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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FireClean LLC, a limited liability company; David Sugg, an individual; and Edward Sugg, an individual; Plaintiffs, v. Andrew Tuohy, Defendant.	No. 4:16-cv-00604-JAS **RESPONSE TO MOTION TO DISMISS**

Mr. Tuohy was maliciously dishonest. David Sugg and Edward Sugg (Sugg Brothers) and FireClean LLC (FireClean) sued him because he intentionally duped his and their target consumers, published disparaging falsehoods about them, portrayed them in a false and offensive light, and aided and abetted one of their business rival's deceptive trade practices. The First Amended Complaint (FAC) (Doc. 11) evidences these facts. By his colorful but legally unsound Motion to Dismiss (Motion) (Doc. 26), Mr. Tuohy tries to twist those facts, improperly introduce evidence outside the pleadings, and escape liability for his unlawful misconduct. The Sugg Brothers and FireClean oppose his Motion. The Court should disregard its objectionable extrinsic evidence, reject its legal arguments, and deny it.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Tuohy is a marketing professional and entrepreneur. He owns and operates a website company, a radio show company, and a clothing business. (Doc. 11 at ¶¶ 29-30, 37, 41-45.) He sells clothing and "publishes content related to guns and weaponry, including reviews of gun-related products, accessories, and policies" under his companies' Vuurwapen brand. (*Id.* ¶¶ 35-38, 41-45, 53-55.) He targets consumers in several industries including but not limited to the military industry, law enforcement industry, self-defense industry, shooting sports industry, gun sales industry, gun care industry, and gun repair industry. (*Id.* ¶¶ 38, 54.)

The FAC and the Motion tell two different stories. The Court must accept the FAC's account as true. Its facts are these. The Sugg Brothers' company, FireClean (www.cleanergun.com), marketed and sold a successful gun cleaner, lubricant, and preservative (CLP) product, FIREClean®, to consumers Mr. Tuohy's companies targeted. (Doc. 11 at ¶¶ 1, 29-45, 75-76.) George Fennell's company, Weapon Shield, sold a competing product. (*Id.* ¶ 77.) Mr. Fennell wanted more consumers to buy his company's product and fewer to buy FIREClean®. (*Id.* ¶¶ 314, 339-41.) He set out to deceive consumers to help his company compete. (*Id.* ¶¶ 339-41.)

Mr. Fennell knew about Mr. Tuohy's popular website, which promoted and marketed many products and services. He predicted his company's profits would increase if he told Mr. Tuohy to write and publish scandalous misinformation about FIREClean® and the Plaintiffs. (*Id.* ¶¶ 339-42.) Mr. Fennell enlisted Mr. Tuohy hoping to profit from Mr. Tuohy's website company's marketing power. (*Id.* ¶ 343.) They joined forces to help their companies benefit from a false advertising scheme. (*Id.* ¶¶ 344-46.)

Mr. Tuohy agreed to write false and derogatory stories about FIREClean®'s composition and functionality and use his popular marketing platform to publish them.

(*Id.* ¶¶ 342, 344.) He hoped to profit from the scheme in at least three ways: increase the values of his website and radio show companies; increase the value of his personal brand; and sell more t-shirts through his clothing company. (*Id.* ¶¶ 11, 237, 345.)

Mr. Tuohy had thoroughly tested FIREClean® in 2012 and published the favorable results in 2013. (*Id.* ¶¶ 71-74.) He knew it was a superior CLP product, not common cooking oil. (*Id.*) He knew of no evidence that could prove any of the disparagements Mr. Fennell wanted him to spread online were true. (*Id.* ¶¶ 8, 82-85.) But the opportunity to build his brands and benefit from some scandalous gossip was too good to pass up.

He misled his, Mr. Fennell's, and FireClean's target consumers into believing FIREClean® is nothing more than common cooking oil, the kind anyone can buy at a local grocery store. (*Id.* ¶¶ 9, 119, 245, 248, 285, 335.) He alleged and implied the Plaintiffs had intentionally lied to consumers, industry leaders, and the U.S. Patent and Trademark Office. (*Id.* ¶¶ 1, 214-15, 221, 226, 273.) His and Mr. Fennell's commercial misconduct cost the Plaintiffs at least hundreds of thousands of dollars, badly defamed them, and portrayed the Sugg Brothers in a false light. (*Id.* ¶¶ 22, 120, 125, 261-62, 289.)

II. LEGAL STANDARD

"A Rule 12(b)(6) motion tests the legal sufficiency of a claim." *Cook v. Brewer,* 637 F.3d 1002, 1004 (9th Cir. 2011). A complaint need not contain detailed allegations, but "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

While "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," the plausibility requirement does not impose the burden of alleging and supporting facts that could only be obtained through discovery. *Id.* The standard "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" of wrongdoing. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

During a sufficiency assessment, "allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Ultimate Creations, Inc. v. McMahon*, 515 F. Supp. 2d 1060, 1064 (D. Ariz. 2007). Every factual doubt must be resolved in the nonmoving party's favor and all reasonable inferences must be drawn in his favor. *Hebbe v. Pliler*, 627 F.3d 338, 340 (9th Cir. 2010).

