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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

JOHN FAITRO, an individual and as the personal representative of THE ESTATE OF LAURA LEE FAITRO, deceased; ARTURO & ELVIRA RENTERIA, as individuals and as the personal representatives of THE ESTATE OF ANA RENTERIA, deceased; BRIDGET SANDOVAL, an individual; SUSAN BLACKBURN, guardian ad litem for TAYLOR BURN, a minor; JESSICA Bleaman, an individual; CONNIE MARIE Hererra, an individual; APRIL MORENO, an individual; as Plaintiff Class Representatives,

Plaintiffs,

v.

TOP SURGEONS, INC., a corporation; TOP SURGEONS, LLC, a limited liability company; 1800 GET THIN, LLC; ALMONT AMBULATORY CENTER, INC., a corporation; ANTELOPE VALLEY SURGICAL CENTER, INC.; BEVERLY HILLS SURGERY CENTER, LLC; CALIFORNIA HOSPITAL MANAGEMENT & COLLECTIONS, INC.; LAP BAND SPECIALISTS, LLC; SKIN CANCER AND RECONSTRUCTIVE SURGERY SPECIALISTS OF BEVERLY HILLS; SKIN CANCER AND RECONSTRUCTIVE SURGERY SPECIALISTS OF VALENCIA; SURGERY CENTER MANAGEMENT, LLC; NEW LIFE SURGERY CENTER, LLC; WOODLAKE AMBULATORY SURGERY CENTER, INC.; KAMBIZ BENIAMIA OMIDI, aka JULIAN OMIDI, an individual; MICHAEL OMIDI, M.D., an individual; CINDY OMIDI, an individual; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. BC454464

Assigned to the Honorable Carl J. West
Dept. 322

NOTICE OF DEMURRER AND DEMURRER TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Concurrently filed with Appendix of Non-California Authorities]

Date: TBD
Time: TBD
Dept.: 322

Complaint Filed: February 4, 2011

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NOTICE OF DEMURRER

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on a date and time to be determined by the above-entitled Court, in Department 322, located at 600 South Commonwealth Ave., Los Angeles, California 90005, Defendants will and hereby do demur to the First Amended Complaint ("FAC") filed by John Faitro, individually and as the personal representative of The Estate of Laura Lee Faitro; Arturo and Elvia Renteria, as individuals and the personal representatives of The Estate Of Ana Renteria; Bridget Sandoval; Susan Blackburn, guardian *ad litem* for Taylor Blackburn; Jessica Bleaman; Susan Leverett; Connie Maria Hererra; and April Moreno[1] as individuals and as the purported representatives of the putative Plaintiff Class ("Plaintiffs").

This Demurrer is based on this Notice of Demurrer and Demurrer, the attached Memorandum of Points and Authorities, the concurrently filed Defendants' Request for Judicial Notice and Appendix of Non-California Authorities, the First Amended Complaint and all other pleadings on file with the Court, any materials subject to judicial notice, and the arguments and any other materials presented at the hearing of this Demurrer

[1] An individual named Samantha Finks Shoffner is referred to in the body of the FAC at paragraph 52, but she is not listed as a plaintiff on the caption of the FAC and does not appear on the Summons. As defendants have not been served with process on her behalf, she is not properly a plaintiff in this action, and all allegations made concerning her are mere surplusage. To the extent deemed necessary, and without waiving any right to separately object to her inclusion as a plaintiff, defendants also demur as to Shoffner.

DEMURRER

Defendants hereby generally demur to the First Amended Class Action Complaint as follows:

Demurrer to First Cause of Action

Plaintiffs' purported First Cause of Action, for violation of the Unfair Competition Law, Business & Professions Code section 17200 et seq., fails to state facts sufficient to constitute a valid cause of action. Among other things, Plaintiffs fail to plead the required elements of reliance and "lost money or property" caused by the alleged wrongful conduct, and the supposed false or misleading statements of Defendants on which Plaintiffs base this claim are either not false and/or non-actionable as a matter of law.

Demurrer to Second Cause of Action

Plaintiffs' purported Second Cause of Action, for violation of the False Advertising Law, Business & Professions Code section 17500 et seq., fails to state facts sufficient to constitute a valid cause of action. Among other things, Plaintiffs fail to plead the required elements of reliance and "lost money or property" caused by the alleged wrongful conduct, and the supposed false or misleading statements of Defendants on which Plaintiffs base this claim are either not false and/or non-actionable as a matter of law.

Demurrer to Third Cause of Action[2]

Plaintiffs' purported Third Cause of Action, for breach of Civil Code section 3345, fails to state facts sufficient to constitute a valid cause of action. Civil Code section 3345 merely provides for the enhancement of certain fines and civil penalties authorized by other statutes, and does not create an independent cause of action.

Demurrer to Fourth Cause of Action

Plaintiffs' purported Fourth Cause of Action, for violation of the Consumer Legal Remedies Action, Civil Code section 1770 ("CLRA"), fails to state facts sufficient to constitute a valid cause of action. Among other things, Plaintiffs fail to plead the required elements of reliance and actual injury caused by the alleged wrongful conduct, and the supposed false or deceptive statements of Defendants on which Plaintiffs base this claim are either not false and/or non-actionable as a matter of law. Further, as

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[2] Plaintiffs omit from the caption page their Cause of Action for alleged breach of Civil Code section 3345, but that claim is contained in the body of the pleading. (FAC ¶¶ 114-18).

reflected in records of this Court subject to judicial notice, Defendants timely complied with the safe-harbor provisions of the CLRA and fully cured the alleged wrongful conduct set forth in Plaintiffs' CLRA notice letter.

