

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Haney, Inc. v. Axium Bioresearch

No. 3:23-cv-01990-RBM-JLB (S.D. Cal. Sept. 25, 2025) · No. 3:23-cv-01990-RBM-JLB · Decided September 25, 2025

SUMMARY

The court partially grants and partially denies Defendants’ motion to dismiss Plaintiff’s First Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and denies the motion to strike under Rule 12(f). The action concerns alleged false advertising and unfair business practices involving drug-testing kits marketed as FDA-approved and made in the United States. The order addresses Article III standing, judicial notice, pleading standards under Rules 12(b)(1), 12(b)(6), and 9(b), and claims under California and Idaho consumer-protection laws, the Lanham Act, and state tort law.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	Ruth Bermudez Montenegro
JURISDICTION	United States District Court for the Southern District of California
DECIDED	September 25, 2025
DOCKET	3:23-cv-01990-RBM-JLB
DISPOSITION	other
PROCEDURAL POSTURE	Defendants moved under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(f) to dismiss Plaintiff's First Amended Complaint, strike its request for punitive damages, and challenge Plaintiff's standing and real-party-in-interest status.
STANDARD OF REVIEW	On Rule 12(b)(1), the Court evaluated whether Plaintiff plausibly established Article III standing, including injury in fact, traceability, and redressability. On Rule 12(b)(6), the Court accepted well-pleaded factual allegations as true, construed them in Plaintiff's favor, and required sufficient factual content to state a plausible claim. Fraud-based allegations were subject to Rule 9(b)'s particularity requirement. The Court reviewed the Rule 12(f) motion under the standard that matter may be stricken only if redundant, immaterial, impertinent, or scandalous, and noted that motions to strike are generally disfavored.

PRECEDENTIAL VALUE	Unpublished federal district court order; persuasive value only and not binding precedent outside the case.
PARTIES	Defendants Axium Bioresearch and Sergius Albert Salvatore v. Haney, Inc., doing business as UTEST

TOPICS

[motions to dismiss](#)
[standing](#)
[consumer protection](#)
[trademark law](#)
[civil procedure](#)

PRACTICE AREAS

[civil procedure](#)
[consumer protection](#)
[false advertising](#)
[intellectual property](#)
[commercial litigation](#)

[constitutional law](#)

QUESTIONS PRESENTED

1. Whether Plaintiff plausibly alleged Article III injury in fact, traceability, and redressability sufficient to establish standing.
2. Whether Plaintiff was the real party in interest under Federal Rule of Civil Procedure 17(a).
3. Whether Plaintiff plausibly stated claims under the California Unfair Competition Law, California False Advertising Law, Idaho Consumer Protection Act, and Lanham Act.
4. Whether the alleged statements that Defendants' kits were FDA approved and made in the United States satisfied the pleading requirements for false advertising claims.
5. Whether the alleged use of the package insert constituted commercial advertising or promotion.
6. Whether Plaintiff plausibly stated a claim for intentional interference with prospective economic advantage.
7. Whether Plaintiff plausibly alleged that Defendant Salvatore could be held personally liable for tortious conduct notwithstanding the corporate form.
8. Whether Plaintiff's request for punitive damages should be stricken under Rule 12(f).

HOLDINGS

1. Plaintiff plausibly established Article III standing because its allegations supported a reasonable inference that Defendants' allegedly false advertising could divert sales from Plaintiff, causing competitive injury fairly traceable to Defendants' conduct.
2. Defendants did not show that Plaintiff was not the real party in interest, and the Rule 17(a) challenge was denied.
3. Plaintiff sufficiently stated claims under the California False Advertising Law and Lanham Act based on allegations that Defendants advertised their drug-testing kits as FDA approved and made in the United States.

4. Plaintiff failed to state false-advertising claims to the extent they were based on statements in the package insert because the allegations did not show that the insert was conveyed to consumers before or for the purpose of influencing their purchasing decisions.
5. Plaintiff sufficiently stated a UCL claim under the unlawful, unfair, and fraudulent prongs based on its adequately pleaded false-advertising claims and alleged violations of California medical-device law.
6. Plaintiff sufficiently stated an Idaho Consumer Protection Act claim because it alleged that Defendants' advertising had the capacity or tendency to deceive and caused Plaintiff competitive harm.
7. Plaintiff failed to state an intentional-interference claim because it did not identify a particular economic relationship or opportunity with a reasonable probability of future economic benefit.
8. Plaintiff could assert its claims directly against Salvatore without proving alter-ego liability because a corporate officer may be personally liable for torts in which he authorizes, directs, or participates.
9. The motion to strike Plaintiff's punitive-damages request was denied because Rule 12(f) does not authorize striking damages claims as legally precluded, Defendants did not show prejudice or immateriality, and Plaintiff adequately alleged the relevant mental states generally under the federal pleading rules.

KEY QUOTATIONS

“Plaintiff must establish an actual economic relationship or a protected expectancy with a third person, not merely a hope of future transactions.” (IV.C.3)

“A corporate ‘officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf.’” (IV.C.4)

“Rule 12(f) does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law.” (IV.D)

FACTUAL BACKGROUND

Haney and Axium are competitors that resell drug-testing kits through online retailers, including Amazon and Walmart. Haney alleged that Axium marketed its kits as FDA approved and made in the United States even though Axium allegedly used component parts sourced from manufacturers in China and India and had not conducted required testing. Haney alleged that the advertising diverted sales and market share, damaged its reputation, and created an unfair competitive advantage. Haney also alleged that Axium used a package insert containing analytical information developed for another manufacturer's products.

PROCEDURAL HISTORY

The Court previously dismissed Plaintiff's initial complaint for lack of Article III standing, with leave to amend. Plaintiff filed the First Amended Complaint, asserting claims under California's Unfair Competition Law and False Advertising Law, the Idaho Consumer Protection Act, the Lanham Act, and for intentional interference with prospective economic advantage. The Court denied most aspects of Defendants' motion, dismissed the interference claim with leave to amend, and denied the motion to strike.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand. Plaintiff may file an amended complaint by October 17, 2025 solely to correct the deficiencies identified in the intentional-interference claim and the package-insert theories. If Plaintiff does not amend and proceeds only on the remaining claims, Defendants must answer by October 31, 2025.

CASES CITED

- Chandler v. State Farm Mut. Auto. Inc. Co., 598 F.3d 1115, 1122 (9th Cir. 2010)
- Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)
- Spokeo, Inc. v. Robins, 578 U.S. 330, 338-39 (2016)
- Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 946 (9th Cir. 2011)
- TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 825 (9th Cir. 2011)
- Ass'n of Data Processing Servs. Orgs., Inc. v. Camp, 397 U.S. 150, 152-53 (1970)
- NJOY, LLC v. Imiracle (HK) Ltd., 760 F. Supp. 3d 1084, 1102-03 (S.D. Cal. 2024)
- Kent v. N. Cal. Reg'l Office of Am. Friends Serv. Comm., 497 F.2d 1325, 1329 (9th Cir. 1974)
- U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1038 (9th Cir. 1986)
- Allstate Ins. Co. v. Hughes, 358 F.3d 1089, 1093-94 (9th Cir. 2004)
- Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556-57, 570 (2007)
- Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
- Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)
- Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2011)
- Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)
- Cook, Perkiss & Liehe v. N. Cal. Collection Serv., 911 F.2d 242, 247 (9th Cir. 1990)
- United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011)
- Kearns v. Ford Motor Co., 567 F.3d 1120, 1125-27 (9th Cir. 2009)
- Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102-06 (9th Cir. 2003)
- Davis v. Chase Bank U.S.A., N.A., 650 F. Supp. 2d 1073, 1089-90 (C.D. Cal. 2009)
- Alabama Legis. Black Caucus v. Alabama, 575 U.S. 254, 270 (2015)
- Safari Club Int'l v. Rudolph, 862 F.3d 1113, 1117 n.1 (9th Cir. 2017)
- Allbirds, Inc. v. Giesswein Walkwaren AG, 2020 WL 6826487, at *4 (N.D. Cal. June 4, 2020)
- JHP Pharms., LLC v. Hospira, Inc., 52 F. Supp. 3d 992, 1000, 1003, 1005 (C.D. Cal. 2014)
- Vampire Fam. Brands, LLC v. MPL Brands, Inc., 2021 WL 4134841, at *7 (C.D. Cal. Aug. 6, 2021)
- Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997)
- Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008)

- Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107, 1115 (9th Cir. 2021)
- Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734-35 (9th Cir. 1999)
- Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1052 (9th Cir. 2008)
- Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 (2014)
- Allergan USA, Inc. v. Prescribers Choice, Inc., 364 F. Supp. 3d 1089, 1104, 1108 (C.D. Cal. 2019)
- Cel-Tech Comms., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999)
- Brady v. Bayer Corp., 26 Cal. App. 5th 1156, 1173 (2018)
- Lona's Lil Eats, LLC v. DoorDash, Inc., 2021 WL 151978, at *13 (N.D. Cal. Jan. 18, 2021)
- Kidwell v. Master Distribs., Inc., 101 Idaho 447, 453-54 (1980)
- Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151 (9th Cir. 2008)
- Soil Retention Prods., Inc. v. Brentwood Indus., Inc., 521 F. Supp. 3d 929, 961 (S.D. Cal. 2021)
- Ranza v. Nike, Inc., 793 F.3d 1059, 1072-73 (9th Cir. 2015)
- Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1021 (9th Cir. 1985)
- Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973-74 (9th Cir. 2010)

OPINION

1 2 3 4 5 6 UNITED STATES DISTRICT COURT 7 SOUTHERN DISTRICT OF CALIFORNIA
 8 9 HANEY, INC., an Idaho corporation, Case No.: 3:23-cv-01990-RBM-JLB doing business
 under the assumed name 10 UTEST, ORDER: 11 Plaintiff, (1) GRANTING IN PART AND 12 v.
 DENYING IN PART DEFENDANTS' 13 MOTION TO DISMISS AXIUM BIORESEARCH, a
 California PLAINTIFF'S FIRST AMENDED 14 corporation, doing business as DrugExam;
 COMPLAINT PURSUANT TO RULE and SERGIUS ALBERT SALVATORE, 15 12(B)(1) AND
 12(B)(6); AND an individual, 16 Defendants.

(2) DENYING DEFENDANTS' 17 MOTION TO STRIKE PURSUANT TO RULE 12(F) 18 19
 [Doc. 18] 20 21 Pending before the Court is Defendants Axiom BioResearch ("Defendant
 Axiom") 22 and Serguis Salvatore's ("Defendant Salvatore") (collectively, "Defendants") Motion
 to 23 Dismiss Plaintiff Haney, Inc.'s First Amended Complaint Pursuant to Fed. R. Civ. P. 24 12(b)
 (1) and 12(b)(6) and Motion to Strike Pursuant to Fed.

