Michael W. Sobol (*Pro Hac Vice*)
Roger N. Heller (*Pro Hac Vice*)
Melissa Gardner (*Pro Hac Vice*)
Michael K. Sheen (*Pro Hac Vice*)
John D. Maher (*Pro Hac Vice*)
Amelia A. Haselkorn (*Pro Hac Vice*)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
Email: msobol@lchb.com
Email: rheller@lchb.com
Email: mgardner@lchb.com
Email: msheen@lchb.com
Email: jmaher@lchb.com
Email: ahaselkorn@lchb.com

Co-Lead Class Counsel

[Additional counsel listed on signature page]

Lynn Lincoln Sarko, Bar No. 35345 (*Pro Hac Vice*)
Gretchen Freeman Cappio (*Pro Hac Vice*)
Benjamin B. Gould (*Pro Hac Vice*)
Sydney Read (*Pro Hac Vice*)
KELLER ROHRBACK L.L.P.
1201 Third Ave., Ste. 3200
Seattle, WA 98101
Telephone: (206) 623-1900
Facsimile: (206) 623-3384
Email: lsarko@kellerrohrback.com
Email: gcappio@kellerrohrback.com
Email: bgould@kellerrohrback.com
Email: sread@kellerrohrback.com

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

In re:

Arizona THERANOS, INC. Litigation,

No. 2:16-cv-2138- DGC

(Consolidated with)
No. 2:16-cv-2373- HRH
No. 2:16-cv-2660- HRH
No. 2:16-cv-2775- DGC
-and-
No. 2:16-cv-3599- DGC

PLAINTIFFS' OPPOSITION TO WALGREENS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

Walgreens knew of, or willfully blinded itself to, the total inability of Theranos's blood testing to deliver reliable results. It nonetheless exposed its customers to that useless testing and charged them for it. This was not a one-time error in judgment, but represented years of choices by Walgreens. Walgreens knew Theranos was perpetrating a massive fraud on regulators and patients. Walgreens could have chosen to end its relationship with Theranos countless times. But it did not. Walgreens latched onto Theranos's fantasy of creating an unproven, if not impossible, blood testing technology which had enormous profit potential for both companies. If Theranos could deliver on its early promises, Walgreens believed it would become "the most important player in US healthcare," beat its competitors, and generate billions of dollars in new revenue. And so Walgreens never strayed from its plan to roll out Theranos testing as quickly as possible, no matter what information it obtained or the risk to patients.

Walgreens evidently hoped that even though the claims about Theranos's blood testing were not *presently* true, they could *become* true before the lies were uncovered. "Fake it till you make it," however, is not a defense to fraud. *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979). Whether Walgreens had an "evil mind" when it first agreed to head down this path, or whether it was completely fooled by Theranos in the early days, is beside the point, for one overarching reason established by the record: before it sold a single blood test, Walgreens became aware that Theranos's claims about its technology were false, its technology was not ready for market, and it was incapable of delivering reliable diagnostic results. At a minimum, the record establishes clearly that Walgreens was recklessly indifferent to or willfully disregarded the truth. Yet Walgreens continued to offer the tests in its stores, making its customers unwitting subjects of medical experimentation.

Although it now plays the victim, Walgreens chose—time and again—to place its pursuit of a profit opportunity over the well-being of its customers. The story of how Walgreens ended up defrauding consumers has four chapters.

- ***Chapter 1: January 2010–July 2010.*** In 2010, Walgreens enters a strategic partnership with Theranos, chasing what it saw as a $100 billion dollar opportunity. Worried about competitors, Walgreens acts hastily, failing to verify or perform adequate diligence into either Theranos as a company or its claims to have developed ground-breaking technology.

- ***Chapter 2: July 2010-June 2012.*** Walgreens' laboratory testing consultant, Kevin Hunter, strongly urges Walgreens to investigate Theranos's technology. In reward for his diligence, Walgreens sidelines him. Walgreens' main concern becomes launching Theranos testing as quickly as possible. It accomplishes this by restructuring the partnership to invite as little regulatory scrutiny as possible, shifting to a model that requires only minimally demanding "CLIA certification" and evades the need for FDA approval of Theranos's technology itself.

- ***Chapter 3: June 2012-March 2013.*** Walgreens moves forward with the plan to expose its customers to Theranos blood testing. Walgreens is provided documentation regarding Theranos's CLIA certification that shows it was based on fraud. Theranos tries, and fails, to develop new technology for the partnership.

- ***Chapter 4: March 2013-June 2016.*** As the launch approaches, Walgreens receives even more concrete evidence that Theranos blood testing is not market ready, including last-minute changes to the testing protocols and technological failures in stores. Walgreens not only proceeds in the face of mounting evidence, it waives contractual due diligence protections and tries, unsuccessfully, to stifle employees' and consultants' concerns. It ignores red flags—which "would have been immediately apparent to anyone with any training in clinical chemistry or laboratory medicine"—even after the *Wall Street Journal* exposes the scam in 2015.

In sum, there is voluminous evidence from which a reasonable jury could conclude that Walgreens was a knowing participant in this fraud. At a minimum, there is more than sufficient evidence from which a reasonable jury could conclude that Walgreens acted with willful blindness or reckless indifference to its customers' well-being.

FACTUAL BACKGROUND

I. Chapter 1 (January 2010-July 2010): Walgreens hastily enters into a strategic partnership with Theranos, well-aware of red flags.

The strategic partnership that Theranos pitched to Walgreens in 2010 was enticing. Its goal was to develop lucrative and world-changing "screening" tests that could predict

patients' risk of disease. Theranos's claims about its present capabilities were as bold as that goal. Theranos claimed Elizabeth Holmes had developed technology to render standard blood testing obsolete even though she was in her twenties and had no college degree or laboratory testing experience. It claimed her device could perform "comprehensive" testing on tiny amounts of blood, even though Walgreens' research showed competing technology was nowhere close. It claimed that ten pharmaceutical companies had validated its technology, even though it had just three documents discussing eight tests in clinical trials as evidence. Theranos even claimed to have operational devices deployed in point-of-care testing, numerous contracts in place, and tens of millions of dollars in revenue—none of which Walgreens bothered to verify. CSF ¶¶ 1-2.

As Plaintiffs' expert Dr. Geoffrey Baird describes, Theranos's early claims were "obviously unrealistic on their face to anyone with knowledge about laboratory testing." CSF ¶ 1. Indeed, Walgreens' expert laboratory consultant Kevin Hunter raised serious doubts. He urged Walgreens to get objective, independent, verifiable answers to questions about the purported technology. CSF ¶ 11-12; RSOF ¶¶ 11, 19. Instead, Walgreens got a two-page "report" from a four-hour meeting at Johns Hopkins that showed "nothing" about Theranos test results. It said, based on a review of some data from Theranos, that Theranos technology was "novel" and "sound." CSF ¶¶ 4-5; RSOF ¶ 8. Walgreens knew Hopkins never actually analyzed the technology in 2010, let alone the equipment later used with real customers; Hopkins even included a disclaimer that it "***in no way signif[ied] an endorsement by Johns Hopkins Medicine to any product or service***." CSF ¶ 5. Other consultants urged Walgreens to speak with the companies that Theranos claimed had validated its technology, worrying that if Walgreens "falls for [Theranos] too soon in the process .... diligence becomes a box-checking exercise." CSF ¶ 3. Walgreens' diligence team sought standard financial information regarding Theranos.

