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

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9 FLP, LLC, an Arizona limited liability  
company,

10 Plaintiff,

11 v.

12 Kimberly Wolf, an individual,

13 Defendant.  
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No. CV17-0214 PHX DGC  
CV17-0773 PHX DGC  
(Consolidated)

**ORDER**

15 Defendant Kimberly Wolf moves to dismiss Plaintiff FLP, LLC's second and third  
16 claims, and part of Plaintiff's first claim pursuant to Rule 12(b)(6). Doc. 17. FLP  
17 opposes the motion and, in the alternative, requests leave to amend. Doc. 23. The  
18 motion is fully briefed (Docs. 23, 24) and neither party has requested oral argument. For  
19 reasons that follow, the Court will grant the motion and grant FLP leave to amend.

20 **I. Background.**

21 For purposes of ruling on the motion, Plaintiff's factual allegations must be  
22 accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). FLP is in the business of  
23 selling household goods to retail and wholesale customers under a variety of trademarked  
24 names, including "Live It" and "Livit" (collectively, the "Marks"). Doc. 1 at 2, 4. The  
25 Marks "have come to be recognized around the world by the consuming public as being  
26 associated with fine household products," and FLP has "considerable profits to expect  
27 due to the sale of" products containing the Marks. *Id.* at 3, ¶¶ 2, 9. Wolf, as owner and  
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1 manager of a competing company, Liv-IT! LLC, has advertised and sold wholesale  
2 household products containing the Marks. *Id.* at 4, ¶ 14. This has resulted in “confusing  
3 and misleading representations to the effect that Wolf is somehow affiliated” with the  
4 Marks. *Id.* ¶ 15. Wolf’s use of the Marks allegedly constitutes “willful, wanton and  
5 callous disregard” of FLP’s rights. *Id.* ¶ 17. Wolf’s conduct has resulted in harm to the  
6 public and harm to FLP in the form of lessened competition between FLP and Wolf, lost  
7 profits, and “reduced prospective business advantages.” *Id.* at 4-5, ¶¶ 18, 22.<sup>1</sup>

8 Based on these allegations, FLP asserts three claims against Wolf: violation of the  
9 Lanham Act, injurious falsehood, and interference with prospective advantage. *Id.*  
10 at 5-16. Wolf moves to dismiss the injurious falsehood and interference claims and the  
11 request for punitive damages under the Lanham Act. Doc. 17.

## 12 **II. Legal Standard.**

13 A successful motion to dismiss under Rule 12(b)(6) must show either that the  
14 complaint lacks a cognizable legal theory or fails to allege facts sufficient to support its  
15 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A  
16 complaint that sets forth a cognizable legal theory will survive a motion to dismiss as  
17 long as it contains “sufficient factual matter, accepted as true, to ‘state a claim to relief  
18 that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl.*  
19 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when “the  
20 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
21 the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing  
22 *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability  
23 requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
24 unlawfully.” *Id.*

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27 <sup>1</sup> The Court notes, for background purposes only, that the validity of FLP’s  
28 registration of the Marks is being challenged in a consolidated case. *See Liv-IT! LLC v.*  
*FLP, LLC*, No. CV-17-00773-PHX-DGC.

1 **III. Analysis.**

2 **A. Exhibits Attached to Plaintiff’s Response.**

3 FLP’s response includes a number of factual exhibits intended to support its  
4 injurious falsehood and interference with prospective advantage claims. Doc. 23-1.  
5 Wolf objects to these exhibits. Doc. 24 at 11. The Court’s focus in ruling on a motion to  
6 dismiss under Rule 12(b)(6) is on the face of the complaint. The Court will not consider  
7 these factual matters and convert the motion to one for summary judgment.

8 **B. Punitive Damages Under the Lanham Act.**

9 The complaint seeks “exemplary and punitive damages” under the Lanham Act.  
10 Doc. 1 at 8, ¶ 5. Citing *Duncan v. Stuetzle*, 76 F.3d 1480, 1490 (9th Cir. 1996), Wolf  
11 argues that punitive damages are not available under the Lanham Act. Doc. 17 at 14.  
12 FLP responds that its allegation refers to treble damages, which are available under 15  
13 U.S.C. § 1117(b). Doc. 23 at 16. But that section applies to cases brought under  
14 § 1114(1)(a) or 36 U.S.C. § 220506. The complaint does not allege a violation of either  
15 of those sections. *See* Doc. 1 at 5 (alleging a violation of 15 U.S.C. § 1125(a)). To the  
16 extent the complaint requests punitive or treble damages for the alleged violation of 15  
17 U.S.C. § 1125(a), it will be dismissed.

18 **C. Injurious Falsehood.**

19 A claim for injurious falsehood requires: (1) publication of a false statement  
20 harmful to another’s interests, (2) intent or knowledge that the publication will result in  
21 harm, (3) knowledge that the statement is false or in reckless disregard of the truth, and  
22 (4) resulting pecuniary loss. Restatement (Second) of Torts § 623A; *Gee v. Pima Cty.*,  
23 612 P.2d 1079, 1079 (Ariz. Ct. App. 1980). Wolf argues that FLP has not identified a  
24 specific statement that she made regarding FLP’s products, when and to whom the  
25 statement was made, how the statement was false, or how Wolf knew it was false.  
26 Doc. 17 at 7-9.<sup>2</sup>

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28 <sup>2</sup> Wolf also argues that FLP has not pled any pecuniary damage resulting from

1 FLP responds that the false statements are Wolf's use of the Marks accompanied  
2 by the trademark symbol "®", which Wolf allegedly placed on her company's products  
3 and used in its advertising. Doc. 23 at 3-4. FLP claims that Wolf's use of ® in  
4 connection with the Marks is equivalent to a statement by Wolf that her products were  
5 FLP products or that the two were "inseparable." *Id.* FLP argues that such a statement is  
6 false, and Wolf knew it was false. *Id.* Wolf's reply argues that FLP cannot assert this "®  
7 theory" for the first time in its response to a motion to dismiss. Doc. 24 at 2. But even if  
8 FLP had pled the ® theory in its complaint, FLP would fail to state a claim for injurious  
9 falsehood. FLP has not identified, and the Court has not found, any case recognizing that  
10 use of another's trademark constitutes a disparaging falsehood for purposes of the tort of  
11 injurious falsehood.

