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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12 FireClean, LLC, a limited liability
13 company; David Sugg, an individual; and
14 Edward Sugg, an individual,

15 Plaintiffs,

16 v.

17 Andrew Tuohy,

18 Defendant.

Case No: 4:16-cv-00604-JAS

**REPLY IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS**

I. PREFATORY REMARKS

19 Before considering specific points, the Court should note several critical errors in
20 FireClean’s response. To help clarify these flaws and how they defeat all of Plaintiff’s
21 arguments, a few words are offered regarding each before proceeding to specific points.

- 22 a. **Error #1:** FireClean incorrectly assumes legal conclusions and unsupported
23 conclusory allegations must always be taken as true.

24 As a matter of Civil Procedure 101, when considering a Rule 12(b)(6) motion
25 courts generally assume the facts in the Complaint are true. Of course, the general rule
26 has a major limitation: “legal conclusions couched as factual allegations are not given a
27 presumption of truthfulness, and ‘conclusory allegations of law and unwarranted
28 inferences are not sufficient to defeat a motion to dismiss.’” *Cosmetic Alchemy, LLC v. R
& G, LLC*, 2010 WL 4777553, at *3 (D. Ariz. Nov. 17, 2010) (quoting *Pareto v. FDIC*,

1 tests, the people who conducted the tests were experts, and the people who conducted the
2 tests interpreted their results accurately. These unproven allegations are outside the
3 pleadings.” Opp. at 4:24–27 (emphasis added).

4 FireClean’s position is simply wrong as a matter of both fact and law. First, as a
5 matter of law, because Mr. Tuohy’s blog articles were both attached to the Complaint and
6 extensively incorporated therein by reference, the text and context of these articles are not
7 matters outside the pleadings. That specific point was preemptively addressed in Mr.
8 Tuohy’s motion at page 3, fn. 1 (citing *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.
9 2005)).

10 Second, factually, FireClean simply misunderstands Mr. Tuohy’s request for the
11 Court to consider the actual verbiage (and broader context) of the blog posts at issue.
12 Specifically, Mr. Tuohy is not asking the Court to accept any part of the truth of these
13 statements. Rather, Mr. Tuohy is merely asking the Court to view the actual statements
14 made for the purpose of determining: A.) what Mr. Tuohy actually said in his blog posts;
15 B.) whether those statements are actionable, and C.) given the actual statements made,
16 whether FireClean has alleged sufficient facts to state any plausible claims for relief.

17 This type of review is hardly a “proscribed practice”, nor is it a jury question at
18 this point. On the contrary, as the Ninth Circuit noted in *Knieval*, “It is for the court to
19 decide [whether a statement is actionable defamation] in the first instance as a matter of
20 law” *Knieval*, 393 F.3d at 1074. Further, the Court may properly undertake this
21 analysis in the context of a Rule 12(b)(6) motion by reviewing the actual blog posts
22 themselves rather than FireClean’s false and misleading version of what was said:

23 In evaluating the context in which the statement appeared, we must take
24 into account “all parts of the communication that are ordinarily heard or
25 read with it.” In doing so, we deviate from the general rule that courts,
26 when ruling on a motion to dismiss, must disregard facts that are not
27 alleged on the face of the complaint or contained in documents attached to
28 the complaint.

Knieval, 368 F.3d at 1076 (emphasis added).

1 Because Mr. Tuohy’s consumer reporting/commentary involves matters of public
2 concern, the rules which govern FireClean’s claims are much different than in other
3 contexts; “Speech on matters of public concern ‘occupies the highest rung of the
4 hierarchy of First Amendment values, and is entitled to special protection.’” *Rodriguez v.*
5 *Fox News Network, L.L.C.*, 238 Ariz. 36, 40, 356 P.3d 322, 326 (Ariz.App. 2015)
6 (quoting *Snyder v. Phelps*, 562 U.S. 443, 451, 131 S.Ct. 1207 (2011)). Among other
7 things, this means that contrary to its argument here, FireClean absolutely does bear the
8 burden of pleading facts which plausibly establish that Mr. Tuohy’s speech was
9 materially false; “Among the constitutional protections available in an action challenging
10 speech is a requirement that a plaintiff who challenges a statement on a matter of ‘public
11 concern’ bear the burden of proving the statement is false.” *Sharper Image*, 2004 WL
12 2554451, *3 (emphasis added) (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475
13 U.S. 767, 777–78, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986)). FireClean must also plead
14 and prove that Mr. Tuohy’s statements were made with actual malice. *See Milkovich v.*
15 *Lorain Journal Co.*, 497 U.S. 1, 14, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