Dated: January 20, 2012

CALLAHAN & BLAINE, APLC

By: _____
Edward Susolik
Robert S. Lawrence
Raphael Cung

Attorneys for Defendants
TOP SURGEONS, INC.; TOP SURGEONS, LLC; 1 800 GET THIN, LLC; ALMONT AMBULATORY SURGERY CENTER, INC.; ANTELOPE VALLEY SURGICAL CENTER, INC.; BEVERLY HILLS SURGERY CENTER, LLC; CALIFORNIA HOSPITAL MANAGEMENT & COLLECTIONS, INC.; LAP BAND SPECIALISTS, LLC; SKIN CANCER AND RECONSTRUCTIVE SURGERY SPECIALISTS OF BEVERLY HILLS; SKIN CANCER AND RECONSTRUCTIVE SURGERY SPECIALISTS OF VALENCIA; SURGERY CENTER MANAGEMENT, LLC; NEW LIFE SURGERY CENTER, LLC; WOODLAKE AMBULATORY SURGERY CENTER, INC.; KAMBIZ BENIAMIA OMIDI, aka JULIAN OMIDI; MICHAEL OMIDI, M.D.; and CINDY OMIDI

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

There is a high road and a low road to the drafting of complaints, and plaintiffs herein have larded their First Amended Complaint ("FAC") with allegations that would do yellow journalism proud, but have nothing to do with their false advertising or unfair competition claims. While disclaiming any intention of filing wrongful death or malpractice claims herein, plaintiffs' FAC contains detailed allegations of two alleged wrongful deaths resulting from Lap-Band surgeries at defendants' clinics, and attempts to smear the doctors associated with the clinics using ad hominem argument that is simple character assassination. Plaintiffs' recurring references to the medical board investigations of certain physicians associated with the clinics, and intentional mischaracterization of the backgrounds and expertise of defendants Julian Omidi and Michael Omidi, paint a picture that has nothing to do with reality but that merely reflects plaintiffs' desire to portray defendants in the worst possible light. Though plaintiffs may be protected by the litigation privilege, they should know better than to rely on unfounded allegations of misconduct or plainly irrelevant background "facts" as a basis for their claims.

Plaintiffs' incendiary allegations – such as the claim that a non-party anesthesiologist associated with the clinics assaulted a process server with a "meat cleaver" – are palpably irrelevant to the claims that they are asserting, and are clearly intended to bias the Court and the trier-of-fact against defendants. However, just as one cannot turn a sow's ear into a silk purse by wishing it were so, plaintiffs herein cannot turn a series of individual medical malpractice cases into a class action under the Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), or Consumer Legal Remedies Act ("CLRA"). The putative class covering "thousands" of unhappy Lap-Band patients who were allegedly misled into having the surgery simply does not exist, and plaintiffs' bold misstatements to the contrary cannot make it come to life.

The real subject matter of these disputes is the outcome of plaintiffs' Lap-Band surgeries – procedures that plaintiffs concede were performed by parties *other* than the defendants named herein. Even assuming the truth of all of plaintiffs' factual allegations, they fail to support plaintiffs' claimed causes of action for breach of the UCL (Business & Professions Code § 17200 et seq.); FAL (Business & Professions Code Section § 17500 et seq.); and CLRA (Civil Code § 1770 et seq.).

First, plaintiffs fail to plead how they relied on defendants' alleged false advertisements for the Lap-Band procedure – a required element for all of the foregoing causes of action. Indeed, none of the plaintiffs describe what particular ads they saw or heard, when they saw them, the contents of the ads, or what portions of the ads were allegedly false or misleading.

Second, plaintiffs fail to sufficiently plead actual injury, including "lost of money or property," as a result of the alleged false advertising. While some plaintiffs plead personal injury from the Lap-Band procedure itself and out-of-pocket expenses due to their insurance company's failure to fully cover the procedures, those are not losses *as a result* of defendants' advertisements.

Third, assuming arguendo that plaintiffs' claims survive despite the lack of reliance or actual injury, they would nonetheless fail because the alleged statements made by defendants are either not false or non-actionable. For instance, any statements by defendants that they are "top rated" or "proven" are merely puffing and cannot serve as the basis for a claim of false or deceptive advertising.

Fourth, as evidenced by facts subject to judicial notice, defendants cured the alleged false advertisements set forth in plaintiffs' CLRA notice letter, thereby obviating any claim for damages under the CLRA.

Fifth, plaintiffs' Third Cause of Action fails as a matter of law, as there is no independent cause of action under Civil Code § 3345, which merely enhances certain fines and penalties where they are authorized by some other statute.

In light of these defects, the Court should sustain this Demurrer and dismiss plaintiffs' FAC without leave to amend.

II. PLAINTIFFS' CLAIMS AND ALLEGATIONS

Plaintiffs allege that they were referred for Lap-Band surgery and related surgical procedures by Defendants.[3] Plaintiffs concede that "none of the Defendants herein performed the actual Lap Band surgeries or pre-operative procedures on the Plaintiffs." (FAC ¶ 17). Instead, plaintiffs assert that this action arises from defendants' allegedly false advertising and marketing of the Lap-Band procedure. Plaintiffs purport to represent a class of persons numbering in the "thousands" who responded to some

[3] Plaintiff April Moreno had only an endoscopy procedure, and not Lap-Band surgery (FAC ¶ 42); and non-plaintiff Samantha Finks Shoffner cancelled her contemplated Lap-Band surgery (*Id.* ¶ 52).

iteration of defendants' advertisements for Lap Band surgery, most of which is alleged to refer to the phone number "1-800-GET-THIN." (*Id.* ¶¶ 98-104).

