No. _____

In the Supreme Court of the United States

MEBO INTERNATIONAL, INC.,
Petitioner,

v.

SHINYA YAMANAKA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state anti-SLAPP statutes are properly applied in federal diversity cases, or whether doing so runs afoul of the *Erie* doctrine. A split in the circuit courts on this question currently exists with the Ninth Circuit applying state anti-SLAPP statutes in diversity actions, but the D.C. Circuit refusing to do so. Compare *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999) and *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner, Mebo International, Inc. was the appellant in the court below. Respondent, Shinya Yamanaka, was the appellee in the court below. Petitioner Mebo International, Inc. has no corporate parent, and there is no publicly held company owning ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mebo International, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's January 13, 2015 order and judgment are reproduced in the accompanying appendix at pages 5-17. The Ninth Circuit's July 20, 2015 memorandum affirming the district court's judgment is reproduced in the appendix at pages 1-4. The Ninth Circuit's August 26, 2015 order denying the petition for rehearing *en banc* is reproduced in the appendix at page 18.

JURISDICTION

The opinion and judgment for which review is sought was entered by the Ninth Circuit on July 20, 2015. App. 5-17. The order denying the petition for rehearing *en banc* was entered on August 26, 2015. App. 18. Petitioner timely invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AT ISSUE

California's anti-SLAPP statute, *Code of Civ. Proc*. Section 425.16, is reprinted in Appendix D to this petition. App. 20-23.

STATEMENT OF THE CASE

The *Erie* doctrine is supposed to safeguard diversity litigants from having the Federal Rules of Civil Procedure ("Federal Rules") upended by conflicting state procedural laws. *Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 78 (1938)). However, in *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999) ("*Newsham*") the Ninth Circuit encroached upon *Erie* by becoming the first circuit court in the nation to hold that a federal court in diversity may apply a state anti-SLAPP[1] statute. In so doing, the Ninth Circuit authorized a "direct collision" between the procedural mechanisms of California's anti-SLAPP statute[2] and the application of the Federal Rules. As a result, a diversity litigant in the Ninth Circuit facing an anti-SLAPP special motion to strike (like Petitioner Mebo International, Inc. ("Petitioner" or "Mebo")) is routinely denied the fundamental procedural protections built into the Federal Rules such as having its pleadings scrutinized against the notice pleading requirements of Rule 8, tested against the sufficiency parameters of Rule 12, and analyzed for the existence of triable issues of fact (following the opportunity to conduct discovery) under Rule 56.

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[1] "SLAPP" is a commonly used acronym for "Strategic Lawsuits Against Public Participation."

[2] California's anti-SLAPP special motion to strike allows a defendant to move (at a very early juncture in the case) to strike claims arising from any act in furtherance of the right of petition or free speech in connection with a public issue unless the plaintiff can establish that there is a probability she will prevail on the claims. California *Code of Civ. Proc*. Section 425.16(b)(1).

While two other circuit courts followed the Ninth Circuit's holding in *Newsham* (the First Circuit and the Fifth Circuit), a split in the circuit courts now exists regarding whether or not state anti-SLAPP statutes should be applied by federal courts in diversity, with the D.C. Circuit answering that question in the negative. See *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015). Further complicating matters, the D.C. Circuit's decision was based in part upon the opinions of certain Ninth Circuit judges who disagreed with the *Newsham* holding and urged that it be overturned. *Abbas* at 1335-36.

This court's review is therefore needed in order to settle this question of national importance and to provide guidance as to whether state anti-SLAPP statutes are properly applied in federal diversity cases, or whether doing so runs afoul of the *Erie* doctrine.

A. The District Court Applies California's Anti-SLAPP Statute in this Diversity Action

Petitioner is the owner of a patented process in which human somatic cells are induced, *in situ*, to convert into pluripotent stem cells and regenerate human tissue and organs. Petitioner originally filed an action against Respondent Shinya Yamanaka ("Respondent" or "Dr. Yamanaka") in San Francisco Superior Court based upon Respondent's competing use of certain phrases that Petitioner alleged to inaccurately affiliate Respondent with the science that is at the heart of Petitioner's work. Respondent removed the case on July 12, 2013 and the U.S. District Judge for the Northern District of California accepted jurisdiction on diversity grounds. Respondent

thereafter filed a special motion to strike under California's anti-SLAPP statute (*Code of Civ. Proc.* Section 425.16(b)(1)), or alternatively, a motion to dismiss under Rule 12(b)(6). On January 30, 2014, the district court issued an order granting the anti-SLAPP special motion to strike and entered judgment in favor of Respondent. App. 5-17.

