

1 for summary judgment, or in the alternative, for summary adjudication of the false advertising
2 claims, ¶ 46, exh. 45.)

3 ORDER TO SHOW CAUSE

4 It appears that Plaintiffs VeriPic and John Kwan and their counsel have, in violation of
5 Code of Civil Procedure section 128.7, subdivision (b): presented papers to the Court primarily
6 for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in
7 the cost of litigation; presented and relied upon allegations and other factual contentions that
8 lacked evidentiary support or, unable to demonstrate evidentiary support after a reasonable
9 opportunity for further investigation or discovery; and, denied factual contentions that were not
10 warranted on the evidence.

11 Specifically, it appears that plaintiff Kwan, the alleged Chief Executive Officer of
12 plaintiff VeriPic, and designated PMK/PMQ for VeriPic for the majority of issues, filed the
13 initial complaint, FAC, SAC, TAC, 4AC, 5AC, 6AC and 7AC, knowing that he had in fact
14 engaged in activity in his capacity as CEO of VeriPic that was “unethical, dishonest,
15 disreputable, not creditworthy, not trustworthy and a bad influence on the community,” despite
16 his allegations to the contrary that any statements to that effect were “patently untrue and
17 outrageously false.” Kwan also filed declarations under penalty of perjury in support of motions
18 to continue the apparently frivolous litigation, including motions for leave to file amended
19 complaints, and motions for summary judgment or adjudication. Kwan has since invoked the
20 Fifth Amendment, and he himself—through his counsel, Mr. Shah—has stated that “the Court
21 may draw any inference it chooses from Kwan’s silence.” In addition, it appears that Kwan, the
22 alleged Chief Executive Officer of plaintiff VeriPic, and designated PMK for VeriPic on the
23 large majority of issues, apparently knowing that his claims and allegations were meritless and
24 frivolous, thereafter pursued litigation lasting five years, specifically filing a number of
25 complaints—starting with the second amended complaint—in which the “Caveat Emptor” claims
26 were “at the heart” of VeriPic’s claims, and exponentially increasing the claimed amount of
27 damages. Thereafter, Kwan added himself as a plaintiff in the 4AC.

1 Despite conceding that “the Court eviscerated the legal grounds to continue pursuing
2 claims based on the Caveat Emptor and related communications,” Plaintiffs and their attorneys
3 —the law firm of Grellas Shah LLP, and attorneys Grellas, Shah and Siegel—continued to
4 pursue claims based on “Caveat Emptor”, including the fifth cause of action for false advertising,
5 the eleventh cause of action for false advertising, and twelfth cause of action for unfair
6 competition, both of which continue to incorporate allegations regarding “Caveat Emptor” even
7 after Plaintiffs’ dismissal of certain causes of action without prejudice. Additionally, despite
8 Kwan’s invocation of the Fifth Amendment, Plaintiffs and their counsel continue to rely, in part,
9 on earlier Kwan declarations and deposition testimony in papers and pleadings filed with and
10 presented to the Court.

11 Moreover, even after the February 24, 2012 David Lai deposition Plaintiffs’ counsel
12 continued to pursue claims based on “Caveat Emptor”, apparently neglecting—or intentionally
13 failing—to conduct a reasonable inquiry as to the merit of those claims. Additionally, it appears
14 that Plaintiffs’ counsel instructed its clients to manufacture evidence to support its motions, and
15 take actions to spoliage evidence, and thereafter, Plaintiffs did manufacture evidence and take
16 actions to spoliage evidence, and then filed papers, including the second amended and subsequent
17 complaints, with knowledge that their claims lacked evidentiary support, and were being
18 presented for an improper purpose.

19 It also appears that Plaintiffs’ counsel, Mr. Shah, as counsel for David Lai at his
20 deposition, instructed his client David Lai to make certain statements against his client’s interests
21 and in favor of his other clients, Plaintiffs, requiring Plaintiffs’ counsel to eventually suspend the
22 February 24, 2012 deposition, and David Lai to obtain separate counsel, file an errata sheet to
23 change his deposition answers, and testify again at the April 5, 2012 deposition. Plaintiffs’
24 counsel have been awarded their attorneys’ fees and costs as monetary sanctions in discovery
25 proceedings and in connection with the aforementioned anti-SLAPP motion, apparently when
26 they knew or should have known that the basis for the claims were without merit.