A plaintiff's complaint "should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

III. ARGUMENT

A. Extrinsic information and new factual allegations should be disregarded.

A motion to dismiss' "[r]eview is limited to the contents of the complaint." *Sprewell*, 266 F.3d at 988. If a court considers extrinsic information, the motion must be treated as one for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Contrary allegations and other extraneous information are not relevant in assessing if the FAC's factual allegations sufficiently establish viable claims for relief. *Id.*

Mr. Tuohy's Motion presents and relies on extrinsic information that is not entitled to a presumption of truth. The Plaintiffs object to this proscribed practice. They also dispute the Motion's contrary allegations and unreasonable interpretations of the FAC's facts. They do not stipulate to their accuracy, validity, or veracity. The Motion's extrinsic evidence and new allegations lack proper foundation, misstate the FAC's facts, are based on hearsay, are not admissible under judicial notice, or are otherwise inadmissible. *See Lee*, 250 F.3d at 688-89.

The Motion alleges Mr. Tuohy commissioned spectroscopy tests, the people who conducted the tests were experts, and the people who conducted the tests interpreted their results accurately. (Doc. 26 at 3-4; 7.) Those unproven allegations are outside the pleadings. The FAC only alleges Mr. Tuohy claimed to commission spectroscopy tests

and claimed that competent people interpreted their results accurately. (Doc. 11 ¶¶ 72, 92-93, 97-98, 161-62, 170.) It does not allege he commissioned the tests he claimed he commissioned. (*Id.*) Nor does it allege the people he claimed interpreted the tests interpreted them in the way he claimed they did. (*Id.*)

The Motion also alleges Mr. Tuohy relied on the alleged opinions of a professor to conclude military members should not use FIREClean®. (Doc. 26 at 4.) That he relied on a professor's opinion is another unproven allegation outside the pleadings.

The Motion devotes two pages to Mr. Tuohy's false claims about the meanings of primer colors, shell casing stamps, and smoke in the Vickers Video. (Doc. 26 at 5-7.) It erroneously alleges the different primer colors of ejected ammunition prove "FireClean used different ammunition without disclosing the fact." (*Id.* at 6.) It deceptively claims "FireClean does not deny that it used different ammunition for each shot in the Vickers Video." (*Id.*) The FAC's allegations refute the Motion's. (Doc. 11 ¶¶ 135-140.)

When determining whether the FAC is legally sufficient, none of the Motion's new assertions may be presumed true. The FAC's facts must be assumed true and interpreted in favor of the Plaintiffs. *Ultimate Creations*, 515 F. Supp. 2d at 1064.

B. The FAC alleges Mr. Tuohy is a competitor who published actionable statements for commercial purposes, giving rise to a legally sufficient false advertising claim under Section 43(a)(1)(B) of the Lanham Act.

1. Standing under Section 43(a)(1)(B) of the Lanham Act.

Mr. Touhy's Motion overcomplicates and misstates the controlling law for Section 43(a)(1)(B) standing. *TrafficSchool.com* is the controlling Ninth Circuit case. *See TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 826 (9th Cir. 2011).

For standing "a plaintiff must show: (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." *Id.* (citing *Jack Russell Terrier Network of N. Ca. v. Am. Kennel Club, Inc.*, F.3d 1027, 1037 (9th Cir. 2005)).

TrafficSchool.com defined competitors as entities that "vie for the same dollars from the same consumer group." *Id.* at 827 (citing *Kournikova v. Gen. Media Commc'ns, Inc.*, 278 F. Supp. 2d 1111, 1117 (C.D.Cal. 2003)). It also set out the test for determining whether a competitor caused a competitive injury actionable under Section 43(a)(1)(B) of the Lanham Act. *Id.* at 825 (citing *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 177 (3d Cir. 2001)). "[A] plaintiff establishes Article III injury if 'some consumers who bought the defendant['s] product under [a] mistaken belief' fostered by the defendant would have otherwise bought the plaintiff['s] product." *TrafficSchool.com*, 653 F.3d at 825.

2. Mr. Tuohy and FireClean, LLC were competitors.

Mr. Tuohy disputes he and FireClean were competitors. (Doc. 26 at 8-11.) The FAC alleges they competed because it alleges they "vie[d] for the same dollars from the same consumer group[s]." *TrafficSchool.com*, 653 F.3d at 827.

FireClean and Mr. Tuohy's companies marketed and sold some goods and services to consumers in the same industries. (Doc. 11 at ¶¶ 56, 58, 75, 76, 292-94.) They marketed and sold things to the military industry, law enforcement industry, self-defense industry, shooting sports industry, gun sales industry, gun care industry, and gun repair industry. (*Id.* ¶¶ 11, 29, 30, 32, 37, 38, 41-46, 50, 53-55, 72, 237, 295.) Mr. Tuohy and his companies also competed against FireClean by helping Mr. Fennell engage in deceptive business practices designed to increase Mr. Fennell's company's sales and decrease FireClean's. (*Id.* ¶¶ 77-81, 83-92, 339-46.)

3. Mr. Tuohy's commercial publications caused competitive injuries.

On February 5, 2016, Mr. Tuohy published a marketing webpage for his clothing company, http://www.vuurwapenblog.com/reviews/clothing/vuurwapen-blog-t-shirts.

A copy of the page, captured on May 25, 2017, is attached as Exhibit 1.[1] He published it via a blog website his website company owns. (*Id.*) The website's name, Vuurwapen Blog, is printed on the t-shirts he marketed and sold. (*Id.*)

Mr. Tuohy hoped the scandalous stories he published about the Plaintiffs would drive more consumers to his company's website, which would increase the value of his company's brand, increase the value of his personal brand, and increase the number of consumers who would visit his clothing company's marketing webpage. (Doc. 11 at ¶ 11.) Revealing his commercial intent, he made the following comments on the webpage:

> Pricing is $17 per (~3.5-4.5oz) shirt, approximately ten dollars less than a two pack (2x2oz) of FireClean from Brownells, making it a better deal by weight. The first 20 shirt buyers will receive a free sample of FireClean! That has to at least double the value of the shirt. Add $1 if you would like your shirt blessed with FireClean.

