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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.

17 RADY CHILDREN’S HOSPITAL-
 18 SAN DIEGO,

19 Defendant.
 20
 21
 22
 23

CASE NO. 16-cv-02408-BTM (JMA)

Honorable Barry Ted Moskowitz
 Courtroom 15B

**DEFENDANT RADY CHILDREN’S
 HOSPITAL- SAN DIEGO’S REPLY
 TO PLAINTIFFS’ OPPOSITION TO
 MOTION TO DISMISS**

DEMAND FOR JURY TRIAL

Date: February 24, 2017
Time: 11:00 a.m.
Place: Courtroom 15B
Judge: Hon. Barry Ted Moskowitz

Trial Date: None Set

24 Defendant, RADY CHILDREN’S HOSPITAL- SAN DIEGO (“RCHSD”)
 25 submits the following memorandum of points and authorities in support of its Reply
 26 to Plaintiffs’ Opposition to RCHSD’s Motion to Dismiss.
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1 **I. SECTION 1557 IS NOT A FEDERAL MEDICAL MALPRACTICE**
2 **STATUTE**

3 Nowhere in their Complaint do Plaintiffs allege that any action by the
4 healthcare providers was the result of the patient’s failure to conform to a sex
5 stereotype. Consequently, Plaintiffs’ discrimination claims fail.

6 Section 1557 of the ACA prohibits discrimination on the basis of protected
7 characteristics. 42 U.S.C. § 18116. Federal anti-discrimination statutes, including
8 Section 1557, do not provide a private right of action for substandard medical care.
9 See *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) (“Even apart from the
10 prison setting it would be extremely odd to suppose that disabled persons whose
11 disability is treated negligently have a federal malpractice claim by virtue of the
12 Americans With Disabilities Act, whereas a sick or injured but not disabled person--
13 a person suffering from an acute viral infection, perhaps, or who has broken his leg,
14 or who has a hernia or an inflamed gall bladder--must be content with the remedy
15 that the state law of medical malpractice provides.”). In other words, merely
16 alleging substandard medical care does not establish a discrimination claim. *Collins*
17 *v. California*, No. S-06-2061 WBS KJM, 2007 U.S. Dist. LEXIS 6302, at *7 (E.D.
18 Cal. Jan. 11, 2007).

19 Here, no discrimination claim exists without allegations that medical care was
20 either inappropriately withheld or inappropriately provided because of a prejudice
21 against some protected characteristic. See *Gonzales v. Marriott Int’l, Inc.*, 142 F.
22 Supp. 3d 961, 983 (C.D. Cal. 2015) (discussing the pleading requirements in a Title
23 VII case which requires that a plaintiff present facts showing a sex stereotype
24 “animated” less favorable treatment.) In the present matter, although the patient was
25 transgender, and although Plaintiffs contend that inappropriate psychiatric care was
26 provided, this alone is insufficient to establish a viable discrimination claim.

27 For this reason, Plaintiffs’ discrimination claims fail.

28

1 **II. PLAINTIFFS DO NOT PLAUSIBLY ALLEGE SEX STEREOTYPING**
 2 **NECESSARY FOR THE SECTION 1557 CLAIM**

3 In their Opposition, Plaintiffs appear to seek a more expansive interpretation
 4 of sex under Title IX to include transgender persons as a protected class. Plaintiffs'
 5 interpretation of Section 1557 and what it prohibits is incorrect. Plaintiffs'
 6 interpretation of *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) is flawed.