B. The Ninth Circuit Affirms the District Court's Judgment and Denies the Petition for Rehearing *En Banc*

Petitioner appealed the judgment to the Ninth Circuit and argued that *Newsham* should be overturned. The Ninth Circuit filed a memorandum on July 20, 2015 affirming the judgment and "declining" to overturn existing Ninth Circuit precedent (*Newsham*) on the applicability of the anti-SLAPP statute in diversity actions. App. 2-3. Petitioner thereafter filed a petition for rehearing *en banc* based upon the split in the circuit courts following the D.C. Circuit's *Abbas* decision, which held contrary to existing Ninth Circuit law on the issue. The Ninth Circuit denied the petition for rehearing *en banc* on August 26, 2015. App. 18-19.

REASONS FOR GRANTING THE PETITION

A. A Split in the Circuit Courts Exists as to Whether State Anti-SLAPP Statutes Should Be Applied in Diversity Cases

After *Newsham*, two other circuit courts (the First Circuit and the Fifth Circuit) also held that state anti-SLAPP statutes should be applied in federal diversity cases. See *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) and *Henry v. Lake Charles American Press, LLC* 566 F.3d 164 (5th Cir. 2009); the former based upon the same logic as the Ninth Circuit's holding in *Newsham*, the latter without any analysis whatsoever[3]. Although *Newsham* recently came under heavy criticism by certain Ninth Circuit judges (see Judge Kozinski's concurrence in *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013) ("*Makaeff I*") and Judge Watford's dissent in the denial of the petition for rehearing *en banc* in *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180 (9th Cir. 2013) ("*Makaeff II*")), *Newsham* nonetheless remains the law in the Ninth Circuit. Judge Kozinski

[3] The Fifth Circuit's decision in *Henry* simply states "Louisiana law, including the nominally procedural [Louisiana anti-SLAPP statute] governs this diversity case." *Id*. at 169. So unconvincing is *Henry*'s "endorsement" of the application of the anti-SLAPP statute in diversity cases that a recent Fifth Circuit panel stated "we note that there is disagreement among courts of appeals as to whether state anti-SLAPP laws are applicable in federal court at all. . . Because we decide this case on alternative grounds, we need not decide whether Louisiana's anti-SLAPP law is appropriately asserted in a federal diversity case." *Mitchell v. Hood*, 2015 WL 3505481 (5th Cir. June 4, 2015). See also *Culbertson v. Lykos*, 790 F.3d 608, 631 (5th Cir. 2015) ("we have not specifically held that the [Texas anti-SLAPP statute] applies in federal court; at most we have assumed without deciding its applicability").

summed it up best, however, when he noted that "*Newsham* was a big mistake. Two other circuits have foolishly followed it." *Makaeff I* at 275 (Judge Kozinski concurring).

In April 2015, the D.C. Circuit created a split in the circuit courts on this issue when it held that the District of Columbia's anti-SLAPP statute should not be applied by federal courts in diversity. *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015). Further complicating matters, the D.C. Circuit's ruling in *Abbas* adopted the very reasoning set forth by Judges Kozinski and Watford in *Makaeff I* and *II* as it held that when considering "whether a federal court exercising diversity jurisdiction may apply the D.C. Anti-SLAPP Act's special motion to dismiss provision. . . The answer is no. Federal Rules of Civil Procedure 12 and 56 establish the standards for granting pre-trial judgment to defendants in cases in federal court." *Abbas* at 1333. See also *Makaeff I* (the Federal Rules "aren't just a series of disconnected procedural devices. Rather, the Rules provide an integrated program of pre-trial, trial and post-trial procedures. . . The California anti-SLAPP statute cuts an ugly gash through this orderly process"). *Id*. at 274 (Judge Kozinski concurring).