R. Civ. P. 12(f) ("Motion"). 25 (Doc. 18.) Plaintiff Haney, Inc. ("Haney") filed an Opposition to
 the Motion 26 ("Opposition") (Doc. 19), and Defendants filed a Reply ("Reply") (Doc. 20). 27 28
 1 Pursuant to Civil Local Rule 7.1, the Court finds the instant matter suitable for 2 determination
 on the papers and without oral argument.

For the reasons set forth below, 3 the Motion is GRANTED IN PART and DENIED IN PART. 4 I.
 BACKGROUND1 5 Plaintiff brings the instant action against Defendants for false advertising and
 unfair 6 business practices. Defendants previously filed a motion to dismiss Plaintiff's initial 7

complaint, which was granted on August 1, 2024 for lack of Article III standing with leave 8 to amend.

(Doc. 14 at 4.)² Plaintiff filed the First Amended Complaint (“FAC”) on August 9 21, 2024. (Doc. 15 [“FAC”].) On August 29, 2024, this action was transferred to the 10 undersigned. (Doc. 16.) In the instant Motion, Defendants seek to dismiss the FAC, 11 arguing primarily that Plaintiff has not suffered an injury sufficient to grant it Article III 12 standing and that the FAC fails to state a claim under Rule 12(b)(6).

(Doc. 18.)¹³ In the FAC, Plaintiff asserts five causes of action for: (1) violation of California’s 14 Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq. (“UCL”) (FAC ¶¶ 67– 15 80); (2) violation of California’s False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, 16 et seq. (“FAL”) (id. ¶¶ 81–90); (3) violation of Idaho’s Consumer Protection Act, Idaho 17 Code §§ 48-601, et seq. (“ICPA”) (id. ¶¶ 91–99); (4) violation of the Lanham Act, 15 18 U.S.C. § 1125(a) et seq. (“Lanham Act”) (id. ¶¶ 100–108); and (5) intentional interference 19 with a prospective economic advantage (“IIPEA”) (id. ¶¶ 109–116).

20 A. The Parties 21 Advin Biotech, Inc (“Advin”), who is not a party to this action, is a San Diego-based 22 developer and manufacturer of multi-level strip drug testing kits for private at-home use. 23 (Id. ¶ 31.) Advin distributes its drug testing kits to resellers, who then repackage the kits 24 25 1 The factual summary in this section reflects Plaintiff’s allegations, not conclusions of fact 26 or law by this Court.

Well-pleaded factual allegations are accepted as true for purposes of 27 this Motion. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). 28 2 1 under their own private labels for resale to the general public. (Id. ¶ 33.) 2 Plaintiff, an Idaho corporation doing business as “UTEST,” is a reseller of Advin’s 3 drug testing kits that operates its business through its company website and various other 4 online retailers such as Amazon.com and Walmart.com.

(Id. ¶ 22.) 5 Defendant Axiom, a California corporation doing business as “DrugExam,” is also 6 a reseller of Advin’s drug testing kits. (Id. ¶¶ 23–24.) Plaintiff and Defendant Axiom both 7 purchase the same or similar drug testing kits from the same manufacturer, Advin, and 8 resell such kits to the general public through Amazon and Walmart’s websites. (Id. ¶ 23.)

9 Defendant Salvatore is the sole founder of Defendant Axiom. (Id. ¶ 25.) He is also 10 Defendant Axiom’s Chief Executive Officer (“CEO”), Secretary, Chief Financial Officer 11 (“CFO”), and sole Director. (Id.) Defendant Salvatore previously worked for Advin until 12 September 2020. (Id. ¶ 41.) 13 B. Advin’s Drug Testing Kits and Package Insert 14 Since 2013, Advin has obtained 510(k) clearances from the United States Food and 15 Drug Administration (“FDA”) for 14 different drug testing kits.

(Id. ¶ 31.) Its drug testing 16 kits are 100% “Made in USA” (id. ¶ 31) and include “a cassette and cap, reactive strip, foil 17 pouch, and two separate stickers” (id. ¶ 33). Advin’s drug testing kits also include a 18 comprehensive written package insert which describes its research and preliminary 19 analytical test results (the “Package Insert”). (Id. ¶¶ 31, 42.)

20 To develop its drug testing kits, Advin allegedly invested substantial time and 21 financial resources “in conducting research aimed at creating” the Package Insert. (Id.) 22 C. Requirements for the Manufacturing and Sale of Medical Devices 23 There are certain requirements resellers must meet to use Advin’s FDA accreditation 24 and the Package Insert. (See id. ¶¶ 34, 42.)

To use Advin’s accreditation, distributors who 25 purchase Advin’s drug testing kits for resale to the general public, can obtain a Clinical 26 Laboratory Improvement Amendments (“CLIA”) certification. (Id. ¶ 34.) This 27 certification is overseen by the FDA and ensures the quality of laboratory test assembling 28 in the United States. (Id.) “Under CLIA regulations, clinical laboratories [i.e.

Advin 1 Biotech’s resellers/distributors, to wit, Defendant Axiom] must apply for and receive both 2 a state registration or license, and a federal CLIA certificate, before being permitted to 3 accept samples for assembling purposes (i.e. resale).” (Id.) A CLIA certification also 4 allows distributors “to replicate and utilize Advin’s documented analytical test results, as 5 presented in the Package Insert, for the marketing and sale of their... private label drug 6 test kits to the general public.” (Id. ¶ 42.)

7 Additionally, Plaintiff alleges that California state law requires manufacturers to 8 obtain a Medical Device Manufacturing License issued by the California Department of 9 Health Services, Food and Drug Branch (“FDB”) before they can lawfully manufacture 10 medical devices. (Id. ¶¶ 9, 35.) 11 D. Defendant Axiom’s Drug Testing Kits 12 Defendant Salvatore incorporated Defendant Axiom on June 20, 2016, while he was 13 still employed at Advin.

(Id. ¶ 37; see Doc. 18-6, Ex. D at 2.) Plaintiff alleges that, upon 14 information and belief, from June 2018 to September 8, 2022, Defendants manufactured, 15 marketed, and sold their “DrugExam” drug testing kits to the public without a Medical 16 Device Manufacturing License from the FDB, as required under California law and FDA 17 regulations. (Id. ¶¶ 12, 36.)

Plaintiff further alleges that from June 2018 to the present 18 day, Defendants have purchased “knockoff” component parts similar to those used in 19 Advin’s drug testing kits, including test cassettes and cap, reactive strip, foil pouch, and 20 two separate stickers, from manufacturers in India and China that are not FDA approved 21 or made in the United States.

(Id. ¶ 38.) Defendants allegedly ordered, and continue to 22 order, test cassettes and caps from Tonisha Electronic, based in New Delhi, India similar 23 to those used in Advin’s drug testing kits. (Id. ¶ 53; see id. ¶ 54 (comparison of Advin’s 24 and Defendant Axiom’s test cassette and cap).)

Defendants also allegedly ordered, and 25 continue to order, similar reactive strips, foil pouches, and stickers from manufacturers 26 based in China.

(Id. ¶¶ 56–60 (comparison of Advin’s and Defendant Axiom’s reactive 27 strips, foil pouches, and stickers).) 28 1 From 2018 to the present day, Defendants allegedly used such components, that are 2 not approved by the FDA or manufactured in the United States, to create and sell their own 3 “DrugExam” drug testing kits. (Id. ¶ 38.) Yet, Defendants “unlawfully market[ed] their 4 drug test[ing] kits for sale” to the “unsuspecting general public” as being FDA approved, 5 and “Made in the USA.” (Id. ¶ 40.)

6 When Defendant Salvatore left his employment at Advin in September 2020, 7 Defendant Axiom allegedly “transitioned to becoming a distributor-reseller of [Advin] 8 drug testing kits with the intent to purchase and resell drug testing kits to the general public 9 under [its] private label ‘DrugExam.’” (Id. ¶ 41.)

On or about September 20, 2020, Advin 10 requested and received a CLIA certification from the FDA on behalf of Defendant Axiom 11 for Defendant Axiom to become a reseller of its drug testing kits and use its FDA 12 accreditation. (Id. ¶ 42.)

The CLIA certification allowed Defendant Axiom to “portray[] 13 itself as a distributor-reseller of” Advin’s FDA drug testing kits. (Id. ¶¶ 44, 47.) It also 14 allowed Defendants to replicate and use the Package Insert for the marketing and sale of 15 their “DrugExam” private label drug testing kits to the general public. (Id.) 16 Plaintiff alleges that “[i]n an attempt to deceitfully portray [FDA] approval and 17 ‘Made in USA’ origin for its drug testing kits, Defendant Salvatore strategically procured 18 a limited quantity of drug testing kits on behalf of Defendant Axiom from [Advin].” (Id.

19 ¶ 50.) “However, this was nothing more than a fraudulent ruse, as Defendants 20 clandestinely procured similar component parts as that of [Advin’s] drug test[ing] kits from 21 manufacturers in India and China at a cheaper price, without ever [having] to conduct any 22 legally required analytical testing, thus unlawfully profiting.” (Id. ¶ 47.) 23 Although “Defendants’ subject drug test[ing] kits were deceitfully comprised of 24 components sourced from [foreign manufacturers], in stark contrast to [Advin’s] genuine 25 products” (id. ¶ 45), Defendants still continued to advertise on Amazon and Walmart’s 26 websites that their drug testing kits are “ (1) U.S. FDA approved, and (2) made in the 27 United States.” (Id. ¶¶ 44, 50–51.)

28 1 E. Unity of Interest 2 On information and belief, Plaintiff alleges that from June 20, 2016 through 3 November 2, 2019, Defendant Salvatore unlawfully operated Defendant Axiom without 4 appointing any corporate officers, corporate directors, or a registered agent for service of 5 process. (Id. ¶ 26.) Defendant Salvatore allegedly never issued any common stock in 6 Defendant

Axium, never conducted a meeting of its board of directors, did not hold a 7 shareholder meeting, and did not issue any corporate bylaws during the three-year time 8 period or anytime thereafter.

(Id.) Plaintiff further alleges that Defendant Salvatore never 9 procured a business license in San Diego County and never filed a Statement of 10 Information on behalf of Defendant Axium as required by the California Secretary of State. 11 (Id. ¶ 27.) Plaintiff adds that during the relevant time period, Defendant Salvatore 12 conducted business as “Axium Bioresearch, Inc.,” although no such corporation exists.

13 (Id.) Moreover, Defendant Axium allegedly had no employees other than Defendant 14 Salvatore who paid himself and his wife, Diana Motina, as independent contractors. (Id.) 15 Plaintiff alleges, upon information and belief, that Defendant Salvatore used Defendant 16 Axium to pay for personal expenditures, including his wife’s, unrelated to any business 17 operation.

