Genus Lifesciences Inc. v. Lannett Company, Inc. et al

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

GENUS LIFESCIENCES INC.,

Plaintiff, v. LANNETT COMPANY, INC., et al.,

Defendants.

Case No. 18-cv-07603-WHO

ORDER GRANTING LANNETT'S MOTION TO DISMISS IN PART AND DENYING IN PART; GRANTING FIRST DATABANK'S MOTION TO DISMISS; DENYING MOTION FOR RECONSIDERATION Re: Dkt. Nos. 55, 64, 66

Plaintiff complains that its competitors in the market for cocaine hydrochloride nasal spray, defendants Lannett Company Inc. and Cody Laboratories, Inc. falsely advertise, market and promote their product (which is not approved by the United States Food and Drug Administration) and unfairly compete with it in ways that violate the law. Genus also sues First Databank, Inc.

dismiss, that none of its claim

e to amend,

with prejudice.

54]. It has also filed a motion for reconsideration related to my dismissal with prejudice of its contributory false advertising claim against First Databank. [Dkt. No. 55]. Lannett and Cody, jointly, and First Databank move to dismiss the FAC. [Dkt. Nos. 64, 66]. For the reasons stated below, Lannett and Cody motion to dismiss is granted in part and denied in part, First

BACKGROUND Factual Background My previous Order contains a detailed factual background; I incorporate it by reference. 1 Order at 2-8. Genus manufactures an FDA approved spray under the brand name GOPRELTO® and Lannett and Cody manufacture an unapproved spray under the brand name C- - Genus newly alleges in the FAC that it has conducted a survey of , revealing that 73.4% of them falsely believe that C-Topical is FDA that Lannett only sells FDA approved products. Id. Genus

uses this survey evidence to bolster its

claims that C- misleading. Id. at ¶¶ 106-128. In addition, Genus alleges new survey data related to whether C-

Id. at ¶¶ 153-154.

In the FAC, Genus asserts: (i) new false advertising allegations based on several of - - Id. at ¶¶ 47, 52, 67-82; Exhibits 34-37 attached to FAC [Dkt. No. 54-2); (ii) new al catalog identifies C-Topical as generic (Id. at ¶ 105); (iii) new allegations related to other listing companies (Id. at ¶¶ 133- communications with Genus (Id. at ¶¶ 137-149, 169-205, 218-220); and (v) additional allegations in support of its Sherman Act claims against Lannett (Id. at ¶¶ 227-238). Procedural Background

In the Order, I granted Lannett motion to dismiss in part and denied it in part.

1 to cease manufacturing and distributing our unapproved C-Topical product as a result of an approved product on the market, the Company has agreed to cease manufacturing its unapproved C- Id. at ¶ 51. On , I ruled: (i) Genus may plead a false advertising claim against Lannett based on the implication that C-Topical is approved using survey data that 91% of pharmacists believe that all products pharmacists dispense are FDA approved; (ii) statements in SEC filings and investor calls that C- specific allegations that they were made for the purpose of influencing customers of cocaine

hydrochloride solutions to buy C-Topical, or were disseminated sufficiently to the relevant within the pharmaceutical industry; (iii) C- indication for oral, laryngeal, or nasal topical

particular spot on the outer surface of the body and the mucus membranes of the oral, laryngeal, C-Topical as unapproved to third party intermediaries and customers was sufficient to state a

claim as to customers based on the survey data, but not as to third party intermediaries without further supporting allegations; (v) the meta description on C- could support a Lanham Act claim because the landing page would not disabuse a consumer of the

notion that C- could be misleading in context combined with allegations that they conveyed the implied message that C-Topical was grandfathered or sold with FDA approval and deceived a significant portion of affirmatively false statement that its active pharmaceutical ingredients were FDA approved; and

(viii) the appearance and content of C- Lanham Act claim because they did not constitute an overt false statement and Genus failed to

allege that the advertising actually conveyed the implied message that C-Topical was FDA approved

and deceived a significant portion of recipients. Order at 9-20.

state a monopolization claim against Lannett based on false advertising for two reasons. Id. at 22- ed C-Topical

Id. Genus also failed to allege why these statements were not readily susceptible to neutralization by rivals. Id. d because Genus did not allege that it had been substantially foreclosed from the entire cocaine hydrochloride market. Id. at 23-24. Finally,

competition laws survived because they were premised on the same allegations of false advertising Id. at 25.

I granted claim failed because Genus was unable to allege that First Databank was anything more than a

reference database. Id. at 27- -Topical did not constitute commercial speech since it did not propose a commercial transaction between First Databank and consumers of cocaine hydrochloride. Id. Genus failed to allege that Lannett and First Databank had a quid-pro-quo relationship based on C-Topi Id. Its contributory false advertising claim against First Databank failed under the tests in Duty Free Ams., Inc. v. Estée Lauder Cos., 797 F.3d 1248, 1275 (11th Cir. 2015) and ADT Sec. Servs., Inc. v. Sec. One Int l, Inc., No. 11-cv- 05149-YGR, 2012 WL 4068632, at *1 (N.D. Cal. Sept. 14, 2012). For the Duty-Free test, Genus participated in it. Id. at 30-33. Under the ADT Services test, Genus did not allege that First

Databank either induced the primary Lanham Act violation by Lannett, or that First Databank continued to supply an infringing product to Lannett. The claims I dismissed against Lannett, Cody and First Databank were with leave to amend, except for advertising claim against First Databank, which was dismissed with prejudice. Id. at 33.