(Exhibit 1.)

In this paragraph, Mr. Tuohy compares the price of his t-shirts with the price of a two-pack of FIREClean®. He claims one of his t-shirts is "a better deal by weight" than a two-pack of FIREClean®. He offers to give the first twenty consumers who bought one of his clothing company's t-shirts a free FIREClean® sample, implying FIREClean® has nearly no commercial value because it is common cooking oil. These provably false statements were part of a false advertising campaign designed to persuade consumers who might have spent their money on FIREClean® to buy Mr. Tuohy's t-shirts and Mr. Fennell's company's products instead.

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[1] The webpage is part of the blog website (www.vuurwapenblog.com) that the FAC references. (Doc. 11 at ¶¶ 29, 20, 31, 32.) It is not evidence outside the pleadings and neither party disputes its authenticity. "[A] court may consider material which is properly submitted as part of the complaint on a motion to dismiss ... If the documents are not physically attached to the complaint, they may be considered if the documents' authenticity ... is not contested and the ... complaint necessarily relies on them."). *Lee*, 250 F.3d at 688 (internal citation omitted).

In his reply, Mr. Tuohy might argue that his February 5, 2016, statements were merely an attempt at humor.[2] Even if that were true, it would still be true, given the FAC's allegations, that their purpose was to help Mr. Tuohy's companies and Mr. Fennell's company compete for dollars that might have gone to FireClean but for Mr. Tuohy's false, albeit humorous, commercial advertising efforts. Those advertising efforts began with false and disparaging articles Mr. Tuohy published about the Plaintiffs and culminated in a webpage, published on the same website, used to market his t-shirts.

Mr. Tuohy's and Mr. Fennell's marketing scheme, though deceptive, was straightforward and simple. Mr. Tuohy chose to conspire and publish false and scandalous articles about FireClean's products. (Doc. 11 at ¶ 85.) Mr. Tuohy hoped to attract more consumers to his company's website and market to them. (*Id.* ¶ 11.) He and Mr. Fennell hoped to discourage the consumers from purchasing FireClean's products and encourage them to purchase their companies' products instead. The deceptive commercial scheme worked. (*Id.* ¶¶ 9, 119, 245, 248, 285, 335-36.) The target consumers spent more money with Mr. Tuohy's and Mr. Fennell's companies.

FireClean has standing to sue Mr. Tuohy for his violations of Section 43(a)(1)(B) of the Lanham Act. *See TrafficSchool.com* at 825. Mr. Tuohy's motion to dismiss FireClean's false advertising claim should be denied.

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[2] If he does, Mr. Tuohy will again flout F.R.C.P. 12(b), improperly introduce extrinsic evidence, and present new arguments for the first time in his reply. Such arguments and information can be stricken and disregarded. *See U.S. ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) (citing *Lujan v. National Wildlife Federation,* 497 U.S. 871, 894–95 (1990) ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers.")).

C. Mr. Tuohy is liable to the Plaintiffs for defamation, injurious falsehood, intentional interference, and false light invasion of privacy.

The Plaintiffs brought claims for defamation, injurious falsehood, false light invasion of privacy, and intentional interference because Mr. Tuohy's statements, when considered in context with all their implications and omissions, made three categories of provably false assertions: "FIREClean® 1) is common cooking oil, 2) is unsafe for military use or its listed uses, and 3) FireClean and its founders have lied or otherwise deceived consumers about the product and functionality." (Doc. 11 at ¶ 215, 5-7, 216-24.) Mr. Tuohy made at least 21 actionable statements about the Plaintiffs across three blog articles and one social media post. (*Id.* ¶¶ 115, 134, 173, 126, 184, 186-87.)

Reasonable jurors instructed appropriately to follow RAJI (CIVIL) 5th Defamation 4C (Fact Versus Opinion) will agree Mr. Tuohy's statements made or implied assertions of fact and fell outside First Amendment protections. Even if a statement "is susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury." *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002).

1. Mr. Tuohy made his statements about the Plaintiffs.

Each of the 21 actionable statements identifies the Plaintiffs by name or clear implication. Statements 1 through 19 appear in publications that identify the Plaintiffs and their product by name. Statements 20 and 21 appear in a publication that mentions the Plaintiffs' product: "The oil used was Fireclean." (Doc. 11 at ¶ 183.) The publication's text implies the "people" Mr. Tuohy alleged "lie for the strangest reasons…to separate you from your money" were the Plaintiffs. (*Id.*) Consumers understood Mr. Tuohy correctly and identified the Plaintiffs by name in the publication's comment's section: "Speaking of FireClean." (*Id.* ¶ 186; Doc. 11-12.) The publications reasonably connect the defamatory statements to the Plaintiffs. *See Hosszu v. Barrett*, 202 F. Supp. 3d 1101, 1108 (D. Ariz. 2016) (quoting *Hansen v. Stoll*, 130 Ariz. 454, 459, 636 P.2d 1236, 1241 (Ariz. App. 1981) ("while it is not necessary for Hosszu to allege that every reader could make the

connection between the article in question and herself, the "connection must be reasonable under the circumstances.")).