(Id.) 18 II. LEGAL STANDARD 19 A. Federal Rule of Civil Procedure 12(b)(1) 20 Federal Rule of Civil Procedure (“Rule”) 12(b)(1) permits challenges to a court’s 21 subject matter jurisdiction and includes a challenge for lack of Article III standing. See 22 *Chandler v. State Farm Mut. Auto. Inc. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). Article 23 III, Section 2 the United States Constitution requires that a plaintiff have standing to bring 24 a claim.

See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “[T]he ‘irreducible 25 constitutional minimum of [Article III] standing’” requires that “[t]he plaintiff must have 26 (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the 27 defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), as revised (May 24, 2016) (citing *Lujan*, 504 U.S. 1 at 560).

To have standing to seek injunctive relief under Article III, a plaintiff must 2 “demonstrate a real and immediate threat of repeated injury in the future.” *Chapman v. 3 Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (cleaned up). “At the pleading 4 stage, general factual allegations of injury resulting from the defendant’s conduct may 5 suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those 6 specific facts that are necessary to support the claim.” *Lujan*, 504 U.S. at 561.

7 B. Federal Rule of Civil Procedure 12(b)(6) 8 Under Rule 12(b)(6), an action may be dismissed for failure to allege “enough facts 9 to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 10 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content 11 that allows the court to draw the reasonable inference that the defendant is liable for the 12 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 13 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it 14 asks for more than a sheer possibility that a defendant acted unlawfully.” *Id.* (citing 15 *Twombly*, 550 U.S. at 556–57).

For purposes of ruling on a Rule 12(b)(6) motion, the court 16 “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the 17 light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. 18 Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). 19 However, the Court is “not bound to accept as true a legal conclusion couched as a 20 factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

Nor is the 21 Court “required to accept as true allegations that contradict exhibits attached to the 22 Complaint or matters properly subject to judicial notice, or allegations that are merely 23 conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Daniels-Hall v. 24 Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). “In sum, for a complaint to survive 25 a motion to dismiss, the non-conclusory factual content, and reasonable inferences from 26 that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss 27 v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.

2009) (internal quotation marks omitted). 28 1 When a Rule 12(b)(6) motion is granted, “a district court should grant leave to amend 2 even if no request to amend the pleading was made, unless it determines that the pleading 3 could not possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe v. N. 4 Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir.

1990) (citations omitted). 5 C. Federal Rule of Civil Procedure 9(b) 6 Rule 9(b) requires a plaintiff alleging fraud claims to “state with particularity the 7 circumstances constituting fraud or mistake.” This includes the “who, what, when, where, 8 and how” of the fraudulent activity. *United States ex rel Cafasso v. Gen. Dynamics C4 9 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir.

2011). “Rule 9(b) applies when (1) a complaint 10 specifically alleges fraud as an essential element of a claim, (2) when the claim ‘sounds in 11 fraud’ by alleging that the defendant engaged in fraudulent conduct, but the claim itself 12 does not contain fraud as an essential element, and (3) to any allegations of fraudulent 13 conduct, even when none of the claims in the complaint ‘sound in fraud.’” *Davis v. Chase 14 Bank U.S.A., N.A.*, 650 F. Supp. 2d 1073, 1089–1090 (C.D.

Cal. 2009) (citing *Vess v. Ciba- 15 Geigy Corp. USA*, 317 F.3d, 1097, 1102–06). 16 The Ninth Circuit and several district courts have applied Rule 9(b) to false 17 advertising and consumer protection claims grounded in fraud. See *Kearns v. Ford Motor 18 Co.*, 567 F.3d 1120, 1125–27 (9th Cir. 2009) (applying Rule 9(b) to claim for false 19 advertising under the UCL); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-04 (9th 20 Cir.

2003) (applying Rule 9(b) to claim for false advertising under the FAL); *Julian Bakery, 21 Inc. v. Healthsource Int’l, Inc.*, Case No.: 16cv2594-JAH (KSC), 2018 WL 1524499, at 22 *4–5 (S.D. Cal. Mar. 28, 2018) (citing cases applying Rule 9(b) to claims under the UCL 23 and FAL). While the Ninth Circuit has not determined that Rule 9(b) applies to all Lanham 24 Act claims, district courts have also applied Rule 9(b) to Lanham Act false advertising 25 claims grounded in fraud.

See, e.g., *EcoDisc Tech. AG v. DVD Format/Logo Licensing 26 Corp.*, 711 F. Supp. 2d 1074, 1085 (C.D. Cal. 2010) (applying Rule 9(b) to a false 27 advertising claim under Lanham Act). 28
1 III. REQUEST FOR JUDICIAL NOTICE 2 In support of their Motion, Defendants filed a Request for Judicial Notice (“RJN”). 3 (Doc. 18-1.) Defendants request that the Court judicially notice five exhibits attached to 4 the Declaration of James H. Turken (Doc.

18-2 [“Turken Decl.”]) including: (1) several 5 documents filed in San Diego Superior Court as part of a related court proceeding involving 6 the Parties (Doc. 18-3 [“Ex. A”]; Doc. 18-4 [“Ex. B”]; Doc. 18-7 [“Ex. E”]); (2) a copy of 7 Defendants’ CLIA certifications from the FDA website (Doc. 18-5 [“Ex. C”]); and (3) 8 Defendant Axium’s articles of incorporation filed on June 20, 2016 (Doc.

18-6 [“Ex. D”]). 9 Plaintiff does not challenge the RJN. (See generally Doc. 19.) 10 A court generally cannot consider materials outside the pleadings on a motion to 11 dismiss for failure to state a claim. Fed. R. Civ. P. 12(d). A court may take judicial notice 12 of “matters of public record without converting a motion to dismiss into a motion for 13 summary judgment.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.

2001) 14 (internal citations omitted). Moreover, under Federal Rule of Evidence 201(b), a court 15 may take judicial notice of facts that are not subject to reasonable dispute because they are 16 (1) “generally known within the trial court’s territorial jurisdiction; or (2) can be accurately 17 and readily determined from sources whose accuracy cannot reasonably be questioned.” 18 Fed.

R. Evid. 201(b). Finally, under the incorporation by reference doctrine, courts may 19 “take into account documents whose contents are alleged in a complaint and whose 20 authenticity no party questions, but which are not physically attached to the [plaintiff’s] 21 pleading.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) 22 (cleaned up).

23 Applying these principles, the Court takes judicial notice of all five exhibits. 24 Exhibits A, B, and E are the complaint, the second amended complaint, and a request for 25 dismissal filed by Plaintiff in a prior related action before the San Diego Superior Court, 26 respectively. Defendants argue that the Court should take judicial notice of such filings 27 because the “Superior Court Action and the present action arise out of the same or 28 substantially identical transactions and happenings, involve the same parties, and call for 1 determination of substantially identical questions of law.” (Doc.

18-1 at 3.) In doing so, 2 Defendants appear to recite the elements of preclusion (Doc. 18 at 6, 8 n.1), but do not raise 3 such arguments in the Motion. (Id. at 10–12.) Although Defendants reference the state 4 court proceedings in their factual background (see id. at 10–11), the state court filings are 5 neither helpful to, nor relevant in, resolving the instant Motion.³ Nonetheless, the Court 6 “may take judicial notice of the existence of unrelated court documents, although it

will not take judicial notice of such documents for the truth of the matter asserted therein.” In *re Bare Escentuals, Inc. Sec. Litig.*, 745 F. Supp. 2d 1052, 1067 (N.D.

Cal. 2010); see 9 *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (“[Courts] may take judicial notice of court filings and other matters of public record [as they] are readily verifiable and, therefore, the proper subject of judicial notice.”) (cleaned up). Exhibit C is a copy of Defendants’ CLIA certification from the FDA website concerning several drug screening tests. “Information on government agency websites has often been treated as properly subject to judicial notice.” *Molina v. Wash. Mut.*

Bank, No. 15 09-CV-00894-IEG (AJB), 2010 WL 431439, at *3 (S.D. Cal. Jan. 29, 2010). In this case, Plaintiff references Defendant Axium’s CLIA certification in the FAC and does not otherwise dispute its accuracy. (See FAC ¶ 42.)

As such, the Court finds “[i]t is appropriate to take judicial notice of this information, as it was made publicly available by [a] government [entity], and neither party disputes the authenticity of the web site[] or the Relatedly, Defendants claim that Plaintiff failed to file a Notice of Related Case as to the state court action in violation of this District’s Civil Local Rule 40.1(f).

(Doc. 18 at 6; Doc. 20 at 3 n.1.) Defendants, however, do not state the relief sought or otherwise substantiate this claim. Local Rule 40.1(f) requires counsel for either party to file a notice when an action on file or about to be filed “is related to another pending action or proceeding on file in this or any other federal or state court....” S.D. Cal. Civ.

40.1(f) (emphasis added). Pursuant to this Local Rule, Defendants filed a Notice of Related Case on November 28, 2023 (Doc. 6), to which Plaintiff filed an Opposition on December 5, 2023 (Doc. 9). The Court therefore finds Defendants’ arguments concerning the state court action are not 1 accuracy of the information displayed therein.” *Daniels–Hall v. Nat’l Educ.*

Ass’n, 629 2 F.3d 992, 998–99 (9th Cir. 2010); see *Eidson v. Medtronic, Inc.*, 981 F. Supp. 2d 868, 878– 3 79 (N.D. Cal. 2013) (collecting cases supporting the propriety of taking judicial notice of 4 information on government agency websites including the FDA’s premarket approval 5 database).

However, to the extent Defendants seek to judicially notice any facts that are 6 subject to reasonable dispute and are inconsistent with the FAC, the Court must rely on the 7 facts as alleged. See *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 8 2011) (“Pursuant to Federal Rule of Evidence 201, [courts] may also take judicial notice 9 of ‘matters of public record,’... but not of facts that may be ‘subject to reasonable dispute.’ 10...

More specifically, [courts] may not, on the basis of evidence outside of the Complaint, 11 take judicial notice of facts favorable to Defendants that could reasonably be disputed.”) 12 (quoting

Lee v. City of Los Angeles, 250 F.3d 668, 689–90 (9th Cir. 2001)). 13 Exhibit D is a copy of Defendant Axiom’s articles of incorporation. District courts 14 routinely take judicial notice of articles of incorporation because they are public records.

15 See e.g., Rhodes v. Sutter Health, No. CIV. 2:12-0013 WBS DAD, 2012 WL 662462, at 16 *3 (E.D. Cal. Feb. 28, 2012) (taking judicial notice of the articles of incorporation of 17 California corporations because they are filed with the Secretary of the State of California); 18 Ostrander v. St. Columba Sch., Case No.: 3:21-cv-00175-W-LL, 2021 WL 3054877, at *2 19 (S.D.

