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10 UNITED STATES DISTRICT COURT  
 11 SOUTHERN DISTRICT OF CALIFORNIA  
 12

13 KATHARINE PRESCOTT, an  
 individual, and KATHARINE  
 14 PRESCOTT, on behalf of KYLER  
 PRESCOTT, a deceased minor,  
 15

Plaintiffs,  
 16

vs.  
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RADY CHILDREN’S HOSPITAL-  
 18 SAN DIEGO,  
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Defendant.  
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CASE NO. 16-cv-02408-BTM (JMA)

Honorable Barry Ted Moskowitz  
 Courtroom 15B

**MEMORANDUM OF POINTS &  
 AUTHORITIES IN SUPPORT OF  
 DEFENDANT RADY CHILDREN’S  
 HOSPITAL SAN DIEGO’S  
 MOTION TO DISMISS  
 PLAINTIFFS’ FOURTH, FIFTH  
 AND SEVENTH CAUSES OF  
 ACTION**

[FED. R. CIV. P. 12(b)(6)]

Hearing Date: December 8, 2017  
 Hearing Time: 11:00 a.m.

**PER CHAMBER RULES: NO  
 APPEARANCE OR ORAL  
 ARGUMENT UNLESS  
 REQUESTED BY THE COURT**

Trial Date: None Set

1 Defendant, RADY CHILDREN'S HOSPITAL- SAN DIEGO ("RCHSD")  
2 submits the following memorandum of points and authorities in support of its  
3 Motion to Dismiss portions of Plaintiff's First Amended Complaint, namely the  
4 claims for purported violation of Cal. Gov't Code § 11135 (Fourth and Fifth Causes  
5 of Action) and Kyler Prescott's claim purported violation California's Fair  
6 Advertising Law, Cal. Bus. & Prof. Code § 17500 (Seventh Cause of Action),  
7 (herein "FAL claim").

8 **I. INTRODUCTION**

9 This matter arises out of psychiatric care provided to Kyler Prescott, a  
10 transgender patient who was admitted for an involuntary detention at RCHSD  
11 because of danger to himself weeks prior to his suicide. Kyler Prescott was  
12 admitted to RCHSD on a Cal. Welf. & Inst. Code § 5150 hold ("5150 hold"), an  
13 involuntary detention for a period not to exceed 72 hours. See Cal. Welf. & Inst.  
14 Code § 5151. A 5150 hold occurs when a person, as a result of a mental health  
15 disorder is a danger to himself or herself, is taken into custody, an involuntary  
16 detention, for a period of up to 72 hours for assessment, evaluation, and crisis  
17 intervention, or placement. Cal. Welf. & Inst. Code § 5150.

18 Plaintiff Katharine Prescott, as an individual and on behalf of her deceased  
19 child, Kyler Prescott, (herein "plaintiffs") filed a Complaint on or about September  
20 26, 2016. (Compl. ECF No. 1.) Plaintiffs contend more than a month prior to his  
21 death, Kyler Prescott was allegedly the subject of discrimination while being treated  
22 at RCHSD because he was transgender. Katherine Prescott was not a patient and  
23 did not receive any medical and/or psychiatric care at RCHSD.

24 Following the filing of the Complaint on September 26, 2016, RCHSD filed a  
25 Motion to Dismiss and a Motion for a Stay. (Def.'s Mot. to Dismiss, ECF No. 9,  
26 15.) In its motion to dismiss, RCHSD requested, in part, the Court dismiss  
27 plaintiffs' section 11135 claims as well as the FAL claims. (Def.'s Mot. to Dismiss,  
28 ECF No. 9.)