Plaintiffs characterize defendants as "business enterprises which advertise, market and sell services to consumers in California for laproscopic surgeries to install Lap Band devices in morbidly obese persons." (*Id.* ¶¶ 1-2). They also allege that defendants Michael and Julian Omidi formed, own and control these entities, and that all of these defendants are alter egos and/or agents of one another. (*Id.* ¶¶ 3-4, 6, 12, 15-16, 54-58).

According to Plaintiffs, defendants made numerous statements in their advertising that were allegedly false, misleading, or deceptive. Those specific statements are set forth and individually addressed in Section V below. Significantly, however, and as elaborated in Section III, none of the plaintiffs allege that they personally saw any of the particular statements at issue, or even, in some cases, what the medium of the statement was in the ad they saw. That fatal flaw, and other defects in the FAC, render plaintiffs' claims legally insufficient and subject to demurrer.

ARGUMENT

III. PLAINTIFFS FAIL TO PLEAD RELIANCE ON DEFENDANTS' ALLEGED FALSE ADVERTISING

The UCL, FAL, and CLRA all share a common requirement that plaintiffs must rely on the alleged false statements or acts of unfair competition at issue, and have suffered harm by virtue of that reliance. *See, e.g., Princess Cruise Lines, Ltd. v. Superior Ct.* (2009) 179 Cal. App. 4th 36, 42-43, 46 (reliance is required element of UCL, FAL, and CLRA claims); *In re Tobacco Cases II* (2009) 46 Cal. 4th 298, 326 (noting existence of "an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong"); *Hale v. Sharp Healthcare* (2010) 183 Cal. App. 4th 1373, 1385 (actual reliance required where UCL claim is based on "unlawful" prong); *Nelson v. Pearson Ford Co.* (2010) 186 Cal. App. 4th 983, 1021-22 (CLRA claim requires actual reliance).

Thus, plaintiffs must allege facts that, if true, would establish that (a) they saw or heard the false advertising, and (b) had they known that the advertising was false, "in all reasonable probability" they would have acted differently, e.g., not purchased the goods or services advertised. *Tobacco II,* 46 Cal. App. 4th at 326. Failure to plead and prove actual reliance is fatal to claims made under the UCL, FAL, or CLRA. *Princess Cruise Lines*, 179 Cal. App. 4th at 42-44, 46 (plaintiffs who would have made

purchase anyway could not sue under UCL, FAL, or CLRA).

Obviously, there can be no reliance where plaintiff never heard or saw the alleged false statements before entering into the transition. *Gawara v. U.S. Brass Corp.* (1998) 63 Cal. App. 4th 1341, 1355-56, 1358-59 (judgment for fraudulent misrepresentation reversed where there was no evidence that any representations at issue were heard by or passed along to plaintiffs). That is the case for both statements made to individuals as well as to a wide group. *Mirkin v. Wasserman* (1993) 5 Cal. App. 4th 1082, 1088-89, 1091-93 (affirming demurrer where plaintiffs failed to plead actual reliance on statements made in prospectus).

In the case at bar, plaintiffs allege that defendants advertised Lap-Band surgery via billboards, TV, radio, the Internet, direct mail, bus placards, and print ads. They also allege that those advertisements contain various misrepresentations, such as that the surgeons referred by defendants were "top rated." Critically, however, plaintiffs fail to plead how they relied on defendants' allegedly false advertising; *i.e.*, how, without such false advertising, in "all reasonable probability" they would not have entered into a contract with any defendant for Lap-Band surgery. Indeed, none of these plaintiffs even bother to allege what particular advertisement they saw or heard, or what the ad said, and absolutely no attempt is made to link the FAC's laundry list of allegedly false advertisements to any plaintiff. Specifically:

- Plaintiff Bridget Sandoval claims to have "responded to a 1-800-GET-THIN radio ad," after which she was referred to a surgical facility in Beverly Hills. (FAC ¶ 20). However, Ms. Sandoval does not allege what the radio ad said, what was false about the ad, that she relied on anything contained in the ad, or why it was reasonable for her to rely on any statement in the ad in deciding to obtain Lap-Band surgery.

- Plaintiff Susan Blackburn alleges that she "responded to a 1-800-GET-THIN billboard ad and called the toll free phone number on behalf of her daughter," Taylor Blackburn. She then went with her daughter to defendants' facility in Palmdale. (*Id.* ¶ 26). Ms. Blackburn does not specify what she saw on the billboard, why it was false or deceptive, or how she relied on any representations made on the billboard.

- Plaintiff Jessica Bleaman alleges that she "responded to a 1-800-GET-THIN ad for Lap Band surgery." (*Id.* ¶ 32). She does not allege even the medium of the ad, the contents of it, why any of those

contents were false, or how she relied on them.

• Plaintiff Connie Hererra claims to have "responded to a 1-800-GET-THIN ad" and then attended one of defendants' seminars. (*Id.* ¶ 36). Again, there are no details regarding the content of the ad, nor how it convinced her to attend the seminar and then undergo the Lap-Band procedure.

