William A. Cohan
California SB #141804
Colorado SB #7426
WILLIAM A. COHAN, P.C.
P.O. Box 3448
Rancho Santa Fe, CA 92067
Tel: 858-832-1632
Fax: 858-832-1845
E-mail: bill@williamacohan.com

Attorney for Defendant
DEBORAH KRUEGER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JULIAN BAKERY, INC., a California Corporation and HEATH SQUIER, an individual, Plaintiffs, v. DEBORAH KRUEGER, an individual, Defendant.	CASE NO. 13 CV 2709H NLS DEFENDANT'S OPPOSITION TO PLAINTIFFS' *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION Courtroom: 15A Judge: Hon. Marilyn L. Huff Complaint Filed: Oct. 18, 2013 Complaint Removed: Nov. 12, 2013 Trial Date: TBD Hearing Date: Nov. 22, 2013 Time: 1:30 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution of the United States

Statutes and Regulations

I.

INTRODUCTION

On November 15, 2013, Plaintiffs filed an *ex parte* motion[1] for a temporary restraining order ("TRO") and order to show cause re: preliminary injunction (docket #2) to silence Defendant's criticism and exposure of their false labels and misleading marketing of bakery products ("bread") as "low carbohydrate" – despite Plaintiffs' admission in the Complaint that for more than one year[2] they falsely labeled the nutritional content of thousands of loaves of bread and marketed them by falsely claiming their bread was low in carbohydrate content when they knew their claims were false and misleading[3].

Plaintiffs seek an order enjoining Ms. Krueger and unidentified agents of Ms. Krueger from: (1) making any false statement about plaintiffs; (2) making any disparaging remarks about plaintiffs

---

[1]Ms. Krueger objects to plaintiffs abuse of the *ex parte* process. There is no emergency justifying hearing this motion on an expedited basis. Ex parte practice is discouraged. *Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F.Supp. 488, 492 (C.D. Cal. 1995)(*Ex parte* applications are reserved for true emergencies, and are "the forensic equivalent of standing in a crowded theater and shouting, 'Fire!' There had better be a fire.") Plaintiffs attempted to manipulate the Court into entering their gag order in this expedited fashion hoping they could ambush Ms. Krueger, who lives out of state, and put her at a major procedural disadvantage by getting their order entered before she could meaningfully respond. This request could and should have been briefed in due course by regular motion.

Before Ms. Krueger removed this action, Plaintiffs' counsel informed Ms. Krueger by phone call on Friday, November 8, 2013, at approximately 5:30pm, that Plaintiffs were moving *ex parte* in the State court proceeding and would provide her with copies of their papers by the following Tuesday, after the Veterans' Day Holiday. No such papers were ever filed or served in State court though Ms. Krueger did not remove the action until approximately 1:30 PM Tuesday, November 12. This was a transparent attempt to ambush Ms. Krueger in State court by serving her with the motion at the eleventh hour knowing she most likely would not appear at the scheduled hearing on November 14.

[2]In 2008, Julian Bakery launched Smart Carb Bread. Complaint ¶11. In 2011, Julian Bakery was alerted that some of its bread was incorrectly labeled with false nutritional information. Complaint ¶13. By late 2012, Plaintiffs had finished reformulating Smart Carb Bread's ingredients to properly reflect the claimed nutritional content. Complaint ¶22.

[3]Ms. Krueger notes that Plaintiffs have not yet offered nor made any restitution to the class of consumers who purchased thousands of loaves of their falsely labeled "low carb" bread.

(even if true); (3) interfering with contractual relationships between plaintiffs and unidentified third parties; (4) interfering with unidentified prospective economic relationships of plaintiffs; and, (5) conduct that allegedly breaches a purported "contract" between the parties. In support of this request for a sweeping (yet vague) restraint on Ms. Krueger's First Amendment rights, Plaintiffs raise essentially three arguments.

First, Plaintiffs primarily rely on the argument that Ms. Krueger's speech is not protected by the First Amendment because she entered into a purported "contract" with Plaintiff Heath Squier whereby she supposedly waived her free speech rights. To support this claim, Plaintiffs cite cases concerning speakers who obtained confidential and proprietary information only after contracting to limit dissemination of that information and receiving financial gain.

