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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CERTIFIED NUTRACEUTICALS, INC.,
12 *a California Corporation,*

13 Plaintiff,

14 v.

15 AVICENNA NUTRACEUTICAL, LLC,
16 *a Georgia Limited Liability Company,*

17 Defendant.

Case No.: 3:16-cv-02810-BEN-BGS

**AMENDED ORDER GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

18 On July 11, 2018, the Court withdrew the July 10, 2018 Order it issued on
19 Defendant’s motion for summary judgment. (Docket No. 46.) This Order amends and
20 replaces the Court’s July 10, 2018 Order.

21 **INTRODUCTION**

22 Plaintiff Certified Nutraceuticals, Inc. (“Certified”) brings this false advertising
23 and unfair business practice action against Defendant Avicenna Nutraceutical, LLC
24 (“Avicenna”). Certified alleges Avicenna falsely advertised its collagen products as
25 “patented” or processed using “patented formulas and production methods” because
26 Avicenna never held any relevant patents. Certified further alleges that, as a competitor
27 also engaged in the sale of collagen products, it suffered damages in the form of diversion
28 of business and loss of goodwill.

1 **PROCEDURAL HISTORY**

2 On November 15, 2016, Plaintiff filed its Complaint asserting three claims for
3 relief: (1) false advertising under Section 43(a)(1)(B) of the Lanham Act; (2) unlawful
4 business practices under California and Professions Code § 17200; and (3) False and
5 Misleading Advertising under California and Business Professions Code § 17500.
6 (Docket No. 1, “Compl.”) Defendant’s now move for summary judgment on all of
7 Plaintiff’s claims. (Docket No. 28.)

8 **BACKGROUND¹**

9 Certified and Avicenna are competitors involved in the manufacture, distribution,
10 and sale of raw ingredients for use in various dietary and nutritional products. In
11 particular, both parties focus on producing and supplying collagen ingredients. Collagen
12 is a complex structural protein, which provides strength and flexibility to skin, hair, and
13 nails, and is an essential and major component of muscles, tendons, cartilage, ligaments,
14 joints, and blood vessels. There are three main types of collagen: I, II, and III. Types I
15 and III are primarily found in skin, tendon, and bone; Type II is predominantly found in
16 articular cartilage.

17 In October 2016, Avicenna’s website included the following statements:

18 Avicenna Nutraceutical is a Georgia, United States based
19 company with the primary focus on the manufacture and
20 distribution of raw materials with a specific emphasis on
Patented Chicken Sternum Type 2 Collagen.

21 Avicenna is a raw materials company, which applies its
22 patented formulas and production methods to process US
chicken sternum into hydrolyzed/undernaturated type 2 collagen.

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26 ¹ The following overview of facts is drawn from the pleadings and the admissible
27 evidence submitted by the parties in litigating the pending summary judgment motion.
28 The Court’s reference to certain pieces of evidence is not an indication that it is the only
pertinent evidence relied on or considered by the Court. The Court has reviewed and
considered all the admissible evidence submitted by the parties.

1 (Docket No. 31-1, Decl. of Robert Tauler (“Tauler Decl.”) ¶ 2, Ex. A at pp. 2-3.)²
2 However, Avicenna admits it did not claim any relevant patents at that time. (Docket No.
3 5, Def.’s Answer ¶¶ 26-27; Tauler Decl. ¶ 9, Ex. H at p. 11.) Certified manufactures a
4 collagen product, KollaGen II-xs (“KollaGen”), which competes with Avicenna’s Type 2
5 Collagen product. (Docket No. 28-2, Decl. of Michael Adams (“Adams Decl.”) ¶ 2, Ex.
6 A at pp. 15-16.) KollaGen is covered by U.S. Patent No. 8,344,106 B1 (“the ’106
7 Patent”). (*Id.* at pp. 176-79.)