• Plaintiff April Moreno claims to have "responded to a 1-800-GET-THIN ad," after which she called defendants' Beverly Hills office, worked with that office on scheduling and billing issues, and then went for a pre-operative endoscopy at defendants' San Diego facility. (*Id.* ¶ 42). Ms. Moreno does not allege the medium of the ad, its contents, why any content was false, or how she relied on any statement made in the ad.

• Plaintiff Susan Leverett alleges that she "responded to a 1-800-GET-THIN ad," after which she attended a seminar hosted by defendants. (*Id.* ¶ 45). Ms. Leverett does not provide any details about the ad, what statements she saw or heard, how she relied on them, or even the medium of the ad.

• Plaintiff John Faitro is suing on behalf of decedent Laura Lee Faitro. Ms. Faitro allegedly "saw and heard Defendants' advertisements on TV and as a result, hired and paid Defendants, and each of them, to perform a Lap-Band surgical procedure." (*Id.* ¶ 46). There is no allegation, however, about what statements Ms. Faitro saw or heard in the TV ad, why they were false, or how she relied on them.

• Plaintiffs Elvia and Arturo Renteria are suing on behalf of decedent Ana Renteria. They allege that Ana Renteria "contracted with defendants, and each of them, for laparoscopic consultation and surgical services based upon seeing the defendants' advertisements." (*Id.* ¶ 49). Conspicuously missing, however, are allegations about what advertisements were seen or hear by Ms. Renteria, why they were false, how Ms. Renteria relied on them, or even the medium of the advertisements.

• Non-plaintiff Samantha Finks Shoffner is alleged to have "responded to a 1 800 GET THIN ad" and contacted defendants' Beverly Hills office. She then allegedly underwent a preoperative endoscopy procedure at defendants' West Hills facility but ultimately decided not to proceed with the Lap-Band surgery. (*Id.* ¶ 52). As is the case with all plaintiffs, there are no details about the ad Ms. Shoffner allegedly saw or heard, what statements were contained therein, why those statements were false, or how

Ms. Shoffner relied on those statements.[4]

In an attempt to distract the Court from this obvious lack of reliance on defendants' alleged false advertising, plaintiffs have alleged various improper acts by defendants that occurred *after* plaintiffs saw or heard the ads – e.g., when plaintiffs were seen in-person for doctors' consultations, when preoperative tests or procedures were performed, when they had Lap-Band surgery, and when they were billed for Lap-Band surgery or associated services. For instance, plaintiff Bridget Sandoval alleges that after she saw and responded to defendants' ad, she consulted with defendant Julian Omidi, who measured her height and weight and then reportedly advised her to report her height as being shorter to qualify for the body mass index required for insurance coverage. (FAC ¶ 20).

As inflammatory as some of those allegations are, they have nothing to do with the subject matter of this suit; namely, that "thousands" of putative class members were allegedly deceived upon seeing advertisements by defendants that contained false or misleading information. At best, the statements or acts allegedly made by defendants *after* plaintiffs responded to their advertisements may give rise to claims for misrepresentations made to the individual plaintiffs who received such statements against the persons making the statements. They cannot, however, be considered "advertising" or "unfair competition" in the context of this purported class action alleging common wrongful acts. *See* Bus. & Prof. Code §17500 ("It is unlawful ... to make or disseminate or cause to be made or disseminated before the public in this state ... any statement ... which is untrue or misleading...."); *Bank of West v. Superior Ct*. (1992) 2 Cal. 4th 1254, 1276 n.9 ("advertising" means widespread promotional activities directed to the public at large.).

While some of these plaintiffs may have seen or heard the phone number 1-800-GET-THIN somewhere, there is nothing false or misleading about the phone number itself. Plaintiffs' utter failure to plead (a) what statements they saw or heard in conjunction with the phone number, (b) why those statements were false or misleading, (c) how plaintiffs relied on those statements, and (d) why such reliance was reasonable is a fatal defect to all of plaintiffs' claims. Plaintiffs may not simply allege that they were misled by some nebulous statement. In order to state a claim, they are required to provide the specifics of what misled them, and allege facts showing that it was reasonable for them to rely on such

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[4] Defendants reiterate their position that Shoffner is not properly a party to this action, as no Summons was served on her behalf.

statements in making their decisions to have Lap-Band surgery. Having failed to do so, their claims necessarily fail.

IV. PLAINTIFFS' FAILURE TO ALLEGE ACTUAL INJURY RESULTING FROM DEFENDANTS' ADVERTISEMENTS IS FATAL TO THEIR CLAIMS

Plaintiffs' claims are fatally defective for the separate and independent reason that plaintiffs fail to plead any actual injury, including lost money or property, caused by defendants' alleged false advertising and unfair competition.

To sue under the UCL and FAL, a private plaintiff must have "suffered injury in fact" *and* "lost money or property as a result of such unfair competition." Bus. & Prof. Code §§17204, 17535. This standard is more restrictive and demanding of plaintiffs than the constitutional requirement of standing through injury in fact. *Cohen v. Facebook, Inc.*, 2011 U.S. Dist. LEXIS 83058, at *21-*22 (N.D. Cal. June 27, 2011) (granting motion to dismiss section 17200 claim for failing to allege loss of money or property).