LEGAL STANDARD Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is facially plausible when

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation Id.

Twombly, 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the plaintiff. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is

In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir.

amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other faLopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

DISCUSSION I. OTION TO DISMISS

A. The Lanham Act Claims

1. Lanham Act Claims and FDA Approval The Lanham Act creates a private right of action for competitors to bring claims for false or misleading advertising, even if the challenged products are regulated by the FDCA. POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2233 (2014). Act claims that do not require specialized knowledge or interpretation o Belcher Pharm., LLC v. Hospira, Inc., No. 17-cv2353, 2018 WL 4643292, at *4 (M.D. Fla. Apr. 9, 2018). Id. (citing Innovative Health Sols., Inc. v. DyAnsys,

Inc., Case No. 14-cv-05207-SI, 2015 WL 2398931, at *8 (N.D. Cal. May 19, 2015)).

Id. (citing Church & Dwight Co. Inc. v. SPD Swiss Precision Diagnostics, 104 F. Supp. 3d 348, 362 (S.D.N.Y. 2015).

To state a false advertising claim under the Lanham Act, a plaintiff must allege: false statement of fact by the defendant in a commercial advertisement about its own or anothers

product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by lessening of the goodwill associated with its Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc., 758 F.3d 1069, 1071-72 (9th Cir. 2014) (citing Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997)). Plaintiffs must allege all five elements of the test in order to state a false advertising claim. Id.

advertising actually conveyed the implied message and thereby deceived a significant portion of JHP Pharm., LLC v. Hospira, Inc., 52 F. Supp. 3d 992, 1002-03 (C.D. Cal. 2014) (citing William H. Morris Co. v. Grp. W, Inc., 66 F.3d 255, 258 (9th Cir. 1995)).

Courts have found that when a Lanham Act claim is based on the mere implication that a drug was approved by the FDA, a plaintiff must also plead other facts to show that customers were actually confused. Par Sterile Prod., LLC v. Fresenius Kabi USA LLC, No. 14-cv3349, 2015 WL 1263041, at *4 (N.D. Ill. Mar. 17, 2015). In Par, the court found the following additional allegations to state a

Lanham Act claim: (i) that buyers believe all prescribed drugs identified on the Price Lists are FDA approved and (ii) that in some surveys 91% of pharmacists are actually confused about whether all drugs that appear on industry price lists are approved. Id. at *4.

2. Statements Made in SEC Filings and Investor Calls In the Order, I held that statements made by Lannett in its SEC filings or by its directors during investment calls stating that C- preliminary were not actionable because they were not accompanied by specific allegations that they were made for the purpose of influencing the customers of cocaine hydrochloride solutions to buy C-Topical, or were disseminated sufficiently to the relevant within the pharmaceutical industry. Order at 12-14 (citing Rice v. Fox Broadcasting Co., 330 F.3d

at 1170, 1181 (9th Cir. 2003) claims based on SEC filings and statements made on investor calls. Defendant Lannett Co. Inc. & at 7-8 [Dkt. No. 64]. It

change the non-commercial nature of these statements. Id. (citing FAC at ¶¶ 55, 64).

Genus contends that its claim is not based on the statements in SEC filings or investor calls alone. Instead, it attempts to bring those claims in combination with the advertisements describing C- - - , this renders the statements contained in the SEC filings and investor calls actionable. Plaintiff Genus

-9 [Dkt. No. 68]. According to Genus, read in the context of the overall complaint. Id. at 6.

Lanham Act claims must be evaluated on a statement-by-statement basis. Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1247-48 (11th Cir. 2002). In Johnson & Johnson, the Third Circuit reviewed a district court decision that reviewed several advertisements together, rather than on an ad-by-ad basis. Id. The court ruled that although courts may not assume context exposed to every advertisement in the campaign. Id. (internal citations and quotation marks omitted).

Here, Genus improperly asks me to assume context. There is no indication that consumers would have observed the SEC filings and statements in the investor calls along with the pre-1938 ads. It would be improper to assume that they did without specific supporting factual assertions. 2

As I held in the Order, Genus has failed to state a false advertising claim based on specific allegations that they were made for the purpose of influencing customers or were disseminated sufficiently to the relevant purchasing public. It does not follow that just because consumers might have seen the pre-1938 ads, they necessarily would also have seen the SEC filings or listened to the investor calls. The pre-1938 ads will be considered separately from the SEC filings and investor calls. granted.

3. The Pre-1938 Ads As discussed above, Genus attached four new C-Topical advertisements by Lannett to the FAC. FAC at ¶¶ 68-76; Exhibits 34-37. All four describe C-Topical as a pre-1938 drug

(Exhibits 34-37) been submitted to the FDA (Exhibits 35-37). These advertisements appeared on www.lannettdirect.com (Exhibit 34) and on www.entjournal.com (Exhibits 35-37).

