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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FireClean, LLC, a limited liability company; David Sugg, an individual; and Edward Sugg, an individual, Plaintiffs, v. Andrew Tuohy, Defendant.	Case No: 4:16-cv-00604-JAS **MOTION TO DISMISS FED. R. CIV. P. 12(b)(6)**

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Andrew Tuohy ("Mr. Tuohy") respectfully moves the Court for an order dismissing Plaintiff's First Amended Complaint (ECF Doc. #11) without leave to amend for the reasons stated herein.

I. INTRODUCTION

Some cases are routine, perhaps even a little boring. This case is neither.

This is a case about greed, lies and *alchemy* – the classic search for a magical formula with the power to transform cheap metals such as lead into precious gold. As our story begins, the reader may initially conclude the tale involves a valiant quest pursued by a small but noble company (plaintiff) seeking vindication from devastating harm inflicted in a vicious and unprovoked attack at the hands of an evil villain (defendant). In the end, a very different story will unfold.

Our tale begins with the cast of characters. First, the Plaintiffs: FireClean, LLC ("FireClean") and its founders, brothers David and Edward Sugg (the "Brothers Sugg"). According to the operative pleading – the First Amended Complaint ("FAC"; ECF Doc. #11; filed 2/8/17) – FireClean is a Virginia-based entity which sells a "patent-pending firearm lubricant (gun oil)" called "FIREclean". FAC ¶ 1. The Brothers Sugg are FireClean's founders and owners. *See id.*

Defendant Andrew Tuohy ("Mr. Tuohy" or "Defendant") lives in Southern Arizona and operates a personal website called "Vuurwapen Blog" ("vuurwapen" means "firearm" in Dutch) located at http://www.vuurwapenblog.com/ where he publishes news and commentary about guns. FAC ¶¶ 27–29. FireClean *claims* Mr. Tuohy uses his blog "for commercial purposes, to market goods and services[]", FAC ¶ 30, but as explained later, that allegation is utterly false.

In a nutshell, FireClean is **furious** about an Internet rumor which claimed its expensive gun oil was little more than common vegetable oil. The rumor, distilled to a short phrase, proclaimed: "**FireClean is Crisco**". Someone (not Mr. Tuohy) even used a photo of a bottle of Crisco next to FireClean as a visual depiction of the rumor.

As explained further in a moment, Mr. Tuohy is a firearms enthusiast who, like many others, took a keen interest in learning more about this rumor. But importantly—Mr. Tuohy did not start the Crisco rumor. Rather, FireClean admits the rumor originated with one of its competitors, George Fennell. *See* FAC ¶¶ 77–79.

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PUBLICATION #1—FIRECLEAN AND CRISCO

Rather than irresponsibly rushing to repeat the "FireClean is Crisco" rumor, Mr. Tuohy did something else — he decided to test it. His investigation resulted in a blog post dated September 12, 2015 entitled *Infrared Spectroscopy of FireClean and Crisco Oils*, a partial copy of which is attached to the Complaint as Exhibit C (ECF Doc. #11-3) and is also available at: http://www.vuurwapenblog.com/general-opinion/lies-errors-and-omissions/ir-spectra-fireclean-crisco/ ("Post #1"). A complete copy of the post (excluding comments not germane to the case) is attached hereto as Exhibit A.[1]

In this first post, Mr. Tuohy began by discussing the rumor and its origins. At the outset, Mr. Tuohy made his view clear: "I did not – and still do not – believe that FireClean is Crisco, but not for the reason you might think." FAC Ex. C, ECF Doc. #11-3 at page 2 of 32 (emphasis added). Mr. Tuohy explained he did not believe FireClean contained a *name brand* oil like Crisco, because "it wouldn't really make sense to buy a name brand product at a high price if the goal was to resell and make money." *Id*. In other words, Mr. Tuohy inferred that if FireClean contained vegetable oil, it was probably a less costly generic brand sold in bulk, not an expensive name brand like Crisco.

After introducing readers to the issues, Mr. Tuohy explained that in an attempt to verify (or dispel) the Crisco rumor, he contacted a professor at the University of Arizona with a Ph.D. in organic chemistry to perform some tests. Ultimately, the professor performed an "infrared spectroscopy test of FireClean and two types of Crisco [one canola, one pure vegetable oil]." FAC Ex. C, ECF Doc. #11-3 at page 3 of 32. Mr. Tuohy included the infrared spectroscopy test results for his readers to see, and he summarized those results as follows: "What did the tests show? FireClean is probably a modern unsaturated vegetable oil, virtually the same as many oils used for cooking." FAC Ex. C, ECF Doc. #11-3 at page 4 of 32.

[1] Viewing each post in its full context conclusively establishes the non-commercial nature of the speech. Such review is proper where web pages have been referenced in the Complaint. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (web pages attached to Rule 12 motion can be considered without converting motion under Rule 56).

Mr. Tuohy concluded the post with a quote from the U of A professor who tested the oils, noting that according to him, "*I don't see any sign of other additives such as antioxidants or corrosion inhibitors. Since the unsaturation in these oils, especially linoleate residues, can lead to their oligomerization with exposure to oxygen and light, use on weapons could lead to formation of solid residues (gum) with time. The more UV and oxygen, the more the oil will degrade.*" *Id*. (italics in original). Based on the professor's comments (which FireClean does not appear to challenge here), Mr. Tuohy concluded: "I would not recommend FireClean be used by members of the military." *Id*.