But Walgreens' priority was not due diligence. Rather—as Walgreens' CFO put it—its priority was to "move extremely fast." The company was consumed by the worry that a competitor like CVS might strike a deal with Theranos first. CSF ¶ 7; RSOF ¶ 26. Indeed,

Walgreens *knew* that the blood-testing technology was not yet in place. As Walgreens' CFO testified, Walgreens understood from its very first meeting with Theranos that introducing low-cost "comprehensive" laboratory testing technology that required only a tiny blood sample—was "theoretical," and something Theranos believed it could accomplish "over time," but not right away. CSF ¶ 7. And although some within Walgreens sought standard financial due diligence, Theranos consistently pushed back, "dodged" questions and refused to provide full information. CSF ¶ 10. Walgreens donned blinders and went ahead anyway.

In the "Master Purchase Agreement" that Walgreens and Theranos executed on July 30, 2010, Walgreens bargained for first-to-market rights, exclusivity for future Theranos-developed tests, and rights to all data Theranos collected from and about Walgreens customers. RSOF ¶ 58. In return, Walgreens agreed to purchase Theranos testing kits for conducting the contemplated tests. Walgreens planned to place Theranos devices in stores and agreed to purchase $30 million in testing components in advance. RSOF ¶ 15. The agreement contemplated three phases, with the end goal being to offer predictive screenings tests sold exclusively at Walgreens, "where the money would be made." CSF ¶ 6.

II. Chapter 2 (July 2010-June 2012): Walgreens suppresses efforts to scrutinize Theranos's claims and devises a plan to minimize regulatory scrutiny.

A. Walgreens marginalizes its consultant for asking tough questions.

Theranos admitted to Walgreens that no more than 25 tests were "ready" but claimed that hundreds more could be developed in a matter of weeks. CSF ¶ 13. Walgreens' laboratory consultant, Kevin Hunter, warned that this was impossible, and thus advised that Walgreens "need[ed] to see evidence." CSF ¶ 13. Hunter recommended a future course of action, including that Walgreens commence "in-depth diligence around the science and scalability of the Theranos systems" with "realistic expectations." And specifically, Hunter suggested having a reputable laboratory conduct parallel tests to verify Theranos test results, embedding a project director at Theranos's Palo Alto office who could help Walgreens "realize if things were legitimate or not," touring the laboratory rather than just Theranos offices, and opening the Theranos devices to investigate how they worked. RSOF ¶ 19.

The consultant's recommendations went nowhere. Walgreens never conducted the parallel testing Hunter suggested. Walgreens never embedded a project director or inspected Theranos's laboratory; indeed he was eventually told by Theranos that a laboratory inspection was "not possible and never going to happen." Walgreens simply accepted this despite its own consultant's requests and advice. CSF ¶ 19. And Walgreens never objectively examined Theranos's technology, even going so far as to forbid Hunter from opening the Theranos device. CSF ¶ 43; RSOF ¶ 19.

Nevertheless, in meetings with Theranos, Hunter kept asking "the tough questions," for which Holmes had no good responses. RSOF ¶ 19. Walgreens reacted by marginalizing Hunter yet further, asking him not to attend meetings with Theranos so they could "get this thing done." RSOF ¶ 19. The company did not seek to challenge the truth of Theranos's claims that it could develop the required tests. Revealingly, at least one Walgreens executive told Hunter that he shared his concerns about the readiness of Theranos technology. Walgreens, the executive said, had to "assume that the technology [was] going to be real. They may not be there yet, but … with our help they can get there." CSF ¶ 13. But he then brushed those concerns aside and reassigned Hunter from evaluating Theranos's technology to "operationaliz[ing]" the partnership. RSOF ¶ 12.

B. Walgreens embraces CLIA certification to minimize regulatory scrutiny.

Walgreens' main worry throughout 2011 and into 2012 was not verifying Theranos's technology—it was dealing with "regulatory risk." That is, once it became apparent that the FDA would intervene if the uncleared Theranos technology were used in stores, Walgreens worked to devise a strategy to minimize that risk, especially the risk to Walgreens. Walgreens devoted substantial time and resources, including Hunter's expertise until he left the project in late 2011, to working this issue out. CSF ¶ 15; RSOF ¶ 12.

Walgreens eventually solved the regulatory "problem" by determining that if Theranos technology were used to perform tests inside a CLIA certified laboratory rather than in Walgreens stores, the risk of FDA intervention would be low and indeed, no

regulator would meaningfully scrutinize Theranos tests or technology. CSF ¶¶ 16-19. Walgreens could go to market with Theranos testing within a year, instead of waiting to see if the FDA actually approved any Theranos device, and Theranos would only have to establish a laboratory with CLIA certification.

Walgreens and its experts knew that CLIA certification was not evidence of a working new technology. CSF ¶ 22. CLIA certification is a relatively easy process that relies on self-reporting. CSF ¶ 17. A CLIA "Certificate of Registration," which allows the laboratory to conduct blood testing, issues upon simply enrolling in the CLIA program by self-reporting what tests it will perform and appropriate equipment and personnel. CSF ¶ 18. A CLIA "Certificate of Compliance" issues after a lab passes an inspection. CLIA regulators conduct inspections once every two years, limited to operations disclosed by the lab, and providing only a snapshot of those operations. CSF ¶ 17. As Hunter testified at his deposition, CLIA inspectors "just look to make sure that the four corners of the building are in order . . . But they don't do anything to validate whether your tests are viable or not." CSF ¶ 22. Theranos obtained a Certificate of Registration in 2011, prompting Hunter to warn Walgreens that Theranos must have falsified its application by disclosing only "off-the-shelf" conventional equipment, rather than the Theranos technology, to regulators. CSF ¶ 18.

But again, Walgreens chose to ignore the evidence at hand and Hunter's warnings and plow forward with its Theranos partnership. Walgreens did this while well aware, at a minimum, of a "high" risk that Theranos was, in fact, "unable to process test results" and its promises may never materialize. CSF ¶ 15. In June 2012, Walgreens and Theranos entered into an amended agreement, the "Amended and Restated Master Services Agreement." This agreement fundamentally restructured the partnership for the duration of an initial "Patient Services Centers (PSC) Pilot," temporarily designating Walgreens stores as "Patient Service Centers" rather than the site where testing was completed, but contemplating that Theranos and Walgreens would return to the original structure at a later

date. CSF ¶ 26. As part of the amended agreement, Walgreens agreed to pay Theranos a $100 million "innovation fee," and to purchase a $40 million convertible note. CSF ¶ 27.

Remarkably, Walgreens performed no additional technical or financial due diligence before entering into the June 2012 agreement. CSF ¶ 20. It received no financial statements or projections from Theranos; Walgreens did not verify any contracts purportedly held by Theranos; nor did Walgreens obtain customary representations or warranties. CSF ¶21. In short, Walgreens performed no due diligence into the financial stability of the contractual partner who would be testing blood sent from customers in Walgreens stores. Nor did Walgreens—yet again—obtain basic technical information about Theranos's machines, such as that recommended by Hunter.

III. Chapter 3 (June 2012-March 2013): Even as the Walgreens/Theranos partnership hurtles toward launch, Walgreens fails to act on the damning information it possesses about Theranos—hiding its head in the sand.

A. Walgreens obtains unambiguous evidence that Theranos obtained its CLIA certification through fraud.

As discussed above, CLIA certification, on its own, has limited to no value in evaluating new technology and testing equipment, but whatever value it has depends on the certified party actually disclosing its technology and equipment to regulators. And just as Hunter had warned, Theranos did not make the required disclosures.