Lannett argues that these advertisements are not actionable because Genus has not plausibly alleged that customers were misled by the s - material to customers. Lan. MTD at 12-13. It contends that Genus makes an unsupported - Id. To plead materiality, Lannett claims that Genus must plausibly allege that the

- approval status is material do not cover these statements. Id. It points out that the ad on

www.l -1938 drug that has not been Id. It does not address the statements related to

2 n this point is not relevant. Lan. Oppo. at 6 (citing Brown v. Collections Bureau of Am., Ltd, 183 F. Supp. 3d 1004, 1006 (N.D. Cal. 2016) (Seeborg, J.) (case involves no Lanham Act false advertising claims with multiple advertisements); Evans v. Gilmore, No. 15-cv- 01772-MEJ, 2015 WL 4463747, at *9 (N.D. Cal. July 21, 2015) (same). submission of an NDA and clinical study data to the FDA. - , sserts that: (i) C- Congress passed the landmark Federal Food, Drug, and Cosmetic Act; (ii) Lannett equates the two

understand what pre-1938 means, Lannett would not use the phrase; and (v) Genus specifically

- n.8. These arguments apply to the claim related to submission of an NDA and clinical data as well. Id. at 9.

I agree that Genus has sufficiently alleged that people in the market for a prescription drug such as C-Topical would know what pre-1938 means in this context or what the implication of submitting clinical data pursuant to an NDA would be. It has sufficiently alleged that the only reason Lannett would advertise C- -1938, or that they had submitted an NDA, would be to convince consumers that C-Topical or otherwise authorized by FDA. 3 Genus counters erroneously conflates FDA approval with FDA authorization. Id. It - , or one that has a submitted NDA, is FDA authorized, not FDA approved. Id. at 7-9. Thus, Genus claims, even where Lannett admits it has no FDA approval for C-Topical, it still falsely suggests that C-Topical is otherwise authorized. Id. And Genus asserts that it has adequately pleaded that customers would care whether C-Topical was sold with FDA authorization because it has alleged that the FDA approval status of a prescription drug is material to customers since approved drugs provide customers assurance concerning the quality of the product not afforded to unapproved prescription drugs. Id.

3 -Topical is a pre- are therefore presumed deceptive. Id. 7-8. Genus contends that the approval of its Goprelto product shows that Cocaine HCL has been proven safe and effective by the FDA. Id. Lannett does not respond to this argument. The claims based on literal falsity survive. It cites to its - Topical if they knew it was unapproved. Id. Therefore, according to Genus, because customers care

whether a drug is FDA-approved, they implicitly care whether the FDA authorizes a manufacturer to sell a drug. Id. alleged that customers care about FDA approval. But I am also persuaded by argument

on the difference between approval and authorization. The complaint does not allege that about it is a bridge too far. Genus has not actually pleaded that FDA authorization, versus

approval, is material to customers of cocaine hydrochloride. As a result, it has not stated a claim based on the pre-1938 ads. Its claims based on these ads are dismissed with leave to amend.

4. C- Packaging In the Order, I held that Genus had failed to state a claim based on the appearance and content of C- and the allegedly misleading similarities between it and the labeling and packaging of an FDA approved drug. Order at 19-20. I held that because the alleged representation was not an overt false statement, but was merely misleading in context, Genus would have to allege that it actually conveyed the implied message that C-Topical was FDA approved and deceived a significant portion of recipients. Id. In response to that guidance, customers; allegedly 73.4% of them falsely believed that C-Topical was FDA approved after reviewing its packaging. AC at ¶¶ 112, 114.

In its motion to dismiss, Lannett claims that this additional factual allegation is still insufficient because Genus does not allege that any of the information on the label or package is false. Lan. MTD at 8-10. According to Lannett, while the Lanham Act forbids misleading as well o Id. It Id. It

claims that it is required by federal law to include the various statements on the packaging and label and that information. Id. Finally, it customers were surveyed. Id.

Lan. Oppo. at 12. While it may not do so now. Its at C-Topicals labeling and packaging also misrepresents ; Genus instead attacks the

overall combination of C- as misleading consumers to believe that it is an FDA approved product. Id.

meaning to an otherwise true statement is distinguishable, and not just because that is not what

Genus is attempting to do. In Mead Johnson & Co. v. Abbott Labs., 201 F.3d 883, 886-87 (7th Cir.), opinion amended on denial of rehg, 209 F.3d 1032 (7th Cir. 2000), the statement alleged to

Doc Id. at 883. The parties disputed whether this implied to consumers that a majority of physicians strongly preferred the product for strictly professional reasons when some surveys only showed plurality support. Id. at 884. The Seventh Circuit found that the district court improperly Id. at 887. Genus is not using survey data to parse a particular phrase and establish that it is misleading, and Mead is unhelpful.

Allergan USA Inc. v. Imprimis Pharm., Inc., No. 17-cv-1551, 2018 WL 5919210, at *6 (C.D. Cal. Apr.

