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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

QUIDEL CORPORATION,

Plaintiff,

v.

SIEMENS MEDICAL SOLUTIONS  
USA, INC., *et al.*,

Defendants.

Case No. 16-cv-3059-BAS-AGS

**ORDER GRANTING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

**[ECF No. 268]**

Presently before the Court is Plaintiff Quidel Corporation's Motion for (1) Summary Judgment or, in the Alternative, Partial Summary Judgment as to All of Defendant Siemens Healthcare Diagnostics Inc.'s Claims; and (2) Partial Summary Judgment as to Defendants' Unclean Hands Affirmative Defense. ("Mot.," ECF No. 268.) Defendants Siemens Medical Solutions USA, Inc. and Siemens Healthcare Diagnostics, Inc. filed an opposition to the Motion, ("Opp'n," ECF No. 273), to which Quidel filed a reply, ("Reply," ECF No. 278).<sup>1</sup> The Court finds this Motion

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<sup>1</sup> Pursuant to this Court's standing orders, the parties filed a joint statement of undisputed material facts along with the reply brief. (ECF No. 279.) The joint statement contains a total of three facts: (1) Quidel filed its complaint; (2) Siemens filed a motion for summary judgment; and (3) the Court granted in part and denied in part Siemens' motion. (*Id.*) The fact that the parties attest that they could agree on no substantive facts and merely presented the Court a timeline of with three filings

1 suitable for determination on the papers and without oral argument. Civ. L. R.  
2 7.1(d)(1). For the reasons stated below, the Court **GRANTS IN PART** and **DENIES**  
3 **IN PART** the Motion.

#### 4 **I. BACKGROUND**

5 The Court detailed the factual background of this case in a prior order and does  
6 not repeat the full background here. (*See* ECF No. 254, at 2–4.) In short, Quidel and  
7 Siemens produce competing assays (blood tests) used for measuring thyroid  
8 stimulating immunoglobins, which can aid in the detection of Graves’ disease.  
9 Generally, there are two types of assays available to aid in the diagnosis of Graves’  
10 disease: (1) TSH receptor antibody (TRAb) assays and (2) TSI only assays. TRAb  
11 assays detect both stimulating and blocking thyroid immunoglobins (also known as  
12 “TSI” and “TBI”), while TSI only assays detect only stimulating immunoglobins.  
13 Quidel’s assay is called Thyretain and Siemens’ assay is called IMMULITE. The  
14 crux of this matter lies in Siemens’ advertising of IMMULITE. In Quidel’s opinion,  
15 IMMULITE “measures the binding of antibodies to the TSH receptor without  
16 discrimination,” meaning it does not distinguish between stimulating or blocking  
17 antibodies. However, Siemens advertised IMMULITE as a “TSI only” assay (i.e.  
18 one that does distinguish between stimulating and blocking antibodies).

19 Quidel filed its original complaint against Defendant Siemens Medical  
20 Solutions USA, Inc. Siemens Medical moved to dismiss the complaint, and Quidel  
21 filed a timely first amended complaint. The amended complaint added Siemens  
22 Healthcare as a defendant.<sup>2</sup> Siemens moved to dismiss the amended complaint, and  
23 the Court denied the motion. Siemens answered the complaint and later requested  
24 leave to file an amended answer and counterclaims. The Court granted the motion.  
25 Siemens filed an amended answer, and within the answer, asserted counterclaims and

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28 that can be confirmed by the docket is offensive and unacceptable. The Court is disappointed that  
the parties’ attorneys were unable to work together on such a simple task.

<sup>2</sup> The Court refers to Defendants collectively as “Siemens.”

1 affirmative defenses. (ECF No. 124.)

2 Quidel moved to strike a portion of the counterclaims pursuant to California  
3 Code of Civil Procedure § 425.16, commonly known as the Anti-Strategic Lawsuits  
4 Against Public Participation (“Anti-SLAPP”) law. (ECF No. 141.) The Court  
5 granted the motion to strike but granted Siemens leave to file new counterclaims  
6 omitting the stricken material. (ECF No. 247.) The Court specified that in amending  
7 the counterclaims, Siemens “may not add any new counterclaims or allegations, and  
8 the only change it may make is to excise the allegations of protected activity the  
9 Court discusses in this Order.” Siemens filed an amended answer and counterclaims.  
10 (“Answer & CC,” ECF No. 252.) Quidel then moved for sanctions against Siemens  
11 because Siemens had added new allegations to its counterclaims. (ECF No. 257.)  
12 The Court granted the motion, finding that Siemens had improperly added new  
13 material in an attempt to bolster its counterclaims. (ECF No. 276.) The Court “will  
14 not consider any material improperly added to Siemens’ amended counterclaims.”  
15 (*Id.* at 3.)

