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 STAND (formerly known as FORESTETHICS);  
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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' REPLY TO PLAINTIFFS'  
 OPPOSITION TO 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

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## I. INTRODUCTION

As has become the norm, Plaintiffs' voluminous Opposition largely ignores Defendants STAND (formerly known as FORESTETHICS) ("Stand") and TODD PAGLIA ("Mr. Paglia") (collectively the "Stand Defendants"), confirming the absence of legally sufficient factual allegations against them, most notably with respect to the central questions of "actual malice" and the specificity requirement under FRCP 9(b) for their RICO claims. Despite 80 pages of text and 151 pages of Appendices, Plaintiffs' Opposition, like their original Complaint and First Amended Complaint, is remarkably lacking in substance as against the Stand Defendants. By way of example, of the 296 items in Plaintiffs' 46-page Appendix A, which they claim constitutes "a **complete list of the false and defamatory statements**" (see **Opposition at 32:15-16 [emphasis added]**), **only 8 statements are attributed in any fashion to the Stand Defendants and 6 of the 8 are the same statement.** The most recent of any of the statements allegedly made by the Stand Defendants identified in Plaintiff's Appendix A is **May 21, 2013**, far beyond the statute of limitations for defamation, trade libel, tortious interference with prospective business relations, and tortious interference with contractual relations.<sup>1</sup> Plaintiff's 105-page Appendix B, which they posit explains why alleged statements were made with actual malice is even more notable: **it does not include any reference to the Stand Defendants, let alone any statements attributed to them.** Moreover, instead of addressing the arguments actually made by the Stand Defendants, Plaintiffs repeatedly reference arguments only asserted by the Greenpeace Defendants in ECF 198 and 199.<sup>2</sup> Thus, Plaintiffs have once again indiscriminately and improperly lumped the Stand Defendants together with the other named defendants in an effort to disguise the threadbare and conclusory nature of their claims against them. And, on those rare occasions where Plaintiffs do mention the Stand Defendants, such as with respect to Mr. Paglia's recent media interview, their contentions

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<sup>1</sup> Plaintiffs' Appendix A says the date of one of the statements is May 21, 2014 (see #164). This is contradicted by their Complaint and First Amended Complaint, which allege the statement was made in May 2013. [ECF 185 at ¶ 227; ECF 1 at ¶ 148].

<sup>2</sup> Plaintiffs' Opposition refers to ECF 198 (Greenpeace Fund's Motion) and/or ECF 199 (Greenpeace International's Motion) 38 times. By contrast, Plaintiffs' Opposition only references ECF 197 (Stand Defendants' Motion) 5 times.

1 are unavailing for reasons this Court has already enumerated.

2 Accordingly, for the additional reasons expressed herein, the Stand Defendants respectfully  
3 request the Court to issue orders granting their Motion to Dismiss and anti-SLAPP Motion to  
4 Strike, without leave to amend.<sup>3</sup>

## 5 **II. THE STAND DEFENDANTS DID NOT MAKE ANY DEFAMATORY STATEMENTS**

6 The 46-page Appendix A to Plaintiffs' Opposition establishes that the Stand Defendants  
7 did not make any defamatory statements. Only 8 of the 296 statements included in Plaintiff's  
8 Appendix A are attributed to the Stand Defendants. Each is time-barred. None are defamatory on  
9 their face.

### 10 **A. Statement #s 3, 4, 5, 6, 7, and 10**

11 Plaintiffs' statement #s 3, 4, 5, 6, 7, and 10 in their Appendix A all involve a **September**  
12 **17, 2012** letter Mr. Paglia allegedly wrote to Member Companies of the Forest Product Association  
13 of Canada and transmitted to others on **September 18, 2012** and **November 12, 2012**. Plaintiffs  
14 claim the letter says: "[W]e *understand* active logging and road building is occurring in areas  
15 originally designated off limits within the CBFA, including by Resolute in the Quebec region  
16 under priority CBFA planning." [italics added] [ECF 185 at ¶ 224 and ECF 185-4 #36; ECF 1 at ¶  
17 145 and ECF 1-1 Appendix F #41]. Plaintiffs' conveniently and misleadingly omit the "we  
18 understand" language from their Appendix A and the body of their pleadings. [ECF 185 at ¶ 224  
19 and ECF 1 at ¶ 145].