Walgreens learned this fact by examining the results of Theranos's "proficiency testing." Theranos was required to conduct this testing three times a year to be a CLIA-certified lab. In June 2012, Theranos provided its proficiency testing reports to two Walgreens executives, Jay Rosan and Ken Finnegan. RSOF ¶ 35. The reports specifically identified that Theranos had used conventional FDA-approved blood testing equipment, not Theranos technology, for the proficiency testing. These reports unmistakably showed that Theranos had misled CLIA regulators by telling them that ***it was using conventional blood testing equipment, not the proprietary technology that Theranos was developing for use in Walgreens stores.*** The CLIA certification Walgreens was ostensibly relying on was meaningless as it related to the services to be offered. CSF ¶ 24; RSOF ¶ 35-36.

B. Theranos rushes to develop working new technology and fails.

To prepare for the PSC Pilot phase added by the 2012 amended agreement, Theranos had to work fast. The original technology was self-evidently not suitable. It was so unready that Theranos decided not to use it. CSF ¶ 26; RSOF ¶ 81. Rather, Theranos came up with new test methods to accommodate the new partnership structure—none of which were safe for consumers or known to regulators. It resurrected a piece of hardware called "Edison" that it had previously jettisoned for its dysfunctionality, hastily putting together copies of it to run consumers' blood samples. CSF ¶ 27. The Edison device was also decidedly not ready for market and was, to state it generously, in development. CSF ¶ 27. Throughout the nearly three years that Theranos and Walgreens would draw tiny blood samples, Theranos would run the samples through some combination of the unready Edison device and other conventional testing machines (designed for larger blood samples) which Theranos had ham-handedly attempted to modify for use with the tiny samples, including by diluting the blood samples taken from patients. RSOF ¶ 81.

C. Walgreens tries to prevent evaluation of Theranos's new testing but cannot prevent others from seeing clear danger to its customers.

Despite knowing that Theranos was developing wholly new technology and testing methods for the 2012 Master Services Agreement (CSF ¶¶ 26, 33-35), Walgreens chose not to ask how the new technology would affect test results. CSF ¶ 33; RSOF ¶ 40. It chose not to exercise contractual rights for more information about Theranos's CLIA certification, such as "exception reports," which would have clearly shown the numerous problems regulators found in the lab. CSF ¶ 36. And it chose to conduct no inspection of Theranos's labs, contrary to the expert advice Hunter had provided more than a year before. CSF ¶ 42.

Instead, Walgreens took an approach to "due diligence" that was deliberately designed *not* to uncover problems. In October 2012, Walgreens hired a consultant, Paul Rust, for a one-day visit to Theranos to review the latest reports. This time, however, Walgreens' Jay Rosan took pains to help Theranos hide evidence that its CLIA certification was meaningless. Rosan gave Rust a very specific assignment "just to review the data

[Theranos provided] and to write a report about the data that [he] read." RSOF ¶ 37. ***Neither Rosan nor anyone else at Walgreens told Rust about the testing that Theranos would actually be performing***, which Rust testified was unusual in this context and made him "uncomfortable." CSF ¶ 25. Rust told Rosan that he was "concerned" about the assignment because proficiency-testing "rules get broken all the time," and you "really have to be suspicious about this when you do see proficiency testing," so a meaningful review would include visiting the lab and talking to the scientists about how proficiency testing had been conducted. CSF ¶ 25. Rosan assured Rust Theranos's proficiency testing was "fine." And instead of the revealing proficiency testing reports that Rosan himself had seen in June 2012, Rust was shown, and authored a report for Walgreens based upon, summary data which did not identify the equipment used for the testing. RSOF ¶ 37.

Throughout this period, rather than scrutinizing the technology that would soon be used on consumers, Walgreens was betting that Theranos's technology would ***eventually*** work and generate billions of dollars in revenue at Walgreens stores in Arizona and beyond. As Walgreens' CFO summarized in February 2013: "We need a profit rocket now. I see no [sic] other initiative in our arsenal with this much upside [potential]." CSF ¶ 27. Indeed, confirming Walgreens' intent to move forward with the Theranos partnership at all costs, Walgreens agreed to waive contractual due diligence protections and later even agreed to accelerate payment of $75 million dollars of the "Innovation Fee." CSF ¶¶ 29-30. (Jan. 7, 2013 and Dec. 31, 2013 letter agreements)

IV. Chapter 4 (March 2013-June 2016): Walgreens aggressively markets and supports Theranos testing, while continuing to sideline critics and ignore concerns for patient health.

A. A March 2013 "soft" launch raises more red flags.

Theranos, still working to develop working blood tests, was not on track to meet the April 1, 2013 deadline that the parties' June 2012 amended agreement had provided for the PSC Pilot. It proposed a "soft" or "controlled" launch in March 2013 using paid clinical trial patients, instead. Walgreens agreed. Walgreens chose not to evaluate the state of Theranos testing or technology operations during the soft launch, and in other areas, it went

poorly. Theranos introduced last-minute changes to the testing protocols, giving Walgreens "[e]ven less confidence in [Theranos's] system," and confirming to Walgreens that Theranos's new technology was "not the product we were sold." Walgreens' "limited insight" into what Theranos was doing with the clinical trial blood samples meant, if and to the extent it did not already have the details, that Walgreens would wait to learn more about those issues after testing was offered to the public. CSF ¶ 33; RSOF ¶ 40.

B. Walgreens deliberately ignored glaring problems after a formal launch in September 2013.

Despite having no objective proof that Theranos's technology could perform reliably on actual patients—and possessing unambiguous evidence that Theranos was unready and had obtained CLIA certification by fraud—in September 2013 Walgreens launched the PSC Pilot in Arizona stores. In fact, Walgreens accompanied the Pilot launch with "blitz" marketing and sales tactics to generate interest in Theranos as a legitimate blood testing provider. CSF ¶ 37. Walgreens and Theranos worked closely together and were in near-constant communication throughout the controlled and public launches. Over the almost three years that followed, Walgreens deliberately ignored the glaring problems in Theranos's equipment, reliability, and protocols.

1. Walgreens saw that the nanotainers were not market-ready.

After signing the 2012 amended agreement, Theranos developed a "nanotainer" for extracting and shipping fingerstick blood. The nanotainer consistently presented functional problems that introduced inaccuracies in the blood tests. Walgreens employees performed fingerstick blood draws by puncturing skin with a lancet sufficiently hard to draw blood, then applying the nanotainer to the finger, allowing capillary action to draw blood into the chamber of the nanotainer. As summarized in Dr. Baird's report, the still-in-development nanotainers had several known problems which impacted blood sample integrity. CSF ¶ 35. Walgreens employees, who worked daily with the nanotainers, reported from the outset that nanotainers were easily breaking, creating air bubbles, leaking, and failing to draw blood up. CSF ¶ 35. Theranos continued to try to develop the nanotainer after the service launched,

sending multiple versions to Walgreens for use in its stores and instituting a quarantine process in light of regular failures, but Walgreens employees continued reporting problems well after launch. CSF ¶ 35. Walgreens never evaluated or even inquired how problems with the nanotainer affected test results. Top Walgreens executives viewed these foundational flaws as just "part of innovation." CSF ¶ 35.