To show "lost money or property," plaintiffs must allege and prove circumstances such as that they (1) surrendered in a transaction more, or acquired in a transaction less, thaN they otherwise would have; (2) had a present or future property interest diminished; (3) were deprived of money or property to which plaintiffs have a claim; or (4) were required to expend money or property that otherwise would have been unnecessary. *Kwikset Corp. v. Superior Ct.* (2011) 51 Cal. 4th 310, 323. Plaintiff must also show that the loss of money or property "was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Id.* at 322 (emphasis in original); *see also Daro v. Superior Ct.* (2007) 151 Cal. App.4th 1079, 1099 ("there must be a causal connection between the harm suffered and the unlawful business activity"); *Bower v. AT&T Mobility LLC* (2011) 196 Cal. App. 4th 1545, 1553-56 (plaintiff's failure to plead that she would have bought the same product elsewhere at lower price but for alleged false advertisement was fatal to her claims).

While the CLRA does not specifically require "lost money or property," it nonetheless requires actual injury. "In order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result." *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal. 4th 634, 646 (even though defendants' use of an unconscionable provision in contract was breach of CLRA, plaintiff had no actual injury where he did not plead that provision was enforced against him).

At least three of the eight plaintiffs here fail to plead that they lost any money at all. Moreover,

none of the plaintiffs alleges that they lost money or property, or received any other injury, due to defendants' purported acts of false advertising and unfair competition. While the FAC tries to glide over this problem by ignoring it, it is spectacularly unsuccessful, as shown below:

• Plaintiff Bridget Sandoval alleges that she paid defendant Top Surgeons, LLC the sum of $132 for evaluation by a dietician, rather than for Lap-Band surgery. (FAC ¶ 24). Ms. Sandoval does not allege that this amount was somehow excessive, or that the dietician's services were worth something materially less than $132, so this payment cannot constitute "loss" for purposes of the UCL, FAL or CLRA. *Kwikset*, 51 Cal. 4th at 323. Ms. Sandoval also fails to allege how defendants' alleged false advertisements caused her to expend this money. She alleges only that after being exposed to defendants' advertisements she came to their office in Beverly Hills in March 2008 (FAC ¶ 20). Given that she is not alleged to have paid the dietician until February 2009 (*Id.* ¶ 24) – almost a year after seeing whatever ad she saw – there is, and can be, no causal connection between the ad and her decision to be evaluated by a dietician.

• Plaintiff Susan Blackburn alleges that "she was forced to incur the [unspecified] cost of removing [her daughter] Taylor's Lap Band . . . thereby suffering an injury in fact." (*Id.* ¶ 31). But this expense was not incurred until September 2010, almost two years after her daughter's Lap-Band surgery (in October 2008), does not reflect any sum paid to any defendants, was required due to complications that arose some two years after surgery (*Id.* ¶ 29), and bears no causal nexus to any alleged false advertising or unfair competition.

• Plaintiff Jessica Bleaman alleges that she paid $5,000 to defendant Beverly Hills Surgery Center, LLC at some unspecified time after her Lap-Band surgery, when her insurance company declined to pay the full amount charged. (*Id.* ¶ 35). Payment by Ms. Bleaman was not predicated on any false advertisement by defendants or any alleged act of unfair competition, but apparently was due to the unwillingness of her insurer to fully pay for the procedure.

• Plaintiff Connie Hererra alleges that she was billed almost $212,000 because her insurance company refused to cover her Lap-Band surgery. She then asserts that, because she had agreed to be financially bound in the event her insurer did not fully cover the procedure, she eventually paid some

$9,498 to Surgery Management, LLC.[5] These payments by Ms. Hererra cannot qualify as lost money or property with respect to these demurring defendants, because they were caused not by any alleged false advertisements or unfair business practices, but by (1) the failure of Ms. Hererra's insurer to cover the services rendered, and (2) Ms. Hererra's voluntary agreement to be personally responsible in the event that her insurance did not cover all costs.

• Plaintiff April Moreno asserts she had an endoscopy procedure performed after seeing one of defendants' ads. While she alleges that defendants billed her for the portion of the costs not paid by her insurer, she does not allege that she actually paid any of them. (*Id.* ¶¶ 42-44). Absent payment, she has no damages and thus no standing under any cause of action pled.

• Plaintiff Susan Leverett alleges that she was charged tens of thousands of dollars for Lap-Band surgery by defendant Beverly Hills Surgery Center, Lap Band Specialist, LLC and Skin Cancer Reconstructive Surgery Specialists of Beverly Hills. Apparently, her insurance refused to pay the majority of these charges, and defendants unsuccessfully attempted to collect the balance from her. The only cost Ms. Leverett claims somehow to have incurred is $250, which was alleged to have been applied by her insurance company to her medical deductible (*Id.* ¶¶ 45) as opposed to having been paid to any defendant. Typically, this means that the insurance company would deduct $250 from the amount it paid the medical provider, but it does not mean that Ms. Leverett actually paid $250 to any defendant, and there is no allegation that she did so. In any event, given that Leverett had Lap-Band surgery, it is clear she received services that were worth more than $250, so that amount cannot be considered "lost" money or property as defined in *Kwikset. See also Bower*, 196 Cal. App. 4th at 1553-56 (no "injury in fact" in the absence of proof that product was worth less than represented by defendant or was different from what consumer wanted).

• Plaintiff John Faitro, who is suing on behalf of Laura Lee Faitro, alleges that "a total of $700 was applied to her deductible as a result of the various bills received by the Defendants." (FAC ¶ 46). There is no allegation, however, that the Faitros actually paid that amount to any defendant (or to anyone). The

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[5] Plaintiff Herrera also alleges that she "paid over $6,000 in COBRA for services rendered by defendants." (FAC ¶ 41). The fact that Ms. Herrera paid $6,000 in COBRA insurance premiums to keep her insurance is neither here nor there, as it cannot qualify as damages under any conceivable cause of action alleged.

only other payments alleged to have been made are *de minimis* co-pays of $25, $35, and $25 made to unidentified parties during office consultations that pre-date Ms. Faitro's Lap-Band surgery.