2. Mr. Tuohy's statements are capable of conveying defamatory meaning.

Mr. Tuohy argues his statements are protected as "pure opinion" based on disclosed facts. But the United States Supreme Court "found the artificial dichotomy between 'opinion' and 'fact' too simplistic and stated that it never intended to create a 'wholesale defamation exemption for anything that might be labeled opinion.'" *Riggs v. Clark County Sch. Dist.*, 19 F. Supp. 2d 1177, 1184 n. 9 (D. Nev. 1998) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)). Also, in Arizona, jurors decide whether a statement was an opinion or objectionable fact. RAJI (CIVIL) 5th Defamation 4C.

"A speaker can't immunize a statement that implies false facts simply by couching it as an opinion based on those facts." *Flowers*, 310 F.3d at 1129. The expression of "opinion" may give rise to liability, even when the speaker discloses facts on which statements are based because "if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 19; *see also Flowers*, 310 F.3d at 1129 ("if it turns out that defendants knew the news reports were wrong—or acted with reckless indifference in the face of some clear warning sign—then they weren't entitled to repeat them publicly and later claim that they were merely expressing nondefamatory opinions.").

The Plaintiffs have not yet claimed the laboratory tests about FIREClean®'s composition were fabricated. Nor have they admitted Mr. Tuohy commissioned any of the tests he claimed to commission or obtained any of the test results he claimed he obtained. The FAC alleges Mr. Tuohy claimed to commission tests and claimed those tests produced certain results. (Doc. 11 ¶¶ 72, 92-93, 97-98, 161-62, 170.) The FAC alleges Mr. Tuohy had no grounds to rely on the alleged results of the tests he discussed or observations he allegedly made because his underlying assumptions were flawed, the

alleged tests were incomplete, the alleged results were misleading, and Mr. Tuohy's conclusions were unreasonable. (Doc. 11 ¶¶ 100-13, 229-36, 238-40, 278.)

"[T]he threshold question in defamation suits is not whether a statement 'might be labeled opinion,' but rather whether a reasonable factfinder could conclude that the statement 'impl[ies] an assertion of objective fact.'" *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990) (quoting *Milkovich*, 497 U.S. at 20, 18) (add'l quotation omitted, alterations in original). For over twenty-five years, our courts have examined the totality of the circumstances and considered "the work as a whole, the specific context in which the statements were made, and the statements themselves to determine whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact and therefore fall outside of the protection of the First Amendment." *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995).

The factors, referenced in several cases Mr. Tuohy's Motion cites, are "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false." *Partington*, 56 F.3d at 1153. Mr. Tuohy's publications create the impression he asserts facts.

The first factor looks to the broad context of the offending publication, including "[t]he general tenor of the work, the subject of the statements, the setting, and the format of the work." *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995). Mr. Tuohy's blog is not simply an online journal or diary as some blogs are. *See Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, n.1 (9th Cir. 2014); *Obsidian Fin. Grp., LLC v. Cox*, 812 F. Supp. 2d 1220, 1232 (D. Or. 2011). Many blogs predispose an audience to view a blogger's posts "with a certain amount of skepticism and with an

understanding that they will likely present one-sided viewpoints rather than assertions of provable facts." *Obsidian*, 812 F. Supp. at 1232-33.

Mr. Tuohy, however, cultivates an overall tone of precision and carefully weaves alleged facts, charts, newspaper articles, and other "evidence" into his posts to engender the sense that his statements are objective, credible, and independent. He claims to provide unbiased factual information "related to guns and weaponry, including reviews of gun-related products, accessories, and policies." (Doc. 11 at ¶ 38.) He references his military service and education as qualifications to provide factual information about "weapons and 'tactical' gear, from both field use and practical design standpoints." (*Id.* ¶ 28.) He assures his readers that all his "reviews, wherever published, will remain objective and free of outside influence." (Exhibit 2.) Comments readers published in response to Mr. Tuohy's publications indicate his consumers did not dismiss his statements as hyperbole or heated opinion. His "readers read and believed his statements." (Doc. 11 at ¶¶ 9, 36, 119, 245, 248, 285, 335-36.)

a) Mr. Tuohy's statements give the impression he asserts objective facts.

Mr. Tuohy uses non-rhetorical, detail-oriented, factual language suggesting he investigates and confirms facts, subjects his opinions to fact-checking and research, and is otherwise presenting well-reasoned, well-researched factual information. He carefully encourages his target consumers to believe he is asserting facts with statements such as, "Still, this wasn't the sort of conclusive proof that would sway me one way or the other"; and "I sought to undertake my own testing to determine whether or not these claims are true about FireClean." (Doc. 11 at ¶ 97.)

In *Ultimate Creations, Inc. v. McMahon*, a case Mr. Tuohy's Motion cites, this Court, after examining statements the defendants published about a professional wrestler, held: "Generally, the DVD uses an honest and serious documentary-style approach…However, the DVD does contain occasional commentary that sarcastically

pokes fun at Warrior's actions and wrestling character." *Ultimate Creations*, 515 F. Supp. 2d at 1065–66. In a broader context and "[a]fter examining the totality of the circumstances in which the Defendants' statements were made" this Court found "Defendants allegedly made statements about Warrior that can be reasonably interpreted as factual assertions." *Id.*

Similarly, in *Flowers*, the Ninth Circuit Court of Appeals reasoned a publication used some subjective language, rhetoric, and hyperbole, but that the phrases "maybe the topics were doctored" and "selectively edited" were capable of defamatory meaning because they could imply fraudulent or deceptive acts. *Flowers*, 310 F.3d at 1118. Mr. Tuohy's statements intended to convey and conveyed the assertion that the Plaintiffs had deceived their consumers through fraudulent or deceptive acts. These statements can be reasonably interpreted as assertions of fact that, when read individually or as a whole, plausibly give rise to the Plaintiffs' claims.

b) Mr. Tuohy's statements can be proven true or false.

