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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SELENA MOORER, individually  
and on behalf of all others similarly  
situated,

Plaintiffs,

v.

STEMGENEX MEDICAL GROUP,  
INC., a California Corporation;  
STEMGENEX, INC., a California  
Corporation; STEM CELL  
RESEARCH CENTRE, INC., a  
California Corporation; ANDRE P.  
LALLANDE, D.O., an individual;  
SCOTT SESSIONS, M.D., an  
individual; RITA ALEXANDER, an  
individual; and Does 1-100,

Defendants.

Case No. 3:16-cv-02816-AJB-NLS

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS  
COMPLAINT**

**[FED. R. CIV. P. 8(A), 9(B) AND  
12(B)(6)]**

Date: February 16, 2017

Time: 2:00 p.m.

Courtroom: 3B (3rd Floor- Schwartz)

Judge: Hon. Anthony J. Battaglia

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10 *Knieval v. ESPN*, 393 F.3d 1068 (9th Cir. 2005)----- 5

11 *Legal Additions LLC v. Kowalski*, 2010 WL 335789 (N.D. Cal. 2010)----- 14

12 *Levine v. Blue Shield of Cal.*, 189 Cal.App.4th 1117 (2010) ----- 21

13 *Levine v. Entrust Grp., Inc.*, 2013 U.S. Dist. LEXIS 82061, 2013 WL 2606407

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26 *Ross v. Bolton*, 904 F.2d 819 (2d Cir. 1990)----- 6

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1 **I. INTRODUCTION AND BACKGROUND**

2 Defendants move to dismiss Plaintiffs' First Amended Complaint ("FAC"),  
 3 on file herein as Doc. No. 1-3, on the grounds that it fails to allege sufficient facts  
 4 to establish liability against them. First, as to each defendant, the FAC fails to meet  
 5 the heightened pleading requirements of Federal Rule of Civil Procedure ("FRCP"),  
 6 Rule 9(b). Second, Plaintiffs fail to properly plead the requisite elements for  
 7 establishing liability.

8 At the outset, Plaintiffs describe the "Nature of Action" herein as false and  
 9 misleading advertising. (FAC ¶¶ 1-4.) Plaintiffs assert that "[t]his action is based  
 10 primarily upon false and misleading statements made by StemGenex . . . as well as  
 11 material omissions." (FAC ¶70.) Plaintiffs propose to represent a nationwide class  
 12 (FAC ¶ 64) against nine (9) different defendants in this action.<sup>1</sup> Because Plaintiffs'  
 13 claims all sound in fraud, their allegations must meet the heightened pleading  
 14 standards of FRCP, Rule 9(b), which requires that the Plaintiffs "must state with  
 15 particularity the circumstances constituting fraud or mistake." Here, Plaintiffs'  
 16 First Amended Complaint suffers from a fatal deficiency, as Plaintiffs lump all nine  
 17 defendants together into a singularly defined entity that they call "StemGenex" or  
 18 "Defendants." (FAC ¶ 1.) Plaintiffs then generally attribute all allegedly false and  
 19 misleading conduct to "StemGenex" without specific identification of: which of the  
 20 nine defendants made which specific statements that Plaintiffs' contend are false,  
 21 what the content of such statements was, when and where the specific defendant  
 22 made such statement and how it made such statement. Accordingly, Plaintiffs  
 23 completely fail to meet the "who, what, where, when and how" pleading  
 24 requirement of FRCP 9(b). As a result, Plaintiffs' FAC should be dismissed as to  
 25 each defendant under FRCP 12(b)(6) for failure to properly state a claim.

26 In addition, Plaintiffs have failed to state a claim under the Racketeer

27 \_\_\_\_\_  
 28 <sup>1</sup> The nine defendants are made up of: 3 corporations, 1 limited liability  
 company, 3 individuals, and 2 trademarks or slogans.

1 Influenced and Corrupt Organizations Act (RICO Act) and the California Elder  
2 Abuse Act because they have not and cannot state the requisite elements of each  
3 claim.

4 Accordingly, Defendants respectfully request that Plaintiffs' First Amended  
5 Complaint be dismissed in its entirety without leave to amend.

6 **II. PLAINTIFFS' ALLEGATIONS AGAINST ALL DEFENDANTS**  
7 **SOUND IN FRAUD**

8 Plaintiffs admit that the "Nature of Action" herein is one of false and  
9 misleading advertising (FAC ¶¶ 1-4; see also ¶ 70) and generally allege that  
10 "Defendants" or "StemGenex" made false and misleading marketing claims about  
11 stem cell treatments and about customer satisfaction surveys. (FAC ¶ 2.)

12 The problem lies in the fact that the term "Defendants" is defined as  
13 "StemGenex Medical Group, Inc., and related persons and entities (collectively,  
14 'Defendants' or 'StemGenex')." (FAC ¶ 1.) In paragraph 23, Plaintiffs reiterate  
15 that "*All Defendants* above, including DOES -100, are collectively referred to in  
16 this Complaint as 'StemGenex.'" (FAC ¶ 23 [emphasis added].) Thus, all nine  
17 defendants are interchangeably referred to as "StemGenex" throughout the FAC,  
18 making it impossible to ascertain which of the defendants are alleged to have  
19 engaged in what conduct or made what false representations, or upon whose  
20 conduct Plaintiffs claim to have relied.<sup>2</sup>

21 Other than the boilerplate alter-ego allegations in Paragraph 24 and 25, the  
22 FAC scarcely mentions the nine different defendants or their alleged relationship.

23 **A. The Individual Defendants**

24 The FAC seeks to allege claims against three individuals: Rita Alexander,  
25 Dr. Scott Sessions and Dr. Andre Lallande. Yet, there is a dearth of allegations  
26

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27 <sup>2</sup>Notably, all causes of action are alleged "Against All Defendants." (See FAC  
28 generally).

1 identifying their allegedly wrongful conduct.