In addition to California, the Legislatures of twenty-six states, as well as Guam and the District of Columbia, have enacted anti-SLAPP statutes. The need then for this court to offer guidance on this issue is readily apparent as circuit courts and district courts around the country continue to wrestle with the proper application of state anti-SLAPP statutes in diversity cases. See *Unity Healthcare, Inc. v. County of*

Hennepin, 2015 WL 3935878 at *1 (D. Minn. June 25, 2015) (citing *Abbas* in its holding that Minnesota's anti-SLAPP law is inapplicable in federal court because it conflicts with Rule 56); *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015) (declining to apply Washington's anti-SLAPP statute in a federal diversity action in a matter arising in the Northern District of Illinois, although specifically reserving the Seventh Circuit's resolution of questions about how the procedural aspects of other states' anti-SLAPP statutes work in federal court). See also *The Royalty Network, Inc. v. Harris*, 736 F.3d 1351, 1362 (11th Cir. 2014) (declining to apply the Georgia anti-SLAPP statute in a federal diversity action because the verification requirement of the statute directly conflicted with Rule 11).

This court should therefore grant this petition in order to settle this question of national importance and to offer proper guidance to the circuit courts.

B. The Application of the Anti-SLAPP Statute Disrupts the Comprehensive Procedural Scheme Embodied in the Federal Rules

The Ninth Circuit in *Newsham* found that California's anti-SLAPP statute did not collide with the Federal Rules, and therefore should apply in diversity cases. *Id*. at 973. *Newsham*'s holding, however, exhibited two key errors. First, the Ninth Circuit failed to answer whether the anti-SLAPP statute is procedural or substantive before conducting its "direct collision" analysis. Second, even if it determined that the anti-SLAPP statute was substantive, it failed to note that relevant Federal Rules that regulate procedure apply even if they are pitted against state

rules with substantive aspects. *Newsham* should therefore be overturned.

1. California's Anti-SLAPP Statute is a State Procedural Law

California's anti-SLAPP statute is a procedural mechanism. *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 39 Cal. 4th 192, 202 (2006) ("the anti-SLAPP statute is a procedural device to screen out meritless claims"); *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* 37 Cal.App.4th 855, 866 (1995) ("section 425.16 is one of several California statutes providing a procedure for exposing and dismissing certain causes of action lacking merit"). In his *Makaeff I* concurrence, Judge Kozinski summed it up succinctly by noting:

> The anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights. The language of the statute is procedural: Its mainspring is a 'special motion to strike'; it contains provisions limiting discovery; it provides for sanctions for parties who bring a non-meritorious suit or motion; the court's ruling on the potential success of plaintiff's claim is not 'admissible in evidence at any later stage of the case'; and an order granting or denying the special motion is immediately appealable. See Code of Civ. Proc. Section 425.16.

Id. at 273.

Where there is a valid and relevant Federal Rule available, "[f]ederal courts must ignore state rules of procedure because it is Congress that has plenary

authority over the procedures employed in federal court, and this power cannot be trenched upon by the states." *Erie*, 304 U.S. at 78. The problem with the Ninth Circuit's decision in *Newsham*, then, is that it failed to properly consider whether the anti-SLAPP statute was procedural or substantive. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980) (considering whether there was a direct conflict only after first determining the state rule was substantive). "[T]he question of a conflict only arises if the state rule is substantive; state procedural rules have no application in federal court, no matter how little they interfere with the Federal Rules." *Makaeff I* at 273. Since California's anti-SLAPP statute is procedural, it should not be applied by federal courts in diversity.

2. California's Anti-SLAPP Statute Directly Collides with Federal Rules 8, 12, and 56

Analyzing whether a Federal Rule conflicts with a state law requires a court to first determine whether the Federal Rule answers the question in dispute. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 398–99 (2010) (majority opinion) (citing *Hanna v. Plumer*, 380 U.S. 460, 463–64 (1965) (holding that a federal court in diversity should not apply a state law or rule if a Federal Rule "answers the same question" as the state law and that Federal Rule does not violate the Rules Enabling Act).[4] The

[4] In *Hanna*, this court emphasized that "when a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule." *Id.* at 471.

Federal Rules are not to be "narrowly construed in order to avoid a 'direct collision' with state law," but rather, must be given their plain meaning. *Walker v. Armco Steel Corp*., 446 U.S. 740, 748-50 (1980). See also *Shady Grove* at 404 (noting that when construing a Federal Rule, the court cannot contort its text to avert a collision with state law)[5]. A state law need not be "perfectly coextensive and equally applicable" to a particular issue in order to be found in "direct collision" with federal law. *Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 26-27 (1988). Here, California's anti-SLAPP statute directly collides with Federal Rules 8, 12, and 56, such that the Ninth Circuit's holding to the contrary in *Newsham* should be overturned.