Cal. July 20, 2021) (same). 20 Accordingly, the Court GRANTS Defendants’ RJN as to all five exhibits. 21 IV. DISCUSSION 22 Defendants seek to dismiss the FAC on the following grounds: (1) lack of subject 23 matter jurisdiction under Rule 12(b)(1), arguing that Plaintiff has not established an injury- 24 in-fact; (2) Plaintiff is not the real party in interest under Rule 17(a); and (3) failure to state 25 a claim under Rule 12(b)(6), including under the heightened pleading standard of Rule 9(b) 26 for claims sounding in fraud.

(See Doc. 18 at 9–20.) Defendants further seek to strike 27 Plaintiff’s request for punitive damages under Rule 12(f). (Id. at 20–21.) 28 1 The Court is required to address jurisdictional issues, such as Article III standing, 2 before proceeding to the merits. See Alabama Legis. Black Caucus v. Alabama, 575 U.S. 3 254, 270 (2015); Safari Club Int’l v. Rudolph, 862 F.3d 1113, 1117 n.1 (9th Cir.

2017). 4 Because Defendants’ arguments under Rule 12(b)(1) and Rule 17 center on whether 5 Plaintiff has standing to assert its claims, particularly as to whether it suffered an injury- 6 in-fact or brings claims on behalf of third parties, the Court addresses those arguments first. 7 A. Article III Standing 8 The Court previously dismissed Plaintiff’s initial complaint for failure to adequately 9 allege Article III standing.

(Doc. 14.) In the instant Motion, Defendants argue that the 10 FAC suffers the same fatal flaws. (Doc. 18 at 15–17.) Specifically, Defendants argue the 11 Court lacks subject matter jurisdiction over this action because Plaintiff “fails to 12 demonstrate how Plaintiff has suffered an injury in fact because its competitor did end up 13 competing with it in the market.” (Id. at 16 (emphasis added).)

Defendants reason that 14 “Plaintiff’s entire [FAC] centers on allegations related to... non-parties, either rooted in 15 allegations about non-party [Advin’s] relationship with Axiom and Salvatore... or about 16 prospective consumers.” (Id. at 9.) Plaintiff responds that the FAC sufficiently pleads: 17 “(1) it suffered an ‘injury-in-fact’ from Defendants’ false advertising; (2) the injury was 18 traceable to Defendants’ unlawful business practices; and (3) the injury will be redressed 19 by a favorable decision awarding monetary damages.” (Doc.

19 at 6.) 20 “To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion
21 of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, 22
not conjectural or hypothetical.’” *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 23 560).
“At the pleading stage, general factual allegations of injury resulting from the 24 defendant’s
conduct may suffice.” *Lujan*, 504 U.S. at 561.

Still, “each element must be 25 supported... with the manner and degree of evidence required at
the successive stages of 26 litigation.” *Id.* 27 In a false advertising suit, “a plaintiff establishes
Article III injury if some consumers 28 who bought the defendant’s product under a mistaken
belief fostered by the defendant 1 would have otherwise bought the plaintiff’s product.”
TrafficSchool.com, Inc. v. Edriver 2 Inc., 653 F.3d 820, 825 (9th Cir.

2011) (cleaned up). A plaintiff may allege a competitive 3 injury for purposes of Article III
standing “(1) by using lost sales data, that is ‘actual market 4 experience and probable market
behavior,’ or (2) ‘by creating a chain of inferences 5 showing how defendant’s false advertising
could harm plaintiff’s business.’” *Allbirds, Inc. 6 v. Giesswein Walkware AG*, Case No. 19-cv-
05638-BLF, 2020 WL 6826487, at *4 (N.D.

7 Cal. June 4, 2020) (quoting *TrafficSchool.com*, 653 F.3d at 825). “In a lawsuit brought by 8 a
plaintiff against a competitor, claims that permit an inference of impending loss of profits 9 due to
the competitor’s wrongful actions suffice to establish an injury in fact.” *NJOY, LLC 10 v. Imiracle
(HK) Ltd.*, 760 F. Supp. 3d 1084, 1102 (S.D. Cal. 2024) (citing *Ass’n of Data 11 Processing Servs.*

Orgs., Inc. v. Camp, 397 U.S. 150, 152–53, (1970) (holding “[t]here can 12 be no doubt” that
plaintiffs “in a competitor’s suit” satisfied injury in fact requirement 13 where they alleged “some
future loss of profits”)).

To do so, a plaintiff must provide at 14 least two “links” in “a chain of inferences to show how that
[the defendant’s] false 15 advertising could harm [the plaintiff’s] business.” *Allbirds*, 2020 WL
6826487, at *4. 16 Here, Plaintiff alleges that Defendants’ allegedly false advertising deprived it
of 17 “rightful business opportunities and revenue” and that Plaintiff “suffered a significant loss 18
of sales and market share, damaging its reputation and standing in the industry.” (FAC 19 ¶ 63.)

Plaintiff’s alleged harm constitutes cognizable competitive injuries. See, e.g., 20 *Dickinson v.
Ryan Seacrest Enter., Inc.*, No. CV-18-2544- GW(JPRX), 2019 WL 3035090, 21 at *7 (C.D. Cal.
Mar. 26, 2019), *aff’d*, 839 F. App’x 110 (9th Cir. 2020) (finding Article 22 III standing established
in false advertising and endorsement suit where the plaintiff alleged 23 injury to reputation and
loss of goodwill); *Levitt v. Yelp!*

Inc., No. C 10-1321 MHP, 2011 24 WL 13153230, at *5 (N.D. Cal. Mar. 22, 2011) (finding
allegations of harm to reputation 25 and loss of business sufficient to confer Article III standing).
Because the FAC does not 26 provide “actual market experience and probable market behavior,”

Plaintiff must establish 27 a chain of inferences showing that Defendants' allegedly false advertising caused its 28 competitive injuries.

See *TrafficSchool.com*, 653 F.3d at 825. 1 As the first link in this chain of inference, Plaintiff alleges, and Defendants do not 2 dispute, that both companies are direct competitors because they resell "the same or similar 3 drug testing kits from the same manufacturer," Advin, through the same websites for the 4 same revenue. (FAC ¶ 23.) 5 As the second link, Plaintiff claims that Defendants' allegedly false advertising of 6 their drug test kits as "FDA Approved" and "Made in the USA" "was and is likely to 7 influence relevant consumers' purchasing decisions." (Id. ¶¶ 63, 85.)

Indeed, "if a product 8 has been approved [by the FDA], consumers may take some assurance that it has been 9 properly tested and meets the agency's minimum quality standards. This makes an FDA- 10 approved product a more attractive product, whether at the wholesale, retail, or end user 11 level." *JHP Pharms., LLC v. Hospira, Inc.*, 52 F. Supp. 3d 992, 1000 (C.D.

Cal. 2014) 12 (analyzing a claim under the Lanham Act). 13 Plaintiff further claims that Defendants' drug testing kits are not FDA approved in 14 violation of California's Sherman Law and several other state regulations, which "created 15 an unfair sales advantage for [D]efendants, misleading consumers into purchasing their 16 inferior, counterfeit products over [P]laintiff's legitimate offerings." (FAC ¶ 63; see id. 17 ¶ 11.)

Indeed, "when a competitor gains an unfair advantage by sidestepping regulatory 18 obligations, it is entirely plausible for a court to conclude that economic harm exists for 19 entities competing in the same market while adhering to the rules." *NJOY, LLC*, 760 F. 20 Supp. 3d at 1103. 21 As the final link, Plaintiff claims that Defendants created their own drug testing kits 22 with less expensive components from foreign manufacturers and were thereby able to 23 assemble and sell its kits "at a significantly lower price than Plaintiff, who purchased drug 24 test kits for resale from Advin." (FAC ¶¶ 63, 65.)

Such allegations further support an 25 inference that consumers chose Defendants' products over Plaintiff's as a result of its 26 allegedly false advertising. See *Vampire Fam. Brands, LLC v. MPL Brands, Inc.*, No. CV 27 20-9482-DMG (ASX), 2021 WL 4134841, at *7 (C.D. Cal. Aug. 6, 2021) (holding a 28 "chain of inferences showing how defendant's false advertising could harm plaintiff's 1 business' that is sufficiently imminent to satisfy Article III standing" was established where 2 defendant competitor made a lower-cost product and paid less in taxes than other 3 competitors by marketing and selling "cocktails" made with agave wine instead of distilled 4 spirits) (quoting *TrafficSchool.com*, 653 F.3d at 825).

5 Based on the facts alleged, the Court finds it reasonable to infer that the challenged 6 advertisements may divert sales from Plaintiff to Defendants. Plaintiff has therefore 7 sufficiently

established an injury-in-fact for purposes of Article III standing.

For the same 8 reasons, Defendants' alleged conduct is "fairly traceable" to Plaintiff's alleged competitive 9 injuries. See *Scilex Pharms. Inc. v. Sanofi-Aventis U.S. LLC*, No. 21-CV-01280-JST, 2021 10 WL 11593043, at *4 (N.D. Cal. Aug. 16, 2021) (finding the "fairly traceable" requirement 11 for Article III standing was satisfied where plaintiff alleged a causal link between the 12 allegedly false advertising and its lost profits even if the advertisements were not the only 13 reason for its reduced sales); see also *Washington Env't Council v. Bellon*, 732 F.3d 1131, 14 1146 (9th Cir.

2013) (noting the "fairly traceable and redressability components for 15 standing overlap and are two facets of a single causation requirement") (cleaned up). 16 Accordingly, Plaintiff has established Article III standing and the Motion to Dismiss 17 under Rule 12(b)(1) is DENIED. 18 B. Real Party in Interest 19 Defendants argue that Plaintiff is not the real party in interest to this action, as 20 required under Rule 17, because the "FAC is entirely centered on allegations that Axiom 21 is misusing the drug testing kits of non-party Advin." (Doc.

18 at 18.)⁴ Defendants appear 22 to object to Plaintiff's ability to bring this suit as part of their standing challenge. 23 24 25 4 Defendants also argue that "Plaintiff is not the only improper party in this action [because] Defendant Axiom [was] erroneously sued as 'Axiom Bioreseach, doing business as 26 DrugExam,' even though [Defendant] Axiom does not do business as DrugExam." (Doc.