7 In *Schwenk*, the Ninth Circuit expressly applied the sex stereotyping theory of
 8 *Price Waterhouse*.¹ See *Schwenk*, 204 F.3d at 1202. The court did not hold that
 9 transgender status is a protected category.² Rather, the court relying on the sex
 10 stereotyping theory, held that “discrimination because one fails to act in the way
 11 expected of a man or a woman is forbidden under Title VII.” *Id.*

12 Moreover, other Ninth Circuit cases agree with this interpretation of *Schwenk*.
 13 See, e.g., *Nichols v. Azteca*, 256 F.3d 864, 874 (9th Cir. 2001) (describing *Schwenk*
 14 as “comparing the scope of the Gender Motivated Violence Act with the scope of
 15 Title VII, which forbids ‘discrimination because one fails to act in the way expected
 16 of a man or woman’”); *Kastl v. Maricopa County Cmty. College Dist.*, 325 Fed.
 17 Appx. 492 (9th Cir. 2009) (unpublished) (“it is unlawful to discriminate against a
 18 transgender (or any other) person because he or she does not behave in accordance
 19 with an employer’s expectations for men or women”).

20 “Discrimination based on a perceived failure to conform to a stereotype

21 _____
 22 ¹ *Price Waterhouse* did not hold that Title VII protections to transgender individuals
 23 should be expanded beyond sex stereotyping. *Price Waterhouse v. Hopkins*, 490
 24 U.S. 228, 251 (1989). *Price Waterhouse* did not involve a claim of transgender
 25 discrimination. Rather, a transgender person, just like anyone else, can bring a sex-
 26 stereotyping gender-discrimination claim under Title VII under a *Price Waterhouse*
 27 theory. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 603
 28 (E.D. Mich. April 15, 2015).

² The position urged by Plaintiffs is a subject pending before the U.S. Supreme
 Court. Whether Title IX’s prohibition against discrimination “on the basis of sex” is
 limited to biological sex discrimination or encompasses a broader definition to
 include gender identity, including transgender status, is an issue before the U.S.
 Supreme Court. See *Gloucester Cnty. Sch. Bd. v. C.G.*, 137 S. Ct. 369 (2016).

1 constitutes actionable discrimination under Title IX.” *Videckis v. Pepperdine Univ.*,
 2 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015); see also *Kastl*, 325 Fed. Appx. 493
 3 (finding the plaintiff stated a prima facie case of gender discrimination under Title
 4 VII on the theory that impermissible gender stereotypes were a motivating factor in
 5 the defendant’s actions against her); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th
 6 Cir. 2011) (“discrimination against a transgender individual because of her gender-
 7 nonconformity is sex discrimination, whether it’s described as being on the basis of
 8 sex or gender”). “Title IX does not prohibit discrimination on the basis of
 9 transgender itself because transgender is not a protected characteristic under the
 10 statute. The Court has found no federal court case that has squarely decided this
 11 issue in the Title IX context.” *Johnston v. Univ. of Pittsburgh of the Commonwealth*
 12 *Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).

13 Here, there are no allegations that this patient was provided inferior medical
 14 care because the patient did not act in a way expected of a male or a female. There
 15 are no allegations of a causal nexus between the alleged wrongful acts by staff and
 16 any discriminatory animus based on sex stereotyping as prohibited by *Price*
 17 *Waterhouse*.³ There are no factual allegations in the Complaint showing
 18 impermissible sex discrimination was a motivating factor in RCHSD’s actions
 19 against this patient during the patient’s care and treatment.⁴ Consequently,
 20 Plaintiffs’ Complaint fails to state a viable claim based on discriminatory
 21 stereotyping.

22

23

24 ³ See *Price Waterhouse*, 490 U.S. at 251, (“The plaintiff must show that the
 25 employer actually relied on her gender in making its decision”).

26 ⁴ Plaintiffs appear to try and discredit the cases cited in RCHSD’s Motion to
 27 Dismiss by claiming they are based on outdated legal analysis. However, these
 28 cases acknowledge the viability of a sex stereotyping theory. The cases cited by
 RCHSD in its Motion to Dismiss merely decline to extend the prohibition beyond
 discrimination based on sex stereotyping.