30, 2018) is not persuasive either. There, the challenged claim was whether it was misleading to describe a product that was FDA-approved as such when the defendant had not perfectly complied with federal laws. That is not the situation here. Genus is not attempting to challenge particular statements on the C- Finally, I am because it is required to include certain information on the package or label. This supposed

dilemma could be remedied by including a statement that C-Topical is not FDA-approved without running afoul of FDA labelling requirements.

- and packaging is denied.

5. In the Order, I held that general statement that it complied with FDA regulatory requirements were not associated with, or made in reference to, C-Topical, and were not false. Order at 17-18. But I held that they could be misleading in context if combined with allegations that they actually conveyed the implied message that C-Topical was grandfathered or sold with FDA approval and deceived a significant portion of recipients. Id. Genus has amended age for its drugs that are FDA approved. AC at ¶¶ 124-125.

Lannett counters in two ways. Lan. MTD at 11- arguing that

implied message that C-Topical was sold with FDA approval. Id. It does not allege that participants were asked if the general statements on Lan

them to believe that C-Topical was approved by the FDA, particularly given that the C-Topical page links to information stating that it is unapproved. Id. Second, it argues that its compliance with FDA regulatory requirements is squarely within the primary jurisdiction of the FDA and may not form the basis of a Lanham Act claim. Lan. MTD at 11-12. Genus points out that its survey provided numerous examples of customers identifying hat Lannett only sells FDA-approved drug

medications, giving impression

Generic drugs still require FDA and again e pleading stage. Regarding the Order, (citing Hospira Id. (citing Innovative Health, 2015 WL 2398931, at

*8).

claims based on statements on its website is denied.

6. Claims Related to the Route of Administration In the Or Administration, C- on. Order at 14-15.

- local (topical) anesthesia of accessible mucous membranes of the oral, laryngeal and nasal

Id. - rately

Id. Despite this ruling, Lannett moves again to dismiss claims based on C- - te of administration is

false. Lan. MTD at 13-15. Instead, Lannett claims, Genus complains that C- of uses for C-Topical is different than the FDA-approved label for Goprelto, which only lists a

nasal route of administration. Id. And, according to Lannett, Genus does not allege any facts

false. Id.

Rule of Civil Procedure 12(g). As the court in In re Anthem, Inc. Data Breach Litig., No. 15-MD-02617-LHK, 2016 WL 3029783, at *44 (N.D. Cal. May 27, 2016) observed:

provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from pr a claim upon which relief can be granted . . . may be raised: (A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion To summarize, under Rule 12(g)(2) and Rule 12(h)(2), a party that seeks to assert a defense that was available but omitted from an earlier Rule 12 motion can only do so in a pleading, a Rule 12(c) motion, or at trial. While Lannett states that its argument is based on that assertion is not well taken. The label and packaging for Goprelto was included in its initial complaint. Complaint at ¶¶ 31, 32 [Dkt. No. 1]. Lannett could have raised this argument in its initial motion to dismiss C- route of administration arguments is denied. 4 T technical me -18. Even if Goprelto is labeled , that does not given that its Lannett, in contrast, describes C- route of administration. For the reasons stated in the Order, this is false.

7. Statements to Third Parties I previously held that Genus failed to allege that Lannett violated the Lanham Act by not identifying C-Topical as unapproved to third party intermediaries because it did not include any supporting allegations that third parties were misled into believing that C-Topical was approved. Order at 15- -Topical did not state that it was unapproved and thus did not weigh in favor of, nor against, a finding that Lannett had misled McKesson. Id. I also found that since the price lists have C- that would support a finding that Lannett had correctly informed the price lists that C- Topical was an unapproved drug. Id. But I found -Topical as to pricing lists was a false statement. Id.

4 Lannett claims that it may raise its argument based on newly provided exhibits attached to the FAC. Lan. MTD at 13-

Lannett argues that Genus has not remedied the identified defects and that exhibits attached to the amended complaint demonstrate that Lannett told pricing list companies that C- Topical is unapproved. Lan. MTD at 15-17. Lannett points to two exhibits. Id. The first is Exhibit 45, which

Genus identifies as a document from First Databank. [Dkt. No. 54-2]. Under - Id. at 3. The second is Exhibit 46, which Genus identifies as a document from

the Medi-Span price list. [Dkt. No. 54- - Id. at 2.

In response, Genus argues that it has added allegations that support its claims that Lannett has McKesson advertise C- -19 (citing FAC at ¶ 130; Exhibit 46 at 2). Genus notes that despite identifying that C-Topical is unapproved, both First Databank and Medi-Span still promote it as generic. Id. (citing to Exhibits 45, 46).

It is not clear if exhibits 45 and 46 promote C-Topical as generic. Without a better explanation from Genus, I find that the exhibits do not support an inference that Lannett has m that Lannett has misrepresented the route of administration to third parties survives but its claim that Lannett has misrepresented C-Topical as generic is dismissed with leave to amend.

