintiff’s] RICO claims” as “[t]he insufficiency of a defamation charge as a RICO predicate act is ascertainable from face of the statute.”]; *Contes v. City of New York* (S.D. N.Y. 1999) 1999 WL 500140 at \*8. Courts are likewise “universally hostile” to attempts to “spin an alleged scheme to harm a plaintiff’s professional reputation into a RICO claim.” *Kimberlin*, 2015 WL 1242763 at \*9.

### 4. Proximate Causation

To have standing to bring a RICO claim, a plaintiff must show that the alleged RICO violation proximately caused injury to its business or property. *Holmes v. Securities Investor Protection Corporation* (1992) 503 U.S. 258, 268; *Chaset v. Fler/Skybox International LP* (9th Cir. 2002) 300 F.3d. 1083, 1086. “When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led *directly* to the plaintiff’s injuries.” *Anza v. Ideal Steel Supply Corporation* (2007) 547 U.S. 451, 463-64 (*italics added*). This is distinct from mere “foreseeability.” The Supreme Court has articulated three reasons why proximate cause is such an important element in the analysis of the pleading sufficiency of a RICO claim:

First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

*Holmes*, 503 U.S. at 269-270. As this Court explained, the Ninth Circuit has distilled the factors articulated by the *Holmes* Court into the following three considerations:

1. Whether there are more direct victims of the alleged wrongful conduct;
2. Whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and
3. Whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

[ECF 173 at 20:7-12 (citing to *Mendoza v. Zirkle Fruit Company* (9th Cir. 2002) 301 F.3d 1163, 1168-1169)].

## 5. Conspiracy

As to a RICO conspiracy claim under 18 U.S.C. § 1962(d), where plaintiffs fail to plead facts sufficient to state a claim under subsections (a), (b), or (c), the conspiracy claim must be dismissed as well. *Wagh v. Metris Direct, Inc.* (9th Cir. 2003) 363 F.3d 821, 831 ["Since [plaintiff] has not satisfied the pleading requirements for any of those subsections, he has also not alleged sufficient facts to state a claim under [§ 1962(d)]."] (overruled on other grounds in *Odom v. Microsoft Corporation* (9th Cir. 2007) 486 F.3d 541, 551).

### B. Plaintiffs' RICO Claims Fail to Adequately Plead the Required Elements

#### 1. No Conduct

The allegations in Plaintiffs' FAC, taken at face value, establish that the Stand Defendants had no part in directing the affairs of the so-called "enterprise." It was *Greenpeace Canada* (a non-party) and *Greenpeace USA* (or individuals from those entities) – not the Stand Defendants – who

1 were responsible for managing and operating the purported “enterprise.” This is readily gleaned by  
 2 whom Plaintiffs allege was responsible for the publication and dissemination of the overwhelming  
 3 majority of the statements and reports at issue. [See, i.e., ECF 185 at ¶¶ 89-104].

4 True, Plaintiffs summarily allege that “ForestEhtics [Stand] *participated* directly and  
 5 indirectly in the criminal enterprise, by among other things, *echoing* the falsehoods that  
 6 Greenpeace was disseminating in reports, direct communications, and on Twitter, threatening  
 7 Resolute’s executives, its customers, and stakeholders, and engaging in other wrongful conduct.”  
 8 [ECF 185 at ¶ 41(m) (*italics added*)]. Yet, mere *participation* in an “enterprise” or simply  
 9 performing services for the “enterprise” is insufficient as a matter of law. *Walter*, at 1249. Indeed,  
 10 Plaintiffs implicitly concede that Stand was not a decision-maker or part of the chain of command  
 11 of the alleged “enterprise” since it was only “echoing” what others had already decided and done.  
 12 *Id.* Plaintiffs do also allege that Mr. Paglia “had responsibility for operating and managing  
 13 ForestEthics’ [Stand’s] coordinated role and participation in the Enterprise’s campaign directed at  
 14 Resolute alleged herein.” [ECF 185 at ¶ 41(n)]. But even loosely construed, this is nothing more  
 15 than an insufficient “formulaic recitation of the elements of a cause of action.” *Gaines*, 2010 WL  
 16 11506442, at \*14; see also ECF 173 at 14:8-9. In actuality, however, all that is alleged is that Mr.  
 17 Paglia was responsible for *Stand’s* role and participation in the Enterprise – *not* the operation and  
 18 management of the Enterprise *itself*. As the preceding paragraph of the FAC establishes, *Stand’s*  
 19 supposed minimal role and participation was secondary, at best.

