

'0'

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIATRACY ANDERSON MIND AND  
BODY, LLC, et al.,

Plaintiffs,

v.

MEGAN ROUP, et al.,

Defendants.

CV 22-4735-RSWL-Ex

**ORDER re: MOTION TO  
DISMISS AND MOTION TO  
STRIKE [15]**

Plaintiffs Tracy Anderson Mind and Body, LLC ("Plaintiff TAMB") and Studio New York LLC ("Plaintiff TANY") (collectively, "Plaintiffs") brought the instant Action against Defendants Megan Roup ("Defendant Roup") and The Sculpt Society ("Defendant TSS") (collectively, "Defendants") alleging copyright infringement, violation of the Lanham Act, breach of contract, and violation of unfair competition law. Currently before the Court is Defendants' Motion to Dismiss [15].



1 and manuals, and transcribed methods . . . including  
2 those comprising the TA Method's proprietary  
3 choreography movements." Id.

4 During Defendant Roup's six-year employment with  
5 Plaintiff TANY, Defendant Roup learned and had access to  
6 significant confidential information, including  
7 "(i) training materials, choreography transcriptions,  
8 and custom write-ups related to the performance and  
9 teaching of the TA Method, and (ii) business  
10 information, customer lists, and operating procedures."  
11 Id. ¶ 4.

12 Later, in or around February 2017, Defendant Roup  
13 terminated her employment with Plaintiff TANY and  
14 founded Defendant TSS the next month. Id. ¶ 5.  
15 Defendant TSS also offers "choreography-based fitness  
16 and mat movement classes that directly compete with  
17 Plaintiffs[' classes]." Id. In creating and operating  
18 Defendant TSS, Defendant Roup neither references her  
19 association with Plaintiffs, nor credits Plaintiffs for  
20 training, teaching, or developing Defendant Roup. Id. ¶  
21 7. Plaintiffs thus filed the current Action seeking  
22 damages and injunctive relief for copyright  
23 infringement, breach of contract, violation of the  
24 Lanham Act, and unfair competition. Id. ¶ 10.

25 **B. Procedural Background**

26 Plaintiffs filed their First Amended Complaint [12]  
27 on September 13, 2022. Defendants then filed the  
28 instant Motion [15] on September 27, 2022. Plaintiffs

1 opposed [17] the Motion on October 11, 2022, and  
2 Defendants replied [18] on October 18, 2022.

## 3 **II. DISCUSSION**

### 4 **A. Legal Standard**

#### 5 1. Motion to Dismiss

6 Rule 12(b)(6) of the Federal Rules of Civil  
7 Procedure allows a party to move for dismissal of one or  
8 more claims if the pleading fails to state a claim upon  
9 which relief can be granted. A complaint must "contain  
10 sufficient factual matter, accepted as true, to state a  
11 claim to relief that is plausible on its face."

12 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotation  
13 omitted). Dismissal is warranted for a "lack of a  
14 cognizable legal theory or the absence of sufficient  
15 facts alleged under a cognizable legal theory."  
16 Balistreri v. Pacifica Police Dep't, 902 F.2d 696, 699  
17 (9th Cir. 1988) (citation omitted).

18 In ruling on a 12(b)(6) motion, a court may  
19 generally consider only allegations contained in the  
20 pleadings, exhibits attached to the complaint, and  
21 matters properly subject to judicial notice. Swartz v.  
22 KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A court  
23 must presume all factual allegations of the complaint to  
24 be true and draw all reasonable inferences in favor of  
25 the non-moving party. Klarfeld v. United States, 944  
26 F.2d 583, 585 (9th Cir. 1991). The question is not  
27 whether the plaintiff will ultimately prevail, but  
28 whether the plaintiff is entitled to present evidence to

1 support its claims. Jackson v. Birmingham Bd. of Educ.,  
2 544 U.S. 167, 184 (2005) (quoting Scheuer v. Rhodes, 416  
3 U.S. 232, 236 (1974)). While a complaint need not  
4 contain detailed factual allegations, a plaintiff must  
5 provide more than "labels and conclusions" or "a  
6 formulaic recitation of the elements of a cause of  
7 action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
8 (2007). However, "a well-pleaded complaint may proceed  
9 even if it strikes a savvy judge that actual proof of  
10 those facts is improbable, and 'that a recovery is very  
11 remote and unlikely.'" Id. at 556 (quoting Scheuer v.  
12 Rhodes, 416 U.S. 232, 236 (1974)).

## 13 2. Motion to Strike

14 California's anti-Strategic Lawsuit Against Public  
15 Participation ("anti-SLAPP") statute provides for a  
16 special motion to strike state law claims brought  
17 "primarily to chill the valid exercise of the  
18 constitutional rights of freedom of speech and petition  
19 for the redress of grievances." Cal. Civ. Proc. Code  
20 § 425.16(a). "A court considering a motion to strike  
21 under the anti-SLAPP statute must engage in a two-part  
22 inquiry." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,  
23 1110 (9th Cir. 2003). "First, a defendant must make an  
24 initial prima facie showing that the plaintiff's suit  
25 arises from an act in furtherance of the defendant's  
26 rights of petition or free speech." Id. (internal  
27 quotation marks and citation omitted). "Second, once  
28 the defendant has made a prima facie showing, the burden

1 shifts to the plaintiff to demonstrate the probability  
2 of prevailing on the challenged claims.” Id. (internal  
3 quotation marks and citation omitted).