12 FLP cites *Western Technologies, Inc. v. Sverdrup & Parcel, Inc.*, 739 P.2d 1318  
13 (Ariz. 1986), for the proposition that a defendant's placement of plaintiff's trademark on  
14 its products "constitute[s] product disparagement . . . as a matter of law" because it  
15 "broadcast[s] the message that" defendant's and plaintiff's products are the same.  
16 Doc. 23 at 4. But *Western Technologies* involved a far different set of facts. It concerned  
17 an engineering report prepared by the defendant for a stadium owner, in which the  
18 defendant stated that the plaintiff was to blame for structural damage to the stadium. *Id.*  
19 at 1319. The defendant's statements identified the plaintiff, criticized the plaintiff's  
20 work, and blamed the plaintiff for costly damages. *Id.* The Arizona Court of Appeals  
21 found these statements analogous to injurious falsehoods under Restatement § 623A. *Id.*  
22 at 1321. This case involves no comparable statements.

23 Plaintiff also cites *Southern Snow Manufacturing Co. v. Snow Wizard Holdings,*  
24 *Inc.*, 829 F. Supp. 2d 437 (E.D. La. 2011), for the proposition that a defendant's use of  
25 the trademark registration symbol in connection with a trademark registered to the  
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27 such a statement and that FLP has failed to satisfy Rule 9(b)'s particularity requirement.  
28 Doc. 17 at 8-10. The Court need not address these arguments because the Court finds  
that FLP has failed to state a claim under Rule 12(b)(6) for other reasons.

1 plaintiff is a misrepresentation about the plaintiff's product. Doc. 23 at 11. But *Southern*  
2 *Snow* concerned the viability of a Lanham Act false advertising claim based on use of the  
3 trademark symbol, not the tort of injurious falsehood. 829 F. Supp. 2d at 444.

4 The use of "Liv-IT! ®" on Wolf's products simply is not a statement about FLP or  
5 its products. Without any allegation of a false statement, FLP has failed to state a claim  
6 for injurious falsehood.<sup>3</sup>

7 **D. Tortious Interference.**

8 A claim for tortious interference with business expectancy includes the following  
9 elements: (1) the existence of a valid contractual relationship or business expectancy,  
10 (2) the interferer's knowledge of the relationship or expectancy, (3) intentional  
11 interference inducing or causing a breach or termination of the relationship or  
12 expectancy, and (4) resultant damage to the party whose relationship or expectancy has  
13 been disrupted. *Antwerp Diamond Exch. of Am., Inc. v. Better*, 637 P.2d 733, 740 (Ariz.  
14 1981) (citations omitted). The interference must also be improper as to motive or means.  
15 *Hill v. Peterson*, 35 P.3d 417, 420 (Ariz. Ct. App. 2001). Wolf argues that FLP has not  
16 alleged a valid contractual relationship or business expectancy of which she had  
17 knowledge, or that she interfered with such a relationship. Doc. 17 at 11-13. Wolf also  
18 contends that FLP has not pled any resulting damage. *Id.* at 13.

19 The complaint alleges that Wolf's "false and deceptive advertising" was an effort  
20 to cause confusion between FLP's and Liv-IT! LLC's goods in order to "interfere with  
21 and/or induce away existing and/or potential contracting third parties and customers of  
22 FLP." Doc. 1 at 12-13. Not only does the complaint fail to identify a specific  
23 relationship or expectancy of which Wolf had knowledge, it also fails to allege that Wolf  
24 induced or caused a breach or termination of the relationship or expectancy. *Antwerp*,  
25 637 P.2d at 740. The complaint is devoid of any facts indicating that an FLP customer or

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27 <sup>3</sup> As explained below, the Court will grant FLP leave to amend. The Court notes,  
28 however, that if FLP plans to amend the injurious falsehood claim, it must identify a  
specific false statement made by Wolf and not rely on the theory presented in its  
response.

1 contracting third party actually breached its relationship with FLP or terminated an  
2 expected relationship with FLP. Thus, FLP has failed to state a claim for tortious  
3 interference.

4 **E. Leave to Amend.**

5 FLP requests leave to amend under Rule 15(a). Doc. 23 at 17. As it appears  
6 possible that defects in the complaint can be cured through amendment, the Court will  
7 grant leave to amend. FLP is cautioned that the Court will not be inclined to permit  
8 further amendments if FLP again fails to state a claim.

9 **IT IS ORDERED:**

10 1. Defendant Wolf's motion to dismiss (Doc. 17) is **granted**.

11 2. Plaintiff FLP's request for leave to amend (Doc. 23 at 17) is **granted**.

12 Plaintiff may file an amended complaint on or before **November 3, 2017**.

13 Dated this 19th day of October, 2017.

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17 David G. Campbell  
18 United States District Judge  
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