20 The letter is unequivocally barred by the one-year statute of limitations for defamation  
21 (Code of Civil Procedure § 340(3)) *and* the two-year statute of limitations for trade libel, tortious  
22 interference with prospective business relations, and tortious interference with contractual relations  
23 (Code of Civil Procedure § 339(1)).

24 Similarly, the letter is not defamatory. As even the cases cited by Plaintiffs emphasize,  
25 "[w]here the language of the statement is "cautiously phrased in terms of apparency," the  
26 statement is less likely to be reasonably understood as a statement of fact rather than opinion.""

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27  
28 <sup>3</sup> The Stand Defendants also join in the arguments of the Greenpeace Defendants and Greenpeace Fund, Inc.  
in support of their separate motions, as appropriate.

1 *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1354; see also *Baker v. Los Angeles Herald*  
 2 *Examiner* (1986) 42 Cal.3d 254, 260; *Gregory v. McDonnell Douglas Corporation* (1976) 17  
 3 Cal.3d 596, 601. Moreover, the context in which a statement is made is essential in determining  
 4 whether it is a statement of fact or opinion:

5 ‘[W]hat constitutes a statement of fact in one context may be treated as  
 6 a statement of opinion in another, in **light of the nature and content of**  
 7 **the communication taken as a whole. Thus, where potentially**  
 8 **defamatory statements are published in a public debate, a heated**  
 9 **labor dispute, or in another setting in which the audience may**  
 10 **anticipate efforts by the parties to persuade others to their**  
 11 **positions by use of epithets, fiery rhetoric or hyperbole, language**  
 12 **which generally might be considered as statements of fact may well**  
 13 **assume the character of statements of opinion.’**

14 ...

15 “Next, the context in which the statement was made must be  
 16 considered. Since ‘[a] word is not a crystal, transparent and unchanged,  
 17 [but] is the skin of a living thought and may vary greatly in color and  
 18 content according to the circumstances and the time in which it is  
 19 used[,]’ the facts surrounding the publication must also be carefully  
 20 considered. [¶] “This contextual analysis demands that the courts look  
 21 at the nature and full content of the communication and ...  
 22 **understanding of the audience to whom the publication was**  
 23 **directed.”**

24 *Melaleuca, Inc.*, 66 Cal.App.4th at 1354 (emphasis added). Thus, where “statements were not  
 25 asserted in the context of a dispute or intellectual inquiry in which the audience might expect  
 26 hyperbole, exaggeration or speculation,” as in *Melaleuca*, but not here, the statements are more  
 27 susceptible to being one of fact rather than opinion. *Id.* (underline added).

28 *Hi-Tech Pharmaceuticals, Inc. v. Cohen* (D. Mass. 2016) 277 F.Supp.3d 236, 245, also  
 cited by Plaintiffs, is in accord:

Indeed, this Court agrees that “[w]here ... a statement is made as part  
 of an ongoing scientific discourse about which there is considerable  
 disagreement, the traditional dividing line between fact and  
 opinion is not entirely helpful.” [*ONY, Inc. v. Cornerstone*  
*Therapeutics, Inc.* (2d Cir. 2013) 720 F.3d 490, 497.] Further the Court  
 recognizes the conflict on which the *ONY* court zeroed in – namely that  
 “it is the very premise of the scientific enterprise that it engages with  
 empirically verifiable facts about the universe[,]” and yet “it is the  
 essence of the scientific method that the conclusions of empirical  
 research are tentative and subject to revision, because they represent  
 inferences about the nature of reality based on the results of  
 experimentation and observation.”

(Emphasis added).

Here, of course, we *are* dealing with the context of a public scientific debate over the CBFA and the letter was sent to companies of the Forest Product Association of Canada who were directly involved in that debate.<sup>4</sup> The cautionary language used in the letter and the setting in which it was made all lead to the conclusion that it is a classic statement of opinion and not defamatory.

**B. Statement #74**

Statement #74 in Plaintiffs' Appendix A is an alleged **May 21, 2013** Tweet by Stand, which says: "'@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].

The Tweet is barred by the one-year statute of limitations for defamation *and* the two-year statute of limitations for trade libel, tortious interference with prospective business relations, and tortious interference with contractual relations. There is likewise nothing defamatory about it. Stand is voicing its opinion that Resolute was not doing what is scientifically needed to protect the forest and caribou.