Federal Rules 8 and 12 together govern the pre-discovery standards for testing the legal sufficiency of a complaint. Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("factual allegations must be enough to raise a right to relief above the speculative level"). Rule 12(b)(6) governs motions to dismiss, where the court assumes plaintiff's version of the facts as true

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[5] In his dissent in *Makaeff II*, Judge Watford extensively analyzed *Shady Grove* and concluded that "California's anti-SLAPP statute conflicts with Federal Rules 12 and 56. Taken together, those rules establish the exclusive criteria for testing the legal and factual sufficiency of a claim in federal court." *Id*. at 1188. Judge Watford went on to note that "just as the New York statute in *Shady Grove* impermissibly barred class actions when Rule 23 would permit them, so too California's anti-SLAPP statute bars claims at the pleadings stage when Rule 12 would allow them to proceed." *Id*. at 1189. Petitioner's claim met that identical fate in this case.

and asks whether she has made a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). California's anti-SLAPP statute, however, directly collides with these Federal Rules because it requires a higher pleading standard; namely, that "the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (1994) disapproved of on other grounds by *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53 (2002). As such, these two sets of rules either conflict, or at the very least, cannot rationally be said to co-exist.

In addition, California's anti-SLAPP statute conflicts with Rule 56, which provides the standard for disposing of a case on the merits, but only where there exists "no genuine issue of material fact." Rule 56(a). In *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250, n.5 (1986), this Court explained that the ability to conduct discovery prior to a Rule 56 motion is presumed, noting that "summary judgment must be refused where the non-moving party has not had the opportunity discover information that is essential to his opposition". *Id*. Contrarily, California's anti-SLAPP statute stays discovery until a decision on the motion is finalized, *(Code of Civ. Proc*. section 425.16(g)), and the court only considers the "pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based," (*Code of Civ. Proc.* Section 425.16(2)). This puts plaintiffs in the position of showing the merits of their claims without having had the opportunity to "discover information that is essential to his opposition," *Anderson*, 477 U.S. at 250 n.5; see also *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d

832, 846 (9th Cir. 2001) (refusing to apply the anti-SLAPP statute's discovery rules because they collide with Rule 56).

Since the procedural mechanisms of California's anti-SLAPP statute's special motion to strike directly collide with the procedural protections of Federal Rules 8, 12, and 56, federal courts in diversity should not apply it. By permitting this application, however, the Ninth Circuit continues to breach the fundamental tenets of *Erie* and its progeny.

CONCLUSION

Petitioner respectfully requests that this court grant this petition and offer much needed guidance on the applicability of state anti-SLAPP statutes in federal diversity cases; an issue that has now divided the circuit courts.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-15359
D.C. No. 4:13-cv-03240-YGR

[Filed July 20, 2015]

MEBO INTERNATIONAL, INC., a California corporation,	)
Plaintiff - Appellant,	)
v.	)
SHINYA YAMANAKA, an individual,	)
Defendant - Appellee.	)

MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

App. 2

Submitted July 9, 2015[**]
San Francisco, California

Before: TALLMAN, M. SMITH, and MURGUIA, Circuit Judges.

Dr. Rongxiang Xu and the company he founded and owned, Mebo International, Inc. ("Mebo"), sued Dr. Shinya Yamanaka ("Dr. Yamanaka") for allegedly misusing terms and acronyms in Dr. Yamanaka's published scientific articles—for which Dr. Yamanaka was awarded the 2012 Nobel Prize for Medicine or Physiology—in a manner likely to deceive the public. Plaintiffs allege that this has negatively impacted Dr. Xu's ability to obtain research grants since both doctors worked in the field of stem cell research. The district court granted Dr. Yamanaka's anti-SLAPP motion and struck the plaintiffs' complaint for violations of California's unfair competition law ("UCL"), Cal. Bus. & Prof. Code § 17200. After Dr. Xu's recent death, only Mebo pursues this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. Mebo argues on appeal that we should overturn fifteen years of circuit precedent and hold that federal courts cannot apply state anti-SLAPP motions under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. We decline to do so. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73 (9th Cir. 1999); *see also Price v. Stossel*, 620 F.3d 992, 999 (9th Cir. 2010) ("We have repeatedly held that California's anti-SLAPP statute can be invoked by

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[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

defendants who are in federal court on the basis of diversity jurisdiction.").

