

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EXELTIS USA INC.,
Plaintiff,
v.
FIRST DATABANK, INC.,
Defendant.

Case No. 17-cv-04810-HSG

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION,
MOTION TO STRIKE, AND MOTION
TO DISMISS**

Re: Dkt. Nos. 3, 26

Pending before the Court is Plaintiff Exeltis USA Inc.’s motion for a preliminary injunction, Dkt. No. 3, and Defendant First Databank Inc.’s related motion to strike and motion to dismiss, Dkt. No. 26. For the reasons detailed below, the Court **DENIES** Plaintiff’s motion for a preliminary injunction, **DENIES** Defendant’s motion to strike, and **DENIES** Defendant’s motion to dismiss.

I. BACKGROUND

A. Factual Background¹

At the heart of this case is a regulatory question about the prescription status of prenatal vitamins under federal law. Plaintiff manufactures and sells prenatal vitamins. *See* Dkt. No. 1 ¶¶ 3, 9 (“Compl.”). According to Plaintiff, its products, which contain 1 mg of folic acid, are not available without a prescription and are labeled and sold “by prescription only.” *Id.* ¶¶ 3, 40. Defendant publishes a database of information about pharmaceutical products, including

¹ The Court limits its review to the pleadings for purposes of the pending motion to dismiss. *See United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003) (“When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond. A court may, however, consider certain materials — documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice — without converting the motion to dismiss into a motion for summary judgment.”).

United States District Court
Northern District of California

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1 Plaintiff's prenatal vitamins. *Id.* ¶¶ 2, 10. Medicaid and insurance providers ("payors") purchase
2 and use Defendant's database to make reimbursement decisions. *Id.* ¶¶ 2, 10, 46–47.

3 Defendant announced in May 2017 that it was revising its coding for dietary supplements
4 and medical foods. *See id.* ¶ 1; *see also* Dkt. No. 26-1, Ex. E. Historically, the "class value" field
5 in Defendant's database signified whether *manufacturers* identified their products as prescription-
6 only. Dkt. No. 26-1, Ex. B at 2368. It used code "F" where "[p]roduct labeling indicates
7 prescription or physician supervision required for use" and code "O" where the "[p]roduct has no
8 labeling indicating dispensing limitations." *Id.* Then in 2016, following guidance by the Food
9 and Drug Administration ("FDA") that medical foods cannot be properly labeled "prescription
10 only," *see* Dkt. No. 26-1, Ex. A,² Defendant amended the "class value" field to "identif[y] a
11 product's prescription status" under *federal law*. *See* Compl. ¶¶ 49–50; Dkt. No. 1-2, Ex. B at
12 379–80, 2506; Dkt. No. 26-1, Ex. C at 2504. Under this revised field, code "F" signifies "[d]rugs
13 that are prohibited by federal law from being dispensed without a prescription" and code "O"
14 signifies "[p]roducts with no federal legal prescription requirement, including medical foods,
15 dietary supplements, non-prescription medical devices, and over-the-counter drugs." Dkt. No. 1-
16 2, Ex. B at 379–80, 2506; Dkt. No. 26-1, Ex. C at 2504. However, code "F" still explicitly
17 included "prenatal vitamins labeled as prescription." Dkt. No. 26-1, Ex. C at 2504. Now,
18 Defendant intends to remove the reference under "F" to prenatal vitamins and change its coding
19 for all dietary supplements and medical foods — including Plaintiff's prescription prenatal
20 vitamins — to "O." Compl. ¶ 58; *see also* 26-1, Ex. D at 2529 & Ex. E. Absent Court
21 intervention, these proposed changes are set to go into effect on February 28, 2018. *See* Dkt. No.
22 53.

23 Plaintiff contends that Defendant's coding decision, categorizing all prenatal vitamins as
24 "O" instead of "F," is false and misleading. Compl. ¶¶ 59, 79, 88, 99, 107, 115. Relatedly,
25 because this coding is false, Plaintiff contends that Defendant's statements that its database is

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27 ² *See also* U.S. Food & Drug Ass'n, FREQUENTLY ASKED QUESTIONS ABOUT MEDICAL FOODS;
28 SECOND EDITION (May 2016),
<https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM500094.pdf>.

1 “robust, reliable, and [offers] effective medication decision support solution[s]” are also false. *See*
 2 Dkt. No. 3 at 18. Plaintiff further urges that Defendant’s new coding “will lead to widespread
 3 denial of Medicaid and insurance coverage for [prenatal vitamins].” Compl. ¶ 4. Plaintiff states
 4 that as a consequence, women will have more limited access to these vitamins, which help prevent
 5 serious birth defects such as anencephaly and spina bifida. *Id.* ¶¶ 5–7, 15–16, 24–25, 67. It may
 6 also “destroy” Plaintiff’s business model, in which only 6% of its prenatal vitamins are paid for
 7 out-of-pocket. *Id.* ¶¶ 8, 76.

8 Accordingly, Plaintiff brings claims against Defendant for violations of the Lanham Act,
 9 15 U.S.C. § 1125(a)(1); California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code
 10 §§ 17200 *et seq.*; and California’s False Advertising Law (“FAL”), Cal. Bus. & Prof. Code
 11 §§ 17500 *et seq.*; as well as claims under California common law for intentional interference with
 12 prospective economic advantage and trade libel. *See* Compl. ¶¶ 77–118.

13 **B. Statutory Background**

14 Plaintiff’s allegations implicate two statutory frameworks: the Federal Food, Drug, and
 15 Cosmetic Act (“FDCA”), 21 U.S.C. §§ 301 *et seq.*, and the Medicaid Act, 42 U.S.C. §§ 1396 *et*
 16 *seq.* The Court briefly discusses both statutory frameworks as they inform the Court’s subsequent
 17 analysis.

18 **i. The FDCA**

19 The FDCA is generally designed to protect the health and safety of the public. *See* 62
 20 *Cases of Jam v. United States*, 340 U.S. 593, 596 (1951); 21 U.S.C. § 331 (prohibiting “[t]he
 21 introduction or delivery for introduction into interstate commerce of any food, drug, device,
 22 tobacco product, or cosmetic that is adulterated or misbranded”). As relevant to the products in
 23 this case, the FDCA identifies three broad categories of pharmaceutical products: drugs, dietary
 24 supplements, and medical foods.

25 A “drug” includes, *inter alia*, “articles intended for use in the diagnosis, cure, mitigation,
 26 treatment, or prevention of disease.” 21 U.S.C. § 321(g)(1)(B). A “dietary supplement” is “a
 27 product (other than tobacco) intended to supplement the diet” that contains one or more dietary
 28 ingredients, including a vitamin, mineral, herb or other botanical, or an amino acid, *id.*

1 § 321(ff)(1)(A)–(D), “is not represented for use as a conventional food or as a sole item of a meal
 2 or the diet,” *id.* § 321(ff)(2)(B), and “is labeled as a dietary supplement,” *id.* § 321(ff)(2)(C). A
 3 medical food is “a food which is formulated to be consumed or administered enterally under the
 4 supervision of a physician and which is intended for the specific dietary management of a disease
 5 or condition for which distinctive nutritional requirements, based on recognized scientific
 6 principles, are established by medical evaluation.” *Id.* § 360ee(b)(3). These distinctions are
 7 significant as the FDCA regulates drugs and non-drug products differently. In particular, only
 8 certain drugs require a prescription under the FDCA. *See id.* § 353(b).