The FAC's actionable statements need only be "sufficiently factual to be susceptible of being proved true or false." *Milkovich*, 497 U.S. at 21. The Plaintiffs allege facts about FIREClean®'s composition and can produce additional evidence that will disprove Mr. Tuohy's false assertions that it is a single oil or repackaged soybean or canola oil. The Plaintiffs can provide evidence to refute Mr. Tuohy's false safety and fitness assertions, such as scientifically sound studies and tests, expert opinions, and lay testimony. Since the assertions about the product's composition, safety, and fitness can be proven or disproven, they cannot be protected opinions.

Mr. Tuohy's accusations that the Plaintiffs misled, defrauded, and deceived consumers can also be proven false. For instance, the Plaintiffs can prove "that no court has ever convicted [them] of criminal fraud and that no court or arbitrator has found [them] civilly liable for fraud or other deceptive practices" to disprove the assertion they have

"lied to…customers, committed criminal acts, such as fraud, or…civil fraud." *Dealer Computer Servs., Inc. v. Fullers' White Mountain Motors, Inc.*, CV07-00748-PCT-JAT, 2008 WL 4628448, at *6 (D. Ariz. Oct. 17, 2008). The Plaintiffs can also provide evidence, such as the results of scientifically sound lab tests (Doc. 11 at ¶¶ 190-204), eyewitness testimony, and expert testimony, to prove the FAC's allegations (*id.* ¶¶ 135-140) that they did not falsify any video test results or mislead the public.

Because Mr. Tuohy's claims about FIREClean® and the Plaintiffs can be proven false, they are actionable statements of fact.

D. Mr. Tuohy's Premature Defenses

1. Actual Malice Defense.

a) The defamation claims do not require proof of actual malice.

If he can do so without violating F.R.C.P. 11(b), a defamation defendant may properly assert a qualified privilege defense or a constitutional privilege defense. He must prove the facts required to give rise to a qualified privilege before a court may apply it to a plaintiff's defamation claim. Restatement (Second) of Torts § 613(2) (Am. Law. Inst. 1977) ("In an action for defamation the defendant has the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication."); *see also* § 613, cmt. g. Only after a court has determined the evidence proves a plaintiff must have been a public figure or the actionable statement must have involved a matter of public concern will the defendant be entitled to the constitutional privilege defense. *Id.* § 613 § 580A, cmt. e.

Whether there is sufficient evidence to conclusively prove a plaintiff was a public figure or the actionable statement involved a matter of widespread public concern is a question of law for the court to decide. *See Milkovich*, 497 U.S. at 17-19. The controlling case for determining whether a constitutional privilege defense applies to an Arizona defamation claim based on a statement concerning a private corporation's or a private

citizen's commercial conduct is *Antwerp Diamond Exch. of Am., Inc. v. Better Bus. Bureau of Maricopa Cty., Inc.*, 130 Ariz. 523, 527, 637 P.2d 733, 737 (1981).

Antwerp Diamond Exchange and its President, Charles Erickson, sued the Better Business Bureau (BBB) for defamation, violation of Arizona's consumer protection laws, and intentional interference for statements one of the BBB's agents published about the plaintiffs' commercial activities. *Antwerp*, 130 Ariz. at 525, 637 P.2d at 735. Antwerp sold precious stones and generated its sales via "media advertising, mailing and telephone solicitations." *Id.* The BBB was a non-profit membership corporation that publicly stated it "promotes truth in advertising and selling; maintains an impartial attitude towards firms and individuals; and is dedicated to the building and preservation of public confidence in legitimate business." *Id.*

The Supreme Court of Arizona reversed summary judgment on the defamation and interference claims. It found the plaintiffs were not public figures and the constitutional privilege requiring proof of actual malice did not apply to the disparaging statements the BBB published about the plaintiffs' commercial activities. *Id.* at 530, 740.

Proof of actual malice will not be required for an Arizona defamation claim unless the evidence proves the statement giving rise to the claim (1) was subject to a qualified privilege defense; (2) was about a public figure or public official; or (3) involved a matter of widespread public concern. RAJI (CIVIL) 5th Defamation 1A (the source and use note sections cite the controlling law). Otherwise, the trial court must instruct the jury to determine whether the defendant negligently defamed the plaintiff. RAJI (CIVIL) 5th Defamation 1B (the source and use note sections cite the controlling law).

Actual malice defamation claims have different standards and burdens of proof than negligence defamation claims. *Compare* RAJI (CIVIL) 5th Defamation 1A *with* RAJI (CIVIL) 5th Defamation 1B. The former requires the plaintiff to prove by a preponderance of the evidence the actionable statement was false and prove by clear and

convincing evidence the defendant either knew the statement was false or acted in reckless disregard of its truth or falsity. RAJI (CIVIL) 5th Defamation 1A and RAJI (CIVIL) 5th Defamation 4A (Reckless Disregard). The latter requires the defendant to prove by a preponderance of the evidence the statement was true and requires the plaintiff to prove by a preponderance of the evidence that the defendant was negligent in failing to determine the truth of the statement. RAJI (CIVIL) 5th Defamation 1B, RAJI (CIVIL) 5th Defamation 4B (Negligence), and RAJI (CIVIL) 5th Defamation 3 (Truth).

Mr. Tuohy has not pleaded or proven a qualified privilege defense. He is not entitled to one.