2. On the merits, the district court properly granted Dr. Yamanaka's anti-SLAPP motion applying the two-prong test. *See Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). First, California's anti-SLAPP statute specifically provides that academic works—such as Dr. Yamanaka's published statements in a scientific journal—are protected activity. Cal. Civ. Proc. Code § 425.17(d)(1). Thus, Dr. Yamanaka's statements do not constitute unprotected commercial speech. *Id.* Second, Mebo has not shown a probability of prevailing on its UCL claims. *See id.* § 425.16(b)(1). It cannot establish a legally and factually sufficient *prima facie* UCL claim because Mebo cannot establish statutory standing, Cal. Bus. & Prof. Code § 17204, which requires economic injury caused by the unfair business practice, *see Kwikset Corp. v. Super. Ct.* (*Benson*), 51 Cal. 4th 310, 322 (2011). Mebo also has not pleaded sufficient facts to survive Federal Rule of Civil Procedure 9(b)'s particularity requirement. *See Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106-08, 1110 (9th Cir. 2003); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1122 (9th Cir. 2009) (holding that California's UCL claims are subject to Rule 9(b) pleading standards).

3. Because the district court's grant of Dr. Yamanaka's anti-SLAPP motion disposed of the entire case, the court did not err in declining to rule on Dr. Yamanaka's Rule 12(b)(6) motion to dismiss. Additionally, Dr. Yamanaka is entitled to attorneys' fees as mandated by the anti-SLAPP statute. *See* Cal. Civ. Proc. Code § 425.16(c)(1).

AFFIRMED. Costs shall be awarded to Appellee Dr. Yamanaka.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No.: 13-CV-3240 YGR

[Filed January 30, 2014]

RONGXIANG XU AND MEBO INTERNATIONAL, INC.,	)
Plaintiffs,	)
v.	)
SHINYA YAMANAKA,	)
Defendant.	)

ORDER GRANTING SPECIAL MOTION TO STRIKE OF DEFENDANT SHINYA YAMANAKA

Plaintiffs Rongxiang Xu ("Xu") and MEBO International, Inc. ("MEBO") (collectively, "Plaintiffs") originally filed their action in San Francisco Superior Court on May 8, 2013, against Defendant Shinya Yamanaka ("Yamanaka"). Plaintiffs filed a First Amended Complaint ("FAC") on May 21, 2013 and served Yamanaka with the FAC and summons on June 12, 2013. Plaintiffs alleged claims for slander of title, defamation, negligent interference with prospective economic advantage, trade libel and unfair competition under the California Unfair Competition law ("UCL"),

Cal. Bus. & Prof. Code section 17200.[1] Yamanaka removed this action to the federal court on diversity grounds through a Notice of Removal filed July 12, 2013. Yamanaka thereafter filed his Motion to Dismiss or Alternatively Special Anti-SLAPP Motion to Strike the First Amended Complaint. The special motion to strike is brought with reference to California Code of Civil Procedure section 425.16, which permits a court to strike claims arising from exercise of free speech rights under the United States or California Constitution. Cal. Code Civ. Proc. § 425.16(b)(1).

Having carefully considered the papers submitted, the pleadings in this action, and the arguments of the parties at the hearing held on October 8, 2013, and for the reasons set forth below, the Court hereby **GRANTS** the Special Motion to Strike.

I. BACKGROUND

Plaintiffs allege that Xu invented a method for regeneration of human tissue. (FAC ¶¶ 7, 8.) Specifically, Plaintiffs allege that "Xu is the first and only person to have obtained a patent for 'inducing *in situ* human somatic cells into pluripotent stem cells and then regenerating physiological tissue and organ.'" (FAC ¶ 9.) Xu's research is in a method to induce fully developed cells to convert into pluripotent stem cells *in situ* (*i.e.*, in the natural or original position in the human body) by a method known as "iPS" or "iPSC," which stands for "induced pluripotent stem cells." Xu is the founder of Plaintiff MEBO International, Inc.,

[1] In their opposition, Plaintiffs withdrew all claims other than their claim under the UCL.

which is a holding company for Xu's intellectual property developed in the course of his work and studies.