8 LEGAL STANDARD

9 Summary judgment is appropriate when “there is no genuine dispute as to any
10 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
11 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is
12 material if it might affect the outcome of the suit under the governing law. *Anderson*,
13 477 U.S. at 248. “Factual disputes that are irrelevant or unnecessary will not be
14 counted.” *Id.* A dispute is genuine if “the evidence is such that a reasonable jury could
15 return a verdict for the nonmoving party.” *Id.* In considering a summary judgment
16 motion, the evidence of the nonmovant is to be believed, and all justifiable inferences are
17 to be drawn in his or her favor. *Id.* at 255.

18 The moving party bears the initial burden of showing there are no genuine issues
19 of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It can do so by
20 negating an essential element of the non-moving party’s case, or by showing that the non-
21 moving party failed to make a showing sufficient to establish an element essential to that
22 party’s case, and on which the party will bear the burden of proof at trial. *Id.* The burden
23 then shifts to the non-moving party to show that there is a genuine issue for trial. *Id.* As
24 a general rule, the “mere existence of a scintilla of evidence” will be insufficient to raise
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28 ² Unless otherwise stated, the Court’s reference to a page number in the parties’
filings is to the page number generated by the CM/ECF system.

1 a genuine issue of material fact. *Anderson*, 477 U.S. at 252. There must be evidence on
2 which the jury could reasonably find for the non-moving party. *Id.*

3 **DISCUSSION**

4 Defendant advances three arguments in support of its motion summary judgment:
5 (1) Plaintiff failed to raise a genuine issue of material fact that it suffered actual injury
6 due to Defendant’s false statements; (2) Plaintiff is barred from recovery under the
7 unclean hands doctrine; and (3) Plaintiff cannot recover under the Lanham Act for what
8 is essentially a claim for the false marking of an unpatented product, which may only be
9 brought under Section 292 of the Patent Act.

10 The Court agrees Defendant is entitled to summary judgment on Plaintiff’s
11 Lanham Act claim because Plaintiff brings its claims with unclean hands. Summary
12 judgment of Plaintiff’s remaining state-law claims is also appropriate, because Plaintiff
13 failed to establish it suffered actual injury as a result of Defendant’s false statements.

14 **A. Unclean Hands Doctrine**

15 “Unclean hands is a defense to a Lanham Act infringement suit.” *Japan Telecom,*
16 *Inc. v. Japan Telecom Am. Inc.*, 287 F.3d 866, 870 (9th Cir. 2002) (quoting *Fuddruckers,*
17 *Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 847 (9th Cir. 1987)) (internal quotation
18 marks omitted). The doctrine of unclean hands “bars relief to a plaintiff who has violated
19 conscience, good faith or other equitable principles in his prior conduct, as well as to a
20 plaintiff who has dirtied his hands in acquiring the right presently asserted.” *Dollar Sys.,*
21 *Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir. 1989). To prevail on a
22 defense of unclean hands, a defendant must demonstrate by clear and convincing
23 evidence: (1) “that the plaintiff’s conduct is inequitable;” and (2) “that the conduct relates
24 to the subject matter of [the plaintiff’s] claims.” *Fuddruckers*, 826 F.2d at 847 (citing
25 *CIBA–GEIGY Corp. v. Bolar Pharm.*, 747 F.2d 844, 855 (3d Cir. 1984)); *see also*
26 *TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820, 833 (9th Cir. 2011) (holding that a
27 defendant must demonstrate that an unclean hands defense applies with “clear,
28 convincing evidence”). Both are demonstrated here.

1 However, even if a defendant satisfies both requirements, a court must not
2 automatically apply the doctrine of unclean hands and “permit a defendant wrongdoer to
3 retain the profits of his wrongdoing merely because the plaintiff himself is possibly guilty
4 of transgressing the law.” *POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085,
5 1092 (C.D. Cal. 2016) (quoting *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387
6 (1944)). “Rather, determining whether the doctrine of unclean hands precludes relief
7 requires balancing the alleged wrongdoing of the plaintiff against that of the defendant,
8 and ‘weigh[ing] the substance of the right asserted by [the] plaintiff against the
9 transgression which, it is contended, serves to foreclose that right.’” *Northbay Wellness*
10 *Grp., Inc. v. Beyries*, 789 F.3d 956, 960 (9th Cir. 2015) (quoting *Republic Molding Corp.*
11 *v. B.W. Photo Utilities*, 319 F.2d 347, 350 (9th Cir. 1963)).