1 On September 27, 2017, this Court granted in part and denied in part  
2 RCHSD’s Motion to Dismiss. (Order Granting in Part and Denying in Part Def.’s  
3 Mot. to Dismiss, ECF No. 22.) Plaintiffs then filed a First Amended Complaint  
4 (herein “FAC”). (FAC, ECF No. 24.) However, the deficiencies of the Complaint  
5 underlying the Court’s decision to grant in part RCHSD’s Motion to Dismiss were  
6 not cured by Plaintiffs’ First Amended Complaint. Consequently, RCHSD brings  
7 the present Motion to Dismiss to dismiss the following causes of action from the  
8 First Amended Complaint for failure to state a valid claim:

- 9 1) Ms. Prescott’s individual claims for violation of Cal. Gov’t Code §  
10 11135 (Fourth and Fifth Causes of Action);
- 11 2) Claims brought on behalf of Kyler Prescott for the alleged violation of  
12 Cal. Gov’t Code §11135 (Fourth and Fifth Causes of Action);  
13 and
- 14 3) The FAL claim asserted by Ms. Prescott on behalf of Kyler Prescott  
15 (Seventh Cause of Action).

16 **II. FACTUAL ALLEGATIONS**

17 According to the FAC, the following is a timeline of the alleged events  
18 related to this matter:

- 19 Age 10: Although a female at birth, at age 10, Kyler Prescott  
20 began exhibiting signs that he was a boy, not a girl.  
21 (FAC, ¶ 27.)
- 22 Age 12: Kyler began self-harming behaviors. (*Id.*)
- 23 Age 13: Kyler identified as a boy and was undergoing therapy for  
24 coping with gender dysphoria. He entered puberty and  
25 became “acutely depressed and began engaging in severe  
26 self-harming behaviors.” (*Id.* at ¶ 28.)
- 27 October 2014: Kyler began receiving puberty-delaying medication  
28 by a physician in the Gender Management Clinic of

1 RCHSD. (*Id.* at ¶ 33.) But depression continued as Kyler  
 2 was allegedly “bullied and harassed about his gender  
 3 identity by his peers and teachers.” (*Id.* at ¶ 34.)

4 April 5, 2015: Kyler, now 14-years-old, was admitted to RCHSD  
 5 on a Cal. Welf. & Inst. Code § 5150 hold for  
 6 psychiatric inpatient treatment. (*Id.* at ¶ 37.) By  
 7 now, Kyler had “received a legal name and gender  
 8 change.” (*Id.* at ¶ 38.)

9 April 7, 2015: Kyler’s medical providers discharged the patient.  
 10 (*Id.* at ¶¶ 49-50.)

11 May 18, 2015: Kyler committed suicide. (*Id.* at ¶ 52.)

12 Plaintiffs contend during Kyler Prescott’s admission to the psychiatric unit at  
 13 RCHSD, RCHSD staff addressed the patient using feminine pronouns and  
 14 “misgendered” Kyler Prescott. (*Id.* at ¶ 41.) RCHSD also allegedly “blocked” the  
 15 Ms. Prescott’s phone number allegedly eliminating her ability to call Kyler in the  
 16 psychiatric unit. (*Id.* at ¶¶ 41-45.)

### 17 **III. PROCEDURAL HISTORY**

18 On September 27, 2017, this Court granted in part and denied in part  
 19 RCHSD’s Motion to Dismiss. (Order, ECF No. 22.) In addition to dismissing the  
 20 prayer for injunctive and declaratory relief under the ACA, the Court also dismissed  
 21 plaintiffs’ claims under Cal. Gov’t Code § 11135 and Kyler Prescott’s FAL claim.  
 22 (Order, 19:2-11, ECF No. 22.) In its order, as to ACA claim, the Court stated:

23 Ms. Prescott lacks standing to assert a section 1557 on her  
 24 behalf because *she is not an aggrieved party*. However, as Ms.  
 25 Prescott has noted, she is not bringing this claim on her behalf,  
 26 but instead on behalf of Kyler. While Ms. Prescott is *unable to*  
 27 *bring a claim as an individual*, she certainly can bring a claim  
 on behalf of Kyler within her representative capacity...”

