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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

In re:

Arizona THERANOS, INC., Litigation

Case 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

DEFENDANTS WALGREENS BOOTS ALLIANCE, INC. AND WALGREEN ARIZONA DRUG CO.'S MOTION FOR SUMMARY JUDGMENT AS TO ALL CLASS CLAIMS

ORAL ARGUMENT SCHEDULED FOR APRIL 25, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This case was filed in 2016, just months after the first public revelation of a mere portion of the brazen, massive, and intricate fraud that Theranos and its executives, Elizabeth Holmes and Ramesh "Sunny" Balwani, perpetrated upon the government, Theranos's investors, its business partners, and the public generally over several years. Between 2016 and 2023, the Parties engaged in extensive discovery, and government investigations and criminal trials have concluded. There is now a complete record that allows for only one reasonable conclusion: Defendants Walgreens Boots Alliance, Inc. and Walgreen Arizona Drug Co. (together, "Walgreens") were *victims* of the Theranos fraud, not participants in it.

Walgreens partnered with Theranos because it promised technology that would provide access to safe, affordable, and convenient blood testing, improving the health of Walgreens customers. Walgreens—a retail pharmacy with its reputation and millions of dollars on the line—conducted years of investigation, and employed industry-leading consultants to vet the reliability of Theranos testing before introducing it to customers. Indeed, Walgreens refused to roll-out Theranos services until after Theranos's labs received government certification to provide laboratory testing. When Walgreens obtained information revealing the illegitimacy of Theranos's testing devices years later, it acted quickly to terminate the partnership—months *before* the government shut Theranos down.

We now know that Theranos was not using its own proprietary machines but instead diluting blood samples and using modified commercial blood testing machines, which impacted the accuracy and reliability of the results. We now know that Theranos lied about the state of its technology, including by manipulating reports supposedly prepared by prominent pharmaceutical companies that validated the technology. And we now know that Theranos concealed deficiencies in its labs and erroneous test results, leading both its regulators and Walgreens to believe that Theranos's technology and labs were generating accurate and reliable results. Walgreens and the public know now the full scope of this scam, but hindsight is 20/20. What matters is what Walgreens knew *at the time*.

All investigations have now been completed, and no government agency or regulator has placed responsibility on Walgreens for Theranos's fraud. There is also no evidence from which a jury could conclude that Walgreens knew about or recklessly disregarded indications of Theranos's fraud *at the time*. All of the claims being pursued on behalf of the class and subclasses—RICO, statutory fraud (omissions-based), battery, and punitive damages—require Plaintiffs to prove (at the very least) that Walgreens *intended* to deceive the public. After years of discovery, including production of millions of documents and dozens of depositions, there is no evidence from which this required knowledge and intent could be found. Walgreens is entitled to summary judgment on all of Plaintiffs' class claims.

FACTUAL BACKGROUND

I. WALGREENS' INITIAL DUE DILIGENCE

Theranos approached Walgreens in early 2010 with the promise of a new technology capable of running "comprehensive blood tests" from a fingerstick. (SOF ¶ 1.) Less invasive than a traditional venous draw, it could be performed at a fraction of the cost and would provide patients with more information about their health. (SOF ¶ 3.) Theranos's testing appeared to have the potential to meaningfully improve the health and well-being of Walgreens' customers, and aligned with Walgreens' business plan to enter the blood-testing market and further become a healthcare destination. (*Id.*)

Theranos represented that its technology—the "Theranos Systems" (also known as the "Edison" or "Minilab")—had "been comprehensively validated over the course of the last seven years by ten of the fifteen largest pharmaceutical companies," was validated by the FDA, and that its correlation data (comparing test results from a Theranos machine to test results from a commercial reference machine) demonstrated highly accurate results. (SOF ¶ 2; *see also* SOF ¶ 21.) Theranos claimed that its clients included major pharmaceutical and bio-pharm companies, research institutions, and U.S. and foreign health and military organizations. (SOF ¶ 2.) Theranos also told Walgreens about notable investors and board members, including Donald Lucas, Larry Ellison, and Bob Shapiro

(former CEO of Pfizer). (*Id.*)

In April 2010, Holmes sent Walgreens "three independent due diligence reports on Theranos" from GlaxoSmithKline, Pfizer, and Schering-Plough, which she represented were based on the pharmaceutical companies' "own technical validation and experience with Theranos Systems in the field." (SOF ¶ 4.) These reports appeared to show scientific validation of Theranos's technology by prominent pharmaceutical companies based on clinical trials they performed. (SOF ¶¶ 4–5.) Dr. Sharon Glave Frazee, Walgreens' Vice President of Clinical Healthcare Analytics and Research[1] who previously worked at Lab Corp (which operates one of the largest clinical laboratory networks in the world), reviewed these reports, and based on their findings, stated that Theranos appeared to be "state-of-the art, providing scientifically valid laboratory testing at point of care locations." (SOF ¶ 5.)

Walgreens also engaged a team from Johns Hopkins School of Medicine, including the Directors of its Hematology Laboratory and Clinical Pathology Laboratory. (SOF ¶ 7.) In April 2010, the Johns Hopkins team reviewed testing data and Theranos demonstrated its technology, leading Johns Hopkins to report that the technology was "novel and sound," could "accurately run a wide range of routine and special assays," and would be "useful in the retail clinic setting." (SOF ¶ 8.) The team noted one of the "[s]pecial strengths of [Theranos's] technology" was "[a]ccuracy" and said "[n]o major weaknesses were identified." (*Id.*) The team further noted that it was looking into its own potential partnership with Theranos, stating that "over the past two years [its clinical pathology laboratory director] has had numerous conversations with Theranos about utilizing their technology at Johns Hopkins" and "both parties will continue to explore opportunities for collaboration." (SOF ¶ 9.)

Around the same time, Walgreens engaged Kevin Hunter, the CEO and Managing Partner of Colaborate, a laboratory management consulting firm, to assist in evaluating a

[1] All titles of Walgreens employees are as of the relevant time period.

potential partnership with Theranos. (SOF ¶ 10.) In a June 2010 report comparing Theranos to other companies in the laboratory industry, Hunter expressed "excite[ment]" about Theranos, concluded that Theranos technology had the "opportunity to be a game changer for the lab industry," and recommended that Walgreens proceed with conducting additional diligence "around the science and scalability of Theranos Systems." (SOF ¶ 11.) Walgreens did so, and expanded Hunter's engagement in July 2010 to advise on a range of topics, including regulatory strategy, business model, and information technology ("IT"). (SOF ¶ 12.) Hunter regularly attended team meetings, including a meeting at Theranos in August 2010, after which Hunter reported that "it was a very good couple days onsite with Theranos," he "walked away feeling good" about Theranos, and felt that Walgreens was "on to something significant." (SOF ¶¶ 12, 16, 18.) And while Hunter raised some questions and concerns during his engagement, including with regard to regulatory approach and IT, numerous Walgreens deponents testified that he never shared concerns that the Theranos technology did not work, nor did he ever advise that Walgreens should not move forward with the Theranos project. (SOF ¶ 20.)