PUBLICATION #2—VICKERS VIDEO REVIEW

Two days after his first post, on September 14, 2015, Mr. Tuohy wrote a second article, entitled, "*Severe Problems With Vickers Tactical FireClean Video*", a partial copy of which is attached to the First Amended Complaint as Exhibit D, ECF Doc. #11-4 (the "Vickers Video Review"). A complete-context copy (excluding comments) is attached hereto as Exhibit B, and it remains online here: http://www.vuurwapenblog.com/general-opinion/lies-errors-and-omissions/where-theres-smoke-theres-liar/.

In this new post, Mr. Tuohy analyzed a FireClean marketing video published on YouTube in December 2014 (the "Vickers Video").[2] This video claimed to show high-speed video footage of two guns being test-fired in three different configurations:

1.) **Dry** (without any lubricant)
2.) After cleaning with "**military grade CLP**" (a generic term for firearm products which "clean, lube, and protect");
3.) After cleaning with **FireClean.**

Featured in the video was a firearm enthusiast (Larry Vickers) and the Brothers Sugg. In short, the Suggs claimed FireClean protects against carbon build-up inside firearms by "preventing carbon from sticking to metal". To visually demonstrate this, the video includes extremely clear, slow-motion footage of the guns being test-fired to show the amount of "fouling" (carbon smoke and soot) *exiting* the guns after each shot.

[2] The video was removed from YouTube for unknown reasons. However, a complete copy remains available here: https://www.youtube.com/watch?v=ekLQJYQ9Uhw

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The implication of the test is simple – if the video shows more smoke leaving the gun after it was treated with FireClean as compared with the other shots, this proves FireClean prevented carbon from sticking to the internal parts of the gun. In other words, if the carbon/smoke/soot exited the gun, then it did not remain inside to cause fouling.

In his analysis of the Vickers Video, Mr. Tuohy quickly noticed a "severe" problem with the test. First, the test shot of the gun treated with FireClean showed substantially more smoke/soot than the dry or CLP test shots. However, upon closer inspection, Mr. Tuohy observed that the bullet casing used on the FireClean shot appeared to be very different from the ones used for the other test shots.

Specifically, enlarged close-up images[3] from the video clearly showed the primer (the small round part in the center of the brass casing struck by the gun's firing pin) used in the FireClean test was **silver** in color, whereas the primers used in the dry and CLP test shots were **brass** – the same as the surrounding cartridge body.

Brass Primer **Silver Primer**

[3] Space limitations preclude reproducing the full-resolution images in the body of this brief, but they are included following the article attached hereto as Exhibit B

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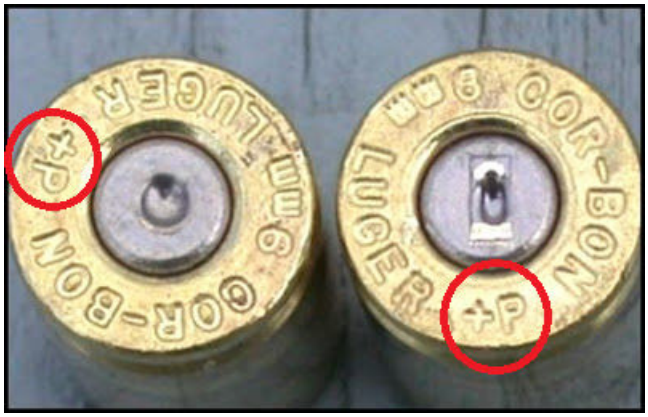
Based on these observations, Mr. Tuohy expressed his belief that the round used in the FireClean test was something known as an "overpressure" or "+P" round. Why does that matter? Because—overpressure ammunition contains more gunpowder than a "standard" round, and thus will produce more pressure and potentially more smoke. *See*, e.g., https://en.wikipedia.org/wiki/Overpressure_ammunition.

Mr. Tuohy's suspicion was also supported (if not irrefutably confirmed) by the "headstamp" text visible on the end of the shell casing. Mr. Tuohy explained that in his view: "That is a different colored primer. More than that, it's a Cor-Bon 9mm Luger +P headstamp." (emphasis added). This point is important because the headstamp on a shell typically contains marks which identify the caliber, manufacturer, and whether the round is overpressure or +P. These marks appear to match those used in the FireClean test shot.



Based on these observations (all of which were clearly set forth in his article using images taken from the Vickers Video), Mr. Tuohy explained, in short, that he believed FireClean "rigged" the test. Specifically, FireClean used different ammunition without disclosing that fact, thus misleading viewers into thinking the additional smoke shown in the test was proof that FireClean oil was more effective than competing products when, in fact, the increased smoke was caused by the use of different ammunition, not the superior performance of FireClean. *See* ECF Doc. #11-4 at page 5 of 24.

Importantly, if not incredibly, FireClean does not deny that it used different ammunition for each shot in the Vickers Video. Instead, apparently hoping that the Court will not pay close attention to this point, FireClean merely offers this explanation: "The

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ammunition used for the FIREClean® firing [in the Vickers Video] *was not materially different* from the ammunition used for the CLP and [dry] demonstrations." FAC ¶ 139 (emphasis added). Of course, this bare assertion is simply a legal conclusion supported by no well-pleaded facts. As such, it is not entitled to the presumption of truth here.