## 20 2. No Enterprise

21 Even assuming for the sake of argument that Plaintiffs have alleged the Stand Defendants’  
 22 engagement in “predicate acts” under the RICO statute (they have not – see below), Plaintiffs have  
 23 not pled an “enterprise” that is distinct from the pattern of predicate acts that they claim. *Turkette*,  
 24 452 U.S. at 583.

25 As in their original Complaint, the FAC contends that the Stand Defendants made false  
 26 statements about Plaintiffs to induce donations to Stand and thereby fund Stand’s operations.  
 27 [Compare ECF 185 at ¶¶ 41(m), 41(n), and 48 with ECF 1 at ¶¶ 41(m), 41(n), and 48]. Stand is  
 28 undisputably an organization engaged in environmental advocacy, which, as part of its *own*

operations, seeks donations from the public to help further its environmental campaigns. Plaintiffs have not alleged how the Stand Defendants' purportedly false statements benefit the claimed RICO "enterprise," which is made up of the other defendants, each of whom is also alleged to have made false representations about Plaintiffs to induce donations to their own respective organizations. The FAC impermissibly attempts to assert the existence of a RICO "enterprise" based on a pattern of allegedly bad acts that the Stand Defendants (and all of the other defendants) committed in the independent operations of their own respective organizations. In other words, Plaintiffs have not alleged an "enterprise" that is distinct from the predicate acts themselves; they have merely alleged a pattern of parallel activity purportedly committed by all of the defendants for the benefit of their own organizations. *Mazur*, 2008 WL 2951351 at \*6-7; *Vertkin*, 2011 WL 175518 at \*4; *American Dental Association*, 605 F.3d at 1292-1293. Allegations that the Stand Defendants' supposed predicate acts simply amount to a part of their usual activities does not constitute sufficient allegations of a RICO enterprise, and RICO claims based on such allegations must be dismissed. *Reves*, at 185.

### 3. No Pattern of Racketeering Activity

The FAC fails to allege a pattern of racketeering activity by the Stand Defendants. While Plaintiffs' seek to apply generic RICO labels to the Stand Defendants' purported actions (i.e., "mail and wire fraud," "extortion," "computer fraud," "money laundering"), it is evident that the underlying conduct is nothing more than alleged defamation. Defamation is not a predicate act under the RICO statute. *Harris*, 315 F.Supp.2d at 1121; *Hourani*, 796 F.3d at 10 at fn. 3; *Kimberlin*, at \*5; *Creed Taylor, Inc.*, 718 F.Supp. at 1180; *Contes*, 1999 WL 500140 at \*8. Plaintiffs cannot spin a claim for defamation into a RICO count, no matter how many pages of paper they use in their attempt. *Kimberlin*, at \*9.

### 4. No Proximate Causation

With respect to Plaintiffs' original Complaint, the Court held that Plaintiffs had "failed to show proximate cause as to its RICO claims." [ECF 173 at 20:3]. The Court observed that "Resolute does not explain how it is the victim of [defendants'] fundraising scheme, given that the only persons who could have been defrauded were the donors who gave the money." [ECF 173 at

20:13-15]. In addition, “to the extent that Resolute can claim harm, determining the amount of Resolute’s damages attributable [to defendants’] advocacy would be very difficult, because there are numerous reasons why a customer might cease or interrupt its relationship with Resolute, as Resolute itself acknowledges.” [ECF 173 at 20:15-18]. These defects remain.