27 Accordingly, Plaintiffs and their counsel Grellas Shah LLP, and attorneys Grellas, Shah
28 and Siegel are ordered to show cause as to why they have not violated Code of Civil Procedure

1 section 128.7 subdivision (b), unless, within 21 days of service of this order to show cause,
2 Plaintiffs and their counsel withdraw: the 7AC to the extent that the claims are based or related
3 to statements contained in the “Caveat Emptor” letter; the declaration by Kwan in support of
4 VeriPic’s opposition to Witzke’s, Temple’s McFall’s and Slaughter’s motion for summary
5 adjudication of the Lanham Act cause of action; the declaration by Kwan in support of VeriPic’s
6 opposition to Foray’s motion for summary judgment, or in the alternative, for summary
7 adjudication of the false advertising claims; and, the deposition testimony by Kwan as PMK for
8 VeriPic filed in support of its opposition to Foray’s two motions for monetary and terminating
9 sanctions. To “withdraw” the 7AC, Plaintiffs and their counsel shall present a proposed 8AC,
10 along with a motion for leave to file the 8AC, detailing the amendments made pursuant to this
11 order. To “withdraw” the declarations and deposition testimony by Kwan referenced above,
12 Plaintiffs shall re-file their opposing papers without any new or different arguments, but deleting
13 any reference to, or inclusion of the aforementioned declarations and deposition transcripts, or
14 any other documents that may in turn rely on those declarations or deposition transcripts.

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16 Further, for the reasons specified above, it appears that the misconduct of Plaintiffs and
17 Plaintiffs’ counsel in the course of litigation and pervasive litigation abuse is so egregious and
18 deliberate such that no sanction other than dismissal is adequate to ensure a fair trial. Plaintiffs’
19 and Plaintiffs’ counsel’s apparent pattern of conduct was so severe and deliberate so as to
20 constitute extreme circumstances and alternatives less severe than dismissal would not be
21 sufficient to protect the fairness of the trial. Accordingly, Plaintiffs and their counsel are ordered
22 to show cause as to why terminating sanctions should not be issued pursuant to the Court’s
23 inherent authority to properly administer justice and to preserve the Court’s integrity.

24 Moreover, as previously stated, Plaintiffs’ and their counsel have been awarded
25 attorney’s fees and costs in connection with discovery motions and the aforementioned anti-
26 SLAPP motion, despite apparently having knowledge that the claims of Plaintiffs’ complaint and
27 the defenses to the cross-complaint upon which the motions were based, were without merit.
28 Plaintiffs and their counsel are ordered to show cause as to why, pursuant to the Court’s inherent

1 authority of the Court and its power to impose sanctions under the Civil Discovery Act, the
2 attorney's fees and costs in connection with those motions should not be disgorged and returned
3 to Defendants.

4 For the reasons specified above, it appears that the misconduct of Plaintiffs and Plaintiffs'
5 counsel's in the course of litigation and pervasive litigation abuse is so egregious and deliberate
6 that issue sanctions should be awarded against Plaintiffs and in favor of Defendants/Cross-
7 complainants as to the issues of: Defendants' affirmative defenses as to the 7AC of unclean
8 hands; Plaintiffs' affirmative defenses as to the 4ACC of: waiver, estoppel, laches, unclean
9 hands, set-off, privilege, justification, speculative damages, contribution of unnamed third
10 parties, uncertainty, truth, opinion, lack of causation, lack of malice, good faith, free speech,
11 right of fair comment and no direct harm, no defamatory meaning conveyed, conditional
12 privilege, and, reservation of rights; any designated issue for which Kwan was designated as
13 PMK/PMQ for VeriPic; Plaintiffs' reputations for honesty, respectability, creditworthiness,
14 trustworthiness, competence and integrity as alleged in paragraph 15 of their 7AC were not
15 damaged by Defendants' allegedly defamatory conduct; Plaintiffs did not suffer any damages as
16 a result of the "Caveat Emptor" letter; the internet service provider for www.foray.ca did not
17 automatically as a matter of its normal business practice forward the site to VeriPic.com as
18 alleged in paragraph 25 of the 7AC; Defendants' statements in emails were factually true, to wit:
19 that VeriPic was "unethical," "devious," and "dishonest", employed business practices that were
20 "unscrupulous," "unethical," and "deceptive" because of their "fear of competition," VeriPic
21 engaged in a "scam to obtain sales leads", VeriPic made statements to customers that were
22 "false" and "misleading," VeriPic had misused the swgit.com and swgde.com web domains "in
23 an effort to solicit sales", VeriPic was "disreputable," "not creditworthy," "not trustworthy" and
24 a "bad influence on the community" as alleged in paragraphs 26 and 27 of their 7AC; there were
25 no false implications that could be left in the minds of VeriPic's existing clients as well as
26 potential customers and others as alleged in paragraph 33 of the 7AC; there was no libelous
27 statements alleging dishonest conduct by Plaintiffs and disparaging VeriPic's products as alleged
28 in paragraph 34 of the 7AC; any claims based on the statements made during the May 19th and