9 The FDA underscored the limited scope of the prescription requirement in May 2016,
 10 when it issued guidance on medical foods. *See* Dkt. No. 26-1, Ex. A.³ The FDA emphasized that
 11 medical foods — unlike drugs — do not require a prescription under federal law. *Id.*; *see also* 21
 12 U.S.C. § 321(g). The agency cautioned that, as a consequence, medical foods may not bear labels
 13 with prescription-only language. *See* Dkt. No. 26-1, Ex. A at 8. Doing so, the guidance advised,
 14 would be false and misleading. *Id.*; *see also* 21 U.S.C. § 353(b)(4)(A)–(B). To date, the FDA has
 15 not issued similar guidance for dietary supplements.

16 **ii. The Medicaid Act**

17 Medicaid is a joint federal-state program that provides healthcare benefits, including
 18 prescription drugs, for low-income Americans. *See* 42 U.S.C. §§ 1396 *et seq.* Medicaid recipients
 19 can obtain certain drugs from their healthcare providers, which are then reimbursed by state
 20 Medicaid programs, which are in turn partly reimbursed by the federal government. *See* 42 U.S.C.
 21 §§ 1396a, 1396b. Reimbursement under Medicaid is, in most circumstances, permitted only for
 22 “covered outpatient drugs.” *See* 42 U.S.C. § 1396b(i)(10); *see also* § 1396r–8. All drugs
 23 approved as safe and effective “prescription drug[s]” by the FDA since 1962 qualify as “covered
 24 outpatient drugs.” *See* 42 U.S.C. § 1396r–8(k)(2)(A); *see also* § 1396r–8(k)(4) (considering non-
 25 prescription drugs prescribed by physicians as “covered outpatient drugs” provided that state

26
 27 ³ *See also* U.S. Food & Drug Ass’n, FREQUENTLY ASKED QUESTIONS ABOUT MEDICAL FOODS;
 28 SECOND EDITION (May 2016),
<https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM500094.pdf>.

1 Medicaid programs cover them). Moreover, Medicaid has mandated since 1993 that all state
 2 Medicaid programs cover “prescription prenatal vitamins.” *See* 42 U.S.C. § 1396r-8(d)(2)(E)
 3 (states may exclude from coverage or otherwise restrict “[p]rescription vitamins and mineral
 4 products, *except prenatal vitamins . . .*”) (emphasis added); *see also* 81 Fed. Reg. 5170, 5188
 5 (according to the Centers for Medicare & Medicaid Services “prescription prenatal vitamins and
 6 fluoride preparations would qualify as [covered outpatient drugs], which . . . states may not restrict
 7 or exclude from coverage); 107 Stat. 312, Pub. L. 103–66, § 13602 (1993) (adding Medicaid
 8 rebate program).

9 **II. LEGAL STANDARD**

10 **A. Preliminary Injunction**

11 A preliminary injunction is a matter of equitable discretion and is “an extraordinary
 12 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”
 13 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). “A plaintiff seeking preliminary
 14 injunctive relief must establish that he is likely to succeed on the merits, that he is likely to suffer
 15 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,
 16 and that an injunction is in the public interest.” *Id.* at 20. Alternatively, an injunction may issue
 17 where “the likelihood of success is such that serious questions going to the merits were raised and
 18 the balance of hardships tips sharply in [plaintiff’s] favor,” provided that the plaintiff can also
 19 demonstrate the other two *Winter* factors. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
 20 1127, 1131–32 (9th Cir. 2011) (quotation omitted). Under either standard, Plaintiff bears the
 21 burden of making a clear showing that it is entitled to this extraordinary remedy. *Earth Island*
 22 *Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010).

23 **B. Motion to Strike**

24 Under California’s anti-SLAPP statute, “[a] cause of action against a person arising from
 25 any act of that person in furtherance of the person’s right of petition or free speech under the
 26 United States or California Constitution in connection with a public issue shall be subject to a
 27 special motion to strike, unless the court determines that the plaintiff has established that there is a
 28 probability that the plaintiff will prevail on the claim.” Cal. Civ. P. Code § 425.16. The statute

1 was enacted to curtail “strategic lawsuits against public participation,” that were “brought
2 primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition
3 for redress of grievances.” *Id.* § 425.16(a). Because “it is in the public interest to encourage
4 continued participation in matters of public significance, and [because] this participation should
5 not be chilled through abuse of the judicial process,” the anti-SLAPP statute is to be construed
6 broadly. *Id.*

7 California courts apply a two-step process for analyzing an anti-SLAPP motion. *Hilton v.*
8 *Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010). Under the first prong, the moving party must
9 make “a threshold showing . . . that the act or acts of which the plaintiff complains were taken ‘in
10 furtherance of the right of petition or free speech under the United States or California
11 Constitution in connection with a public issue,’ as defined in the statute.” *Equilon Enters., LLC v.*
12 *Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (Cal. 2002) (quoting Cal. Civ. P. Code § 425.16(b)(1)).
13 If the moving party meets its threshold showing, then the burden shifts to the non-moving party to
14 prove a probability of prevailing on the claim. *See id.* at 67.⁴

15 C. Motion to Dismiss

16 Under Federal Rule of Civil Procedure 12(b)(6), the Court must dismiss a complaint if it
17 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
18 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
19 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard

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21 ⁴ Since 1999, the Ninth Circuit has determined that the motion to strike and attorneys’ fees
22 provisions of California’s anti-SLAPP statute, Cal. Civ. P. Code § 425.16(b)–(c), are available in
23 federal court because there is no “direct collision with the Federal Rules.” *See U.S. ex rel.*
24 *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999) (quotation
25 omitted). Yet a number of judges have questioned this holding. *See, e.g., Travelers Cas. Ins. Co.*
26 *of Am. v. Hirsh*, 831 F.3d 1179, 1182–86 (9th Cir. 2016) (Kozinski, J., concurring); *id.* at 1186
27 (Gould, J., concurring); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274–75 (9th Cir. 2013)
28 (Kozinski, J., concurring); *see also id.* at 275–76 (Paez, J., concurring); *In re Gawker Media LLC*,
571 B.R. 612, 628–32 (Bankr. S.D.N.Y. 2017); *cf. Abbas v. Foreign Policy Grp., LLC*, 783 F.3d
1328, 1333–37 (D.C. Cir. 2015) (rejecting application of District of Columbia’s anti-SLAPP
statute in federal court). The Court applies the statute in this case as required by binding case law,
but shares the concern that the Ninth Circuit’s interpretation of the statute to date “vastly
understates the disruption when federal courts apply the California anti-SLAPP statute,”
particularly as it interacts with Rule 12 and its plausibility standard. *See Makaeff*, 715 F.3d at 274
(Kozinski, J., concurring).

1 requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant
 2 has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court accepts as true a
 3 plaintiff’s well-pleaded factual allegations and construes all factual inferences in the light most
 4 favorable to the plaintiff. *Id.* However, a plaintiff must provide “more than labels and
 5 conclusions.” *Twombly*, 550 U.S. at 555. The Court does not credit allegations that are
 6 conclusory, unwarranted deductions of fact, or unreasonable inferences. *Kwan v. SanMedica Int’l*,
 7 854 F.3d 1088, 1096 (9th Cir. 2017).