PUBLICATION #3—"A CLOSER LOOK"

About a month later, Mr. Tuohy published a third and final article entitled "*A Closer Look at FireClean and Canola Oil*", a partial copy of which is attached to the FAC as Exhibit I, ECF Doc. #11-9, a complete copy is attached hereto as Exhibit C, and where is available here: http://www.vuurwapenblog.com/general-opinion/lies-errors-and-omissions/a-closer-look-at-fireclean-and-canola-oil/. In this final article, Mr. Tuohy described the substantial public interest generated by his first "FireClean is Crisco" post, noting that some people had questioned the test results; "Lines were drawn, accusations were made, the science was championed by some and attacked by others." ECF Doc. #11-9 at page 2 of 25.

To allay those concerns, Mr. Tuohy commissioned a new and far more detailed round of tests, this time conducted at the Worcester Polytechnic Institute in Massachusetts. As explained in the article, Mr. Tuohy "submitted eighteen samples for various tests, including gun oils, gun pastes, cooking oils, and gear oils … . These tests included IR spectroscopy and nuclear magnetic resonance testing." *Id*.

As before, Mr. Tuohy explained the test results for his readers: "**According to every PhD who looked at the NMR results, FireClean and Canola oil appear to be 'effectively' or 'nearly' identical.**" ECF Doc. #11-9 at page 3 of 25 (emphasis in original). As before, that conclusion was supported by extensive raw data and facts, none of which are directly challenged by FireClean's Complaint.

For instance, rather than directly disputing any of the specific test data, FireClean makes broad, vague and wholly conclusory/unsupported allegations such as: "Mr. Tuohy had no reasonable grounds to believe Mr. Baker's test proved FIREClean® is canola oil[]", FAC ¶ 168 (but without ever explaining *why*), and "Mr. Tuohy disregarded the

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information showing FIREClean is not canola oil, soybean oil, or any repackaged common cooking oil." FAC ¶ 169. Despite these serious accusations, FireClean offers no factual support for either claim; it offers no facts showing how or why Mr. Tuohy somehow "disregarded" information that contradicted the published test results, nor does FireClean even indentify what "information" it is referring to.

PUBLICATION #4—TUOHY "ATTACKS" ON FACEBOOK

The fourth and final publication at issue here is an "attack" published by Mr. Tuohy on Facebook, quoted in ¶ 183 of the First Amended Complaint. This brief comment is not "of and concerning" FireClean; it merely describes Mr. Tuohy's general opinions about people who claim to be able to fire "10,000 rounds and no cleaning". In this discussion, Mr. Tuohy simply expresses his view that it is ordinarily not possible to fire 10,000 rounds through a firearm without the firearm showing significant dirt/fouling and that anyone who claims otherwise should be questioned. As explained further below, this statement of Mr. Tuohy's opinion is simply not actionable as a matter of law.

II. ARGUMENT

a. Lanham Act False Advertising Claim

Taking the easiest issue first, Plaintiff's third cause of action is a claim for false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). This claim fails because: A.) Mr. Tuohy and FireClean are not competitors; and B.) Mr. Tuohy's comments about FireClean were not made in "commercial advertising". For both reasons, FireClean's false advertising claim must be dismissed, even assuming that something in Mr. Tuohy's comments was false or misleading in some way.

i. The Parties Are Not Competitors

Among other things, to state a valid Lanham Act false advertising claim, the Complaint must allege the parties are competitors; "Maintenance of a false advertising claim under [the Lanham Act] requires, '(1) a commercial injury based upon a misrepresentation about a product; and (2) that the injury is "competitive," or harmful to the plaintiff's ability to compete with the defendant.'" *Jurin v. Google Inc.*, 695 F. Supp.

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2d 1117, 1122 (E.D. Cal. 2010) (granting 12(b)(6) dismissal of false advertising claim because parties were not competitors) (quoting *Jack Russell Terrier Network of Northern California v. American Kennel Club, Inc.*, 407 F.3d 1027, 1037 (9th Cir. 2005)).

Without a well-pleaded allegation of competition, dismissal is proper:

> Here, Plaintiff and Defendant [Google] are not direct competitors. Although [Google] may provide advertising support for others in Plaintiff's industry, [Google] nonetheless does not directly sell, produce, or otherwise compete in the building materials market. Without a showing of direct competition, Plaintiff fails to sustain a claim for false advertising under the Lanham Act.

Jurin, 695 F. Supp. 2d at 1122 (emphasis added); *see also Theodosakis v. Clegg*, 2017 WL 1294529, *17 (D.Ariz. 2017) (Lanham Act false advertising claim is limited to statements "by a defendant who is in commercial competition with plaintiff….") (emphasis added); *report and recommendation adopted*, 2017 WL 1210345 (D.Ariz. March 31, 2017); (citing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003); *Coastal Abstract Serv. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999)).