4 **B. Analysis**

5 1. Rule 12(b)(6) Motion

6 a. Copyright Infringement

7 Plaintiffs bring a claim against Defendant for  
8 copyright infringement. FAC ¶¶ 50-56. “To establish  
9 infringement, two elements must be proven: (1) ownership  
10 of a valid copyright, and (2) copying of constituent  
11 elements of the work that are original.” Feist  
12 Publ’ns., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S.  
13 340, 361 (1991). A copyright registration is “prima  
14 facie evidence of the validity of the copyright and the  
15 facts stated in the certificate.” 17 U.S.C. § 410(c).  
16 While an “accused infringer can rebut [the] presumption  
17 of validity” conferred by a copyright registration,  
18 “such a presumption is strong in a motion to dismiss  
19 since the court must assume all factual allegations are  
20 true.” Datastorm Techs., Inc. v. Excalibur Commc’ns,  
21 Inc., 888 F. Supp. 112, 115 (N.D. Cal. 1995). To show  
22 copying, a plaintiff can rely on circumstantial evidence  
23 that the defendant had access to the copyrighted work  
24 and that there is substantial similarity between  
25 defendant’s work and copyrighted work. Swirsky v.  
26 Carey, 376 F.3d 841, 844 (9th Cir. 2004).

27 Here, Plaintiffs adequately pled a prima facie case  
28 of copyright infringement. First, Plaintiffs provided a

1 list of copyright registrations for nineteen "Motion  
2 Picture[s]" for which Plaintiff TAMB is the sole  
3 copyright claimant. FAC, Attachment A, ECF No. 12-1.  
4 Next, Plaintiffs alleged that Defendants have published  
5 videos that "infringe on [Plaintiff TAMB's] copyrights  
6 by copying the choreography movements, sequences, and  
7 routines depicted in the [copyrighted works];  
8 organizational structure and format of the [copyrighted  
9 works]; and aesthetic elements depicted in the  
10 [copyrighted works]." FAC ¶ 47. Moreover, Plaintiffs  
11 contend that Defendants had access to the copyrighted  
12 works through Defendant Roup's employment with  
13 Plaintiffs and specify that at least three of Defendant's  
14 videos are substantially similar to Plaintiff's  
15 copyrighted works.<sup>1</sup> Id. ¶¶ 3-4, 48-49. Therefore,

16  
17 <sup>1</sup> Under certain circumstances, a court ruling on a motion to  
18 dismiss may independently assess whether works are not  
19 substantially similar. See Christianson v. West Pub. Co., 149  
20 F.2d 202, 203 (9th Cir. 1945) ("There is ample authority for  
21 holding that when the copyrighted work and the alleged  
22 infringement are both before the court, capable of examination  
23 and comparison, non-infringement can be determined on a motion to  
24 dismiss."). Here, however, the Court cannot properly examine and  
25 compare the works to determine non-infringement. Plaintiffs have  
26 provided three examples broadly describing how Defendants'  
27 "choreography movement, sequences, and routines are substantially  
28 similar" to those depicted in Plaintiffs' copyrighted works. FAC  
29 ¶ 48. But Plaintiffs did not submit the referenced videos with  
30 their FAC. See generally FAC. Moreover, Plaintiffs state that  
31 "[b]ecause Defendants' videos are published behind a paywall,"  
32 Plaintiffs are "unable to review and compare every one of  
33 Defendants' videos" with their own, and therefore, "the full  
34 extent of Defendants' infringement . . . cannot be assessed until  
35 Defendants produce the videos to Plaintiffs in discovery." Id.  
36 ¶ 49. Consequently, the Court is unable to determine non-  
37 infringement at this stage of litigation.

1 Plaintiffs have pled a prima facie case of copyright  
2 infringement. See Wake Up & Ball LLC v. Sony Music Ent.  
3 Inc., 119 F. Supp. 3d 944, 952 (D. Ariz. 2015) (finding  
4 that plaintiff pled a plausible infringement claim by  
5 presenting its copyright registration and alleging that  
6 defendants published plaintiff's copyrighted work  
7 online).

8 Defendants, however, argue that Plaintiffs have not  
9 pled a prima facie case of copyright infringement  
10 because "functional exercise movements are not  
11 copyrightable." Defs.' Mot. to Dismiss ("Mot.") 7:12-  
12 14., ECF No. 15. Plaintiffs counter that (1) whether a  
13 copyrighted work qualifies for copyright protection is a  
14 factual inquiry not appropriate for determination on a  
15 motion to dismiss, and (2) regardless, Plaintiffs'  
16 choreographic work is copyrightable. Plfs.' Opp'n  
17 ("Opp'n") 5:21-21, 8:6-8. The Court agrees that an  
18 inquiry into the copyrightability of Plaintiffs' works  
19 is not appropriate at this stage of litigation.