2 The FAC contains only two sentences that specifically mention Defendant  
3 Rita Alexander. In paragraph 16 of the FAC, Plaintiff alleges *on information and*  
4 *belief*, that “[i]t is believed that Ms. Alexander is an owner, operator, and/or  
5 controller of StemGenex.” (FAC ¶ 16.) And in paragraph 26 of the FAC, Plaintiff  
6 alleges that “StemGenex was founded by a non-physician, Ms. Alexander.” (FAC  
7 ¶ 26.) Nowhere else in the 39-page FAC is Defendant Alexander ever mentioned.

8 The same is true for Defendants Dr. Sessions and Dr. Lallande who are only  
9 alleged *on information and belief* in paragraphs 17 and 18 as owning, operating  
10 and/or controlling StemGenex. (FAC ¶ 17 & 18.) And in paragraph 27 as two  
11 doctors who perform stem cell treatments. (FAC ¶ 27.) Nowhere else in the 39-  
12 page FAC are Defendants Lallande and Sessions ever mentioned.

### 13 **B. The Corporate Defendants**

14 The allegations related to the four corporate defendants suffer from the same  
15 fatal deficiencies.

16 The FAC contains only a single paragraph referring specifically to Defendant  
17 Stem Cell Research Centre, Inc. This reference merely identifies Stem Cell  
18 Research Centre, Inc. as a California Corporation located in La Jolla, California.  
19 (FAC ¶ 15.)

20 Similarly, Defendant StemGenex Biologic Laboratories, LLC is only  
21 mentioned once in the First Amended Complaint, and that reference is to identify it  
22 as being a California limited liability company. (FAC ¶ 20.b.)

23 Defendant StemGenex, Inc. is similarly identified only in paragraphs 13 and  
24 28 as a California Corporation located in La Jolla, California since 2011. (FAC ¶¶  
25 13 & 28.) Other than these two paragraphs, StemGenex, Inc. is not specifically  
26 referred to in the FAC.

27 Finally, Defendant StemGenex Medical Group, Inc. is identified in paragraph  
28 14 as a California Corporation located in La Jolla, California (FAC ¶ 14) and is



1 mentioned in paragraphs 34-36, 38 as an entity about which representations are  
2 made by the collectively referenced entity known as “StemGenex.” (FAC ¶¶ 34-36,  
3 38.) In none of these paragraphs, however, is it alleged that StemGenex Medical  
4 Group itself engaged in any misleading or fraudulent conduct.

5 **C. The Trademark Defendants**

6 Perplexingly, Plaintiffs also name two trademarks as defendants in this action  
7 as well. Paragraph 20.a of the FAC names a reserved trademark as DOE Defendant  
8 No. 1 as “Stem Cells . . . The Human Repair Kit” (FAC ¶ 20.a). (*See also*, Request  
9 for Judicial Notice (“RJN”) at ¶ 1.) “Stem Cells . . . The Human Repair Kit” is not  
10 otherwise named in the complaint.

11 Paragraph 20.c also names the pseudo trademark of “Stem Genetic” as DOE  
12 Defendant No. 3. (FAC ¶ 20.c.) This pseudo trademark was created by the U.S.  
13 Patent and Trademark Office (“USPTO”) for purposes of searching conflicting  
14 marks. (RJN at ¶ 2.) As explained by the USPTO. “The USPTO may assign  
15 pseudo marks, as appropriate, to new applications to assist in searching the USPTO  
16 database for conflicting marks. They have no legal significance and will not appear  
17 on the registration certificate.” (Id.) “Stem Genetic” is not otherwise named in the  
18 complaint.

19 **III. LEGAL STANDARD ON 12(B)(6) MOTIONS**

20 A pleading must contain “a short and plain statement of the claim showing  
21 that the pleader is entitled to relief . . . .” Fed.R.Civ.P. Rule 8(a)(2). A party may  
22 move to dismiss a complaint for “failure to state a claim upon which relief can be  
23 granted.” Fed.R.Civ.P. Rule 12(b)(6). A complaint survives a motion to dismiss if it  
24 contains “enough facts to state a claim to relief that is plausible on its face.” *Bell*  
25 *Atl. Corp. v. Twombly* (“*Twombly*”), 550 U.S. 544, 570 (2007). The court reviews  
26 the contents of the complaint, accepting all factual allegations as true, and drawing  
27 all reasonable inferences in favor of the nonmoving party. *Knievel v. ESPN*, 393  
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1 F.3d 1068, 1072 (9th Cir. 2005). Notwithstanding this deference, the reviewing  
2 court need not accept “legal conclusions” as true. *Ashcroft v. Iqbal* (“*Iqbal*”), 556  
3 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). Moreover, it is improper for a court  
4 to assume “the [plaintiff] can prove facts that [it] has not alleged.” *Associated*  
5 *General Contractors of California, Inc. v. California State Council of Carpenters*,  
6 459 U.S. 519, 526 (1983). Accordingly, a reviewing court may begin “by  
7 identifying pleadings that, because they are no more than conclusions, are not  
8 entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679. “When there are well-  
9 pleaded factual allegations, a court should assume their veracity and then determine  
10 whether they plausibly give rise to an entitlement to relief.” *Id.* A claim has “facial  
11 plausibility when the plaintiff pleads factual content that allows the court to draw  
12 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*  
13 at 678. “The plausibility standard is not akin to a ‘probability requirement,’ but it  
14 asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*  
15 “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s  
16 liability, it ‘stops short of the line between possibility and plausibility of entitlement  
17 to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557).

#### 18 **IV. LEGAL ARGUMENTS**

##### 19 **A. The Allegations in the Complaint Against the Nine Defendants** 20 **"Sound in Fraud" and Are Therefore Governed by Rule 9(b)**

21 Under Federal Rule of Civil Procedure Rule 12(b)(6), a complaint must be  
22 dismissed when the allegations fail to state a claim upon which relief may be  
23 granted. When a complaint includes claims for fraud, "a party must state with  
24 particularity the circumstances constituting the fraud ... " Fed. R. Civ. P. Rule 9(b).  
25 "Rule 9(b) requires that a plaintiff set forth what is false or misleading about a  
26 statement, why it is false, including the 'who, what, when, where, and how of the  
27 misconduct charged.'" *Davis v. Chase Bank U.S.A., NA.*, 650 F. Supp. 2d 1073,  
28 1090 (C.D. Cal. 2009), quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,

1 1106 (9th Cir. 2003). The complaint must include an account of the "time, place  
2 and specific content of the false representations as well as the identities of the  
3 parties to the misrepresentation." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058,  
4 1066 (9th Cir. 2004) (citation omitted); *see also Neubronner v. Milken*, 6 F.3d  
5 666,672 (9th Cir. 1993) (fraud allegations must be "specific enough to give  
6 defendants notice of the particular misconduct ... so that they can defend against the  
7 charge and not just deny that they have done anything wrong.").