12 1. *Whether Defendant Has Demonstrated Plaintiff Engaged in Inequitable*
13 *Conduct with Clear and Convincing Evidence*

14 In the Ninth Circuit, “only a showing of wrongfulness, willfulness, bad faith, or
15 gross negligence, proved by clear and convincing evidence, will establish sufficient
16 culpability for invocation of the doctrine of unclean hands.” *Pfizer, Inc. v. Int’l Rectifier*
17 *Corp.*, 685 F.2d 357, 359 (9th Cir. 1982) (citing *Carpet Seaming Tape Licensing Corp. v.*
18 *Best Seam Inc.*, 616 F.2d 1133, 1138-39 (9th Cir. 1980); *W. R. Grace & Co. v. W. U. S.*
19 *Indus., Inc.*, 608 F.2d 1214, 1218 (9th Cir. 1979)).

20 Defendant contends Plaintiff “admitted to engaging in the same improper conduct
21 for which it faults [Defendant] – namely, publishing false statements about a product
22 being ‘patented’ before the patent had been issued.” (Mot. at p. 12.) To support its
23 contention, Defendant presents evidence that over a year before the United States Patent
24 and Trademark Office (“USPTO”) issued the ’106 patent,³ Plaintiff was falsely stating in
25 a November 15, 2011 press release on its website: “We developed *Patented* kollagen II-
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28 ³ The ’106 Patent was issued on January 1, 2013. (Adams Decl. ¶ 11, Ex. J.)

1 xs [sic] – 100% Avian Sternum Collagen Type II for joint health[.]” (Adams Decl. ¶ 12,
2 Ex. K.) (emphasis added.) Defendant also presents evidence that this false statement
3 appeared in an October 25, 2011 press release issued by Infiniti Marketing Group, a
4 company “acting as Certified Sales & Marketing Department [sic].” (*Id.* ¶ 13, Ex. L.)

5 In its opposition, Plaintiff does not object or otherwise contest the accuracy or
6 publication of either press release. Instead, Plaintiff asserts the statements made prior to
7 the issuance of the ’106 Patent were not false or misleading because “the KollaGen
8 product was covered by [U.S. Patent No. 6,323,319 (“the ’319 Patent”)], issued on or
9 about November 11, 2001.” (Opp’n at p. 4; Docket No. 31-21, Decl. Ahmad Alkayali
10 (“Alkayali Decl.”) ¶ 3.) But as Defendant points out in its reply, Plaintiff was not an
11 owner, assignee, or licensee of the ’319 Patent in 2011.⁴

12 Since the initial assignment in 1997, neither Plaintiff nor Mr. Alkayali appears to
13 have held any interest or license for the ’319 Patent. *See* n.4, below. This may be due to
14 the fact that on May 3, 2002, the Orange County Superior Court⁵ issued a permanent
15 injunction against Mr. Alkayali which, *inter alia*, permanently enjoined Mr. Alkayali, his
16 “officers, agents, employees, representative, and all persons acting in concert or
17 participating with [him] . . . from engaging in, committing, or performing, directly or
18 indirectly, by any means whatsoever, any of the following acts”:

19 A. Transferring, assigning, licensing, hypothecating,
20 enforcing, selling, granting, encumbering, or in any way

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22 ⁴ The Court takes judicial notice that the ’319 Patent was issued on November 27,
23 2001, and that Ahmad Alkayali, Plaintiff’s founder and current Chief Executive Officer
24 (*see* Alkayali Decl. ¶ 1), assigned his interest in the ’319 Patent while it was pending on
25 December 2, 1997. *See* USPTO Website, *Patent Assignment Search for Patent No.*
26 *6,323,319*, available at <https://assignment.uspto.gov/patent/index.html#/patent/search>
27 (last visited July 3, 2018). *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.
28 2001) (“The Court may take judicial notice of “matters of public record.”) (quoting
Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986)).