27 18 at 9 n.2 (citing Doc. 18-8 ["Salvatore Decl."] ¶ 5); see Doc. 20 at 3, 9.) However, Defendants do not state the relief sought, do not identify who the "correctly named 28 1 Rule 17(a) requires that all actions "be prosecuted in the name of the real party in 2 interest." However, "Rule 17(a) does not give [a party] standing; 'real party in interest' is 3 very different from standing." See *Kent v. N. Cal. Reg'l Office of Am.*

Friends Serv. 4 Comm., 497 F.2d 1325, 1329 (9th Cir. 1974). While Rule 17 does not define "real party in 5 interest," the Ninth Circuit has held that the real party in interest is the party with the right 6 to enforce a claim under the applicable substantive law. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 7 793 F.2d 1034, 1038 (9th Cir. 1986); see *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093– 8 94 (9th Cir.

2004) ("Whether [the plaintiff] is the real party in interest under [Rule] 17(a) 9 in this federal diversity suit is dependent upon whether [the plaintiff] is a proper party to 10 maintain this action under applicable state law."). Indeed, "[Rule] 17 governs only the 11 right of [a plaintiff] to bring the suit." *Id.* 12 Here, beyond stating that "[n]one of the factual allegations relate whatsoever to 13 Plaintiff's right to sue under substantive law" (Doc.

18 at 18), Defendants neglect to 14 substantiate their contentions. Defendants do not identify the applicable standard for 15 determining Plaintiff's right to sue, do not attempt to apply such a standard, and do not 16 otherwise provide any legal support for their argument. Defendants also invoke Rule 17 17 but do not state the relief requested.⁵ Accordingly, Defendants' Motion is DENIED on 18 this basis.

19 C. Failure to State a Claim 20 Based on the same allegedly false advertisements, Plaintiff alleges that Defendants 21 engaged in: (1) unfair competition, including unlawful, unfair, and fraudulent business 22 practices, in violation of the UCL (FAC ¶¶ 72–74); (2) false advertising in violation of the 23 FAL (id. ¶¶ 83–85); (3) unfair competition in violation of the ICPA (id. ¶¶ 97–99); (4) false 24 25 26 5 The Court notes that it “may not dismiss an action for failure to prosecute in the name of 27 the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.” Fed.

R. Civ. P. 28 1 advertising in violation of the Lanham Act (id. ¶¶ 100–108); and (5) intentional 2 interference with a prospective economic advantage (id. ¶¶ 109–116). 3 Defendants argue that Plaintiff's claims are “intertwined with one another” and fail 4 to meet the minimum pleading standards. (Doc. 18 at 23, 25.) Specifically, Defendants 5 seek to dismiss the UCL, FAL, ICPA, and Lanham Act claims because: (1) Defendant 6 Axium had obtained a CLIA certification from the FDA which Defendants claim makes 7 their drug testing kits “FDA approved” (Doc.

18 at 23–24); and (2) Plaintiff's false 8 advertising allegations based on Defendants' use of the Package Insert do not meet Rule 9 9(b)'s heightened pleading standard (id. at 23–25). Defendants also argue that Plaintiff's 10 intentional interference with prospective economic advantage claim fails because Plaintiff 11 does not identify any economic benefits it was likely to receive.

(Id. at 18–20.) Finally, 12 Defendants argue that Plaintiff fails to state a claim against Defendant Salvatore based on 13 the alter ego doctrine. (Id. at 18–20.) 14 Because Plaintiff's claims rely on the same allegedly false statements, the Court 15 finds Plaintiff's claims are similarly grounded in fraud and therefore applies Rule 9(b) to 16 determine the legal sufficiency of the FAC.

(See supra II.C.) The Court first addresses 17 Plaintiff's false advertising claims before turning to the remaining claims. 18 1. FAL and Lanham Act (Second and Fourth Causes of Action) 19 Section 43(a) of the Lanham Act is designed “to protect persons engaged in... 20 commerce against unfair competition,” making “actionable the deceptive and misleading 21 use of marks.” 15 U.S.C. § 1125(a).

The FAL similarly prohibits “untrue or misleading” 22 advertising “which is known, or which by the exercise of reasonable care, would be known 23 to be untrue or misleading.” Cal. Bus. & Prof. Code § 17500. Claims pursuant to the FAL 24 are subject to the heightened pleading requirements of Rule 9(b). See *Yumul v. Smart 25 Balance, Inc.*, 733 F. Supp. 2d 1117, 1123 (C.D.

Cal. 2010) (citation omitted) (noting a 26 complaint must plead “‘the who, what, when, where, and how’ of the misconduct charged” 27 under the FAL); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–104 (9th Cir. 2003). 28 1 Because Plaintiff’s FAL and Lanham Act claims are premised on the same allegedly 2 false statements, the Court evaluates the sufficiency of such false advertising claims 3 collectively.

See *Allergan USA, Inc. v. Prescribers Choice, Inc*, 364 F. Supp. 3d 1089, 4 1108 (C.D. Cal. 2019) (“Claims under the FAL are substantially congruent to those under 5 the Lanham Act.”). To state a false advertising claim under § 43(a) of the Lanham Act, 6 Plaintiff must allege: 7 (1) the defendant made a false statement either about the plaintiff’s or its own product; (2) the statement was made in commercial advertisement or 8 promotion; (3) the statement actually deceived or had the tendency to deceive 9 a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the 10 plaintiff has been or is likely to be injured as a result of the false statement, 11 either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff’s product.

12 13 *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1052 (9th Cir. 2008) (quoting 14 *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829 (9th Cir. 2002)). 15 Defendants argue that Plaintiff has failed to establish the first, second, and fifth 16 elements of its Lanham Act claim. (Doc. 18 at 23–25 (arguing the FAL claim does not 17 identify Plaintiff’s “purported harm”).)

Defendants also argue that Plaintiff does not 18 “identify any false statement, let alone when, where, how and what was false about it, or 19 to whom it was made.” (Id. at 24.)⁶ In its Opposition, Plaintiff asserts that the FAC alleges 20 Defendants made three false statements on Amazon’s website “that its drug test kits were[.] 21 22 23 6 Defendants also claim the FAC “raises fair notice concerns” because the title of Plaintiff’s claim states a cause of action under § 43(a)(1) (A) and “does not clearly state if Plaintiff is 24 asserting a ‘false association’ claim... or a ‘false advertising’ claim.” (Doc.

18 at 23.) 25 However, Plaintiff expressly recites the elements of a false advertising cause of action (see FAC ¶¶ 101–103, 106), relies on three primary advertisements, and explains why the 26 advertisements are allegedly false and misleading.

Thus, Defendants have “ample notice 27 of the particular misconduct so that they can defend against the charge.” In *re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1176 (S.D. Cal. 2010) (quoting *Kearns v. Ford* 28 1 (I) approved by the [FDA], (II) ‘Made in the USA’ and (III) have a 99% success rate in the 2 Product Insert.” (Doc. 19 at 24.) 3 As the Parties only dispute the first, second, and fifth elements of the Lanham Act 4 claim, the Court addresses only the disputed elements for each of the three alleged 5 statements.

For the reasons discussed below, the Court finds that Plaintiff has stated a false advertising claim based on Defendants' alleged statements that their drug testing kits are "FDA approved" and "Made in the USA." However, Defendants' alleged use of, and statements contained in, the Package Insert do not support a false advertising claim under the FAL and Lanham Act.

a. Falsity Plaintiff alleges that Defendants' advertisements made false statements about its drug testing kits being "FDA approved" and "Made in the USA." (FAC ¶ 20.) Defendants seemingly challenge the first element of Plaintiff's false advertising claim, arguing that Defendant Axiom does possess FDA approval for its products. (Doc. 18 at 24; see also id. at 23 (asserting the same argument against UCL claim).)

"To demonstrate falsity within the meaning of the Lanham Act, a plaintiff may show that the statement was literally false, either on its face or by necessary implication, or that the statement was literally true but likely to mislead or confuse consumers." *Southland*, 108 F.3d at 1139. "[A]t the pleading stage the plaintiff need only allege specific misleading statements and explain why they are misleading in accordance with Rule 9(b)." *Clorox Co. v. Reckitt Benckiser Grp.*

PLC, 398 F. Supp. 3d 623, 636 (N.D. Cal. 2019). The Ninth Circuit has noted that "a Lanham Act claim could be pursued for injuries suffered by a competitor as a result of a false assertion that [FDA] approval had been granted" where "it was clear that an affirmative statement of approval by the FDA was required before a given product could be marketed and that no such FDA approval had been granted." *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924–25 (9th Cir.

2010). In this case, the Lanham Act claim is premised on Defendants' affirmative statements that its drug testing kits are "FDA approved." (FAC ¶¶ 1, 3.) Plaintiff claims its drug testing kits are medical devices that require FDA approval. (Id. ¶¶ 11). See *PhotoMedex*, 601 F.3d at 924–25. Relying on its CLIA certification, Defendants argue that its "products are approved by the FDA and made in the United States." (Doc.

at 8 4 (citing Doc. 18-1, Ex. C).) Plaintiff acknowledges that Defendant Axiom received its CLIA certification on September 20, 2020. (FAC ¶ 42.) Plaintiff also alleges that Advin obtained 501(k) clearances from the FDA for drug testing kits (id. ¶ 31) and that a CLIA certification allows re-sellers to use Advin's accreditation to manufacture, market, and sell Advin's drug testing kits (id. ¶¶ 34, 42, 45).

Instead of re-selling Advin's drug testing kits, however, Plaintiff claims that Defendant Axiom manufactured and sold its own kits using components sourced from unregistered, third-party manufacturers located in China and India that were not tested or approved by the FDA. (Id. ¶¶ 2, 38–39, 45, 51.) Specifically, Plaintiff alleges that Defendants obtained reactive strips from a

Chinese-based 14 manufacturer and “test cassettes and caps from Tonisha Electronic, based in New Delhi, 15 India.” (Id. ¶¶ 55–56.)

The FAC also contains photos showing the differences between 16 Advin’s components and those used by Defendant Axiom. (Id.) 17 At the pleading stage, the Court finds these allegations sufficient to satisfy the first 18 element of its Lanham Act claim.

Although Advin’s drug testing kits received FDA 19 approval, and the CLIA certification allows Defendant Axiom to manufacture and sell 20 Advin’s kits, Plaintiff plausibly alleges that Defendant Axiom’s drug testing kits are 21 created with parts that were not produced by an FDA-approved or domestic manufacturer. 22 Viewing these facts in the light most favorable to Plaintiff, the Court finds Plaintiff pleads 23 sufficient facts to support that Defendants made false statements about the FDA approval 24 status and domestic manufacturing of its drug testing kits.

See PhotoMedex, 601 F.3d at 25 924–25; see also Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) 26 (reversing dismissal of UCL claims based on allegedly deceptive product packaging as 27 inappropriately decided on a motion to dismiss). 28 1 b. Commercial Advertisement 2 Defendants argue that Plaintiff fails to explain how the Package Insert “could 3 constitute a false statement to a prospective consumer when it is, by definition, inside the 4 packaging.” (Doc.

