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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 ThermoLife International, LLC,
10 Plaintiff,
11 vs.
12 Gaspari Nutrition, Inc.,
13 Defendant.

No. CV 11-01056-PHX-NVW

ORDER

14 Before the Court is Defendant's Motion to Dismiss Counts 1, 2, 3, 4, 5, 6, 7, 8, 9,
15 and 11 of Plaintiff's First Amended Complaint (Doc. 39). The Motion will be denied in
16 part and granted in part for the reasons stated below.

17 **I. BACKGROUND FACTS**

18 Plaintiff ThermoLife International, LLC ("ThermoLife") and Defendant Gaspari
19 Nutrition, Inc. ("Gaspari") are both suppliers of dietary supplements targeted at
20 competitive and amateur bodybuilders. Plaintiff claims that Gaspari falsely and
21 misleadingly marketed and sold its products – specifically Defendant's Novedex XT,
22 Halodrol Liquigels, Halodrol MT, and SuperPump 250 products – as safe, natural,
23 complaint with the federal Dietary Supplement Health and Education Act of 1994
24 (DSHEA), and legal. Plaintiff makes nine separate claims of false advertising related to
25 Defendant's claims that (1) it only sells legal products; (2) Novedex XT is DSHEA
26 compliant; (3) Novedex XT is naturally occurring; (4) Novedex XT is safe; (5) Halodrol
27 Liquigels and Halodrol MT are DSHEA compliant; (6) Halodrol Liquigels and Halodrol
28 MT are safe; (7) Halodrol Liguigels and Halodrol MT contain 95% 3,4-

1 divanillytetrahydrofuran; (8) SuperPump 250 contains turkesterone; and (9) SuperPump
2 250 contains effective doses of turkesterone. In 2010, the FDA issued reports stating that
3 Defendant's Novedex XT and Halodrol products were not DSHEA compliant. Plaintiff
4 asserts that Defendant's products contain unsafe materials that are not naturally
5 occurring, even though they were advertised as safe and naturally occurring.

6 In addition, Plaintiff asserts that it tested material that was marketed and sold as
7 95% 3,4-divanillytetrahydrofuran and concluded that commercial production of 95% 3,4-
8 divanillytetrahydrofuran was cost prohibitive, and that therefore Defendant's Halodrol
9 products could not actually contain 95% 3,4-divanillytetrahydrofuran. Plaintiff also
10 asserts that it tested Defendant's SuperPump 250 product and did not detect the presence
11 of any turkesterone. Even if SuperPump 250 were to contain some small trace of
12 turkesterone, such trace amounts would not be an effective dose. Accordingly, Plaintiff
13 asserts Defendant falsely advertised that the SuperPump 250 contained effective levels of
14 Turkesterone. Plaintiff cites to various statements made by Defendant and its agents
15 from 2006 until 2010 to support its claims.

16 Plaintiff manufactures dietary supplements that are in direct competition with
17 Defendant's products, such as Plaintiff's T-BOL, E-BOL, Tribosten, and Ecdysten
18 products, and that it sells and markets its products through the same stores and channels
19 as Defendant. Plaintiff also claims to be the market leader in the use of turkesterone in
20 dietary supplements and that it has an exclusive distribution agreement with the only
21 company known to produce turkesterone for use in dietary supplements. Plaintiff asserts
22 that it has been harmed by Defendant's false and misleading advertisements related to
23 these products through a direct diversion of Plaintiff's sales and a lessening of the
24 goodwill associated with its products.

25 Finally, Plaintiff alleges that Defendant improperly prevented Plaintiff from
26 attending and exhibiting at the 2009 Mr. Olympia Weekend Expo bodybuilding
27 competition and trade show by contacting American Media, Inc., the organizer of the
28 event, and threatening to pull its advertising if ThermoLife was allowed to exhibit at the

1 event. Plaintiff claims Defendant's actions caused Plaintiff to lose business opportunities
2 and unrecoupable costs it had expended in anticipation of attending the competition, such
3 as plane tickets, hotel reservations, and planning its exhibition. Plaintiff claims
4 Defendant intentionally and maliciously interfered with its contractual relationship with
5 American Media, Inc., as well as preventing Plaintiff from earning business and goodwill
6 at the event.