20 As explained, when assessing a motion to dismiss,  
21 the Court "must assume all factual allegations [in the  
22 Complaint] are true." Datastorm Techs., Inc., 888 F.  
23 Supp. at 115. Accordingly, motion to dismiss arguments  
24 that copyrighted works do not qualify for copyright  
25 protection based on a "detailed factual analysis" of the  
26 works are "inappropriate . . . as the Court must accept  
27 all material factual allegations as true." Thomson v.  
28 HMC Grp., No. CV1303273DMGVBKX, 2014 WL 12589312 at \*3

1 (C.D. Cal. Feb. 18, 2014) (holding that motion to  
2 dismiss arguments regarding copyrightability are  
3 premature and such arguments should instead be asserted  
4 at summary judgment); see also P & P Imports, LLC v.  
5 Festival Trading, Inc., No. CV171541DOCJCGX, 2018 WL  
6 5099723 at \*6 (C.D. Cal. May 15, 2018) (declining to  
7 assess copyrightability of a copyrighted work on a  
8 motion to dismiss); E. W. Sounds, Inc. v. Phoenix,  
9 No. CV 12-6143 CAS AJWX, 2012 WL 4003047 at \*3  
10 (C.D. Cal. Sept. 10, 2012) (same).

11 In Thomson, the defendant asserted that the  
12 copyrighted works did not qualify for copyright  
13 protection because they were "functional" designs that  
14 amounted to "[mere] ideas and concepts." Thomson,  
15 2014 WL 12589312 at \*3. There, the court held that  
16 determining whether the copyrighted works fell into the  
17 specified categories would require "a detailed factual  
18 analysis" inappropriate for a motion to dismiss. Id.  
19 Similarly, here, Defendants contend that Plaintiffs'  
20 copyrighted works are not copyrightable because they are  
21 "functional exercise movements" that are ultimately  
22 "unprotectable 'ideas' or 'processes.'" Mot. 7:12-24.  
23 As in Thomson, determining the protectability of  
24 Plaintiffs' copyrighted works would require the Court to  
25 conduct a detailed factual analysis unfit for ruling on  
26 a motion to dismiss. Thus, Defendants' argument fails,  
27 and Plaintiffs have met their burden of pleading  
28 copyright infringement. See Ashcroft, 556 U.S. 662

1 at 678 (holding that a complaint must contain enough  
2 factual sufficiency to be plausible on its face to  
3 survive a motion to dismiss for failure to plead a  
4 claim); see also Lee v. City of Los Angeles, 250 F.3d  
5 668, 688 (9th Cir. 2001) (“[F]actual challenges to a  
6 plaintiff’s complaint have no bearing on the legal  
7 sufficiency of the allegations under Rule 12(b)(6).”).  
8 Accordingly, the Court **DENIES** Defendants’ Motion to  
9 Dismiss Plaintiffs’ copyright infringement claim.

10 b. Violation of the Lanham Act - False  
11 Advertising

12 To succeed on a Lanham Act claim for false  
13 advertising, a plaintiff must establish: (1) a false  
14 statement of fact by the defendant in a commercial  
15 advertisement about its own or another’s product;  
16 (2) the statement actually deceived or has the tendency  
17 to deceive a substantial segment of its audience;  
18 (3) the deception is material, in that it is likely to  
19 influence the purchasing decision; (4) the defendant  
20 caused its false statement to enter interstate commerce;  
21 and (5) the plaintiff has been or is likely to be  
22 injured as a result of the false statement, either by  
23 direct diversion of sales from itself to defendant or by  
24 a lessening of the goodwill associated with its  
25 products. See 15 U.S.C. § 1125.

26 Importantly, district courts in the Ninth Circuit  
27 apply a heightened pleading standard for false  
28 advertising claims. See, e.g., EcoDisc Tech. AG v. DVD

1 Format/Logo Licensing Corp., 711 F. Supp. 2d 1074, 1085  
2 (C.D. Cal. 2010) ("Although the Ninth Circuit has not  
3 concluded that Rule 9(b) applies to Lanham Act claims,  
4 many district courts have applied this heightened  
5 pleading standard to claims that are grounded in fraud,  
6 such as misrepresentation claims."). "To satisfy  
7 Rule 9(b), Plaintiff must state the time, place, and  
8 specific content of the false representations as well as  
9 the identities of the parties to the misrepresentation."  
10 EcoDisc Tech., 711 F. Supp. 2d at 1085 (citing Schreiber  
11 Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393,  
12 1401 (9th Cir. 1986)). Plaintiffs must also set forth  
13 what is false and misleading about the statement and why  
14 it is false. Id. (citing Vess v. Ciba-Geigy Corp. USA,  
15 317 F.3d 1097, 1106 (9th Cir.2003)).