The FAC pleads allegations that, when assumed true, prove Mr. Tuohy is not entitled to any constitutional privilege defense. (Doc. 11 at ¶¶ 256-58); *Antwerp*, 130 Ariz. at 527, 637 P.2d at 737. Mr. Tuohy's Motion argues "FireClean appears to correctly concede that statements at issue involve matters of public concern" because the FAC alleges Mr. Tuohy published actionable statements with actual malice. (Doc. 26 at 18.) But his Motion makes no attempt to explain how the Plaintiffs are public figures or whether Mr. Tuohy's publications involved matters of public concern.

In *Antwerp*, the Supreme Court of Arizona held the BBB's disparaging public statements about whether a diamond seller's precious stones were what the seller and its president claimed were not matters of public concern. 130 Ariz. at 526-527, 637 P.2d at 736-737. Here, the Plaintiffs sued Mr. Tuohy for falsely claiming they lied to and defrauded their consumers about a CLP product that costs less than thirty dollars for a two-pack on www.amazon.com. If the BBB's public statements about a diamond seller's alleged deceptive business practices were not matters of public concern, Mr. Tuohy's actionable statements about the Plaintiffs most certainly were not.

b) The Plaintiffs' injurious falsehood claims do not necessarily require proof of actual malice at this stage.

Arizona expressly recognized the injurious falsehood tort in 1986. *W. Techs., Inc. v. Sverdrup & Parcel, Inc.*, 154 Ariz. 1, 4, 739 P.2d 1318, 1321 (Ariz. App. 1986) (citing W. Prosser and W. Keeton, The Law of Torts § 128 at 963 (5th ed. 1984) and Restatement (Second) of Torts § 623A) ("Generally, injurious falsehood 'consist[s] of the publication of matter derogatory to the plaintiff's ... business in general ..., of a kind calculated to prevent others from dealing with him or otherwise to interfere with his relations with others to his disadvantage.'").

Defamation and injurious falsehood are different torts. *Compare* Restatement (Second) of Torts §§ 558 – 623 (Am. Law Inst. 1977) *with* §§ 623A – 652. The injurious falsehood tort gives plaintiffs a theory of relief for harms they suffered to their pecuniary interests due to others' false statements about their commercial activities. *Id.* § 623A. One of injurious falsehood's elements of proof is actual malice—proof the defendant knew the injurious statement was false or acted in reckless disregard of its truth or falsity. *Compare id.* § 623A(b), cmt. d, cmt. g *with* RAJI (CIVIL) 5th Defamation 1A and RAJI (CIVIL) 5th Defamation 4A.

But the Restatement makes it clear that it has no opinion on whether the actual malice element should be applied to all injurious falsehood claims or only those claims that involve public figures or matters of public concern:

> [T]he statement in blackletter for this Section has been confined to those bases of the tort of injurious falsehood for which the constitutionality is substantially certain to be sustained. The alternate bases for the tort at common law, for which constitutionality is not entirely clear, have been treated by way of Caveat, and the Institute takes no position as to their present validity.

Restatement (Second) of Torts § 623, cmt. c (Am. Law Inst. 1977). Nor has the U.S. Supreme Court addressed whether proof of actual malice is a necessary element of the tort. *Vascular Sols., Inc. v. Marine Polymer Thchs., Inc.*, 590 F.3d 56, 59 (1st Cir. 2009) (per curiam) ("[N]either the Supreme Court nor this one has decided whether the First Amendment requires in product disparagement actions the actual malice standard of *New York Times Co. v. Sullivan*.").

Arizona courts have yet to confront the question of whether a private figure's injurious falsehood claim, based on a statement that was not about a matter of public concern, requires proof of actual malice even if no qualified privilege applies. The Court did not reach this question in *W. Techs.*, because it held an absolute privilege defense shielded the defendant from liability. *W. Techs.*, 154 Ariz. at 4–5, 739 P.2d at 1321–22.

c) The FAC alleges Mr. Tuohy published the statements with actual malice.

Though its failure to do so would not have been fatal, the FAC alleges Mr. Tuohy published each actionable statement with actual malice because it alleges (1) he knew each statement was false before he published it, or (2) he acted with reckless disregard of the truth or falsity of each statement when he published it, or (3) he published each statement even though he seriously doubted whether it was true or false. RAJI (CIVIL) 5th Defamation 1A (Elements Where Actual Malice Is Required) and RAJI (CIVIL) 5th Defamation 4A (Reckless Disregard).

The FAC alleges Mr. Tuohy knew all his actionable statements were false before he published them. (Doc. 11 at ¶¶ 72-74, 228, 229, 232-34, 236-37.) It also alleges he acted with reckless disregard of the truth or falsity of his statements or had serious doubts about the truth or falsity of his statements when he made them. (*Id.* ¶¶ 72- 74, 80-84, 86-89, 91, 92, 99-101, 104-10, 230-34, 236, 238-41.)

Even if this Court holds Mr. Tuohy is entitled to a constitutional privilege defense despite the absence of evidence to support that holding under *Antwerp,* it should still

deny Mr. Tuohy's request to dismiss the Plaintiffs' defamation and injurious falsehood claims because the FAC is replete with factual allegations Mr. Tuohy published every actionable statement with actual malice. "During the pleading stage, plaintiffs may generally aver a defendant's state of mind simply by stating that it existed." *Ultimate Creations, Inc.*, 515 F. Supp. 2d at 1066; *see also Flowers*, 310 F.3d at 1130-31.