16 Because FireClean bears the burden of proof on these points, it must allege facts
17 sufficient to plausibly show Mr. Tuohy’s speech was not only inaccurate, but that it was
18 in fact materially false; “A factual statement need only be substantially true in order to be
19 protected from a suit for defamation.” *Unelko*, 912 F.2d at 1057; *see also* RESTATEMENT
20 (SECOND) OF TORTS § 581(A), comment f (1977) (“Slight inaccuracies of expression are
21 immaterial provided that the defamatory charge is true in substance.”) As the U.S.
22 Supreme Court has explained, a “statement is not considered false unless it ‘would have a
23 different effect on the mind of the reader from that which the pleaded truth would have
24 produced.’” *Masson v. New Yorker*, 501 U.S. 496, 516, 111 S.Ct. 2419 (1991).

25 Of course, depending on the context in which it is raised, the related doctrine of
26 “substantial truth” is sometimes referred to as a “defense”. *See, e.g., Read v. Phoenix*
27 *Newspapers, Inc.*, 169 Ariz. 353, 819 P.2d 939, 941 (Ariz.1991) (“Substantial truth is an
28 absolute defense to a defamation action in Arizona.”). However, due to the heightened

1 importance of the First Amendment rights at issue, federal courts have agreed that when a
2 Complaint fails to plead facts showing that a challenged statement is materially false,
3 dismissal pursuant to Fed. R. 12(b)(6) is proper; “Because the threat of protracted
4 litigation could have a chilling effect on the constitutionally protected right of free
5 speech, prompt resolution of defamation actions, either by motion to dismiss or summary
6 judgment, is appropriate. [citation] Specifically, a motion to dismiss can be granted on
7 the basis that the challenged publication was substantially true.” *Brokers' Choice of Am.,*
8 *Inc. v. NBC Universal, Inc.*, 138 F. Supp. 3d 1191, 1199 (D.Colo. 2015); *Avid Life*
9 *Media, Inc. v. Infostream Grp., Inc.*, 2013 WL 6002167, *7 (C.D. Cal. 2013) (dismissing
10 defamation claim where Complaint failed to show that “any slight inaccuracies” in
11 challenged statements were materially different from the truth); *Nanji v. Nat'l*
12 *Geographic Soc.*, 403 F. Supp. 2d 425, 431 (D.Md. 2005) (dismissing defamation claim
13 where plaintiff failed to allege facts showing challenged statement was materially false).

14 As explained in Mr. Tuohy’s motion, FireClean’s Complaint fails to plausibly
15 show that any of Mr. Tuohy’s statements were *materially false*. For example, FireClean
16 repeatedly attacks Mr. Tuohy for implying that “FireClean is Crisco”, but at no point
17 does the Complaint explain *what the actual contents of FireClean oil are*. Of course,
18 without knowing what ingredients FireClean oil actually contains, it is impossible to
19 know whether Mr. Tuohy’s statements were true or false. Similarly, FireClean disputes
20 Mr. Tuohy’s statement that different ammunition was used in the “Vickers Video”, but at
21 no point does FireClean identify the actual type(s) of ammo used. Again, without that
22 information, it is impossible to evaluate the accuracy of Mr. Tuohy’s comments.