Second, Plaintiffs aver that Julian Bakery, Inc. and Mr. Squier will suffer irreparable injury because Ms. Krueger lacks sufficient assets to satisfy any money judgment they might obtain if they successfully litigated the breach of contract claim[4]. In support of this irreparable injury argument, Mr. Squier claims (without any supporting evidence or reference to many other critics): "since the republication of Defendant's websites and the multiple postings she has made at other websites, Julian Bakery's sales have decreased by an average of approximately $200,000 per month."

Finally, Plaintiffs make the audacious claim that the public interest favors enjoining Ms. Krueger from exercising her First Amendment Rights.

Plaintiffs' motion must be denied for three reasons, any one of which is sufficient to require dismissal of their claims. First, Defendant Krueger's internet postings exposing Plaintiff's false labeling and misleading marketing of their bread scheme constitutes paradigmatic speech about an issue of public importance protected by the First Amendment. Indeed, Plaintiffs admitted Defendant correctly identified Plaintiffs' false labeling and misleading marketing, which eventually induced

---

[4]Defendant concedes she has limited financial resources, particularly when compared to Plaintiffs. Plaintiffs' abuse of the *ex parte* process in both State court and this Court are a transparent attempt to exploit Plaintiffs' economic advantage over Ms. Krueger. This, coupled with the complete lack of legal authority and evidence to support Plaintiffs' claims, make Plaintiffs' suit susceptible to the Anti-SLAPP motion that will follow shortly after this opposition is filed.

Plaintiffs to cease making some of their false statements about their bread. This is an issue of public concern because it affects the public health. Accordingly, in addition to paramount First Amendment considerations the public interest favors denying Plaintiffs' request for a TRO.

Second, Plaintiffs fail to identify any false statements allegedly made by Defendant Krueger, compounding this critical omission by failing to state, much less provide any evidence of, any logical or legal link between Ms. Krueger's speech on the one hand and Plaintiffs' alleged damages on the other. Plaintiffs' self-serving unsubstantiated claim of "belief" that $200,000 damages per month is attributable to Defendant Krueger's speech is woefully inadequate to establish the damages[5] element of a breach of contract claim. *See* Squier Decl. (docket # 2-3) ¶37.

Third, Plaintiffs offer no authority to support their troubling claim that Defendant Krueger's criticism should be silenced forever – no matter what Plaintiffs do in the future – because her meager assets may be inadequate to satisfy their alleged damages (if they could prove any such "damages") and that Ms. Krueger's speech was unprotected.

II.

ARGUMENT

Defendant first discusses Plaintiffs' inapposite legal authority. Next, Defendant refutes Plaintiffs' contract claims. The discussion then demonstrates the specific speech Plaintiffs cite is protected.

A. Plaintiffs' Legal Authority

Plaintiffs' heavy reliance on *Paul v. Friedman* (2002) 95 Cal. App. 4th 853 is misplaced. This case provides no support for limiting Ms. Krueger's speech. *Friedman* addressed whether a lawyer's investigative acts in the course of prosecuting his clients' arbitration claims against a

[5]Plaintiffs fail to attach contract(s) or any financial records to support this claim. Obvious evidence to corroborate this would include such things as agreement(s) with Whole Foods, financial statements, sales records, and bank records. Even assuming Plaintiffs have such records showing decreased sales, far more would be required to establish a nexus between Ms. Krueger's speech and Plaintiffs' claimed recent economic hardship. Any decrease in sales of bread would be caused by many economic factors, which, at a minimum, would require actual evidence, complex economic models and expert testimony. No such preliminary showing is even attempted by Plaintiffs.

securities broker were acts in furtherance of [the lawyer's] free speech rights within the meaning of California's anti-SLAPP statute. *Id.* at 856. The single paragraph at the beginning of the Court's discussion conclusively demonstrates that *Paul v. Friedman* provides no support for plaintiffs' attempt to evade dismissal based on Code Civ. Proc. §425.16:

> ...A lawsuit seeking redress for harassing investigation of topics unrelated to those under consideration in an official proceeding is not the type of "abuse of judicial process" that the Legislature sought to prevent... [A]nti-SLAPP procedures [are] clearly intended to expose and dismiss abusive lawsuits that chill free speech, but not actions seeking redress for improper investigation of frivolous claims.