16 Finally, the Court has already analyzed two motions for summary judgment.  
17 The Court granted in part Siemens’ motion, finding that even if Siemens’ advertising  
18 of IMMULITE was false, any false advertising was not material to the laboratories’  
19 decision to purchase IMMULITE. The Court also found that issues of material fact  
20 exist as to whether physicians are a part of the relevant market of purchasers of the  
21 assays and whether physicians were deceived by the advertising of IMMULITE. The  
22 Court also denied Siemens’ request for summary judgment as to its unclean hands  
23 defense. (*See* ECF No. 254.)

24 In the present Motion, Quidel seeks summary judgment as to Siemens’  
25 counterclaims of trade libel, abuse of process, and unfair competition, and as to the  
26 affirmative defense of unclean hands.

## 27 **II. LEGAL STANDARD**

28 Summary judgment is appropriate under Rule 56(c) where the moving party

1 demonstrates the absence of a genuine issue of material fact and entitlement to  
2 judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477  
3 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law,  
4 it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
5 242, 248 (1986). A dispute about a material fact is genuine if “the evidence is such  
6 that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

7 A party seeking summary judgment always bears the initial burden of  
8 establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.  
9 The moving party can satisfy this burden in two ways: (1) by presenting evidence  
10 that negates an essential element of the nonmoving party’s case; or (2) by  
11 demonstrating that the nonmoving party failed to make a showing sufficient to  
12 establish an element essential to that party’s case on which that party will bear the  
13 burden of proof at trial. *Id.* at 322–23. “Disputes over irrelevant or unnecessary facts  
14 will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec.*  
15 *Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

16 If the moving party fails to discharge this initial burden, summary judgment  
17 must be denied, and the court need not consider the nonmoving party’s evidence.  
18 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970). If the moving party  
19 meets this initial burden, however, the nonmoving party cannot defeat summary  
20 judgment merely by demonstrating “that there is some metaphysical doubt as to the  
21 material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,  
22 586 (1986); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995)  
23 (“The mere existence of a scintilla of evidence in support of the non-moving party’s  
24 position is not sufficient.” (citing *Anderson*, 477 U.S. at 242, 252)). Rather, the  
25 nonmoving party must “go beyond the pleadings” and by “the depositions, answers  
26 to interrogatories, and admissions on file,” designate “specific facts showing that  
27 there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P.  
28 56(e)).

1           When making this determination, the court must view all inferences drawn  
2 from the underlying facts in the light most favorable to the nonmoving party. *See*  
3 *Matsushita*, 475 U.S. at 587. “Credibility determinations, the weighing of the  
4 evidence, and the drawing of legitimate inferences from the facts are jury functions,  
5 not those of a judge, [when] he [or she] is ruling on a motion for summary judgment.”  
6 *Anderson*, 477 U.S. at 255.

### 7 **III. ANALYSIS**

#### 8 **A. Trade Libel Claim**

9           California law defines trade libel as “an intentional disparagement of the  
10 quality of property [or a product], which results in pecuniary damage.” *Erlich v.*  
11 *Etner*, 224 Cal. App. 2d 69, 73 (1964). The elements of trade libel are (1) a false  
12 publication, (2) which induces others not to deal with the party, and (3) special  
13 damages. *Aetna Cas. & Surety Co. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th  
14 Cir. 1988).

15           In its trade label claim, Siemens alleges that Quidel published false statements  
16 that are disparaging to Siemens and the IMMULITE assay. (Answer & CC ¶ 63.)  
17 These false statements “induced Siemens’ prospective and existing customers to not  
18 deal with it” which caused injury to Siemens. (*Id.* ¶¶ 65, 66.) Siemens further alleges  
19 that it suffered damages of legal fees, lost sales and customers, and loss of reputation  
20 and goodwill. (*Id.* at ¶¶ 10, 55, 61, 65–66.) Quidel moves for summary judgment  
21 because Siemens has not sufficiently alleged and cannot prove special damages.  
22 (Mot. at 6.)

23           Rule 9(g) establishes that special damages must be specifically stated. Fed. R.  
24 Civ. P. 9(g). In its prior order, the Court noted that one court held that the defendant  
25 sufficiently alleged special damages when it alleged lost market share as a result of  
26 the plaintiff’s false online reviews. (ECF No. 247, at 18 (citing *Swiss Am. Trading*  
27 *Corp. v. Regal Assets, LLC*, No. CV 14-4960 DDP (ASx), 2015 WL 631569, at \*3  
28 (C.D. Cal. Feb. 13, 2015)).) “But the breadth of cases require much more.” (*Id.*)