2. Walgreens personnel questioned Theranos's science and asked for proof they never got.

Walgreens tried to minimize the "visibility" of information about Theranos to its employees. CSF ¶ 23, 39. Nevertheless, those working with Theranos technology detected major problems and escalated their concerns. An employee with training in laboratory procedures questioned the reliability of Theranos technology, observing that Theranos's conduct seemed inconsistent with its promises and with that of a working legitimate blood testing laboratory. CSF ¶ 36. In an April 2013 email to Jay Rosan, she reminded Walgreens that CLIA certification was no proof. "When the inspectors come in for CLIA, they just check paperwork to make sure stuff has been submitted, but the CLIA inspectors don't approve the devices, that's an FDA thing." CSF ¶ 22.

Nurse practitioners working inside Walgreens stores also questioned the reliability of the tests, starting during the controlled launch. CSF ¶ 40. Walgreens executives decided with Theranos to "educate" the nurses, pointing out that Theranos was CLIA certified, even though it knew that certification was meaningless. CSF ¶ 40. When nurses asked Walgreens to track metrics like adverse events and quality, they were told: "We don't have visibility to that data today. **Theranos is on the hook for this**, since they are the CLIA certified lab. Will let you know if and when this data becomes available." CSF ¶ 23 (emphasis added).

Undeterred and concerned for patients, the nurses continued to voice their concerns about a lack of proof and "worrie[s] about the accuracy of the finger stick" after September 2013. Walgreens worked on "messaging" to them, and had an executive with medical (but not laboratory) expertise review some correlation studies from Theranos and report they looked "good," but recognized the nurse practitioners' requests "aren't that unreasonable,"

the studies "most likely will not provide any level of comfort with the technology." CSF ¶ 40. The studies actually showed poor performance. RSOF ¶ 35. In 2014, the nurses persisted, emphasizing their "concerns are valid based on . . . the [test] results." CSF ¶ 40.

In or around June 2014, that persistence resulted in an evaluation by Walgreens' Chief Medical Officer (CMO) of four Theranos-tested patients. RSOF ¶ 51. The CMO identified potential false positive test results, potential lab error, and potential problems with the nano-technology, and, echoing Hunter's early advice, recommended that Walgreens analyze a larger sample of lab data, follow up on abnormal values with venous tests sent to a traditional lab, follow up with patients, and "systematically monitor [Walgreens'] Theranos testing and ensure that the rate of errors is acceptable." Instead, Walgreens had Theranos show the CMO some correlation data which, as Baird explains in his report, showed, to even a moderately trained eye, that Theranos testing "lacked reliability, precision, and accuracy, therefore posing grave risks to the well-being of Walgreens' and Theranos's customers." RSOF ¶ 53. Walgreens tried to use the mere fact of his review to quiet the nurses, but *Wall Street Journal* reporters contacted Walgreens with questions about the nurses' concerns in July 2015. RSOF ¶ 59. Walgreens worked with Theranos to craft a comforting response; one executive told reporters the CMO had verified the data coming out of Theranos's lab, and "trust me, if the results weren't there we would hear." CSF ¶ 39. In emails with Theranos, a Walgreens executive made the company's attitude towards scrutiny very clear, stating: "***I really want to 'quiet' this reporter.***" CSF ¶ 39.

3. Theranos *told* Walgreens it was still developing its technology.

Throughout the period that testing was offered to the public, Theranos failed to perform the promised "comprehensive" testing using fingerstick blood. It required venous blood draws for approximately 40% of tests performed in Walgreens stores. CSF ¶ 34. In November 2013, the month that testing began in Arizona Walgreens stores, Theranos admitted to Walgreens that "the technology is almost there to do all the tests with just a finger stick, it's just still being developed." In January 2014, Walgreens itself noted that the cause of this issue was "Delays in Science." In November 2014, Theranos helped a

Walgreens employee prepare a presentation for Walgreens executives on this issue by suggesting they write: "Theranos is still continuing to develop their technology. . . ." At other times, Walgreens apparently accepted bizarre explanations from Theranos for its failure to increase the percentage of tests using fingerstick blood. CSF ¶ 34.

V. Denouement: The relationship finally collapses.

Eventually, damning press reports finally put Walgreens in a position where it could no longer act as if the Theranos project were working. RSOF ¶ 64. This public outing, and not concern for its customers' safety, drove Walgreens to reluctantly take action. It belatedly "demanded" and received more information, which it could have done at any time, but even then kept selling Theranos testing in Arizona for several more months. CSF ¶ 41. Not until eight months after the public outing, and six months after CMS publicly threatened to revoke Theranos's CLIA certificate, did Walgreens finally terminate the partnership. By that time, more than 120,000 tests had been conducted in Arizona and California, mostly via Walgreens' facilities. As Walgreens now acknowledges, the service was a sham. In 2016 every single Edison test result from 2014-2015 was voided, with many other tests voided or corrected before Theranos finally went under in 2018.

STANDARD OF REVIEW

Walgreens' motion for summary judgment is narrow and challenges only some of the elements of Plaintiffs' claims. *See infra* Addendum. To prevail on its motion, Walgreens must show "that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On issues for which Plaintiffs bear the burden of proof at trial, Walgreens can satisfy its initial burden by showing "that there is an absence of evidence to support [Plaintiffs'] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986). If Walgreens fails to carry its initial burden of production, Plaintiffs need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000).

On a summary-judgment motion, Walgreens also bears the burden of persuasion. *Celotex*, 477 U.S. at 322-23. Plaintiffs' evidence "is to be believed, and all justifiable

inferences are to be drawn in [their] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The court does not weigh the evidence or make determinations of witness credibility. *Dominguez–Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1036 (9th Cir.2005); *see also Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1076 (9th Cir. 2001) ("it is not the province of the district court to weigh conflicting evidence for purposes of summary judgment."). Plaintiffs "need only show a triable issue of material fact to proceed to trial, not foreclose any possibility of [Walgreens'] success on the claims." *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (citations omitted).

Here, Walgreens has failed to carry its burden to show an absence of evidence to support the challenged elements of Plaintiffs' case. Its motion should therefore be denied.

ARGUMENT

I. Walgreens Misstates the Elements of Plaintiffs' Claims.

Walgreens sets forth a misleading account of what Plaintiffs' claims require (although on this record, even Walgreens' inflated standards are satisfied). The following summarizes what Plaintiffs' claims require them to show about Walgreens' state of mind and explains how they may show it.

RICO: For purposes of wire fraud—the relevant RICO "predicate act" here[1]—a defendant acts with the requisite fraudulent intent if it makes a misrepresentation or omission with (1) knowledge that it is false *or* (2) with "reckless indifference" to "truth or falsity." *United States v. Munoz*, 233 F.3d 1117, 1136 (9th Cir. 2000), *superseded on other grounds as stated in United States v. Ali*, 620 F.3d 1062, 1071 (9th Cir. 2010).

Willful blindness is legally equivalent to actual knowledge. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011) (defendants who "deliberately shield[]

[1] For a discussion of the required elements of a RICO claim, including "predicate acts," see *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Walgreens' motion only advances arguments about (1) the requisite state of mind for predicate acts and (2) RICO's "enterprise" requirement.

themselves from clear evidence of critical facts that are strongly suggested by the circumstances . . . are just as culpable as those who have actual knowledge").[2] A defendant is willfully blind if it (1) "subjectively believe[s] that there is a high probability that a fact exists" and (2) "take[s] deliberate actions to avoid learning of that fact." *Glob.-Tech Appliances*, 563 U.S. at 769. This doctrine applies in both criminal and civil cases. *Bruner Corp. v. R.A. Bruner Co.*, 133 F.3d 491, 496 (7th Cir. 1998); *Kuzma v. N. Ariz. Healthcare Corp.*, 607 F. Supp. 3d 942, 951 (D. Ariz. 2022).