**C. Statement #164**

Statement #164 of Plaintiff's Appendix A is an alleged **May 21, 2013**<sup>5</sup> statement made by Mr. Paglia in an interview with the Globe and Mail. Mr. Paglia is quoted as stating: "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].

Once again, the alleged statement is barred by the one and two-year statutes of limitations. Once more, there is nothing defamatory about it. Saying that "[w]e feel like Resolute is the bad apple" is an opinion.

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<sup>4</sup> Plaintiffs' Opposition cites to pages 1354-1355 of the *Melaleuca* opinion for the proposition that there is "no scientific debate immunity for defamation." (See Opposition at 35:19-22). As the quotes above demonstrate, *Melaleuca* says no such thing. To the contrary, *Melaleuca* emphasizes the importance played by context, including the existence of an intellectual debate, when making the fact versus opinion determination. Plaintiffs also cite to page 245 of the *Hi-Tech Pharmaceuticals, Inc.* opinion for its alleged categorical rejection of a "scientific debate" privilege. (See Opposition at 35:22-23). Once more, Plaintiffs are mistaken. *Hi-Tech Pharmaceuticals, Inc.*, which was based on First Circuit and Massachusetts law, simply found the statements *at issue* to not be protected by a scientific debate privilege.

<sup>5</sup> See footnote 1, above.

Plaintiffs concede in their Opposition that there are *no* other alleged defamatory statements by the Stand Defendants at issue in this litigation.

### **III. MR. PAGLIA'S RECENT INTERVIEW IS IRRELEVANT**

Plaintiffs' Opposition attempts to draw focus upon a statement made by Mr. Paglia in a March 2, 2018 interview with The Real News Network for the purpose of challenging the argument that the use of the term "destruction" in connection with Plaintiffs' activities in the Boreal Forest is not meant to be literal. (See Opposition at 15:11-18 and 37:15-21). In his interview, Mr. Paglia is quoted as saying the following:

It's really basic. So, there was a forest there. They come in, clear cut vast areas of it and then there's not a forest there. So, thus it was destroyed. And what we've seen in areas where Resolute has operated for decades and decades is fewer and fewer intact forest areas, fewer and fewer areas where caribou which is sort of a signal species that the boreal forest can survive and satellite imagery and direct photos of what they do to the landscape is more than enough evidence to show what they're doing.

(See Exhibit B to Ms. Agre's Declaration).<sup>6</sup>

First, it is important to note that Plaintiffs do not allege in this lawsuit that Mr. Paglia's statement to The Real News Network was defamatory. Furthermore, the Stand Defendants do not even use the words "destroy" or "destruction" in any of the alleged statements that Plaintiffs *do* claim in this lawsuit were wrongful. (See Section II, above).

Second, even if the Stand Defendants *had* used the words "destroy" or "destruction" in their alleged statements at issue in this lawsuit, it remains true – as this Court has already determined – that those terms are not meant literally to "annihilate" or "eliminate completely." "Destruction" can mean many things: "If the fundamental nature of the forest is degraded during the course of management – for example by the loss of wildlife species or ecological processes – then we can also reasonably say that it has been destroyed. After all, a forest consists of more than its trees." (See Court's October 16, 2017 Order at 17:5-10). Indeed, it would make little sense for the Stand Defendants (or anyone else) to be campaigning to save the Boreal Forest if the Boreal Forest was *already* literally "destroyed." Under that circumstance, there would be nothing left to

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<sup>6</sup> As has become commonplace, Plaintiffs fail to actually cite the entirety of Mr. Paglia's quote in the body of their Opposition.

1 save. Rather, Mr. Paglia used the term “destroyed” in the interview to convey the opinion and view  
 2 that the clear-cutting of the Boreal Forest by Plaintiffs is resulting in fewer and fewer intact forest  
 3 areas. This is specifically stated in the interview, but ignored by Plaintiffs. Just as “a forest consists  
 4 of more than its trees,” the Stand Defendants’ advocacy is aimed at more than just protecting the  
 5 number of *trees* in the Boreal Forest. (See Court’s October 16, 2017 Order at 16:11-17:10).