1           In *Homeland Housewares, LLC v. Euro-Pro Operating LLC*, No. CV 14-3954  
2 DDP (MANx), 2014 WL 6892141, at \*4 (C.D. Cal. Nov. 5, 2014), the plaintiffs  
3 alleged special damages by alleging they suffered “general statements of economic  
4 loss” and requested \$3 million total for all causes of action. The court held “to  
5 recover damages based on general business loss, Plaintiffs ‘should have alleged facts  
6 showing an established business, the amount of sales for a substantial period  
7 preceding the publication, the amount of sales subsequent to the publication, [and]  
8 facts showing that such loss in sales were the natural and probable result of such  
9 publication[.]’” *Id.* (quoting *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 12  
10 F. Supp. 2d 1035, 1047 (C.D. Cal. 1998)). Because the plaintiffs had only generally  
11 alleged “lost sales, market share, and customer goodwill,” they had not adequately  
12 alleged special damages for trade libel. *Id.*; see also *Franklin Fueling Sys., Inc. v.*  
13 *Veeder-Root Co.*, No. S-09-580 FCD/JFM, 2009 WL 2462505, at \*5 (E.D. Cal. Aug.  
14 11, 2009). Further, courts have held if a plaintiff alleges lost sales, it must “identify  
15 particular customers and transactions of which it was deprived as a result of the  
16 libel.” *Mann v. Quality Old Time Serv., Inc.*, 120 Cal. App. 4th 90, 109 (2004).

17           Siemens does not directly dispute the assertion that it has not presented  
18 sufficient evidence of special damages. However, Siemens argues that its trade libel  
19 claim does not require proof of special damages because the challenged statements  
20 are libel per se. (Opp’n at 12.)

21           A statement is libel for se when it “is defamatory without the need for  
22 explanatory matter such as an inducement, innuendo or other extrinsic  
23 fact.” *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 700  
24 (2007) (citing Cal. Civ. Code § 45a). If a plaintiff adequately alleges and proves a  
25 libel per se claim, it is unnecessary to prove special damages; rather, damage to  
26 reputation is presumed. See *Barnes-Hind, Inc. v. Superior Court*, 181 Cal. App. 3d  
27 377, 381 (1986). The issue thus becomes whether the concept of libel per se may  
28 apply to trade libel claims. “Trade libel is generally distinguished from common-

1 law defamation and is said to connote ‘an intentional disparagement of the quality of  
2 property, which results in pecuniary damage to plaintiff.’ Libel per se, on the other  
3 hand, is based in common law defamation, and thus relates to the standing and  
4 reputation of the businessman as distinct from the quality of his or her goods.” *Id.*  
5 (citation omitted).

6 In *Peak Health Center v. Dorfman*, No. 19-cv-4145-VKD, 2019 WL 5893188  
7 (N.D. Cal. Nov. 12, 2019), the defendant made a similar argument that Siemens  
8 makes here: that it need not allege special damages for its trade libel claim because  
9 “a claim for libel per se” does not require it. The court held, while it may be true that  
10 libel per se does not require an allegation of special damages, “Peak Health has  
11 chosen to pursue a claim for trade libel in its amended complaint, not libel per se—a  
12 distinction recognized in [various] cases.” *Id.* at \*6. The court cited *Barnes-Hind* as  
13 well as *Erlich*, 224 Cal. App. 2d at 73, where the California Court of Appeal similarly  
14 held: “plaintiff elected to proceed against Etner solely on the theory of trade  
15 libel. . . . Trade libel is defined as an intentional disparagement of the quality of  
16 property, which results in pecuniary damage to plaintiff. While [] general damages  
17 are presumed in a libel of a businessman, this is not so in action for trade libel.” *Id.*  
18 (citation omitted). Similarly, in *Universal Grading Service v. eBay, Inc.*, No. C-09-  
19 2755 RMW, 2011 WL 846060, at \*10 (N.D. Cal. Mar. 8, 2011), the court held,  
20 “plaintiffs cannot bypass the requirement to show special damages by now asserting  
21 trade libel *per se* because the [the complaint] clearly alleges ‘common law trade  
22 libel.’”

23 Indeed, there are courts that have found otherwise. The court in *Theme*  
24 *Productions, Inc. v. News Am. FSI, Inc.*, No. C-97-4617-VRW, 1998 U.S. Dist.  
25 LEXIS 23560, at \*20 (N.D. Cal. 1998) held, “[o]rdinarily, a cause of action for trade  
26 libel requires at a minimum: (1) a publication; (2) which induces others not to deal  
27 with plaintiff; and (3) special damages. A determination that a publication is libelous  
28 per se negates the necessity of pleading special damages.” (citations omitted.) This

1 Court does not find such a holding to be supported and therefore disagrees. The  
2 Court finds *Peak Health, Erlich, and Universal Grading* to be well-reasoned and  
3 applicable. Like the defendant in *Universal Grading*, Siemens pled “trade libel under  
4 California common law.” (See Answer & CC at 30.) If Siemens had intended to  
5 plead trade libel per se, it could have done so. Without this, special damages are  
6 required. Because Siemens has failed to sufficiently plead special damages, let alone  
7 provide evidence supporting such damages them, the Court **GRANTS** Quidel’s  
8 Motion for Summary Judgment on the trade libel counterclaim.