7 On December 16, 2011, the Court granted Defendant's motion to dismiss
8 Plaintiff's original complaint and gave Plaintiff leave to file an amended complaint (Doc.
9 34), which Plaintiff filed on January 13, 2012 (Doc. 38). Plaintiff's amended complaint
10 raises the above-discussed nine counts for false advertising under 15 U.S.C. §
11 1125(a)(1)(B) (hereinafter "the Lanham Act") related to statements made about
12 Defendant's products, one count for common law unfair competition, and one count for
13 tortious interference with business and business expectancy. Defendant now moves to
14 dismiss the counts for false advertising and tortious interference.

15 **II. LEGAL STANDARD**

16 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material
17 fact are assumed to be true and construed in the light most favorable to the nonmoving
18 party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). To avoid dismissal, a
19 complaint must contain "only enough facts to state a claim for relief that is plausible on
20 its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial
21 plausibility when the plaintiff pleads factual content that allows the court to draw the
22 reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*
23 *Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). However, the principle that a court
24 accepts as true all of the allegations in a complaint does not apply to legal conclusions or
25 conclusory factual allegations. *Id.* at 1949, 1951. "Threadbare recitals of the elements of
26 a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949.
27 "A plaintiff's obligation to provide the grounds of his entitlement to relief requires more
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1 than labels and conclusions, and a formulaic recitation of the elements of a cause of
2 action will not do.” *Twombly*, 550 U.S. at 555.

3 **III. ANALYSIS**

4 Defendant moves to dismiss Plaintiff’s counts for false advertising under the
5 Lanham Act for lack of standing and untimeliness. Defendant also moves to dismiss
6 Plaintiff’s count for tortious interference for failing to state sufficient facts to support that
7 claim.

8 **A. Standing Under the Lanham Act**

9 Defendant claims that the first nine counts of Plaintiff’s amended complaint fail
10 because Plaintiff has not suffered a commercial injury based on Defendant’s alleged
11 misrepresentations and therefore does not have standing to bring a claim for false
12 advertising under the Lanham Act. In order for a plaintiff to have standing to state a
13 claim under the false advertising provisions of the Lanham Act, the plaintiff must allege
14 “(1) a commercial injury based upon a misrepresentation about a product; and (2) that the
15 injury is ‘competitive,’ or harmful to the plaintiff’s ability to compete with the
16 defendant.” *Trafficschool.com, Inc. v. EDriver Inc.*, 653 F.3d 820, 826 (9th Cir. 2011)
17 (quoting *Jack Russell Terrier Network of Northern Ca. v. Am. Kennel Club, Inc.*, 407 F.3d
18 1027, 1037 (9th Cir. 2005)). Defendant claims that because Plaintiff has not sufficiently
19 alleged that any of its products compete directly with any of Defendant’s products and
20 that it has failed to allege anything beyond speculative injury, it does not have standing to
21 bring these claims.¹

22 The Ninth Circuit’s recent opinion in *TrafficSchool* analyzed a standing challenge
23 on the basis of an alleged lack of non-speculative, concrete injury and held that “a false

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25 ¹ Defendant also claims that to the extent Plaintiff purports to bring this action on behalf
26 of consumers hurt by Defendant’s false advertising, such injury is not actionable under
27 Section 43(a) of the Lanham Act (Doc. 39 at 2). However, Plaintiff clearly alleges direct
28 competitive harm to itself; it does not rely on injury to consumers as the basis for its false
advertising claims.

1 advertising plaintiff need only believe that he is *likely* to be injured in order to bring a
2 Lanham Act claim.” 653 F.3d at 825. *TrafficSchool* makes clear that “when [a] plaintiff
3 competes directly with [a] defendant, a misrepresentation will give rise to a presumed
4 commercial injury that is sufficient to establish standing.” *Id.* at 827. Here, Plaintiff has
5 specifically alleged that it is a direct competitor of Defendant and sells products that are
6 competitive with Defendant’s, including its T-BOL, E-BOL, Tribosten, and Ecdysten
7 products.² Plaintiff has also alleged that it is the market leader in dietary supplements
8 containing turkesterone and that Defendant’s false advertising of its SuperPump 250 as
9 containing effective doses of turkesterone, caused the SuperPump 250 to be in direct
10 competition with Plaintiff’s production of supplements containing turkesterone. Plaintiff
11 is not simply alleging damage to the “industry overall resulting from” Defendant’s false
12 advertising or basing its claim on injury to misled consumers. *Skydive Arizona, Inc. v.*
13 *Quattrochi*, 2006 WL 2460595, at *10 (D. Ariz. 2006). Rather, it is alleging direct
14 competitive injury in the form of diversion of its own sales to Defendant’s falsely
15 advertised products.