Reckless indifference to truth or falsity means that "the defendant knew of facts which, if considered and weighed in a reasonable manner, indicate a substantial and unjustifiable risk" of falsity, and that "the defendant knew of that risk." *United States v. Rodriguez*, 880 F.3d 1151, 1162 (9th Cir. 2018) (defining "reckless disregard").

Consumer Protection Claims: Arizona and California recognize that willful blindness is legally equivalent to knowledge. Thus, the Arizona Supreme Court has held that even where a criminal "defendant had no actual knowledge," he was still "aware of the high probability that the scheme was fraudulent and deliberately shut his eyes to avoid learning the truth"—which "justifie[d] the ultimate inference of knowing participation." *State v. Haas*, 675 P.2d 673, 680 (Ariz. 1983). This principle has been applied in Arizona civil cases. *See Estée Lauder Cosms. Ltd. v. Get Your Mac On, LLC*, No. 13-0634, 2015 WL 274133, at *3 (D. Ariz. Jan. 22, 2015) (civil counterfeiting claim under Ariz. Rev. Stat. § 44-1453(A)), *amended on other grounds*, 2015 WL 11120677 (D. Ariz. Mar. 13, 2015).

California law likewise regards deliberate ignorance as legally equivalent to actual knowledge. *See Levy v. Irvine*, 66 P. 953, 956 (Cal. 1901) (defendant could not "willfully shut his eyes to the means of information which he knows is at hand, and if he does so his willing ignorance is to be regarded as equivalent to actual knowledge"); *Buena Vista Oil*

---

[2] A plaintiff may contend that the evidence "will support a finding of actual knowledge," *and* argue that if the factfinder rejects the plaintiff's case as to actual knowledge, it "could rationally find willful blindness[.]" *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007) (en banc) (holding that the government could both argue for actual knowledge and request a jury instruction on willful blindness).

Co. v. Park Bank of Los Angeles, 180 P. 12, 14 (Cal. Ct. App. 1919) ("The defendant cannot be allowed to shut his eyes and say he did not see, when by opening them he might have seen[.]" (quotation and citation omitted)).

Under the consumer-protection laws at issue here, moreover, Walgreens need not have known of or been willfully blind to Theranos's entire fraudulent scheme. It need only have known of or been willfully blind to *some material fact it omitted*. This is true under the ACFA, which prohibits persons from engaging in "any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of *any* material fact[,]" *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 826 (D. Ariz. 2016) (emphasis added), and under the FAL and UCL, which prohibit *any* omissions "material and likely to deceive a reasonable consumer." *Schellenbach v. GoDaddy.com LLC*, No. 16-00746, 2017 WL 192920, at *9 (D. Ariz. Jan. 18, 2017).

Battery: "[T]he central question in a case of medical battery is whether the patient has effectively given his or her consent to the procedure." *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 438 (Ariz. 2003). "[C]onsent" is ineffective under either of two circumstances: First, if patients are "induced to consent by a substantial mistake concerning the nature of the invasion . . . and the mistake is known" to the defendant; **or** second**,** if their consent was "induced by the other's misrepresentation[.]" Dkt. 182, at 31-32.

Walgreens' assertion that consent is valid absent "specific intent to defraud" misstates the legal requirement. The "intent" required in a battery case is to cause the relevant contact; Walgreens has never claimed it performed the blood draws accidentally. And, as to Walgreens' knowledge, Plaintiffs lay out below the ample evidence that Walgreens knew or willfully blinded itself to the fact that the "tiny" blood draw patients were "induced to consent by a substantial mistake." *Duncan*, 70 P.3D at 440 (citation omitted). That is, there is no dispute these patients thought the essential purpose of these draws was reliable blood testing, and there is substantial evidence that Walgreens knew or willfully ignored that the "tiny" blood technology was never able to serve that purpose.

Moreover, where, as here, the *defendant* "induced" the battery plaintiff's mistaken belief, evidence of knowledge or willful blindness is not even required. *Duncan*, at 441; *see also* Restatement (Second) of Torts § 892B cmt. h. On this point, *O'Brien v. Synnott*, 72 A.3d 331 (2013) is instructive. There, the plaintiff had refused to provide a blood sample to police officers, who then asked a nurse to get them a sample, which she did. There was "no evidence that nurse [who took the sample] was aware of plaintiff's prior refusals." *Id.* at 335. Thus, the nurse subjectively believed that the plaintiff *had* consented to the blood draw she performed. But the nurse had induced the patient's mistake by "present[ing] herself in her capacity as plaintiff's medical provider" and did not mention that officers had requested the blood draw when she took the sample. *Id.* at 333, 334-35. In those circumstances, material fact questions regarding the plaintiff's consent precluded summary judgment. *Id.*

Walgreens' contributions to Plaintiffs' mistaken belief are even plainer here. The entire premise of Walgreens' involvement with Theranos was the portrayal—both explicitly and implicitly—of the "tiny" blood draws, and of the services generally, as being market-ready and for legitimate testing purposes. Walgreens touted Theranos as a legitimate laboratory service provider, saying in a September 2013 joint press release, for example, that "Theranos is introducing CLIA certified laboratory services with the ability to run its tests on micro-samples. Theranos[] . . . minimizes human error . . . to produce high quality results . . . to help informed treatment choices." Walgreens built "Wellness Centers" for Theranos blood draws and advertised Theranos in stores. CSF ¶ 37. Walgreens checked in patients and performed blood draws consistent with an ordinary medical service. CSF ¶ 37. Throughout the time that Walgreens performed "tiny" blood draws on Edison Subclass members, it intentionally and substantially contributed to their mistaken impression and belief that the blood draws were for legitimate testing purposes.

Circumstantial Evidence Is Sufficient: All of the foregoing "knowledge" or "intent" elements may be met by circumstantial evidence—something Walgreens tellingly fails to acknowledge. Plaintiffs are not required to present *direct* evidence on these issues to the jury. *United States v. Jamison*, 91 F.3d 156 (9th Cir. 1996); *Friedman v. Live Nation*

Merch., Inc., 833 F.3d 1180, 1189 (9th Cir. 2016). Indeed, because "circumstantial evidence can be used to prove any fact," the question of whether "a party had knowledge of a particular circumstance is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Id.* (citation and quotation omitted); *accord, e.g.*, *Gurule v. Ill. Mut. Life & Cas. Co.*, 734 P.2d 85, 87 (Ariz. 1987); *Landeros v. Flood*, 551 P.2d 389, 398 n.13 (Cal. 1976). The jury can thus infer Walgreens' knowing conduct by "inference from circumstantial evidence," and through the substantial evidentiary record of Walgreens' deliberate ignorance. *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020); *see also Friedman*, 833 F.3d at 1188–89.

II. Walgreens Fails to Adduce Undisputed Evidence That Would Prevent a Reasonable Juror from Inferring It Acted with the Requisite State of Mind.

There is more than enough evidence from which a reasonable jury could conclude that Walgreens acted with the requisite state of mind. Walgreens simply cannot show that there is *no evidence* supporting its liability. Instead, Walgreens draws self-serving inferences of material fact from at best, ambiguous, evidence, and asks the Court to weigh this evidence, and the credibility of several witnesses, in its favor. That is the antithesis of the summary judgment standard. Moreover, there is both substantial record evidence of Walgreens' *actual knowledge*, and substantial record evidence from which Walgreens' *willful blindness* or *reckless indifference* to the truth can reasonably be inferred.