Here, despite its nearly 350 (!) paragraphs of allegations, FireClean's Complaint is devoid of any well-pleaded facts showing Mr. Tuohy has ever competed with Plaintiff in the gun oil industry or any other field. At best, FireClean simply contends Mr. Tuohy uses his website, Vuurwapen Blog, "for commercial purposes, to market goods or services". Compl. ¶ 30. FireClean offers virtually no explanation of the "goods or services" offered via Mr. Tuohy's website, other than the following cursory allegations in the First Amended Complaint:

> ¶ 41. Mr. Tuohy also operates a clothing business in Arizona.
> …
> ¶ 43. Mr. Tuohy markets the clothing business via www.vuurwapenblog.com
> …
> ¶ 292. Mr. Tuohy, **through his clothing business's dealings**, and **FireClean, through its business dealings**, struggle against one another to gain commercial advantages in interstate commerce. (emphasis added)

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At first blush, these allegations make it *sound like* Mr. Tuohy operates a for-profit commercial clothing business, and that consumers can visit his website to shop for all the latest fashions and styles. This is blatantly false. The only "clothing" marketed through Mr. Tuohy's website is a single promotional t-shirt offered in blue or grey. *See* http://www.vuurwapenblog.com/reviews/clothing/vuurwapen-blog-t-shirts/.[4] Aside from this, the site contains no advertising or any form of commercial speech. Beyond its efforts to mislead this Court regarding Mr. Tuohy's "clothing business", FireClean never alleges that it competes with Mr. Tuohy in the "clothing" industry, nor does FireClean allege that Mr. Tuohy competes with it in the gun oil/firearm lubricant industry.

Instead, FireClean offers vague allegations suggesting the parties somehow "struggle against one another to gain commercial advantages in interstate commerce". Conclusory allegations of this sort are not entitled to the presumption of truth for the purposes of the instant motion; "legal conclusions couched as factual allegations are not given a presumption of truthfulness, and 'conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.'" *Cosmetic Alchemy, LLC v. R & G, LLC*, 2010 WL 4777553, at *3 (D. Ariz. Nov. 17, 2010) (quoting *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998)). Furthermore, "The Court need not accept as true … allegations contradicting the exhibits attached to the complaint." *Perry v. Peak Prop. & Cas. Ins.*, No. 2016 WL 7049472, at *2 (D. Ariz. Dec. 5, 2016) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

Here, the exhibits attached to the Complaint, as well as those included with this motion, flatly contradict FireClean's allegation that Mr. Tuohy is a competitor.[5] The copies of pages printed from www.vuurwapenblog.com clearly do not contain any advertising (for gun oil or anything else). Accordingly, these pages do not establish that

[4] As explained in footnote 1, *supra*, because FireClean refers to Mr. Tuohy's website pages by reference, this Court may properly consider those pages.

[5] As noted further *infra*, copies of Mr. Tuohy's blog posts are attached hereto as Exhibit A, Exhibit B and Exhibit C. None of these pages contain any advertisements, nor do they reflect any commercial activity whatsoever.

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the parties are competitors. Absent well-pleaded facts to support that allegation, the Lanham Act simply does not apply here. *See Bosley Medical Inst., Inc. v. Kremer*, 403 F.3d 672, 679–80 (9th Cir. 2005) (rejecting application of Lanham Act to website which contained statements criticizing the plaintiff; "Any harm to [Plaintiff] Bosley arises not from a competitor's sale of a similar product under Bosley's mark, but from [Defendant] Kremer's criticism of their services. Bosley cannot use the Lanham Act either as a shield from Kremer's criticism, or as a sword to shut Kremer up."); *Jurin*, 695 F. Supp. 2d at 1122 ("Without a showing of direct competition, Plaintiff fails to sustain a claim for false advertising under the Lanham Act."); *see also Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1035 (N.D. Cal. 2005) ("the Ninth Circuit has held that in order to constitute a false advertising claim for purposes of the Lanham Act, the statement must be made 'by a defendant who is in commercial competition with plaintiff.'") (emphasis added).

The facts set forth in the Complaint are clear—FireClean sells gun oil. Compl. ¶ 1. Mr. Tuohy does not. *Ergo*, the parties are not competitors. For that reason alone, Plaintiff's Lanham Act claim should be dismissed without leave to amend.

ii. Mr. Tuohy's Blog Posts Are Not Commercial Advertisements

Even when parties are in direct competition, not every false or misleading statement is actionable under the Lanham Act. Instead, the challenged speech must occur in the context of a commercial advertisement: "The Lanham Act provides a remedy for false statements of fact made *in commercial advertising or promotion*. The terms 'advertising' and 'promotion' should be given their plain and ordinary meanings." *eMove, Inc. v. SMD Software, Inc.*, 2012 WL 1379063, *8 (D.Ariz. 2012) (emphasis added) (citing *Seven–Up Co. v. Coca–Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996)).

To qualify as "commercial advertising or promotion", the statements must meet the following four-part test:

> [T]he representation must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of

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> influencing consumers to buy defendant's good or services. While the representations need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

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Theodosakis, 2017 WL 1294529, *17 (quoting *Rice*, 330 F.3d at 1181).

Despite FireClean's best efforts to skew the otherwise simple facts, nothing in the First Amended Complaint demonstrates that any of Mr. Tuohy's comments involved commercial advertising, promotion, or anything even remotely approaching commercial speech. Instructive on this point is an extremely factually similar case, *Goodman v. Does 1–10*, 2014 WL 1310310 (E.D.N.C. 2014). In *Goodman*, the plaintiff (an auto mechanic) found himself "the target of an extraordinarily aggressive smear campaign" involving a website called www.LocalDirtbags.com.

Just as FireClean did here, Goodman filed an exceptionally long Complaint spanning 172 paragraphs (vs. FireClean's 347), which included a federal cause of action for Lanham Act false advertising. Mr. Goodman's Complaint included virtually identical conclusory allegations regarding the commercial nature of defendant's website. First, Goodman claimed, without any specific factual support, "the postings and articles represent 'commercial activities in connection with the commercial advertising and promotion of Doe Defendants' services and products'". *Goodman*, 2014 WL 1310310, *5. FireClean's Complaint includes nearly identical language. *See* FAC ¶ 30.