8. Genus raises a new Lanham Act claim s from 2016, 2014, and 2010, each of which characterizes C-39, 40. Lannett moves to dismiss because Genus has not pleaded any facts to suggest that these

product catalogs were available to customers after Genus entered the market. Lan. MTD at 17-18. Lannett contends that in order to have standing, Genus must allege that the statements contained in these catalogs proximately caused les or business reputation[.] Id. (citing , 572 U.S. 118, 140 (2014)). According to Lannett, its entry into the market continued to have a market effect, such that it suffered competitive injury Id. (citing Dyson, Inc. v. Garry Vacuum, LLC, No. 10-01626, 2011 WL 13268002, at *5-6 (C.D. Cal. Jan. 4, 2011); Sigma Dynamics, Inc. v. E. Piphany, Inc., No. 04-cv-0569-MJJ, 2004 WL 2648370, at *4 (N.D. Cal. June 25, 2004).

Genus responds that Lannett has not averred that it removed the statements from any 2017, 2018, or 2019 catalogs or stopped using its 2016 catalog after Goprelto was approved by the FDA in 2017. Lan. Oppo. at 9-10. It April 2019 and that Lannett has not produced more recent marketing materials. Id. It also argues that Lannett misreads its complaint; it is alleging that Lannett not only misled, but currently misleads, customers with its catalogs. Id. isleads customers by characterizing C- It states that this is -Topical is generic across its meta-description, product page, product catalogs, and other statements. Id. It seeks to combine its allegations with its survey data. Id. It also argues that Lannett relied on outdated authority and that Dyson and Sigma have been superseded by Lexmark, which holds that pleading proximate cause requires

Id. at 10-11 (citing 572 U.S. at 129-134). It states that it has done so

. Id. (citing FAC at ¶¶ 244, 252).

Genus has failed to plead facts suggesting that these product catalogs are currently used by Lannett

in advertising or promotion or made available to purchasers in any way. Id. That Genus was able to locate these older catalogs does not suggest otherwise. Its attempt to force Lannett to affirm that it no longer described C-Topical as generic in later catalogs is inappropriate at the pleading stage. Id.

Further, I agree with Lannett that Dyson and Sigma are still good law and consistent with Lexmark. Id. at 11-12. Lexmark

when deception of consumers causes them to withhold trade from the plaintiff. 572 U.S. at 133. Genus would need to show how its injury flowed directly from these catalogs prior to it entering the market. There is no reason to think this is impossible, but use of the present tense See misleads customers by characterizing C-

argument that this false advertising is also insufficient.

2014, and 2010 catalogs is granted. If discovery reveals similar statements in catalogs used by Lannett after Genus entered the market, Genus may amend its complaint.

9. Contributory False Advertising Claim Against Cody In the O against Cody was alse advertising and this, Lannett and Cody again argue that this claim fails not only because Genus fails to plausibly

allege violations of the Lanham Act, but also because Genus pleads no [facts] suggesting that

n.8. I will not revisit my earlier ruling.

B. The Sherman Act Claims In the Order,

-25 (citing Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482-83 (1992) (citation omitted)). Genus did not overcome the presumption that de minimis effect on competition. Id. at 22-23.

atements were not readily susceptible to neutralization or offset by rivals. Id. at 23. Besides its attempts to get First Databank to change C- Goprelto failed or would not be successful. Id. It did not plausibly allege why it was incapable of

Id. L monopolization claim based on false advertising also failed to allege how long had been online or how long Lannett had described C- Id. at 23. And its monopolization claim for listing practices failed because it did not establish that it had been substantially foreclosed from the entire cocaine hydrochloride market. Id. at 23-25. Genus merely described its efforts related to a single promotional channel, First Databank, and did not show that existing or potential alternative channels of promotion were also foreclosed. Id. In the FAC, Genus again brings its monopolization claims based on four things it claims Lannett does: (i) falsely characterizing C- in order to prevent customers from

buying, or even becoming aware of Goprelto; (ii) preventing C- Topical from receiving the same product code as Goprelto by prohibiting First Databank from ue and complete information about available products in order to exclude competition by deceiving and misleading healthcare professionals into believing that no competing cocaine hydrochloride solution product exists; and (iv) tricking doctors, patients, and other consumers into believing that C-Topical is FDA approved so they will not feel inclined to search for an FDA-approved alternative. FAC at ¶ 311.

1. Monopolization Claim Based on False Advertising Lannett argues that Genus still fails to overcome the advertising had a de minimis effect on competition. Lan. MTD at 19-22. To plausibly allege that

on competition was de minimis, a plaintiff must allege cumulative facts that would prove the statements were: (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible to neutralization or other offset by rivals. Am. Prof l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997) (citation omitted). 5

Id. According to Lannett, Genus still does not plead facts to explain why an advertising campaign promoting Goprelto as the only FDA approved

5 Lannett also makes arguments about the first four factors. Id. at 21. I have already rejected these arguments in my prior Order and do not need to revisit them. Order at 22-23. cocaine hydrochloride product would not be successful, or why any efforts to tell customers that C-Topical is unapproved or that its route of administration is misleading would fail. Id. It

are not becoming aware of Goprelto. Id. (citing FAC at ¶ 311). In opposition, Genus contends traditional advertising because its false and misleading statements were being presented to the

market through third-party price lists that appear to provide objective and unbiased information. Id. It also argues susceptible to neutralization or other offset because courts do not apply the test in Harcourt when

a defendant employs a third party to give false and misleading information the appearance of objectivity and lack of bias. Id.