1 **III. BECAUSE PLAINTIFFS FAIL TO ALLEGE THE REQUISITE**
 2 **INTENT, THE SECTION 1557 VIOLATION AND UNRUH ACT**
 3 **CAUSES OF ACTION FAIL**

4 There are no allegations in the Complaint alleging that prejudice against the
 5 patient's sex was a motivation behind any alleged wrongful act. Plaintiffs merely
 6 contend that substandard treatment was provided, the patient was transgender and
 7 then conclude that discrimination occurred. However, this is insufficient to meet the
 8 pleading requirements for a discrimination claim under federal and state anti-

9 Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a).
 10 The Court "glean[s] from this language of the statute a requirement of underlying
 11 intent, and therefore motivation, on the part of the actor to discriminate *because of*
 12 *one's sex or gender.*" *Lopez v. Regents of the Univ. of Cal.*, 5 F. Supp. 3d 1106,
 13 1123-24 (N.D. Cal. 2013) citing *Wolfe v. Fayetteville, Arkansas Sch. Dist.*, 648 F.3d
 14 860, 865 (8th Cir. 2011). Title IX prohibits *intentional* discrimination. *Kauhako v.*
 15 *Haw. Bd. of Educ.*, No. 13-00567 DKW-BMK, 2015 U.S. Dist. LEXIS 12753, at
 16 *6-7 (D. Haw. Feb. 3, 2015), citing *Alexander v. Sandoval*, 532 U.S. 275, 280, 121
 17 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (holding that Title VI, upon which Title IX is
 18 based, prohibits only intentional discrimination).

19 Likewise, to establish a claim for violation of the Unruh Act, a plaintiff must
 20 establish *intentional* discrimination by a business establishment. *Walsh v.*
 21 *Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1123 (E.D. Cal. 2011). The
 22 complaint must set forth nonconclusory allegations setting forth evidence of
 23 unlawful intent. *Grier v. Brown*, 230 F. Supp. 2d 1108, 1120 (N.D. Cal. 2002)
 24 (dismissing Unruh Act claims where plaintiff pled that defendant "discriminated
 25 against them" and "intended to deprive them" of their civil rights without more
 26 detail because the Unruh Act requires the showing of discriminatory intent).

27 To state a cognizable claim, factual allegations must be enough to raise a right
 28 to relief above the speculative level. *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F.

1 Supp. 2d 1107, 1115 (E.D. Cal. 2011). Further, stray remarks are insufficient to
 2 establish discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, (1989);
 3 *Sneddon v. ABF Freight Sys.*, 489 F. Supp. 2d 1124, 1130 (S.D. Cal. 2007).

4 In *Rumble v. Fairview Health Servs.*, a plaintiff, brought a lawsuit alleging
 5 sex discrimination under the ACA’s Section 1557 and sexual orientation/gender
 6 identity discrimination under a state law. *Rumble v. Fairview Health Servs.*, No. 14-
 7 CV-2037 (SRN/FLN), 2017 U.S. Dist. LEXIS 13316, at *2 (D. Minn. Jan. 30,
 8 2017). Similar in some respects to the allegations in the present case, the *Rumble*
 9 plaintiff alleged that during the course of his medical treatment, defendant
 10 healthcare providers provided poor medical care and subjected him to unnecessary
 11 trauma based on his status as a transgender individual. *Id.* However, unlike the
 12 present matter, the *Rumble* plaintiff adequately alleged discriminatory intent by the
 13 healthcare providers. The *Rumble* complaint included an allegation that in direct
 14 violation of Section 1557, the defendants perpetrated discrimination based upon
 15 plaintiff’s gender identity or transgender status “with malice, deliberate disregard
 16 for, or deliberate reckless indifference to Plaintiff’s rights.” *Rumble v. Fairview*
 17 *Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 U.S. Dist. LEXIS 31591, at *20
 18 (D. Minn. Mar. 16, 2015).⁵ Here, unlike *Rumble*, Plaintiffs’ Complaint fails to
 19 allege any intent to discriminate. There is no allegation in Plaintiffs’ Complaint of
 20 malice, deliberate disregard or reckless indifference. This failure to plead intent, is a
 21 _____