8 "Rule 9(b)'s heightened pleading requirement 'safeguards defendant's  
9 reputation and goodwill from improvident charges of wrongdoing..." *Vess*, 317  
10 F.3d 21 at 1104, *quoting Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990).

11 In the Ninth Circuit, Rule 9(b) applies:

- 12 (1) when a complaint specifically alleges fraud as an essential element of  
13 a claim,
- 14 (2) when the claim "sounds in fraud" by alleging that the defendant  
15 engaged in fraudulent conduct, but the claim itself does not contain  
16 fraud as an essential element, and
- 17 (3) to any allegations of fraudulent conduct, even when none of the claims  
18 in the complaint 'sound in fraud.'

19 *Davis*, 650 F. Supp. 2d at 1089-90, *citing Vess v. Ciba-Geigy Corp. USA*, 317 F.3d  
20 2 1097, 1102-06 (9th Cir. 2003).

21 As such, in the Ninth Circuit, a claim for relief need not be synonymous with  
22 fraud to be subject to the requirements of Rule 9(b). Rather, it need only "sound in  
23 fraud." *Id.* A complaint sounds in fraud where it alleges a "unified course of  
24 fraudulent conduct and re[lies] entirely on that course of conduct as the basis of a  
25 claim." *In re Daou Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005), *quoting Vess*,  
26 317 F.3d at 1103. Even where the entire asserted claim for relief does not sound in  
27 fraud, "if particular averments of fraud are insufficiently pled under Rule 9(b), a  
28 district court should 'disregard' those averments, or 'strip' them from the claim. The

1 court should then examine the allegations that remain to determine whether they  
2 state a claim." *Vess*, 317 F.3d at 1105. The "rationale behind [the "sounds in  
3 fraud"] standard rests on the preference for substance over form: where a complaint  
4 alleges conduct which in effect amounts to fraud, Defendants are entitled for policy  
5 reasons to the enhanced reliability and notice that accompany more detailed  
6 pleadings." *FTC v. Swish Mktg.*, 2010 WL 653486 at \*3 (N.D. Cal. 2010), *citing*  
7 *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001).

8 In this case, the Plaintiffs' allegations against the nine defendants plainly  
9 "sound in fraud," thus implicating Rule 9(b). Plaintiffs assert that "[t]his action is  
10 based primarily upon false and misleading statements made by StemGenex about  
11 consumer satisfaction and efficacy of its Stem Cell Treatments via its primary point  
12 of contact with consumers, its website (www.stemgenex.com), as well as material  
13 omissions." (FAC ¶ 70.) Thus, all causes of action in the complaint stem from  
14 Plaintiffs' overarching assertion that defendants have not "told the truth" and that  
15 they have made "false statements and misleading statements and made material  
16 omissions." (FAC ¶¶ 60-61.) Thus, misrepresentation or fraud *necessarily* forms  
17 the very essence of each of Plaintiffs' claims. "It is well-settled in the Ninth Circuit  
18 that misrepresentation claims are a species of fraud, which must meet Rule 9(b)'s  
19 particularity requirement." *Meridian Project Systems, Inc. v. Hardin Const. Co.,*  
20 *LLC*, 404 F. Supp. 2d 1214, 1219 (E.D. Cal. 2005).

21 Courts in the Ninth Circuit have consistently applied Rule 9(b) to false  
22 advertising claims and analogues state law claims, even where a plaintiff "neither  
23 needed to prove nor alleged all elements of common law fraud." *See Swish Mktg.*,  
24 2010 WL 653486 at \*4. For example, in *Kearns v. Ford Motor Co.*, the Ninth  
25 Circuit found that the California Unfair Competition Law ("UCL") and the  
26 Consumer Legal Remedies Act ("CLRA") required heightened pleading under Rule  
27 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-27 (9th Cir. 2009). The  
28 UCL prohibits "unlawful, unfair, or fraudulent business act[s] or practices" and

1 "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code §  
2 17200. The Ninth Circuit noted that "Rule 9(b)'s particularity requirement applies  
3 to [this] state-law cause[] of action. In fact, we have specifically ruled that 9(b)'s  
4 heightened pleading standards apply to claims for violations of the CLRA and  
5 UCL." *Kearns*, 567 F.3d at 1125 (citations omitted). The Ninth Circuit observed  
6 in *Kearns* that even though fraud is "not a necessary element of a claim under the  
7 CLRA and UCL, a plaintiff may nonetheless allege that the defendant engaged in  
8 fraudulent conduct." *Id.* The focus is on the pleading as a whole: "[a] plaintiff may  
9 allege a unified course of fraudulent conduct and rely entirely on that course of  
10 conduct as the basis of that claim. In that event, the claim is said to be 'grounded in  
11 fraud' or to 'sound in fraud,' and the pleading ... as a whole must satisfy the  
12 particularity requirement of Rule 9(b)." *Id.* In *Kearns*, the Ninth Circuit expressly  
13 found that the plaintiff's complaint "allege[d] a unified course of fraudulent  
14 conduct, namely that [defendant] and its 'co-conspirator' dealerships knowingly  
15 *misrepresent[ed] to the public* that [its] vehicles are safer and more reliable, with an  
16 intent to induce reliance and defraud customers," and upheld its dismissal by the  
17 district court pursuant to Rule 9(b). *Id.* at 1127 (emphasis added).