⁵ *BioCell Tech. v. Alkayali*, Orange County Superior Court Case No. 00CC06708,
May 3, 2002 Judgment, aff’d, 2004 WL 114699, at *1 (Cal. Ct. App. Jan. 26, 2004).

1 changing the legal or equitable title to the patent issued by the
2 United States Patent Office as US Patent # 6,025,327, or any
3 continuation thereof (collectively referred to as “327 Patent”).⁶

4 B. Manufacturing, distributing, offering for sale, or selling
5 any of the product or goods covered under the 327 Patent.”

6 . . .

7 D. From interfering, directly or indirectly, with BioCell’s
8 manufacture, distribution, offer for sale, selling or licensing the
9 327 Patent or any product or good covered under the 327
Patent.

10 (Docket No. 33-4, Supp. Decl. of Brian Berggren (“Berggren Decl.”) ¶ 4, Ex. O at pp. 8-
11 9.)

12 Plaintiff did not object or otherwise dispute the authenticity or continuing
13 applicability of the permanent injunction order. Nor does Plaintiff offer any other
14 rebuttal evidence that its statements were not false or misleading, other than the false
15 statement in Mr. Alkayali’s declaration that he was the “assignee of Patent No.
16 6,323,319.”⁷ (Alkayali Decl. ¶ 3.) Thus, the Court agrees with Defendant that it can
17 reasonably conclude that either of two scenarios occurred at the time Plaintiff made the
18 2011 statements about its KollaGen product: (1) KollaGen is only covered by the ’106
19 Patent; or (2) prior to the issuance of the ’106 Patent, KollaGen was covered by the ’319
20 Patent. In either scenario, it appears Plaintiff knowingly made false statements regarding
21 the patented nature of KollaGen – either because it knew the ’106 Patent had not yet been
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24 ⁶ The Court takes judicial notice that the ’319 Patent is “a continuation of . . . U.S.
25 Pat. No. 6,025,327 [(the ’327 Patent)].” See USPTO Website, *USPTO Patent Full-Text*
26 *and Image Database Search for Patent No. 6,323,319*, available at
27 <http://patft.uspto.gov/netahtml/PTO/srchnum.htm> (last visited July 3, 2018).

28 ⁷ The Court further notes Plaintiff’s Complaint admits the ’319 Patent is “related”
to the ’327 Patent, and falsely asserts Mr. Alkayali “is listed as the assignee” of the ’319
Patent. (Compl. ¶¶ 19-20.)

1 issued, or because it knew it had no right to manufacture, distribute, offer for sale, or sell
2 any goods under the '319 Patent because it was a continuation of the '327 Patent.

3 For all of these reasons, the Court finds Defendant has met its burden of
4 demonstrating Plaintiff's wrongfulness, willfulness, and bad faith in engaging in
5 inequitable conduct with clear and convincing evidence. *Pfizer*, 685 F.2d at 359
6 (citations omitted).

7 2. *Whether Defendant's Unclean Hands Defense Relates to Plaintiff's False*
8 *Advertising Claim*

9 The second requirement of the unclean hands defense does not require "precise
10 similarity" between the plaintiff's inequitable conduct and the plaintiff's claims, but the
11 misconduct "must be 'relative to the matter in which [the plaintiff] seeks relief.'" *Pom*
12 *Wonderful LLC v. Welch Foods, Inc.*, 737 F. Supp. 2d 1105, 1110 (C.D. Cal. 2010)
13 (alterations in original) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach.*
14 *Co.*, 324 U.S. 806, 814 (1945)). Stated differently, the defense should only be applied
15 "where some unconscionable act of one coming for relief has immediate and necessary
16 relation to the equity that he seeks in respect of the matter in litigation." *U-Haul Int'l,*
17 *Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1254 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th
18 Cir. 1982) (internal citation omitted). The relevant inquiry is not "whether the plaintiff's
19 hands are dirty," but whether the plaintiff "dirtied them in acquiring the right" presently
20 asserted or whether "the manner of dirtying renders inequitable the assertion of such
21 rights against the defendants." *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th
22 Cir. 1985) (quoting *Republic Molding Corp.*, 319 F.2d at 349 (internal quotation marks
23 omitted).