Throughout the first half of 2010, Walgreens continued to evaluate Theranos, including visits to Theranos's headquarters and lab, discussions of business models, review of patents, and initial discussions regarding regulatory strategy. (SOF ¶¶ 13, 17.) Based on the information gathered from this initial due diligence and advice from its consultants, Walgreens entered into a Master Purchase Agreement with Theranos on July 30, 2010. (SOF ¶ 14.) This contract was not a commitment to go to market, nor did Walgreens make any financial payments pursuant to it; rather, it secured the opportunity for Walgreens to exclusively work with Theranos on a potential partnership as it further evaluated the opportunity. (SOF ¶ 15.)

II. THE GOVERNMENT CERTIFIES THERANOS LABORATORIES

From the beginning, Walgreens made clear that Theranos must have government approval for its testing before it could be offered in Walgreens stores. (SOF ¶ 24.) The regulatory approach turned in large part on where the Theranos testing device would be

located. The 2010 agreement contemplated that the device would be located *inside* Walgreens stores, and the parties accordingly worked to align on the requisite regulatory approval. (SOF ¶¶ 14, 25.) Walgreens sought the advice of outside counsel and Hunter, who advised on various potential regulatory strategies, including certification under the Clinical Laboratory Improvement Amendments of 1998 ("CLIA")—the federal regulations that govern laboratory testing. (SOF ¶¶ 17, 19.) Theranos, for its part, employed Bill Schultz, former deputy commissioner for policy at the FDA, and engaged in direct discussions with regulators, including then-Secretary of Health and Human Services Kathleen Sebelius. (SOF ¶ 25.) In June 2011, Walgreens postponed the launch of Theranos testing until appropriate regulatory approval was in place, even if this meant that Theranos might go to market with a competitor instead of Walgreens. (SOF ¶ 26.) Hunter rolled off the project in November 2011 during this pause in the relationship. (SOF ¶ 27.)

In early 2012, the parties aligned on a revised operating and regulatory model, memorialized in the June 2012 Amended and Restated Theranos Master Services Agreement (the "Agreement"). (SOF ¶ 32.) It differed significantly from what was envisioned in 2010: instead of Theranos devices inside Walgreens stores, the devices would be located at a stand-alone Theranos laboratory where testing would occur. (*Id.*) Walgreens would act as a patient service center; Walgreens or Theranos employees would collect blood samples using Theranos finger-stick technology in "Theranos Wellness Centers" inside Walgreens stores. (*Id.*) The blood then would be sent to a CLIA-certified laboratory owned and operated by Theranos, and Theranos would be solely responsible for running tests and sending results to the requesting physician or patient. (*Id.*) Walgreens was not involved in the actual testing of the blood samples, nor did it receive or have involvement in the reporting of test results to patients or healthcare providers. (SOF ¶ 58.) In addition, Walgreens purchased a $40 million convertible note, and agreed to pay Theranos a $100 million "Innovation Fee" in installments, based on reaching certain milestones (which Walgreens paid in full by December 2013). (SOF ¶ 33.)

Pursuant to the Agreement, Walgreens required all Theranos laboratories to receive

a CLIA Certificate of Compliance. (SOF ¶ 32.) CLIA regulations are overseen by the Centers for Medicare & Medicaid Services ("CMS") within the U.S. Department of Health and Human services, to establish "quality standards for all laboratory testing to ensure the accuracy, reliability and timeliness of patient test results." (SOF ¶¶ 28–29.) To obtain a CLIA Certificate of Compliance, a laboratory must undergo an initial inspection as well as ongoing inspections and recertification surveys by CMS to confirm continued compliance with federal law. 42 C.F.R. § 493.1777(a), (b); *see also* 42 U.S.C. § 263a(g). Laboratories are required to perform proficiency testing on sets of blind samples for every test that the lab offers, beginning at the time of CLIA certification. *See* 42 C.F.R. §§ 493.801, 493.803.

As Hunter described to Walgreens in a 2010 report, to be CLIA certified, a "laboratory must demonstrate its compliance with federal standards in areas of administration, proficiency test participation, patient test management, quality control, personnel, quality assurance, inspections, and computer systems." (SOF ¶ 17.) Further, as both Parties' experts recognize, laboratories only receive CLIA certification after satisfying regulators that they can deliver accurate and reliable results. (SOF ¶ 29.) Theranos (not Walgreens) was responsible for applying and maintaining CLIA certification, and its laboratories were CLIA-certified at all times that Theranos testing was offered in Walgreens stores. (SOF ¶¶ 28, 48, 56.)

Shortly after signing the 2012 Agreement, Theranos provided Walgreens a copy of its CLIA Certificate of Compliance and associated inspection report, reflecting that Theranos's laboratory passed the government's inspection without exception or condition. (SOF ¶ 35.) Ken Finnegan, Walgreens' Vice President of New Product Development and Innovation and former Quest Diagnostics executive (a leading clinical laboratory company), reviewed Theranos's proficiency reports and correlation studies, and was satisfied with the results. (SOF ¶¶ 34–35.) Dr. Jeffrey Kang, Walgreens' Senior Vice President of Pharmacy, Health, and Wellness Services and Solutions, and the former Chief Medical Officer of CMS, also visited Theranos and performed his own review of its proficiency data, correlation studies, and inspection reports. (SOF ¶¶ 46–47.)

Even after CLIA certification and this review of proficiency data, "in an abundance of caution," Walgreens retained another independent third-party consultant, Paul Rust, also a former Quest Diagnostics executive, to do "further review" of Theranos's correlation and proficiency test results. (SOF ¶ 37.) Rust visited Theranos in October 2012, reviewed the data, and concluded that the results documented "excellent performance" and that Holmes and Balwani had "deep and abiding commitments to quality." (SOF ¶ 38.)

III. ONGOING ASSESSMENT AND LAUNCH OF THERANOS TESTING

In March 2013, more than a year after Theranos received its CLIA Certificate of Compliance and months after Walgreens' review of Theranos's proficiency data and correlation studies, Walgreens and Theranos began a controlled "soft launch" with paid clinical trial patients in one Phoenix Walgreens store. (SOF ¶ 40.) The purpose of the soft launch was to test the operations of the partnership—including workflow, staffing, and IT—ahead of the anticipated launch of testing to the public. (*Id.*)

By the summer of 2013, Theranos had added to its illustrious board, including James Mattis, retired Marine Corp General and former Secretary of Defense; William J. Perry, former Secretary of Defense; and former Secretaries of State Henry Kissinger and George P. Shultz. (SOF ¶ 41.) Theranos also represented to Walgreens that it was actively working with the U.S. military—even showing Walgreens a device it had purportedly developed for use in the battlefield—and that it was conducting blood testing at its grocer partner's corporate campus. (SOF ¶ 31.) Further, several health insurance providers, after meeting with Theranos, had committed to participate in the pilot, and some had directly invested in Theranos. (SOF ¶¶ 21–23.)