9 **B. Abuse of Process Claim**

10 The California abuse of process tort has two elements: “(1) an ulterior motive;  
11 and (2) a willful act in the use of process not proper in the regular conduct of the  
12 proceedings.” *Drum v. Bleau, Fox & Assocs.*, 107 Cal. App. 4th 1009, 132 (2003).  
13 Simply filing or maintaining a lawsuit—even with an improper motive—is not  
14 actionable. *Silver v. Gold*, 211 Cal. App. 3d 17 (Ct. App. 1989). The tort must  
15 involve a misuse of the power of the court, or “an act done under the authority of the  
16 court for the purpose of perpetrating an injustice.” *Younger v. Solomon*, 38 Cal. App.  
17 3d 289, 297 (1974). There must be “an improper act outside the scope of judicial  
18 proceedings[,]” *Carlock v. RMP Fin.*, No. 03-cv-688 W (AJB), 2003 WL 24207625,  
19 at \*2 (S.D. Cal. Aug. 5, 2003), because “maintenance of a lawsuit . . . is not a proper  
20 basis for an abuse of process action.” *Oren Royal Oaks Venture v. Greenberg,*  
21 *Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1168 (1986).

22 Siemens alleges that Quidel abused the process through its action of sending  
23 its original complaint and amended complaint with letters to physicians and  
24 laboratories, who are the parties’ customers. (Answer & CC ¶ 68.) The first issue is  
25 whether these actions may form the basis of an abuse of process claim.

26 “[T]he essence of the [abuse of process] tort [is] . . . misuse of the power of  
27 the court; it is an act done in the name of the court and under its authority for the  
28 purpose of perpetrating an injustice.” *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1057



1 (2006) (quoting *Meadows v. Bakersfield S. & L. Assn.*, 250 Cal. App. 2d 749, 753  
2 (1967).) The tort “requires misuse of a judicial process.” *Stolz v. Wong Commc’ns*  
3 *Ltd. P’ship*, 25 Cal. App. 4th 1811, 1822 (1994). Quidel’s action of sending its own  
4 complaints, with a letter detailing Quidel’s opinions and research, to potential  
5 customers is not an act that uses “the power of the court[,]” nor was it done “in the  
6 name of the court” or “under its authority.” Therefore, the abuse of process claim is  
7 not proper here. Further, even if the tort applied to Quidel’s actions, the Court finds  
8 that Quidel is protected by the litigation privilege.

9       The purpose of California’s litigation privilege “is to afford litigants . . . the  
10 utmost freedom of access to the courts without fear of being harassed subsequently  
11 by derivative tort actions.” *Silberg v. Anderson*, 50 Cal.3d 205 (1990). The litigation  
12 privilege applies to any communication (1) made in a judicial proceeding; (2) by  
13 litigants or other participants authorized by law; (3) to achieve the objects of the  
14 litigation; and (4) that have some connection or logical relation to the action. *Id.*  
15 “[W]hether a given communication is within the privilege is an issue of law, and not  
16 fact.” *Nguyen v. Proton Tech. Corp.*, 69 Cal. App. 4th 140, 147 (1999).

17       As to the first prong, the privilege pertains not only to statements made during  
18 a trial, but also to steps taken before trial and statements made “to achieve the objects  
19 of the litigation, even though the [statement] is made outside of the courtroom and  
20 no function of the court or its officers is invoked.” *Albertson v. Raboff*, 46 Cal.2d  
21 375, 381 (1956); *see also Castaline v. Aaron Mueller Arts*, No. C 09-2543 CRB,  
22 2010 WL 583944, at \*4 (N.D. Cal. Feb. 15, 2010) (finding plaintiff’s action of  
23 sending the complaint to distributors satisfies the first prong “because the Complaint  
24 relates to a judicial proceeding even though it was not made in the proceeding per  
25 se”). Quidel’s acts of notifying potential customers that it believes IMMULITE is  
26 falsely advertised serves the “objects of the litigation” of preventing the sale of  
27 falsely advertised products. The first prong is met. Next, the second prong is  
28 satisfied because the action of sending the complaints and letters was performed by