16 While Plaintiff may not be able to muster specific and concrete non-speculative
17 evidence of any injury to allow a damages recovery at a later stage, it has raised a
18 presumption of injury – diversion of its own sales and goodwill to Defendant – sufficient
19 to confer standing under the Lanham Act. Accordingly, Defendant’s motion to dismiss
20 Plaintiff’s false advertising claims for lack of standing will be denied.

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24 ² Defendant’s unsupported attempt in its reply (Doc. 44 at 2-3) to narrowly define the
25 universe of “competitive” products to only products which are effectively identical and
26 advertised as such is unavailing. Plaintiff’s allegations that both Plaintiff and Defendant
27 sold dietary supplements containing similar ingredients, serving similar purposes, and
28 targeting a specific audience (here, competitive and amateur bodybuilders) is sufficient to
allege direct competition and justify the presumption of competitive injury at the motion
to dismiss stage.

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B. Statute of Limitations Under the Lanham Act

Defendant also claims that Plaintiff’s false advertising claims are barred by the statute of limitations. Defendant asserts the most analogous state statute of limitations for Plaintiff’s claims is the one year statute of limitations under the Arizona Consumer Fraud Act, A.R.S. § 44-1522. Because Defendant’s alleged false advertising occurred more than one year prior to the filing of Plaintiff’s complaint on May 26, 2011, Defendant argues Plaintiff’s Lanham Act claims are time barred. Plaintiff claims in response that, under *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836 (9th Cir. 2002), laches, not the statute of limitations, applies to its claims. Plaintiff further asserts that the proper laches period is three years, and that it is inappropriate for Defendant to claim Plaintiff’s claims are time barred at this stage in the proceedings since it was not previously raised and there is no showing that Defendant would suffer prejudice or that Plaintiff’s delay in filing suit was unreasonable.

The issue before the court in *Jarrow* was “whether laches bars a manufacturer of nutritional supplements from suing its competitor for false advertising under the Lanham Act when the analogous state statute of limitations period [had] expired.” *Jarrow*, 304 F.3d at 832. Defendant had moved for summary judgment “on the grounds that the statutes of limitation and laches bar[red] Jarrow’s claims.” *Id.* at 833. The district court had dismissed Jarrow’s action as barred by laches but did not address the statute of limitations issue. *Id.* Therefore, the Ninth Circuit limited its review to the district court’s determination of a laches bar to plaintiff’s claims for false advertising. The court first noted that it was “well established that laches is a valid defense to Lanham Act claims, including those for false advertising.” *Id.* at 835 (citations omitted). It went on to note that

[W]hile laches and the statute of limitations are distinct defenses, a laches determination is made with reference to the limitations period for the analogous action at law. If the plaintiff filed suit within the analogous limitations period, the strong presumption is that laches is inapplicable. ... However, if suit is filed

1 outside of the analogous limitations, courts often have presumed that laches is
2 applicable.

3 *Id.*

4 In reviewing the application of laches to plaintiff's claims, the court noted that the
5 "proper interplay between laches and the statute of limitations for Lanham Act claims is
6 somewhat elusive." *Id.* at 836. The court acknowledged that Ninth Circuit cases had
7 stated that the Lanham Act "borrows a state limitations period as a statute of limitations
8 defense," but had "failed to consider whether Congress intended that laches, as opposed
9 to the statute of limitations, be the sole timeliness defense available to [claims for false
10 advertising under the Lanham Act]." *Id.* The court noted that the "equitable character"
11 of false advertising claims under the Lanham Act might support the idea that only laches,
12 and not a statute of limitations, be available as a time bar. However, although *Jarrow*
13 engaged in this discussion, the court did not reach the issue of whether laches is the sole
14 time bar to claims for false advertising under the Lanham Act. Rather, it simply
15 conducted its laches analysis with reference to the most analogous state limitations
16 period, which the parties agreed was California's three year limitations period for fraud.
17 *Id.* at 838 (citing *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187 (2d Cir. 1996), which
18 borrowed New York's fraud period for a Lanham Act false advertising claim). The court
19 went on to hold that "in determining the presumption for laches, the limitations period
20 [for a false advertising claim] runs from the time the plaintiff knew or should have known
21 about his § 43(a) cause of action." *Id.* Because plaintiff was aware of defendant's false
22 advertising more than three years prior to commencing the suit, the court applied a
23 presumption of laches and analyzed whether defendant had shown that plaintiff's delay in
24 filing was unreasonable and whether defendant would be prejudiced thereby, and
25 ultimately concluded that plaintiff's suit was barred by laches. *Id.* at 838-41.