A. There is ample evidence of Walgreens' actual knowledge.

There are multiple categories of evidence from which a reasonable jury could find that Walgreens had *actual* knowledge of serious deficiencies in Theranos's technology and its claims regarding its blood testing services. Walgreens quarrels with two of these—Kevin Hunter's recommendations and its review of materials about the scope of Theranos's CLIA-certification—while failing to mention, much less discredit, a host of additional evidence.

First, Kevin Hunter's sworn testimony provides clear evidence of Walgreens' actual knowledge. Specifically, Hunter testified to telling Walgreens that Theranos ***could not*** develop blood tests at the rate it claimed, had produced ***no*** proof its technology even

worked, had generated a host of red flags warranting substantial further diligence, and ***must be*** misrepresenting its technology to CLIA regulators, among other things. RSOF ¶ 19. Walgreens asks the Court to ignore this evidence, throwing up a host of bantamweight objections. It complains that Hunter's testimony is not in a document—but there is no requirement that probative evidence be documentary. It claims the record does not support his testimony, but it does. It also argues that the self-serving testimony of its own executives should be credited over Mr. Hunter's—but witness credibility is a determination for the jury, not a proper enquiry at summary judgment. *Dominguez–Curry*, 424 F.3d at 1036. And Walgreens witnesses' testimony does not contradict Hunter's in any event. RSOF ¶ 20.

Second, documentary evidence shows that Walgreens possessed indisputable proof that Theranos's CLIA certification was fraudulent. RSOF ¶ 35. In response, Walgreens seeks to dictate what inferences should be drawn from this evidence. But at summary judgment, Plaintiffs' evidence "is to be believed" and inferences from that evidence to be drawn in Plaintiffs' favor. *Anderson*, 477 U.S. at 255. Walgreens' discussion of the evidence regarding its actual knowledge ends here. But there is far more evidence of Walgreens' actual knowledge, which its motion fails to even acknowledge.

Third, Walgreens' actual knowledge shows in several other categories of evidence ignored in its motion. As set forth above, Walgreens' actual knowledge that Theranos testing, including the "tiny" technology, was not market-ready at any time included: (a) knowledge of last-minute changes to testing protocols and other evidence Theranos did not follow CLIA guidelines (CSF ¶ 36); (b) knowledge that the nanotainers were not ready and not functioning properly (CSF ¶ 35); (c) knowledge of Theranos's admissions that its testing was still in development, requiring venous draws for nearly half the tests occurring in Walgreens' own stores (CSF ¶ 34); and (d) knowledge of the complaints and concerns (which were escalated) of obvious red flags by numerous Walgreens personnel, from executives to on-the-ground nurses (CSF ¶ 40; RSOF ¶ 19). Walgreens fails to refute any of this evidence. At trial, the jury will hear an even broader factual record from which it

could reasonably conclude that even if it possessed no actual knowledge, Walgreens still acted with reckless disregard and/or willful blindness.[3] We address this evidence next.

B. There is ample evidence that Walgreens acted with reckless indifference or deliberate ignorance.

A reasonable jury could find Walgreens was aware of so many red flags that, when it exposed its customers to Theranos's testing, it acted with willful blindness or reckless indifference to the fact that the testing was unreliable and not ready for market:

- *2010 and the first agreement:* Walgreens never verified Theranos's unrealistic claims regarding its technology, and never performed customary diligence into Theranos's financial status. CSF ¶¶ 2-10.

- *2010-2012 and the amended agreement:* Walgreens tossed aside the recommendations of its technological and financial experts, prioritizing speed and profit. And once it became clear that Theranos's technology was far from FDA approval, Walgreens worked with Theranos to completely retool the structure of their relationship, until Theranos was ready, and started planning the PSC Pilot. It performed no additional scientific or financial due diligence prior to entering into the amended June 2012 agreement with Theranos. CSF ¶¶ 11-25.

- *2012-2013 and the launch:* Walgreens proceeded quickly to roll out the patient service centers and testing contemplated by the amended agreement. Although it knew that the parties' revised agreement required Theranos to quickly pivot technologically, and knew that changing the testing technology eliminated any negligible value of its early "due diligence," Walgreens did not review technical reports and engaged a consultant with a tightly circumscribed remit, designed to prevent tough questions into Theranos's operations. Even when serious issues arose shortly before the pilot launch, Walgreens pressed ahead. CSF ¶¶ 26-33.

- *2013-2016 and the Pilot:* Walgreens doubled down on its Theranos bet shortly after the pilot launch, accelerating the payment of an "innovation

---

[3] If the jury views the evidence that Plaintiffs discuss in this section as insufficient to prove actual knowledge, it could still use much or all of that evidence to support a finding of willful blindness or reckless disregard. Conversely, the evidence of willful blindness or reckless disregard discussed in the next section could be used to support actual knowledge. *See United States v. Solano*, 694 F. App'x 581, 582 (9th Cir. 2017) (same evidence can support either actual knowledge or willful blindness).

> fee" and aggressively marketing Theranos services. It quickly became directly aware that Theranos testing was not performing consistent with Walgreens' advertising. Walgreens persisted in offering Theranos testing, despite mounting concerns and shocking press exposure of Theranos, until a government shutdown was imminent. CSF ¶¶ 34-41.

In response to this mass of evidence, Walgreens points to three things: (1) Theranos's CLIA certification, (2) its consultants, and (3) its supposed review of data. None of this evidence even begins to negate the genuine issues of fact.

First, expert testimony and documentary evidence show Walgreens and Theranos pursued CLIA certification as a means of *avoiding* regulatory oversight. Not only did Walgreens know CLIA certification does not mean "approval" of in-development technology, it also knew the certification relies on self-reporting and is easily gamed. Walgreens knew Theranos ***had*** gamed (and given the state of its technology, ***had to*** game), the process. The views of Walgreens' experts, *see* Mot. at 17-18, are controverted by Dr. Baird, and cannot negate the genuine issues of fact, since "[w]eighing the credibility of conflicting expert witness testimony is the province of the jury." *Wyler Summit P'ship v. Turner Broad., Sys., Inc.*, 235 F.3d 1184, 1192 (9th Cir. 2000).

Second, as explained above, the evidence shows Walgreens ignored its consultants rather than relying on them. In arguing otherwise, Walgreens simply fails to mention most of Kevin Hunter's warnings. Mot. at 20. It also relies on an interval in time between those warnings and the launch of the testing services, *see id.*—but a jury could easily find that what Walgreens learned during that interval (e.g., the sham CLIA certification) served only to *vindicate* Hunter's warnings. Walgreens certainly did not heed them. RSOF ¶ 19.

Third, as also explained above, the proficiency test reports Theranos showed Walgreens in June 2012 was direct evidence that Theranos had procured its CLIA certification fraudulently. As for the other data to which Walgreens points, Dr. Baird opines that this data, far from comforting Walgreens, should have served as red flags to any reasonable participant in the diagnostic testing industry. Substantial evidence indicates that Walgreens' purported review of Theranos data was just another box-

checking exercise designed to quiet concerned nurses. CSF ¶¶ 39; RSOF ¶ 47, 53. A jury is entitled to hear, and a reasonable jury could agree with, Dr. Baird's testimony.