The cases cited by Genus to argue that the test in Harcourt should not apply are not helpful. For example, in TYR Sport, Inc. v. Warnaco Swimwear, Inc., 679 F. Supp. 2d 1120, 1127 (C.D. Cal. 2009) plaintiff TYR and defendant Speedo were both designers and manufacturers of high-end swim wear for competitive swimmers. USA Swimming, the national governing body of the sport, hired co-defendant Mark Schubert to be the head coach of the national and Olympic teams. Id. Schubert

was and remained a paid spokesperson for Speedo. Id. TYR alleged that a combination of Speedo and USA Swimming made USA Swimming a de facto sales agent for Speedo. Id. In exchange for payments from Speedo, USA Swimming allegedly agreed to act as a promoter for Speedo and to make false statements that Speedos products were its rivals products were Id. Schubert misled national team members by claiming that the Speedo suit provided s rivals. Id. USA Swimming agreed to alter images of sponsored athletes to remove logos of Speedos competitors. Id. USA Swimming did not allow Speedos competitors to advertise in its official publication, sponsor USA Swimming-sanctioned meets, or to post signs at meets. Id. There were also allegations that Schubert went beyond criticism and threatened athletes who chose to wear and that he might use his . Id. at 1131. Some athletes ympics. Id.

It is unsurprising that the court in TYR found that the Harcourt test did not apply. de minimis comments about a rival seller [that] should caution us against attaching much weight to isolated

Id. at 1132 (citing Harcourt, 108 F.3d at 1152). It did not apply because the use of Schubert to make the disparaging statements gave the appearance of objectivity and lack of bias. Id. Even if his connection to Speedo was generally known, his coaching position may have given him added credibility that he otherwise would not have had solely as a Speedo spokesperson. Id.

The facts in this case are quite different. Unlike Schubert, the price lists did not make disparaging or false comments about Goprelto that would be difficult to rebut. If anything, Genus alleges that the pricing lists accurately describe Goprelto and inaccurately describe C-Topical. This is not the same as rebutting disparaging comments made by an ostensibly neutral third-party authority. 6 Killian Pest Control, Inc. v. HomeTeam Pest Defense, Inc., No. 14-cv-05239-VC 2015 WL 13385918, at *4 (N.D. Cal. Dec. 21, 2015) is also of no help. That case involved rival pest control companies where one misled homeowners into thinking that service by the other would damage their home pest control systems and it physically placed locks on the systems to prevent access. Id. Nothing like that happened here. Lastly, Genus cites , No. 17-cv-00220-LHK, 2019 WL 2206013 (N.D. Cal. May 21, 2019) and 6

Genus also cites , No. 11-cv-02652, 2012 WL 3778348, at *10 (S.D. Cal. Aug. 30, 2012) for the same proposition and it is inapplicable for the same reason. There, Prime Healthcare alleged that a competing healthcare Id. at *2. The union defendant and the healthcare provider defendant routinely cited these disparaging statements s poor quality of care. Id. at *10. That is not the scenario described in this case. false advertising on the pricing lists by expending sufficient time and money on marketing to educate customers, this w objective third parties. Lan. Oppo. at 22 n.21. But again, the conduct in these cases is too argument susceptible to neutralization or offset. Qualcomm involved wholly dissimilar allegations related to

a complex licensing scheme; the court did not even consider the Harcourt test. Premier involved the effect of non-union electrical workers underbidding union electrical workers because they did not

have to pay dues. Again, the court did not consider the Harcourt test.

Genus has not shown more than a de minimis effect on competition. It fails to explain why an advertising campaign to promote Goprelto as the only FDA approved cocaine hydrochloride solution would not be effective. Its arguments are undercut by its own survey data, which was told that the cocaine hydrochloride solution product sold by Lannett was not FDA approved,

- Topical; [C-Topical] if he or she had information that [C-Topical] was not FDA approved. FAC at ¶¶

153, 154.

Additionally, Genus now alleges that Lannett has been making false and misleading representations that C-Topical has a topical route of administration since at least 2013. Lan Oppo. at 21 (citing FAC at ¶ 167). In support of this pro filings. 7

FAC at ¶ 167. It has not shown that these filings were made for the purpose of influencing the customers of cocaine hydrochloride solution to buy C-Topical, or were disseminated sufficiently to the relevant purchasing public. They cannot be used to satisfy the

7 - -K filing to the U.S. Securities and Exchange Commission, the company described C- Lannett used identical language in its 2014, 2015, 2016, and 2017 10-K filings. In 2018, Lannett filed a 10-K document where it describes a competitor recei - fifth prong of the Harcourt test.