Second, in an effort to demonstrate the commercial nature of the defendant's website, Goodman's Complaint alleged, "'[u]pon information and belief, Doe Defendant who registered and operates localdirtbags.com engages in the conduct alleged in this Complaint in order to drive traffic to the blog, and increase the monetary value of the blog, in a collective effort to promote and sell the blog to a third party.'" *Goodman*, 2014 WL 1310310, *5. Put differently, Goodman alleged the blog was commercial in some vague way, but he never alleged that the defendant was his direct competitor.

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Despite these allegations, the District Court in *Goodman* correctly found the plaintiff's Lanham Act claim was subject to dismissal under Rule 12(b)(6) because, "Goodman has failed to sufficiently allege that these internet postings constitute **commercial speech or** that they were made 'by a defendant in **commercial competition** with plaintiff.'" *Goodman*, 2014 WL 1310310, *5 (emphasis added) (quoting *Gordon & Breach Science Publishers v. American Institute of Physics*, 859 F.Supp. 1521 (S.D.N.Y. 1994)). In reaching that conclusion, the District Court aptly noted "[The Lanham Act] has never been applied to stifle criticism of the goods or services of another by one, such as a consumer advocate, who is not engaged in marketing or promoting a competitive product or service." *Goodman*, 2014 WL 1310310, *5 (quoting *Wojnarowicz v. Am. Family Ass'n*, 745 F.Supp. 130, 141–42 (S.D.N.Y. 1990)).

Importantly, the District Court in *Goodman* also noted that a factually unsupported claim that the defendant's website was "commercial" was a legal conclusion, not a well-pleaded fact, and "The court is not required to credit legal conclusions when deciding a motion to dismiss." 2014 WL 1310310, *5 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)).

The same standards apply here. Like a 55-gallon drum attempting to be filled with 60 gallons of vegetable oil, FireClean's Complaint is literally overflowing with broad, vague, conclusory, confusing and unsupported statements of law masquerading as allegations of fact such as this: "Mr. Tuohy, through his clothing business's dealings, and FireClean, through its business dealings, struggle against one another to gain commercial advantages in interstate commerce." Compl. ¶ 292. This false statement is not a well-pleaded fact which must be taken as true. Rather it is a legal conclusion which this Court cannot and should not rely upon in the absence of any well-pleaded factual support.

Based on the same logic and analysis applied by the District Court in *Goodman*, this Court should dismiss FireClean's Lanham Act claim because the Complaint fails to show that any of Mr. Tuohy's critical remarks were made in the context of a commercial advertisement or promotion. As the *Goodman* Court explained, "while the articles and

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comments may support a claim for defamation, they do not plausibly constitute commercial speech." 2014 WL 1310310, *6 (citing *Shell v. Am. Family Rights Ass'n*, 899 F.Supp.2d 1035, 1060–62 (D.Colo. 2012) ("While [allegations regarding internet postings criticizing another's work] might state a claim for defamation, [the complaint] does not plausibly allege the advertising of a product or service sold by [the defendant].") (brackets in original). For the same reason, the Lanham Act claim should be dismissed.

b. Defamation & Related Claims

Moving beyond the Lanham Act, FireClean's Complaint contains four essentially identical and wholly duplicative state law tort claims: 1.) defamation; 2.) injurious falsehood; 3.) intentional interference with business relations; and 4.) false light invasion of privacy. At their core, these claims are all based on the same three blog posts which FireClean painstakingly parses into 21 discrete statements, rather than reading each post as a whole.[6] As explained herein, the needless complexity of its approach notwithstanding, FireClean has not alleged any plausible claims.

i. A.R.S. § 12-651 Prohibits The Assertion of Multiple/Duplicative Claims Arising From A Single Publication

FireClean's assertion of multiple claims arising from a single publication (and, for dramatic effect, multiple "counts" per claim) is improper based on Arizona's Single Publication Rule, A.R.S. § 12-651. This rule provides, in part, "No person shall have more than one cause of action for damages for libel, slander, invasion of privacy or any other tort founded upon a single publication, exhibition or utterance."

To survive dismissal, rather than pleading and proving that every word of each blog post was false, FireClean must allege plausible facts showing that each separate post contains at least one actionable statement published with the requisite degree of fault (actual malice). If it could do so, FireClean may properly assert one tort claim per

[6] For purposes of clarity, attached hereto as Exhibit D is a table identifying each "statement" referenced in the First Amended Complaint and explaining the source where each statement was made.

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publication, not multiple claims. But as explained below, as a matter of law FireClean has failed to allege even a single valid claim.

ii. Mr. Tuohy's Statements Are Protected As "Pure Opinion"

Under the "pure opinion" doctrine, when a defendant discloses a set of facts to the reader, the defendant's subsequent comments about those facts qualify as non-actionable expressions of opinion. *See* RESTATEMENT (SECOND) OF TORTS § 566 cmt. d (1977) (explaining, "If all that the communication does is to express a harsh judgment upon known or assumed facts, there is no more than an expression of opinion of the pure type, and an action of defamation cannot be maintained.")

The logic underlying this rule is simple – a statement is not defamatory unless it can reasonably be understood as describing *actual facts* about the plaintiff. Thus, even when a statement is literally false—such a parody accusing Reverend Jerry Falwell of having sex with his mother in an outhouse—the speech remains protected by the First Amendment if no reasonable person would believe the statement was conveying *actual facts* (as opposed to non-literal humor, exaggeration, opinion, rhetoric, and so forth). *See generally*, *Hustler v. Falwell*, 485 U.S. 46, 108 S.Ct. 876 (1988).