18 Similarly, the Ninth Circuit has also applied Rule 9(b)'s heightened pleading  
19 standards to complaints under California's False Advertising law because the  
20 allegations were "grounded in fraud," even though some elements of common law  
21 fraud were not required. *Asis Internet Servs. v. Subscriberbase Inc.* 2009 U.S. Dist.  
22 LEXIS 112852, at \*7 (N.D. Cal. Dec. 4, 2009); *In re Sony Gaming Networks and*  
23 *Customer Data Security Breach Litigation*, 996 F.Supp.2d 942, 989 (S.D. Cal.  
24 2014). Additionally, in the Ninth Circuit, all RICO claims involving fraud must  
25 be alleged with particularity under Rule 9(b). *Edwards v. Marin Park, Inc.*, 356  
26 F.3d 1058, 1065–66 (9th Cir. 2004) (stating that Rule 9(b) applies equally to civil  
27 RICO claims and that the plaintiff must state with particularity the circumstances  
28 constituting the fraud); *Schreiber Distrib. Co., v. Serv-Well Furniture Co., Inc.*, 806

1 F.2d 1393, 1401 (9th Cir. 1986) (stating that allegations of wire fraud must identify  
2 the time, place, and manner of each fraud plus the role of each defendant in each  
3 scheme); *In re Toyota Motor Corp.* 785 F.Supp.2d 883, 918 (C.D. Cal. 2011). The  
4 same is true of Plaintiff's Elder Abuse claim. *Moran v. Bromma*, 2014 U.S. Dist.  
5 LEXIS 12418, at \*12-13 (E.D. Cal. Jan. 30, 2014, citing *Levine v. Entrust Grp.,*  
6 *Inc.*, 2013 U.S. Dist. LEXIS 82061, 2013 WL 2606407, at \*5 (N.D. Cal. June 11,  
7 2013) (noting that the Ninth Circuit "has held that Rule 9(b) prevents plaintiffs  
8 from lumping defendants together for the purposes of fraud allegations")); see also  
9 *Trapp v. Chase Home Fin., LLC*, 2010 U.S. Dist. LEXIS 120232, at \*14 (C.D. Cal.  
10 Nov. 12, 2010). Similarly, Plaintiff's Health & Safety Code claim for "human  
11 experimentation" is also based on allegations that Plaintiffs were "misled" and  
12 subject to fraud and deceit. (FAC ¶¶ 113 & 116.) In addition, where, as here, the  
13 negligent misrepresentation claim sounds in fraud, Rule 9(b)'s heightened pleading  
14 standard also applies. *Sukonik v. Wright Med. Tech., Inc.* 2015 U.S. Dist. LEXIS  
15 177502, at \*51-52 (C.D. Cal. Jan. 26, 2015) (collecting cases).

16 Here, the purposes of Rule 9(b) are best served by finding that the rule  
17 applies to the claims asserted by Plaintiffs against each of the nine defendants.  
18 Rule 9(b) serves three purposes: (1) to provide Defendants with adequate notice to  
19 allow them to defend the charge and deter plaintiffs from the filing of complaints  
20 "as a pretext for the discovery of unknown wrongs"; (2) to protect those whose  
21 reputation would be harmed as a result of being subject to fraud charges; and (3) to  
22 "prohibit [] plaintiff[s] from unilaterally imposing upon the court, the parties and  
23 society enormous social and economic costs absent some factual basis." *Kearns*,  
24 567 F.3d at 1125, quoting *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir.  
25 1996). These purposes are met by applying the rule here.

26 First, none of the named defendants have been provided with adequate notice  
27 of the charges against them. The FAC fails to provide even a general outline of  
28 each specific defendant's role in the alleged misconduct. Where, as here, the

1 plaintiffs have failed to identify a single tangible act by any specific defendant, the  
2 defendants have no notice of what they supposedly did wrong. Accordingly,  
3 Defendants are prejudiced in their ability to respond to these allegations and  
4 prepare their defense. The Plaintiffs apparently hope to discover misconduct by  
5 each defendant during the course of litigation. This situation presents precisely the  
6 fishing expedition that Rule 9(b) seeks to prevent.

7 Second, the Defendants' reputations are being seriously harmed by the  
8 charges of a nationwide "fraud" and "a scheme" leveled against them in this class  
9 action lawsuit. The public is not likely to draw a legal distinction between common  
10 law fraud and deception causing consumer injury. By virtue of this lawsuit, and  
11 Plaintiffs' counsel's statements to the Los Angeles Times newspaper (see generally  
12 FAC ¶ 30) about bringing this consumer class action to combat "snake oil", each of  
13 the defendants' reputations in the community is being harmed just as severely as if  
14 the Plaintiffs had accused them of common law fraud (which it also does in the  
15 sixth cause of action).

16 Third, charging the nine separate defendants with violating the UCL laws,  
17 the False Advertising Laws; Consumer Legal Remedies Act; the Racketeer  
18 Influenced and Corrupt Organizations Act, the Health and Safety Code, the Elder  
19 Abuse laws, as well as common law fraud and negligent misrepresentation laws  
20 without any supporting factual allegations, apart from their alleged alter-ego roles  
21 of one another unjustly imposes both social costs on the defendants as well as  
22 unnecessary economic court costs on this Court, the defendants and taxpayers.

23 Accordingly, where, as here, the Plaintiffs' suit against the nine defendants  
24 necessarily "sounds in fraud," it must be pled with particularity pursuant to Rule  
25 9(b).