16 Plaintiffs alleged all elements of a Lanham Act  
17 violation with sufficient particularity, specifically  
18 listing the following "false and/or misleading"  
19 statements from Defendant Roup's biography on  
20 Defendants' website: "I knew that there was something  
21 missing from the boutique fitness community, so I  
22 combined my passion for dance and love for fitness to  
23 create The Sculpt Society. I spent years teaching  
24 fitness and developing The Sculpt Society method before  
25 launching in 2017." FAC ¶ 58. Plaintiffs assert that  
26 these statements "misrepresent the nature,  
27 characteristics, and qualities of Defendants' services"  
28 because they "imply" that (1) Defendant Roup developed

1 the "TSS Method" over a period of multiple years, when  
2 she did not; (2) the "TSS Method" was created through  
3 years of science-based research, development, data  
4 collection, analysis, and trial and error, when it was  
5 not; and (3) the "TSS Method" is significantly different  
6 from Plaintiffs' "TA Method," when it is not. Id. ¶ 58,  
7 59.

8 Defendants counter that these statements are  
9 "facially non-actionable" because, amongst other  
10 reasons, (1) they are "classic examples of non-  
11 actionable opinions or puffery which are both  
12 nonmaterial and unlikely to induce consumer reliance,"  
13 and (2) they are non-material because a reasonable  
14 consumer would not rely on the statements when making  
15 purchasing decisions. Mot. 12:22-17:25.

16 The Court's analysis therefore centers on whether  
17 Plaintiff has plausibly alleged a false statement of  
18 fact.

19 i. False Statement of Fact

20 "To demonstrate falsity within the meaning of the  
21 Lanham Act, a plaintiff may show that the statement was  
22 literally false, either on its face or by necessary  
23 implication, or that the statement was literally true  
24 but likely to mislead or confuse consumers." Southland  
25 Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139  
26 (9th Cir. 1997). The allegedly false statement must be  
27 examined in the full context of the advertising or  
28 promotional materials in which the statement was made.

1 Id.

2       Importantly, an advertising statement may be non-  
3 actionable if it constitutes "puffery," which is defined  
4 as "exaggerated advertising, blustering, and boasting  
5 upon which no reasonable buyer would rely." Id. at  
6 1145. Puffery includes "statement[s] of fact  
7 [in]capable of being proved false," statements that are  
8 not "specific and measurable," or statements that  
9 otherwise cannot be "reasonably interpreted as a  
10 statement of objective fact." Coastal Abstract Serv.,  
11 Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th  
12 Cir. 1999); see also Glen Holly Ent., Inc. v. Tektronix  
13 Inc., 343 F.3d 1000, 1015 (9th Cir. 2003) (establishing  
14 that "generalized, vague, or unspecific assertions"  
15 constitute unactionable puffery); Cook, Perkiss & Liehe,  
16 Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242,  
17 246 (9th Cir. 1990) ("[Puffery] has been described by  
18 most courts as involving outrageous generalized  
19 statements, not making specific claims, that are so  
20 exaggerated as to preclude reliance by consumers.").

21       A statement is also considered puffery if the claim  
22 is extremely unlikely to induce consumer reliance.  
23 Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038,  
24 1054 (9th Cir. 2008). Ultimately, the difference  
25 between a statement of fact and mere puffery rests in  
26 the specificity or generality of the claim. Cook,  
27 Perkiss & Liehe, Inc., 911 F.2d at 246. "The common  
28 theme that seems to run through cases considering

1 puffery in a variety of contexts is that consumer  
2 reliance will be induced by specific rather than general  
3 assertions.” Id. Thus, a statement that is  
4 quantifiable, that makes a claim as to the “specific or  
5 absolute characteristics of a product,” may be an  
6 actionable statement of fact while a general, subjective  
7 claim about a product is non-actionable puffery. Id.

8 Courts may determine at the motion to dismiss stage  
9 whether an alleged misrepresentation is a statement of  
10 fact or mere puffery as a matter of law. Newcal Indus.,  
11 Inc., 513 F.3d at 1053. Since Plaintiffs assert that  
12 Defendants’ statements are “false and/or misleading,”  
13 the Court assesses whether the claims are literally  
14 false or true but misleading. FAC ¶ 58.

15 A. Literally False

16 To be literally false, a statement must “expressly  
17 or impliedly assert a fact that is susceptible to being  
18 proved false,” and must be able to reasonably be  
19 “interpreted as stating actual facts.” Weller v.  
20 American Broad. Cos., 283 Cal. Rptr. 644, 650 (1991).  
21 Claims that a defendant invented a product to fill a gap  
22 in the market, and the resulting implications regarding  
23 the innovativeness of a defendant’s product, constitute  
24 puffery rather than an assertion of fact. See  
25 Soilworks, LLC v. Midwest Indus. Supply, Inc., 575 F.  
26 Supp. 2d 1118, 1133 (D. Ariz. 2008) (holding that claims  
27 that a company was the “innovator” of a product and that  
28 the product was the result of “revolutionary state-of-

1 the-art innovation" constituted puffery because those  
2 claims are general, vague, and unmeasurable.); Williams  
3 & Lake LLC v. Genesis Systems LLC, No. CV-17-00117-TUC-  
4 CKJ, 2017 WL 6418937 at \*6-8 (D. Ariz. Sept. 13, 2017)  
5 (establishing that "inventorship is not a cause of  
6 action" for false advertising under the Lanham Act, and  
7 that claims attacking defendant's statements about  
8 inventorship do not challenge the nature of the  
9 defendant's product even if the statements create a  
10 perception that the plaintiff's product is inferior).