26 *Jarrow* therefore does not resolve the currently pending dispute as to whether the
27 statute of limitations period, or only laches, is available as defense against Plaintiff's
28 claims. Defendant contends that the statute of limitations can apply to bar Plaintiff's suit

1 and cites *Theodosakis v. Contract Pharmacal Corp.*, 172 Fed. Appx. 772, 2006 WL
2 7739222 (9th Cir. 2006), for the proposition that Arizona’s one year limitations period,
3 under the Arizona Consumer Fraud Act is the most analogous state statute of limitations.
4 In that unpublished decision, the Ninth Circuit did not determine which state statute of
5 limitations period is appropriate in analyzing claims under the Lanham Act; rather, it
6 simply held that the district court “properly granted summary judgment against
7 [plaintiff]’s claims regardless of which Arizona limitations period applies (the one-year
8 consumer fraud, trademark statute or the three-year fraud statute) because [plaintiff]
9 knew about the potential infringement” more than three years prior to his filing suit. *Id.*
10 at *1. Nor did *Theodosakis* resolve whether laches is the exclusive time bar defense to a
11 Lanham Act claim; it simply noted that plaintiff made this argument, but that it was
12 unnecessary to decide that question because the district court “did not abuse its discretion
13 in finding that laches barred this action as well.” Accordingly, *Theodosakis* is unhelpful
14 in deciding the question before the Court. Defendant cites no further case law for its
15 position that a one year limitations period should bar Plaintiff’s claims here.

16 Plaintiff cites *Au-Tomotive Gold, Inc. v. Volkswagen of Amer., Inc.*, 603 F.3d 1133
17 (9th Cir. 2010), for the proposition that Arizona’s three-year statute of limitations for
18 fraud applies to provide the laches period for Lanham Act claims. Defendant contends
19 that *Au-Tomotive Gold* is inapplicable here, as that case dealt with a Lanham Act claim
20 for trademark infringement and dilution, not false advertising. However, *Au-Tomotive*
21 *Gold* relied on *Jarrow*, a false advertising case, in its laches analysis, and made no
22 distinction based on the underlying nature of plaintiff’s claims. *Id.* at 1139-40. Further,
23 it held without qualification that “Arizona’s three-year statute of limitations for fraud
24 applies to Lanham Act claims.” *Id.* at 1140. The Court finds no persuasive reason to
25 divert from this holding, and accordingly agrees that Arizona’s three year fraud
26 limitations period is the proper limitations period.

27 Whether the Court conducts a statute of limitations or a laches analysis is not
28 controlled by any of the authority presented by the parties. However, the Court need not

1 decide this issue because Plaintiff's claims cannot be determined to be time-barred by
2 either the statute of limitations or laches at this stage in the proceedings. While Plaintiff
3 alleges Defendant made false statements as far back as 2007, it cannot be said from the
4 pleadings that Plaintiff discovered then that the statements were false. Rather, a plausible
5 inference is that Plaintiff did not know of the falsity of Defendant's statements until
6 Defendant's products began being recalled (in 2009 and 2010) and Plaintiff
7 independently conducted tests of Defendant's products to determine whether Defendant's
8 advertising was false (in 2009), all of which falls within the three year limitations period.
9 Defendant's motion to dismiss Plaintiff's Lanham Act claims on the basis that they are
10 time-barred will therefore be denied.

11 **C. Tortious Interference With Business Expectancy**

12 Plaintiff has raised a claim for tortious interference with business expectancy
13 related to Defendant's alleged improper actions in preventing Plaintiff from exhibiting at
14 the 2009 Mr. Olympia Weekend Expo. Plaintiff claims Defendant interfered with
15 Plaintiff's contract with American Media, Inc., the company organizing the weekend
16 expo, and Plaintiff's business expectancy with potential customers at the weekend expo.
17 Defendant has moved to dismiss Plaintiff's claim for tortious interference with business
18 expectancy with potential customers at the weekend expo because Plaintiff has not
19 sufficiently alleged any specific party with which it expected to do business or identified
20 any specific damages resulting from the alleged interference.³

21 To state a claim for tortious interference with business expectancy, a plaintiff must
22 allege "(1) [t]he existence of a valid contractual relationship or business expectancy; (2)
23 knowledge of the relationship or expectancy on the part of the interferer; (3) intentional
24 interference inducing or causing a breach or termination of the relationship or
25 expectancy; and (4) resultant damage to the party whose relationship or expectancy has

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27 ³ Defendant has not moved to dismiss Plaintiff's claim for tortious interference with
28 respect to its claim regarding Plaintiff's relationship with American Media, Inc.