This Court’s first holding corresponded directly with the reasoning applied in *Kimberlin*, which was based on strikingly similar facts to the case at bar. The plaintiff in *Kimberlin* alleged that the defendants had formed a criminal enterprise to spread false and defamatory information about him “to raise money from people who believed and supported the [defendants’] false narrative.” *Kimberlin*, at \*1. The *Kimberlin* court found that the plaintiff had failed to establish proximate cause, explaining that “the direct victims of the mail fraud, wire fraud, and money laundering are the individuals who were induced into making donations. If [the plaintiff’s] allegations are true, these individuals may pursue their own remedies under the law.” *Id.* at \*13. Accordingly, the court dismissed the plaintiff’s RICO claims.

Here, Plaintiffs are likewise seeking to recover damages for alleged predicate acts that were directed at third parties. This is prominently highlighted in the very first paragraph of the FAC:

‘Greenpeace’ has fraudulently induced people throughout the United States and the world to donate millions of dollars based on materially false and misleading claims about its purported environmental purpose and its ‘campaigns’ against targeted companies.

[ECF 185 at ¶ 1]. It is then specifically repeated as to the Stand Defendants:

ForestEthics [Stand] . . . worked closely with GP-Inc. and Greenpeace Canada in both the dissemination of disinformation and the subsequent aggressive attacks on Resolute’s customers and did so to participate in the opportunity to induce donations based on the fraudulent disinformation that would perpetuate these organizations and pay the salaries of its owners and leaders . . . .

[ECF 185 at ¶ 48].

In fact, Plaintiffs emphasize *throughout* the FAC that prospective *donors* – not Plaintiffs – were the target of the alleged fraudulent activity:

///

- 1 • “Greenpeace’s most important audience is its prospective donors . . .  
2 Greenpeace uses what it calls internally ‘ALARMIST  
3 ARMAGEDDONIST FACTOIDS’ to induce donations and other  
4 support it would not otherwise receive . . . Of course, were such  
5 disclaimers shared with the public when it is bombarded by the  
6 untruths these corrupt organizations use to ‘emotionalize donors and  
7 induce contributions, few if any would make such contributions.”  
8 [See ECF 185 at ¶ 3].
- 9 • Greenpeace “promotes to potential donors.” [See ECF 185 at ¶ 4].
- 10 • “The ‘Resolute: Forest Destroyer’ campaign has fraudulently  
11 induced many millions of dollars in donations from regular working  
12 class people.” [See ECF 185 at ¶ 18].
- 13 • “The common purpose of the Enterprise was to target Resolute with  
14 a disinformation campaign that could be used to fraudulently induce  
15 millions of dollars in donations from individual donors and  
16 foundations . . .” [See ECF 185 at ¶ 43].
- 17 • “Greenpeace International used the disinformation campaign to  
18 directly and fraudulently induce donations . . .” [See ECF 185 at ¶  
19 44].
- 20 • “GP-Fund benefited from this participation by fraudulently inducing  
21 donations to itself . . .” ECF 185 at ¶ 45].
- 22 • “GP-Inc. and enterprise members Brindis, Moas, and Skar  
23 aggressively prosecuted the disinformation campaign to fraudulently  
24 induce donations . . .” [See ECF 185 at ¶ 46].
- 25 • “Greenpeace Canada used the disinformation campaign to  
26 fraudulently induce donations . . .” [See ECF 185 at ¶ 47].
- 27 • Greenpeace has “strayed further and further away from legitimate  
28 environmental work to schemes for generating monies necessary to  
perpetuate the salaries of [its] officers and employees and to continue  
fundraising . . . But Greenpeace has consistently focused instead on  
sensational headlines that are divorced from real issues and the truth,  
and crafted instead at maximizing donations.” [See ECF 185 at ¶ 50].
- “Greenpeace needs to ‘emotionalize’ issues rather than report facts to  
generate sufficient donations . . .” [See ECF 185 at ¶ 53].
- “But coherence, science, and truth are not important to Greenpeace  
leadership; inducing donations by whatever means necessary is.”  
[See ECF 185 at ¶ 60].
- “[T]he Greenpeace Defendants decided [their time] would be better  
spent on a sensational public campaign against Resolute that would  
generate substantial publicity and donations for the Greenpeace  
network . . .” [See ECF 185 at ¶ 74].
- “The only party who is genuinely not interested in these  
considerations is the Enterprise, which is a stranger to the Boreal  
with no skin in the game other than using the Boreal to raise money

1 . . . .” [See ECF 185 at ¶ 181].

