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9 UNITED STATES DISTRICT COURT
 10 SOUTHERN DISTRICT OF CALIFORNIA
 11

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

14 Plaintiffs,

15 vs.

16 RADY CHILDREN’S HOSPITAL-
 17 SAN DIEGO,

18 Defendant.
 19

CASE NO. 3:16-cv-02408 BTM(JMA)
 Honorable Barry Ted Moskowitz
 Courtroom: 15B

**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
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26 PLEASE TAKE NOTICE that on December 8, 2017, defendant RADY
 27 CHILDREN’S HOSPITAL-SAN DIEGO (RCHSD) will move this Court for an
 28 Order to Dismiss the following causes of action alleged against defendant RCHSD

1 pursuant to Fed. R. Civ. P. 12(b)(6) on the following grounds:

2 1. Plaintiffs KATHARINE PRESCOTT, an individual, and KATHERINE
3 PRESCOTT, on behalf of KYLER PRESCOTT, a deceased minor's Fourth
4 Cause of Action for purported Violation of California Government Code §
5 11135 (Discrimination Based on Sex) fails to state a claim against RCHSD
6 upon which relief can be granted. (Fed. R. Civ. P. 12(b)(6));

7 2. Plaintiffs KATHARINE PRESCOTT, an individual, and KATHERINE
8 PRESCOTT, on behalf of KYLER PRESCOTT, a deceased minor's Fifth
9 Cause of Action for purported Violation of California Government Code §
10 11135 (Discrimination Based on Disability) fails to state a claim against
11 RCHSD upon which relief can be granted. (Fed. R. Civ. P. 12(b)(6));

12 3. Plaintiff KATHARINE PRESCOTT, on behalf of KYLER PRESCOTT, a
13 deceased minor's Seventh Cause of Action for purported Violation of
14 California Business & Professions Code § 17500 *et seq.*, fails to state a claim
15 against RCHSD upon which relief can be granted. (Fed. R. Civ. P. 12(b)(6));

16 **PLEASE TAKE FURTHER NOTICE** that Per Chamber Rules no
17 appearance or oral argument is necessary unless requested by the court.

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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
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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.
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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
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**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 (9th 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 (9th 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.

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

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

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

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

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

Restitution is restorative in nature. It serves to restore the status quo by returning to the plaintiff funds in which he or she had an ownership interest. *See Rizzo v. Ins. Co. of Pa.*, 969 F. Supp. 2d 1180, 1195 (C.D. Cal. 2013); *see also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003). Here, there are no facts alleged showing Kyler had an “ownership interest” in any money sought to be recovered from RCHSD. The FAC does not allege Kyler Prescott provided money to RCHSD which Kyler Prescott seeks returned. For this reason, 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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10 Bv: /s/ Julie R. Dann
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12 Attorneys for Rady Children’s Hospital -
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FEDERAL COURT PROOF OF SERVICE

CASE NO. 16-CV-02408

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

At the time of service, I was over 18 years of age and not a party to the action. My business address is 701 B Street, Suite 1900, San Diego, California 92101. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On the date below, I served the following listed documents by the method indicated below, on the parties in this action: [See service list provided by Pacer]

- 1. **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)]**
- 2. **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)]**

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

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

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

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

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

Executed on October 26, 2017, at San Diego, California.

Gail A. Deasy
(Print Name)


(Signature)

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SERVICE LIST

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

CASE NO. 16-CV-02408

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