24 Plaintiff contends "there is no good faith basis for Defendant to claim that
25 statements made in 2011 have an *immediate* and necessary relationship" to Plaintiff's
26 Complaint. (Opp'n at p. 12) (emphasis in original). But the Court has little difficulty in
27 finding Plaintiff's inequitable conduct has an immediate and necessary relationship to the

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1 equitable remedies he seeks.⁸ It is undisputed that Plaintiff’s KollaGen product competes
2 with Defendant’s Type 2 Collagen product. (Adams Decl. ¶ 2, Ex. A at pp. 15-16.) It is
3 also undisputed that the false statements Plaintiff attributes to Defendant (and which
4 make up the basis for his claims for relief) are with respect to the patented nature of
5 Defendant’s Type 2 Collagen product. (Compl.; Tauler Decl. ¶ 2, Ex. A at pp. 2-3.)

6 In sum, it cannot seriously be argued that Plaintiff’s inequitable conduct in making
7 false statements regarding the patented nature of the KollaGen product does not have an
8 “immediate and necessary relation to the equity that [it] seeks.” *Henderson*, 135 S. Ct. at
9 1783 n.1; *see also Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 952 (S.D. Cal.
10 1996) (“The misconduct which brings the clean hands doctrine into operation must relate
11 directly to the transaction concerning which the complaint is made, *i.e.*, it must pertain to
12 the very subject matter involved and affect the equitable relations between the litigants.”)
13 (quoting *Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists*, 227 Cal. App.
14 2d 675, 728-29 (1964)) (internal quotation marks omitted).

15 After weighing the substance of Plaintiff’s claims against the evidence of
16 Plaintiff’s inequitable conduct as established by Defendant, the Court finds Plaintiff’s
17 inequitable conduct warrants application of the unclean hands doctrine. *Northbay*
18 *Wellness Grp., Inc.*, 789 F.3d at 960. Accordingly, Defendant’s motion for summary
19 judgment on Plaintiff’s Lanham Act claim is **GRANTED**.

20 **B. Plaintiff’s California State-Law Claims**

21 Plaintiff’s two remaining claims arise under California’s unfair competition law
22 (“UCL”) and false advertising law (“FAL”). The UCL prohibits “any unlawful, unfair or
23 fraudulent business act or practice and unfair, deceptive, untrue or misleading
24 advertising,” and any act prohibited by the FAL. Cal. Bus. & Prof. Code § 17200. The
25 FAL generally prohibits advertising that contains “any statement . . . which is untrue or
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28 ⁸ The Complaint prays for an accounting and disgorgement, restitution, and a permanent injunction.

1 misleading, and which is known, or . . . should be known, to be untrue or misleading[.]”
2 Cal. Bus. & Prof. Code § 17500. Unlike a Lanham Act claim, the unclean hands doctrine
3 is not available as a defense to bar claims for unfair business practices act violations
4 under Cal. Bus. & Prof. Code § 17200 et seq. *Ticconi v. Blue Shield of Cal. Life &*
5 *Health Ins. Co.*, 160 Cal. App. 4th 528, 543 (2008) (“Courts have long held that the
6 equitable defense of unclean hands is not a defense to an unfair trade or business
7 practices claim based on violation of a statute.”) (citations omitted).

8 Defendant argues summary judgment on Plaintiff’s UCL and FAL claims is
9 appropriate because there is no genuine dispute that Plaintiff did not suffer actual injury
10 as a result of Defendant’s false statements. To prevail on a claim under either the UCL or
11 FAL based on false advertising or promotional practices, “it is necessary only to show
12 that ‘members of the public are likely to be deceived.’” *Chapman v. Skype Inc.*, 220 Cal.
13 App. 4th 217, 226-27 (2013) (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002))
14 (internal quotation marks omitted).