8 **III. PRELIMINARY INJUNCTION**

9 **A. Prior Restraint**

10 As a threshold matter, Defendant contends that the requested preliminary injunction in this
 11 context would impose an unconstitutional prior restraint. “The term prior restraint is used to
 12 describe administrative and judicial orders *forbidding* certain communications when issued in
 13 advance of the time that such communications are to occur.” *Alexander v. United States*, 509 U.S.
 14 544, 550 (1993) (quotation omitted). “Temporary restraining orders and permanent injunctions —
 15 *i.e.*, court orders that actually forbid speech activities — are classic examples of prior restraints.”
 16 *Id.* The Supreme Court has advised that “prior restraints on speech and publication are the most
 17 serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v.*
 18 *Stuart*, 427 U.S. 539, 559 (1976). Consequently, there is a “heavy presumption against [their]
 19 constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). This
 20 presumption exists even when the party seeking the restraint alleges that the speech is false or will
 21 have harmful ramifications. *Id.* (denying injunction prohibiting publication of Pentagon Papers
 22 even in light of asserted threat to national security interests); *Org. for a Better Austin v. Keefe*, 402
 23 U.S. 415, 418–19 (1971) (“It is elementary, of course, that . . . the courts do not concern
 24 themselves with the truth or validity of the publication. . . . [T]he injunction, so far as it imposes
 25 prior restraint on speech and publication, constitutes an impermissible restraint on First
 26 Amendment rights.”).

27 Yet the First Amendment offers fewer protections for commercial speech. *See Central*
 28 *Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563 (1980). It remains an open

1 question in the Ninth Circuit whether there is an exception to the prior restraint doctrine for
2 allegedly false commercial speech. *Hunt v. City of Los Angeles*, 638 F.3d 703, 718, n.7 (9th Cir.
3 2011); *cf. Sears, Roebuck & Co. v. F. T. C.*, 676 F.2d 385, 399 (9th Cir. 1982) (“[F]alse or
4 deceptive commercial speech is entitled to no first amendment protection whatsoever.”). Even
5 assuming that Defendant’s database is commercial speech, *see* Section III.B.i, the Court finds no
6 persuasive justification for not applying the general presumption against prior restraints, where
7 there has not yet been any determination on the merits that the speech is in fact false or
8 misleading, and falsity is the key issue in dispute. To do so would risk erroneously enjoining
9 truthful, protected speech on the basis of an incomplete record. *Cf. Textile Unlimited, Inc. v. A.*
10 *BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001) (“A preliminary injunction is not a preliminary
11 adjudication on the merits, but a device for preserving the status quo and preventing the
12 irreparable loss of rights before judgment.”); *accord New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d
13 1071, 1084 (C.D. Cal. 2003) (“[T]he danger of a prior restraint, as opposed to [an] ex post . . .
14 action, is precisely that making predictions ex ante as to what restrictions on speech will
15 ultimately be found permissible is hazardous and may chill protected speech.”) (quoting *Latino*
16 *Officers Ass’n, New York, Inc. v. City of New York*, 196 F.3d 458, 465 (2d Cir. 1999)). Although
17 “commercial speech may be more durable than other kinds . . . [s]ince advertising is the Sine qua
18 non of commercial profits,” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*,
19 425 U.S. 748, 772 (1976), the speech at issue here is not advertising, but instead concerns third-
20 party manufacturers’ products, as discussed in Section III.B.i below.

21 Plaintiff’s cases do not persuade the Court otherwise. *See* Dkt. No. 41 at 4. Most do not
22 address the First Amendment or prior restraint doctrine at all. *See, e.g., Pom Wonderful LLC v.*
23 *Hubbard*, 775 F.3d 1118, 1124–33 (9th Cir. 2014); *United States v. Estate Pres. Servs.*, 202 F.3d
24 1093, 1106 (9th Cir. 2000); *U-Haul Int’l, Inc. v. Jartran, Inc.*, 681 F.2d 1159, 1159–62 (9th Cir.
25 1982); *cf. Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record,
26 neither brought to the attention of the court nor ruled upon are not to be considered as having been
27 so decided as to constitute precedents.”). Others turn on factual details not present in this case.
28 *See, e.g., Nat’l Abortion Fed’n, NAF v. Ctr. for Med. Progress*, 685 F. App’x 623, 626–27 (9th

1 Cir. 2017) (affirming district court’s conclusion that prior restraint doctrine not at issue where
2 party had signed nondisclosure agreement).

3 Other cases cited by Plaintiff discuss the constitutional implications of a preliminary
4 injunction only briefly. *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.* merely
5 cites *Central Hudson* for the general principle that false and misleading commercial speech has
6 limited constitutional protection. 700 F. App’x 251, 264 (4th Cir. 2017). And *Vidal Sassoon, Inc.*
7 *v. Bristol-Myers Co.* rejects the defendant’s First Amendment argument in a footnote, citing
8 *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979).
9 *See Vidal Sassoon*, 661 F.2d 272, 276 & n.8 (2d Cir. 1981). In *Dallas Cowboys*, however, the
10 court found that a pornographic movie that depicted “Texas cheerleaders” had a “barely
11 discernable message” and the plaintiff’s trademark, as a property right, “need not yield to the
12 exercise of First Amendment rights under circumstances where adequate alternative avenues of
13 communication exist.” 604 F.2d at 206.

14 Plaintiff does not propose any “alternative avenue[] of communication” here, but rather
15 requests a preliminary injunction to essentially freeze Defendant’s database and prevent Defendant
16 from “recoding prescription prenatal vitamins as ‘over-the-counter’ or ‘O’ in its widely used drug
17 databases.” Dkt. No. 3 at 25. Plaintiff also suggests that Defendant’s decision to redefine “O” or
18 the class value field itself would lead to irreparable harm and should be circumscribed. *See* Dkt.
19 No. 41 at 7–8. The Court finds that the requested injunction would constitute a prior restraint on
20 speech because it would order Defendant to refrain from speech — altering its own database —
21 before there has been any trial or adjudication of the merits. Plaintiff has not met its “heavy
22 burden” to justify a prior restraint in this context. *Cf. Near v. Minnesota*, 283 U.S. 697, 716
23 (1931) (identifying extraordinary circumstances that may warrant a prior restraint, such as the
24 “actual obstruction to [the government’s] recruiting service or the publication of the sailing dates
25 of transports or the number or location of troops,” or “incitements to acts of violence and the
26 overthrow by force of orderly government”).⁵

27 _____
28 ⁵ During the hearing on this motion, Plaintiff suggested that the application of the prior restraint
doctrine in this context would hinder the government’s regulatory enforcement efforts. *See* Dkt.

1 **B. Preliminary Injunction Factors**

2 Even if a preliminary injunction would not constitute an unconstitutional prior restraint, the
3 Court also concludes that a preliminary injunction would nevertheless be inappropriate under the
4 traditional *Winter* factors. *See Winter*, 555 U.S. at 20.

5 **i. Likelihood of Success on the Merits**

6 Plaintiff brings five causes of action against Defendant: violations of the Lanham Act; the
7 UCL; and the FAL; as well as intentional interference with prospective economic advantage and
8 trade libel claims. *See Compl.* ¶¶ 77–118. It is undisputed that the federal and state consumer
9 protection statutes apply exclusively to commercial speech,⁶ and that all of Plaintiff’s causes of
10 action require a showing that Defendant’s database is either false or misleading.⁷ The Court
11 addresses these two elements in turn.