1           **B. The Allegations in the First Amended Complaint Against All**  
2           **Defendants Fail to Satisfy the Requirements of Rule 9(b) and Must**  
3           **be Dismissed.**

4           Plaintiffs' factual allegations are insufficient to state a claim against each  
5 Defendant, as the allegations unquestionably fail to meet the particularity  
6 requirements of Rule 9(b). As indicated above, the specific defendants are  
7 identified, but otherwise barely mentioned by name in the remainder of the  
8 allegations in the FAC. The FAC falls far short in alleging what, if anything, each  
9 individual defendant actually *did*. The FAC does not answer any of the following:  
10 What were their parts in conceiving and/or directing the implementation of the  
11 alleged misconduct? What were their responsibilities relating to the alleged  
12 conduct? What was the nature of their alleged participation in the alleged  
13 violations? The FAC alleges no facts regarding any tangible acts by any specific  
14 defendant. The Plaintiffs' allegations simply do not differentiate between conduct  
15 committed by each individual defendant. Instead, the FAC indicts all defendants  
16 interchangeably. Rule 9(b) does not permit this type of pleading. *Levine*, 2013  
17 U.S. Dist. LEXIS 82061, 2013 WL 2606407, at \*5 (noting that the Ninth Circuit  
18 "has held that Rule 9(b) prevents plaintiffs from lumping defendants together for  
19 the purposes of fraud allegations")). Indeed, a plaintiff may not simply lump  
20 together multiple defendants without specifying the role of each defendant in the  
21 fraud. *In re Toyota Motor Corp.* 785 F.Supp.2d 883, 919 (C.D. Cal. 2011) citing  
22 *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

23           Accordingly, the Plaintiffs' claims for relief as against each defendant should  
24 be dismissed for failure to satisfy Rule 9(b), and, as such, failure to state a claim  
25 upon which relief may be granted.

26           **C. The Allegations in the Complaint Against All Defendants Fail to**  
27           **Satisfy the Requisites of Rule 8(a) and Thus Should be Dismissed**

28           Apart from the stricter pleading standards of Rule 9(b), the Plaintiffs' factual



1 allegations fail even to satisfy the requisites of Rule 8(a), as discussed by the  
2 United States Supreme Court and the FAC must consequently be dismissed.

3 To state a claim for relief, Rule 8(a)(2) demands that a pleading include a  
4 "short and plain statement of the claim showing that the pleader is entitled to  
5 relief." Fed.R.Civ.P.8(a)(2). The Supreme Court has identified a "two-pronged  
6 approach" for determining the legal sufficiency of a complaint under Rule 8(a)(2) in  
7 the face of a Rule 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 678-79  
8 (*referencing Twombly*, 550 U.S. 544).

9 First, the district court should "identify[] pleadings that, because they are no  
10 more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S.  
11 at 678. "While legal conclusions can provide the framework of a complaint, they  
12 must be supported by factual allegations." *Id.* at 679. "A pleading that offers  
13 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of  
14 action will not do.'" *Id.* at 678, *quoting Twombly*, 550 U.S. at 555. Although the  
15 Rule 8 pleading standard does not require "detailed factual allegations," it  
16 "demands more than an unadorned, the-defendant-unlawfully-harmed-me  
17 accusation" or "naked assertion[s] devoid of further factual enhancement." *Iqbal*, at  
18 678. (internal quotation marks and citations omitted). "Threadbare recitals of the  
19 elements of a cause of action, supported by mere conclusory statements, do not  
20 suffice." *Id.*; *Twombly*, 550 U.S. at 555.

21 Second, the court should assume the veracity of any "well-pleaded factual  
22 allegations" and then determine "whether they plausibly give rise to an entitlement  
23 to relief." *Iqbal*, at 679. "Weighing a claim's plausibility is ordinarily a task well-  
24 suited to the district court but, where the well-pleaded facts do not permit the court  
25 to infer more than a mere *possibility* of misconduct, the complaint has not shown  
26 the pleader is entitled to relief." *FTC v. Swish Mktg.*, 2010 WL 653486 at \*6 (N.D.  
27 Cal. 2010).

28 In this case, the FAC fails to meet the requirements of either prong. First, the

1 Plaintiffs' First Amended Complaint is improperly reliant on boilerplate language,  
2 which does not satisfy the requirements of Rule 8. The *only* mentions of each  
3 separate defendant are allegations of their identity and that all the entity defendants  
4 are the alter egos of all the individual defendants. (FAC ¶ 24.) This amalgam of all  
5 defendants is an inadequate "naked assertion," *see Iqbal*, 556 U.S. at 678, and must  
6 be disregarded.

7 By way of example, in *FTC v. Swish Marketing*, the FTC brought claims  
8 against the CEO of a corporation for an alleged violation of Section 5(a) of the FTC  
9 Act. *FTC v. Swish Mktg.*, 2010 WL 653486 (N.D. Cal. 2010). In *Swish*  
10 *Marketing*, the FTC expressly mentioned the CEO's name only one time in the  
11 entire complaint and, identical to the present action, made identical boilerplate  
12 allegations that the CEO "formulated, directed, controlled, had the authority to  
13 control, or participated" in the misconduct. *Id.* at \*6. The court found that "the  
14 'factual' allegations alleged against [the CEO] ... [were] cursory at best," and  
15 dismissed the complaint pursuant to Rules 8(a)(2) and 12(b)(6). *Id.* at \*2, 7. The  
16 same "threadbare" recitations of elements and legal conclusions, found to be  
17 insufficient in *Swish Marketing*, are also insufficient here.

18 Third, even if the FAC's allegations were well-pleaded, it still fails to state a  
19 plausible claim for relief. "A claim has facial plausibility when the plaintiff pleads  
20 factual content that allows the court to draw the reasonable inference that the  
21 defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663, *citing*  
22 *Twombly*, 550 U.S. at 556. "Where a complaint pleads facts that are 'merely  
23 consistent with' a defendant's liability, it 'stops short of the line between possibility  
24 and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678, *quoting Twombly*,  
25 550 U.S. at 556-57. Here, Plaintiffs have not made a single factual allegation  
26 establishing the involvement of any specific defendant beyond their corporate  
27 existence and statuses as individual owner/operators.

28 A claim against a corporate official<sub>13</sub> must plead *a factual context* from which

1 the court "is able to infer that [the official] was *aware of and complicit in*, the  
 2 enterprise's unlawful conduct." *FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d  
 3 378,388 n.3 (D. Md. 2009) (emphasis added). In *Innovative Marketing, Inc.*, the  
 4 district court was able to infer awareness and complicity because "the allegations  
 5 describing the mechanics of the Enterprise's scheme reveal[ed] the critical  
 6 [supportive facts]" to support an interference of [the CEO's] involvement. *Id.* In  
 7 contrast, the FTC's complaint in *Swish Marketing* fell short because it presented  
 8 "*virtually [no] facts*" tying the CEO to the misconduct. *Swish Mktg.*, 2010 WL  
 9 653486 at \*8 (emphasis added). The Plaintiffs' First Amended Complaint here  
 10 fails for the same reason. The assertion of the individual defendants' alleged roles  
 11 as owners or operators of all the other corporate entities is simply not enough.