22 ⁵ Although the *Rumble* matter was filed before the Final Rule went into effect on
 23 May 16, 2016, in denying the defendants’ motions to dismiss, the *Rumble* court
 24 relied upon HHS OCR’s opinion letter which stated that Section 1557 “extends to
 25 stereotypical notions of masculinity or femininity.” *Rumble v. Fairview Health*
 26 *Servs.*, No. 14-cv-2037 (SRN/FLN) 2015 U.S. Dist. LEXIS 31591, at *26. The
 27 *Rumble* court found OCR’s interpretation persuasive. “OCR’s interpretation of
 28 Section 1557 persuasively concludes that Section 1557 protects plaintiffs, like
 Rumble, who allege discrimination on the basis of ‘gender identity.’” *Id.* at *28.
 Thus, on March 16, 2015, relying on OCR’s expansive interpretation of “on the
 basis of sex,” the district court denied the defendant healthcare providers’ motions
 to dismiss.

1 basis for the Court to grant RCHSD’s Motion to Dismiss.

2 The Complaint fails to set forth any facts establishing that the use of the
3 feminine pronoun to address a patient who was female at birth was in anyway an
4 intentional act to discriminate against the patient because of the patient’s sex and/or
5 transgender status. Speculation that the alleged offensive conduct occurred because
6 of the patient’s transgender status, does not make a cognizable claim. Therefore,
7 Plaintiffs’ Complaint fails to state viable claims for violations of Section 1557 and
8 Unruh Act violations.

9 **IV. COURTS HAVE STAYED SIMILAR MATTERS PENDING THE U.S.**
10 **SUPREME COURT’S DECISION**

11 On October 28, 2016, the Supreme Court granted certiorari in *Gloucester*
12 *County*, and one of the questions posed is whether Title IX’s prohibition against
13 discrimination “on the basis of sex” includes gender identity discrimination.
14 *Gloucester County School Bd. v. G.G.*, 137 S. Ct. 369 (2016). The “fundamental
15 question of whether Title IX’s prohibition against sex-based discrimination
16 embraces gender identity is squarely before the highest court in the land.” *Rumble*,
17 2017 U.S. Dist. LEXIS 13316, at *11, citing U.S. Supreme Court’s grant of
18 certiorari in *Gloucester Cnty, Sch. Bd. v. C.G.*, 137 S. Ct. 369, (2016).

19 Thus, in *Rumble*, a stay of the matter was issued although the case involves
20 alleged discrimination under Section 1557 before HHS’ Final Rule was
21 implemented. In *Rumble*, the court determined that a stay was necessary because
22 the U.S. Supreme Court’s decision will serve to “simplify Plaintiff’s Section 1557
23 claim and serve the orderly administration of justice.” *Rumble*, 2017 U.S. Dist.
24 LEXIS 13316, at *3.⁶

25 Similarly, a stay was also recently ordered in *Robinson v. Dignity Health*, No.

26 _____
27 ⁶ If the U.S. Supreme Court determines that “on the basis of sex” in the federal anti-
28 discrimination statutes refers only to biological sex assigned to a person at birth,
then Plaintiffs’ Section 1557 claim fails.

1 16-CV-3035 YGR, 2016 U.S. Dist. LEXIS 168613, at *5-6 (N.D. Cal. Dec. 6, 2016)
 2 another case dealing with alleged violation of Section 1557. The *Robinson* court
 3 determined a stay was necessary and proper because “the central issue [in
 4 *Gloucester County*], as here, is whether ‘sex’ encompasses gender identity for
 5 purposes of anti-discrimination protection under [Title IX].” *Robinson*, 2016 U.S.
 6 Dist. LEXIS 168613, at *5-6.

7 Here, Plaintiffs’ claim under the ACA, just like in *Rumble* and *Robinson*, will
 8 be directly affected by the U.S. Supreme Court’s interpretation of Title IX’s phrase
 9 “on the basis of sex.” *Rumble* and *Robinson* are two cases directly dealing with
 10 private causes of action for the purported violation of the ACA, Section 1557. If
 11 Plaintiffs’ argument is correct that the law was well established and clear prior to
 12 HHS’ Final Rule regarding Section 1557 that “on the basis of sex” in Title IX
 13 included prohibition of transgender discrimination, then stays would not have been
 14 issued in both the matters of *Rumble* and *Robinson*. In their Opposition, Plaintiffs
 15 completely fail to address the recent stays in *Rumble* and *Robinson*.