- 2 • “[E]ach of these Enterprise members continue to solicit donations  
3 based on the false and misleading allegations set forth in the rebutted  
4 report.” [See ECF 185 at ¶ 205].
- 5 • “[T]he Enterprise continues to solicit donations based on the false  
6 and misleading allegations set forth in those rebutted reports.” [See  
7 ECF 185 at ¶ 211].
- 8 • “[T]he Enterprise continues to solicit donations based on the false  
9 and misleading allegations set forth in those rebutted reports.” [See  
10 ECF 185 at ¶ 380].
- 11 • “[T]he Enterprise, through Amy Moas of Greenpeace USA, issued  
12 the sensational and false report ‘Exposed: 3M Sourcing From Forest  
13 Destruction’ that solicited donations . . . .” [See ECF 185 at ¶ 405].
- 14 • “[T]he Enterprise then used the mails and wires to direct false and  
15 misleading ‘ALARMIST ARMAGEDDONIST FACTOIDS’ casting  
16 Resolute as villain of the Canadian Boreal Forest in order to  
17 ‘emotionalize’ and manipulate prospective donors.” [See ECF 185 at  
18 ¶ 413].
- 19 • “Over the past four years, the Defendants used the mails and wires to  
20 execute this scheme to defraud donors. Each of the Defendants, in  
21 furtherance of and for the purpose of executing and attempting to  
22 execute this scheme and artifice to defraud donors, on numerous  
23 occasions committed acts, used and caused to be used wire  
24 communications in interstate and foreign commerce and U.S. mails,  
25 by both making and causing to be made wire communications and  
26 mailings.” [See ECF 185 at ¶ 414].
- 27 • “[U]pon information and belief, the Enterprise disseminated  
28 falsehoods about Resolute by phone, through electronic mail, and  
U.S. mail to these donors and prospective donors.” [See ECF 185 at  
¶ 416].
- “Greenpeace International, GP-Fund, GP-Inc., and Greenpeace  
Canada have processed millions of dollars in fraudulently induced  
donations over the wires in thousands of individual transactions.”  
[See ECF 185 at ¶ 417].
- “These predicate acts were intended to and did mislead donors about  
the Plaintiffs and the putative impact of their harvesting on the  
environment in order to fraudulently induce donors to donate to  
Greenpeace’s campaign . . . .” [See ECF 185 at ¶ 418].

Stand’s donors are the “directly injured victims” of the purported RICO violations asserted  
by Plaintiffs because the donors are the ones who may have acted in reliance upon the claimed

1 misrepresentations, and it is those donors who “can generally be counted on to vindicate the law as  
 2 private attorneys general,” if what Plaintiffs allege is true. *Holmes*, at 269-70. Plaintiffs have no  
 3 standing to vindicate harm to Stand’s donors.