12 Fourth, the Plaintiffs' threadbare allegations of alter ego (FAC ¶¶ 24-25) also  
 13 fail to state a claim for relief under Rule 8(a) because they state "only conclusory  
 14 factual content". *Legal Additions LLC v. Kowalski*, 2010 WL 335789 at \*6-7 (N.D.  
 15 Cal. 2010); *see also, Eclectic Properties East LLC v. Marcus & Milli-chap Co.*,  
 16 2010 WL 384736 at \*4 (N.D. Cal. 2010); *Hammond v. Monarch Investors LLC*,  
 17 2010 WL 2674401 at \*5 (S.D. Cal. 2010). This is insufficient to meet the  
 18 requirements of Rule 8.

19 **D. Plaintiffs' Ninth Cause of Action Under California's Elder Abuse**  
 20 **Law Must Be Dismissed.**

21 In asserting their Ninth Cause of Action, Plaintiffs seek to bootstrap the very  
 22 serious allegation of elder financial abuse to their claims of false advertising in this  
 23 consumer class action. Not only is this claim entirely without merit, but the claim  
 24 must fail because Plaintiffs do not have standing to pursue such claim and, in any  
 25 event, have failed to plead the requisite elements under the statute.

26 **1. Plaintiffs Lack Standing Under California's Elder Abuse**  
 27 **Law.**

28 Whether or not a plaintiff has stated a basis for statutory standing is tested

1 under Rule 12(b)(6). A lack of statutory standing requires dismissal for failure to  
2 state a claim. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

3 It is axiomatic that only an “elder” may assert a claim for elder abuse under  
4 the state’s Elder Abuse and Dependent Adult Civil Protection Act, Cal. Welfare and  
5 Institutions Code section 15610 *et seq.* Welfare and Institutions Code section  
6 15610.27 defines an “elder” as “any person residing in this state, 65 years of age or  
7 older.” Thus, in order to state a claim under the statute, the allegedly abused  
8 person must be (1) the requisite age and (2) a resident of California.

9 Here, Plaintiffs allege that “Stephen Ginsberg [] is a resident of the State of  
10 Florida, who traveled to San Diego, California after relying on StemGenex’s  
11 website, in order to have Stem Cell Treatment.” (FAC ¶ 9.) As such, Mr. Ginsberg  
12 does not have standing to bring an elder abuse claim under the plain language of the  
13 statute. Plaintiffs’ later conclusory allegation that “Ginsberg... resided in  
14 California” is entirely unsupported by the factual allegations pled and admitted by  
15 Plaintiffs. Plaintiffs cannot avoid dismissal by the assertion of this conclusory  
16 contention. *See, Iqbal* 556 U.S. at 678 [Neither a “formulaic recitation of the  
17 elements of a cause of action” nor “naked assertions [of fact] devoid of further  
18 factual enhancement” are sufficient to withstand dismissal.”] Indeed, when, as  
19 here, allegations are merely “conclusory,” they are “not entitled to be assumed  
20 true.” *Iqbal*, 556 U.S. at 680-81.

21 Accordingly, Plaintiffs’ ninth cause of action should be dismissed in its  
22 entirety without leave to amend.

23 **2. Plaintiffs’ Financial Elder Abuse Claim Should Be**  
24 **Dismissed for Failure to State a Claim.**

25 To plead a claim for elder abuse the plaintiff must establish that a “taking”  
26 occurred. In relevant part, section 15610.30 of California Welfare and Institutions  
27 Code provides that:

1 (a) "Financial abuse" of an elder or dependent adult occurs when  
2 person or entity does any of the following:

3 (1) Takes, secretes, appropriates, obtains, or retains real or personal  
4 property of an elder or dependent adult for a wrongful use or with  
5 intent to defraud, or both.

6 ...  
7 (3) Takes, secretes, appropriates, obtains, or retains, or assists in  
8 taking, secreting, appropriating, obtaining, or retaining, real or  
9 personal property of an elder or dependent adult by undue influence, as  
10 defined in Section 15610.70.

11 Subdivision (b) of section 15610.30 imposes an additional requirement beyond the  
12 existence of improper conduct, namely, that "the person or entity knew or should  
13 have known that this conduct is likely to be harmful to the elder ... adult." *Paslay v.*  
14 *State Farm General Ins. Co.*, 248 Cal.App.4th 639, 657 (2016).

15 Financial elder abuse claims must be pleaded with particularity. *Lintz v. Bank*  
16 *of Am., N.A.* 2013 U.S. Dist. LEXIS 139717, at \*25-26 (N.D. Cal. Sep. 27, 2013)  
17 citing *Chavers v. GMAC Mortgage, LLC*, 2012 U.S. Dist. LEXIS 85505, 2012 WL  
18 2343202, at \*7 (C.D. Cal. June 20, 2012).) Critically, there are no allegations in the  
19 First Amended Complaint identifying which of the nine defendants allegedly "took,  
20 secreted, appropriated, or retained funds" from elderly individuals or which "knew  
21 or should have known" that any of the alleged conduct was harmful as required by  
22 statute. (*See* FAC, ¶ 23 [collectively referring to all Defendants including DOES  
23 1-100 as "StemGenex"].) Where, as here, a plaintiff's Elder Abuse claim is  
24 grounded in fraud and it fails to distinguish between Defendants as required by  
25 Federal Rule of Civil Procedure 9(b) it should be dismissed. *Moran*, 2014 U.S.  
26 Dist. LEXIS 12418, at \*12-13 citing *Levine*, 2013 U.S. Dist. LEXIS 82061, 2013  
27 WL 2606407, at \*5 (N.D. Cal. June 11, 2013). Indeed, Plaintiffs here have not and  
28 cannot allege specific facts regarding conduct by each Defendant giving rise to the  
elder abuse claim. Thus, this claim should be dismissed without leave to amend.