16 **V. THE RECENT NATIONWIDE PRELIMINARY INJUNCTION**
 17 **ESTABLISHES THAT “ON THE BASIS OF SEX” INCORPORATED**
 18 **INTO SECTION 1557 THROUGH TITLE IX IS THE BINARY**
 19 **DEFINITION OF SEX, NOT GENDER IDENTITY**

20 HHS implemented its Final Rule to “clarif[y] and codif[y] existing
 21 nondiscrimination requirements,” incorporated in Section 1557. *Franciscan All.,*
 22 *Inc. v. Burwell*, Civil Action No. 7:16-cv-00108-O, 2016 U.S. Dist. LEXIS 183116,
 23 at *6-7 (N.D. Tex. Dec. 31, 2016), citing 81 Fed. Reg. at 31376. When
 24 implementing the Title IX portion of Section 1557, HHS defined discrimination “on
 25 the basis of sex” to include “gender identity.” 45 C.F.R. § 92.4.⁷

26 ⁷ The Final Rule defines gender identity as “an individual’s internal sense of gender,
 27 which may be male, female, neither, or a combination of male and female, and
 28 which may be different from an individual’s sex assigned at birth.” 45 C.F.R. § 92.4.
 The Final Rule explains that the “gender identity spectrum includes an array of
 possible gender identities beyond male and female.” 81 Fed. Reg. at 31392.

1 Very recently, a federal district court issued a nationwide preliminary
 2 injunction enjoining HHS from enforcing its Final Rule⁸ holding that HHS's
 3 expanded definition of sex discrimination to include gender identity discrimination
 4 "exceeds the grounds incorporated by Section 1557." *Franciscan All.*, 2016 U.S.
 5 Dist. LEXIS 183116, at *47. The Final Rule interpreting "on the basis of sex" to
 6 include "on the basis of gender identity" is contrary to law and exceeds statutory
 7 authority. *Id.* at *62-63.

8 Plaintiffs have not and cannot explain why a preliminary nationwide
 9 injunction was issued in *Franciscan Alliance* and why the U.S. Supreme Court
 10 granted certiorari in *Gloucester County*, if in fact at the time of this patient's
 11 treatment, transgender was a protected class.

12 **VI. MS. PRESCOTT'S INDIVIDUAL CLAIMS ALLEGING SECTION**
 13 **1557 VIOLATION, UNRUH ACT CLAIMS, AND VIOLATIONS OF**
 14 **CA GOVERNMENT CODE SECTION 11135 ARE BARRED FOR**
 15 **LACK OF STANDING**

16 Plaintiffs do not oppose RCHSD's motion that Ms. Prescott cannot bring the
 17 Section 1557 claim, the Unruh Act claims, and the California Government Code
 18 section 11135 claims as an individual. For these reasons, these claims brought by
 19 Ms. Prescott in her individual capacity must be dismissed.

20 **VII. PLAINTIFFS FAIL TO PROPERLY PLEAD CALIFORNIA**
 21 **GOVERNMENT CODE SECTION 11135 CLAIMS**

22 As noted by a federal district court just last year, there is an exhaustion
 23 requirement for a claim brought pursuant to California Government Code section
 24 11135. *J.E.L. v. S.F. Unified Sch. Dist.*, 185 F. Supp. 3d 1196, 1201 (N.D. Cal.
 25 2016) citing *Santos v. Merritt Coll.*, No. C-07-5227 EMC, 2008 U.S. Dist. LEXIS
 26 75496, at *8 (N.D. Cal. July 1, 2008). Moreover, for a Government Code Section

27 ⁸ In its opinion, the *Franciscan Alliance* court even referenced the present matter.
 28 See 2016 U.S. Dist. LEXIS 183116, at *58 n.35, referring to Compl., *Prescott v. Rady Children's Hosp.* — San Diego, No. 16-2408 (S.D. Cal. Sept. 26, 2016).