11 Here, Defendant Roup's statements constitute non-  
12 actionable puffery. First, her statement that "[she]  
13 knew something was missing from the boutique fitness  
14 community, so [she] combined [her] passion for dance and  
15 love for fitness to create The Sculpt Society" conveys a  
16 general, vague, and unmeasurable assertion regarding  
17 inventorship and the innovativeness of Defendants'  
18 products. See Soilworks, LLC, 575 F. Supp. 2d at 1133;  
19 Williams & Lake LLC, 2017 WL 6418937 at \*6-8. Next,  
20 Defendant Roup's statement that she "spent years  
21 teaching fitness and developing The Sculpt Society  
22 method before launching in 2017" is another general and  
23 vague assertion of inventorship. While Plaintiffs  
24 appear to primarily take issue with Defendant Roup's  
25 statement about her development of The Sculpt Society  
26 method, it is worth noting that Plaintiffs offer  
27 evidence proving the truth of Defendant Roup's claim  
28 that she "spent years teaching fitness." FAC ¶¶ 58-59;

1 Id. ¶ 3 (“[Plaintiff] TANY employed [Defendant] Roup as  
2 a trainer from 2011 to 2017.”). Moreover, it is  
3 unlikely a reasonable consumer would rely on these  
4 statements as an objective, measurable statement of  
5 fact. See R & A Synergy LLC v. Spanx, Inc., No. 2:17-  
6 CV-09147-SVW-AS, 2019 WL 4390564 at \* 11 (C.D. Cal.  
7 May 1, 2019) (holding that a CEO’s representations that  
8 she invented a product and that it filled a “white  
9 space” in the market were puffery that would not induce  
10 consumer reliance).

11 B. True But Misleading

12 If an advertising claim is not literally false, a  
13 plaintiff may still satisfy the first element of a  
14 Lanham Act false advertising claim by establishing that  
15 the representations of fact in advertising statements  
16 were literally true but otherwise misled, confused, or  
17 deceived the public. Southland Sod, 108 F.3d at 1140.  
18 A plaintiff generally relies on consumer surveys to  
19 assess whether consumers were misled. Id.

20 Plaintiffs argue that Defendant Roup’s statements  
21 may mislead the public to wrongly believe that  
22 (1) Defendant Roup developed the “TSS Method” over a  
23 period of multiple years, when she did not; (2) the “TSS  
24 Method” was created through years of science-based  
25 research, development, data collection, analysis, and  
26 trial and error, when it was not; and (3) the “TSS  
27 Method” is significantly different from Plaintiffs’ “TA  
28 Method,” when it is not. FAC ¶ 58, 59. As explained

1 above, Defendant Roup's statements are non-actionable  
2 puffery, meaning that reasonable consumers are unlikely  
3 to rely on these statements to make purchasing decisions  
4 regardless of whether the statements may be misleading.  
5 Thus, Defendant Roup's statements cannot be considered  
6 true but misleading as a matter of law.

7 Therefore, Plaintiffs have not adequately pled that  
8 Defendants have made a false statement of fact and the  
9 Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's  
10 Lanham Act claim.

11 Since the Court resolves Defendants' Motion to  
12 Dismiss Plaintiff's Lanham Act claim on these grounds,  
13 it need not address the remaining false advertising  
14 factors or parties' arguments.

15 c. Breach of Contract

16 Plaintiff TANY alleges that Defendant Roup breached  
17 her employment contract with Plaintiff TANY. FAC ¶ 65.  
18 To plead a cause of action for breach of contract, a  
19 plaintiff must show (1) the existence of a contract;  
20 (2) plaintiff's performance or excuse for  
21 nonperformance; (3) defendant's breach; and (4) that  
22 plaintiff sustained damages resulting from the breach.  
23 See Zamora v. Solar, No. 2:16-CV-01260-ODW-KS, 2016 WL  
24 3512439, at \*3 (C.D. Cal. June 27, 2016) (citing CDF  
25 Firefighters v. Maldonado, 70 Cal. Rptr. 3d 667, 680  
26 (2008)).

27 Plaintiff TANY has sufficiently alleged a breach of  
28 contract claim. Plaintiff TANY states that it entered

1 into and performed its obligations under a "Trainer  
2 Agreement" with Defendant Roup. FAC ¶¶ 3, 29, 65-66.  
3 The Trainer Agreement prohibited trainers, including  
4 Defendant Roup, from "using or disclosing company  
5 'Confidential Information,' which includes its nonpublic  
6 business and operational information, training materials  
7 and manuals, and the transcribed methods taught to  
8 trainers, including those comprising the TA Method's  
9 proprietary choreography movements, sequences, and  
10 routines" during and after their employment with  
11 Plaintiff TANY. Id. ¶ 3, 29.