C. Monopolization Claim Based on Listing Practices

for four reasons. Lan. MTD at 22-24. First, Genus has not alleged that Lannett denied it access to First Databank or Medi-Span. Instead, according to Lannett, Genus claims that it is able to correctly list its products on the pricing lists used by the three largest wholesalers and that essentially the entire market can access information about Goprelto by either searching for Id. complaint rests on the narrow allegation that

if a customer re-orders C-Topical or searches directly for it, they will not also be notified of Goprelto. Id. price lists, and that there are no allegations that Lannett has prevented it from using other

promotional channels. Id. -ride -Topical. Id. concern about

because it has petitioned First Databank to remove C-Topical from its price list entirely. Genus responds that it has sufficiently alleged that Lan distribution channels through which cocaine hydrochloride is sold and therefore it has been

excluded from the entire market. Lan. Oppo. at 23-25. It argues that because virtually all cocaine

hydrochloride solution is purchased through the three largest drug wholesalers (AmerisourceBergen, Cardinal Health, and McKesson) and that all three wholesalers rely on First Databank and Medi- falsely identified route of administration impacts all distribution channels. Id. It contends that this does not affect the purchase decisions of only the because virtually all customers that look at either product must conclude that they do not share the same route of administration and would question whether they are equivalent and substitutable for the same procedure. Id. It asserts that this interferes with the primary purpose of the price lists, namely to collect accurate information regarding drug characteristics and pricing from a litany of sources so that doctors can easily compare products on a single platform. Id. Genus also argues that even though its product is still listed on the price lists, substantial foreclosure does not require total foreclosure, and courts routinely find that foreclosure has occurred even when a competitor has access to the market. Id. decisi harm potential competitors because it prevents customers from understanding that new cocaine

hydrochloride solution products entering the market can be substituted for C-Topical. Id. It states that this burden is disproportional because it is not one that Lannett was forced to overcome and is insurmountable. Id. Genus cites to an email from Cardinal stating that because of the different routes of administration on the labels for Goprelto and C-Topical, customers purchasing C-Topical would not see Goprelto as a equivalent. Id. (citing Exhibit 51). s as its c can still be found on the price lists that it alleges are the source of its problems. Its survey data - Topical lacked FDA approval they would not purchase it. FAC at ¶¶ 153, 154. It has not alleged about the approval status of C- Topical. Cocaine hydrochloride customers who are not simply reordering C-Topical would still be able to find Goprelto as well. Ge Qualcomm is not persuasive for the reasons described above. Its citation to Church & Dwight Co., Inc. v. Mayer Labs., Inc., No. 10-cv-4429- EMC, 2011 WL 1225912, at *6 (N.D. Cal. Apr. 1, 2011) is similarly unhelpful. There, the alleged scheme involved rebates on condoms from the defendant manufacturer that incentivized drug stores to use a certain percentage of their display area on only preventing competitors from displaying their products. Id. at *2. Here, C-Topi

price databases does not foreclose a large percentage of display space as it did with physical stores in Church. Both C-Topical and Goprelto are displayed on an online price database; unlike shelf space, an online price database is not a zero-sum display. Church is unhelpful to Genus. I dismiss with prejudice.

D. The State Law Claims

Competition Law claims because they are premised on the same allegations as the Lanham Act Claims. Lan. MTD at 24-25. The Order already rejected this argument. Genus has sufficiently pleaded reason and its motion to dismiss state law claims is denied. II. ION TO DISMISS

In the O against First Databank failed because a Lanham Act claim must be based on commercial speech and First Databank was not engaging in commercial speech when it listed C-Topical (or Goprelto) on its pricing list. Order at 25-30. I reasoned that First Databank does not propose a

commercial transaction between it and customers of cocaine hydrochloride and Genus failed to allege that the information contained in its pricing ial transaction with First Databank. Id. at 27. I observed that Genus does not contend that First Databank will be more successful or have a monetary interest in whether customers of cocaine hydrochloride choose to buy C-Topical rather than Goprelto. Id. There were no allegations of a quid-pro-quo relationship between Lannett and First Databank, where First Databank would receive a kickback from sales of C-Topical that it would not receive from sales of Goprelto. Id. at 27-28. Indeed, the allegations having a comprehensive list of pharmaceutical products, not that any particular pharmaceutical product should be more successful than another. Id. at 28. Lannett has amended its complaint to provide more detail on how First Databank operates and the role of price lists in the pharmaceutical industry. FAC at ¶¶ 169-198. None of these allegations supports a finding that First Databank has any monetary interest in whether customers of cocaine hydrochloride choose to buy C-Topical rather than Goprelto. Accordingly, First Databank moves to dismiss. 8

8 First Databank also makes a number of other arguments that I need not reach because the commercial speech issue is dispositive. Id. at 7-9. Genus contends that First Databank falsel

at 7-11. Count V states that:

administration. First Databank falsely and misleadingly assigns a CFI

code to reflect the route of administration and falsely and misleadingly assigns GOPRELTO® a different CFI code. FAC at ¶ 284. This database

This argument fails on the merits as well. As First Databank contends, Genus cannot show a causal link between these general statements and its alleged injuries sufficient to confer standing under the Lanham Act. FD Reply at 2. To the extent that First Databank customers rely upon it in making decisions, they are relying on the database itself, not generic statements about the pricing list as a whole. These general statements do not relate to C-Topical or Goprelto and cannot form