18 at 23, 25.) 5 To constitute commercial advertising or promotion under the Lanham Act, a 6 representation must be, among other things, “for the purpose of influencing consumers to 7 buy defendant’s goods or services, and... sufficiently disseminated to the relevant 8 purchasing public.” Ariix, LLC v. NutriSearch Corp., 985 F.3d 1107, 1115 (9th Cir. 2021) 9 (citing Coastal Abstract Serv., Inc. v. First Am.

Title Ins. Co., 173 F.3d 725, 735 (9th Cir. 10 1999)). A false advertising claim must be “likely to influence the purchasing decision” of 11 consumers. Southland, 108 F.3d at 1139. Indeed, Plaintiff “has the burden of pleading at 12 least some facts tending to show that the alleged implied message is actually transmitted 13 to the consumer.” JHP Pharms., 52 F. Supp. 3d at 1005 (citing William H. Morris Co. v. 14 Grp.

W, Inc., 66 F.3d 255, 258 (9th Cir.1995)). 15 Here, Plaintiff alleges Defendant Axiom’s drug testing kits include the Package 16 Insert containing information about Advin’s preliminary analytical findings concerning its 17 own drug testing kits. (FAC ¶¶ 2, 31.)

In its Opposition, Plaintiff claims that Defendants 18 falsely stated their drug testing kits “have a 99% success rate in the Product Insert.” (Doc. 19 19 at 24.) However, as Plaintiff did not include this statement as a factual allegation in the 20 FAC, the Court does not consider it in determining the sufficiency of Plaintiff’s pleading. 21 See Marron v. Saha, Case No.: 19cv1344-BAS (MSB), 2020 WL 2467062, at *3 (S.D.

22 Cal. May 13, 2020) (“Under [Rule] 7(a), a plaintiff’s opposition to a motion to dismiss 23 does not constitute pleadings, and thus ‘new’ allegations raised in a plaintiff’s opposition 24 to a motion to dismiss are not considered when resolving a motion to dismiss.”) (citing 25 *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1014 (9th Cir. 2018)). 26 Moreover, Plaintiff claims that Defendant Axium’s use of the Package Insert “falsely 27 impl[ies] its applicability and validity to” their drug testing kits because Defendants “failed 28 to conduct any form of [the stated] analytical testing for the component parts.” (FAC ¶ 46.)

1 But as Defendants note, the facts alleged do not support that the Package Insert, or any 2 information conveyed therein, is actually conveyed to consumers for the purpose of 3 influencing their purchasing decisions. See *Ariix, LLC*, 985 F.3d at 1115.

Because 4 consumers only have access to the Package Insert after they have purchased Defendant 5 Axium’s drug testing kits, the allegedly false statements in the Package Insert do not 6 constitute “commercial advertisement about [Defendants’] own... product.” *BHRS Grp., 7 LLC v. Brio Water Tech., Inc.*, 553 F. Supp. 3d 793, 799 (C.D. Cal. 2021) (citation omitted); 8 see *JHP Pharms.*, 52 F. Supp. 3d at 1003 (“Thus, to succeed on its claims [a plaintiff] must 9 allege facts tending to show that the message ‘our product is FDA-approved’ was actually 10 conveyed to consumers....”).

Accordingly, Defendant Axium’s alleged statements in the 11 Package Insert do not support a false advertising claim under the Lanham Act. 12 Unlike Plaintiff’s allegations concerning the Package Insert, Plaintiff asserts that 13 Defendants’ statements that its drug testing kits are “FDA approved” and “Made in the 14 USA” were made on Amazon and Walmart’s websites.

(FAC ¶¶ 3, 20.) Such statements 15 were therefore made in commercial advertisement or promotion. See *United States v. 16 Sutcliffe*, 505 F.3d 944, 952-53 (9th Cir. 2007) (“[T]he Internet is an instrumentality and 17 channel of interstate commerce.”) (cleaned up).

Thus, Plaintiff’s allegations concerning 18 such statements sufficiently satisfy the second element of its Lanham Act claim. 19 c. Injury 20 Defendants argue that Plaintiff “vaguely reference[s] ‘Defendants’ actions” or 21 conduct without identifying the purported harm to Plaintiff that gives rise to the causes of 22 action.” (Doc. 18 at 25.)

Although Defendants assert this argument against Plaintiff’s 23 claims under the FAL and the ICPA, the Court addresses it as part of its current analysis. 24 See *Allergan*, 364 F. Supp. 3d at 1108 (“Claims under the FAL are substantially congruent 25 to those under the Lanham Act.”). 26 Under the Lanham Act, a plaintiff must “plead (and ultimately prove) an injury to a 27 commercial interest in sales or business reputation proximately caused by the defendant’s 28 misrepresentations.” *Openwave Messaging, Inc. v. Open-Xchange, Inc.*, No. 16-cv-00253- 1 WHO, 2016 WL 6393503, at *4 (N.D.

Cal. Oct. 28, 2016) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 (2014)). Lost sales for the plaintiff because of the defendant's false advertising is the "paradigmatic direct injury from false advertising." *Id.* at *5 (quoting *Lexmark Int'l*, 572 U.S. at 134). The Court finds that Plaintiff has adequately alleged injury caused by Defendants' allegedly false advertising.

Plaintiff alleges that as a result of the advertisements, it has suffered a significant loss of sales and market share that it would have otherwise earned. (FAC ¶ 63.) Plaintiff also claims that the advertisements have damaged its reputation and standing in the industry. (*Id.*) Such allegations are sufficient to plead damages. See *Openwave Messaging, Inc.*, 2016 WL 6393503, at *5, (allegations that defendant's false advertisement caused "potential customers to mistakenly turn to [defendant] when seeking [plaintiff's] products and services, and the sales or inquiries of [defendant's] products resulting from this false advertising should rightly have gone to [plaintiff]" were sufficient to establish proximate cause and injury for the purposes of a motion to dismiss); *Luxul Tech., Inc. v. Nectarlux, LLC*, 78 F. Supp. 3d 1156, 1169 (N.D.

Cal. 2015) (allegations that defendant's "misrepresentations regarding the source of LED tube lamps resulted in harm to distinctiveness of Plaintiff's product, brand, good, and reputation," and the "likelihood of commercial injury based on Defendants' misbranding of Luxul products" was sufficient to show injury).

Thus, Plaintiff has satisfied the fifth element of its Lanham Act claim. d. Conclusion Based on the foregoing reasons, the Court finds that Plaintiff has sufficiently stated a false advertising claim under the Lanham Act and the FAL based on Defendants' alleged statements about their drug testing kits being "FDA approved" and "Made in the USA." Accordingly, the Motion is DENIED as to the Second and Fourth Causes of Action.

However, Plaintiff failed to plead that the alleged statements in the Package Insert constituted commercial advertising to state a false advertising claim. To the extent the Second and Fourth Causes of Action are premised on the alleged statements in the Package Insert, the Motion is therefore GRANTED. 2. Consumer Protection Claims a. UCL (First Cause of Action) Plaintiff alleges that Defendants' allegedly false advertisements violate the FAL and thus constitute an unlawful business practice under the UCL.

(FAC ¶ 73.) Plaintiff also alleges that Defendants violate California's Sherman Law by manufacturing and selling drug testing kits that have not been approved by the California Department of Health Services or the FDA and therefore such sales are actionable under the UCL as an unlawful business practice. (*Id.* ¶ 71.) Defendants seek to dismiss Plaintiff's UCL claim, arguing that Plaintiff does not "even state 'threadbare recitals of the elements of the cause of action.'" (Doc.

18 at 22–23 (quoting *Iqbal*, 556 U.S. at 678).) 11 “The UCL prohibits ‘any unlawful, unfair or fraudulent business act or practice.’” 12 *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 865 (9th Cir. 2018) (quoting Cal. Bus. & Prof. Code § 17200). An “unlawful” practice under the UCL is “anything that can properly be called 14 a business practice and that at the same time is forbidden by law.” *Cel-Tech Comms., Inc. v. Los Angeles Cellular Tel.*

Co., 20 Cal. 4th 163, 180 (1999) (cleaned up). Thus, “to state 16 a claim under the unlawful prong of the UCL, a plaintiff must sufficiently plead a predicate 17 violation.” *MacDonald v. Ford Motor Co.*, 37 F. Supp. 3d 1087, 1097 (N.D. Cal. 2014). 18 The “unfair” prong of the UCL “prohibit[s] not only advertising which is false, but also 19 advertising which[,] although is true, is either actually misleading or which has a capacity, 20 likelihood or tendency to deceive or confuse the public.” *Brady v. Bayer Corp.*, 26 Cal. 21 App.

5th 1156, 1173 (2018) (citation omitted). 22 Alleged violations of the Lanham Act and the FAL can serve as a predicate basis for 23 a claim of unlawful and unfair practices under the UCL. *Lona’s Lil Eats, LLC v. 24 DoorDash, Inc.*, Case No. 20-cv-06703-TSH, 2021 WL 151978, at *13 (N.D. Cal. Jan. 18, 25 2021); see *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002) (“[A]ny violation of the false 26 advertising law necessarily violates the UCL.”) (cleaned up).

Moreover, a violation of the 27 FAL generally is also a violation of the “fraudulent” prong of the UCL. *Hadley v. Kellogg 28 Sales Co.*, 243 F. Supp. 3d 1074, 1089 (N.D. Cal. 2017). California’s Sherman Law can 1 also serve as a predicate for an unlawful practice claim under the UCL. *Allergan USA, Inc. 2 v. Prescribers Choice, Inc.*, 364 F. Supp. 3d 1089, 1104 (C.D.

Cal. 2019) (citing *Farm 3 Raised Salmon Cases*, 42 Cal. 4th 1077, 1091 n.13 (2008)). 4 Here, Plaintiff alleges that Defendants are violating the FAL by falsely advertising 5 its drug testing kits as “FDA approved” and “Made in the USA.” (FAC ¶ 73.)

Because 6 Plaintiff has stated claims for false advertising under the Lanham Act and the FAL (see 7 *supra* IV.C.1), it has also stated a UCL claim under all three prongs. 8 Additionally, Plaintiff also plausibly alleges that Defendants are violating 9 California’s Sherman Law and other California regulations by failing to satisfy medical 10 device-approval requirements and falsely advertising their drug testing kits.

(FAC ¶¶ 11, 11 71.) The Sherman Law provides that “[n]o person shall sell, deliver, or give away any new 12... device” that has not been approved by the California Department of Health Services or 13 the FDA. Cal. Health & Safety Code § 111550(a)–(b).