Further, as detailed above in Sections IV. A and B herein, Plaintiffs have

1 entirely failed to plead fraud with the specificity required by Rule 9(b). They have  
2 failed to plead sufficient facts to suggest Defendants forced Mr. Ginsberg, with  
3 intent to defraud or by undue influence, to pay Defendants money in exchange for  
4 no real consideration as they conclusorily allege. (See, FAC ¶ 166; *Jackson v.*  
5 *Ocwen Loan Servicing, LLC* (E.D. Cal. Feb. 8, 2011) 2011 U.S. Dist. LEXIS  
6 12816, at \*14.) Thus, they have not adequately pled an intent to defraud.  
7 Moreover, there is no allegation in the complaint that Defendants took anything for  
8 a “wrongful use.” Accordingly, Plaintiffs cannot state a claim under WIC  
9 15610.30(a)(1).

10 Plaintiffs conclusory claim that Defendants “stood in a position of trust to the  
11 Elder Subclass” and “unduly influenced them to give money in  
12 exchange for no real consideration” (FAC ¶ 166) is also insufficient to meet the  
13 requirements of the statute. “Undue influence” under the statute means “excessive  
14 persuasion that causes another person to act or refrain from acting by overcoming  
15 that person's free will and results in inequity.” (Wel. & Inst. Code § 15610.70(a).)  
16 In determining whether a result was produced by undue influence, all of the  
17 following are to be considered: (1) the vulnerability of the victim; (2) the  
18 influencer’s apparent authority; (3) the actions or tactics used by the influencer; and  
19 (4) the equity of the result. (Wel. & Inst. Code § 15610.70(a)(1)-(4).) Evidence of  
20 an inequitable result, without more, is not sufficient to prove undue influence.  
21 (Wel. & Inst. Code § 15610.70(b).)

22 Per the First Amended Complaint, the alleged misrepresentations were  
23 communicated to Plaintiffs solely via website advertising and internet ads. (See,  
24 FAC ¶¶ 31-44, 61.) By their own volition, Plaintiffs allegedly reviewed the  
25 statements on the website and subsequently decided to seek treatment. (FAC ¶¶ 8-  
26 9.) These allegations confirm that Defendants did not occupy a position of trust  
27 and had no special relationship with Plaintiffs, had no apparent authority over  
28 Plaintiffs, and did not exert any undue influence. No actions or tactics of control,

1 coercion, affection, intimidation, haste or secrecy were undertaken. In fact,  
 2 according to Plaintiffs, Defendants are alleged to have only posted a website for  
 3 prospective purchasers of Stem Cell Treatments to review. As a matter of law, this  
 4 is simply not enough to establish undue influence. *See* Wel. & Inst. Code  
 5 §15610.70; see also *Guccione v. JPMorgan Chase Bank, N.A.* 2015 U.S. Dist.  
 6 LEXIS 57700, at \*60 (N.D. Cal. May 1, 2015) [finding no allegations of undue  
 7 influence where plaintiff failed to allege that Defendant used excessive persuasion  
 8 that caused plaintiff to act or refrain from acting by overcoming plaintiff’s free will  
 9 and resulted in inequity].

10 Accordingly, Plaintiffs’ ninth cause of action must be dismissed for failure to  
 11 state a claim.

12 **E. Plaintiffs Have Failed to State a Claim Under the Racketeer**  
 13 **Influenced and Corrupt Organizations Act.**

14 Plaintiffs’ fifth cause of action seeks to transform a standard fraud claim into  
 15 a federal claim under the Racketeer Influenced and Corrupt Organization Act  
 16 (“RICO”). RICO prohibits “any person employed by or associated with any  
 17 enterprise, directly or indirectly, in the conduct of such enterprise’s affairs through  
 18 a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C. §  
 19 1962(c). To state a RICO claim, a plaintiff must allege: “(1) conduct (2) of an  
 20 enterprise (3) through a pattern (4) of racketeering activity [known as predicate  
 21 acts].” *Sedima, S.P.R.L. v. Imrex Co., Inc.* 473 U.S. 479, 496 (1985). Plaintiffs’  
 22 attempt to plead a RICO claim is deficient in several respects, as discussed below.

23 **1. Plaintiffs Have Failed to Adequately Plead the Predicate**  
 24 **Acts**

25 In support of their RICO claim, Plaintiffs broadly allege Defendants engaged  
 26 in the predicate acts of mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. §  
 27 1343. (FAC ¶ 132.) These predicate acts are grounded in fraud. Accordingly,  
 28 Plaintiffs’ must allege the predicate acts of mail fraud and wire fraud with

1 particularity under Rule 9(b), which they did not.

2 To allege a violation of mail and wire fraud statutes under 18 U.S.C. §§ 1341  
3 and 1343, a plaintiff must show (1) a scheme to defraud, (2) use of either the U.S.  
4 mails or interstate wires in furtherance of the fraud, and (3) specific intent to  
5 defraud. *Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 195 (9th Cir.  
6 1987).

7 Under Ninth Circuit law, RICO claims based on predicate violations of mail  
8 and wire fraud must be dismissed where the allegations related to the predicate acts  
9 fail to state a claim for violation of the mail and wire fraud statutes. *See Edwards v.*  
10 *Marin Park, Inc.*, 356 F.3d 1058, 1065-66 (9th Cir. 2004) (Rule 9(b) "applies to  
11 civil RICO fraud claims.") (citing *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d  
12 1388, 1392 (9th Cir. 1989)); *In re All Terrain Vehicle Litig.*, 771 F. Supp. 1057,  
13 1059-60 (C.D. Cal. 1991) (applying 9(b) to predicate acts of mail fraud, wire fraud,  
14 and interstate transportation of stolen property). Thus, to withstand a motion to  
15 dismiss, the plaintiff must allege "the time, place, and specific content of the false  
16 representations as well as the identities of the parties to the misrepresentation."  
17 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir.  
18 1986); *Moore v. Kayport Package Exp. Inc.*, 885 F.2d 531, 541 (9th Cir. 1989)  
19 (same).