In addition, in July and August 2013, Theranos performed blood test demonstrations on Walgreens executives, purportedly using Theranos's finger-stick methodology, and reported to the executives what appeared to be accurate results. (SOF ¶ 42.) It was Walgreens' understanding that these tests were performed using the same technology that would be used for the pilot, further indicating to Walgreens that Theranos's technology was capable of generating accurate and reliable results. (SOF ¶ 85.)

In September 2013, more than three years after Walgreens and Theranos first discussed a potential partnership, the parties launched the pilot in one Palo Alto store. (SOF ¶ 43.) Over the next year, Theranos Wellness Centers opened in 40 stores in the Phoenix area, bringing the total number of stores to 41, out of the more than 8,000 Walgreens stores open at the time. (*Id.*)[2]

During the pilot, Walgreens continued to receive positive reinforcement regarding Theranos, and responded to potential issues when they arose. Dr. Harry Leider, Walgreens' Chief Medical Officer; Dr. Patrick Carroll, Chief Medical Officer of the Healthcare Clinics; and Dr. Kang all reviewed Theranos's correlation studies on multiple occasions and were satisfied with the results. (SOF ¶¶ 46–47, 53.) In late 2013, a few nurse practitioners who worked at the health clinics requested additional information about the accuracy of Theranos testing before they would recommend Theranos testing to patients. (SOF ¶ 46.) In response, Walgreens requested, received, and shared with the nurse practitioners Theranos's clinical correlation information, which Dr. Kang reviewed and concluded looked good. (SOF ¶¶ 46–47.) In mid-2014, after a nurse practitioner raised questions about a small number of test reports, Drs. Leider and Carroll reviewed the reports, met with Theranos to discuss the reports and review Theranos correlation studies, and were satisfied with the results. (SOF ¶¶ 51–52.)

At this same time, Theranos continued to remain in compliance with CLIA regulations designed to ensure the accuracy and reliability of test results. On January 9, 2014, the government renewed Theranos's California laboratory's CLIA Certificate of Compliance after another inspection and review of additional proficiency testing results. (SOF ¶ 48.) Theranos opened a second laboratory in Arizona, which also received a CLIA Certificate of Compliance in May 2015. (SOF ¶ 56.) Additionally, on July 2, 2015, Theranos publicly announced that it had received FDA clearance of its test system and herpes simplex 1 virus IgG (HSV-1) test for both finger stick and venous blood testing,

[2] *See also* Walgreens Boots Alliance, Inc. 2016 Annual Report, at 4 (2016) https://www.annualreports.com/HostedData/AnnualReportArchive/w/NASDAQ_WBA_2016.pdf.

explaining that with FDA approval, it could use the test system itself "in locations outside of traditional clinical laboratories," including Theranos Wellness Centers. (SOF ¶ 57.)

Walgreens also received other indicia of the legitimacy of Theranos testing. For example, after Advocate Health Care's Chief Medical Officer and lab medical director met with Theranos, the Chief Medical Officer told Walgreens that he was "impressed[] with the disruptive technology and confident that it was reliable and accurate." (SOF ¶ 49.) Theranos and the Cleveland Clinic announced a strategic alliance in March 2015. (SOF ¶ 55.) And Theranos's board continued to add prominent members, including Dr. William Foege, former Director of the U.S. Centers for Disease Control and Prevention. (SOF ¶ 41.)

IV. THERANOS'S DECEPTION IS REVEALED AND PROSECUTED

In October 2015, *The Wall Street Journal* published an article accusing Theranos of not using its own technology to conduct the majority of its blood tests and suggesting that Theranos cheated on the proficiency tests that were vital to CLIA certification. (SOF ¶ 59.) This was the first time that Walgreens learned of these accusations. (*Id.*) Theranos privately assured Walgreens that *The Wall Street Journal*'s reporting was inaccurate. (SOF ¶ 60.) Walgreens immediately sought answers, met with Theranos, and sent Theranos a series of information requests for, among other things, proficiency test reports, correlation data results, inspection reports, and communications with state and federal inspectors. (SOF ¶¶ 61–62.)

In January 2016, CMS issued a letter to Theranos identifying deficiencies at its California laboratory. (SOF ¶ 63.) The day after news of CMS's letter became public (and first known to Walgreens), Walgreens suspended Theranos services in California and insisted that Theranos immediately cease sending blood samples to the California lab. (SOF ¶¶ 64–66.) Theranos sent samples for the Phoenix stores to its Arizona laboratory—which remained a laboratory in good standing—or a third-party lab. (SOF ¶ 66.)

Over the next several months, Walgreens continued to demand information. On May 18, 2016, Walgreens heard, via a news report, that Theranos voided two years of Edison test results. (SOF ¶ 67.) On May 23, 2016, Walgreens wrote Theranos requesting

confirmation and information regarding the news report, and Walgreens followed up on May 29 and June 6. (SOF ¶ 68.) On June 12, 2016, one day after Theranos confirmed that news report, Walgreens terminated the Agreement for cause, effective immediately. (SOF ¶ 69.) A month later, CMS revoked the CLIA Certificate for Theranos's California lab—more than six months after Walgreens had prohibited Theranos from sending samples there. (SOF ¶ 70.) In February 2017—eight months after Walgreens terminated the Agreement—CMS revoked the CLIA Certificate for Theranos's Arizona lab. (SOF ¶ 71.)

Theranos, Holmes, and Balwani were subsequently charged with fraud by the U.S. Securities and Exchange Commission and the U.S. Department of Justice. (SOF ¶ 73.) Separate juries convicted Holmes and Balwani of multiple counts of wire fraud and conspiracy to commit wire fraud, and each has been sentenced to more than a decade in federal prison. (SOF ¶¶ 75–76.) Additionally, the Arizona Attorney General entered into a Consent Decree with Theranos whereby Theranos paid full refunds to Arizona consumers who purchased any Theranos blood test, at a Walgreens location or elsewhere. (SOF ¶ 72.)