15 In 2004, California passed Proposition 64, which amended the UCL’s and FAL’s
16 standing requirements for private actions for relief. *Veera v. Banana Republic, LLC*, 6
17 Cal. App. 5th 907, 915-16 (Cal. Ct. App. 2016) (citing *Kwikset Corp. v. Superior Court*,
18 51 Cal. 4th 310, 320 (2011); *In re Tobacco II Cases*, 46 Cal. 4th 298, 314 (2009)).
19 Subsequently, to have standing to advance UCL and FAL claims, a private plaintiff must
20 prove they suffered: (1) “a loss or deprivation of money or property sufficient to qualify
21 as injury in fact, i.e., *economic injury*,” and (2) that the economic injury “was the result
22 of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of
23 the claim.” *Veera*, 6 Cal. App. 5th at 916 (quoting *Kwikset Corp.*, 51 Cal. 4th at 322)
24 (emphasis added in original).

25 The Ninth Circuit recognizes that “California’s unfair competition law defines
26 ‘injury in fact’ more narrowly” than what is required for Article III standing. *See*
27 *TrafficSchool.com*, 653 F.3d at 825 n.1 (“Plaintiffs filing an unfair competition suit
28 [under California law] must prove a pecuniary injury . . . and ‘immediate’ causation . . . [.]

1 Neither is required for Article III standing.”) (internal citations omitted). Thus, the Court
2 construes Defendant’s argument as an attack on Plaintiff’s standing as a separate element
3 of its UCL and FAL claims, rather than an attack on Plaintiff’s Article III standing.

4 To support its position, Defendant submitted evidence that: 1) Plaintiff could only
5 identify two customers it “lost” as a result of Defendant’s false statements: Emenee
6 Distributors, LLC (“Emenee”) and Vibrant Health (“Vibrant”); and 2) these customers’
7 decisions to purchase collagen products from Defendant were not based on the false
8 statements. (Adams Decl. ¶¶ 2, 3, Ex. A at pp. 12-15 & Ex. B at p. 9.)⁹

9 Specifically, Defendant provided the declaration of Emenee’s owner, Edward J.
10 Stroup, which expressly states his decision to purchase Defendant’s Collagen Type II
11 Product “was not based on any representations by [Defendant] regarding its ‘patents’ or
12 the ‘patented’ nature of the Collagen Type II Product.” (Adams Decl. ¶ 4, Ex. C.)
13 Rather, Mr. Stroup’s decision was based “on the quality of [Defendant’s] Collagen Type
14 II Product[.]” (*Id.*)

15 Similarly, Defendant provided the declaration of Mark Timon, Vibrant’s founder
16 and formulator. (Adams Decl. ¶ 5, Ex. D.) Mr. Timon states Vibrant purchased
17 KollaGen from Plaintiff from December 2012 to February 2014, but stopped purchasing
18 KollaGen “because it proved to be inconsistent in flavor, texture, and performance.” (*Id.*)
19 In 2016, Vibrant decided to “switch” to Defendant’s Collagen Type II Product “to
20 remedy multiple production, sales, and performance problems caused by [Plaintiff’s
21 KollaGen].” (*Id.*) Like Emenee, its decision to purchase Defendant’s Collagen Type II
22 Product “was not based on or otherwise due to any representations by [Defendant]
23 regarding ‘patents’ or the ‘patented’ nature of [Defendant’s] Collagen Type II Product.”
24 (*Id.*) Instead, Vibrant “chose to purchase [Defendant’s] Collagen Type II Product”
25 because it considers it to be “superior in terms of quality” to Plaintiff’s KollaGen. (*Id.*)
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28 ⁹ Plaintiff’s objections to this evidence are overruled.

1 As part of its opposition, Plaintiff submitted an expert declaration from Thomas
2 Gourley. (Opp’n at p. 9; Docket No. 31-19, Decl. of Thomas Gourley.) In its reply,
3 Defendant objects to Mr. Gourley’s declaration on the grounds that it offers an expert
4 opinion that Plaintiff failed to timely disclose.¹⁰ (Reply at p. 10.) Defendant further
5 argues that Plaintiff failed to rebut its evidence of Plaintiff’s lack of actual injury. The
6 Court agrees that the expert opinion Plaintiff offers is untimely and that Plaintiff has not
7 met its burden to rebut Defendant’s evidence that it did not suffer actual injury.