6 **IV. PLAINTIFFS FAIL TO ENUMERATE ANY FACTS IMPLICATING**  
 7 **ACTUAL MALICE ON THE PART OF THE STAND DEFENDANTS**

8 Where the plaintiff is a limited public figure, as here<sup>7</sup>, the plaintiff must prove actual malice  
 9 by “clear and convincing” evidence. The clear and convincing standard applies in the context of a  
 10 plaintiff attempting to establish a probability of prevailing on the merits in the face of an anti-  
 11 SLAPP motion to strike. *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th  
 12 688, 700; *Melaleuca, Inc.*, 66 cal.App.4th at 1350 [both cases cited by Plaintiffs]. The actual  
 13 malice question is therefore quite “demanding,” as this Court has recognized. [ECF 173 at 13:11-  
 14 13]. The plaintiff must establish actual malice as to *each* defendant as to *each* purported  
 15 defamatory statement. *Dodds v. American Broadcasting Company* (9th Cir. 1998) 145 F.3d 1053,  
 16 1059; *Murray v. Bailey* (N.D. Cal. 1985) 613 F.Supp. 1276, 1281; *Secord v. Cockburn* (D.D.C.  
 17 1990) 747 F.Supp. 779, 787; *Price v. Viking Penguin, Inc.* (8th Cir. 1989) 881 F.2d 1426, 1446.  
 18 Moreover, the actual malice requirement is “applicable to all injurious falsehood claims and not  
 19 solely to those labeled ‘defamation.’” *Blatty v. New York Times Company* (1986) 42 Cal.3d 1033,  
 20 1043 and 1045. Accordingly, it applies to not only Plaintiffs’ cause of action for defamation, but  
 21 also their derivative claims for trade libel, tortious interference with prospective business relations,  
 22 tortious interference with contractual relations, and unfair business practices, all of which are based  
 23 on the alleged dissemination of false, misleading and defamatory statements concerning Plaintiffs’  
 24 product or business. [ECF 185 at ¶¶ 464, 473, 482, and 493]. Plaintiffs do not argue otherwise in  
 25  
 26  
 27

28 <sup>7</sup> This Court has already ruled that Plaintiffs are limited public figures. [See ECF 173 at 12:13-14]. Plaintiffs’  
 Opposition is silent on the point.

1 their Opposition.<sup>8</sup>

2 Plaintiffs' Opposition is silent as to how the Stand Defendants purportedly acted with  
3 actual malice. While Plaintiffs assert their First Amended Complaint "alleges that each defendant  
4 published defamatory statements with actual knowledge of the falsity of those statements" (see  
5 Opposition at 53:6-7), their brief establishes the opposite. On pages 53-56, Plaintiffs enumerate  
6 exclusively via citations to their First Amended Complaint why Defendants Daniel Brindis, Amy  
7 Moas, Rolf Skar, Greenpeace USA, and Greenpeace International supposedly acted with actual  
8 malice. **Absent from their discussion are the Stand Defendants.**<sup>9</sup> Similarly, on pages 48-51,  
9 Plaintiffs repeatedly reference ¶¶ 333-378 of their First Amended Complaint in an effort to buttress  
10 their actual malice argument. **Yet, the Stand Defendants are not mentioned in any of those**  
11 **cited paragraphs of the First Amended Complaint.** Plaintiffs also direct the Court to Appendix  
12 B of their Opposition for "facts establishing each speakers' knowledge of falsity and/or reckless  
13 disregard of the truth . . ." (See Opposition at 53:7-8). **However, Plaintiffs' 105-page Appendix B**  
14 **does not refer to the Stand Defendants anywhere.** The complete lack of any evidence, not to  
15 mention *allegations*, of actual malice against the Stand Defendants is striking, but not surprising  
16 given the sparse nature of Plaintiffs' claims against them in the first place. It is fatal to their causes  
17 of action for defamation, trade libel, tortious interference with prospective business relations,  
18 tortious interference with contractual relations, and unfair business practices, and those claims  
19 must be dismissed.

20 ///

21 ///

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22  
23 <sup>8</sup> In fact, Plaintiffs completely ignore the actual malice requirement in their Opposition sections on the claims  
24 for trade libel, tortious interference with prospective business, and unfair business practices. The Opposition does not  
25 address Plaintiffs' tortious interference with contract claim *at all*, other than a brief allusion to its existence in footnote  
26 27.