* * *

In sum, a reasonable jury could find for Plaintiffs on all of their claims given the compelling evidence that Walgreens knew of, or at least was willfully blind toward, Theranos's fraud and that Theranos's technology—including the "tiny" blood testing—was never market ready and wholly unreliable. *See, e.g.*, *United States v. Salman*, 618 F. App'x 886, 890–91 (9th Cir. 2015) (inference of actual knowledge appropriate where jury could find defendant "deliberately refrained from asking" for critical information); *Bruner Corp.*, 133 F.3d at 496 (summary judgment improper where "[a]t the least, a reasonable fact-finder could conclude that [evidence] triggered [defendant's] obligation to investigate"); *United States v. Khaleghi*, 121 F.3d 718 (9th Cir. 1997) (that an employee "realized in a matter of weeks" that operations were fraudulent supported inference that co-employee defendant had knowledge of scheme); Dkt. 182, at 18-19 (ruling that it is reasonable to infer that "Theranos's secretive behavior should have put Walgreens on notice that there might be some problems with Theranos's technology. . . . This second inference supports plaintiffs' allegation that Walgreens knew that the blood tests were unreliable.").

C. Plaintiffs Have Adduced Ample Evidence of an Association-in-Fact Under RICO.

In addition to disputing whether the record evidence may establish the requisite requirement of intent, Walgreens also argues there was no association-in-fact enterprise because there was no shared purpose. *See Boyle v. United States*, 556 U.S. 938, 946 (2009) (setting out the requisites of a RICO association-in-fact enterprise, one of which is "a purpose"). And there was no shared purpose, Walgreens contends, because Plaintiffs lack evidence that it knowingly participated in the fraudulent scheme. But there is ample evidence, discussed above, of Walgreens' actual knowledge of or willful blindness to the scheme—evidence that is more than sufficient to withstand summary judgment. *See United States v. Asefi*, 788 F. App'x 449, 452 & n.1 (9th Cir. 2019) (holding that a willful-blindness

instruction was properly given where the defendant claimed he "believed" the enterprise was legitimate but "did not ask questions"); *United States v. Shayota*, 784 F. App'x 986, 990 (9th Cir. 2019) (willful-blindness doctrine applied where "[d]espite their exposure to numerous suspicious aspects of the scheme, [defendants] continued to participate").

III. A Reasonable Jury Could Find Support for Punitive Damages.

Walgreens insists no reasonable jury could find that clear and convincing evidence supports the imposition of punitive damages. In advancing this argument, however, it wholly ignores the compelling evidence that Walgreens "deliberately interfere[d] with the rights of others, consciously disregarding the unjustifiable substantial risk of significant harm to them." *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 907 P.2d 506, 518 (Ariz. Ct. App. 1995) (quotation and citation omitted) (defining the requisite "evil mind").

Plaintiffs have already discussed a broad swath of the evidence indicating that, before launching the blood-testing service, Walgreens had actual knowledge—or deliberately remained ignorant—of the truth about Theranos testing and the risk to consumers. Yet Walgreens chose to expose its customers to this fraud for three years. Worse, during those three years, Walgreens consciously disregarded the evidence it was involved in a fraud that continued to pile up, treating concerns from nurse practitioners that Walgreens *recognized* were "reasonable" as a mere PR problem, failing to follow Walgreens' Chief Medical Officer's advice to "systematically monitor" Theranos testing, and instead sending him to review correlation studies that should have troubled anyone with medical training. Even as journalists began to publicize Theranos's fraud and CMS threatened to revoke the CLIA certification, Walgreens carefully monitored the situation, concerned for its reputation, but still waited *months* to end the partnership. Together, this evidence would justify a jury in finding a "high probability," *Hyatt Regency*, 907 P.2d at 518, that Walgreens was "well aware" it was performing invasive medical procedures that had no clinical value but "deliberately persisted" in its misconduct "over a long period of time." *White v. Mitchell*, 759 P.2d 1327, 1333 (Ariz. Ct. App. 1988); *see also Hyatt*

Regency, 907 P.2d at 518 (among the factors to consider in awarding punitive damages are "the duration of the misconduct," "the defendant's awareness of the harm or risk of harm," and "any concealment").

This is not a case, moreover, where class members were defrauded into paying for an ordinary consumer good. Rather, class members were trusting Walgreens with their health. *See Rhue v. Dawson*, 841 P.2d 215, 227 (Ariz. Ct. App. 1992) (the kind of relationship between the parties is relevant to punitive damages). They were defrauded into paying for a critical diagnostic tool supposed to alert patients to potential health problems:

> To me, as a physician, the very fact that Theranos provided tests that were not just inaccurate, but in fact totally incapable of producing a seriously abnormal result when the abnormal result was the true value, is terrifying. A laboratory test that cannot diagnose critical illness . . . is a tremendous threat to the health of patients, especially when the expectation of those using the test is that the test can, in fact, identify such critical cases.

Baird Rep ¶ 20; *see also Hyatt Regency*, 907 P.2d at 518 (among the "[i]mportant factors to consider when deciding whether a defendant acted with an evil mind" are "the reprehensibility of defendant's conduct and the severity of the harm likely to result," and "any harm that has occurred"). Walgreens argues that punitive damages are unwarranted, repeating the refrain that it was a victim and not the perpetrator of fraud. It is conceivable, if unlikely, that a rational jury could agree. But a rational jury could also conclude that punitive damages are warranted because Walgreens was, in effect, "a party to the illegal actions of" Theranos—for by the time the scheme was up and running, Walgreens knew of Theranos's fraud, "took no actions to prevent" it, and instead "benefited" from the wrongful acts. *Sec. Title Agency, Inc. v. Pope*, 200 P.3d 977, 997 (Ariz. Ct. App. 2008).

Separately, Walgreens argues in footnotes that the Edison Subclass members may not recover punitive damages because only "nominal" damages are available after they elected not to pursue remedies for emotional distress. Dkt. 521 nn. 4, 7. The parties already litigated this issue and the Court already decided it. Plaintiffs have been clear that they are pursuing damages for the invasion of Edison Subclass members' dignitary rights, including

to know and control the purposes for which blood draws were performed on their bodies. Hr'g Tr. at 6-8, 25-26, 29-30, 48-51 (Jan. 23, 2020). The Court understood Plaintiffs' election and certified the battery claim for general and punitive damages:

> The traditional rule for battery cases is that general damages or presumed damages of a substantial amount can be recovered merely upon showing that the tort was committed at all." *Johnson v. Pankratz*, 2 P.3d 1266, 1269 (Ariz. Ct. App. 2000) (citation omitted). Plaintiffs are seeking "dignity damages," measured by an "ordinary person" standard and not each individual's experience. . . . If plaintiffs prevail and recover general damages for battery or if they prevail and recover treble or punitive damages, the individual allocation of such recoveries is a matter for claims administration . . .

Dkt. 369 at 16, 22. Plaintiffs' right to recover more than "nominal" damages on this theory is well grounded in the law.[4] The Court should reject Walgreens' request to litigate these settled issues again. The Edison Subclass members are pursuing compensatory "presumed" damages; punitive damages are available for their claims if they succeed.

CONCLUSION

Walgreens has failed to carry its burden to show an absence of evidence to support the challenged elements of Plaintiffs' case. The Court should deny Walgreens' motion.

[4] Revised Arizona Jury Instruction (Civil) 2 n.3 ("A plaintiff is not required to prove damages . . . damages are presumed"); *Johnson v. Pankratz*, 196 Ariz. 621, 623 (Ct. App. 2000), ¶ 6, 2 P.3d at 1268 (App. 2000) (quoting Dan B. Dobbs, Dobbs Law of Remedies, ¶ 7.1 (2d ed.1993)) ("the only harm [from a battery may be] the affront to the plaintiffs dignity as a human being, the damage to his self-image, and the resulting mental distress. It does not follow that recovery is limited to nominal damages, however, even if the extent of emotional distress is not proved."); Dobbs § 7.1(1) ("affront to [plaintiff's] dignity as a human being" is a compensable harm); *id.* § 7.1(2) (a purpose of presumed damages for battery is compensating "a value to the right in question irrespective of plaintiff's actual harm beyond loss of the right itself"); *id.* ("the invasion . . . is the harm for which damages are recoverable.").