As previously discussed, Plaintiff 14 has sufficiently alleged that Defendant Axiom is selling its own drug testing kits with 15 components that are not approved by either agency. (See *supra* IV.C.1.a.) The Court 16 therefore finds that, at the pleading stage, Plaintiff has pled sufficient facts to show 17 Defendants engaged in “an act or practice, committed pursuant to business activity,

that is 18 at the same time forbidden by law.” *Bernardino v. Planned Parenthood Fed. of Am.*, 115 19 Cal. App.

4th 322, 351 (2004). 20 Defendants raise the same arguments as they did for Plaintiff’s false advertisement 21 claims, including that: (1) Defendant Axiom received a CLIA certification from the FDA 22 to sell its drug testing kits; and (2) the unlawful claim is predicated on alleged violations 23 of the Sherman Law based on Defendant Axiom’s use of the Package Insert but Plaintiff 24 fails to explain “how that could constitute a false statement to a prospective consumer when 25 26 27 28 1 it is, by definition, inside the packaging.” (Id. at 23.)

However, Defendants’ arguments 2 are unpersuasive for the reasons previously stated. (See *supra* IV.C.1.a.)⁷ 3 The Motion is therefore DENIED as to the UCL claim. 4 b. Idaho Consumer Protection Act (Third Cause of Action) 5 The ICPA protects both consumers and businesses against unfair methods of 6 competition and unfair or deceptive acts and practices in the conduct of trade or commerce.

7 Idaho Code § 48-603. Like Plaintiff’s consumer protection claims under California law, 8 “[a]n act or practice is unfair if it is shown to possess a tendency or capacity to deceive 9 consumers.” *Roost Project, LLC v. Andersen Constr. Co.*, 437 F. Supp. 3d 808, 827 (D. 10 Idaho 2020) (quoting *Kidwell v. Master Distribs., Inc.*, 101 Idaho 447, 453 (1980)); see 11 *Brady v. Bayer Corp.*, 26 Cal. App.

5th 1156, 1173 (2018) (noting that the UCL prohibits 12 advertising that “is either actually misleading or which has a capacity, likelihood or 13 tendency to deceive or confuse the public.”). 14 Defendants argue the ICPA claim fails because Plaintiff “vaguely reference[s] 15 ‘Defendants’ actions’ or conduct without identifying the purported harm to Plaintiff that 16 gives rise to” an ICPA claim.

(Doc. 18 at 24.) However, for the reasons previously 17 discussed (see *supra* IV.C.1.c), Plaintiff has sufficiently alleged that its harm was caused 18 by Defendants’ allegedly false advertising to consumers. See *Kidwell*, 101 Idaho at 454 19 (“Actual damage to the public need not be shown to establish a trade practice as unfair or 20 deceptive if it is shown that the practice possesses a tendency or capacity to deceive.”); In 21 22 23 7 Defendants’ argument concerning the Package Insert is inapplicable to Plaintiff’s UCL claim based on violations of the Sherman Law because this claim does not require 24 allegations of fraud or deception.

See *Brinkerhoff v. L’Oreal USA, Inc.*, 417 F. Supp. 3d 25 1308, 1314 (S.D. Cal. 2019) (“Plaintiff need not plead reliance because neither the alleged FDCA violation nor the alleged Sherman Law violation requires allegations of fraud or 26 deception.”); *Allergan USA Inc. v. Imprimis Pharms., Inc.*, Case No. SA CV 17-1551-DOC 27 (JDEx), 2017 WL 10526121, at *12 (C.D.

Cal. Nov. 14, 2017) (finding defendant's "actual reliance" argument was irrelevant to the unlawful business practices claim under the UCL 28 1 re W. Acceptance Corp., Inc., 788 P.2d 214, 216 (Idaho 1990) (holding the ICPA must be 2 "liberally construed to effect the legislative intent to deter deceptive or unfair trade 3 practices and to provide relief for consumers exposed to proscribed practices.")).

4 Further, Defendants summarily argue that Plaintiff's ICPA claim fails because it is 5 untimely under Idaho law. (Doc. 18 at 24.). Section 48-619 of the ICPA provides that "no 6 private action may be brought under this act more than two (2) years after the cause of 7 action accrues." In their Motion, Defendants do not provide further explanation or 8 argument to support that Plaintiff's claim under the ICPA is rendered untimely.

As 9 Defendants failed to develop their argument, the Court considers it waived. See Khademi 10 v. South Orange Cnty. Cmty. College Dist., 194 F. Supp. 2d 1011, 1027 (C.D. Cal. 2002) 11 ("A judge is... neither required to hunt down arguments [the parties] keep camouflaged, 12 nor required to address perfunctory and undeveloped arguments... [T]o the extent that 13 [Defendants] failed to develop any additional argument or provide any legal support for 14 them, [it] has waived them.").

15 Accordingly, the Motion is DENIED as to the Third Cause of Action. 16 3. IIPEA (Fifth Cause of Action) 17 Defendants argue that Plaintiff's intentional interference with prospective economic 18 advantage claim fails because Plaintiff does not identify any economic benefits it was likely 19 to receive. (Doc. 18 at 18–20.)

The Court agrees. 20 To allege a claim for intentional interference with prospective economic advantage, 21 a plaintiff must allege: "(1) an economic relationship between the plaintiff and some third 22 party, with the probability of future economic benefit to the plaintiff; (2) the defendant's 23 knowledge of the relationship; (3) intentional [wrongful] acts on the part of the defendant 24 designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) 25 economic harm to the plaintiff proximately caused by the acts of the defendant." 26 Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151 (9th Cir.

2008). 27 As to the first element, a plaintiff must allege "a 'particular relationship or 28 opportunity with which the defendant's conduct is alleged to have interfered' rather than 1 vague allegations regarding a relationship with an 'as yet unidentified' customer." Soil 2 Retention Prods., Inc. v. Brentwood Indus., Inc., 521 F. Supp. 3d 929, 961 (S.D. Cal. 2021) 3 (quoting Weintraub Fin.

Servs., Inc. v. Boeing Co., Case No. CV 20-3484-MWF (GJSx), 4 2020 WL 6162801, at *8 (C.D. Cal. Aug. 7, 2020)). To allege an economic relationship, 5 "it must be reasonably probable the

prospective economic advantage would have been realized but for defendant's interference." *Id.* (quoting *Song v. Drenberg*, No. 18-CV- 7 06283-LHK, 2019 WL 1998944, at *7–8 (N.D.

Cal. May 6, 2019)). In its Opposition, Plaintiff contends that it has adequately pled "a colorable economic relationship" with "all customers who purchase drug test kits on Amazon.com, and was likely to enter into actual relationships with a certain percentage of such potential customers." (Doc. 19 at 18.)

However, such "a hope of future transactions" is insufficient to support a claim of tortious interference." *Soil Retention Prods., Inc.*, 521 F. Supp. 3d at 13 961 (quoting *Brown v. Allstate Ins. Co.*, 17 F. Supp. 2d 1134, 1140 (S.D. Cal. 1998). "Plaintiff must establish an actual economic relationship or a protected expectancy with a third person, not merely a hope of future transactions." *Brown*, 17 F. Supp. 2d at 1140.

For example, the court in *Song* dismissed an IIPEA claim where the plaintiff "merely allege[d] interference with possible business contracts," and failed "to name a single entity or person" or point to any particular opportunity that was disrupted by the defendant's alleged conduct. 2019 WL 1998944, at *8. Instead, the court noted that the complaint only made "sweeping generalizations lacking any detail about the loss of prospective business opportunities." *Id.* at *7.

In this case, Plaintiff generally alleges that it had economic relationships with third party customers and "a reasonable expectancy of profit to be derived as a result of its" drug testing kit sales via Amazon and Walmart's websites. (FAC ¶¶ 110, 112.) But Plaintiff does not allege any facts to support that there was a reasonable probability that any purchasers of drug testing kits on the Amazon website would purchase Plaintiff's drug testing kits but for Defendants' alleged interference.

The Court therefore finds that Plaintiff fails to plausibly allege a "particular relationship or opportunity with which [Defendants'] conduct is alleged to have interfered." See *Soil Retention Prods., Inc.*, 521 F. Supp. 3d at 961.

Accordingly, Plaintiff's Fifth Cause of Action for IIPEA is DISMISSED with leave to amend. 4. Alter Ego Plaintiff brings all five causes of action against both Defendant Axiom and Defendant Salvatore. (See FAC ¶¶ 67–116.) Defendants argue that Plaintiff fails to state a claim against Defendant Salvatore because its alter ego claims "fail to meet the minimum pleading standards to establish [Defendant] Salvatore is the alter ego of [Defendant] Axiom, and vice versa." (Doc.

18 at 18–19.) Courts "apply the law of the forum state in determining whether a corporation is an alter ego of an individual." *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003) (quoting *Towe Antique Ford Found. v. IRS*, 999 F.2d 1387, 1391 (9th Cir. 1993)). Alter ego liability

allows a plaintiff to “pierce the corporate veil” and hold a corporate actor or parent 14 corporation liable for conduct of the corporation or subsidiary.

Stark v. Coker, 129 P.2d 15 390, 394 (Cal. 1942). Disregarding the corporate form, however, is an “extreme remedy, 16 sparingly used.” *Sonora Diamond Corp. v. Superior Ct.*, 83 Cal. App. 4th 523, 539 (2000). 17 To state a plausible claim of alter ego liability against Defendant Salvatore, Plaintiff 18 “must make out a prima facie case (1) that there is such unity of interest and ownership 19 that the separate personalities [of the two entities] no longer exist and (2) that failure to 20 disregard [their separate identities] would result in fraud or injustice.” *Ranza v. Nike, Inc.*, 21 793 F.3d 1059, 1072 (9th Cir.

2015) (citation omitted). Factors used to support the first 22 element, unity of interest, include: 23 [C]ommingling of funds, failure to maintain minutes or adequate corporate records, identification of the equitable owners with the domination and control 24 of the two entities, the use of the same office or business locations, the 25 identical equitable ownership of the two entities, the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of 26 an individual, and the failure to adequately capitalize a corporation.

27 28 1 *Pac. Mar. Freight, Inc. v. Foster*, No. 10–cv–0578–BTM–BLM, 2010 WL 3339432, at *6 2 (S.D. Cal. Aug. 24, 2010) (citing *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. 3 App. 2d 825, 838–40 (1962)). “The identification of the elements of alter-ego liability plus 4 two or three factors has been held sufficient to defeat a 12(b)(6) motion to dismiss.” *Id.* 5 (citing *Federal Reserve Bank of San Francisco v. HK Sys.*, No. C–95–1190, 1997 WL 6 227955, at *6 (N.D.

Cal. Apr. 24, 1997)). Under Ninth Circuit precedent, “[t]otal 7 ownership and shared management personnel are alone insufficient to establish the 8 requisite level of control” to satisfy the alter-ego test. *Ranza*, 793 F.3d at 1073; see also 9 *Katzir’s Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004) 10 (“[T]he mere fact of sole ownership and control does not eviscerate the separate corporate 11 identity that is the foundation of corporate law.”).