27 <sup>9</sup> Notably, Plaintiffs do not provide any *evidence* to support their actual malice theory (or any other theory) as  
28 against *any* defendant, let alone the Stand Defendants. This is a critical omission vis-a-vis the anti-SLAPP analysis.  
While a court may consider the pleadings in determining the nature of the "cause of action" (i.e., whether the  
anti-SLAPP statute applies), admissible evidence is required to oppose an anti-SLAPP motion. *Oviedo v. Windsor*  
*Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 109, fn. 10; *Thayer v. Kabateck Brown Kellner LLP* (2012) 207  
Cal.App.4th 141, 155; *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 350-351.

**V. PLAINTIFFS' RICO CLAIMS ARE IMPROPER**

**A. Lack of Specificity of Wrongdoing and Role in Operation and Management**

Plaintiffs' Opposition contends they have adequately pled the required elements for their Federal RICO claims. Not so. As against the Stand Defendants, the lack of specificity of any alleged wrongdoing, as required by FRCP 9(b), is wanting.

Pursuant to FRCP 9(b), a plaintiff must "state with particularity the circumstances constituting fraud or mistake." This "requires a pleader of fraud [or RICO] to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme." *Lancaster Community Hospital v. Antelope Valley Hospital District* (9th Cir. 1991) 940 F.2d 397, 405. In addition, the pleader must "set forth an explanation as to why the statement or omission complained of was false and misleading." *Mostowfi v. i2 Telecom International, Inc.* (9th Cir. 2008) 269 Fed.Appx. 621, 624. "[G]eneral statements about actions committed by the defendants," failure to "specify who committed the violation" that serves as the basis of each predicate act, and "lump[ing] together the defendants without identifying the particular acts or omissions that each defendant committed" are squarely insufficient and mandate dismissal. *Id.*

Plaintiffs explain that "[t]he Amended Complaint and accompanying appendices plead the date, author, recipient and statement for each of the 296 publications that Plaintiffs allege constitute separate acts of mail and wire fraud." (See Opposition at 60:21-23). **However, consistent with Appendices A and B to their Opposition, the Tables within the body of Plaintiffs' First Amended Complaint and the four Appendices attached to it contain only 3 alleged publications by the Stand Defendants, and 2 of the 3 are the same.**

Table A found at pages 151-156 of the First Amended Complaint merely references the **September 18, 2012** email transmission to Axel Springer referencing the letter written to the Member Companies of the Forest Product Association of Canada.<sup>10</sup> Appendix D of the First Amended Complaint only identifies that same letter.<sup>11</sup> And Appendix B of the First Amended

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<sup>10</sup> This is the same as Statement #4 in Appendix A to Plaintiffs' Opposition.

<sup>11</sup> This is the same as Statement #3 in Appendix A to Plaintiffs' Opposition.

1 Complaint simply lists the **May 21, 2013** Tweet by Stand.<sup>12</sup> As explained in Section II, above,  
 2 there is nothing wrongful with any of these publications and Plaintiffs certainly do not meet FRCP  
 3 9(b)'s heightened pleading standard with respect to them. **There are no other publications**  
 4 **attributed to the Stand Defendants in the Tables or Appendices to the First Amended**  
 5 **Complaint.** Table B found at pages 165-169 and Appendices A and C of the First Amended  
 6 Complaint do not include any publications allegedly made by the Stand Defendants.

7 Plaintiffs' contention that they have adequately detailed the Stand Defendants' "direct  
 8 participation in the RICO enterprise" (see Opposition at 61:7-8), notwithstanding the lack of  
 9 publications attributed to them, is equally without merit. The so-called "Operational  
 10 Memorandum" is not a predicate RICO act. Nor is there anything unlawful about it. All the  
 11 "Operational Memorandum" actually says, as quoted by Plaintiffs, is that the Stand Defendants  
 12 intended to advocate their viewpoint that Plaintiffs' forestry practices were not up to par with their  
 13 environmental standards. Such advocacy is quintessential conduct regarding a public issue that is  
 14 protected by the First Amendment. It is also precisely the kind of activity that Stand, a non-profit  
 15 organization engaged in environmental advocacy, does as part of its *own* operations – not the  
 16 conduct of a separate and distinct "enterprise." Plaintiffs' "extortion" allegations have already been  
 17 rejected by the Court because "[t]here was no alleged property transfer between [the Stand  
 18 Defendants] and Resolute." [ECF 173 at 21:1-18]. The **September 2012** letter to the Member  
 19 Companies of the Forest Product Association of Canada, discussed above, is innocuous.