12 Next, Plaintiff TANY contends Defendant Roup  
13 breached the Trainer Agreement by "using and disclosing  
14 to [third parties] the Confidential Information after  
15 the termination of her employment [with Plaintiff]  
16 TANY." Id. ¶ 68. Specifically, Plaintiff TANY asserts  
17 that Defendant Roup (1) used the Confidential  
18 Information "with developing the TSS Method and with  
19 planning, recording, and publishing videos on the TSS  
20 app and website"; (2) used the Confidential Information  
21 "related to customers, operations, program structure,  
22 customer intake methods, and employees"; and  
23 (3) "disclosed the Confidential Information to third  
24 parties, including employees, affiliates, and/or  
25 customers of TSS." Id. Finally, Plaintiff TANY  
26 contends that as a result of Defendant Roup's alleged  
27 breach, Plaintiff TANY "has suffered, and will continue  
28 to suffer, substantial monetary damages in an amount to

1 be determined at trial.” Id. ¶ 69. Thus, Plaintiff  
2 TANY has alleged a plausible breach of contract claim.  
3 The Court therefore **DENIES** Defendants’ Motion to Dismiss  
4 Plaintiffs’ breach of contract claim.

5 d. Violations of California Unfair Competition  
6 Law

7 Plaintiffs argue that Defendants violated  
8 California’s Unfair Competition Law (“UCL” or “section  
9 17200”) because they engaged in unfair and/or fraudulent  
10 business acts and practices including: (1) taking,  
11 using, and continuing to use Plaintiffs’ confidential  
12 information to form and operate TSS, which competes with  
13 Plaintiffs, and (2) making false and/or misleading  
14 descriptions or representations of fact by setting forth  
15 the statements addressed in Plaintiffs’ false  
16 advertisement claim. FAC ¶ 71.

17 California’s UCL prohibits “any unlawful, unfair or  
18 fraudulent business act or practice and unfair,  
19 deceptive, untrue or misleading advertising.” Cal. Bus.  
20 & Prof. Code § 17200. Each UCL prong—unlawful, unfair,  
21 and fraudulent—provides a separate and distinct theory  
22 of liability. Lozano v. AT&T Wireless Servs., Inc.,  
23 504 F.3d 718, 731 (9th Cir. 2007).

24 Since Plaintiffs alleged Defendants participated in  
25 “unfair and/or fraudulent business acts,” they are  
26 required to plead their claims under the unfair and  
27 fraud prongs of the UCL. See Lozano, 504 F.3d at 731.

28 ///

1 ///

2 i. "Unfair" Prong

3 The "unfair" prong of the UCL prohibits a business  
4 practice that "violates established public policy  
5 or . . . is immoral, unethical, oppressive or  
6 unscrupulous and causes injury to consumers which  
7 outweighs its benefits." McKell v. Wash. Mut., Inc.,  
8 49 Cal. Rptr. 3d 227, 240 (2006). The California  
9 Supreme Court has held that "[w]hen a plaintiff who  
10 claims to have suffered injury from a direct  
11 competitor's 'unfair' act or practice invokes  
12 section 17200, the word 'unfair' in that section means  
13 conduct that threatens an incipient violation of an  
14 antitrust law, or violates the policy or spirit of one  
15 of those laws because its effects are comparable to or  
16 the same as a violation of the law, or otherwise  
17 significantly threatens or harms competition." Cel-Tech  
18 Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.  
19 4th 163, 187 (1999).

20 Although Plaintiffs allege that Defendants are  
21 competitors, Plaintiffs do not argue that Defendants'  
22 alleged misconduct threatens an incipient violation of  
23 an antitrust law or has effects comparable to a  
24 violation of an antitrust law. See generally FAC.  
25 Accordingly, Plaintiffs have not sufficiently alleged a  
26 plausible claim for relief under the UCL's unfair prong.

27 ii. "Fraud" Prong

28 "To state a claim under the 'fraud' prong of

1 [section] 17200, a plaintiff must allege facts showing  
2 that members of the public are likely to be deceived by  
3 the alleged fraudulent business practice.” Antman v.  
4 Uber Techs., Inc., No. 3:15-cv-1175-LB, 2015 WL 6123054,  
5 at \*6 (N.D. Cal. Oct. 19, 2015). “Claims under the  
6 fraud prong of the UCL are subject to the particularity  
7 requirements of Federal Rule of Civil Procedure 9(b).”  
8 In re Anthem, Inc. Data Breach Litig., No. 15-MD-2617-  
9 LHK, 2016 WL 3029783, at \*34 (N.D. Cal. May 27, 2016);  
10 see also Kearns v. Ford Motor Co., 567 F.3d 1120, 1122,  
11 1126-27 (9th Cir. 2009) (“[If] the [UCL] claim is said  
12 to be ‘grounded in fraud’ . . . the pleading of that  
13 claim as a whole must satisfy the particularity  
14 requirement of Rule 9(b).”). A plaintiff, therefore,  
15 must plead the time, place, and contents of the false  
16 representations, as well as the identity of the person  
17 making the misrepresentation and what that person  
18 obtained thereby. See Fed. R. Civ. P. 9(b).