23 In short, although it contains a shocking level of detail (about largely
24 collateral/irrelevant issues) FireClean’s Complaint only provides half of the story – it
25 identifies statements that it claims are false, but FireClean refuses to explain what the true
26 facts are. Without that essential information, it is impossible to determine whether Mr.
27 Tuohy’s statements were entirely true, substantially true, mostly true or dead wrong. For
28 that reason, the Complaint fails to meet *Twombly’s* admittedly low plausibility test.

1 **II. ARGUMENT**

2 **a. FireClean’s Lanham Act Should Be Dismissed**

3 **i. FireClean Presents The Wrong Legal Standard For**
 4 **‘Competitors’**

5 Mr. Tuohy’s motion noted that FireClean’s Lanham Act claim must be dismissed
 6 because the Complaint contains no well-pleaded facts showing the parties are
 7 competitors. Not surprisingly, FireClean’s response angrily disputes this, claiming
 8 (without any well-pleaded factual support and in a conclusory manner) the parties “sold
 9 some goods and services to the consumers in the same industries.” Opp. at 6:16–17.¹

10 The only support offered for this claim is a citation to ¶¶ 56, 58, 75, 76, and 292–
 11 94 of the First Amended Complaint, ECF Doc. #11 (“FAC”). Yet a cursory review of
 12 those allegations confirms precisely what Mr. Tuohy said in his motion: 1.) the
 13 Complaint contains no well-pleaded facts showing any direct competition between the
 14 parties; and 2.) to the extent the Complaint contains any factual contentions, they are
 15 nothing more than legal conclusions; i.e., “Mr. Tuohy, though his clothing business’s
 16 dealings, and FireClean, though its business dealings [selling gun oil], struggle against
 17 one another to gain commercial advantages in interstate commerce.” FAC ¶ 292.

18 Rather than supporting FireClean’s position, these threadbare recitals mandate
 19 dismissal of the Lanham Act claim. There is simply not a shred of well-pleaded factual
 20 support for FireClean’s claim that Mr. Tuohy has ever competed with it in the gun oil
 21 industry. Furthermore, the fact that Mr. Tuohy sells t-shirts promoting *his personal*
 22 *website* Vuurwapenblog.com does not establish competition because FireClean does not
 23 claim to sell the same shirts. That single point is fatal to the Lanham Act claim.

24 _____
 25 ¹ FireClean also accuses Mr. Tuohy of “misstating the controlling law”, claiming the
 26 correct standard is found in *TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820 (9th
 27 Cir. 2011). This argument merits only the briefest reply because: A.) the legal standards
 28 set forth in *TrafficSchool.com* are identical to those discussed in Mr. Tuohy’s original
 motion, and B.) in *TrafficSchool.com* the plaintiff and defendant were, in fact, direct
 competitors. Because Mr. Tuohy and FireClean are not competitors, either directly or
 indirectly, *TrafficSchool.com* is entirely unhelpful to FireClean’s arguments.

1 **ii. FireClean Has Pleaded No Facts Showing Any Actionable**
2 **Statements Were Made In *Commercial Advertising***

3 Mr. Tuohy’s motion also noted that FireClean’s Lanham Act claim was subject to
4 dismissal because none of the challenged statements were made in either commercial
5 speech or commercial advertising. *See* MTD, ECF Doc. #31 at 11–14. Of course, because
6 Mr. Tuohy’s comments were not made in commercial advertising, the Lanham Act
7 simply does not apply at all; “[i]f speech is not ‘purely commercial’—that is, if it does
8 more than propose a commercial transaction—then it is entitled to full ...’ protection.”
9 *Theodosakis v. Clegg*, 2017 WL 1294529, *17 (D.Ariz. 2017) (quoting *Mattel, Inc. v.*
10 *MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002); *Hoffman v. Capital Cities/ABC,*
11 *Inc.*, 255 F.3d 1180, 1185-86 (9th Cir. 2001)).