Through these government proceedings, Walgreens learned that Theranos, Holmes, and Balwani had lied repeatedly to Walgreens. They lied about pharmaceutical companies writing the reports sent to Walgreens; Holmes admitted at trial that Theranos actually wrote the reports and she added the pharmaceutical logos to the front page. (SOF ¶ 78.) They lied about the FDA reviewing Theranos Systems in 2005. (SOF ¶ 79.) They lied about Theranos Systems being used by the military. (SOF ¶ 80.) They lied about Theranos testing being done on its own proprietary machines; both Holmes and Balwani *admitted they never told Walgreens* that Theranos tests were run on modified commercial machines (which required dilution of the blood samples, impacting accuracy). (SOF ¶¶ 81–84.) And they lied to Walgreens' executives during the live test demonstrations; Theranos used a "demo app" to "shield[] protocol failures," and selectively "corrected" and "removed" results that it "felt were questionable" before sending them to the Walgreens executives. (SOF ¶¶ 85–86.)

No investigating agency has ever accused Walgreens of any wrongdoing or role in Theranos's fraud: not the Arizona Attorney General, not the SEC, and not the DOJ.

(SOF ¶¶ 72–73, 77.) The federal government has repeatedly emphasized that Walgreens is a victim of Theranos's fraud, seeking $40 million in restitution for Walgreens from Balwani and Holmes. (SOF ¶ 77.) And in his Order on Sentencing for Balwani, Judge Davila noted that Walgreens "was not aware that third-party machines were used for the vast majority of testing." (SOF ¶ 81.)

PROCEDURAL BACKGROUND

Plaintiffs' Complaint asserts 14 claims against Theranos, Holmes, Balwani, and Walgreens; some claims require actual knowledge and intent, others are negligence-based. The Complaint alleges that Defendants "marketed and sold blood testing services that they knew were unreliable, not ready-for-market, and failed to meet even basic industry standards" and "concealed material information about the unreliability of all of the testing services, and about the grossly deficient nature of the testing facilities and equipment." (Dkt. 159, Second Amended Complaint ("SAC") ¶¶ 3, 5.)

In April 2018, the Court dismissed certain claims, and in March 2020, certified a Class and three Subclasses to pursue only six causes of action: (1) RICO (18 U.S.C. § 1962(c)) (the "Class"); (2) omissions-based claims under the Arizona Consumer Fraud Act (ACFA) (A.R.S. § 44-1522(A)) (the "Arizona Subclass"); (3) omissions-based claims under the California False Advertising Law (FAL) (Cal. Bus. & Prof. Code § 17250) and (4) Unfair Competition Law (UCL) (Cal. Bus. & Prof. Code. § 17200) (collectively (3) and (4), the "California Subclass"); and (5) battery and (6) medical battery (collectively (5) and (6), the "Edison Subclass"). Notably, Plaintiffs did not seek class certification for many of the other claims brought in their Complaint, including their negligence-based claims and affirmative-based statutory fraud claims. (Dkt. 369 at 3 & n.7; Dkt. 368, Class Cert Tr. at 21:24–22:3.)[3] Plaintiffs also disclaimed damages for emotional distress. (Dkt. 369 at 3.)[4]

[3] If Plaintiffs plan to pursue on an individual basis any claims for which they disclaimed class treatment, the arguments made herein apply to the extent the claims require proof that Walgreens acted with knowledge and/or recklessness or Plaintiffs seek punitive damages.

[4] Plaintiffs' disclaimer of emotional distress damages is particularly relevant to the Edison Subclass's battery claims. The Subclass have not articulated *actual* damages suffered from the alleged battery, other than emotional distress. While Plaintiffs insist they are seeking

ARGUMENT

"Summary judgment is appropriate if the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law." *Cabral v. State Farm Fire & Cas. Co.*, 582 F. Supp. 3d 701, 703–04 (D. Ariz. 2022) (citing Fed. R. Civ. P. 56(a)). "The moving party 'bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "Only disputes over facts that might affect the outcome of the suit will preclude summary judgment—the disputed evidence must be 'such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* The "mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

I. ALL OF PLAINTIFFS' CLAIMS REQUIRE PROOF OF ACTUAL KNOWLEDGE OR RECKLESS DISREGARD OF THERANOS'S FRAUD.

Under § 1962(c) of RICO, Plaintiffs must prove that Walgreens participated in an "association-in-fact" enterprise with Theranos that shared a common purpose, through a pattern of racketeering activity (*i.e.*, "predicate acts") causing injury to Plaintiffs. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014) (citing 18 U.S.C. § 1962(c)); *see also* SAC ¶ 521. Plaintiffs must prove each element of the predicate act—here, wire fraud—just as "if the predicate act were a stand-alone claim." *Nutrition Distrib. LLC v. Custom Nutraceuticals LLC*, 194 F. Supp. 3d 952, 957 (D. Ariz. 2016).

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damages for so-called "dignity harm," under Arizona law, the only way to determine damages for a "dignitary tort" (other than nominal damages) is to look to emotional distress. *See Johnson v. Pankratz*, 2 P.3d 1266, 1269 (Ariz. Ct. App. 2000) (remedy for "dignitary torts" is "an award of nominal damages" plus "compensation for the *resulting mental disturbance*, such as fright, revulsion or humiliation" (emphasis added) (quoting W. Page Keeton *et. al.*, Prosser & Keeton on the Law of Torts § 9, at 40 (5th ed. 1984))).

One element of wire fraud is the "intent to defraud," which requires a plaintiff to prove the defendant either knew it was making false representations or acted with reckless indifference to their truth or falsity. *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982); *see also United States v. Wheeler*, 16 F.4th 805, 819 (11th Cir. 2021).

Plaintiffs' Arizona and California state statutory fraud-based claims are based only on alleged omissions. *See supra* at 11. Plaintiffs therefore must show that Walgreens had *actual knowledge* that Theranos testing did not produce reliable results and concealed that fact. *See, e.g.*, *Barrera v. Samsung Elecs. Am., Inc.*, No. CV-18-00481, 2019 WL 1950295, at *5 (N.D. Cal. Feb. 27, 2019) (ACFA "require[s] that the defendant knew of the failure to disclos[e] at the time of the transaction" (citing *State ex rel. Horne v. AutoZone, Inc.*, 275 P.3d 1278, 1281 (Ariz. 2012))); *Williams v. Tesla, Inc.*, No. 20-cv-08208, 2022 WL 899847, at *3 (N.D. Cal. Mar. 28, 2022) (UCL and FAL "have a knowledge requirement" for omissions claims). This makes sense: "[p]arties have no legal duty to disclose facts that they do not know or believe to be true." *Dreamstime.com, LLC v. Google LLC*, No. 20-16472, 2022 WL 17427039, at *2 (9th Cir. Dec. 6, 2022) (affirming summary judgment on UCL claim). As one court stated in interpreting the ACFA: "[A defendant] could only fail to disclose [a defect] if it *knew* the [product] was faulty." *Reger v. Ariz. RV Ctrs., LLC*, 515 F. Supp. 3d 915, 962–63 (N.D. Ind. 2021) (emphasis added) (granting summary judgment on ACFA claim where plaintiff introduced no evidence that defendant *knew* of the defect and therefore "fail[ed] to designate evidence of [] intent to mislead").[5]