Yamanaka is a scientist who won the Nobel Prize in Physiology or Medicine in 2012 for his research showing that adult skin cells could be reprogrammed into pluripotent cells. The award was based upon Yamanaka's publication in which he took skin cells from the body and transferred genes into these cells, in vitro, so that they had similar functions of stem cells. (FAC ¶ 10.) Yamanaka labeled his artificial cells as "induced pluripotent stem cells" or "iPSC." The June 14, 2012 article by Yamanaka entitled "Induced Pluripotent Stem Cells: Past, Present, and Future" ("the Article"), in which he discusses the history and future outlook of "iPSC" technology, was published in the *Cell Stem Cell* journal. (FAC ¶ 10.) In the Article, Yamanaka was quoted as saying "[i]n 2006, we showed that stem cells with properties similar to ESCs ('embryonic stem cells') could be generated from mouse fibroblasts by simultaneously introducing four genes. We designated these cells as iPSCs." *Id*. Plaintiffs also allege that Yamanaka used his position as the editor for several scientific journals to feign an ability to induce somatic cells into pluripotent stem cells and called them "iPSCs." (FAC ¶ 12.)

Plaintiffs contend that Yamanaka's research on artificial cells has nothing to do with stem cells and that his use of the term "pluripotent stem cells," is confusing and misleading. (FAC ¶11.) Plaintiffs allege that Yamanaka has created a man-made cell *in vitro* (*i.e.*, outside the living body and in an artificial environment) that is not equivalent to a pluripotent

stem cell existing *in situ,* and that Yamanaka should not be using the term iPSC for his method. Plaintiffs further allege that Yamanaka's misuse of the term iPSCs has affected the vendibility of Xu's patents, as well as his ability to obtain investment, grant and research monies related to "iPS" or "iPSC." (FAC ¶ 12.) By using the term "iPSCs," Yamanaka usurped the "public recognition, funding, and prestige" that "legally belongs" to Xu. (FAC ¶ 12.) Yamanaka's mislabeling of his process as "iPSC" has brought him fame and recognition as a Nobel prize winner, as well as various awards, grant and research monies, and other forms of compensation, which would have been directed to Xu and MEBO.[2]

II. DISCUSSION

Yamanaka brings this motion seeking to strike the FAC under section 425.16 of the California Code of Civil Procedure. California enacted this statute to curtail "strategic lawsuits against public participation," known as "SLAPP" actions, finding "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." Cal.Civ.Proc.Code § 425.16(a). This Court, sitting in diversity, follows the California courts' two-step process for analyzing an anti-SLAPP motion. *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010). First, the moving party must make "a threshold showing ... that the act or acts of which the plaintiff complains were taken 'in furtherance of the right of

[2] The Court notes that Plaintiffs do not allege any patent infringement or other claims related to Xu's intellectual property.

petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." *Equilon Enters., LLC v. Consumer Cause, Inc.,* 29 Cal.4th 53, 67 (2002) (quoting Cal. Code Civ. Proc. § 425.16(b)(1)). The moving party does so by showing that act underlying the complaint fits one of the categories spelled out in section 425.16(e). *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002) (citing *Braun v. Chronicle Publishing Co.*, 52 Cal.App.4th 1036, 1043 (1997).) Once such a showing is made, the burden shifts to the complainant to show that there is a probability of prevailing on the complaint. *Navellier,* 29 Cal.4th at 88. The statute focuses not on the form of the plaintiff's claim, but the underlying nature of the defendant's activity giving rise to the asserted liability. *Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1232 (2003).

A. Protected Activity

Here, the Court looks first to whether Yamanaka has established that Plaintiffs' claims arise from protected speech or actions. Section 425.16(e) defines a variety of activity that is considered protected under the anti-SLAPP statute, which includes "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(3). "A 'public forum' traditionally has been defined as a place that is open to the public where information is freely exchanged." *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1036 (2008). A magazine is such a public forum. *Id.* at 1039. "[A] newspaper or magazine need not be an open forum to be a public forum—it is

enough that it can be purchased and read by members of the public." *Id.* Although Cal. Civ. Proc. Code § 425.16 does not define "public interest," its preamble states that its provisions "shall be construed broadly" to safeguard "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Civ. Proc. Code § 425.16(a).