• Plaintiffs Elvia and Arturo Renteria, who are suing on behalf of Ana Renteria, allege that Ana Renteria paid $100 to defendant Top Surgeons, Inc. as partial payment for hiatal hernia surgery that was performed the week before she had Lap-Band surgery. Plaintiffs also allege that $948.70 was applied to Ms. Renteria's insurance deductible for services rendered, but nowhere claim that Ms. Renteria paid those sums to any defendant. (*Id.* ¶ 50). Plaintiffs further allege that they paid $2,100 to a different hospital in connection with Ms. Renteria's subsequent hospitalization a week later (*Id.* ¶ 51), due to complications following her surgery. Payments made to another hospital because of surgical complications ipso facto bear no relation to any claim that defendants' alleged false advertising caused Ms. Renteria to enter into a contract for Lap-Band surgery.

• Non-plaintiff Samantha Finks Shoffner apparently considered having Lap-Band surgery, but cancelled her appointment. She alleges that sums totaling $762.36 were applied to her insurance deductible for certain routine procedures that precede Lap-Band surgery, but does not allege that she paid the deductibles, or incurred any financial or other harm. She also plainly admits that she has not paid defendants the cancellation fee demanded, and thus has apparently paid no defendant any sum whatsoever. (*Id.* ¶ 52).

Under the analysis above, none of the plaintiffs have asserted actual injury as defined by the UCL, FAL or CLRA, and thus all of plaintiffs' claims fail as a matter of law.

V. PLAINTIFFS BASE THEIR CLAIMS ON STATEMENTS THAT ARE NEITHER FALSE NOR ACTIONABLE

Plaintiffs' inability to sufficiently allege reliance or resulting injury disposes of all of their claims. Even assuming arguendo that plaintiffs could overcome those hurdles, their case nonetheless founders because the statements on which their claims are premised are neither false nor actionable.

A. Puffery Is Not Actionable

To be actionable, a statement in an advertisement must contain a factual representation that is demonstrably false. *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.* (9th Cir. 1999) 173 F.3d 725, 731 (affirming dismissal where representation "was not a specific and measurable claim, capable of being proved false"). Advertising that amounts to "puffery" is non-actionable because it cannot be verified as

being true or false, and no reasonable consumer would rely on it. *Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv., Inc.* (9th Cir. 1990) 911 F.2d 242, 246; *see also Oestreicher v. Alienware Corp.* (N.D. Cal. 2008) 544 F. Supp. 2d 964, 973-74 ("generalized and vague statements of ... superiority such as 'superb, uncompromising quality' and 'faster, more powerful, and more innovative' are non-actionable puffery" and do not support claims under UCL or FAL); *Annunzito v. eMachines, Inc.* (C.D. Cal. 2005) 402 F. Supp. 2d 1133, 1139 (terms "quality," "reliability," "performance," and "latest technology" are non-actionable puffing).

B. The Statements in the Complained-of Advertisements Are Not False and Are Not Actionable

All the alleged statements by defendants on which plaintiffs base their claims are either not false and/or are non-actionable.

Statement No. 1: Defendants allegedly represented that they employed "top rated surgical specialists," "proven doctors," a "nationally recognized, expert and caring team," and offered a "higher level of care." Plaintiffs claim these statements are false because several doctors affiliated with the defendant entities had allegedly been investigated or disciplined by the medical board. (FAC ¶¶ 107(b)-(c), 123(1)-(2)).

Plaintiffs are incorrect. They cannot prove their case by attacking the medical credentials of a few surgeons performing Lap-Band procedures at the defendants' clinics and asking the trier of fact to infer that the ads were necessarily false because several physicians were the subject of disciplinary proceedings. The fact that any patient filed a complaint against any particular doctor with the medical board does not make false any claim by defendants that their surgeons were "proven," "caring," or "expert."

Moreover, statements such as those complained-of by plaintiffs are clearly non-actionable puffery. *Pulvers v. Kaiser Found. Health Plan, Inc.* (1979) 99 Cal. App. 3d 560, 564-565 (claim that health plan provided "high standards" of medical service mere puffing); *Schonfeld v. City of Vallejo* (1975), 50 Cal.App.3d 401, 412 (claim that marina was "first class harbor" and "best berthing facility" mere puffing); *Allstate Ins. Co. v. Abbott* (5th Cir. 2007) 495 F.3d 151, 166 (implication that repair shop offered "best" services mere puffing).

Statement No. 2: Plaintiffs allege that defendants' statements that Top Surgeons "performs more successful Lap Band surgeries than anyone in California," that "Top Surgeons has proven to be a leader

in Lap Band surgery, and that "Diets Fail – The Lap Band Works" constitute false advertising. (FAC ¶¶ 82 [image of 1 800 GET THIN Advertisement], 86(d), 102(e)-(f)).

However, as is the case with all the foregoing statements, ads that claim general superiority or high-quality, or that suggest a comparison with unspecified others, are also "puffing" and therefore are non-actionable. *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351 (claim that satellite system offered "crystal clear digital video" or "CD-quality audio"); *Pizza Hut, Inc. v. Papa John's Int'l, Inc.* (5th Cir. 2000) 227 F.3d 489, 497, 499 (claiming "Better Ingredients, Better Pizza"); *August Storck K.G. v. Nabisco, Inc.* (7th Cir. 1995) 59 F.3d 616, 618 ("A 'comparison' to a mystery rival is just puffery; as it is not falsifiable.").