Knowledge and intent to defraud are equally required for Plaintiffs' battery and medical battery claims: A defendant "is subject to liability to another for battery if the actor *intentionally* engages in an act that results in harmful or offensive contact with the person of another." *Duncan v. Scottsdale Med. Imaging, Ltd.*, 70 P.3d 435, 438 (Ariz. 2003) (*en*

[5] *See also Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.5 (9th Cir. 2012) ("the failure to disclose a fact that a manufacturer does not have a duty to disclose, *i.e.*, a defect of which it is not aware, does not constitute an unfair or fraudulent practice"); *In re Nexus 6P Prod. Liab. Litig.*, 293 F. Supp. 3d 888, 926–27 (N.D. Cal. 2018) ("California law [including under the UCL and FAL] supports this common-sense notion that a defendant cannot 'disclose facts of which it was unaware.'" (citation omitted)).

banc). A battery claim, including in the medical context, is typically defeated by consent. *Id.* Consent is not valid, however, if the patient "is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation." *Id.* at 440 (emphasis omitted) (quoting REST. (2D) TORTS § 892B(2)).

Here, the Edison 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." SAC ¶¶ 442, 446, 598, 602 (emphasis added); *see also* Pls. Memo ISO Class Cert., Dkt. 303, at 29 ("Plaintiffs will offer common proof to show that Theranos and Walgreens had *actual knowledge* that the Theranos tiny blood draws were ineffective and not ready for market …." (emphasis added)). This means that, to survive summary judgment, there must be evidence from which a jury could determine that Walgreens "*purposefully* lied to[] or misled" the Edison Plaintiffs. *Brown v. John C. Lincoln Health Network*, No. CA-CV-14-0814, 2016 WL 2893739, at *2 (Ariz. Ct. App. May 17, 2016) (emphasis added) (granting motion for summary judgment on medical battery claim). Indeed, in *Duncan*, a health care provider "allegedly told [the plaintiff] she would receive a morphine injection, when in fact [the health care provider] *knew it to be fentanyl*." 70 P.3d at 441 (emphasis added). So the plaintiff's "consent [was] ineffective" because the nurse knowingly lied about the injection provided. *Id.*

II. NO REASONABLE JURY COULD FIND WALGREENS ACTUALLY KNEW OR WAS RECKLESSLY INDIFFERENT TO THE FRAUD.

Plaintiffs have failed to present sufficient evidence from which a reasonable jury could find that Walgreens had actual knowledge or was recklessly indifferent to the now-known fact that Theranos testing was not market ready and could not produce accurate and reliable results. Quite the contrary, the evidence shows that Walgreens reasonably believed that Theranos testing *was* accurate and reliable.

A. There is No Evidence Of Actual Knowledge Of Theranos's Fraud.

To prevail on their statutory fraud and battery claims, Plaintiffs must prove Walgreens actually knew that Theranos's testing was inaccurate and unreliable. However, undisputed evidence in the record shows that Theranos concealed this information from Walgreens. *Theranos lied to Walgreens* about the validation of its technology, including manipulating reports supposedly prepared by prominent pharmaceutical companies. (SOF ¶¶ 78–79.) *Theranos lied to Walgreens* about conducting tests on Theranos devices, when the vast majority of blood tests were analyzed using third-party commercially available analyzers. (SOF ¶¶ 81–84.) *Theranos lied to Walgreens* during technology demonstrations, pretending it was giving a demonstration of its technology when in reality Theranos tested Walgreens' executives blood on commercial machines, and then selectively corrected and removed results it "felt were questionable" before sending to Walgreens executives. (SOF ¶¶ 85–86.) *Theranos lied to Walgreens* about the accuracy of the results Theranos provided to patients (which Walgreens did not see). (SOF ¶¶ 58, 67–69.) And *Theranos lied to Walgreens* about the fact that its technology was being used by the military, a lie made more believable by its military board members. (SOF ¶ 80.) Theranos lied, and it deceived not just Walgreens, but also its investors, board members, government regulators, and the public generally.

Plaintiffs do not and cannot dispute any of these facts. Nor can Plaintiffs seriously argue that Walgreens knew of Theranos's fraud. Indeed, Plaintiffs have only argued that Walgreens knew *one* of these things—that Theranos had deceptively achieved CLIA certification with commercial lab machines, not its proprietary technology—pointing to two pieces of purported evidence. First, from a record consisting of millions of documents, Plaintiffs point to a single internal Theranos email with a number of attachments, including proficiency testing reports that reflect the use of commercial lab machines instead of Theranos's proprietary equipment. (Dkt. 303 at 12.) There is ***no evidence***, however, that Walgreens ever saw these proficiency testing reports. The email itself reflects Holmes asking for only one particular attachment—an examiner's report—to be printed for her

meeting with Walgreens, and the examiner's report simply states that no deficiencies were found during CMS's inspection and does not identify the type of testing equipment used. (Ex. 28 at -21, -36.) Indeed, no Walgreens witness or consultant recalled being shown these reports. (SOF ¶¶ 36–39.) And both Holmes and Balwani testified they never told Walgreens that Theranos was testing blood on third-party machines instead of their proprietary Edison machines and went to great lengths to conceal that information from Walgreens. (SOF ¶¶ 82–84.)

Second, Plaintiffs have pointed to Hunter's 2022 deposition testimony in which he claimed—for the first time—that he purportedly told Walgreens in 2011 that "there was no way [Theranos] got a CLIA license on the Edison device." (Ex. 79, Hunter Dep. at 203:11–18.) But Theranos did not obtain its CLIA certification until 2012—*after* Hunter left the project. (SOF ¶¶ 27–28.) Moreover, no document produced in this case reflects this assertion. To the contrary, Walgreens deponents repeatedly testified that Hunter never shared concerns that the Theranos technology did not work, nor did he ever advise that Walgreens should not move forward with the Theranos project; rather his concerns were focused on IT and operational issues that were addressed prior to the start of the pilot in 2013. (SOF ¶ 20.) Because there is not sufficient evidence from which a jury could find that Walgreens *knew* that Theranos testing was fraudulent and defective, Walgreens is entitled to summary judgment on Plaintiffs' statutory fraud and battery claims. *See Anderson*, 477 U.S. at 252 ("mere existence of a scintilla of evidence… [is] insufficient").