4 Similarly, nothing has changed in regards to the Court’s second holding. Plaintiffs cannot  
 5 plausibly allege that the only reason the Stand Defendants received donations was its alleged  
 6 misrepresentations about Plaintiffs. As Plaintiffs admit in the FAC – like they did in their original  
 7 Complaint – the defendants pursue advocacy campaigns for many different causes, including  
 8 nuclear waste, climate change, disappearing ice shelves, harmful commercial fishing tactics, and  
 9 endangered animal species. [Compare ECF 185 at ¶¶ 51-52, 56, 58-60, 64-65 with ECF 1 at ¶¶  
 10 52-53, 57, 59-61, and 65-66]. Plaintiffs likewise acknowledge – again – that the Stand Defendants  
 11 engage in many campaigns other than “the one directed at Resolute.” [Compare ECF 185 at ¶  
 12 41(m) with ECF 1 at ¶ 41(m)]. If, as Plaintiffs concede, the Stand Defendants receive donations for  
 13 many different reasons, and engage in many different campaigns, then the donations allegedly  
 14 funding the supposed RICO enterprise are not proximately caused by any of the alleged  
 15 misrepresentations or other predicate acts. Therefore, the donations the Stand Defendants receive  
 16 and use to pay expenses are not “attributable to the [alleged RICO violations], as distinct from  
 17 other, independent, factors.” *Holmes*, 503 U.S. at 269. Additionally, it would be impossible for the  
 18 Court to require the Stand Defendants to “disgorge[]” its allegedly “illicit proceeds” attributable  
 19 only to donations caused by the statements that are the subject of Plaintiffs’ claims. [Compare ECF  
 20 185 at ¶¶ 436, 444, and 453 with ECF 1 at ¶¶ 236, 244, and 253]. Stand’s donors presumably were  
 21 motivated by any number of advocacy campaigns and other factors, very few of which relate  
 22 specifically to Plaintiffs. As the Supreme Court has stated, the difficulty in “adopt[ing]  
 23 complicated rules apportioning damages among plaintiffs removed at different levels of injury  
 24 from the violative acts” militates against a finding of proximate cause. *Holmes*, at 269.

25 In short, Plaintiffs have still failed to plead an injury proximately caused by the alleged  
 26 RICO violations. Those claims must be dismissed.

27 ///

28 ///

## 5. No RICO Conspiracy

As Plaintiffs have failed to sufficiently plead facts to support any substantive RICO claim, their RICO conspiracy cause of action (Count III) must also be dismissed. *Wagh*, 363 F.3d at 831.

### C. Summation

The FAC, like its predecessor, fails to adequately plead the elements of a RICO violation by the Stand Defendants. The Stand Defendants did not direct the so-called “enterprise.” In fact, there was no “enterprise,” only parallel conduct wherein the various defendants supposedly committed bad acts in the independent operations of their own respective organizations to induce donations from the public. Defamation is not a predicate act under the RICO statute. Plaintiffs’ cannot establish proximate cause since it was the *donors* – not Plaintiffs – who are the alleged “directly injured victims.” And because there was no underlying RICO violation, there was no RICO conspiracy.

For each of these reasons, Plaintiffs’ RICO causes of action (Counts I-III) fail to state a claim upon which relief can be granted.

### iii. Plaintiffs’ Cause of Action for Unfair Business Practices Fails for the Same Reasons as Plaintiffs’ Defective Defamation Claim

Plaintiffs’ new count for unfair business practices (like their cause of action for trade libel) is based entirely on their defunct defamation claim. [Compare ECF 185 at ¶¶ 455-462 (defamation count) with ¶¶ 493-497 (unfair business practices count)].

As California courts have explained, the viability of an unfair business practices cause of action “stands or falls” with the underlying claim it is founded upon. *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 178; *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1068 [“Because the unfair competition claim utilizes the [Unruh] Act as its triggering statute, if no violation of the Act has been demonstrated, the entire action must be stricken.”]; *Van Ness v. Blue Cross of California* (2001) 87 Cal.App.4th 364, 376 [unfair business practices cause of action dismissed when summary judgment rendered on underlying claims]. The Ninth Circuit has reached the same conclusion. *Denbicare U.S.A., Inc. v. Toys “R” US, Inc.* (9th Cir. 1996) 84 F.3d 1143, 1152-1153 [“Thus, since dismissal of Denbicare’s Lanham Act claim was

proper, dismissal of its § 17200 claim was proper as well.”] (abrogated on other grounds in *Kirtsaeng v. John Wiley & Sons, Inc.* (2013) 568 U.S. 519); *Renick v. Dun & Bradstreet Receivable Management Services* (9th Cir. 2002) 290 F.3d 1055, 1058 [“Dun & Bradstreet’s notice also did not constitute an ‘unlawful, unfair or fraudulent business act or practice,’ in violation of California Unfair Business Practices Act, Cal. Bus. & Prof. Code § 17200, because the state claim hinges on Renick’s rejected federal claim.”].