The claims here are alleged to arise from the Article published in *Cell Stem Cell*—the journal of the International Society for Stem Cell Research. (FAC ¶ 10.) Access to *Cell Stem Cell* journal is available to anyone who pays for a subscription. The issue of stem cell research is one of interest to the public, as is supported by the allegations of the FAC itself. (*See* FAC ¶ 8, 10, 13 [advances in stem cell research could lead to the cure disease and have been awarded the Nobel Prize, as well as recognized by the U.S. President, as a significant scientific breakthrough].)

Plaintiffs argue that, even if the Article would ordinarily be considered protected speech or activity, the statute exempts claims arising from commercial speech under certain circumstances which apply here. Section 425.17(c) exempts a claim arising from commercial speech from the protections of the anti-SLAPP statute when:

> (1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services;
>
> (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or

> a business competitor's business operations, goods, or services;
>
> (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and
>
> (4) the intended audience for the statement or conduct meets the definition set forth in Cal. Code Civ. Proc. § 425.17(c)(2) (*i.e.,* an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer).

Cal. Code Civ. Proc. § 425.17(c). California courts have held that the "so-called commercial speech exemption ... is a statutory exception to section 425.16 and 'should be narrowly construed.'" *Hawran v. Hixson,* 209 Cal.App.4th 256, 271 (2012) (citing *Simpson Strong–Tie Co., Inc. v. Gore*, 49 Cal. 4th 12, 22 (2010)). Yamanaka counters that the commercial speech exemption does not apply to publication in scientific journals, which are expressly excepted from its application by section 425.17(d)(1) (excepting "*any person engaged in the dissemination of ideas* or expression in any book or *academic journal*, while engaging in the gathering, receiving, or processing of information for communication to the public," emphasis supplied). Plaintiffs have the burden of demonstrating that the commercial speech exemption applies. *Rivera v. First DataBank, Inc.*, 187 Cal. App. 4th 709, 717 (2010).

Plaintiffs do not and cannot demonstrate that the Article is "commercial speech" not protected under the statute. Plaintiffs simply argue that Yamanaka has used the publication to "sell" his academic research and obtain grant money for that research. The Article does not fit into the narrow exception created in the statute. Plaintiffs do not plausibly allege that Yamanaka is "primarily engaged in the business of selling or leasing goods or services" or that the Article was made for the purpose of obtaining, promoting, or securing sales, leases or commercial transactions. Cal. Code Civ. Proc. § 425.17(c).

Plaintiffs' citations to *Kasky v. Nike,* 27 Cal.4th 939, 960 (2002) and similar cases denying protected status to advertisements or other speech concerning the sale of various products, are distinguishable. As the *Kasky* court noted, determining what constitutes commercial speech requires that a court look to "the speaker, the intended audience, and the content of the message." *Kasky,* 27 Cal.4th at 960. Unlike *Kasky*, there is no showing that Yamanaka is in a commercial enterprise, that the Article was directed to an audience of potential purchasers of any product or service from Yamanaka, or that the content of the speech concerned any commercial enterprise. Moreover, unlike the commercial speech issues discussed in *Kasky*, the commercial speech exception here is specifically codified in the statute and has its own meaning and exceptions. Section 425.17 represents the California legislature's reasoned judgment about what exceptions and exemptions should be provided in the anti-SLAPP motion context. Here, there is a specific, codified exception to the commercial speech provision, within which the Article at issue squarely falls.

B. Probability of Prevailing

Turning to the second prong, Plaintiffs must put forward evidence to show that they are likely to prevail on their UCL claim. Plaintiffs must state a legally sufficient claim and must support that claim with a sufficient prima facie evidentiary showing to sustain a favorable judgment, assuming that evidence is credited. *See Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1044 (2008). The standard applied for an anti-SLAPP motion—probability of prevailing on the merits—presents a higher burden than the plausibility standard applied for a motion to dismiss. If Plaintiffs cannot plead a plausible cause of action under the FRCP 12(b)(6) standard, then Plaintiffs as a matter of law cannot meet the probability of success on the merits standard. *Hilton*, 599 F.3d at 902 (finding that a defendant who was unsuccessful on a motion to dismiss could still prevail on the anti-SLAPP motion to strike because the plaintiff may state "a legal claim" but may not have "facts to support it").

Yamanaka argues that Plaintiffs have not pleaded facts sufficient to establish their UCL claim for fraudulent conduct.[3] To establish standing to pursue this claim, Plaintiffs must allege a plausible claim of injury as a result of Yamanaka's actions. *See* Cal. Bus. & Prof. Code § 17204. Under the UCL, plaintiffs only have standing to bring an action if they have "suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition" *Id*.