1 been disrupted.” *Wagenseller v. Scottsdale Mem’l Hosp.*, 147 Ariz. 370, 386, 710 P.2d
2 1025, 1041 (1985) (superseded by statute in other respects). Any alleged interference
3 must have been both intentional and improper. *Id.* at 387-88, 710 P.2d at 1042-43. A
4 plaintiff must be able to “identify a specific relationship with which the defendant
5 interfered” to state a plausible claim for relief; the speculative hope of a business
6 expectancy is not enough. *Dube v. Likins*, 216 Ariz. 406, 414, 167 P.3d 93 (Ct. App.
7 2007).

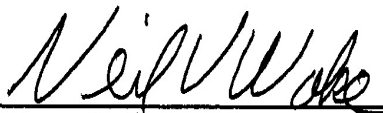
8 Plaintiff has only conclusorily asserted that it would have earned business at the
9 Mr. Olympia Weekend Expo if it had been allowed to exhibit there. Such an allegation is
10 insufficient to state a claim for tortious interference with business expectancy. Plaintiff
11 identifies customers that attended the Mr. Olympia Weekend Expo as the individuals
12 with whom it would have formed business relationship absent Defendant’s alleged
13 interference. However, these allegations do not rise beyond the “mere hope” of a
14 business expectancy, nor can Plaintiff sufficiently show that it suffered any specific loss
15 because of Defendant’s alleged interference. *See Dube*, 216 Ariz. 412-13 (noting a
16 “claim for tortious interference with a business expectancy is insufficient unless the
17 plaintiff alleges facts showing the expectancy constitutes more than a mere ‘hope’”
18 (citing *Marmis v. Solot Co.*, 117 Ariz. 499, 502, 573 P.2d 899, 902 (Ct. App. 1977)).

19 Plaintiff’s reliance on *Antwerp* and *Edwards* is misplaced. In *Antwerp*, the court
20 held that the defendant’s publication of defamatory reports about plaintiff’s business
21 would likely have deterred potential customers and therefore supported a claim for
22 tortious interference. 130 Ariz. 523, 530, 627 P.2d 733, 740 (1981). In *Edwards*, the
23 court held that defendant’s interference in contract negotiations between plaintiff and a
24 third party for the purchase of plaintiff’s mining claims supported a claim for tortious
25 interference because there was a specific, identifiable relationship with which defendant
26 had interfered, even though no contract was actually formed. 115 Ariz. 313, 314, 565
27 P.2d 190, 191 (Ct. App. 1997). Here, while Plaintiff certainly intended to form business
28 relationships with the customers at the expo, whether Plaintiff actually would have made

1 a profit or entered into any contract with customers at the weekend expo is too
2 speculative to form the basis for an independent tortious interference claim.
3 *See Soilworks, LLC v. Midwest Indus. Supply, Inc.*, 575 F.Supp.2d 1118, 1128 (D. Ariz.
4 2008) (noting speculative damages that cannot be established with reasonable certainty
5 may not form the basis for a tortious interference judgment). Further, to the extent
6 Plaintiff can establish any damages related to potential business expectancies it would
7 have yielded had it been permitted to attend the weekend expo, these will be recoverable
8 under Plaintiff's claim for tortious interference with its contract with American Media,
9 Inc., which Defendant has not moved to dismiss. Accordingly, Defendant's motion to
10 dismiss Plaintiff's claim for tortious interference with its prospective business
11 relationships with customers at the Mr. Olympia Weekend Expo will be granted.

12 IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Counts 1, 2,
13 3, 4, 5, 6, 7, 8, 9, and 11 of Plaintiff's First Amended Complaint (Doc. 39) is denied as to
14 counts 1, 2, 3, 4, 5, 6, 7, 8, and 9, and granted as to count 11 to the extent Plaintiff alleges
15 interference with business expectancy of relationships with consumers at the Mr.
16 Olympia Weekend Expo. Count 11 is dismissed as directed in this Order without leave to
17 amend.

18 Dated this 16th day of May, 2012.

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22 _____
23 Neil V. Wake
24 United States District Judge
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