1 Quidel, who is a party to the suit.

2 The California Supreme Court has characterized the third prong of the test as  
3 being “simply part of” the fourth. *Silberg*, 50 Cal. 3d at 219–20. Under the fourth  
4 prong, “other participants authorized by law” include non-parties who have a  
5 “substantial interest in the outcome of the pending litigation.” *Castaline*, 2010 WL  
6 583944, at \*4. In *Youngevity International Corp. v. Smith*, Youngevity issued a press  
7 release to a trade publication announcing the initiation of the litigation. No. 16-cv-  
8 704-BTM-JLB, 2017 WL 6389776, at \*3 (S.D. Cal. Dec. 13, 2017), *aff’d in part*,  
9 *rev’d in part, dismissed in part sub nom. Youngevity Int’l Corp. v. Andreoli*, 749 F.  
10 App’x 634 (9th Cir. 2019). Judge Moskowitz found that the litigation privilege did  
11 not apply to the republication of the complaint to non-participating third parties. He  
12 reasoned, “[t]hough out-of-court statements may fall within the protections of the  
13 litigation privilege, here, there is no indication that the republication to a non-  
14 participating party functioned as a necessary step in the litigation process.” *Id.* at \*7.  
15 The Ninth Circuit disagreed, finding that Youngevity’s press release which  
16 summarized the complaint is protected speech. *Youngevity Int’l Corp. v. Andreoli*,  
17 749 F. App’x 634 (9th Cir. 2019). The panel reasoned that the litigation privilege  
18 “applies to communications made in judicial proceedings and extends to  
19 communications regarding such judicial proceedings made to people with ‘a  
20 substantial interest in the outcome of the pending litigation.’” *Id.* at 635 (citations  
21 omitted).<sup>3</sup>

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24 <sup>3</sup> In arguing the privilege does not apply, Siemens points to *Rothman v. Jackson*, 49 Cal. App. 4th  
25 1134 (1996). There, the court concluded that, to be sufficiently in furtherance of the litigation, the  
26 communication must “function intrinsically, and apart from any consideration of the speaker’s  
27 intent, to *advance a litigant’s case.*” *Id.* at 1143. “Statements to persons with no connection to a  
28 case are not covered by the litigation privilege.” A communication must have a “*functional* connection” to the litigation, meaning that the communicative act “must function as a necessary or useful step in the litigation process and must serve its purposes.” *Id.* While the district court in *Youngevity* analyzed whether the communication served as a “necessary step” in the litigation pursuant to *Rothman*, the Ninth Circuit did not. Siemens appears to argue that the

1           The case *Tri-Star Electronics International, Inc. v. Preci-Dip Durtal SA*, No.  
2 CV 08-4226 GAF (AJWx) 2011 WL 13176071 (C.D. Cal. May 27, 2100) is also  
3 instructive. There, the plaintiff sued for patent infringement. Plaintiff then sent  
4 letters to defendant’s customers and distributors informing them of the complaint and  
5 the alleged infringement. The court found the litigation privilege applies to the  
6 communications. *Id.* at \*7. The letter served “‘the objects of the litigation,’ i.e.  
7 preventing continued infringement of” the patent. *Id.* (citation omitted). The  
8 recipients had a substantial outcome in the pending litigation because they could be  
9 exposed to potential liability for the patent depending on the outcome of the  
10 litigation. *Id.* at \*8. The act was a necessary and useful step in the litigation process  
11 because it pertained directly to the subject matter of the lawsuit and served to deter  
12 the continued infringement of the patent. *Id.*

13           Similarly, in *Epistar Corp. v. Philips Lumileds Lighting Co.*, No. C 07-5194  
14 CW, 2008 WL 3930030 (N.D. Cal. Aug. 26, 2008), the plaintiff alleged that the  
15 defendant sent false and misleading letters that misled plaintiff’s customers into  
16 believing that plaintiff’s products infringe patents. Defendant claimed its conduct  
17 was protected by the litigation privilege. *Id.* at \*6. The court found that the  
18 customers have a substantial interest in the proceeding, as they “purchased  
19 [plaintiff’s] products, incorporated them into their own and intended to import those  
20 products.” *Id.* at \*7. The letters are protected by the litigation privilege. *Id.*; *see*  
21 *also Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, Inc.*, 814  
22 F. Supp. 2d 1033, 1041 (S.D. Cal. 2011) (holding the recipients of plaintiff’s press  
23 release which detailed the lawsuit and the alleged infringement have a substantial  
24 interest in the outcome of the pending litigation because those considering buying  
25 the products would want to know whether the products are effective).

26           These cases are applicable here. The customers who received the complaint

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28 Ninth Circuit holding is incorrect and incomplete, (*see* Opp’n at 16 n.9) but this Court is bound by  
and follows the Ninth Circuit precedent.