B. There is No Evidence Of Reckless Indifference To Theranos's Fraud.

Plaintiffs may seek to satisfy the "intent to defraud" element of their wire fraud claim (the predicate for the RICO claim) with assertions that Walgreens acted with reckless indifference to the truth. *See Cusino*, 694 F.2d at 187. Wire fraud requires "showing of a specific intent to defraud," meaning that the allegedly fraudulent "scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension." *Eclectic*, 751 F.3d 990, 997 (internal quotation and citation omitted). This requires a "guilty mindset" and "highly unreasonable omission[s], involving not merely simple, or even inexcusable

negligence, but an extreme departure from the standards of ordinary care, and which present[] a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 782 F. Supp. 1382, 1385 (D. Ariz. 1991); *see also O'Brien v. Price Waterhouse*, 740 F. Supp. 276, 280 (S.D.N.Y. 1990) ("failure to make further inquiries does not rise above the level of negligence, which is legally insufficient, unless facts are alleged which tend to establish the accountant's knowledge of the fraud" (internal citation, quotation marks, and alteration omitted)). There is no evidence from which a jury could conclude that Walgreens acted recklessly; instead, the evidence demonstrates Walgreens' reasonable belief that Theranos testing was accurate and reliable.

1. Walgreens Relied on the Government's CLIA Certification.

It is undisputed that Theranos's labs were certified by the government at all times testing was offered in Walgreens stores. Theranos obtained a CLIA Certificate of Compliance for its California lab prior to the pilot, renewed that certification in 2014, and received a certification for its Arizona lab in 2015. (SOF ¶¶ 28, 48, 56.) As explained above, CLIA is designed to "ensure the accuracy, reliability and timeliness of patient test results, regardless of where the test was performed." (SOF ¶ 29.) Obtaining and maintaining CLIA certification involves rigorous government evaluation, interviews with lab personnel, observation of current lab practices, review of relevant records, and participation in regular proficiency testing. *Supra* at 6. (*See also* Ex. 93, Robbins Rpt. ¶ 57; Ex. 92, Jena Rpt. ¶ 28.) Multiple federal and state regulatory agencies ensure that CLIA is an effective and rigorous determinant of clinical laboratory quality. (Ex. 92, Jena Rpt. ¶ 29.) As independent consultant Paul Rust testified, CLIA certification "demonstrate[s] market readiness" and "is by far and away the most important test of whether a laboratory is proficient and producing results that are accurate." (SOF ¶ 29.) Even Plaintiffs' expert Dr. Geoffrey Baird acknowledged that one of the purposes of CLIA is to ensure the accuracy and reliability of test results. (*Id.*)

Walgreens expert Dr. Mark Robbins, based on his 40 years of experience in the

pharmaceutical and biotechnology industries, explained that "CLIA certification is commonly relied upon by companies in the pharmaceutical and biotechnology industries" and opined that "it was reasonable for Walgreens to rely on CLIA certification as an indication that Theranos's laboratories were in compliance with federal regulations, including quality standards designed to ensure accurate and reliable test results." (Ex. 93, Robbins Rpt. ¶ 56.) Walgreens expert Dr. Anupam B. Jena, Professor of Health Care Policy at Harvard Medical School and a physician at Massachusetts General Hospital, explained that "CLIA certification is considered an effective and safe method of ensuring reliability in a laboratory setting." (Ex. 92, Jena Rpt. ¶ 27.) Moreover, the government is best positioned to set uniform safety standards for laboratories through CLIA, which removes the need for healthcare industry participants to individually perform subjective assessments to determine whether testing is sufficiently reliable. (*Id.* ¶¶ 21, 24.)

Nonetheless, Plaintiffs are expected to argue that "Walgreens knew CLIA certification was of limited value and did not validate the viability of testing" because relying on CLIA meant relying on Theranos to comply with CLIA regulations. (Dkt. 509 (Plaintiffs' pre-summary judgment letter).) But there is no evidence that Walgreens was aware that Theranos misled the government or otherwise was in non-compliance with CLIA regulations. Indeed, as discussed above, Theranos expressly concealed from Walgreens that it was using modified commercial analyzers to perform blood tests. *Supra* at 10. To the contrary, Walgreens was aware that Theranos obtained Certificates of Compliance for its California lab in 2012 and 2014, and its Arizona lab in 2015—all after undergoing the inspections and proficiency testing required by CLIA regulations. Plaintiffs' argument, therefore, appears to be that Walgreens should have assumed Theranos was lying. But this is nothing more than an exercise in hindsight, and it is unreasonable to assert that Walgreens, a retail pharmacy, was reckless in failing to uncover a fraud that not even government regulators discovered.

2. Walgreens Hired Experienced Laboratory Consultants.

Walgreens did not solely rely on CLIA certification; it also hired several third-party

consultants with relevant experience and expertise to perform due diligence of Theranos. Among the consultants hired was Johns Hopkins Medicine, whose team of five experienced professionals, including an Associate Professor of Pathology and Director of the Clinical Pathology Laboratory, reviewed Theranos's data and participated in a technology demonstration. (SOF ¶ 7.) The Johns Hopkins team concluded in an April 2010 report that Theranos's "technology is novel and sound," that one of the "[s]pecial strengths of the technology" was "accuracy," and "no major weaknesses were identified." (SOF ¶ 8.)

Walgreens also retained lab consultants Kevin Hunter and Paul Rust to assist in its evaluation of Theranos. (SOF ¶¶ 10, 12, 37.) Mr. Hunter wrote in a June 2010 report that he was "excited" about Theranos's technology, which had the "opportunity to be a game changer for the lab industry," and later, in August 2010, after conducting a site visit at Theranos, stated that both Walgreens and Colaborate "walked away feeling good about [their] mutual opportunity" and thought "we are on to something significant here." (SOF ¶¶ 11, 18.) Mr. Rust reported in October 2012 that "all Proficiency Test result summaries submitted or reviewed documented excellent performance throughout 2011 and through Q3 2012" and the "Correlation methods and results shown to Consultant utilized state of the art statistical methodology and demonstrated excellent performance." (SOF ¶ 38.) Each of these consultants encouraged Walgreens to proceed with the partnership, and Plaintiffs cannot point to a single document from either (or any other consultant) advising Walgreens not to go forward. Moreover, as Dr. Robbins wrote in his report, "retaining third-party consultants is a common feature of due diligence," and it was "reasonable for Walgreens to rely on the due diligence performed by Walgreens' third-party consultants," in addition to its own due diligence and Theranos's CLIA certification, in deciding to proceed. (Ex. 93, Robbins Rpt. ¶¶ 73–83.)