2. Substantial Truth.

Mr. Tuohy claims his actionable statements were substantially true. But the Court must disregard these disputed assertions, many of which rely on extrinsic evidence, at this stage. He also argues the Court should dismiss the Plaintiffs' defamation claims because the FAC allegations do not prove the statements giving rise to this action are false. (Doc. 26 at 20–22.) His argument is legally and factually wrong.

a) The Plaintiffs' defamation claims do not require proof of falsity.

Mr. Tuohy presumes the Plaintiffs bear the burden of proving his statements were false. As explained above, Mr. Tuohy will bear the burden of proving a truth defense unless he proves he is entitled to a qualified privilege or this Court, despite *Antwerp*, holds each of the Plaintiffs was a public figure or each actionable statement Mr. Tuohy published about each Plaintiff was a matter of public concern. Mr. Tuohy did not argue or prove he is entitled to a qualified privilege defense. The FAC proves his statements are not entitled to a constitutional privilege defense under *Antwerp*.

To prove a truth defense for an Arizona defamation claim, a defendant must prove each actionable statement giving rise to the claim is "substantially true" because "the statement differs from the truth only in insignificant details." RAJI (CIVIL) 5th Defamation 3 (Truth). The plaintiff does not bear the burden of proving the actionable statement was not substantially true. *Id.* Unless there is irrefutable proof the actionable statement must have been substantially true, a trial court must let a jury decide whether it was substantially true or probably false. Restatement (Second) of Torts § 617(b) (Am.

Law. Inst. 1977). "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Soo Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)).

The sole case Mr. Tuohy cites to support his substantial truth defense is inapposite here. *See Vogel v. Felice*, 127 Cal. App. 4th 1006, 26 Cal. Rptr. 3d 350 (2005). *Vogel* involved statements about candidates for public office—public figures—that involved matters of public concern and were subject to California's anti-SLAPP statutes. Since the undisputed facts in *Vogel* proved constitutional privileges and California's anti-SLAPP law applied to the actionable statements, the plaintiffs had to prove the statements were false to prevail. *Id*. at 1021, 361-62.

There are no public figures in this case. None of Mr. Tuohy's actionable statements involved matters of public concern. And California's anti-SLAPP laws do not regulate Arizona defamation claims. Mr. Tuohy is not entitled to a dismissal of any of the Plaintiffs' claims on the disputed grounds that the FAC fails to plead allegations that can prove his statements were not substantially true.

b) The FAC alleges Mr. Tuohy's actionable statements were false.

The FAC alleges Mr. Tuohy's actionable statements were false and misleading. The Plaintiffs do not need to disclose "the product's exact formula" to sufficiently allege or prove Mr. Tuohy's statements were false and misleading. They can prove falsity several other ways. The following table summarizes the false assertions the FAC alleges Mr. Tuohy published and how the FAC explains his assertions were false.

False Assertion	Showing of Falsity
FIREClean® is common cooking oil, soybean oil, or Crisco. (Doc. 11 at ¶¶ 215, 216.)	(*Id.* ¶¶ 58, 60, 62-66, 82, 89, 91, 96, 100-10, 128, 130, 131, 165, 168, 190-204, 220.)
FIREClean® is not safe or effective in extreme weather conditions. (*Id.* ¶¶ 215, 218.)	(*Id.* ¶¶ 58-60, 74, 128, 130, 136-39, 165, 190-204 220, 232-34, 236.)
FIREClean® use will cause corrosion. (*Id.* ¶ 219.)	(*Id.* ¶¶ 59, 165, 190-204, 220, 233-34, 236.)
FIREClean® has no anti-corrosive properties. (*Id.* ¶ 219.)	(*Id.* ¶¶ 59, 165, 190-204, 220, 233-34, 236.)
FIREClean® use will lead to malfunctions. (*Id.* ¶ 219.)	(*Id.* ¶¶ 59, 60, 74, 128, 130, 136-39, 165, 190-204, 220, 232-34, 236.)
FIREClean® is unsafe for military use. (*Id.* ¶ 217.)	(*Id.* ¶¶ 58-60, 74, 128, 130-31, 136-139, 165, 190-204, 220, 232-34, 236.)
FIREClean® is unsafe for its listed uses. (*Id.* ¶ 217.)	(*Id.* ¶¶ 58-60, 128, 130-31, 136-38, 165, 190-204, 220, 232-34, 236.)
The plaintiffs lied to or deceived their consumers about FIREClean®'s functionality. (*Id.* ¶ 221.)	(*Id.* ¶¶ 58-60, 81, 89, 91, 128, 130-31, 136, 137-39, 165, 168, 190-204, 220, 232-34, 236.)
The plaintiffs are untrustworthy, unethical, or unprofessional because they altered a test or its results to make it appear as though their product is more effective than it is. (*Id.* ¶ 222.)	(*Id.* ¶¶ 60, 82, 89, 91, 128, 130, 131, 136-39, 165, 168, 190-204, 232-34, 236.)
FIREClean® was a pre-existing product brought from one area of commerce to another and consumers were misled about its worth and price. (*Id.* ¶ 223.)	(*Id.* ¶¶ 58, 60, 62-66, 74, 82, 89, 91, 128, 165, 168, 190-204, 220.)
FIREClean® is dangerous and may harm consumers if used as directed. (*Id.* ¶ 224.)	(*Id.* ¶¶ 59-60, 89, 128, 130-31, 136-39, 190-204, 232.)