1 May 20th 2009 California Trade Conference in San Jose as alleged in paragraphs 35-38 of the
2 7AC were similarly without merit; VeriPic has not suffered any damages as a result of any lies
3 that Defendants and others have been spreading about Plaintiffs' reputations and products to
4 VeriPic's existing clients as well as to its prospective customers and others as alleged in
5 paragraphs 39-103 and 104-110 of the 7AC; Plaintiffs' intent to divert Foray's customers,
6 potential customers, public entities, law enforcement agencies and the general public to VeriPic's
7 website; Plaintiffs' intent to profit from the confusion caused by operating the domain name
8 foray.ca and the More Hits domain names; the foray.ca domain name and the More Hits domain
9 names were intentionally confusing similar to trademarks of Foray; and, Foray's allegations
10 regarding Plaintiffs' conduct as alleged in paragraphs 8-15 of the 4ACC is true. Plaintiffs and
11 their counsel are ordered to show cause as to why, pursuant to the Court's inherent authority of
12 the Court and its power to impose sanctions under the Civil Discovery Act, issue sanctions as
13 listed above should not be awarded against them.

14 For the reasons specified above, it appears that the Plaintiffs' and Plaintiffs' counsel's
15 misconduct in the course of litigation and pervasive litigation abuse is so egregious and
16 deliberate that evidentiary sanctions should be awarded against Plaintiffs so that Plaintiffs are
17 prohibited from introducing evidence pertaining to: any declaration by, or deposition of Kwan, in
18 his individual capacity or as the PMK/PMQ for VeriPic; any declaration by, or deposition of
19 David Lai—including the errata sheet; any declaration by, or deposition of Henry Lai; any
20 discovery responses made by Kwan, in his individual capacity or as the PMK/PMQ for VeriPic;
21 any of Defendants/Cross-complainants' discovery responses in response to Kwan's discovery
22 requests made in his individual capacity; any order made by the Court in which a declaration or
23 deposition of Kwan, in his individual capacity or as the PMK/PMQ for VeriPic, was submitted in
24 support of the motion, or in opposition to the motion; any order by the Court in which
25 Defendants/Cross-complainants' discovery responses in response to Kwan's discovery requests
26 made in his individual capacity was submitted in support of the motion, or in opposition to the
27 motion; the "Caveat Emptor" letter or statements relating thereto; any document produced in
28 response to a discovery request by Kwan only; any document produced in response to a

1 discovery request by Plaintiffs the subject matter of which is one that Kwan was designated as
2 the PMK/PMQ for VeriPic; Plaintiffs' claim that their reputation is "spotless... for honesty and
3 integrity" and that they "conduct themselves and their business with honesty, respectability,
4 creditworthiness, trustworthiness, competence and integrity" as alleged in paragraph 15 of the
5 7AC and alluded to elsewhere in the 7AC; Defendants' allegedly false statements in emails that:
6 VeriPic was "unethical," "devious," and "dishonest", employed business practices that were
7 "unscrupulous," "unethical," and "deceptive" because of their "fear of competition," VeriPic
8 engaged in a "scam to obtain sales leads", VeriPic made statements to customers that were
9 "false" and "misleading," VeriPic had misused the swgit.com and swgde.com web domains "in
10 an effort to solicit sales", VeriPic was "disreputable," "not creditworthy," "not trustworthy" and
11 a "bad influence on the community" as alleged in paragraphs 26 and 27 of their 7AC;
12 implications that could be left in the minds of VeriPic's existing clients as well as potential
13 customers and others as alleged in paragraph 33 of the 7AC; any claims based on the statements
14 made during the May 19th and May 20 2009 California Trade Conference in San Jose as alleged
15 in paragraphs 35-38 of the 7AC; and, damages as a result of any alleged lies that Defendants and
16 others have been spreading about Plaintiffs' reputations and products to VeriPic's existing clients
17 as well as to its prospective customers and others as alleged in paragraphs 39-103 and 104-110 of
18 the 7AC. Plaintiffs and their counsel are ordered to show cause as to why, pursuant to the
19 Court's inherent authority of the Court and its power to impose sanctions under the Civil
20 Discovery Act, evidentiary sanctions as listed above should not be awarded against them.

21 For the reasons specified above, it appears that the Plaintiffs' misconduct in the course of
22 litigation and pervasive litigation abuse is so egregious and deliberate such that it constitutes a
23 fraud on the court that necessitates monetary sanctions in the amount of \$250,000, made payable
24 to the Court clerk. In determining this amount, the Court has considered: the apparent bad faith
25 misconduct of Plaintiffs, the apparent level of egregiousness of Plaintiffs, the amounts of
26 attorneys' fees and costs that Plaintiffs and their counsel have apparently wrongfully received
27 through prevailing on motions that were without evidentiary basis, supported by evidence
28 manufactured by Plaintiffs, and/or based on meritless pleadings; the amount of time spent by the