20 In addition, nowhere do Plaintiffs explain how the Stand Defendants supposedly  
 21 participated in the *operation or management* of the enterprise itself, as is required under the  
 22 "conduct" element of the RICO statutes. *Reves v. Ernst & Young* (1993) 507 U.S. 170, 179. Mere  
 23 participation is not enough. *Walter v. Drayson* (9th Cir. 2008) 538 F.3d 1244, 1249.

24 Simply put, Plaintiffs have failed to adequately allege the elements of their RICO claims  
 25 with the specificity required by FRCP 9(b), and thus those claims must be dismissed.

26 ///

27 ///

28 

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<sup>12</sup> This is the same as Statement #74 in Appendix A to Plaintiffs' Opposition.

1           **B.       No Proximate Cause**

2                   **1.       Plaintiffs Cannot Circumvent the *Holmes* Factors**

3           Plaintiffs First Amended Complaint repeats the fatal errors of its predecessor when it comes  
4 to the proximate cause element of their RICO claims.

5           In *Holmes v. Securities Investor Protection Corporation* (1992) 503 U.S. 258, 269-270, the  
6 Supreme Court articulated three reasons why proximate cause is such an important element in the  
7 analysis of the pleading sufficiency of a RICO claim:

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

20           As this Court explained, the Ninth Circuit has distilled the factors articulated by the *Holmes*  
21 Court into the following three considerations:

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

27 [ECF 173 at 20:7-12 (citing to *Mendoza v. Zirkle Fruit Company* (9th Cir. 2002) 301 F.3d 1163,  
28 1168-1169)].

29           In recognition of those factors, this Court observed that "Resolute does not explain how it  
30 is the victim of [defendants'] fundraising scheme, given that the only persons who could have been  
31 defrauded were the donors who gave the money." [ECF 173 at 20:13-15]. In addition, "to the  
32 extent that Resolute can claim harm, determining the amount of Resolute's damages attributable  
33 [to defendants'] advocacy would be very difficult, because there are numerous reasons why a  
34 customer might cease or interrupt its relationship with Resolute, as Resolute itself acknowledges."

1 [ECF 173 at 20:15-18].

2 As highlighted in the Stand Defendants' moving papers [ECF 197 at 20:14-23:3], Plaintiffs  
3 emphasize *throughout* their First Amended Complaint that it was Stand's prospective *donors* – not  
4 Plaintiffs – who were the target and “direct victims” of the alleged fraudulent activity. This is  
5 determinative of the proximate cause element of Plaintiffs' RICO claims.

6 Plaintiffs' Opposition attempts to side-step the proximate cause analysis required by  
7 *Holmes* (and this Court) by arguing that *reliance* is not a necessary element for a RICO violation.  
8 However, whether Plaintiffs are required to *rely upon* the misrepresentations alleged to have been  
9 made to prospective donors of Stand does nothing to circumvent or dispense with the three  
10 proximate cause factors enumerated above. In fact, the cases that Plaintiffs quote from specifically  
11 cite to *Holmes*' three factors with approval. *Bridge v. Phoenix Bond & Indemnity Co.* (2008) 553  
12 U.S. 639, 654-655; *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products*  
13 *Liability Litigation* (N.D. Cal. 2017) 2017 WL 4890594, \*8-9. Moreover, those cases go out of  
14 their way to explain why, under the facts presented therein, there were no more direct victims of  
15 the wrongful conduct or, for that matter, *any* other injured parties that would create difficulties of  
16 apportionment or risks of multiple recoveries:

17 And here, unlike in *Holmes* and *Anza*<sup>13</sup>, there are no independent factors  
18 that account for respondents' injury, there is no risk of duplicative  
19 recoveries by plaintiffs removed at different levels of injury from the  
20 violation, and no more immediate victim is better situated to sue. Indeed,  
both the District Court and the Court of Appeals concluded that  
respondents and other losing bidders were the *only* parties injured by  
petitioners' misrepresentation.