12 **a. Commercial Speech**

13 The Ninth Circuit has highlighted that federal law is not “clear” about “what type of
14 speech qualifies as commercial speech.” *United States v. Schiff*, 379 F.3d 621, 626 (9th Cir.
15 2004). The Supreme Court has held that the “core notion of commercial speech” encompasses
16 “speech which does no more than propose a commercial transaction.” *Bolger v. Youngs Drug*

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18 No. 51 at 15:15–20. The Court need not address that issue here, because nothing in the record
19 suggests that there has been any regulatory enforcement activity against Defendant in this case.
20 That there may be a public interest in the database and in women’s access to prenatal vitamins
21 does not alter the fact that this is a private dispute between private parties. The Court, therefore,
22 declines to address the scope of the government’s interest in and the breadth of its power to
23 “protect[] consumers from ‘commercial harms.’” *See Sorrell v. IMS Health Inc.*, 564 U.S. 552,
24 579 (2011) (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)).
25 ⁶ “California’s consumer protection laws, like the unfair competition law, govern only commercial
26 speech.” *Rezec v. Sony Pictures Entm’t, Inc.*, 116 Cal. App. 4th 135, 140 (Cal. Ct. App. 2004)
27 (discussing UCL, FAL, and CLRA claims).
28 ⁷ “To demonstrate falsity within the meaning of the Lanham Act, a plaintiff may show that the
statement was literally false, either on its face or by necessary implication, or that the statement
was literally true but likely to mislead or confuse consumers.” *Southland Sod Farms v. Stover
Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997). Similarly, the UCL prohibits any “unlawful,
unfair or fraudulent business act or practice,” Cal. Bus. & Prof. Code § 17200, and the FAL
prohibits any “unfair, deceptive, untrue, or misleading advertising,” Cal. Bus. & Prof. Code
§ 17500. Plaintiff’s intentional interference and trade libel claims also require a showing that
Defendant published a false or misleading statement. *See J-M Mfg. Co., Inc. v. Phillips & Cohen
LLP*, 247 Cal. App. 4th 87, 97 (Cal. Ct. App. 2016) (“[L]ibel requires a false statement of fact.”);
cf. Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 944 (Cal. 2008) (noting that intentional
interference requires an intentional and independently wrongful act).

1 *Prod. Corp.*, 463 U.S. 60, 66 (1983) (quotation omitted). It has alternatively defined commercial
2 speech as “expression related solely to the economic interests of the speaker and its audience.”
3 *Am. Beverage Ass’n v. City & Cty. of San Francisco*, 871 F.3d 884, 890 (9th Cir. 2017). In any
4 event, courts are loath to identify a strict test. *Cf. Discovery Network, Inc.*, 507 U.S. at 419
5 (acknowledging “the difficulty of drawing bright lines that will clearly cabin commercial speech
6 in a distinct category”).

7 Plaintiff cites the Supreme Court’s opinion in *Bolger v. Youngs Drug Prod. Corp.*, and the
8 California Supreme Court’s opinion in *Kasky v. Nike, Inc.*, to focus the Court’s analysis on “the
9 speaker, the intended audience, and the content of the message.” *Kasky v. Nike, Inc.*, 27 Cal. 4th
10 939, 960 (2002), *as modified* (May 22, 2002); *see also Bolger*, 463 U.S. at 66–67 (considering the
11 advertising format and the speaker’s economic motivation in its commercial speech analysis).
12 Plaintiff posits that under these factors, Defendant’s database is commercial because it is available
13 for purchase and used by “commercial actors” to complete “commercial transactions” among
14 third-parties (*e.g.*, payors, pharmacies, and consumers). *See* Dkt. No. 36 at 11–13. The Court is
15 not persuaded.

16 The Court questions Plaintiff’s broad interpretation of what constitutes commercial speech.
17 As even the court in *Kasky* acknowledged, “[t]he United States Supreme Court has never decided
18 whether false statements about a [third-party’s] product or service . . . would properly be
19 categorized as commercial speech,” and the California Supreme Court declined to offer its own
20 opinion. *Kasky*, 27 Cal. 4th at 962; *cf. Handsome Brook Farm*, 700 F. App’x at 264 (finding
21 commercial speech where defendant certified egg producers as “humane,” received revenue for
22 eggs sold with its “certified humane” label, and sent email at issue to grocery stores considering
23 changing to an uncertified producer as their egg supplier). Moreover, there is no ready limiting
24 principle under Plaintiff’s proposal: any speech could be commercial if eventually relied on by
25 third-party actors who conduct business. A newspaper article, for example, could be considered
26 “commercial speech” simply because the newspaper company sells newspapers and third-parties
27 base decisions on information they read in the newspaper. *See New York Times Co. v. Sullivan*,
28 376 U.S. 254, 266 (1964) (“That the Times was paid for publishing [an] advertisement is as

1 immaterial in this connection as is the fact that newspapers and books are sold.”). That a publisher
2 compiles information, or even provides its own interpretation of that information, for commercial
3 actors is not enough to transform it into commercial speech. The Supreme Court has previously
4 rejected such sweeping definitions. *See id.*

5 As even Plaintiff must concede, Defendant’s database is not a traditional advertisement,
6 but rather a “drug compendia.” Dkt. No. 3 at 8. According to the record before the Court,
7 Defendant is not promoting any of the pharmaceutical products identified in its database, nor does
8 it have a financial incentive in payors’ reimbursement decisions, as it is not a party to those
9 transactions and receives no compensation contingent on reimbursement. The Court therefore
10 finds that Plaintiff has not met its burden of establishing a likelihood of success on the merits on
11 this point.

12 **b. Falsity**

13 The Court also questions Plaintiff’s ability to establish that Defendant’s statements are
14 false under either of Plaintiff’s two theories.

15 Plaintiff appears to eschew its original argument that Defendant’s revisions would
16 simplistically mislabel Plaintiff’s products as “over-the-counter.” *Compare* Dkt. No. 3 at 1, 11–
17 13, 18, *with* Dkt. No. 41 at 1, 7–8. Instead, Plaintiff first argues that, regardless of any delineated
18 definition, payors commonly understand the codes “F” and “O” to mean prescription and over-the-
19 counter respectively. Dkt. No. 41 at 8. Plaintiff urges that the new definitions will consequently
20 lead to confusion among payors. *Id.* Yet Plaintiff does not adequately account for the weight of
21 Defendant’s proffered evidence. In particular, Defendant’s revised definitions of “F” and “O” are
22 not binary, signifying merely “prescription” or “over-the-counter.” Rather, “F” signifies “[d]rugs
23 that are prohibited by federal law from being dispensed without a prescription” and “O” signifies
24 “[p]roducts with no federal legal prescription requirement, including medical foods, dietary
25 supplements, non-prescription medical devices, and over-the-counter drugs.” *See* Dkt. No. 26-1,
26 Ex. D at 2529.