95 Cal.App.4th at 861 (emphasis supplied).

The *Paul v. Friedman* Court's analysis actually supports Deborah Krueger's First Amendment rights to speech, press and association:

> ...A SLAPP suit is a meritless lawsuit 'filed primarily to chill the defendant's exercise of First Amendment rights.' (*Wilcox v. Superior Court* (1994) 27 Cal. App. 4th 809, 815 fn.2....) ..."[W]hile SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so."[6](*Wilcox v. Superior Court, supra*, 27 Cal. App. 4th at p. 816-817....)
>
> FN 13 "SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. [Citations omitted in original.] Indeed, one of the common characteristics of a SLAPP suit is its lack of merit... But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective... As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished."

95 Cal. App. 4th at 861-862. Section 425.16 permits a special motion to strike 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 in connection with a public issue. The statute defines an "act in furtherance of a person's right of petition or free speech...in connection with a public issue" to include four types of

---

[6] Plaintiffs seek damages based on losses from bread sales of $200,000 per month which they attribute to Ms. Krueger's internet postings. They glibly observe that Ms. Krueger's meager assets will be insufficient to compensate them for financial losses, arguing this supports a lifetime gag order prohibiting Ms. Krueger's criticism regardless of the nature, extent, timing and adverse impact on public health caused by Plaintiffs' marketing food falsely labeled to conceal its large carbohydrate content.

conduct: including (3) Any written or oral statement or writing made in a public place in connection with an issue of public interest (§425.16, subd.(e)(3)); and, (4) Any other conduct in furtherance of the exercise of the rights of petition and free speech "in connection with a public issue or an issue of public interest." (§425.16, subd.(e)(4)).

It is difficult to imagine an issue more clearly "connected with an issue of public interest" than Ms. Krueger's internet postings which exposed Julian Bakery's false statements on thousands of loaves of bread misleading diabetics and others concerned about carbohydrates in their diets.

Plaintiffs implicitly concede Ms. Krueger's prima facie showing she was exercising her protected First Amendment rights under §425.16(b)(1), set forth in more detail in Ms. Krueger's Anti-SLAPP motion. Ultimately, Plaintiffs must show they will prevail on both the instant request for TRO and to refute the Anti-SLAPP motion. Plaintiffs' TRO filing fails because their conclusory claims have neither evidence nor any legal authority to support them. Furthermore, Plaintiffs fail to demonstrate that any consideration supports the purported "contract" they rely on to restrain Ms. Krueger's speech.

Unlike all cases Plaintiffs cite, Ms. Krueger did not receive any financial benefit from Plaintiffs or otherwise from her protected internet speech. To the contrary, as shown by her attached declaration, Ms. Krueger spent $3400 for the laboratory analysis of five varieties of Plaintiffs' falsely labeled bread. *See* Krueger Decl. Ex. 2, ¶3. This is not a case concerning confidentiality agreements in the context of employment disputes (Ms. Krueger was certainly never employed by Plaintiffs) nor does it concern confidentiality required for settlement negotiations during mediation or arbitration. Plaintiffs' disingenuous citation to such obviously inapplicable authority reveals their claims are meritless.

Plaintiffs cite *Paul v. Friedman* for the proposition: "[I]t is possible to waive even First Amendment free speech rights by contract." *95* Cal.App.4th at 869. But the circumstances in *Paul v. Friedman* bear no similarity to Deborah Krueger's statements on the internet, i.e. "...written statements in a public place in connection with a public issue or an issue of public interest." Ms. Krueger's postings exposing Plaintiffs' false labels, which misled health conscious consumers

concerned about the carbohydrate content of plaintiffs' bread, are nothing like Friedman's declarations which violated "the confidentiality of mediation communications or to the statutory limits on the content of mediators' reports." *Id.* at 869.

Furthermore, in *Paul v. Friedman* the plaintiff "clearly established a probability he will prevail on the claim, regardless of whether it was otherwise subject to [Friedman's] special motion to strike." *Id.* At 869. Plaintiffs cannot establish any such probability.