28 (Order, 9:3-8, ECF No. 22, emphasis added.) As to the claims brought under

1 section 11135, the Court stated:

2 As discussed above within the context of the ACA, Ms.  
3 Prescott has not demonstrated a threat of future harm or how an  
4 injunction would redress the injuries. Because remedies are  
5 limited to equitable relief, Ms. Prescott cannot support a claim  
6 based on RCHSD’s alleged discrimination under Government  
7 Code section 11135. Therefore, RCHSD’s motion to dismiss  
8 this claim is granted and the Court need not reach RCHSD’s  
9 separate arguments.

10 (Order, 12:23-13:1, ECF No. 22.) Regarding the FAL claim, “Ms. Prescott had  
11 sufficiently alleged a FAL claim for herself, but had failed to allege actual reliance  
12 as to Kyler.” (Order, 17:25-27, ECF No. 22.)

13 Overall, the Court granted Ms. Prescott leave to file a First Amended  
14 Complaint as to her claims under section 11135 and as to Kyler Prescott’s FAL  
15 claim. Subsequently, on October 1, 2017, Plaintiffs filed a First Amended  
16 Complaint asserting the following causes of action:

- 17 1) alleged violation of the Patient Protection and Affordable Care Act  
18 (“ACA”) brought by Ms. Prescott on behalf of Kyler Prescott in a  
19 representative capacity (First Cause of Action);
- 20 2) alleged violation of the Unruh Civil Rights Act brought by Ms. Prescott  
21 on behalf of Kyler Prescott (Second and Third Causes of Action);
- 22 3) alleged violation of Cal. Gov’t Code § 11135 brought both by  
23 Ms. Prescott as an individual and also on behalf of Kyler Prescott  
24 (Fourth and Fifth Causes of Action);
- 25 4) purported UCL claims (Sixth Cause of Action) brought by Ms, Prescott  
26 individually and also on behalf of Kyler Prescott; and
- 27 5) purported FAL claim brought by Ms, Prescott individually and also on  
28 behalf of Kyler Prescott (Seventh Cause of Action).

RCHSD now moves the Court to dismiss all claims for purported violation of

1 Cal. Gov't Code § 11135 (Fourth and Fifth Causes of Action) and Kyler Prescott's  
2 purported FAL claim (Seventh Cause of Action).

3 **IV. ARGUMENT AND AUTHORITY**

4 **A. Standard of Review**

5 Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal  
6 sufficiency of a claim for relief. Fed. R. Civ. P 12(b)(6); see also *Navarro v. Block*,  
7 250 F.3d 729, 732 (9<sup>th</sup> Cir. 2001). A complaint may be dismissed as a matter of law  
8 for failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or  
9 (2) insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police*  
10 *Dep't*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990).

11 A plaintiff must plead factual content that allows the court to draw reasonable  
12 inferences that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*,  
13 556 U.S. 662, 678, (2009). A complaint cannot simply leave "open the possibility  
14 that a plaintiff might later establish some 'set of [undisclosed] facts' to support  
15 recovery." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561, 127 S. Ct. 1955, 167 L.  
16 Ed. 2d 929 (2007) (citation omitted). A plaintiff's obligation is to "provide the  
17 grounds of his entitle[ment] to relief" which requires "more than labels and  
18 conclusions, and a formulaic recitation of the elements of a cause of action will not  
19 do." *Twombly*, 550 U.S. at 555 (internal quotations omitted).

20 Here, the First Amended Complaint contains causes of action, which like the  
21 original Complaint, plaintiffs lack standing to bring and also such claims are devoid  
22 of sufficient facts to support cognizable legal theories. For this reason, RCHSD  
23 requests this Court dismiss the causes of action.