27 Although these definitions only appear on a single page of a lengthy document, the Court
28

1 is not persuaded that a payor would overlook this change.⁸ Though the change may be subtle,
 2 Defendant provided its subscribers with substantial notice. *See* Dkt. No. 26-1, Ex. E. In a letter to
 3 its subscribers dated May 15, 2017, Defendant highlighted its view that neither dietary
 4 supplements nor medical foods are drugs subject to the FDCA’s prescription requirement. *Id.* at 2.
 5 As such, “the notion that [they] can be properly labeled as products for which a prescription is
 6 required is not tenable.” *Id.* Defendant identified prenatal vitamins as “simply one form of dietary
 7 supplements” that do not require a prescription. *Id.* Yet it was careful to acknowledge that “the
 8 fact that there is no federal *requirement* for a prescription does not mean an item cannot be
 9 prescribed by a physician.” *Id.* Accordingly, Defendant explained it would “provide
 10 supplemental descriptive attributes for [non-drug] products . . . to identify them as . . . ‘Marketed
 11 as Prescription Prenatal Vitamin,’ etc.” *Id.* And as Defendant advised in the letter, its new “class
 12 value” field definition includes a text box, which notes that Defendant “provides additional
 13 information regarding labeler representations” in a separate table. *See* Dkt. No. 26-1, Ex. D at
 14 2529.

15 Falsity cannot be assessed by plucking terms out of context. *See Ranbaxy Labs. Inc. v.*
 16 *First Databank, Inc.*, 826 F.3d 1334, 1336 (11th Cir. 2016) (“Reference to the documentation is
 17 necessary to understand the various fields of coded data, many of whose meaning is not self-
 18 evident.”). The Court finds that when all of Defendant’s statements are considered in context,
 19 Plaintiff has not established a likelihood of success on this argument.

20 Plaintiff argues in the alternative that even if the “class value” field now refers to whether
 21 products are required by federal law to be dispensed by prescription and subscribers understand
 22 these definitions, its products are in fact subject to federal legal prescription requirements. Dkt.
 23

24 ⁸ Although not squarely before the Court, the Court also notes its concern that a practical
 25 consequence of Plaintiff’s reliance argument is that Defendant could never alter its database. Yet
 26 as Plaintiff acknowledged during oral argument, in general speakers may determine how to convey
 27 their message. *See* Dkt. No. 51 at 20:17–19 (“[Defendant is] more than welcome and of course
 28 can change the definitions of their fields.”); *cf. Pac. Gas & Elec. Co. v. Pub. Utilities Comm’n of*
California, 475 U.S. 1, 11 (1986) (“[A]ll speech inherently involves choices of what to say and
 what to leave unsaid.”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348 (1995)
 (recognizing that in general a speaker is generally “free” to make its own “decisions concerning
 omissions or additions to the content of a publication.”).

1 No. 41 at 8–9. Plaintiff points to the Medicaid Act as the relevant federal law, which requires
2 state programs to cover “prescription prenatal vitamins.” *See* 42 U.S.C. § 1396r-8(d)(2)(E) (states
3 may exclude from coverage or otherwise restrict “[p]rescription vitamins and mineral products,
4 except prenatal vitamins . . .”). CMS has also commented that “prescription prenatal vitamins
5 and fluoride preparations would qualify as [covered outpatient drugs], which . . . states may not
6 restrict or exclude from coverage. *See also* 81 Fed. Reg. 5170, 5188. Yet on its face the Medicaid
7 Act only mandates states to cover “prescription prenatal vitamins.” It does not define
8 “prescription prenatal vitamins,” nor does it mandate which products actually require a
9 prescription. To the contrary, the Medicaid Act’s definition of “covered outpatient drugs”
10 generally turns on the FDA’s determination of approved “prescription drugs” under the FDCA.
11 *See* 42 U.S.C. § 1396r–8(k)(2)(A). Plaintiff does not allege whether its prenatal vitamins are
12 drugs or dietary supplements for purposes of the FDCA, but only certain drugs require a
13 prescription under the FDCA. *See* 21 U.S.C.A. § 353(b). Plaintiff may seek approval of its
14 products as new drugs, which would then necessitate a prescription, but Plaintiff has not provided
15 any evidence that it has done so.

16 Nevertheless, in an attempt to define the FDA’s position on prenatal vitamins, Plaintiff
17 cites a letter that the FDA sent to Defendant in June 2017 regarding Defendant’s coding changes
18 for medical foods. The FDA writes that it “has been made aware of patients who are losing or
19 have lost insurance coverage for their products marketed as medical foods” because “insurance
20 providers belie[ve] that the products are over-the-counter (OTC) drugs.” Dkt. No. 3-16, Ex. O.
21 This letter says nothing about the prescription requirements for prenatal vitamins. The parties do
22 not suggest that prenatal vitamins are medical foods. And even if they were, the FDA clearly
23 states throughout the letter that the FDA “does not require [medical foods] to be dispensed by
24 prescription” because they “are not drugs.” *Id.*

25 The Court acknowledges the apparent disconnect between CMS and the FDA, as neither
26 agency appears to make any attempt to harmonize coverage under the Medicaid Act with the
27 FDA’s prescription requirements. If “prescription prenatal vitamins” must be covered by state
28 programs, it follows that some category of prenatal vitamins are properly available by

1 prescription. Nevertheless, Plaintiff has not pointed to a federal law that *requires* its products to
 2 be dispensed by prescription only. The Court finds that Plaintiff has not met its burden of
 3 showing a likelihood of succeeding on its claims. That Plaintiff would prefer Defendant to
 4 organize its information or code Plaintiff's products differently does not render the database false
 5 or misleading.

6 Because of the deficiencies identified in Plaintiff's commercial speech and falsity
 7 arguments, the Court finds that Plaintiff has not established a likelihood of success on the merits
 8 of its claims.

9 **ii. Irreparable Harm**

10 The Court also finds that Exeltis will not suffer irreparable harm absent a preliminary
 11 injunction. "Irreparable harm is traditionally defined as harm for which there is no adequate legal
 12 remedy." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). Rather than
 13 focus on its own injury, Plaintiff attempts to redirect the focus of the irreparable harm inquiry to
 14 third parties. This is not permissible. "A plaintiff seeking a preliminary injunction must
 15 establish . . . that *he is* likely to suffer irreparable harm in the absence of preliminary relief."
 16 *Winter*, 555 U.S. at 20 (emphasis added). Women's access to affordable prenatal vitamins has a
 17 place in the preliminary injunction analysis, but not under the irreparable harm prong. *See* Section
 18 III.B.iii. *But see Standard & Poor's Corp. v. Commodity Exch., Inc.*, 683 F.2d 704, 711 (2d Cir.
 19 1982) (considering third-party harm as part of equities analysis because "[the Second Circuit's]
 20 settled preliminary injunction standard does not explicitly mention the public interest").

21 Plaintiff's cases analyzing irreparable harm based on third-party harm are readily
 22 distinguishable. In *Hawaii v. Trump*, the Ninth Circuit analyzed the scope of the President's
 23 power to control immigration and the district court's order enjoining parts of Executive Order
 24 13780. 859 F.3d 741 (9th Cir.), *cert. granted, judgment vacated sub nom. Trump v. Int'l Refugee*
 25 *Assistance Project*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017), and *vacated*, 874 F.3d
 26 1112 (9th Cir. 2017). In doing so, the state plaintiffs identified their own proprietary injuries as
 27 the basis for irreparable harm, including the state's limited ability "to recruit[]and attract[] students
 28 and faculty members to the University of Hawaii," the state's "decreased tuition revenue," and

1 “the [s]tate’s inability to assist in refugee resettlement.” *Id.* at 765, n.6, 782–83. In *Women’s*
2 *Med. Prof’l Corp. v. Voinovich*, the district court considered harm to a doctor’s patients because of
3 “the close relationship between [the doctor] and his patients, and given the obstacles which
4 prevent pregnant women from challenging [a state ban on certain abortion procedures].” 911 F.
5 Supp. 1051, 1058, 1092 (S.D. Ohio 1995), *aff’d*, 130 F.3d 187 (6th Cir. 1997). Plaintiff has not
6 identified any comparable relationship here. To the contrary, the evidence Plaintiff proffers
7 indicates that Plaintiff markets exclusively to physicians, who then make the requisite prescribing
8 decisions for their patients. *See* Dkt. No. 3-4, Ex. C ¶ 7. Plaintiff’s other cases merely discuss
9 third-party standing under Article III of the Constitution and do not address preliminary
10 injunctions at all. *See* Dkt. No. 3 at 21, n.12.

