

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/02/09

DEPT. NE S

HONORABLE JOSEPH F. DE VANON

JUDGE

G. BERNI

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

NONE

Deputy Sheriff

NONE

Reporter

8:30 am

GC041766

Plaintiff

Counsel N/A

A.H. BARNES

VS

Defendant N/A

XCENTRIC VENTURES, LLC, EDWARD  
MADGESON

Counsel

## NATURE OF PROCEEDINGS:

### RULING ON SUBMITTED MATTER

The court having taken defendant Robert E. Kinney and Kinney Recruiting, Inc.'s motion to strike the first amended complaint under submission on November 24, 2009, now rules as follows:

Special motion to strike is granted as against all plaintiffs except BCG Attorney Search.

All defendants are being sued for conduct that is protected by CCP 425.16(e). Except for BCG Attorney Search, the only plaintiff that is potentially a competitor of defendant, the speech is not exempt under the CCP 425.17(c) commercial speech exception. Although defendant made the web posting anonymously, an inference may be raised that the statements were made to promote Kinney's own business.

As against all plaintiffs except BCG Attorney Search, the commercial speech exemption does not apply and therefore the burden shifts to plaintiffs to demonstrate a probability of prevailing on the merits. Plaintiffs will be unable to do so because the complaint is time barred. The conduct alleged in the complaint concerns a web posting on May 29, 2008; The operative pleading was filed on August 5, 2009, more than a year later. The causes of action, which are all based on libel, are barred by the one year statute of limitations. CCP 340(c). Robert Kinney and Kinney

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Recruiting, Inc. were not named or served as doe defendants and therefore the addition of these parties to the litigation does not relate back to the original complaint. Notwithstanding allegations of unfair competition and interference with prospective economic advantage, the gravamen of the action is libel. HYDRO-MILL CO., INC. V. HAYWARD, TILTON & ROLAPP INS. ASSOC., INC. (2004) 115 CAL.APP.4TH 1145.

In addition to being time barred, plainiffs have not provided sufficient evidence to establish a probability of prevailing on the merits. Defendants have presented evidence that there was already a good deal of on-line discussion regarding plaintiffs' businesses when defendant Kinney posted his remarks, which were based on his first hand knowledge. Kinney's statements of opinion are privileged communications amount interested parties. CC47(c).

Objections to Kinney, Jowers, Avitable, Nugent, Mago, Barnes, Binstock and Bavely declarations are over-ruled. Objections to the Berra declaration are sustained to the extent he purports to provide evidence that Kinney and Kinney Recruiting were added as doe defendants.

### CLERK'S CERTIFICATE OF MAILING/ NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the

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## NATURE OF PROCEEDINGS:

above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 12/2/09 upon each party or counsel named below by depositing in the United States mail at the courthouse in Pasadena, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: December 2, 2009

John A. Clarke, Executive Officer/Clerk

By: \_\_\_\_\_

G. BERNI

PAUL S. BERRA

LAW OFFICES OF PAUL S. BERRA

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