Aguilar v. Avis Rent A Car System, (1999) 21Cal. 4th 121, addressed a narrowly circumscribed injunction limited to prohibiting a manager's use of racial epithets in the workplace, which did not constitute an invalid prior restraint on speech. Plaintiffs' attempt to equate Deborah Krueger's criticism of Plaintiffs on the internet resulting from Plaintiffs' admittedly false statements to mislead health conscious consumers, endangering and damaging public health, with a manager's use of racial epithets is unavailing. Plaintiffs ignore the obvious distinction between protected speech about a serious public health issue and the manager's non-existent right to verbally abuse subordinates at the workplace with racial epithets. At the risk of belaboring the obvious, that the right to free speech is not absolute (i.e., racial epithets are not protected speech in the workplace) cannot support limitations on Krueger's rights to expose plaintiffs' extensive and dangerous false bread labeling scheme. Plaintiffs concede in the Complaint they grossly mislabeled nutritional information for at least an entire year[7]. Plaintiffs' false packaging and false claims on the Julian Bakery, Inc. website caused injuries to and endangered thousands of unsuspecting consumers who reasonably relied on plaintiffs' false claims about its "low carbohydrate breads."

Next, seeking support for their permanent prohibition against Ms. Krueger's criticism – particularly her exposure of their admittedly false claims and misleading marketing of supposedly "low carb bread" with a very high carbohydrate content – plaintiffs cite *ITT Telecom Products v. Dooley*, (1989) 214 Cal.App. 3rd 307. But an ex-employee's breach of a written contract not to disclose confidential information obtained during employment, misappropriating corporation trade secrets and confidential, proprietary information bears no resemblance Ms. Krueger's internet

[7]Complaint ¶¶ 11 and 13, described in footnote 2, *supra*.

criticism. Ms. Krueger's websites and internet posts are not based on proprietary or confidential information or trade secrets, nor was Ms. Krueger employed by plaintiffs. Ms. Krueger has never contracted with nor received any benefit from Plaintiffs. To the contrary, she suffered from spiking blood sugar levels directly resulting from her reliance on plaintiffs' false and fraudulent statements concerning their "low carbohydrate" bread, including labels specifically stating a 42 gram slice of their bread contained a single gram of carbohydrate which actually contained 14 grams of carbohydrate. All five (5) varieties of plaintiffs' bread dramatically understated the specific carbohydrate content as well as other important data on protein and calories.

In a decision pre-dating enactment of the Anti-SLAPP Statute, the *ITT Telecom Products v. Dooley* court distinguished between speech generally protected by the litigation privilege and proprietary information such as trade secrets:

> [T]rade secrets have been recognized as a constitutionally protected intangible property interest. (*Ruckelshaus v. Monsanto* (1984) 467 US 986, 1001-1004...). Evidence Code section 1060 provides: 'If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.'

214 Cal.App.3d 307, 318-319.

While it is *possible* to waive First Amendment free speech rights by contract in limited circumstances because of important public policy interests based on valid consideration, this is not such a case. In *In re Steinberg* (1983) 148 Cal. App. 3d 14, 20, a movie maker's First Amendment right to disseminate his movie was limited by his prior agreement as a condition to obtain access to confidential information about juveniles in the court system – requiring Steinberg to submit the final version of the movie to the juvenile court for editing. In a footnote, the *Dooley* court explains: "*Steinberg* cites cases upholding secrecy agreements by Central Intelligence Agency ("CIA") employees against First Amendment claims." They rely primarily on national security concerns rather than particular contract language. Thus, we balance society's interest in accurate judicial proceedings against ITT's property interest in information yielding a competitive advantage and Dooley's written promise of nondisclosure. Dooley relied on *Willig v. Gold* (1946) 75 Cal. App. 2d

809, which observed that an agent is under no legal duty to refrain from disclosing his principal's dishonest acts to their victim...*Willig* involved no assertion of privilege and its irrelevance is manifest. *Id*. 318-319.

Plaintiffs Julian Bakery and Heath Squier cite *ITT Telecom Products v. Dooley* for the proposition, "it is possible to waive even First Amendment rights by contract," claiming the e-mail exchange between Plaintiff Squier and Ms. Krueger constitutes a contract by which Ms. Krueger is precluded forever from publishing any derogatory statements about Plaintiffs, regardless of Plaintiffs' conduct or its impact on public health and despite the lack of anything resembling trade secrets, confidential information about minors or "national security concerns." Plaintiffs seek a permanent prior restraint on First Amendment protected speech.

Steinberg's discussion of prior restraints on speech illuminates fatal flaws in plaintiffs' claims instanter:

> Steinberg had no right to obtain the information [subject matter of his film] without juvenile court approval. But, having obtained that approval, he has a right to disseminate the information as he sees fit, provided he complies with any agreement that he made in obtaining the juvenile court's approval.