11 The only direct harm that Plaintiff identifies to the company is “financial loss[es]” and an
12 “accompanying loss of goodwill.” *See* Dkt. No. 3 at 14–15. Although Plaintiff describes the loss
13 of goodwill broadly as harm to the company’s “reputation for quality and its relationships with
14 business partners,” when pushed to elaborate on what this means, Plaintiff states that “pharmacists
15 will stop stocking, doctors will stop prescribing, and patients will stop using [Plaintiff’s]
16 products.” Dkt. No. 41 at 13. In other words, Plaintiff’s “goodwill” injury is, in effect, a lost
17 revenue proxy. In general, “economic injury alone does not support a finding of irreparable harm,
18 because such injury can be remedied by a damage award.” *Rent-A-Ctr., Inc. v. Canyon Television*
19 *& Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). To the extent Plaintiff also suggests
20 it will lose some competitive advantage, the changes to the database will affect all prenatal vitamin
21 supplement manufacturers, and nothing in the database or federal law prevents physicians from
22 continuing to prescribe Plaintiff’s product. *Cf. Int’l Franchise Ass’n, Inc. v. City of Seattle*, 803
23 F.3d 389, 411–12 (9th Cir. 2015) (finding irreparable harm based on competitive disadvantage
24 where ordinance would impose higher minimum wage for franchisees over non-franchisees).

25 Even if the Court were to conclude that such injury is not easily measured by monetary
26 damages, the Court still finds it speculative. *See, e.g., Winter*, 555 U.S. at 22 (“Issuing a
27 preliminary injunction based only on a possibility of irreparable harm is inconsistent with our
28 characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a

1 clear showing that the plaintiff is entitled to such relief.”). Plaintiff’s claimed injury turns on the
 2 following chain of events: based on Defendant’s revised database, payors will no longer
 3 reimburse for Plaintiff’s prenatal vitamins; because payors will not reimburse for Plaintiff’s
 4 products, physicians will stop prescribing them and will instead prescribe other, covered prenatal
 5 vitamins; and consumers will no longer take Plaintiff’s products and may not find a suitable
 6 alternative. In short, the harm Plaintiff identifies turns on independent decisions made by several
 7 third-parties.

8 Plaintiff’s evidence cannot overcome this attenuation problem. Critically, Plaintiff’s sales
 9 director and two experts simply assume, without sufficient explanation, that following the changes
 10 to the database, payors will no longer cover Plaintiff’s products. *See generally* Dkt. No. 3-2, Ex.
 11 A; *see also* Dkt. No. 3-3, Ex. B ¶¶ 25–28, 33–34; Dkt. No. 3-4, Ex. C ¶¶ 14–16. They do not
 12 address the revised definitions of the “class value” field and of “F” and “O” respectively, nor do
 13 they account for the additional table and data field, which would describe whether a product is
 14 “designated as prescription” and is “designated as a prenatal dietary supplement.” *See id.*; *see also*
 15 Compl. ¶ 58; *see also* 26-1, Ex. D at 2529 & Ex. E. As Plaintiff’s own expert explains, “the *payor*
 16 must determine if the drug is covered and how much the pharmacy will be reimbursed.” Dkt. No.
 17 3-3, Ex. B ¶¶ 1–2, 21, 24 (emphasis added). Payors use these databases to “determine whether [a]
 18 drug is covered under the *payor’s* coverage policies.” *Id.* ¶ 23 (emphasis added). There is no
 19 reason in the record for the Court to conclude that payors would abdicate their responsibility to
 20 determine which products to reimburse, or that Defendant should be held accountable if they do
 21 so. To the extent that Plaintiff’s expert cautions that payors would need time to change their
 22 claims processing systems to account for Defendant’s proposed changes, *see id.* ¶¶ 44–45,
 23 Defendant provided notice to its database subscribers of its interpretation of federal law and the
 24 resulting changes to its database in May 2017, Compl. ¶ 1; *see also* Dkt. No. 26-1, Ex. E. There is
 25 simply no evidence in the record to suggest that this notice or timeframe is insufficient.

26 **iii. Balance of Equities**

27 As suggested in its discussion of prior restraints and irreparable injury, the Court finds that
 28 the balance of equities favors Defendant. Defendant’s First Amendment rights will be curtailed if

1 it is restricted in its ability to alter its own database and inform its subscribers about its
2 understanding of the prescription status of certain products. On the other hand, the financial
3 hardship suffered by Plaintiff is compensable though money damages after a final determination at
4 trial, and its asserted harm is far more attenuated than Defendant's.

5 **iv. Public Interest**

6 “When the reach of an injunction is narrow, limited only to the parties, and has no impact
7 on non-parties, the public interest will be at most a neutral factor in the analysis rather than one
8 that favor[s] [granting or] denying the preliminary injunction.” *Stormans, Inc. v. Selecky*, 586
9 F.3d 1109, 1138–39 (9th Cir. 2009). “If, however, the impact of an injunction reaches beyond the
10 parties, carrying with it a potential for public consequences, the public interest will be relevant to
11 whether the district court grants the preliminary injunction.” *Id.*

12 Plaintiff emphasizes the public health consequences that could follow if payors no longer
13 reimburse for prenatal vitamins. *See* Dkt. No. 3 at 23–24. Both parties appear to agree that
14 prenatal vitamins — and folic acid more specifically — provide key health benefits, such as
15 drastically reducing the risk of birth defects. *See* Dkt. No. 3 at 3–5; Dkt. No 26 at 4–5. The Court
16 does not minimize the vital importance of ensuring that women have access to adequate and
17 affordable prenatal healthcare. Yet the Court does not have unfettered discretion, even when
18 considering the equities and public interest for purposes of a preliminary injunction; instead, it is
19 constrained by the facts of the case to determine “the likely consequences of the injunction.”
20 *Stormans*, 586 F.3d at 1139. Such consequences, to be properly considered, “must not be too
21 remote, insubstantial, or speculative and must be supported by evidence.” *Id.*

22 As touched on above, the Court finds that Plaintiff has failed to establish more than a
23 speculative possibility, rather than a likelihood, that women will be denied access to prenatal
24 vitamins absent an injunction. Plaintiff relies on several unsupported assumptions about the
25 conduct of third parties. In particular, Plaintiff assumes that payors will abandon their
26 independent obligations to determine which products they must cover under federal law.
27 Although the Court has highlighted a potential ambiguity in the relevant law, *see* Section III.B.i.b,
28 this order does not purport to exonerate payors who actually fail to comply with federal law.