1 and letters from Quidel have a substantial interest in the litigation. Quidel is alleging  
2 that Siemens' assay is falsely advertised, and the purchasers of that assay are  
3 interested in the efficacy of it. As a final note, "[a]ny doubt about whether the  
4 privilege applies is resolved in favor of applying it." *Kashian v. Harriman*, 98 Cal.  
5 App. 4th 892, 913 (2002). Therefore, because all of the *Silberg* prongs are met, the  
6 litigation privilege applies to Quidel's acts of sending the complaint and letter to the  
7 customers. The Court **GRANTS** Quidel's Motion for Summary Judgment as to the  
8 abuse of process counterclaim.

9 **C. Unfair Competition Claims**

10 Siemens claims Quidel violated California's Unfair Competition Law  
11 ("UCL") through its unlawful and unfair practices. Siemens alleges Quidel engaged  
12 in unlawful practices by violating (1) the False Claims Act (31 U.S.C. § 3729); (2)  
13 California common law prohibition against trade libel; and (3) California's False  
14 Claims Act (Cal. Gov't Code § 12651). Siemens also alleges Quidel engaged in  
15 unfair practices through its misrepresentations regarding Thyretain. (Answer & CC  
16 ¶¶ 59–60.) Quidel moves for summary judgment on a number of grounds, the first  
17 being standing.

18 To establish standing under the UCL, a party must demonstrate that it  
19 "suffered injury in fact and [ ] lost money or property as a result of the unfair  
20 competition." Cal. Bus. & Prof. Code § 17204. Quidel moves for summary  
21 judgment on this claim because Siemens has no "evidence that it lost any money or  
22 property as a result of Quidel's alleged unfair competition." (Mot. at 15.) Siemens  
23 disagrees, noting it has alleged that it "suffered economic injury in the form of  
24 'harmed business reputation, lost goodwill, and lost sales.'" (Opp'n at 17 (quoting  
25 Answer & CC ¶ 61).)

26 A party's burden, in any standing inquiry, must be supported "with the manner  
27 and degree of evidence required at the successive stages of litigation." *Lujan v. Defs.*  
28 *of Wildlife*, 504 U.S. 555, 561 (1992). "To survive a motion for summary judgement,

1 a [party] need not definitively establish standing. Rather, [it is] only required to set  
2 forth sufficient evidence to create a genuine issue of material fact concerning such  
3 requirements.” *Murphy v. Best Buy Stores, L.P.*, 690 F. App’x 553, 554–55 (9th Cir.  
4 2017).

5 Here, while Siemens has certainly alleged that it has been injured by Quidel’s  
6 actions, it has not pointed to one piece of evidence showing said harm. Instead, it  
7 contends it “has alleged and will prove at trial” economic injury, and cites four cases  
8 in support of its assertion that this is sufficient. (Opp’n at 17.) But in those four  
9 cases, the courts were addressing motions to dismiss, and found that the defendants  
10 there had sufficiently alleged injury at that stage. This authority does not support  
11 Siemens in its attempt here to survive summary judgment. *See In re Actimmune*  
12 *Mktg. Litig.*, No. C 08-2376 MHP, 2010 WL 3563491, at \*11 (N.D. Cal. Sept. 1,  
13 2010) (granting defendant’s motion to dismiss a UCL claim predicated on a violation  
14 of the False Claims Act because plaintiff had not alleged how it was injured “as a  
15 result of” the conduct). Because Siemens has not pointed to any evidence that would  
16 create an issue of fact as to whether it has suffered an injury (and thus has standing),  
17 the Court **GRANTS** Quidel’s Motion for Summary Judgment on the unfair  
18 competition counterclaim.<sup>4</sup>

19 **D. Unclean Hands Defense**

20 Siemens claims Quidel’s conduct is barred by its unclean hands. Specifically,  
21 Siemens argues Quidel engages in false and misleading advertising in a variety of  
22 ways: first, because it advertises Thyretain as “TSI-only” when the assay detects both  
23 TSI and TBI and “may lead to misdiagnosis.” (Answer & CC at 8–9.) Second,  
24 Siemens claims that Quidel tells the parties’ customers to use the incorrect  
25 reimbursement code when using Thyretain so that Quidel may gain more profit. (*Id.*  
26 at 9.) Third, Siemens claims Quidel advertises Thyretain as an assay that provides  
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28 <sup>4</sup> Because the Court grants the Motion for Summary Judgment as to the three counterclaims, it does not address Quidel’s argument that the claims are partially barred by statutes of limitations.

1 results within three to four hours but the true time for results is eighteen to twenty-  
2 one hours. (*Id.*)

3 There is no dispute that “[u]nclean hands is a defense to a Lanham Act  
4 infringement suit.” *Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 847  
5 (9th Cir. 1987) (citations omitted). To prevail, “the defendant must demonstrate that  
6 the plaintiff’s conduct is inequitable and that the conduct relates to the subject matter  
7 of its claims.” *Id.* (citation omitted).