148 Cal. App. 3d 14, 18. This is not controlling here because Ms. Krueger did not agree to anything with Plaintiffs to obtain the information on her websites and internet posts. To the contrary, Ms. Krueger learned of Plaintiffs' scheme from: (1) her own physical discomfort; (2) testing her own blood; and, (3) sending the suspicious bread to an independent laboratory which determined that the Plaintiffs' baked goods were labeled falsely.

Ms. Krueger needed no approval from Plaintiffs (or anyone) to obtain the information she disseminated concerning Plaintiffs' false labels and widespread misleading marketing of bread as "low in carbohydrates." Plaintiffs conveniently ignore (despite their admissions), and now attempt to erase, that Mr. Krueger's comments on the internet that Plaintiffs recklessly and/or deliberately disseminated thousand of loaves of mis-labeled bread are actually true – i.e., not defamatory. As discussed below, the purportedly offending comments by Ms. Krueger that Plaintiffs cite in the Complaint and *ex parte* motion are at most expressions of opinion based on facts.

As the *Steinberg* court noted in citing the U.S. Supreme Court, "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *See New York Times Co. v. United States* (1971) 403 US 713, 714, quoting *Bantam Books, Inc. v. Sullivan* (1963) 372 US 58, 70. With this assertion the Supreme Court cleared the way for publishing the Pentagon Papers, holding that "the burden of showing sufficient justification for the imposition of such a restraint had not been met by the government." Plaintiffs present nothing like a threat to national security to support their demands for a temporary restraining order and preliminary injunction. The instant *ex parte* application seeks precisely the prior restraint condemned by the United States Supreme Court.

B. There Was No Contract Between The Parties

The parties did not enter into a contract because (1) no consideration supports the purported "contract" and (2) such a contract would be void as against public policy. "A promise is not enforceable unless consideration was given in exchange for the promise." *US Ecology, Inc. v. State* (2001) 92 Cal.App.4th 113, 128. California Civil Code ("CC") §1605 defines good consideration as:

> Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for the promise.

(Emphasis added.) As used in CC §1605, the term "good consideration" is equivalent to "valuable consideration" and does not refer to adequate consideration in the sense of monetary value. *Bank of California v. Connoly* (1973) 36 Cal.App.3d 350, 370. Good consideration must have some, at least *de minimus*, value, however[8]. *A.J. Indus., Inc. v. Ver Halen* (1977) 75 Cal.App.3d 751, 761. As a general rule, a promise to perform a preexisting legal duty (i.e., remove false and misleading information about bread from plaintiffs' website) is not good consideration to support a binding contract. *O'Byrne v. Santa Monica-UCLA Med. Ctr.* (2001) 94 Cal.App.4th 797, 808.

[8]Under CC § 3391(1), the remedy of specific performance is not available unless the party against whom enforcement is sought has received "adequate consideration." This TRO proceeding seeks to circumvent a claim for specific performance of the purported "contract."

A contractual provision that violates public policy is unlawful under CC §1667(2) and may be declared void. *Farmers Ins. Exch. v. Hurley* (1999) 76 Cal.App.4th 797. CC § 1668 renders certain exculpatory clauses unenforceable. It provides:

> All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of law.

1. No Consideration Supports Plaintiffs' Purported "Contract"

Plaintiffs proffer a so-called "contract" between Heath Squier and Deborah Krueger in the form of a brief e-mail exchange concerning Plaintiffs' falsely labeled bakery products and Ms. Krueger's agreement to cease posting derogatory (but true) comments about Plaintiffs and their products upon Plaintiffs ceasing to publish false statements about some of those products. As conceded by Plaintiffs, Ms. Krueger ceased her criticism when Plaintiffs ceased making certain false statements about their products, but Ms. Krueger resumed her criticism of Plaintiffs when she learned of additional misconduct by Plaintiffs precipitating web postings months later.

Steinberg discussed the decisions in *Snepp v. United States* (1980) 444 US 507 and *United States v. Marchetti*, (4th Cir. 1972) 466 F.2d 309, as examples of decisions upholding agreements in the face of First Amendment challenges, both of which involved former CIA agents who had previously signed secrecy agreements as a condition of employment, promising not to publish any information derived from CIA work without prior approval. Had these CIA agents not signed express secrecy agreements they would not have been employed or obtained access to the information they sought to publish.