21 *Bridge*, 553 U.S. at 658; see also *In re Volkswagen*, 2017 WL 4890594 at \*8-9 [“there are no more  
22 direct victims of the wrongful conduct because the Franchise Dealers bought the affected vehicles  
23 directly from co-schemer Volkswagen.”].

## 24 2. Feld is Not on Point

25 As they did with respect to the first round of pleading motions, Plaintiffs further rely upon  
26 *Feld Entertainment, Inc. v. American Society for the Prevention of Cruelty to Animals* (D.D.C.  
27 2012) 873 F.Supp.2d 288 for their “proximate cause” argument. The facts in *Feld* have not  
28

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<sup>13</sup> *Anza v. Ideal Steel Supply Corporation* (2006) 547 U.S. 451.

1 changed. It remains readily distinguishable. [See, i.e., ECF 94 at 12-13]. In short, *Feld* involved a  
 2 targeted fundraiser by animal advocacy groups against a circus based on alleged misrepresentations  
 3 about its animal handling practices that were made for the specific purpose of obtaining money to  
 4 use in a tainted lawsuit against the circus. Thus, the allegedly ill-gotten donations in *Feld* were  
 5 made exclusively and directly as the result of the claimed misrepresentations about the circus and  
 6 the circus was directly harmed by the funds that were raised via the misrepresentations.

7 In the present case, by contrast, donations to Stand were made for a whole host of reasons –  
 8 not just because Mr. Paglia and Stand made statements about Plaintiffs’ practices. Plaintiffs  
 9 concede this point. As Plaintiffs admit in the First Amended Complaint – like they did in their  
 10 original Complaint – the defendants pursue advocacy campaigns for many different causes,  
 11 including nuclear waste, climate change, disappearing ice shelves, harmful commercial fishing  
 12 tactics, and endangered animal species. [Compare ECF 185 at ¶¶ 51-52, 56, 58-60, 64-65 with ECF  
 13 1 at ¶¶ 52-53, 57, 59-61, and 65-66]. Plaintiffs likewise acknowledge – again – that the Stand  
 14 Defendants engage in many campaigns other than “the one directed at Resolute.” [Compare ECF  
 15 185 at ¶ 41(m) with ECF 1 at ¶ 41(m)]. Further, Plaintiffs allege that defendants used the funds  
 16 they have raised to pay general operating expenses (such as salaries), not to harm Plaintiffs  
 17 directly, let alone to fund a lawsuit against Plaintiffs’ forest practices. [ECF 185 at ¶ 48].

18 *Feld* is most notable in that the court actually dismissed portions of the RICO claims that  
 19 were not directly related to the circus’s defense of the sham litigation, including claims based on  
 20 harm caused by the advocacy groups’ efforts with various administrative and legislative entities.  
 21 The court found that the alleged harm was “far too remote to satisfy proximate cause.” *Id.* at 320.  
 22 Hence, far from supporting Plaintiffs’ tenuous assertion of proximate cause, *Feld* stands for the  
 23 proposition that, unless an advocacy group obtains donations from a targeted fundraiser that are  
 24 used to harm the plaintiff directly, proximate cause is not satisfied. See also, i.e., *Proctor &*  
 25 *Gamble Company v. Amway Corporation* (5th Cir. 2001) 242 F.3d 539, 565 [explaining that a loss  
 26 of sales as the alleged result of misrepresentations made about the plaintiff does “not flow directly”  
 27 from those misrepresentations and there were “too many intervening factors for proximate cause to  
 28 be proven . . .”].

**VI. PLAINTIFFS CONCEDE THE FIRST PRONG OF THE ANTI-SLAPP ANALYSIS**

In line with this Court's October 16, 2017 Order, Plaintiffs concede by omission that the few allegations they have asserted against the Stand Defendants arise out of activity made in connection with a public issue in furtherance of the Stand Defendants' right to free speech under the United States and California Constitution (i.e., the first prong of the anti-SLAPP analysis).

**VII. CONCLUSION**

For the foregoing additional reasons, the Stand Defendants respectfully request the Court to issue orders granting their Motion to Dismiss and anti-SLAPP Motion to Strike, without leave to amend, and awarding the Stand Defendants their attorney's fees incurred pursuant to California Code of Civil Procedure § 425.16(c)(1).

Dated: May 11, 2018

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