Dated: March 24, 2023

Respectfully submitted,

By: */s/ Roger Heller*

Michael W. Sobol (*Pro Hac Vice*)
Roger N. Heller (*Pro Hac Vice*)
Melissa Gardner (*Pro Hac Vice*)
Michael K. Sheen (*Pro Hac Vice*)
John D. Maher (*Pro Hac Vice*)
Amelia A. Haselkorn (*Pro Hac Vice*)
LIEFF CABRASER HEIMANN
& BERNSTEIN LLP
275 Battery St, 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
Email: msobol@lchb.com
Email: rheller@lchb.com
Email: mgardner@lchb.com
Email: msheen@lchb.com
Email: jmaher@lchb.com
Email: ahaselkorn@lchb.com

Mark D. Samson, Bar No. 011076
Ron Kilgard, Bar No. 005902
Alison E. Chase, Bar No. 028987
KELLER ROHRBACK L.L.P.
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012
Telephone: (602) 248-0088
Facsimile: (602) 248-2822
Email: msamson@kellerrohrback.com
Email: rkilgard@kellerrohrback.com
Email: achase@kellerrohrback.com

Lynn Lincoln Sarko, Bar No. 35345 (*Pro Hac Vice*)
Gretchen Freeman Cappio (*Pro Hac Vice*)
Benjamin B. Gould (*Pro Hac Vice*)
Sydney Read (*Pro Hac Vice*)
KELLER ROHRBACK L.L.P.
1201 3rd Ave., Ste. 3200
Seattle, WA 98101
Telephone: (206) 623-1900
Facsimile: (206) 623-3384
Email: lsarko@kellerrohrback.com
Email: gcappio@kellerrohrback.com
Email: bgould@kellerrohrback.com
Email: sread@kellerrohrback.com

Co-Lead Class Counsel

ADDENDUM: ELEMENTS OF PLAINTIFFS' CLAIMS CHALLENGED BY THE MOTION FOR SUMMARY JUDGMENT

CLAIM	ELEMENTS	MOTION	RESPONSE
Arizona Consumer Fraud Act	1. Walgreens failed to disclose material information and intended that others rely on that omission	"Plaintiffs [] must show that Walgreens had actual knowledge that Theranos testing did not produce reliable results and concealed that fact." MSJ at 13.	• Willful blindness is legally equivalent to actual knowledge. Even where a defendant claims to have no knowledge, a "high probability that the scheme was fraudulent and deliberately shut his eyes to avoid learning the truth" justifies an "inference of knowing participation." Opp. at 16. • The is ample evidence of Walgreens' actual knowledge, Opp. at 19-20, reckless indifference, and/or willful disregard, *id.* at 21-23. • Walgreens also need only be willfully blind to some omitted material fact. Opp. at 16.
	2. in connection with the sale or advertisement of merchandise	N/A [not challenged or subject to motion]	N/A
	3. the Class suffered damages	N/A [not challenged or subject to motion]	N/A
	4. The amount of damages[1]	N/A [not challenged or subject to motion]	N/A
Battery	1. Walgreens caused a harmful or offensive contact with Edison Subclass Members.[2]	N/A [not challenged or subject to motion]	N/A
	2. Any consent is invalid because: (a) the subject's consent was based on their mistake as to the essential nature of the contact; and (b) Walgreens knew about the mistaken belief or contributed to the mistaken belief.	"…Plaintiffs' battery theory is that Walgreens 'knew that [Edison Plaintiffs] mistakenly and reasonably believed the essential nature and purpose of the[] 'tiny' blood draws was legitimate blood testing," and "intentionally concealed and failed to disclose" that "the essential nature and purpose of the 'tiny' blood draws was not, and could not have been, legitimate blood testing." MSJ at 14.	• The relevant "intent" is to cause the contact. Opp. at 17. • Consent is ineffective either where induced by mistake (and that mistake is known) or by misrepresentation. Opp. at 17.
	3. The Class suffered damages.	N/A [not challenged or subject to motion]	N/A

[1] A.R.S. §§ 44-1521 *et seq.*; *State ex rel. Horne v. Autozone, Inc.*, 258 P.3d 289 (Ariz. Ct. App. 2011), *vacated in part on other grounds*, 275 P.3d 1278 (Ariz. 2012); *Powers v. Guar. RV, Inc.*, 278 P.3d 333 (Ariz. Ct. App. 2012).

[2] *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 441 (Ariz. 2003); *Restatement (Second) of Torts* § 892B(2).

CLAIM	ELEMENTS	MOTION	RESPONSE
RICO	1. Conduct[3]	N/A [not challenged or subject to motion]	N/A
	2. Of an enterprise	Plaintiffs "must show that each of the Defendants, including Walgreens, knew that Theranos testing was inaccurate and unreliable." MSJ at 22.	• Willful blindness is legally equivalent to actual knowledge. Opp. at 15-16. • RICO's intent requirement is also satisfied by reckless indifference. Opp. at 15-16. • The is ample evidence of Walgreens' actual knowledge, Opp. at 19-20, reckless indifference, and/or willful disregard, *id. at* 21-23.
	3. Through a pattern	N/A [not challenged or subject to motion]	N/A
	4. Of "racketeering" activities (i.e., predicate acts)	Walgreens' lacked intent to defraud by participating in enterprise. MSJ at 16.	• A shared purpose establishes an enterprise. Opp. at 23-24. • The is ample evidence of Walgreens' actual knowledge, Opp. at 19-20, reckless indifference, and/or willful disregard, *id. at* 21-23, of the fact that Theranos was engaged in fraud.
	5. Causing injury	n/a [not challenged or subject to motion]	N/A
California UCL	1. Unfair competition (including any unlawful, unfair, or fraudulent business act or practice; and any unfair, deceptive, untrue, or misleading advertising).[4]	"Plaintiffs [] must show that Walgreens had actual knowledge that Theranos testing did not produce reliable results and concealed that fact." MSJ at 13 (same as Arizona Consumer Fraud).	• Willful blindness is legally equivalent to actual knowledge. Opp. at 16. • The is ample evidence of Walgreens' actual knowledge, Opp. at 19-20, reckless indifference, and/or willful disregard, *id. at* 21-23. • Walgreens also need only be willfully blind to some omitted material fact. Opp. at 16.
	2. The Class was harmed	N/A [not challenged or subject to motion]	N/A
	3. The harm resulted from Walgreens' conduct	N/A [not challenged or subject to motion]	N/A
California False Advertising Law	1. Walgreens' advertising was untrue or misleading because it failed to disclose material information;[5]	N/A [not challenged or subject to motion]	N/A
	2. Walgreens knew, or should have known, that the advertising failed to disclose material information; and	"Plaintiffs [] must show that Walgreens had actual knowledge that Theranos testing did not produce reliable results and concealed that fact." MSJ at 13 (same as Arizona Consumer Fraud).	*See id.* (California UCL Response).
	3. The Class was harmed by Walgreens' conduct	N/A [not challenged or subject to motion]	N/A

[3] *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996).

[4] *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1043 (9th Cir. 2003)

[5] Cal. Bus. & Prof. Code § 17500; *San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 690 (N.D. Cal. 2020).