The FAC alleges facts that show FIREClean® "consists of a proprietary blend of at least three oils" (Doc. 11 at ¶ 2); "is not marketed or sold under any other name, label, or brand" (*id.* ¶ 57); "is not made from a single type of oil" (*id.* ¶ 62); "is not Crisco

Canola Oil" (*id.* ¶ 63); is not "repackaged common canola oil" (*id.* ¶ 64); is not "Crisco Vegetable Oil, which is soybean oil" (*id.* ¶ 65); and is not "repackaged common soybean oil." (*Id.* ¶ 66; ¶¶ 190-204; Doc. 11-13; Doc. 11-14.) These facts are not legal conclusions and FIREClean®'s patent application does not contradict them. (Doc. 11-1.) They must be accepted as true.

The FAC alleges Mr. Tuohy's claims and implications about FIREClean®'s safety and fitness are untrue. (Doc. 11 at ¶¶ 175, 214-15, 217-20, 224, 226, 232-35, 271, 276, 281.) It alleges FIREClean® "improves the reliability and performance of firearms by reducing the adhesion of carbon residue that results from discharging a firearm." (*Id.* ¶ 58.) It also alleges facts that contradict Mr. Tuohy's claims and implications the Sugg Brothers and FireClean misled, defrauded, and deceived consumers. (*Id.* ¶¶ 57, 135-40, 190-204, 220-23, 270-75; Doc. 11-1; Doc. 11-13; Doc. 11-14.)

The Motion fails to address each of the FAC's allegations demonstrating the falsity of Mr. Tuohy's statements. Meanwhile, the FAC goes to great lengths to show how the actionable statements were provably and materially false and misleading, not slightly inaccurate. When assumed true and read in a light most favorable to the Plaintiffs, the FAC shows Mr. Tuohy's actionable statements were false. Mr. Tuohy's motion to dismiss the Sugg Brothers' and FireClean's defamation claims on the grounds the FAC fails to prove his statements were not substantially true should be denied.

E. The Single Publication Act does not prohibit the Plaintiffs from litigating any of their theories of relief for this action.

The purpose of Arizona's Uniform Single Publication Act is to protect defendants from being harassed by multiple lawsuits based on the same operative facts. *Larue v. Brown*, 235 Ariz. 440, 444–45, 333 P.3d 767, 771–72, ¶ 21 (Ariz. App. 2014) (citing *Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1131 (9th Cir. 2006) ("The single publication rule is designed to protect defendants from harassment through multiple

suits and to reduce the drain of libel cases on judicial resources.")); and then citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984).

Section 12-651 prohibits parties from obtaining multiple judgments for the same cause of action only if each judgment would be based on the same publication. A.R.S. § 12-651(A) and (B). A "cause of action" is "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person." *Black's Law Dictionary* (10th ed. 2014).

As long as none of the parties in this case obtains more than one judgment for each actionable publication, there will be no violation of A.R.S. § 12-651. At this stage, no party has obtained a judgment based on any actionable publication. A.R.S. § 12-651 does not prohibit the individual plaintiffs from pleading or litigating a different theory of relief for each actionable publication. After the discovery phase, each one will decide which liability and remedy theory to use for each publication. There are no legal grounds to dismiss any of the Plaintiffs' legal claims at this stage based on A.R.S. § 12-651.

F. Mr. Tuohy aided and abetted a competitor's tortious conduct.

An aiding and abetting claim in Arizona requires allegations: "(1) the primary tortfeasor must commit a tort that causes injury to the plaintiff; (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach." *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 23 (Ariz. 2002); *accord Joshua David Mellberg LLC v. Will*, 96 F. Supp. 3d 953, 989 (D. Ariz. 2015).

The Plaintiffs allege George Fennell engaged in improper, tortious conduct that harmed the Plaintiffs. (Doc. 11 at ¶ 338.) Specifically, the Plaintiffs allege this competitor violated the Lanham Act through a campaign of false advertising. (*Id.* ¶ 341.) Proving a defendant knew about the primary tortfeasor's conduct "may be satisfied by

showing general awareness of the primary tortfeasor's fraudulent scheme." *Dawson v. Withycombe,* 216 Ariz. 84, 163 P.3d 1034 (Ariz. App. 2007).

The FAC alleges Mr. Tuohy and Mr. Fennell teamed up and "agreed to help each other publish false and disparaging statements about the Plaintiffs" and that the two men "intended to profit and profited from their joint conduct." (Doc. 11 at ¶¶ 342, 346.) Mr. Tuohy knew Mr. Fennell and the Plaintiffs were competitors. (*Id.* ¶ 83.) For their mutual benefit, Mr. Fennell persuaded Mr. Tuohy to publish false and disparaging statements about the Sugg Brothers and FireClean. (*Id.* ¶¶ 80-85, 90-91, 229, 314, 344.)

The FAC alleges Mr. Tuohy knew Mr. Fennell's conduct was improper before he helped him. Mr. Tuohy's complicity can also be inferred. *See Facciola v. Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 925 (D. Ariz. 2011), *aff'd*, 593 Fed. Appx. 723 (9th Cir. 2015) (finding "the Plaintiffs have alleged sufficient facts from which knowledge and substantial assistance can be inferred" by alleging knowledge of and complicity in the misconduct.). The aiding and abetting claim is legally sufficient.

IV. CONCLUSION

Mr. Tuohy's Motion improperly introduces and relies on extrinsic evidence. It cites inapposite caselaw and misapplies controlling caselaw. Its allegations cannot be assumed true but the Plaintiffs' factual allegations must be. The Plaintiffs have established viable claims for relief and the Court should deny Mr. Tuohy's Motion.

DATED: May 30, 2017.

HOPKINSWAY PLLC

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s/ Alexandra Tracy-Ramirez
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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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I also certify I delivered a copy of the foregoing document by mail and email to:

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s/ Alexandra Tracy-Ramirez