### 8 1. Siemens’ Harm

9 First, Quidel argues it is entitled to summary judgment on this affirmative  
10 defense because Siemens has no evidence that it was harmed as a result of Quidel’s  
11 conduct. (Mot. at 20.) Siemens disagrees that such evidence is necessary for an  
12 unclean hands defense. Both parties cite cases in their favor. *See Metro-Goldwyn-*  
13 *Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1222–23 (C.D. Cal.  
14 2007) (“To establish unclean hands, a defendant must demonstrate (1) inequitable  
15 conduct by the plaintiff; (2) that the plaintiff’s conduct directly relates to the claim  
16 which it has asserted against the defendant; and (3) plaintiff’s conduct injured the  
17 defendant.”); *contra Intamin, Ltd. v. Magnetar Techs. Corp.*, 623 F. Supp. 2d 1055,  
18 1075 (C.D. Cal. 2009) (holding it is inconsistent with controlling Supreme Court,  
19 Federal Circuit and Ninth Circuit authority to require the defendant to “additionally  
20 demonstrate that it was injured or prejudice by [plaintiff’s] conduct” to establish  
21 unclean hands”). The Court agrees with *Intamin* that there is a clear two-part test for  
22 unclean hands, and a third requirement of harm has not been definitively established.  
23 *See TrafficSchool.com v. Edriver Inc.*, 653 F.3d 820, 833 (9th Cir. 2011) (applying  
24 two-part test); *Fuddruckers*, 826 F.2d at 847 (same). Therefore, the Court declines  
25 to issue summary judgment on this ground. The Court now turns to the specific  
26 allegations behind the unclean hand defense.

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1                   **2. Quidel’s Allegedly False Advertising of Thyretain as TSI**  
2                   **Only**

3                   In its prior summary judgment motion, Siemens argued that the Court should  
4 grant summary judgement in its favor due to Quidel’s unclean hands, specifically  
5 with respect to its allegedly false advertising of Thyretain as a TSI only assay. The  
6 Court found there to be “evidence on both sides of the argument” as to whether it is  
7 “literally false” for Quidel to call Thyretain a TSI only assay. (ECF No. 254, at 19.)  
8 “Given this dispute of material fact, the Court cannot determine at this stage whether  
9 Plaintiff’s advertising is false; therefore, the Court cannot determine whether  
10 Plaintiff has unclean hands due to its advertising of Thyretain as a ‘TSI only assay.’”  
11 (*Id.*) The same holding applies here, and the Court **DENIES** summary judgment for  
12 this specific unclean hands allegation.

13                   **3. Quidel’s Allegedly False Advertising of Thyretain’s**  
14                   **Reimbursement Code**

15                   Siemens alleges that Quidel advises customers that they may submit claims to  
16 Medicare for the use of Thyretain under the Current Procedural Terminology  
17 (“CPT”) code 84445. Siemens alleges that because Thyretain is a “qualitative”  
18 assay, it is not entitled to the higher reimbursement under code 84445, which is  
19 available for only “quantitative” assays. (Answer & CC at 8–9.) The Court also  
20 previously analyzed this claim. It recognized that the unclean hands defense is not  
21 designed so a party may bring up “misconduct in the abstract, unrelated to the claim  
22 to which it is asserted as a defense.” *Republic Molding Corp. v. B.W. Photo Utils.*,  
23 319 F.2d 347, 349 (9th Cir. 1963). “Because the Court grants judgment as to  
24 Plaintiff’s claims regarding the laboratories in this Order, Defendants’ unclean hands  
25 claim no longer is related to the claims at issue. Defendants claim Plaintiff told  
26 laboratories to use the wrong billing code, and thus profited more than it should have.  
27 This defense is not sufficiently related to what is left of Plaintiff’s case after this  
28 Order.” (ECF No. 254, at 20.) As noted above, whether physicians were deceived

1 by Siemens' advertising is still an issue in this case. Siemens now argues that Quidel  
2 also misled physicians because it "blanketed laboratories and physician offices with  
3 letters claiming that the 'Thyretain test is available from most national reference labs  
4 by ordering CPT code 84445.'" (Opp'n at 7.) Siemens points to many documents,  
5 one being a pamphlet answering frequently asked questions about Thyretain.  
6 (Exhibit 30 to Haas Decl., ECF No. 273-3, at 93.) The pamphlet notes that the CPT  
7 code for Thyretain is 84445. (*Id.*) Another document, entitled "Important Graves'  
8 Disease Facts" also provides information about Thyretain, and similarly states that  
9 one may order Thyretain from a lab by using CPT code 84445. (Exhibit 27 to Haas  
10 Decl., ECF No. 273-3, at 2.) Quidel does not directly respond to the allegation  
11 regarding the CPT code or explain why 84445 is the correct code for Thyretain.