8 1. *Whether Mr. Gourley’s Declaration Contains an Untimely Expert Opinion*

9 On March 22, 2017, Magistrate Judge Bernard G. Skomal issued a Scheduling
10 Order, which set September 15, 2017 as the deadline for the parties’ expert witness
11 designations. (Docket No. 9 ¶ 3.) The parties were ordered to comply with the expert
12 disclosure provisions of Rule 26(a)(2)(A) and (B) of the Federal Rules of Civil Procedure
13 by October 27, 2017.¹¹ (*Id.* ¶ 4.) The parties were further order to supplement their
14 expert disclosures regarding contradictory or rebuttal evidence by November 10, 2017.
15 (*Id.* ¶ 5.) Defendant objects that Mr. Gourley’s declaration sets forth an untimely new
16 expert opinion that was not disclosed in his timely October 2017 expert report. (Reply at
17 p. 10.)

18 Mr. Gourley’s October 2017 expert report indicates he was retained by Plaintiff “to
19 measure damages related in accordance with 15 U.S.C. § 1117 and other applicable laws,
20 and as a consequence of Defendant’s deceptive, untrue, and misleading advertising.”
21 (Adams Decl. ¶ 9, Ex. H at p. 4.) However, the report itself only “calculate[s]
22 [Defendant’s] revenues since inception and assess[es] the adequacy of the information
23 provided to date in order to make such a calculation.” (*Id.*) Yet, Plaintiff now presents a
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26 ¹⁰ The Court construes Defendant’s reply argument that “Mr. Gourley’s
27 supplemental declaration is a late-disclosed, new expert opinion that should be stricken”
as an objection. (Reply at p. 10.)

28 ¹¹ Unless otherwise stated, the Court’s reference to a “Rule” in this section is to the
Federal Rules of Civil Procedure.

1 declaration from Mr. Gourley in support of its opposition to Defendant’s summary
2 judgment motion that purports to “demonstrate a direct relationship between Defendant’s
3 representations that it applied ‘patented formulas and production methods’ to its products
4 and a decline in Plaintiff’s sales.” (Opp’n at p. 9.)

5 The Court agrees that the present declaration offers a new expert opinion that was
6 not previously disclosed in Mr. Gourley’s October 2017 expert report. In other words,
7 when Plaintiff filed Mr. Gourley’s declaration to support its opposition on March 12,
8 2018, the deadline for its disclosure had passed by almost five months, and the deadline
9 for rebuttal disclosures had passed by over four months. Plaintiff’s opposition does not
10 provide any justification or explanation for the untimely submission, or argue that its
11 failure to timely disclose the declaration was harmless. Nor has Plaintiff filed an
12 objection or otherwise contradicted the assertion that the declaration was untimely.

13 Therefore, the Court sustains Defendant’s objection.¹² See Fed. R. Civ. P. 37(c)(1)
14 (“If a party fails to provide information or identify a witness as required by Rule 26(a) or
15 (e), the party is not allowed to use that information or witness to supply evidence on a
16 motion, at a hearing, or at a trial, unless the failure was substantially justified or is
17 harmless.”).

18 2. *Whether a Genuine Issue of Material Fact Exists that Plaintiff Suffered*
19 *Actual Injury*

20 Plaintiff also draws the Court’s attention to Defendant’s alleged concealment of its
21 relationship with, and failure to produce corresponding sales documentation for, NeoCell,
22 one of Defendant’s “major customers.” (Opp’n at p. 2, 7.) This is the only other
23 “evidence” Plaintiff offers to establish it suffered actual injury, which amounts to nothing
24 more than an accusation that Defendant intentionally concealed evidence during
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27 ¹² The Court notes that even if Mr. Gourley’s declaration had been timely
28 disclosed, it appears to be of little evidentiary value as it lacks an evidentiary basis and
relies almost entirely on Mr. Gourley’s own assumptions and conclusions.