Ms. Krueger has not obtained any confidential or proprietary information or any benefit from Plaintiffs. Instead, Ms. Krueger suffered from ingesting high levels of carbohydrates -- as have thousands of other unsuspecting victims -- as a direct result of her reliance on Plaintiffs' false labeling, marketing and sales of thousands of loaves of bread. She learned of the actual contents of Plaintiffs' falsely labeled and marketed bread from (1) her own physical discomfort, (2) measurements of elevated blood sugar in her own blood, and (3) laboratory test results on five (5)

varieties of Julian Bakery bread for which Ms. Krueger paid some $3400, which test results are attached hereto to Ms. Krueger's declaration. Ex. 2, ¶¶ 2-4.

The purported "contract" Plaintiffs allege provides absolutely nothing of any value to Ms. Krueger as consideration. Plaintiffs cannot seriously contend that taking down false information concerning some of their bread, which they were never entitled to publish and use to mislead consumers, provides any consideration to support silencing Ms. Krueger forever from making "disparaging statements concerning Plaintiffs[9]," regardless of whether they are in fact true statements, and regardless of Plaintiffs' conduct.

2. Plaintiffs "Contract" Is Void For Violating Public Policy

Plaintiffs conclude without any analysis that somehow the public interest supports restraining Ms. Krueger from making any disparaging remarks about them, regardless of whether the remarks are in fact true. Plaintiffs' Motion (docket 2-1), p. 15. Not so. The public has a clear interest in allowing Ms. Krueger to express her opinions and tell the story of her experiences with Plaintiffs and their products. Although Ms. Krueger's motives are irrelevant, her postings obviously help protect the public by providing information relevant to consumers' nutritional choices, particularly diabetics and individuals who must track carbohydrate intake for other health concerns.

On the other hand, Plaintiffs appear to have no purpose other than to harass and intimidate Ms. Krueger with the instant lawsuit and request for TRO. Plaintiffs seek through this lawsuit to continue peddling their products unhindered by Ms. Krueger's criticism – even though based on fact.

Ms. Krueger is not Plaintiffs' only critic. Her websites and other posts on the internet are part of a chorus of Plaintiffs' critics. Her speech is part of a public debate on an important health issue of public interest in the public forum of the internet. *See* Krueger Decl. Ex. 4, ¶¶10-12. Accordingly, it is quintessential protected First Amendment speech, which public policy protects.

---

[9]This category of speech is so vague it could never be enforced. Moreover, it cannot be imputed to unidentified present and potential future agents of Ms. Krueger. For example, this very filing would be prohibited (though it clearly is not) despite the fact it is a required response protected by the privilege to make statements during judicial proceedings. The Court ordered a response in opposition (docket #3).

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976)(citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

C. Statements Plaintiffs Identify Are Disparaging Expressions Of Opinion Not Shown To Be False

Plaintiffs do not identify any false statements of fact on Ms. Krueger's websites or other internet posts. Instead, Plaintiffs allude to purported false statements by claiming "Defendant's websites are saturated with false invectives" and focus specifically only on (1) the caption of an article on one of Ms. Krueger's websites stating that Mr. Squier is "The 'Bernie Madoff' of the Low Carb Internet Scam Artists," (2) Ms. Krueger's statements of opinion – supported by facts – that: Julian Bakery "bilked" and "cheated" the low-carb and diabetic communities and that Plaintiffs are guilty of "business raping;" and, (3) that Julian Bakery has infringed on a third parties' patent. Complaint ¶18; Plaintiffs' Motion (docket 2) p.3, ll. 14-19.

A reasonable person would not construe the caption to Ms. Krueger's webpage as charging Mr. Squier with running an oxymoronic bread ponzi-scheme – obviously a metaphor for unscrupulous business practices. *See Knievel v. ESPN*, 393 F.3d 1068, 1078 (9th Cir. 2005)("But we assess the meaning of the work in... context... the caption cannot reasonably be interpreted literally in this context....") The First Amendment protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20 (1990)(quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)). Courts have extended First Amendment protection to such statements in recognition of "the reality that exaggeration and non-literal commentary have become an intergral part of social discourse." *Levinsky's Inc. v. Wal-Mart Stores, Inc.,* 127 F.3d 122, 128 (1st Cir. 1997).