19 To have standing under the UCL’s fraud prong, a  
20 claim must plead “actual reliance by the [party] seeking  
21 relief under [the statute].” Morgan v. AT&T Wireless  
22 Servs., Inc., 177 Cal. App. 4th 1235, 1235 (2009). No  
23 California state court has addressed whether “competitor  
24 plaintiffs must plead their own reliance or whether  
25 pleading consumer reliance is sufficient for fraudulent  
26 business practice claims brought by competitors.”  
27 23andMe, Inc. v. Ancestry.com DNA, LLC, 356 F. Supp. 3d  
28 889, 911 (N.D. Cal. 2018). As a result, there is a

1 split of authority in the California district courts  
2 with a majority view that a plaintiff must allege its  
3 own reliance and not the reliance of third parties.  
4 Id.; see also ConsumerDirect, Inc. v. Pentius, LLC, No.  
5 821CV01968JVSADSX, 2022 WL 16949657 at \*8 (C.D. Cal.  
6 Aug. 25, 2022) (adopting the majority approach that a  
7 plaintiff must allege its own reliance). But see  
8 Jerome's Furniture Warehouse v. Ashley Furniture Indus.,  
9 Inc., No. 20CV1765-GPC(BGS), 2021 WL 1541649 at \*7-8  
10 (S.D. Cal. Apr. 20, 2021) (adopting the minority  
11 approach based on some courts' perception that the  
12 "broad, sweeping language" of the UCL indicates  
13 California legislative intent that the substantive reach  
14 of UCL claims be "expansive") (internal quotations and  
15 citations omitted).

16 Plaintiffs fail to plead with specificity that they  
17 actually relied upon Defendant Roup's alleged  
18 misrepresentations. Therefore, Plaintiffs fail to state  
19 a UCL claim under the fraud prong.

20 Since Plaintiffs have not sufficiently alleged a  
21 UCL claim under either relevant prong, the Court **GRANTS**  
22 Defendants' Motion to Dismiss Plaintiffs' UCL claim.

23 e. Leave to Amend

24 "Where a motion to dismiss is granted, a district  
25 court must decide whether to grant leave to amend."  
26 Winebarger v. Pennsylvania Higher Educ. Assistance  
27 Agency, 411 F. Supp. 3d 1070, 1082 (C.D. Cal. 2019).  
28 "The court should give leave [to amend] freely when

1 justice so requires." Fed. R. Civ. P. 15(a)(2). In the  
2 Ninth Circuit, "Rule 15's policy of favoring amendments  
3 to pleadings should be applied with 'extreme  
4 liberality.'" United States v. Webb, 655 F.2d 977, 979  
5 (9th Cir. 1981). Against this extremely liberal  
6 standard, the Court may consider "the presence of any of  
7 four factors: bad faith, undue delay, prejudice to the  
8 opposing party, and/or futility." Owens v. Kaiser  
9 Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir.  
10 2001).

11 Here, leave to amend Plaintiffs' claims should be  
12 granted because Plaintiffs can cure their Complaint by  
13 pleading additional facts that support their claims.  
14 There is no evidence of bad faith or undue delay by  
15 Plaintiff, or potential prejudice to Defendant by  
16 allowing amendment. The Court therefore **GRANTS**  
17 Defendants' Motion to Dismiss Plaintiff's Lanham Act and  
18 UCL claims **with leave to amend**.

19 2. Motion to Strike

20 Defendants move to strike the portion of  
21 Plaintiffs' UCL claim asserting that Defendants engaged  
22 in unfair and/or fraudulent business acts and practices  
23 by making false or misleading statements in advertising.  
24 See Mot. 23:1-24:21; White v. Lieberman, 103 Cal. App.  
25 4th 210, 220 (2002) (holding that the trial court erred  
26 as a matter of law when it denied the defendant's anti-  
27 SLAPP motion to strike as moot because it granted the  
28 defendant's demurrer on the same claim); Thornbrough v.

1 West Placer Unified Sch. Dist., 2010 WL 2179917, at \*11  
2 (E.D. Cal. May 27, 2010) ("Since a defendant who  
3 prevails on an anti-SLAPP motion is entitled to recover  
4 mandatory attorney's fees, the dismissal of Plaintiff's  
5 claims against [defendant] does not moot [defendant's]  
6 anti-SLAPP motion.").

7 As described, a court considering whether claims  
8 are barred by the "anti-SLAPP statute must engage in a  
9 two-part inquiry." Vess v. Ciba-Geigy Corp. USA,  
10 317 F.3d 1097, 1110 (9th Cir. 2003). "First, a  
11 defendant must make an initial prima facie showing that  
12 the plaintiff's suit arises from an act in furtherance  
13 of the defendant's right of petition or free speech."  
14 Id. (internal quotation marks omitted). Under the anti-  
15 SLAPP statute, free speech includes "'any written or  
16 oral statement or writing made in a place open to the  
17 public or a public forum in connection with an issue of  
18 public interest,' and 'any other conduct in furtherance  
19 of the exercise of the constitutional right of petition  
20 or the constitutional right of free speech in connection  
21 with a public issue or an issue of public interest.'" Id.