20 Plaintiffs fail to plead mail or wire fraud, or any instance of fraud, with any  
21 particularity. In paragraph 133, Plaintiffs simply recite in conclusory terms that  
22 "hundreds or thousands of mail and interstate wire communications" were used in  
23 the scheme to defraud. (FAC ¶ 133.) Notably, the FAC does not allege which of the  
24 nine Defendant sent the mail or wire communications, when (other than sometime  
25 between December 2013 and the filing of the complaint) and to whom the  
26 communications were made, and what exactly the communications said – nor does  
27 the FAC allege how those communications were part of a scheme (whatever that  
28 may be) to defraud Plaintiffs. For these reasons, the predicate acts allegations are



1 wholly insufficient under Rule 9(b).

2 **2. Plaintiffs Have Failed to Plead a “Pattern of Racketeering”**

3 Likewise, Plaintiffs’ allegations do not establish a pattern of racketeering  
4 sufficient to state a RICO claim. Under section 1962(c), a plaintiff must establish a  
5 “pattern of racketeering activity.” A “pattern of racketeering activity” is defined as  
6 at least two predicate acts, within ten years of each other. 18 U.S.C. § 1961(5). The  
7 Supreme Court has held that the “pattern” requirement can be met by showing: 1)  
8 “that the racketeering predicates are related;” and 2) that the predicates “amount to  
9 or pose a threat of continued criminal activity.” *H.J., Inc. v. Northwestern Bell Tel.*  
10 *Co.*, 492 U.S. 229, 239 (1989). The Ninth Circuit has “adopted a test for pattern  
11 which inquires whether the predicate acts are sporadic or isolated. If they are  
12 isolated or sporadic, then they cannot form a ‘pattern.’” *Ikuno v. Yip*, 912 F.2d 306,  
13 309 (9th Cir. 1990) (citing *Sun Savings & Loan*, 825 F.2d at 194.)

14 The pattern alleged by Plaintiffs completely fails to meet this standard. Here,  
15 Plaintiffs allege mail and wire fraud as Defendants’ predicate acts. But Plaintiffs’  
16 only allegation regarding the predicate acts is Defendants’ posting of allegedly  
17 misleading statistics on its website relating to customer satisfaction. (FAC ¶¶ 52,  
18 131.) At most, the website posting, which allegedly led to the distribution of  
19 misleading statements to Plaintiffs, only constitutes a single predicate act. *See*  
20 *Durning v. Citibank*, 990 F.2d 1133, 1139 (9th Cir. 1993) (holding that predicate  
21 acts arising from a single event, the dissemination of a misleading document, did  
22 not satisfy continuity requirement). Because the second prong of the “pattern”  
23 element— requiring continuity – cannot be met here based on a solitary website  
24 posting, Plaintiffs’ allegations do not establish a pattern of fraudulent acts.

25 Even if the Court were to find that Plaintiffs alleged at least two predicate  
26 acts, the FAC does not allege that *each* of the Defendants committed two predicate  
27 acts under section 1962(c). To establish a “pattern of racketeering,” Plaintiffs must  
28 allege that each of the individual defendants committed two or more predicate acts

1 of racketeering activity. Where multiple defendants allegedly engaged in fraudulent  
 2 activity, "Rule 9(b) does not allow a complaint to merely lump multiple defendants  
 3 together." *Swartz*, 476 F.3d at 764. Rather, a plaintiff must identify each  
 4 defendant's role in the alleged scheme to defraud. *Id.* at 765. Here, the allegations of  
 5 the FAC broadly allege a single predicate act against *all* Defendants, which is  
 6 insufficient to allege a RICO claim against *any* Defendant individually.

7 As shown above, Plaintiffs' attempt to transform a standard fraud claim into  
 8 a RICO claim is deficient in many respects. Accordingly, the fifth cause of action  
 9 must be dismissed for failure to state a claim.

10 **F. Plaintiffs' Eighth Cause Of Action Should Be Dismissed There Is**  
 11 **No Standalone Cause Of Action For Unjust Enrichment Under**  
 12 **California Law.**

13 Plaintiffs' eighth cause of action purports to assert an independent cause of  
 14 action for unjust enrichment. But as state and federal courts – including the Ninth  
 15 Circuit and this Court – have held, California law does not recognize this theory as  
 16 an independent cause of action. For example, in *Durell v. Sharp Healthcare*, 183  
 17 Cal.App.4th 1350 (2010), the Court of Appeal explained that “there is no cause of  
 18 action in California for unjust enrichment.” *Id.* at 1370 (quoting *Melchoir v. New*  
 19 *Line Prods., Inc.*, 106 Cal.App.4th 779, 793 (2003); see also *Levine v. Blue Shield of*  
 20 *Cal.*, 189 Cal.App.4th 1117, 1138 (2010) (same). This Court likewise has held that  
 21 “California law does not recognize a standalone cause of action for unjust  
 22 enrichment. ‘The phrase “Unjust Enrichment” does not describe a theory of  
 23 recovery, but an effect: the result of a failure to make restitution under  
 24 circumstances where it is equitable to do so.’” *Allstate Life Ins. Co. v. Attisha*, No.  
 25 15cv2211 JM(BGS), 2016 U.S. Dist. LEXIS 75544, at \*4 (S.D. Cal. June 9, 2016)  
 26 (quoting *Melchoir*, 106 Cal.App.4th at 793.)

27 The Ninth Circuit has also confirmed that unjust enrichment “is not an  
 28 independent cause of action in California.” See *Smith v. Ford Motor Co.*, 462 F.

1 App'x 660, 665 (9th Cir. 2011); *Myers-Armstrong v. Actavis Totowa, LLC*, 382 F.  
2 App'x 545, 548 (9th Cir. 2010) (“In California, ‘[t]here is no cause of action for  
3 unjust enrichment.’”); *Bosinger v. Belden CDT, Inc.*, 358 F. App'x 812, 815 (9th  
4 Cir. 2009) (same).) In light of this binding authority, Plaintiffs’ purported cause of  
5 action for unjust enrichment must be dismissed.

6 **V. CONCLUSION**

7 For the reasons set forth above, Defendants respectfully request that  
8 Plaintiffs’ FAC be dismissed in its entirety without leave to amend.

9  
10 Respectfully submitted this 22nd Day of November, 2016.

11  
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