Just as an obvious joke or parody is not actionable when it is clear the speech was not intended to convey actual facts (as opposed to the speaker's opinion) if two people are shown the same facts (such as photos comparing the number of people who attended the inauguration of President Trump vs. those who attend the inauguration of President Obama, or images of ammunition bearing Cor-Bon +P headstamps), each viewer can decide for themselves whether they agree with the speaker's conclusions, or whether a different conclusion is warranted. Thus, when readers are provided with a set of fully disclosed facts, the specifics of which are not alleged to be false, then a defendant's comments or observations regarding those facts qualify as fully protected speech.

Other courts have reached the same conclusion under similar facts. For example, in *Global Telemedia, Inc. v. Doe*, 132 F. Supp. 2d 1261 (C.D.Cal. 2001), an anonymous defendant made disparaging online comments attacking the plaintiff's business and

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accusing the plaintiff of "SEC [securities and exchange commission] violations". To support his claim, the defendant provided a link to a document published on the SEC's website. *See Global Telemedia*, 132 F. Supp. 2d at 1268.

The District Court found this scenario could not support a defamation claim. This conclusion was proper because the defendant's "statement about [plaintiff] is clearly based on a public document which he provides for the readers. Thus, any reader may look at the same document and determine what they think of the information. By supplying the underlying document which supports his views, **[defendant] has set forth an opinion, not fact**." *Global Telemedia*, 132 F. Supp. 2d at 1268 (emphasis added) (citing *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1102 (N.D.Cal.1999) (noting, "when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.") (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1156–57 (9th Cir. 1995)).

1. Post #1 Was Based On Disclosed Facts

Here, the most inflammatory statement FireClean seeks to challenge is Mr. Tuohy's observation that based on test results performed by a third party, "FireClean is probably a modern unsaturated vegetable oil virtually the same as many oils used for cooking." Compl. 115(b). FireClean furiously proclaims this statement is false, yet when viewed in their full context, Mr. Tuohy's conclusions about FireClean's probable ingredients were pure opinions, not "actual facts". Mr. Tuohy's comments were based on the infrared spectroscopy test results published within the article itself, *see* Compl. Ex. C, and FireClean does not claim the test results themselves were fabricated or false.

Instead, FireClean offers nothing more than conclusory and unsupported legal conclusions such as: "Mr. Tuohy knew or recklessly disregarded that Infrared spectroscopy is not a suitable method for comparing oils from the same class of compounds." FAC ¶ 100. Even more summarily, FireClean contends "Mr. Tuohy's published analysis was not scientifically sound, and he knew it." FAC ¶ 104.

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Yet both of these allegations are not well-pleaded facts; they are merely legal conclusions presented without a single shred of factual support; i.e., FireClean never explains *why* "Infrared spectroscopy is not a suitable method for comparing oils from the same class of compounds," or how Mr. Tuohy (a layperson) could have possibly known this. Similarly, FireClean never explains *how or why* Mr. Tuohy knew or should have known that the tests (which were performed by a third party professor at the University of Arizona, not by Mr. Tuohy), were "not scientifically sound".

However, regardless of whether infrared spectroscopy is the best or worst method for comparing oils, the simple fact remains that all of Mr. Tuohy's comments in Crisco Post #1 were predicated on scientific test results which were provided for each reader to review. If those tests were so manifestly insufficient to support Mr. Tuohy's conclusions, then anyone reading the results would have known that Mr. Tuohy's opinions were unfounded; "any reader may look at the same document and determine what they think of the information. By supplying the underlying document which supports his views, [defendant] has set forth an opinion, not fact." *Global Telemedia*, 132 F. Supp. 2d at 1268.

Because every statement Mr. Tuohy made in Post #1 was based on fully disclosed facts which FireClean does not plausibly demonstrate as false, the entire post is protected by the First Amendment and cannot support any of FireClean's claims.

2. Vickers Video Article Was Based On Disclosed Facts

The same conclusion is true as to the Vickers Video – all of Mr. Tuohy's comments and conclusions were based solely on the video itself. Of course, FireClean does not claim any part of the video (which it produced) is untrue.

If another person watching the video did not believe it shows two different types of ammunition were used, then they are free to conclude the test was *not* rigged by FireClean, just as President Trump is free to proclaim that more people attended his inauguration than President Obama's. Either way, the video speaks for itself, and Mr. Tuohy's comments about it are fully protected as nothing more than pure opinion.

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3. "A Closer Look" Was Based On Disclosed Facts

Like both of the other blog posts, Mr. Tuohy's follow-up post "*A Closer Look at FireClean and Canola Oil*", was based on fully-disclosed facts (new tests which also confirmed that FireClean appears to be "effectively" or "nearly" identical to canola oil). The Complaint contains no plausible allegations showing that any of the test results were false. As such, the entire post is protected opinion. *See Ruiz v. Hull*, 191 Ariz. 441, 453, 957 P.2d 984, 996 (Ariz. 1998) ("[t]he expression of one's opinion is absolutely protected ... ."); *Yetman v. English*, 168 Ariz. 71, 81, 811 P.2d 323, 333 (1991)).

iii. The Complaint Alleges No Facts Showing Actual Malice

FireClean's Complaint repeatedly (but summarily) alleges that Mr. Tuohy published all of the 21 different challenged statements with "actual malice". In doing so, FireClean appears to correctly concede the statements at issue involve matters of public interest or concern. As such, to state a valid claim, FireClean must plead facts sufficient to establish actual malice; "If a defamation action involves a matter of public concern, a plaintiff must establish the presence of actual malice." *Hamilton v. Yavapai Cmty. Coll. Dist.*, 2016 WL 5871502, at *2 (D. Ariz. Oct. 7, 2016) (citing *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 312, 560 P.2d 1216, 1219 (1977)).