12 In its response, FireClean again points to a single fact – that Mr. Tuohy offers a t-
13 shirt for sale which promotes his website, Vuurwapenblog.com.² Based on a clearly
14 tongue-in-check suggestion that the t-shirt is a “better deal by weight” than a “two pack
15 of FireClean”, FireClean declares “these provably false statements were part of a false
16 advertising campaign designed to persuade customers who might have spent their money
17 on FireClean® [oil] to buy Mr. Tuohy’s t-shirts ... instead.” *Opp.* at 7:17–18.

18 This argument warrants two brief comments. First, despite a near pathological-
19 level of obsessive pleading detail, nothing in FireClean’s Complaint suggests that Mr.
20 Tuohy’s t-shirt marketing page contains any false or actionable statements, either in the
21 form of commercial advertising or common-law defamation. Second, and more
22 importantly, even assuming that Mr. Tuohy was engaged in a dastardly and malicious
23 plan to increase t-shirt sales by publishing blog articles discussing his investigation into
24 the “FireClean is Crisco” rumor, that is still not enough to implicate the Lanham Act with

25 ² As irrefutable proof of this damning fact (which was fully explained in Mr. Tuohy’s
26 original motion at page 10), FireClean has provided the Court with an impressive forensic
27 “PageVault Capture” showing the “Vuurwapen Blog T-Shirt” marketing page. *See* ECF
28 Doc. #31-1. To be clear, as already noted in his original motion, Mr. Tuohy agrees the
Court can and should properly consider this page, and that it need not convert the motion
under Rule 56 to do so.

1 respect to his other, clearly non-commercial commentary such as the three blog posts and
2 one Facebook post described in the Complaint. This is so because, “Commercial speech
3 does not retain its commercial character ‘when it is inextricably intertwined with
4 otherwise fully protected speech.” *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th
5 Cir. 2011). Thus, the mere fact that Mr. Tuohy is engaged in some type of commercial
6 activity is irrelevant absent a showing that FireClean directly competes with Mr. Tuohy
7 in the same market. *See Jurin v. Google, Inc.*, 695 F.Supp.2d 1117, 1122 (E.D.Cal. 2010)
8 (granting 12(b)(6) dismissal of Lanham Act false advertising claim because although
9 Google is a commercial entity, it “nonetheless does not directly sell, produce, or
10 otherwise complete [with plaintiff] in the building materials market.”)

11 In short, FireClean does not sell Vuurwapenblog.com t-shirts, and Mr. Tuohy does
12 not sell cooking oil. To the extent FireClean is unhappy with any of Mr. Tuohy blog
13 posts, those publications simply do not qualify as commercial speech, nor are they
14 advertising by a competitor. For those reasons, the Lanham Act claim fails.

15 **b. Mr. Tuohy’s Comments Qualify As Pure Opinion**

16 As noted at pages 15–18 of the original motion, all of Mr. Tuohy’s comments
17 about FireClean are protected by the First Amendment because those comments were
18 based on fully disclosed facts which FireClean does not plausibly allege are false;
19 “‘Where a publication sets forth the facts underlying its statement of opinion ... and those
20 facts are true, the Constitution protects that opinion from liability for defamation.’”
21 *Standing Comm. v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) (quoting *Lewis v. Time,*
22 *Inc.*, 710 F.2d 549, 556 (9th Cir. 1983)); *see also Partington v. Bugliosi*, 56 F.3d 1147,
23 1156 (9th Cir. 1995) (“[W]hen a speaker outlines the factual basis for his conclusion, his
24 statement is protected by the First Amendment.”)

25 FireClean offers a very limited response to this argument in its brief at 10, noting
26 that as a general principle of law, sometimes a statement labeled “opinion” may still be
27 actionable if it implies the existence of undisclosed defamatory facts. That point is
28 certainly true, but it has nothing to do with Mr. Tuohy’s argument – i.e., that in this

1 specific case, Mr. Tuohy fully disclosed all of the facts upon which his investigation and
2 commentary were based and FireClean does not dispute those facts.³