Since Plaintiffs’ defamation (and trade libel) counts fail, so too does their derivative unfair business practices cause of action.

iv. **Plaintiffs’ Cause of Action for Common Law Civil Conspiracy Fails Because They Have Not Pleaded the Existence of a Conspiracy or the Commission of Any Underlying Tort**

Plaintiffs’ cause of action for common law conspiracy in their FAC is *identical* to what they alleged in their original Complaint. [Compare ECF 185 at ¶¶ 488-491 with ECF 1 at ¶¶ 306-309]. As with their original Complaint, those allegations are insufficient as a matter of law. Plaintiffs merely allege that “[e]ach of the Defendants shared the same conspiratorial objective.” [ECF 185 at ¶ 488]. But Plaintiffs do not allege how any of the defendants actually engaged in the alleged conspiracy, other than to assert that the defendants all made similar statements about Plaintiffs. There is nothing inherently illegal or improper about coordinating behavior or statements in pursuit of an advocacy campaign. As the Supreme Court has explained, “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.” *NAACP v. Alabama ex. rel. Patterson* (1958) 357 U.S. 449, 460. Accordingly, Plaintiffs cannot make out a civil conspiracy claim merely by alleging that some of the defendants made similar statements about Plaintiffs.

In addition, a prerequisite to a civil conspiracy claim is the committing of an underlying tort. *Okun v. Superior Court* (1981) 29 Cal.3d 442, 454 [“A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damages.”]; *Applied Equipment Corporation v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.

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1 Because Plaintiffs have failed to state a claim for any of the torts they assert in their FAC, their  
2 civil conspiracy count likewise fails.

3 **B. Anti-SLAPP Motion to Strike**

4 **1. Legal Standards**

5 The California Legislature developed the anti-SLAPP statutory scheme enumerated by  
6 California Code of Civil Procedure § 425.16 due to “a disturbing increase in lawsuits brought  
7 primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition  
8 for the redress of grievances.”

9 In pertinent part, the anti-SLAPP statute provides:

10 (b)(1) A cause of action against a person arising from any act of that person in  
11 furtherance of the person’s right of petition or free speech under the  
12 United States or California Constitution in connection with a public issue  
13 shall be subject to a special motion to strike, unless the court determines  
14 that the plaintiff has established that there is a probability that the plaintiff  
15 will prevail on the claim.

16 An “act in furtherance of a person’s right of petition or free speech under the United States  
17 or California Constitution in connection with a public issue” is defined to include:

- 18 1. Any written or oral statement or writing made before a legislative,  
19 executive, or judicial proceeding, or any other official proceeding  
20 authorized by law;
- 21 2. Any written or oral statement or writing made in connection with an  
22 issue under consideration or review by a legislative, executive, or  
23 judicial body, or any other official proceeding authorized by law;
- 24 3. Any written or oral statement or writing made in a place open to the  
25 public or a public forum in connection with an issue of public  
26 interest; or
- 27 4. Any other conduct in furtherance of the exercise of the  
28 constitutional right of petition or the constitutional right of free  
speech in connection with a public issue or an issue of public  
interest.

California Code of Civil Procedure § 425.16(e).

The anti-SLAPP statute involves a two part test. First, the defendant must make a  
threshold showing that the challenged cause of action arises from a constitutionally protected  
activity. Second, once the defendant has made this threshold showing, the burden shifts to the  
plaintiff to demonstrate that he or she has a reasonable probability of prevailing on the challenged

1 claims. In order to do so, the plaintiff must establish that the complaint is legally sufficient and  
 2 supported by a sufficient prima facie showing of facts to sustain a favorable judgment. *Navellier v.*  
 3 *Sletten* (2003) 106 Cal.App.4th 763, 766 and 768; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901,  
 4 907; *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* (9th Cir. 2013) 724 F.3d  
 5 1268, 1272-1273; *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1024; *Metabolife International,*  
 6 *Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, 840. In this sense, the plaintiff's burden on the  
 7 second prong is analogous "to that of a party opposing a motion for summary judgment."  
 8 *Navellier*, 106 Cal.App.4th at 768.