Statement No. 3: Plaintiffs allege defendants falsely advertised that the Lap Band procedure is a "safe, 1-hour, FDA-approved" procedure. (FAC ¶¶ 76-81, 107(c), (e), 111-112.) Plaintiffs contend the statements were false because the mortality rate among members of the plaintiff class are higher than the "published" rates for such surgeries, and that the advertisements did not explain FDA data regarding national clinical studies that tracked post-surgical complications in Lap Band patients. (*Id.* ¶¶ 76, 79, 81.) Moreover, plaintiffs aver, Lap Band surgery requires several hours of post-operative recovery beyond the 1-hour surgery time. (*Id.* ¶¶ 77, 81).

Plaintiffs' unsubstantiated rhetoric about the expected mortality rate for Lap Band patients is refuted by published medical literature, representations from Allergan (which makes the device and has conducted its own research to determine its safety), and the FDA's recent decision to relax restrictions on the use of the Lap Band because of its proven safety record. In any event, plaintiffs' claim that the Lap Band is unsafe is preempted by federal Medical Device Amendments, 21 U.S.C. § 360c, *et seq.* The question of safety of medical devices approved by the FDA is a matter of federal law, and state court actions seeking to impose stricter safety or marketing standards are preempted. *Riegel v. Medtronic, Inc.* (2008) 552 U.S. 312, 316 (citing 21 U.S.C. § 360k(a)); *Robinson v. Endovascular Technologies, Inc.* (2010) 190 Cal. App. 4th 1490, 1500.[6]

[6]Moreover, plaintiffs' claim that defendants' mortality rates exceed the publish standards is mere hypothetical surmise, as plaintiffs admittedly have no information on the number of Lap-Band surgeries performed at any clinic associated with the defendants.

Plaintiffs' assertions regarding the recovery time for Lap Band patients fare no better, given that Defendants' advertisements make no representations about recovery time; they only describe a "One hour outpatient procedure." (FAC ¶ 82). Plaintiffs' slanted inferences and strained interpretation of statements obviously intended as advertising claims – not clinical descriptions of a medical procedure and post-operative recovery – do not show that the statements are "false."

Statement No. 4: Plaintiffs allege that defendants falsely represented that they employed "specially trained, handpicked board certified surgeons," when in fact "few, if any, of the Defendants' surgeons hold any 'board certifications.'" (*Id.* ¶ 107(d)). Here, plaintiffs opt for rhetoric over fact. Plaintiffs point to only two doctors who are not board certified: defendant Michael Omidi – whom plaintiffs acknowledge never performed Lap-Band surgery on any plaintiff – and non-party Dr. George Tashjian. Given that "thousands" of Lap-Band procedures are alleged to have been performed at defendants' facilities, the fact that one specific Lap-Band surgeon is not "board certified" does not mean that *none* of defendants' other doctors are board certified. Plaintiffs merely read the complained-of language in the manner that best suits their case, but no matter how the language is parsed plaintiffs' claims fail, as defendants never stated that every physician associated with Top Surgeons (or any other ASC) was board-certified.

Statement No. 5: Defendants are alleged to have falsely represented that they were "fully accredited," when one facility – Almont Ambulatory Surgery Center – was no longer participating in the Medicare program and had lost its accreditation with one accreditation organization. (*Id.* ¶¶ 107(f), 123(3)-(4)). As with the "board certification" issue, defendants have not claimed that every one of their facilities was accredited by all possible accrediting bodies at all times. Plaintiffs admit that defendants "operate in eleven (11) different cities" (*Id.* ¶ 99), so the fact that one facility lost accreditation from one organization – only to be accredited by another organization thereafter – does not make the foregoing statement false. Given that no plaintiffs allege that they had Lap-Band surgery at a non-accredited facility at the time of their surgery, this alleged false statement is in any event a red herring.

Statement No. 6: Plaintiffs' assertion that defendants somehow misled customers by identifying themselves only as "1-800-GET-THIN" – thereby "concealing the true identities of the principals, owners, and actual surgeons employed by the Defendants"(*Id.* ¶ 107(I)) – is simply absurd. One does not hide one's identity by providing a phone number for people to call for more information.

Moreover, plaintiffs' argument is based on the fallacy that ownership of the entity at which a patient has surgery is both of paramount concern to patients, and required to be disclosed as a matter of law. This argument is meritless, since plaintiffs have no legal right to know the ownership structure of their private hospital. But in any case, had plaintiffs really wanted to learned about their surgeons and the members of the operating team, they were at liberty to ask questions and to research their backgrounds, which they apparently failed to do. As plaintiffs themselves acknowledge, calling 1-800-GET-THIN was simply the starting point for patients to obtain information about the Lap-Band procedure, which led to a battery of tests and physical examinations, interviews with psychologists, meetings with doctors and staff, and numerous other steps which preceded surgery. No allegation is made, nor could there be, that defendants precluded any patient for finding out as much information as they wanted to know during that process.