3 An extremely helpful case on this point is *Sharper Image Corp. v. Consumers*
4 *Union of U.S., Inc.*, 2004 WL 2554451, *3 (N.D.Cal. 2004), which involved highly
5 similar if not identical facts. In *Sharper Image*, the plaintiff manufactured an air cleaner
6 which defendant (the publisher of “Consumer Reports”) tested and ranked as “poor”.
7 Exactly as FireClean does here, the plaintiff claimed the defendant’s tests were “false”
8 because it challenged the testing protocols used; “Sharper Image contends that the testing
9 protocol employed by Consumers Union was ‘inapplicable’ to Sharper Image’s product”
10 and “even if the protocol employed is applicable ... ‘the protocol was incorrectly
11 applied.” *Sharper Image*, 2004 WL 2554451, *6.

12 Just as this Court should do, the *Sharper Image* court agreed that the defendant’s
13 statements regarding the effectiveness of a consumer product implicated matters of public
14 concern, and “Accordingly, ‘significant constitutional protections [are] warranted in this
15 area.’” *Id.* at *3 (quoting *Milkovich*, 497 U.S. at 15). Next, the district court noted that it
16 could not evaluate the defendant’s statements in isolation, but rather, “To determine
17 whether a statement is false, a court must ... ‘look at the nature and full context of the
18 communication and to the knowledge and understanding of the audience to whom the
19 publication was directed.’” 2004 WL 2554451, *14.

20 Based on that review, even though the plaintiff offered extensive evidence to show
21 that different testing protocols may have been better, the court dismissed all claims
22 because the defendant disclosed its test results to its readers, and “Sharper Image has not
23 shown that the test protocol used by Consumers Union was scientifically, or otherwise,
24 invalid, nor does Sharper Image suggest Consumers Union did not actually obtain the
25 results it reported as to the Friedrich.” *Id.* at 16. The same result follows here.

26
27 ³ FireClean’s response admits that it has not challenged these facts, apparently lacking a
28 sufficient Rule 11 basis to do so; “The Plaintiffs have not yet claimed the laboratory tests
about FIREClean®’s composition were fabricated.” Opp. at 10:21–22.

c. FireClean’s Allegations Contradict Exhibits To The Complaint

As noted on page 10 of Mr. Tuohy’s motion, “The Court need not accept as true ... allegations contradicting the exhibits attached to the complaint.” *Perry v. Peak Prop. & Cas. Ins.*, No. 2016 WL 7049472, at *2 (D. Ariz. Dec. 5, 2016). Despite this, FireClean’s opposition contains a table purporting to identify all of the false statements made by Mr. Tuohy. *See Opp.* at 21.

Rather than accepting FireClean’s allegation as true, this Court can and should review Mr. Tuohy’s actual statements set forth in the exhibits to the Complaint (cleaner copies were also attached to Mr. Tuohy’s motion). Upon review, the Court will quickly discover a disturbing fact – FireClean’s table of false assertions is flatly contradicted by the actual text of Mr. Tuohy’s article. In short, Mr. Tuohy either did not say what FireClean claims, or FireClean has grossly misrepresented the context of each statement. This Court need not accept FireClean’s allegations which contradict these exhibits.

Furthermore, to the extent FireClean’s claims are based on the idea that Mr. Tuohy defamed the company by falsely stating or implying that “FIREClean® is common cooking oil, soybean oil, or Crisco[.]” *Opp.* at 21:1–2, the Court should not rely on FireClean’s assertion that this is false. Instead, the Court should review FireClean’s own patent application attached to its Complaint as Exhibit A. As noted in Mr. Tuohy’s motion at 19–20, the patent application confirms that FireClean contains vegetable oil, or a mix of other oils, and that such oils are “about 100% of the total volume of the oil composition.” *FAC Ex. A*, ECF Doc. #11-1 at page 19 of 36. Based on this admission, FireClean has not and cannot plausibly (or ethically) claim that Mr. Tuohy’s statements about the “FireClean is Crisco” rumor were false.

III. CONCLUSION

For all the foregoing reasons, Defendant’s Motion to Dismiss should be granted.

DATED June 6, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2017 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following:

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