9 The anti-SLAPP statute is construed broadly. California Code of Civil Procedure §  
 10 425.16(a); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60, fn. 3. To this  
 11 end, a moving party need not demonstrate that the plaintiff's subjective intent in filing a lawsuit  
 12 was to chill the defendant's exercise of constitutional rights. *Id.* at 58-60. Rather, "the critical  
 13 consideration is whether the cause of action is *based on* the defendant's protected free speech or  
 14 petitioning activity." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89. Similarly, a "public issue" or an  
 15 "issue of public interest" includes "not only governmental matters, but also private conduct that  
 16 impacts a broad segment of society and/or that affects a community in a manner similar to that of a  
 17 governmental entity." *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.  
 18 This definition extends to issues that are not necessarily of interest to the entire public, but rather to  
 19 a limited, definable portion of the public, so long as the protected activity occurs "in the context of  
 20 an ongoing controversy, dispute or discussion." *Du Charme v. International Broth. of Elec.*  
 21 *Workers, Local 45* (2003) 110 Cal.App.4th 107, 118-119. Moreover, as this Court has already  
 22 recognized, California's anti-SLAPP statute applies to state law claims brought in federal court.  
 23 [ECF 173 at 22:14-21].

## 24 2. Analysis

25 This Court has already determined "it is clear that the Defendants were involved in  
 26 protected activity with respect to Resolute's state claims." [ECF 173 at 24:11-25:1]. The law of the  
 27 case dictates that the first prong of the anti-SLAPP analysis has been satisfied.

28 ///

1 So too has the second prong. Again, as held by the Court, “if Plaintiffs cannot plead a  
 2 plausible cause of action under the FRCP 12(b)(6) standard, then Plaintiffs as a matter of law  
 3 cannot meet the probability of success on the merits standard.” [ECF 173 at 25:2-16]. For the  
 4 reasons stated above, each of Plaintiffs’ claims against the Stand Defendants fails to survive a  
 5 Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly,  
 6 Plaintiffs are therefore unable to satisfy the probability of success on the merits requirement  
 7 necessary to defeat the Stand Defendants’ anti-SLAPP Motion to Strike on their state law claims  
 8 (Counts IV-IX).

#### 9 IV. CONCLUSION

10 The Stand Defendants have been sued by Plaintiffs and accused of criminal racketeering  
 11 and other wrongdoing merely because they chose to engage in public advocacy regarding issues of  
 12 significant public importance and intense debate: climate change and sustainable forestry practices.  
 13 The purpose of this lawsuit is not even thinly-veiled -- it is patently clear: Plaintiffs, who are on  
 14 one side of the debate, seek to use the power of the Court to stifle those who advocate positions on  
 15 the other side of the debate. That effort runs contrary to the concept of vigorous public discourse  
 16 and debate that is essential to the evolution and exchange of ideas in a free society and that is  
 17 embodied in the First Amendment. Notably, Plaintiffs do not dispute the existence of the debate --  
 18 their experts have acknowledged it. Nevertheless, Plaintiffs effectively seek to silence one side of  
 19 the debate. But when there is a debate of public importance, with both sides claiming that the other  
 20 side’s arguments are wrong, or even damaging, “the remedy to be applied is more speech, not  
 21 enforced silence.” *Whitney v. California* (1927) 274 U.S. 357, 377 (Brandeis, J., concurring).

22 For the all of the reasons expressed herein, the Stand Defendants respectfully request the  
 23 Court to issue orders granting their Motion to Dismiss and anti-SLAPP Motion to Strike, without  
 24 leave to amend. Plaintiffs were afforded an opportunity to re-plead their claims. That effort was  
 25 unsuccessful and demonstrates that further amendment would be futile. *Lipton v. Pathogenesis*

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1 *Corp.* (9th Cir. 2002) 284 F.3d 1027, 1039 [if “any amendment would be futile, there is no need to  
2 prolong the litigation by permitting . . . amendment.”].

3 Dated: January 29, 2018

4 BRADLEY, CURLEY, BARRABEE &  
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6  
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