1 11135 claim, a plaintiff must show likelihood plaintiff will be harmed in future if
 2 injunction not granted. *Blumhorst v. Jewish Family Services of Los Angeles* (2005)
 3 126 Cal. App. 4th 993, 1004. The allegations in Plaintiffs' Complaint do not show
 4 compliance with the exhaustion requirement and do not meet the pleading
 5 requirements. Thus, the Section 11135 claims must be dismissed under Section
 6 1557.

7 **VIII. MS. PRESCOTT CANNOT RECOVER DAMAGES FOR**
 8 **EMOTIONAL DISTRESS SUFFERED BY HER SON**

9 Ms. Prescott is incorrect that she can recover damages for the purported
 10 emotional distress her son suffered before his death. See *Walsh v. Tehachapi*
 11 *Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1127 (E.D. Cal. 2011) (holding that
 12 plaintiff was barred from recovering Decedent's emotional distress as a successor-
 13 in-interest under Title IX.)

14 **IX. PLAINTIFFS' CAUSES OF ACTION FOR VIOLATION OF**
 15 **CALIFORNIA BUSINESS & PROFESSIONS CODE SECTIONS 17200**
 16 **AND 17500 FAIL**

17 There are insufficient allegations of unfair competition and false advertising
 18 pertaining to this case. First, Plaintiffs cannot show the advertising was related to
 19 the care at issue. The patient was admitted to the CAPS unit, rather than the Gender
 20 Management Clinic. The web page statement Plaintiffs contend was false pertains
 21 to children with gender dysphoria deserving a home referring to the Gender
 22 Management Clinic. The care at issue in this case is not care provided at the Gender
 23 Management Clinic.

24 As to the verbal statements, about referring to the patient with a specific
 25 gender pronoun, these statements were not solicitation to convince Ms. Prescott to
 26 purchase goods or services; it was the hospital staff attempting to reassure Ms.
 27 Prescott. Such speech is not commercial in nature and thus does not fall within the
 28 ambit of the False Advertising Act.

1 **UNITED STATES DISTRICT COURT**
2 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

3 **CASE NO. 16-CV-02408**

4 **Katharine Prescott, et al. v. Rady Children's Hospital – San Diego**

5 At the time of service, I was over 18 years of age and not a party to the
6 action. My business address is 701 B Street, Suite 1900, San Diego, CA 92101. I
7 am employed in the office of a member of the bar of this Court at whose direction
8 the service was made. On February 17, 2017, I served the following document(s):

8 **DEFENDANT RADY CHILDREN'S HOSPITAL- SAN DIEGO'S**
9 **REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS**

9 I served the documents on the following persons at the following addresses
10 (including fax numbers and e-mail addresses, if applicable):

11 **SEE ATTACHED SERVICE LIST**

12 [] **(BY COURT'S CM/ECF SYSTEM)** Pursuant to Local Rule, I
13 electronically filed the documents with the Clerk of the Court using the CM/ECF
14 system, which sent notification of that filing to the persons listed below.

14 [] **(BY MAIL)** By Placing a true copy thereof enclosed in a sealed envelope(s),
15 with postage fully prepaid, addressed as per the attached service list, for collection
16 and mailing via regular U.S. Mail.


16 [] **STATE** I declare under penalty of perjury under the laws of the State of
17 California that the above is true and correct.

18 [] **FEDERAL** I declare under penalty of perjury under the laws of the United
19 States that I am employed in the office of a member of the bar of this court at whose
20 direction the service is made.

20 I declare under penalty of perjury under the laws of the United States of
21 America that the above is true and correct.

21 Executed on February 17, 2017, at San Diego, California.

23 Gail A. Deasy
24 (Print Name)

23 
24 _____
(Signature)

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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

CASE NO. 16-CV-02408

Katharine Prescott, et al. v. Rady Children’s Hospital – San Diego

SERVICE LIST

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