1 discovery. In short, Plaintiff suggests that the Court may infer that it suffered injury
2 because Defendant allegedly concealed the identity and sales documentation of one of its
3 customers. This argument is unpersuasive for three reasons.

4 First, as Defendant correctly points out, Plaintiff has already raised this issue with
5 Magistrate Judge Skomal, who denied Plaintiff's request to reopen discovery after
6 concluding Plaintiff did not meet its burden to justify additional discovery. (*See* Docket
7 No. 29, *February 13, 2018 Order* at p. 3) ("Plaintiff's stated purpose for requesting this
8 additional discovery is to ascertain whether or not Defendant is indeed withholding
9 discovery from Plaintiff. . . . The Court finds Plaintiff's disbelief of Defendant does not
10 meet this burden, and therefore does not justify reopening discovery.") (citation omitted).

11 Plaintiff's deadline to object to Magistrate Judge Skomal's Order denying his
12 request to reopen discovery expired on February 28, 2018. *See* Fed. R. Civ. P. 72(a)
13 ("When a pretrial matter not dispositive of a party's claim or defense is referred to a
14 magistrate judge to hear and decide, the magistrate judge must promptly conduct the
15 required proceedings and, when appropriate, issue a written order stating the decision. A
16 party may serve and file objections to the order within 14 days after being served with a
17 copy. A party may not assign as error a defect in the order not timely objected to."); *see*
18 *also* 28 U.S.C. § 636(b)(1)(A); CivLR 72.1.b. ("a magistrate judge will hear and
19 determine any pretrial motions, including discovery motions"). In failing to file a timely
20 objection to Magistrate Judge Skomal's Order, Plaintiff waived the issue.

21 Second, even if the Court considered Plaintiff's accusation as evidence (which it
22 does not), it is not enough to raise a genuine issue of material fact. Unlike Emenee and
23 Vibrant, Plaintiff does not claim NeoCell was a customer it "lost" as a result of
24 Defendant's false statements. Instead, it essentially argues that, but for Defendant's false
25 statements, NeoCell would have purchased collagen products from Plaintiff. But this
26 conclusory argument ignores the fact that Plaintiff admits there is at least one other
27 competitor in the marketplace that NeoCell could have purchased collagen from. (Adams
28 Decl. ¶ 2, Ex. A at p. 11.) Put simply, the mere fact that NeoCell was one of *Defendant's*

1 customers does not, on its own, establish a genuine issue of material fact that: 1)
2 NeoCell’s decision to purchase collagen products from Defendant was based on its false
3 statements, or 2) but for Defendant’s false statements, NeoCell would have purchased
4 collagen products from Plaintiff.

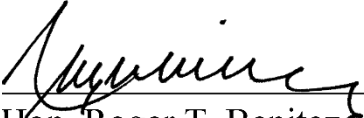
5 Third, Plaintiff’s accusation that Defendant withheld sales documentation of its
6 sales to NeoCell does not in any way rebut Defendant’s evidence that Emenee’s and
7 Vibrant’s decision to purchase Defendant’s collagen products were *not* based on its
8 claims that its products were “patented.” (Adams Decl. ¶¶ 4-5, Exs. C-D.) As discussed
9 above, Emenee and Vibrant are the only customers Plaintiff identified as having “lost” to
10 Defendant. As a result, Plaintiff has failed to present even a scintilla of evidence to
11 establish a genuine issue of material fact that it suffered an actual injury. *Anderson*, 477
12 U.S. at 252. Therefore, Defendant’s motion for summary of Plaintiff’s UCL and FAL
13 claims is **GRANTED**.

14 **CONCLUSION**

15 For all of the foregoing reasons, Defendant’s motion for summary judgment of
16 Plaintiff’s claims is **GRANTED**.

17 **IT IS SO ORDERED.**

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19 Dated: July 27, 2018

20 
21 Hon. Roger T. Benitez
22 United States District Judge
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