1 Assuming payors misinterpret federal law and erroneously deny coverage for prenatal vitamins,
 2 the wrongful conduct lies with the payors, and not with Defendant. Yet an injunction against
 3 Defendant would not control payors' reimbursement decisions. Because the denial of access to
 4 prenatal vitamins is so far removed from Defendant's actual speech, and because of the limited
 5 reach of an injunction in this case, the Court finds that the public interest does not offset the
 6 significant and immediate harm that a preliminary injunction would cause by silencing
 7 Defendant's speech. *See* Section III.B.

8 * * *

9 Accordingly, Plaintiff's motion for a preliminary injunction is **DENIED**.

10 **IV. MOTION TO STRIKE**

11 Defendant, in turn, seeks to strike Plaintiff's California state law claims under California
 12 Code of Civil Procedure § 425.16. *See Thomas v. Fry's Elecs., Inc.*, 400 F.3d 1206, 1206–07 (9th
 13 Cir. 2005) (finding that the anti-SLAPP statute is available to litigants in federal court).

14 **A. Matter of Public Interest**

15 To be subject to an anti-SLAPP motion, the cause of action must arise from an act "in
 16 furtherance of the person's right of petition or free speech under the United States Constitution or
 17 the California Constitution in connection with a public issue." Cal. Civ. P. Code § 425.16(b). The
 18 statute "shall be construed broadly" to safeguard "the valid exercise of the constitutional rights of
 19 freedom of speech and petition for the redress of grievances." Cal. Civ. P. Code § 425.16(a).

20 Covered acts include, but are not limited to, "any written or oral statement or writing made
 21 in a place open to the public or a public forum in connection with an issue of public interest" or
 22 "any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in
 23 connection with a public issue or an issue of public concern." Cal. Civ. P. Code § 425.16(e)(3)–
 24 (e)(4). Speech is considered "in connection with an issue of public interest" if it concerns: (1) "a
 25 person or entity" in the public eye; (2) "conduct that could directly affect a large number of people
 26 beyond the direct participants"; or (3) "a topic of widespread, public interest." *Rivero v. Am.*
 27 *Fed'n of State, Cnty., and Mun. Employees, AFL–CIO*, 105 Cal. App. 4th 913, 924 (Cal. Ct. App.
 28 2003).

1 Defendant’s database describes a broad array of information about pharmaceutical
2 products, and, as Plaintiff concedes, it is used by “[m]ost state Medicaid programs and private
3 insurers” to make reimbursement determinations for consumers. Dkt. No. 36 at 3; *see also* Compl.
4 ¶¶ 2, 69–73. Nevertheless, Plaintiff contends that the database cannot constitute a matter of public
5 interest because it is only available to paying subscribers who utilize “sophisticated computer
6 algorithms.” Dkt. No. 36 at 20. Because the information is not freely available to the public,
7 consumers, or policymakers, Plaintiff suggests that the information is not a matter of public
8 interest. *Id.* at 20–21. During the hearing on this motion, Plaintiff acknowledged that there are no
9 limitations on who may subscribe to the database. *See* Dkt. No. 51 at 6:14–7:9. Still, it urged that
10 the database is only available to paying subscribers and as a practical matter, is only used by
11 payors. *Id.*

12 Although Plaintiff appears to conflate public interest issues with public forum issues, even
13 speech that is only available to select and limited groups may be protected by the anti-SLAPP
14 statute. *See Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 476–477 (Cal. Ct.
15 App. 2000) (finding a newsletter published to 3,000 members of homeowners’ association a public
16 forum). The fact that people must subscribe or pay to have access to the information is also not
17 preclusive. *See Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1037–38 (Cal. Ct. App.
18 2008) (noting that “a newspaper or magazine need not be an open forum to be a public forum — it
19 is enough that it can be purchased and read by members of the public.”). However, where an issue
20 is “not of interest to the public at large, but rather to a limited, but definable portion of the public
21 (a private group, organization, or community),” the anti-SLAPP statute protects activity that
22 occurs “in the context of an ongoing controversy, dispute or discussion.” *Du Charme v. Inter.*
23 *Broth. of Elec. Workers, Local 45*, 110 Cal. App. 4th 107, 119 (Cal. Ct. App. 2003).

24 Plaintiff’s own evidence highlights the context of Defendant’s speech and its connection to
25 a matter of public interest. Plaintiff cites a newspaper article which describes Defendant’s role in
26 reimbursement decisions as well as letters from members of Congress to CMS specifically
27 regarding Defendant’s proposed coding changes for prenatal vitamins. *See* Dkt. Nos. 36-2; 36-3;
28 36-4. Plaintiff’s argument fares no better if the Court limits its analysis to payors. Plaintiff

1 alleges that, at least according to Defendant, First Databank is “the industry’s most widely used,
2 integrated drug database” and is “involved in 1.88 billion retail pharmacy prescriptions and 3.26
3 billion prescription claims annually.” Compl. ¶ 73. Moreover, “eight of the top nine pharmacy
4 benefit managers” use Defendant’s database, as do 43 state Medicaid programs. *Id.* And as both
5 parties make clear, there is an “ongoing discussion” about the prescription status of prenatal
6 vitamins. *See, e.g.*, Dkt. No. 26-1, Ex. E at 1 (noting “questions from customers” and Defendant’s
7 year-long review). In the absence of clear directives from either the FDA or CMS, Defendant
8 weighed in to express its interpretation of the “inconsistent if not conflicting” legal landscape. *Id.*
9 The Court accordingly finds that the speech at issue in this case concerns a topic of widespread,
10 public interest. *Cf. Rivera v. First DataBank, Inc.*, 187 Cal. App. 4th 709, 716–17 (Cal. Ct. App.
11 2010) (finding drug information was a matter of public interest because “[t]reatment for
12 depression” and “matters of health . . . are undeniably of interest to the public.”).

13 **B. Commercial Speech Exception**

14 Plaintiff contends that, as commercial speech, Defendant’s database is not subject to anti-
15 SLAPP protections in any event. The commercial speech exception to the anti-SLAPP statute is,
16 however, a narrow one.

17 The anti-SLAPP statute “does not apply to any cause of action brought against a person
18 primarily engaged in the business of selling or leasing goods or services” if: (1) the speech
19 “consists of representations of fact about that person’s or a business competitor’s business
20 operations, goods, or services, that is made for the purpose of obtaining approval for, promoting,
21 or securing sales or leases of, or commercial transactions in, the person’s goods or services, or the
22 statement or conduct was made in the course of delivering the person’s goods or services”; and
23 (2) the “intended audience is an actual buyer or potential buyer or customer, or a person likely to
24 repeat the statement to, or otherwise influence, an actual buyer or customer” *Simpson*
25 *Strong-Tie Co., Inc. v. Gore*, 49 Cal. 4th 12, 26 (Cal. 2010) (citing Cal. Civ. P. Code § 425.17(c)).
26 The party asserting this exception bears the burden of proving its applicability. *Id.*

27 Plaintiff does not suggest that Defendant’s database “consist[s] of representations” about
28 Defendant’s own products or those of a competitor. Nor does it explain how it relates to

1 Defendant's own sales. Instead, the speech at issue is about third-party manufacturers' products
 2 and is contained in the database itself, not made in the course of selling or delivering Defendant's
 3 product (*i.e.*, the database). *Accord Rivera*, 187 Cal. App. 4th at 718; *New.Net*, 356 F. Supp. 2d at
 4 1104. The Court finds that Plaintiff has not met its burden of proving the commercial speech
 5 exception bars application of the anti-SLAPP statute to its state law claims.