Statement No. 7: Plaintiffs allege that defendants falsely claimed that impending "Insurance Reform" could jeopardize potential Lap-Band patients' ability to obtain coverage from their insurance companies' PPO plans for the procedure, thereby creating "a false sense of urgency." (*Id.* ¶¶ 82-83). Again, this is ridiculous. The "newspaper" depicted in the complain-of ad (FAC at p. 41) – which no plaintiff claims to have seen – is obviously fictitious, and no reasonable viewer could think that the ad purported to report actual news. Moreover, any statement about how possible or pending legislation might change insurance coverage for Lap-Band surgery would in any event constitute nothing but an opinion about, or prediction of, future events, which is not actionable. *Bernardo v. Planned Parenthood Fed. of Am.* (2004) 115 Cal. App. 4th 322, 349-50 (a prediction of future events, even if it turns out to be wrong, cannot be "false," because it essentially is an opinion that cannot be proven true or false at the time made); *Pacesetter Homes, Inc. v. Brodkin* (1970) 5 Cal. App. 3d 206, 210-11 (estimate of future rental income was not representation of existing fact and therefore is not actionable).

V. DEFENDANTS HAVE ADDRESSED THE ALLEGED WRONGFUL CONDUCT IN PLAINTIFFS' CLRA LETTER

Plaintiffs' CLRA claim fails for the same reasons their UCL and FAL claims fail, as discussed in Sections I-III. It is also fatally deficient because defendants have cured the claimed wrongful acts.

Contrary to plaintiffs' claim "on information and belief" that "Defendants failed to satisfy the notice and cure requirements provided in [Civil Code] Section 1782(c) within thirty (30) days," defendants

did in fact timely address all the issues raised in plaintiffs' CLRA letter. Plaintiffs' claim to damages is subject to a "no merits" motion because – as plaintiffs are well-aware – after many months of discussion about the scope of the proposed response to their CLRA letter and what would be required, defendants fully addressed the issues raised and gave notice to their patients.

As reflected in the parties' Joint Initial Status Conference Report of May 11, 2011 and Joint Status Report of June 24, 2011, defendants cured the claimed defects and communicated this fact to plaintiffs before the filing of the FAC – which added the CLRA cause of action – thereby coming within the safe harbor of C.C.P. § 1782(c). (*See, e.g.*, May 11, 2011 Rep. at 14; June 24, 2011 Rep. at 6). Plaintiffs CLRA cause of action for damages therefore is improperly before this Court and must be dismissed.

VI. PLAINTIFFS' PURPORTED CAUSE OF ACTION UNDER CIVIL CODE SECTION 3345 DOES NOT EXIST

Plaintiffs purport to plead for their Third Cause of Action a violation of Civil Code § 3345, which states, in relevant part, "Whenever a trier of fact is authorized by statute to impose either a fine or a civil penalty... it may impose [one] in an amount up to three times greater ... [where] ... the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons. Civ. Code § 3345(b)(1). Plaintiffs allege that because "a large percentage of Lap-Band patients suffer from diabetes and other 'physical or mental impairments,'" they are "disabled persons" for purposes of this statute. (FAC ¶¶ 115-17). Plaintiffs cannot plead a violation of §3345 as an independent cause of action. Caselaw is clear that the section merely provides additional remedies where a statute already authorizes a fine, penalty, or other remedy, in which case the trier of fact may impose three times that amount. *Clark v. Superior Ct.*, 50 Cal. 4th 605, 614 (2010)(holding §3345 does not apply to UCL).

VII. CONCLUSION

For the reasons cited above, this Honorable Court should sustain this Demurrer to plaintiffs' First Amended Complaint, and dismiss the action with prejudice.

Dated: January 20, 2012

CALLAHAN & BLAINE, APLC

By: _____

Edward Susolik
Robert S. Lawrence
Raphael Cung

Attorneys for Defendants

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 3 Hutton Centre Drive, Ninth Floor, Santa Ana, California 92707.

On **January 20, 2012** I served the foregoing document(s) entitled:

NOTICE OF DEMURRER AND DEMURRER TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

on the interested parties in this action by placing [ ] the original [ ] a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

[ ] **BY MAIL:** I deposited such envelope in the mail at Santa Ana, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

[ ] **BY FEDEX:** I deposited such envelope at Santa Ana, California for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing packages for overnight delivery by Federal Express. They are deposited with a facility regularly maintained by Federal Express for receipt on the same day in the ordinary course of business.

[ ] **BY PERSONAL SERVICE:** I caused such document to be delivered by hand to the aforementioned addressee.

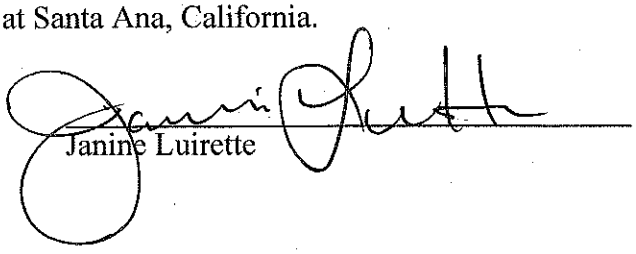
[ ] **VIA E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[X] **VIA CASE ANYWHERE:** A true and correct copy of the above-mentioned document was electronically served on counsel of record by transmission to Case Anywhere.

[ ] **BY FACSIMILE:** I transmitted the foregoing document by facsimile to the party(s) identified below by using the facsimile number(s) indicated. Said transmission(s) were verified as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **January 20, 2012**, at Santa Ana, California.



Janine Luirette

SERVICE LIST

FAITRO, et al. v. TOP SURGEONS, etc., et al.
Case No.: BC454464

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