24 **B. Kyler Prescott's Seventh Cause of Action for Violation of**  
25 **California Business & Professions Code sections 17500 et seq.**  
26 **Should Be Dismissed Due to Failure to Allege Actual Reliance by**  
27 **Kyler Prescott**

28 In its Order dated September 27, 2017, this Court granted RCHSD's Motion

1 to Dismiss Kyler Prescott’s FAL claim after determining the Complaint did “not  
 2 allege that Kyler actually relied on RCHSD’s misrepresentations” and the  
 3 Complaint “failed to allege actual reliance as to Kyler.” (Order, 17:27, ECF No. 22.)  
 4 The FAC has not cured this defect. Actual reliance by Kyler Prescott is not alleged  
 5 anywhere in the FAC.

6 Only persons who have been injured in fact and lost money or property as a  
 7 result of the alleged false advertising have standing to bring action for relief under  
 8 California’s False Advertising Law, (“FAL”), Cal. Bus. & Prof. Code §§ 17500 *et*  
 9 *seq.*; see Cal. Bus. & Prof. Code § 17535; *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th  
 10 310, 326 (2011); *Branick v. Downey Savings & Loan Assn.*, 39 Cal. 4th 235, 240-  
 11 241 (2006). **Actual reliance** is required to have standing to sue under the FAL. *In*  
 12 *re Ferrero Litig.*, 794 F. Supp. 2d 1107, 1111 (S.D. Cal. 2011), citing *Kwikset*  
 13 *Corp. v. Sup. Ct.*, 51 Cal. 4th at 326-27; *In re Tobacco II Cases*, 46 Cal. 4th 298,  
 14 306 (2009).

15 Here, there are no facts showing actual reliance on the part of Kyler Prescott  
 16 as to the purported wrongful statements. No allegations exist to show Kyler Prescott  
 17 would not have sought the medical services but for the alleged false advertising on  
 18 RCHSD’s website. (See FAC, ¶¶ 107, 117.) Rather, the FAC states Kyler Prescott  
 19 was admitted to RCHSD on 5150 hold. (FAC, ¶ 37.) As defined by law, a 5150  
 20 hold is an involuntary detention. Cal. Welf. & Inst. Code, § 5151. Because Kyler  
 21 Prescott was admitted on a 5150 hold, reliance by Kyler Prescott necessary to bring  
 22 a FAL claim on his behalf is absent from the FAC. The purported facts of the FAC  
 23 defeat a FAL claim on behalf of Kyler Prescott.

24 For these reasons, Kyler Prescott’s purported FAL claim should be dismissed  
 25 without leave to amend.

26 **C. Plaintiffs’ Fourth and Fifth Causes of Action for Violation of**  
 27 **California Government Code Section 11135 Based on Sex and**  
 28 **Disability Discrimination Should Be Dismissed**

28 The FAC fails to state causes of action on behalf of Ms. Prescott individual

1 and on behalf of Kyler Prescott for purported violations of Cal. Gov't Code § 11135  
2 (“section 11135”).

3 **1. Ms. Prescott Lacks Standing to Bring a Section 11135 Claim on**  
4 **Her Own Behalf**

5 A plaintiff alleging a cause of action under section 11135 must allege he or  
6 she was personally damaged. *Blumhorst v. Jewish Family Servs. of L.A.*, 126 Cal.  
7 App. 4th 993, 1002 (2005). Government Code sections 11135 and 11139 do not  
8 create a broad standing to a plaintiff who did not suffer injury. *Id.* at 1001.