1 Court on this frivolous action, as evidenced by the number of motions involved, and the number
2 of volumes of files of papers filed with the Court (presently consisting of at least 86 regular
3 volumes of court files, plus at least an additional 40 inches of pleadings held in sealed envelopes
4 and not contained in the standard court files); the length of time during which Plaintiffs actively
5 pursued litigation in the instant case, despite knowing that their claims were meritless; the
6 amount of escalating damages sought by Plaintiffs through their multiple iterations of their
7 complaints; an appropriate amount significant to deter Plaintiffs from the frauds they continue to
8 visit upon the court system and their adversaries; and, Plaintiffs' concession that the Court may
9 draw any inference it chooses from Kwan's silence. (See Evidence Code section 413.) Plaintiffs
10 are ordered to show cause as to why, pursuant to the Court's inherent authority of the Court and
11 its power to impose sanctions under the Civil Discovery Act, monetary sanctions in the amount
12 of \$250,000 should not be awarded against them.

13 Finally, for the reasons specified above, it appears that the misconduct of Plaintiffs'
14 counsel in the course of litigation and pervasive litigation abuse is so egregious and deliberate
15 such that it constitutes a fraud on the court that necessitates monetary sanctions in the amount of
16 \$250,000, made payable to the Court clerk. In determining this amount, the Court has
17 considered: the apparent bad faith misconduct of Plaintiffs' counsel, the apparent level of
18 egregiousness of Plaintiffs' counsel, the amounts of attorneys' fees and costs that Plaintiffs'
19 counsel have apparently wrongfully received through prevailing on motions that were without
20 evidentiary basis, supported by manufactured evidence, and/or based on meritless pleadings; the
21 apparent fact that Plaintiffs' counsel directed their clients to manufacture and spoliage evidence
22 so as to preserve/create Plaintiffs' meritless claims; despite conceding that "the Court eviscerated
23 the legal grounds to continue pursuing claims based on the Caveat Emptor and related
24 communications," Plaintiffs and their counsel—Grellas, Shah and Siegel—continued to pursue
25 claims based on "Caveat Emptor", including the fifth cause of action for false advertising, the
26 eleventh cause of action for false advertising, and twelfth cause of action for unfair competition,
27 both of which incorporate allegations regarding "Caveat Emptor" in the 7AC; the amount of
28 time spent by the Court on this frivolous action, as evidenced by the number of motions

1 involved, and the number of volumes of files of papers filed with the Court; the length of time
2 during which Plaintiffs' counsel actively pursued litigation in the instant case, even after the
3 February 24, 2012 David Lai deposition, where Plaintiffs' counsel apparently neglected—or
4 intentionally failed—to conduct a reasonable inquiry as to the merit of claims based on “Caveat
5 Emptor” and still continued to pursue those claims (the Court notes that in February of 2012, the
6 court file comprised 12 volumes of pleadings, and is now at 86 volumes); Plaintiffs' counsel
7 continued escalation of damages sought by Plaintiffs and their counsel, even after having inquiry
8 notice that their claims at the February 24, 2012 David Lai deposition were without merit;
9 Plaintiffs' counsel, Mr. Shah, as counsel for David Lai, instructed his client to make certain
10 statements against his client's interests and in favor of Plaintiffs, his other clients, requiring
11 Plaintiffs' counsel to eventually suspend the February 24, 2012 deposition, and David Lai to
12 obtain separate counsel, file an errata sheet to change his deposition answers, and testify again at
13 the April 5, 2012 deposition; an appropriate amount significant to deter Plaintiffs from the frauds
14 they continue to visit upon the court system and their adversaries; Plaintiffs' concession that
15 Kwan had an opportunity to provide an explanation in opposition to Foray's sanctions motions or
16 to invoke a reliance on counsel defense, and that the Court may draw any inference it chooses
17 from Kwan's silence; and, the fact that Plaintiffs' counsel made that concession during the
18 representation of Kwan. Plaintiffs' counsel, Grellas, Shah and Siegel, are ordered to show cause
19 as to why, pursuant to the Court's inherent authority of the Court and its power to impose
20 sanctions under the Civil Discovery Act, monetary sanctions in the amount of \$250,000 should
21 not be awarded against them.

22
23 The Court will confer with Plaintiffs and their counsel on a date on which they will be
24 ordered to appear to show cause as to why the above monetary, issue, evidentiary and
25 terminating sanctions should not be awarded, and to set an appropriate briefing schedule.
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1 Defendants' motion for sanctions was taken under submission at the hearing on March
2 21, 2014. The submission of those motions is hereby vacated and continued to a date to be
3 determined by parties and their counsel, to be set at the same time as the hearing on this Order to
4 Show Cause.

5 No party shall file any further papers in support of or in opposition to the Defendants'
6 motion for sanctions.

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8 May 1, 2014

Mary E. Arand

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11 Mary E. Arand
12 Judge of the Superior Court
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