Nonetheless, Plaintiffs have attempted to undermine Walgreens' use of qualified professionals by claiming that Walgreens failed to heed the consultants' warnings and recommendations. (Dkt. 508 at 2.) Plaintiffs may selectively excerpt statements in Hunter's 2010 reports, including a June 2010 recommendation that Walgreens conduct "in-depth

diligence around the science and scalability of Theranos Systems hardware and test menu platform with realistic expectations." (SOF ¶ 11.) Contrary to ignoring this advice, however, Walgreens expanded the engagement and retained Hunter as a full-time member of the team to continue this "in-depth diligence." (SOF ¶ 12.) Plaintiffs may also point to a sentence in Hunter's August 2010 report regarding Theranos's "[p]lausible overselling or overstating in terms of where they are at scientifically with the cartridges/devices and technically with the client connectivity software." (Ex. 13, 8/2010 Colaborate Site Visit Mem. at -28.) But this appears in a section titled "IT Observations and Recommendations," in a report that began by saying, "I think I speak for all of us that it was a very good couple of days onsite with Theranos as I think we all walked away feeling good about our mutual opportunity," and ended with "Please don't get me wrong, I think we are on to something significant here, we do need to make sure the *IT base* is cover[ed] and covered quickly however." (*Id.* at -31 (emphasis added); *see also* SOF ¶ 18.) Simply put, there is no evidence that Hunter ever told Walgreens in 2010 or 2011 that Theranos technology could not work. Indeed, Hunter sought to *rejoin* the Theranos project in 2014, after Theranos testing was already being offered at Walgreens' stores. (SOF ¶ 50.) And at his deposition, Hunter testified that he "wish[es] that [he] could have said more or done more that would have prevented all this from happening; but for whatever reason, [he] *couldn't find the words*." (Ex. 79, Hunter Dep. 189:16–19 (emphasis added).)

Moreover, Plaintiffs overlook the fact that Hunter's reports were written nearly *two years* before Theranos obtained CLIA certification, and *three years* before Theranos testing occurred in Walgreens stores. During those years, Walgreens conducted additional diligence, including addressing the issues raised by Hunter before his departure in 2011. In fact, far from ignoring his views, Walgreens determined not to proceed with the pilot in mid-2011 until regulatory approval was in place. In any event, fraud is not established by one individual raising questions several years before Walgreens offered Theranos testing to consumers. *See Bitton v. Gencor Nutrients*, 654 F. App'x 358, 363 (9th Cir. 2016) (affirming dismissal of RICO claim with wire fraud predicate act against nutritional

supplement company: "fraudulent intent cannot be inferred" from the fact that defendants received a copy of a report critiquing a study about the effectiveness of the supplement, as defendant also knew that "those who conducted the study had a contrary view").

3. Walgreens' Internal Experts Reviewed Theranos Data and Concluded That it Evidenced Accuracy and Reliability.

Walgreens professionals with relevant experience also supported the due diligence of Theranos, providing further evidence that Walgreens acted reasonably, not recklessly. As discussed above, Dr. Sharon Glave Frazee stated in 2010 based on review of supposedly independent pharmaceutical company reports that Theranos's systems appeared to be "state-of-the-art, providing scientifically valid laboratory testing at point of care locations." (SOF ¶ 5.) In June 2012, Ken Finnegan and Dr. Jeffrey Kang evaluated Theranos's proficiency data and correlation studies and were satisfied with the results. (SOF ¶¶ 34–35, 47.) And in 2013 and 2014, Walgreens medical officers Dr. Harry Leider, Dr. Patrick Carroll, and Dr. Kang further evaluated Theranos correlation studies and again believed they evidenced accurate blood testing technology. (SOF ¶¶ 46–47, 53.) Based on Theranos's CLIA certification, plus Walgreens' additional due diligence and assessment, Walgreens reasonably believed that Theranos testing was market-ready and provided accurate, reliable blood testing. Indeed, it makes no sense that Walgreens would purchase a $40 million convertible note, agree to pay a $100 million Innovation Fee, and then accelerate the full payment of that fee in December 2013, unless it reasonably believed that Theranos's testing was accurate, reliable, and market-ready.

III. PLAINTIFFS' RICO CLAIMS ALSO FAIL BECAUSE THERE IS NO EVIDENCE OF AN "ASSOCIATION-IN-FACT ENTERPRISE."

To establish a RICO "association-in-fact enterprise," as alleged here, Plaintiffs must show that Theranos and Walgreens "associated together for a common purpose of engaging in a course of conduct." *Odom v. Microsoft Corp.*, 486 F.3d 541, 552 (9th Cir. 2007) (*en banc*). Plaintiffs expressly allege that the RICO "common purpose" was to "perpetrate fraud"—specifically "to market and sell testing services that were unreliable and not ready-

for-market to unwitting customers, obtain under false pretenses blood ... for research and product development purposes," and to "conceal" from consumers that Theranos testing was unreliable and unsafe. SAC ¶ 525. Because Plaintiffs have expressly alleged that the shared purpose was to perpetrate fraud, they must show that *each of the Defendants*, including Walgreens, knew that Theranos testing was inaccurate and unreliable. *See, e.g.*, *Stitt v. Citibank, N.A.*, No. 12-cv-03892, 2015 WL 75237, at *5 (N.D. Cal. Jan. 6, 2015) (RICO plaintiffs required to show that each of "the enterprise members actually knew of the alleged fraudulent common purpose, or that they 'formed' the enterprise to participate" in that purpose); *RJ v. Cigna Behav. Health, Inc.*, No. 5:20-CV-02255-EJD, 2021 WL 1110261, at *7 (N.D. Cal. Mar. 23, 2021) (dismissing RICO claim in absence of sufficient allegations that defendant-entities "knowingly formed an enterprise to fraudulently underpay claims"); *see also Gilbert v. MoneyMutual, LLC*, No. 13-cv-01171-JSW, 2018 WL 8186605, at *13 (N.D. Cal. Oct. 30, 2018) (where plaintiffs asserted common purpose to promote, market and make illegal short-term loans, they "are required to show *each of the [Defendants]* knew the loans at issue were illegal" (emphasis added)).

For all of the reasons discussed above, there is no evidence that Walgreens knew of the alleged fraudulent common purpose—*i.e.,* to perpetrate fraud by knowingly marketing and selling unreliable and unvalidated blood tests and conceal this information from consumers. (SAC ¶ 525.) To the contrary, the evidence reflects that Theranos went to great lengths to perpetrate a fraud *against Walgreens*. *Supra* at 10. It is simply illogical for Plaintiffs to argue that Walgreens was engaged with Theranos in the "common purpose" of "perpetrating fraud" when Theranos was concealing that very fraud from Walgreens.

Moreover, Walgreens' actions prior to and throughout the pilot are wholly inconsistent with the allegation that it knew of and participated in an enterprise whose common purpose was to perpetrate a fraud of unreliable and inaccurate blood testing. *See Spotlight Ticket Mgmt., Inc. v. StubHub, Inc.*, No. CV 19-10791 PA (JCX), 2020 WL 4342260, at *3 (C.D. Cal. May 22, 2020) (defendants' attempt to "remedy[]" known issues suggests they did not share a fraudulent common purpose). Walgreens dedicated significant

time and resources, including the engagement of several consultants to evaluate Theranos testing. *See supra* at 3–4, 7. Walgreens also required that Theranos have regulatory approval before any testing would be offered to the public and postponed the launch of the pilot until Theranos's labs were CLIA-certified. (SOF ¶ 24.) And when nurse practitioners requested more information or raised questions about individual test reports, Walgreens medical experts reviewed the at-issue test reports, reviewed Theranos's correlation studies, and provided the requested information. (SOF ¶¶ 51–53.) If Walgreens' true purpose was to market and sell unreliable testing as part of an enterprise with Theranos, as Plaintiffs allege, Walgreens would have rushed the testing to market (not mandated regulatory approval), and ignored the questions raised.