9 Section 11135(d) allows a person associated with another individual who has  
10 a protected characteristic to recover *if* the associated person was discriminated  
11 against and thus denied full and equal access to services, programs, and activities  
12 that qualify under section 11135(a). Cal. Gov't. Code § 11135. However, this does  
13 not apply to parents bringing claims on their own behalf when it is their children  
14 who are allegedly denied benefits. *See D.K. v. Solano County Office of Education*  
15 (*Solano I*), 2008 U.S. Dist. LEXIS 101169, at \*17-18 (E.D. Cal. Dec. 15, 2008) (in  
16 which the Court explained the parents could not bring individual claims under  
17 section 11135 because they were not denied any benefits or discriminated against  
18 under any program or activity that has been funded directly by the State of  
19 California.); *D.K. v. Solano Cnty. Office of Educ. (Solano II)*, 667 F. Supp. 2d 1184,  
20 1187-1188, 1194-1195 (“Parent Plaintiffs . . . have not alleged that they were denied  
21 access to or participation in any programs or activities. Therefore, Parent Plaintiffs .  
22 . . have not sufficiently stated a cause of action . . .”).

23 Consequently, Ms. Prescott’s claim fails. The CAPS unit was an inpatient  
24 unit treating, not herself, but her son. Ms. Prescott was not the subject of the alleged  
25 discrimination. As such, she cannot prevail on such a claim. Ms. Prescott lacks  
26 standing to sue for any purported violation of Cal. Gov’t Code § 11135 under the  
27 facts alleged in Plaintiffs’ FAC.

28 ///



1           **2. The First Amended Complaint Lacks Any Factual Allegations to**  
2           **Show Compliance with the Exhaustion Requirement of California**  
3           **Government Code Section 11135**

4           There is an exhaustion requirement for a claim brought pursuant to Cal. Gov't  
5 Code § 11135. Cal. Code Regs. tit. 2, § 11143 (Lexis Advance through Register  
6 2017, No. 39, September 29, 2017); *see J.E.L. v. S.F. Unified Sch. Dist.*, 185 F.  
7 Supp. 3d 1196, 1201 (N.D. Cal. 2016); *Santos v. Merritt Coll.*, No. C-07-5227  
8 EMC, 2008 U.S. Dist. LEXIS 75496, at \*8 (N.D. Cal. July 1, 2008). Claims  
9 brought in federal court for purported violation of section 11135 are subject to  
10 dismissal for failure to show exhaustion. *Aikins v. St. Helena Hosp.*, 843 F. Supp.  
11 1329, 1341 (1994); *.E.L. v. S.F. Unified Sch. Dist.*, 185 F. Supp. 3d at 1201.

12           The facts alleged in Plaintiffs' First Amended Complaint do not show  
13 compliance with the exhaustion requirement and do not meet the pleading  
14 requirements. Consequently, plaintiffs' purported section 11135 claims should be  
15 dismissed.

16           **3. The FAC Fails to Establish Kyler Prescott Would Be Entitled to**  
17           **Equitable Relief of Restitution**

18           There are no facts alleged in the FAC establishing any element of damage for  
19 Kyler Prescott if he prevails on his purported section 11135 claims. There are no  
20 facts establishing he would be entitled to restitution.

21           Restitution is restorative in nature. It serves to restore the status quo by  
22 returning to the plaintiff funds in which he or she had an ownership interest. *See*  
23 *Rizzo v. Ins. Co. of Pa.*, 969 F. Supp. 2d 1180, 1195 (C.D. Cal. 2013); *see also*  
24 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003). Here,  
25 there are no facts alleged showing Kyler had an "ownership interest" in any money  
26 sought to be recovered from RCHSD. The FAC does not allege Kyler Prescott  
27 provided money to RCHSD which Kyler Prescott seeks returned. For this reason,  
28 Kyler Prescott's claims brought under section 11135 fail.

///

1 **V. CONCLUSION**

2 For all of the foregoing reasons, RADY CHILDREN’S HOSPITAL-SAN  
3 DIEGO respectfully requests that this Court grant its motion dismissing from the  
4 First Amended Complaint the Fourth and Fifth causes of action brought by both  
5 plaintiffs and the Seventh cause of action brought on behalf of Kyler Prescott  
6 without leave to amend.

7  
8 DATED: October 26, 2017 LEWIS BRISBOIS BISGAARD & SMITH LLP

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