Ms. Krueger's rhetorical statements that Plaintiffs "bilked" and "cheated" the low-carb community and diabetic communities are essentially conceded by Plaintiffs in their Complaint. *See* Complaint ¶¶11, 13, and 22. There is no dispute that Plaintiffs sold falsely labeled bread from sometime in 2011 through late 2012, supplemented by an inference the "Smart Carb Bread" was

falsely labeled since its launch in 2008. "Business raping" is an obvious metaphor but to the extent it excoriates Plaintiffs for profiting from their falsely labeled bread, it is a true statement of fact. Plaintiffs apparently have taken some subsequent remedial measures to correct their falsely labeled products, but they have done nothing to reimburse any consumers induced to purchase the mislabeled products under false pretenses. Ms. Krueger is not a patent lawyer, so her statement concerning Plaintiffs' putative patent infringement is merely her lay opinion on the subject. It also is not demonstrably false at this point.

All of these opinions are protected speech because they are Ms. Krueger's imaginative expressions of contempt for Plaintiffs:

> Comments that are no more than " 'rhetorical hyperbole,' 'vigorous epithet [s],' 'lusty and imaginative expression[s] of ... contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection. [Citations.]" (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401, 88 Cal.Rptr.2d 843; accord, *Seelig*, *supra,* 97 Cal.App.4th at p. 809, 119 Cal.Rptr.2d 108.) Consequently, courts have frequently found the type of name calling, exaggeration, and ridicule found in [Ms. Krueger's] posts to be nonactionable speech. (See, e.g., *Krinsky*, *supra,* 159 Cal.App.4th at pp. 1159, 1173, 72 Cal.Rptr.3d 231 [in a chat room setting, anonymous post that corporate officers consisted of a "cockroach," "losers," "boobs," and "crooks" fell into the grouping of "crude satiric hyperbole which, while reflecting the immaturity of the speaker, constitute protected opinion"]; *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 690–691, 29 Cal.Rptr.2d 547 [title "Lies, Damn Lies, and Fund Advertisements" nonlibelous as "simply 'imaginative expression' or 'rhetorical hyperbole,' traditionally protected under the First Amendment"]; *James v. San Jose Mercury News, Inc.* (1993) 17 Cal.App.4th 1, 12, 20 Cal.Rptr.2d 890 [article describing lawyer as engaging in "sleazy, illegal, and unethical practice" fell into "protected zone of ' "imaginative expression" ' or ' "rhetorical hyperbole" ' "].)

Summit Bank v. Rogers (2012) 206 Cal.App.4th 669, 699-700. Moreover, in *ComputerXpress*, *Inc. v. Jackson* (2001) 93 Cal.App.4th 993, the court ruled similar Internet statements critical of the plaintiff company to be nonactionable opinion. The nondefamatory statements included:(1) "When the people who have ... been duped into this stock realize the scam they were coaxed into, my guess is there will be hell to pay," *Id.* at 1013; (2) "You guys really seem to think you can sucker a lot of people all the time!" *Ibid.*; and, (3) "[W]ill someone please tell me why ANYONE would believe ANYTHING these guys and their pump and dump supporters say?" *Ibid.* The court ruled that the "tone and substance" of such remarks identified them as statements of opinion and not of fact. 93

Cal.App.4th at 1012–1013. Ms. Krueger's statements are indistinguishable from these protected internet comments.

III.

CONCLUSION

For all the foregoing reasons Plaintiffs' *ex parte* application for TRO and order to show cause re: preliminary injunction should be denied.

DATED: November 21, 2013

Respectfully Submitted,

WILLIAM A. COHAN, P.C.

By: */s/ William A. Cohan*
William A. Cohan
Attorney for Defendant Deborah Krueger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT: I am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California. My business address is 17211 Circa Del Sur, Rancho Santa Fe, CA 92067. I am not a party to the above-entitled action; and I served the foregoing DEFENDANT'S OPPOSITION TO PLAINTIFFS' *EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION*, via the CM/ECF court system:

Attorneys for Plaintiffs:

Frederick K. Taylor, Esq.
PROCOPIO, CORY, HARGREAVES & SAVITCH LLP
fkt@procopio.com

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21ST day of November, 2013.

/s/ *Alicia Cisneroz*
Alicia Cisneroz, Legal Assistant