On this single point, all of FireClean's defamation and related claims are subject to dismissal because the Complaint does not contain <u>any</u> facts sufficient to establish actual malice. For example, on page two of the First Amended Complaint, FireClean introduces the main statement it finds objectionable: "Mr. Tuohy falsely alleged FIREClean® is Crisco or a common cooking oil that is sold in most grocery stores." FAC ¶ 5. Next, FireClean asserts the statement was made with actual malice because, *without offering any factual support or elaboration*, it alleges: "Mr. Tuohy recklessly disregarded evidence disproving his false allegations, and published his disparagements despite having reasons to believe they were false." FAC ¶ 8.

These allegations fail for two reasons. First, the claim that Mr. Tuohy defamed FireClean by stating that its gun oil was "Crisco" is flatly contradicted by the exhibits to

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the Complaint wherein Mr. Touhy's actual words are reflected: "**I did not – and still do not – believe that FireClean is Crisco …"** Compl. Ex. D, ECF Doc. #11-3 at page 2 of 32 (emphasis added). To be sure, after providing his readers with test results showing that FireClean gun oil bears significant similarities to Crisco Pure Canola and Crisco Pure Vegetable Oil, Mr. Tuohy expressed his opinion as follows: "FireClean is probably a modern unsaturated vegetable oil virtually the same as many oils used for cooking." Compl. Ex. D, ECF Doc. #11-3 at page 4 of 32.

As explained *supra*, Mr. Tuohy's statement of opinion that FireClean is *probably* a modern unsaturated vegetable oil is not actionable as a matter of law based on the "pure opinion" doctrine. However, separate and apart from that issue, somewhat astonishingly, FireClean's own patent application proves this statement could not have been made with actual malice because the statement is either completely or substantially true.

Specifically, attached to the First Amended Complaint as Exhibit A is FireClean's patent application entitled "VEGETABLE OILS, VEGETABLE OIL BLENDS, AND METHODS OF USE THEREOF". In this application, FireClean repeatedly asserts that vegetable oil (including 100% vegetable oil) makes a superior gun lubricant and cleaner:

> **[0025]** A single vegetable oil or vegetable oil blend that is suitable for the above uses includes any single oil or blend that sufficiently reduces carbon or other contaminant fouling or avoids carbon or other contaminant build up. In an aspect of the present invention, the composition that may be used in the above manner may include at least about 25% vegetable oil, more preferably at least about 50% vegetable oil, still more preferably at least about 75%, and most preferably about 100% or 100% vegetable oil, by volume. Preferably, for some applications,

FAC Ex. A, ECF Doc. #11-1 at page 9 of 36.

FireClean's patent application does not identify the product's exact formula or contents. However, it unequivocally admits FireClean **may** contain a mix of up to three different vegetable oils, and that "the combined volume of the at least three vegetable oils is about 100% of the total volume of the oil composition." FAC Ex. A, ECF Doc. #11-1

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at page 19 of 36. Thus, FireClean's own evidence demonstrates that Mr. Tuohy's comment "FireClean is probably a modern unsaturated vegetable oil" cannot have been made with actual malice because the statement was both literally and substantially true—according to FireClean itself. To the extent FireClean's Complaint falsely claims otherwise, dismissal is nevertheless proper; "The Court need not accept as true … allegations contradicting the exhibits attached to the complaint." *Perry v. Peak Prop. & Cas. Ins.*, 2016 WL 7049472, at *2 (D. Ariz. Dec. 5, 2016) (emphasis added).

iv. The Complaint Does Not Sufficiently Allege Material Falsity

Although it is not necessary for the Court to reach this issue, FireClean's bare denial of the "FireClean is Crisco" rumor is, as a matter of law, insufficient to plead a viable defamation claim. This is so because in order to plead a viable claim, FireClean cannot merely point to a comment and say: "THAT'S FALSE!" Instead, it must present well-pleaded facts which show Mr. Tuohy's statements were not merely inaccurate, but also that they were *substantially false*. *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 355, 819 P.2d 939, 941 (1991) ("Slight inaccuracies will not prevent a statement from being true in substance, as long as the 'gist' or 'sting' of the publication is justified.")

Instructive on this point is *Vogel v. Felice*, 127 Cal.App.4th 1006, 26 Cal.Rptr.3d 350 (Cal.App.6th Dist. 2005). *Vogel* involved a defamation claim brought by a candidate for public office who was angry about being included on a website list of "Top Ten Dumb Asses." *Vogel*, 127 Cal.App.4th at 1010. Among other things, the website stated the plaintiff was a "deadbeat dad" who "owes Wife and kids thousands." *Id*. at 1021. In his Complaint, the plaintiff denied this allegation, but offered only the following bare assertion: "I do not owe my wife and kids thousands." *Id*.

The California Court of Appeal found this bare denial was not sufficient to support a defamation claim because it failed to plausibly show the challenged speech was *substantially false*. In other words, the Court concluded the plaintiff's bare denial that he owed "thousands" was a "'**negative pregnant**,' i.e., 'a denial of the literal truth of the total statement, but not of its substance.'" *Id*. (emphasis added).