6 C. Probability of Success

7 Although for purposes of the preliminary injunction analysis the Court found that Plaintiff
 8 has not established a likelihood of success on the merits, the standard for evaluating the strength of
 9 Plaintiff's case is more lenient under the anti-SLAPP statute. To justify a preliminary injunction,
 10 Plaintiff has to demonstrate a "strong likelihood of success on the merits." *Johnson v. Cal. State*
 11 *Bd. of Accountancy*, 72 F. 1427, 1430 (9th Cir. 1995). But to survive an anti-SLAPP motion,
 12 Plaintiff only has to "show a reasonable probability of prevailing on its claims." *Mindys*
 13 *Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) (quotation omitted). "Reasonable
 14 probability" in this context means "only a minimum level of legal sufficiency and triability." *Id.*
 15 (quotation omitted). Significantly, "the trial court does not weigh the evidence or determine
 16 questions of credibility; instead the court accepts as true all of the evidence favorable to the
 17 plaintiff." *Nagel v. Twin Labs., Inc.*, 109 Cal. App. 4th 39 (2003); *see also* Cal. Civ. P. Code
 18 § 425.16(b)(2). The Court finds that, under this more lenient standard, Plaintiff has established
 19 that its claims have the necessary "minimal merit" to survive a motion to strike. *Navellier v.*
 20 *Sletten*, 29 Cal. 4th 82 (Cal. 2002).

21 As the parties point out and as already discussed above, Plaintiff's claims turn on the
 22 commercial nature of the database as well as the falsity of the proposed coding changes.
 23 According to Plaintiff, Defendant's database is not simply utilized as a factor in payors'
 24 reimbursement decisions, but is in fact the linchpin of these determinations. *See* Compl. ¶¶ 2, 46–
 25 51, 67–69. In support of this argument, Plaintiff identifies an expert, a former California Chief
 26 Medicaid Pharmacist, who explains that the database is at "the heart of every pharmacist claims
 27 processing system." Dkt. No. 3-3, Ex. B ¶ 22. In his role with the Department of Health Care
 28 Services, Plaintiff's expert "was responsible for setting and implementing California's Medicaid

1 (Medi-Cal) reimbursement policy and rebate contracting.” *Id.* ¶ 2. And he explains that
2 reimbursement decisions are determined “instantly” based on information from databases like
3 Defendant’s. *Id.* ¶¶ 21–23. He further suggests that this is by design, and the databases market
4 themselves to enter and facilitate reimbursement transactions between third-parties. *Id.* ¶¶ 22–23.
5 Although the Court has concerns about expanding the commercial speech doctrine, its application
6 is fact dependent, and payors’ actual use of the database and the database’s primacy in actually
7 effectuating reimbursement decisions may suggest that the database is commercial in nature.
8 Accepting Plaintiff’s evidence as true, the Court cannot conclude that there is no reasonable
9 probability (as defined by the applicable lenient standard described above) of succeeding on this
10 argument.

11 Similarly, the Court finds that Plaintiff has raised a legally sufficient argument that
12 Defendant’s new coding is false or misleading. As currently formulated, Defendant’s database
13 explicitly includes “prenatal vitamins labeled as prescription” under its “F” coding description:

14 Drugs that are prohibited by federal law from being dispensed
15 without a prescription; bulk drug ingredients for compounding;
16 *prenatal vitamins labeled as prescription*; or prescription medical
17 devices.

17 *See* Dkt. No. 26-1, Ex. C at 2504 (emphasis added). Defendant’s proposed revision is subtle,
18 maintaining the current description almost entirely, but omitting “prenatal vitamins labeled as
19 prescription” from the end. As amended, it would read: “Drugs that are prohibited by federal law
20 from being dispensed without a prescription.” *See* Dkt. No. 26-1, Ex. D at 2504. Even assuming
21 a reasonable payor would review these definitions in detail, the documentation does not highlight
22 the change on its face. It refers to a new table with “labeler representations for dietary supplement
23 and medical food products,” but says nothing about prenatal vitamins or the latent ambiguity in
24 their prescription status. *Id.* The only reference to the change in the record that is before the
25 Court is the May 2016 letter to subscribers. *See* Dkt. No. 26-1, Ex. E. Although the letter details
26 Defendant’s legal research, the Court cannot say that this stage that no reasonable factfinder could
27 conclude from the legal morass described in the letter that the database misleads payors into
28 concluding that Plaintiff’s products are available over-the-counter and that payors should withhold

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1 coverage on this basis. *See also* Dkt. No. 3-3 ¶¶ 34–35.

2 To the extent that Defendant believes Plaintiff must supply even more evidence than it has,
3 the Court disagrees and declines to grant the motion to strike at this early stage in the litigation.
4 As the Ninth Circuit has cautioned, discovery is “require[ed]” where “the nonmoving party has not
5 had the opportunity to discover information that is essential to its opposition.” *Metabolife Int’l,*
6 *Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001). The Court finds that, in particular, discovery
7 may be necessary to obtain further information about payors’ use of Defendant’s database,
8 Defendant’s role in the related reimbursement transactions, payors’ awareness of Defendant’s
9 proposed changes, and Defendant’s own awareness of the above issues.

10 The Court takes the opportunity to repeat its concern about the tension between the anti-
11 SLAPP statute and the Federal Rules of Civil Procedure. Even after *Metabolife*, at the very outset
12 of a case, the anti-SLAPP statute places “the burden on the plaintiffs to show that they have not
13 merely a triable issue of fact, but a reasonable probability of success” *Makaeff*, 715 F.3d at
14 275 (Kozinski, J., concurring). In any event, applying the anti-SLAPP statute as it must, the Court
15 still finds that this is not the kind of obviously meritless or harassing case that the anti-SLAPP
16 statute was designed to discourage. *See Metabolife*, 264 F.3d at 837, n.7 (“The purpose of the
17 statute is to protect individuals from meritless, harassing lawsuits whose purpose is to chill
18 protected expression.”); *see also* Cal. Civ. P. Code § 425.16.

19 * * *

20 The Court finds that Plaintiff’s case has the minimal merit necessary to survive a motion to
21 strike. The motion is **DENIED**.

22 **V. MOTION TO DISMISS**

23 Defendant also seeks to dismiss Plaintiff’s claims under Federal Rule of Civil Procedure
24 12(b)(6) for reasons similar to those discussed in the motion for preliminary injunction and
25 motion to strike: namely, the database is not commercial speech and Plaintiff has not established
26 the falsity of its revised coding. The analysis, therefore, overlaps. Yet the plausibility standard
27 that applies to a motion to dismiss is even lower than the probability standard that applies to an
28 anti-SLAPP motion. *See Hilton*, 599 F.3d at 901–02. The key inquiry is simply whether, taken as


1 true, the pleadings state a claim for relief. For the reasons already discussed above, *see* Section
2 IV.C, the Court finds that Plaintiff has met its burden under Rule 12(b)(6). Defendant’s motion to
3 dismiss is, therefore, **DENIED**.

4 **VI. CONCLUSION**

5 Accordingly, the Court **DENIES** Plaintiff’s motion for a preliminary injunction. A case
6 management conference is **SET** for January 10, 2018 at 10:00 a.m. The parties are directed to
7 meet and confer and submit a joint case management conference statement by January 3, 2018.

8 **IT IS SO ORDERED.**

9 Dated: 12/21/2017

10 
11 HAYWOOD S. GILLIAM, JR.
12 United States District Judge

United States District Court
Northern District of California

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