12 Here, Plaintiff alleges that Defendant Salvatore is the sole founder of Defendant 13 Axium and operated the company from June 20, 2016 through November 2, 2019 without 14 appointing any other corporate officers, directors, a board of directors, or a registered agent 15 for service of process. (FAC ¶ 26.) Plaintiff also alleges that Defendant Axium never 16 issued any common stock, never held any shareholder or board meetings, and did not file 17 a yearly Statement of Information with the California Secretary of State.

(FAC ¶¶ 26–27.) 18 According to Plaintiff, Defendant Salvatore and his wife, Diana Motina, were Defendant 19 Axium’s only employees and were paid as independent contractors. (*Id.* ¶ 27.) Plaintiff 20 adds that, on information and belief, “Defendant Salvatore used Defendant Axium to

pay 21 for personal expenditures, including his wife's, that had nothing to do with any business 22 operation." (Id.)

Based on these allegations, Plaintiff has at a minimum pled a disregard 23 for corporate formalities and commingling of funds. The Court finds this is sufficient to 24 allege a unity of interest. See *Pac. Mar. Freight, Inc.*, 2010 WL 3339432, at *7 ("Sole 25 ownership alone is often enough to defeat a motion to dismiss, and when taken with the 26 commingling of funds, [the plaintiff] has sufficiently pled a unity of interest between [the 27 individual defendant] and [the corporate defendant]").

28 1 As to the second element, Plaintiff must also allege that an inequitable would result 2 in the recognition of the corporate form. See *Ranza*, 793 F.3d at 1073. "Inequitable results 3 flowing from the recognition of the corporate form include the frustration of a meritorious 4 claim, perpetuation of a fraud, and the fraudulent avoidance of personal liability." *Pac.*

5 *Mar. Freight, Inc.*, 2010 WL 3339432, at *7. Here, Plaintiff alleges that "adherence of the 6 fiction of a separate existence of Defendant Axiom business entity and Defendant Salvatore 7 would permit an abuse of the corporate privilege, and would sanction and promote 8 injustice." (FAC ¶ 28.) Defendants argue that "Plaintiff's allegations to support its alter 9 ego theory are conclusory and recitations of the law, and therefore, Plaintiff's FAC fails to 10 state a claim upon which relief could be granted." (Doc.

18 at 19.) However, the Court 11 finds alter ego liability is not applicable or necessary in this case because Plaintiff 12 sufficiently pleads that Defendant Salvatore himself committed tortious acts that would 13 expose him to personal liability as a corporate director. 14 "A corporate 'officer or director is, in general, personally liable for all torts which 15 he authorizes or directs or in which he participates, notwithstanding that he acted as an 16 agent of the corporation and not on his own behalf." *Transgo, Inc. v. Ajac Transmission 17 Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir.

1985). In this case, all five of Plaintiff's claims 18 are based on alleged actions taken by Defendant Salvatore who is Defendant Axiom's 19 CEO, CFO, and sole director. (See FAC ¶¶ 25, 37.) As Defendant Salvatore is the sole 20 actor of Defendant Axiom, Plaintiff sufficiently alleges he was a participant in all alleged 21 tortious conduct.

As a result, Defendant Salvatore "will not be able to 'hide behind 22 [Defendant Axiom's] corporate form' for [his] own alleged tortious actions." *A-Tek Mech., 23 Inc. v. KHW Servs., Inc.*, Case No.: 3:21-cv-01974-H-WVG, 2022 WL 3044815, at *11 24 (S.D. Cal. Aug. 2, 2022), on reconsideration in part, No. 3:21-CV-01974-H-DDL, 2022 25 WL 18635745 (S.D. Cal. Oct.

13, 2022) (quoting *Hawes v. Kabani & Co., Inc.*, 182 F. 26 Supp. 3d 1134, 1144 (W.D. Wash. 2016)); see *Coastal Abstract Serv., Inc. v. 1st Am. Title 27 Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999) (finding a jury could find the corporate 28 defendant's officer liable for an actionable

statement under the Lanham Act). 1 Accordingly, Plaintiff's claims may be asserted against Defendant Salvatore directly 2 and Defendant Salvatore may be held personally liable for such claims without the need to 3 show alter ego liability.

The Motion is therefore DENIED as to the claims against 4 Defendant Salvatore in his individual capacity. 5 D. Rule 12(f) 6 Plaintiff seeks punitive damages, in an amount to be proven at trial, for Defendants' 7 alleged intentional interference with a prospective economic advantage. (FAC ¶¶ 114, 8 116.) Defendants move to strike Plaintiff's request for punitive damages from the FAC.

9 (Doc. 18 at 25–26.) Defendants argue that Plaintiff fails to state a claim which could 10 support its punitive damages request and does not “plead facts showing acts that plausibly 11 show oppression, fraud or malice” as required under California law. (Id.) 12 As an initial matter, “Rule 12(f) does not authorize district courts to strike claims for 13 damages on the ground that such claims are precluded as a matter of law.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir.

2010). Under Rule 12(f), the Court 15 “may strike from a pleading an insufficient defense or any redundant, immaterial, 16 impertinent, or scandalous matter.” The function of a motion to strike pursuant to Rule 17 12(f) is “to avoid the expenditure of time and money that must arise from litigating spurious 18 issues by dispensing with those issues prior to trial.” *Whittlestone, Inc.*, 618 F.3d at 973 19 (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993)). “Motions to strike 20 are generally viewed with disfavor and will usually be denied unless the allegations in the 21 pleading have no possible relation to the controversy and may cause prejudice to one of 22 the parties.” *Sliger v. Prospect Mortg., LLC*, 789 F. Supp. 2d 1212, 1216 (E.D.

Cal. 2011). 23 In the Motion, Defendants argue that Plaintiff's allegations are insufficient to state 24 an IIPEA claim but do not identify any prejudice they would suffer if the request for 25 punitive damages remains or explain how striking Plaintiff's request would streamline the 26 case. (Doc. 18 at 25–26.)

Thus, Defendants' request to strike under Rule 12(f) constitutes 27 “an attempt to have certain portions of [the FAC] dismissed or to obtain summary judgment 28 1 against [Plaintiff] as to those portions of the suit—actions better suited for a Rule 12(b)(6) 2 motion or a Rule 56 motion, not a Rule 12(f) motion.” *Whittlestone, Inc.*, 618 F.3d at 973. 3 Defendants also argue that Plaintiff's allegations are insufficient under California 4 Civil Code § 3294 to give rise to punitive damages.

(Doc. 18 at 25–26.) However, “the 5 Federal Rules of Civil Procedure govern the punitive damages claim procedurally with 6 respect to the adequacy of the pleadings.” *Terpin v. AT and T Mobility LLC*, 118 F.4th 7 1102, 1112 (9th Cir. 2024); see *Clark v. Allstate Ins. Co.*, 106 F. Supp. 2d 1016, 1018 (S.D. 8 Cal. 2010) (“It is well-established that federal courts sitting in diversity must apply state 9 substantive law and federal procedural rules.”) (emphasis in original).

Indeed, “California 10 Civil Code section 3294 is a state procedural rule not implicated in federal court.” *Waryck 11 v. Thor Motor Coach, Inc.*, No. 22-CV-1096-L-KSC, 2023 WL 4166098, at *2 (S.D. Cal. 12 June 23, 2023) (quoting *Strojnink v. Braemar P’ship*, No. 19-CV-01446-BAS-AHG, 2020 13 WL 3250184, at *3 (S.D. Cal. June 16, 2020) (cleaned up)).

Under Rule 9(b), the applicable 14 federal pleading standard, “a plaintiff may include a short and plain prayer for punitive 15 damages that relies entirely on unsupported and conclusory averments of malice or 16 fraudulent intent.” *Clark*, 106 F. Supp. 2d at 1018; Fed. R. Civ. P. 9(b) (“Malice, intent, 17 knowledge, and other conditions of a person’s mind may be alleged generally.”).

18 Although the Court dismissed Plaintiff’s IIPEA claim with leave to amend (see 19.IV.C.2.c.), Plaintiff clearly requests punitive damages and has sufficiently alleged that 20 Defendants acted with “malice, oppression, fraud, or reckless disregard.” (FAC ¶ 114.) 21 Accordingly, Defendants’ Rule 12(f) Motion to Strike is DENIED. 22 V. CONCLUSION 23 Based on the foregoing, Defendants’ Motion (Doc.

18) is GRANTED in part and 24 DENIED in part. Specifically: 25 1. The Court DENIES Defendants’ Motion Pursuant to Rule 12(b)(1). 26 2. The Court DENIES Defendants’ Motion under Rule 17(a) for failure to prosecute 27 in the name of the real party in interest. 28 1 3.

The Court DENIES Defendants’ Motion as to the UCL claim (First Cause of 2 Action). 3 4. The Court DENIES Defendants’ Motion as to the FAL claim concerning 4 Defendants’ alleged statements that its drug testing kits are “FDA approved” and 5 “Made in the USA” (Second Cause of Action). 6 5.

The Court GRANTS Defendants’ Motion as to the FAL claim concerning 7 Defendants’ alleged use of the Package Insert (Second Cause of Action). 8 6. The Court DENIES Defendants’ Motion as to the ICPA claim (Third Cause of 9 Action. 10 7.

The Court DENIES Defendants’ Motion as to the Lanham Act claim concerning 11 Defendants’ alleged statements that its drug testing kits are “FDA approved” and 12 “Made in the USA” (Fourth Cause of Action). 13 8. The Court GRANTS Defendants’ Motion as to the Lanham Act claim concerning 14 Defendants’ alleged use of the Package Insert (Fourth Cause of Action).

15 9. The Court GRANTS Defendants’ Motion as to the ITPEA claim (Fifth Cause of 16 Action). This claim is DISMISSED with leave to amend. 17 10. The Court DENIES Defendants’ Motion to Strike Pursuant to Rule 12(f). 18 Plaintiff may file an amended complaint on or before October 17, 2025 solely to 19 || correct the deficiencies identified above.* If Plaintiff does not amend and proceeds only 20 |on the remaining claims, Defendants must file an Answer on or before October 31, 2025.

21 IT IS SO ORDERED. 22 ||DATE: September 25, 2025 2 Zak smu, Mitten > HON. RUTH BERMUGDEZ'MONTENEGRO UNITED STATES DISTRICT JUDGE 25 27 ||* If Plaintiff amends, as permitted, and Defendants move to dismiss again rather than filing an Answer, the Parties must contact the assigned Magistrate Judge to proceed with an Early Neutral Evaluation, Case Management Conference, and discovery.

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