At bottom, Walgreens agreed to form what it believed was a legitimate business relationship with Theranos to pursue its business objective to become a healthcare destination, and to create a positive patient experience. *Supra* at 2. The stated objectives of the Agreement were to "[m]ake testing less invasive, faster and far more accessible"; "[e]mpower Walgreens to play a more active role in patient health management;" improve patient health and cost-savings; and "[i]ntroduce a new revenue stream for Walgreens." (Ex. 26, 2012 Agmt. at -18.) Plaintiffs cannot prove that Walgreens was pursuing anything other than the ordinary business aims outlined in the Agreement, and courts "overwhelmingly reject[] attempts to characterize routine commercial relationships as RICO enterprises." *Shaw v. Nissan N. Am., Inc.*, 220 F. Supp. 3d 1046, 1054 (C.D. Cal. 2016); *see also, e.g.*, *Fraser v. Team Health Hldgs., Inc.*, No. 20-cv-04600, 2022 WL 971579, at *11 (N.D. Cal. Mar. 31, 2022) (evidence that "a group of entities were involved in trying to earn money ... is insufficient to establish a common purpose because it is consistent with ordinary business conduct").[6] There is no evidence from which a

[6] *See also Spotlight*, 2020 WL 4342260, *3 ("[p]arties that enter commercial relationships for their own gain or benefit do not constitute an enterprise"; rejecting RICO claim where "Defendants were pursuing their individual economic interests, rather than a shared purpose" (internal citation and quotation marks omitted)); *Woodell v. Expedia Inc.*, No. C19-0051JLR, 2019 WL 3287896, at *8 (W.D. Wash. July 22, 2019) ("Where the alleged association-in-fact is formed through routine contracts for services, the 'common purpose'

reasonable jury could find that Walgreens and Theranos acted as an "enterprise" with the common purpose to defraud purchasers of blood tests.

IV. NO REASONABLE JURY COULD FIND PLAINTIFFS ARE ENTITLED TO PUNITIVE DAMAGES BY CLEAR AND CONVINCING EVIDENCE.

Plaintiffs seek punitive damages under their battery and Arizona statutory fraud claims, Dkt. 369 at 19–20, requiring them to "prove that defendant's evil hand was guided by an evil mind." *Heward v. Thahab*, No. CV-19-05155-PHX-DJH, 2021 WL 1947508, at *6 (D. Ariz. May 14, 2021). The purpose of punitive damages is to "punish the wrongdoer," and "[p]unishment is an appropriate objective in a civil case only if the defendant's conduct or motive involves some element of outrage similar to that usually found in a crime." *Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1003 (D. Ariz. 2011) (Campbell, J.) (citation and quotation marks omitted). "The Arizona Supreme Court has made clear that 'punitive damages are not recoverable in every fraud case, even though fraud is an intentional tort.'" *Id.* (quoting *Rawlings v. Apodaca*, 726 P.2d 565, 578 n.8 (Ariz. 1986)); *see also, e.g.*, *Racquet Club at Scottsdale Ranch Condo. Ass'n, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV-17-1215, 2019 WL 283649, at *6–7 (D. Ariz. Jan. 22, 2019) (Campbell, J.) (granting summary judgment on punitive damages, noting that "something more" than bad faith is required); *EEOC v. GLC Restaurants, Inc.*, No. CV-05-0618, 2006 WL 3052224, at *13 (D. Ariz. Oct. 26, 2006) (Campbell, J.) ("corporate incompetence" is not sufficient for punitive damages). To survive summary judgment, Plaintiffs must present sufficient evidence "for a jury to find an evil mind by clear and convincing evidence." *Surowiec*, 790 F. Supp. 2d at 1003.

No evidence, let alone "clear and convincing evidence," would allow a reasonable jury to find Walgreens acted with an "evil mind." To the contrary, one of Walgreens' primary motivations for entering the partnership was the potential to meaningfully improve the health and well-being of customers. *Supra* at 2. Further, Theranos's laboratories were

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element is unmet because the entities are pursuing their own individual economic interests, rather than a shared purpose.").

certified by the government the entire time that testing was offered in Walgreens stores. *Supra* at 6–10. While regulatory compliance is not dispositive as to the availability of punitive damages, it is certainly relevant. *Courkamp v. Fisher-Price Inc.*, No. CV-19-02689-PHX-GMS, 2022 WL 4448323, at * 17 (D. Ariz. Sept. 23, 2022); *see also Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (granting JNOV for defendant on punitive damages claim: "compliance with ... federal regulations ... is some evidence of due care"). And Walgreens did not solely rely on government approval; as discussed above, it performed additional analysis and engaged third-party consultants to evaluate the Theranos technology and data. *Supra* at 3–4, 7–8.

It is also relevant to Plaintiffs' punitive damages claims against *Walgreens* that Theranos actively deceived and concealed information from Walgreens regarding the accuracy and reliability of testing throughout the relationship. *Supra* at 10. The Arizona Attorney General, SEC, and DOJ have all brought charges against Theranos, Holmes, and Balwani for the fraud that they perpetrated. *Supra* at 10–11. Walgreens has not been implicated in any of those cases. *Id.* In fact, the government has repeatedly identified Walgreens as a victim of Theranos's fraud, most recently recommending $40 million in restitution to Walgreens as part of Balwani's criminal sentence. *Id.*

Walgreens acted without anything close to an evil mind during its relationship with Theranos. Walgreens thought Theranos was going to revolutionize blood testing for the better, and, through a massive scheme of fraud, Theranos deceived Walgreens, regulators, investors, and the public alike. Accordingly, this Court should at minimum hold that Plaintiffs are not entitled to punitive damages as a matter of law.[7]

CONCLUSION

Walgreens respectfully requests that this Court enter an Order granting its Motion for Summary Judgment as to All Class Claims.

[7] Plaintiffs are not entitled to punitive damages on their battery claim for the additional reason that only nominal damages are available, *see supra* at n. 4. *See Estate of Bensfield v. Liberty Mut. Fire Ins. Co.*, No. CV-17-00797-PHX-DGC, 2017 WL 4224091, at *4 (D. Ariz. Sept. 22, 2017) (Campbell, J.) (no punitive damages if only nominal damages).

DATED: February 24, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2023, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties.

/s/ *Kara L. McCall*