In addition, courts have generally found that false advertising claims cannot be premised on these sorts of general statements of accuracy or reliability. Courts may determine as a matter of law whether a statement is puffery. Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc., 911 F.2d 242, 245 (9th Cir. puffery when considering a motion to dismiss pursuant to Federal Rule of Civil Procedure whether a statement constitutes puffery examine whether it contains general assertions that say

nothing about the specific characteristics or components of a product or whether it includes puffery in a variety of contexts is that consumer reliance will be induced by specific rather than

general assertions. Advertising which merely states in general terms that one product is superior is

not actionable. However, misdescriptions of specific or absolute characteristics of a product are Id. at 246 (citing Smith-Victor Corp. v. Sylvania Elec. Products, Inc., 242 F. Supp. 302, 308-

numerically the alleged superi

The statements identified by Genus have been held to be non-specific puffery in other cases. See In re Seagate Tech. LLC Litig., For the same reasons, .

concerning - the Order. I will not revisit it here. Order at 25-30. abank is dismissed with prejudice.
III. MOTION TO RECONSIDER ON CONTRIBUTORY FALSE ADVERTISING

In the Databank with prejudice. Order at 30-33. I observed that it was unclear in this Circuit if contributory false advertising could apply to non-commercial speech in any context because the Lanham Act applies only to commercial speech. Id. at 30 (internal citations omitted). Even if it does fails under either the Eleve articulated in Duty Free Ams., Inc. v. Estée Lauder Cos., 797 F.3d 1248, 1275 (11th Cir. 2015) 9

or the test in ADT Sec. Servs., Inc. v. Sec. One Int l, Inc., No. 11-cv-05149-YGR, 2012 WL 4068632, at *1 (N.D. Cal. Sept. 14, 2012). Id. at 31-33.

The claim failed the test in Duty Free because Genus did not allege that First Databank

advert Id. at 32. I held that the allegations in the complaint did induced Lannett to represent its route of administration

9 To date, no other court in the Ninth Circuit has applied the Duty Free test. Id. I then found that First Databank failed the test articulated in ADT because Genus did not allege that First Databank intentionally induced the primary Lanham Act violation by Lannett or that First Databank continued to supply an infringing product to Lannett. Id. at 32-33. I observed that:

Although the tests in Duty Free and ADT. Sec. Servs. are different, the same theory animates both: the party accused of contributorily infringing essentially d It cannot state a claim for contributory preferred test. Order at 33. Genus now moves for leave to file a motion for reconsideration, entry of partial judgment, or to allow it to certify the issue for appeal to the Ninth Circuit. [Dkt. No. 55]. Genus argues that the Ninth Circuit recently reaffirmed the broad legal standard for contributory liability as requiring Id. (citing VHT, Inc. v. Zillow Group, Inc., 918 F.3d 723 (9th Cir.

Duty Free and that it was error to require alle Id.

In its proposed motion, Genus elaborates that in VHT, the Ninth Circuit broadly articulated the standard for contributory liability in a copyright infringement case as follows:

[Proposed] Motion for Reconsideration Pursuant to Civil Local Rule 7-9 or, Alternatively, Certification for Appeal Pursuant to FRCP 54(b) and/or 28 U.S.C. § 1292(b) (Recon. Mot.) at 4 (citing VHT, 918 F.3d at 745 (internal quotation marks omitted)) [Dkt. No. 56-1]. Genus states that this decision was p motion to dismiss. Id. Were I to import the standard from VHT, Genus argues, its contributory k has control over its database, it is one of the main channels through which Lannett propagated its false claims, Id. at 4-5. After Genus filed its motion to reconsider, I issued an order for response. [Dkt. No. 72]. First Databank opposed because although VHT was not decided until after Genus filed its opposition, the opinion was issued weeks before oral argument and Genus did not raise the decision then. Id. at 1. More significantly, VHT is a copyright case, not a Lanham Act case, and Id. First Databank states that it is unclear how the standard in VHT could be applied to a false advertising claim without collapsing the secondary claim into the primary false advertising claim. Id. It non-commercial information based on allegations that the information they publish contributes to

Id.

VHT involved a professional real estate photography studio that brought a copyright infringement action against the owner of a real estate marketplace website. 918 F.3d at 730. The plaintiff alleged that the owners use of photos on its website exceeded scope of studios licenses to brokers, agents, and listing services who provided photos to website. Id. The court held that in

its system, and can take simple measures to prevent further damage to copyrighted works, yet

Id. at 745 (internal citations omitted).

I agree with First Databank that it is not clear that importing the material contribution standard from the online copyright context to Lanham Act false advertising claims makes sense. To do so would open up a vast and currently non-existent scope of liability for all publishers of non-commercial information. Copyright has its own body of law that is separate and apart from the Lanham Act; 10

10 Genus also provides argument related to whether First Databank can be contributorily liable for -7. Because the material contribution issue is dispositive, I need not reach this argument. dismissed with prejudice. I also decline to enter partial judgment or to certify the issue for appeal. I agree with First advertising claims against Lannett and Cody. Certification for appeal will delay the case and drive

up the costs of the parties in violation of the principles of Federal Rule of Civil Procedure 1.

CONCLUSION

denied in part. Genus may amend its Lanham Act claims against Lannett and Cody. Its Sherman Act

claims are dismissed with prejudice. also granted with prejudice.

IT IS SO ORDERED. Dated: September 3, 2019

William H. Orrick United States District Judge