23 Generally, if a defendant makes an initial prima  
24 facie showing, "the burden shifts to the plaintiff to  
25 demonstrate a probability of prevailing on the  
26 challenged claims." Id. But "when an anti-SLAPP motion  
27 to strike challenges only the legal sufficiency of a  
28 claim," as here, a court considers instead "whether a

1 claim is properly stated.” Planned Parenthood Fed’n of  
2 Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 834  
3 (9th Cir.), amended, 897 F.3d 1224 (9th Cir. 2018); see  
4 also Day v. California Lutheran Univ., No.  
5 821CV01286JLSDFM, 2022 WL 17037433 at \*12 (C.D. Cal.  
6 Aug. 30, 2022) (assessing whether defendants made a  
7 prima facie showing that the activities at issue in  
8 their anti-SLAPP motion were protected conduct).

9 As to the first part of the anti-SLAPP inquiry, the  
10 Court finds that the Defendants have sufficiently made a  
11 prima facie showing that the activities at issue are  
12 protected conduct. Defendants pled that the challenged  
13 written statements are publicly available on a website,  
14 and that they regard an issue of public interest because  
15 of Defendant Roup’s public persona. Mot. 23:1-24:21.

16 The California appellate courts have developed  
17 multiple tests to determine whether a defendant’s  
18 activity is in connection with a public issue. Hilton  
19 v. Hallmark Cards, 599 F.3d 894 906 (9th Cir. 2010).  
20 Relevant here is the Rivero test, where the Court of  
21 Appeal for the First District of California surveyed the  
22 appellate cases and established three categories of  
23 public issues: (1) statements “concern[ing] a person or  
24 entity in the public eye”; (2) “conduct that could  
25 directly affect a large number of people beyond the  
26 direct participants”; (3) “or a topic of widespread,  
27 public interest.” Rivero v. American Federation of  
28 State, County, & Municipal Employees, 130 Cal. Rptr. 2d

1 81, 89-90 (2003).

2 Here, Defendants have adequately pled that  
3 Defendant Roup is person or entity in the public eye by  
4 stating that she is a "celebrity fitness trainer and  
5 influencer" with a substantial number of customers and a  
6 significant social media following. Mot. 23:21-24:5.  
7 Further, Defendants contend that Defendant Roup's  
8 statements are biographical, and therefore Defendants  
9 have shown that the statements concern a person or  
10 entity in the public eye. Id. 24:6-10.

11 As to the second part of the analysis, Defendants  
12 argue that "Plaintiffs cannot carry their burden to show  
13 a likelihood of prevailing on the portion of their UCL  
14 claim" based on Defendant Roup's biographical  
15 statements. Id. 24:12-16. And the Court has already  
16 established that Plaintiffs have not pled a plausible  
17 UCL claim. But "granting a defendant's anti-SLAPP  
18 motion to strike a plaintiff's [] complaint without  
19 granting the plaintiff leave to amend would directly  
20 collide with Fed. R. Civ. P. 15(a)'s policy favoring  
21 liberal amendment." Verizon Delaware, Inc. v. Covad  
22 Commc'ns Co., 377 F.3d 1081, 1091 (9th Cir. 2004); see  
23 also Day, 2022 WL 17037433 at \*12 (granting plaintiffs'  
24 leave to amend their first amended complaint despite  
25 defendants' anti-SLAPP motion).

26 The purpose of the anti-SLAPP statute would still  
27 be served if Plaintiffs eliminate meritless claims or  
28 plead them adequately. See id. If, after amendment,

1 the Complaint still contains legally insufficient  
2 claims, Defendants continue to have anti-SLAPP remedies  
3 available to them. See Day, 2022 WL 17037433 at \*12  
4 (declining to rule on defendants' anti-SLAPP motion  
5 since the court dismissed plaintiffs' claims with leave  
6 to amend and defendants could reassert the motion once  
7 plaintiffs filed an amended complaint). Accordingly,  
8 the Court will defer its final ruling on Defendants'  
9 anti-SLAPP request until after Plaintiffs have amended  
10 their complaint in light of this Order.

### 11 **III. CONCLUSION**

12 Based on the foregoing, the Court **GRANTS**  
13 Defendants' Motion to Dismiss Plaintiffs' Lanham Act and  
14 UCL claims **with leave to amend** and **DENIES** Defendant's  
15 Motion to Dismiss Plaintiffs' copyright and breach of  
16 contract claims.

17  
18 **IT IS SO ORDERED.**

19  
20 DATED: December 12, 2022

/S/ RONALD S.W. LEW

21 **HONORABLE RONALD S.W. LEW**  
22 Senior U.S. District Judge  
23  
24  
25  
26  
27  
28