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[3] In their opposition to the motion, Plaintiffs clarify that they are relying only on the fraudulent prong of the UCL. (Oppo. at 14:22-16:11.)

Plaintiffs contend that they have offered evidence to support standing. In his declaration, Xu states that MEBO approached Merrill Lynch to solicit investors for funding the expansion of its business operations in the United States. (Xu Declaration, Dkt. No. 19, at ¶ 10.) Xu states that "[a]t first, it appeared Merrill Lynch would perform these investment solicitation services for [MEBO], but later put the project on hold" because Merrill Lynch was "uncertain whether to do business with Yamanaka or MEBO International, Inc., due to the competing uses of the [terms "iPSC" and "iPS."]" *Id.*

Construing this evidence in the light most favorable to Plaintiffs, it is still insufficient to state a prima facie case that they suffered injury in fact and lost money or property as a result of the unfair competition alleged here. At best, Xu declared that Merrill Lynch was *planning to solicit* investors for Plaintiffs. Any money or property to be gained as a result of that solicitation is purely speculative. Even if Plaintiffs could demonstrate that Merrill Lynch declined to work with them as a result of Yamanaka's use of certain phrases or acronyms in the Article (or other research), Plaintiffs have still not demonstrated a likelihood that they could establish an injury in fact that is more than speculation. *See Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 690 (2010) ("Plaintiffs' UCL claim also fails because they have not demonstrated they suffered injury in fact and [have] lost money or property as a result of the unfair competition.")

Further, Plaintiffs have not alleged specific facts, much less offered evidence, to support a claim that Yamanaka's use of the terms "induced pluripotent stem cells," "iPS," or "iPSC" in scientific publications –

publications which apparently describe and therefore distinguish Yamanaka's methods from Xu's (as the FAC pleads) – would mislead or deceive members of the public or the scientific community. *Vess v. Ciba-Geigy Corp. USA,* 317 F. 3d 1097, 1103 (9th Cir. 2003). Plaintiffs' allegations that Yamanaka's use of the terms is a "continuing threat to members of the public in that they are likely to be deceived as to veracity of Dr. Yamanaka's research and the inherent risk of cancer" (FAC ¶35) are conclusory and lacking in even basic evidentiary support to defeat an anti-SLAPP motion.

III. CONCLUSION

Accordingly, the Special Motion to Strike pursuant to California Code of Civil Procedure section 425.165 is **GRANTED**. Plaintiffs' First Amended Complaint is **STRICKEN**.

Defendant is entitled to an award of attorneys' fees and costs pursuant to Cal. Civ. Proc. Code § 425.16(c). *See Vargas v. City of Salinas,* 200 Cal.App.4th 1331, 1340 (2011) (an award of attorneys' fees to a prevailing defendant on a SLAPP motion is mandatory).

This terminates Docket No. 11.

IT IS SO ORDERED.

Date: January 30, 2014

/s/_____

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No.: 13-CV-3240 YGR

[Filed January 30, 2014]

RONGXIANG XU AND MEBO INTERNATIONAL, INC.,	)
Plaintiffs,	)
v.	)
SHINYA YAMANAKA,	)
Defendant.	)

JUDGMENT

The issues in this action having been duly considered, and the Court having granted the Special Motion To Strike of Defendant Shinya Yamanaka, it is **ORDERED, ADJUDGED AND DECREED** that the First Amended Complaint is **DISMISSED WITH PREJUDICE**.

Judgment is entered in favor of Defendant Shinya Yamanaka and against Plaintiffs Rongxiang Xu and MEBO International, Inc. Plaintiffs shall take nothing by their First Amended Complaint.

IT IS SO ORDERED.

Date: January 30, 2014

/s/_____

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-15359
D.C. No. 4:13-cv-03240-YGR
Northern District of California, Oakland

[Filed August 26, 2015]

MEBO INTERNATIONAL, INC., a California corporation,

Plaintiff - Appellant,

v.

SHINYA YAMANAKA, an individual,

Defendant - Appellee.

ORDER

Before: TALLMAN, M. SMITH, and MURGUIA, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX D

RELEVANT STATUTORY PROVISION

California Code of Civil Procedure Section 425.16

425.16. (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

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

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at

any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

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

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

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

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in

connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

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

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

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

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

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related

notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

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