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The Court further explained:

> By denying a debt in a specified amount, it leaves open the possibility of a debt in some other, perhaps substantially equivalent, amount. Thus if "thousands" means $2,000 or more, Vogel's simple negation leaves open the possibility that he owes $1,999.99, in which case the challenged statement remains substantially true … . This ambiguity becomes all the more striking considering the presumptive ease with which Vogel could have stated the true facts, i.e., how much he owed, and when and how the debt, or portions of it, were discharged. Vogel's failure to plainly refute the defamatory imputation by stating the true facts may be understood to imply that he did in fact continue to owe substantial amounts of unpaid child support. Certainly it was insufficient to establish his ability to prove the substantial falsity of the imputations that he was a "deadbeat dad" who "owed thousands."

Vogel, 127 Cal.App.4th at 1010.

The same logic applies here. For instance, FireClean's Complaint contains the following conclusory statements: "¶ 62. FIREClean® is not made from a single type of oil"; "¶ 63. FIREClean® is not Crisco Canola Oil"; and "64. FIREClean® is not repackaged common canola oil." These statements are all "negative pregnants" – they only deny the literal accuracy of each statement but offer no information that would allow a reader to judge whether the statement is substantially true. Put differently, if FireClean contains *Kirkland Select* vegetable oil (from Costco), then the statement "FireClean is Crisco" is clearly false (assuming Crisco and Kirkland do not use the same supplier). However, without facts showing that there is a material difference between Costco-brand and Crisco-brand vegetable oils, then it is impossible to determine whether the statement is substantially false.

Similarly, regarding the identification of the ammunition used in the Vickers Video, FireClean only contends "The ammunition used for the FIREClean® firing was not 'handloaded' or 'Cor-Bon +P rounds." FAC ¶ 138. Despite this, FireClean never explains what ammunition was actually used in the test. As the Court noted in *Vogel*, "This ambiguity becomes all the more striking considering the presumptive ease with

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which [FireClean] could have stated the true facts." Yet because FireClean never identifies which ammunition was used in the test, it is simply impossible for anyone to know whether Mr. Tuohy's observations were true, false, or substantially accurate.

This ambiguity, which permeates every aspect of FireClean's pleading, is wholly unacceptable. Although Rule 8 surely does not require much from a plaintiff, it absolutely requires more than this. In sum, because FireClean offers nothing more than conclusory "negative pregnant" allegations, it has failed to establish any plausible claims.

c. The "Facebook Attack" Is Not Of And Concerning FireClean

In paragraph 183 of its Complaint, FireClean quotes a comment Mr. Tuohy posted on Facebook which it describes as an "attack". As a matter of law, this statement is not capable of a defamatory meaning because, *inter alia*, it contains no factual allegations which are "of and concerning" FireClean. *See Ultimate Creations, Inc. v. McMahon*, 515 F. Supp. 2d 1060, 1064 (D. Ariz. 2007).

d. The Complaint Does Not Allege Sufficient Facts To Establish Aiding & Abetting

FireClean's Complaint includes a claim that Mr. Tuohy "aided and abetted" George Fennell (the person responsible for starting the "FireClean is Crisco" rumor). However, FireClean's pleading contains nothing more than a threadbare recital of the elements of the cause of action without any factual support. As such, this claim is subject to dismissal. *See Yang v. Arizona Chinese News, LLC*, 2015 WL 2453724, *5 (Ariz.App. 2015) (affirming dismissal of aiding and abetting claim where plaintiff offered nothing more than conclusory allegations to support claim) (citing *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 485, ¶ 34, 38 P.3d 12, 23 (2002) (as an element of an aiding and abetting claim, plaintiff must prove defendant substantially assisted or encouraged the primary tortfeasor); *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8, 284 P.3d 863, 867 (Ariz. 2012) ("In determining if a complaint states a claim on which relief can be granted,

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courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient.")

III. CONCLUSION

As the discussion above shows, this case is surely *not* about a malicious attack launched by one competitor against another. In fact, it is not even close.

Even if the Court takes all well-pleaded facts as true and construes them in a light most favorable to plaintiff, what we have here is very simple – Mr. Tuohy believed the "FireClean is Crisco" rumor was interesting and worthy of further investigation. Mr. Tuohy therefore obtained testing from third parties which seemed to confirm the rumor was either completely or at least substantially true. Of course, Mr. Tuohy did not ask his readers to take his word for it; he provided his audience with full access to the facts upon which his beliefs were based.

In doing so, Mr. Tuohy did not defame FireClean with false and malicious assertions of fact. Rather, he expressed an opinion based on fully-disclosed facts. FireClean may not like Mr. Tuohy's opinion, but it is non-actionable as a matter of law.

If FireClean believes a different set of facts would support a materially different opinion about its product, it is free to make that argument to the public. What FireClean may *not* do is unlawfully abuse the legal system in an effort to suppress and conceal honest, legitimate expressions of opinion; "[The Lanham Act] has never been applied to stifle criticism of the goods or services of another by one, such as a consumer advocate, who is not engaged in marketing or promoting a competitive product or service." *Goodman*, 2014 WL 1310310, *5. The conclusion is precisely applicable here.

For the foregoing reasons, Plaintiff's Complaint should be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(6), without leave to amend.

DATED May 15, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2017 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following:

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