12         The Court first finds that Siemens' claim that Quidel is using an incorrect  
13 reimbursement code is related to claims that Quidel asserts. *Fuddruckers, Inc.*, 826  
14 F.2d at 847 (holding for the unclean hands affirmative defense, "the defendant must  
15 demonstrate that the plaintiff's conduct is inequitable and that the conduct relates to  
16 the subject matter of its claims"). Quidel asserts that Siemens' marketing of  
17 IMMULITE "as detecting TSI only may lead to reimbursement that should be  
18 reserved for TSI only assays because true TSI only assays are reimbursed at higher  
19 rates than assays that cannot differentiate between" TSI and TBI. (First Amended  
20 Complaint, "FAC," ECF No. 12 ¶ 18.) And the Court has already determined that  
21 there is an issue of material fact as to whether physicians are in the relevant market.  
22 (ECF No. 254, at 16.) Therefore, whether Quidel misled physicians by advertising  
23 that CPT code 8445 is appropriate for Thyretain is a question of fact. Whether Quidel  
24 has unclean hands due to its advertising of this code is also a question of fact, and  
25 the Court **DENIES** the Motion for Summary Judgment as to this unclean hands  
26 allegation.

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1                   **4. Quidel’s Allegedly False Advertising of Thyretain As**  
2                   **Producing Results in Three to Four Hours**

3                   Siemens alleges Quidel incorrectly advertises Thyretain as producing results  
4 in three to four hours. (Answer & CC at 10.) Quidel argues this claim is now  
5 irrelevant because it only relates to the claims regarding the laboratories (which have  
6 been dismissed). (Mot. at 21 (“It is the laboratories that run the test and would be  
7 concerned about run time.”).) Siemens responds that this claim remains viable  
8 because Quidel “advanced the same wrongful reimbursement statements to  
9 physicians that it made to laboratories.” (Opp’n at 24.) Siemens produced a  
10 screenshot from Quidel’s website that provides information about Thyretain.  
11 (Exhibit 43 to Haas Decl., ECF No. 273-3, at 266.) The website states, “Thyretain  
12 specifically detects TSI in a user-friendly format. . . . Results in 3 to 4 hours assures  
13 a quick turnaround time in the lab.” (*Id.*) The Court agrees that because this  
14 statement was on Quidel’s website and widely available, it is possible that physicians  
15 were exposed to the information and Siemens’ claim is thus relevant.

16                   Dr. Lollar testified that to get the results for Thyretain, first the cells grow for  
17 fifteen to eighteen hours, then one “add[s] the serum and controls, and allow[s] it to  
18 react” for three hours. (Exhibit 5 to Haas Decl., ECF No. 273-2, at 128:16–24.) He  
19 clarifies that “after you add the specimen[,]” results are available in three hours, but  
20 the full, overall time is eighteen to twenty-one hours. (*Id.* at 121:1–19; 178:23–  
21 179:25.) Dr. Maio testified to the same. (Exhibit 17 to Haas Decl., ECF No. 273-2,  
22 at 108:11–109:10 (testifying that the assay takes about twenty-one hours “if you  
23 count the cell seeding” overnight).

24                   And indeed, Quidel does not disagree that the cells must be cultured overnight.  
25 The Court finds that given this evidence, there is a question of material fact as to  
26 whether Quidel’s advertising Thyretain with the claim: “Results in 3 to 4 hours  
27 assures a quick turnaround time in the lab” is misleading. Doctors and laboratories  
28 who will be recommending or using the assay would want the full picture and know

1 the amount of work that must take place before Thyretain produces results. The  
2 Court **DENIES** Quidel's Motion for Summary Judgment as it relates to this assertion  
3 of unclean hands by Siemens.


4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN**  
6 **PART** Quidel's Motion for Summary Judgment. Specifically, the Court grants the  
7 Motion for Summary Judgment as to the three affirmative defenses. The Court grants  
8 in part the Motion for Summary Judgment as to the unclean hands counterclaim, as  
9 detailed above.

10 Subject to the Order of the Chief Judge No. 18, *In re Suspension of Jury Trials*  
11 *and Other Proceedings During the Covid-19 Public Emergency* (S.D. Cal. Mar. 17,  
12 2020), the Court orders the parties to contact the Magistrate Judge's chambers to  
13 reset their mandatory settlement conference. Upon conclusion of this conference,  
14 the parties shall coordinate with the Magistrate Judge to set new dates for a pretrial  
15 conference and trial.

16 **IT IS SO ORDERED.**

17 **DATED: April 9, 2020**

  
**Hon. Cynthia Bashant**  
**United States District Judge**

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