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6
7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE**

11 [REDACTED], an individual; [REDACTED]
[REDACTED] an individual; [REDACTED],
12 an individual; on behalf of themselves and
all others similarly situated,
13

14 Plaintiffs,

15 vs.

16 MELISSA BACELAR, an individual;
WAGMOR PETS, a California non-profit
17 corporation; WYLDER'S HOLISTIC PET
CENTER, INC. dba THE WAGMOR, a
18 Delaware corporation; and DOES 1 through
10, inclusive,
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20 Defendants.
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CASE NO.: 22STCV20771

Hon. Stuart M. Rice – Dept. 1

**REPLY IN SUPPORT OF DEMURRER TO
FIRST AMENDED COMPLAINT**

Date: May 1, 2023

Time: 10:30 a.m.

Dept.: 1

Case Filed: 6/24/22

Trial Date: Not Assigned

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3 **1. INTRODUCTION**

4

5 Plaintiffs' Opposition fails to address the legal issues raised in the moving papers.

6 Most importantly, the FAC contains specific factual allegations which undermine Plaintiffs'

7 claims. For example, Plaintiffs allege that:

8

9 Puppies are "adopted" sight unseen. Potential "adopters" must

10 fill out an application online prior to seeing any dog or puppy in

11 person. If a potential "adopter" is contacted, they are told to

12 pay for the animal in advance... FAC, 11:9-11.

13 Plaintiffs go on to allege, for example, that [REDACTED] found her dog through an Instagram

14 post, signed forms online and paid online, all without ever seeing the dog in person.

15 FAC, 18:3-22. As matter of law, those specific factual allegations take precedence over

16 the general allegation¹ that all three plaintiffs adopted dogs from a physical pet store.²

17 The Pet Store Animal Care Act therefore does not apply to this case. The same

18 allegations undermine her conclusory fraud claim. Any misrepresentation made after she

19 adopted is irrelevant, and, according to the FAC, she made her decision based on an

20 Instagram post, the content of which she does not even mention.

21 Plaintiffs employ three tactics in their Opposition. First, they materially misstate the

22 law, including both the Los Angeles Municipal Code and the Health & Safety Code.

23 Second, they ignore the arguments made in the moving papers, and not just those

24

25

26 ¹ On demurrer, specific allegations take precedence over general allegations. "Under this

27 principle, it is possible that specific allegations will render a complaint defective when the

28 general allegations, standing alone, might have been sufficient." See *Medical Marijuana, Inc. v. ProjectCBD.com*, 6 Cal.App.5th 602 at 619 (2016), citing *Perez v. Golden Empire Transit Dist.*, 209 Cal.App.4th 1228 (2012).

1 mentioned above. Plaintiffs also ignore the myriad of contradictory factual allegations.
2 For example, plaintiff ██████ alleges that, upon first seeing his dog in Defendants' facility,
3 it was covered in urine and feces. He claims that he "wanted to adopt her and get her out
4 of these horrible conditions." FAC, 14:14-15. Then, he alleges that "It was only because
5 ██████ believed that the higher price paid for the puppy meant a higher
6 level of care . . ." FAC, 17:19-22. The FAC contains numerous other contradictory factual
7 allegations, as pointed out in the moving papers.³ Plaintiffs ignore several other
8 arguments in the moving papers. The Court should treat that as an admission that the
9 arguments are meritorious, which of course they are.

10
11 Finally, while ignoring many of the arguments in the moving papers, Plaintiffs
12 barrage the Court with citations from their 227 paragraph FAC, knowing that Defendants
13 will never have enough time to mention them all, let alone discuss them individually in a
14 reply brief.⁴ But volume and vitriol are no substitute for merit. And, the specific factual
15 allegations in the FAC, e.g., the one referenced above, are enough to preclude liability.
16 The demurrer should be sustained, without leave to amend.

17
18 **2. THE OPPOSITION MATERIALLY MISSTATES THE RELEVANT LAW, AND**
19 **CITES AN UNPUBLISHED CASE**

20
21 Plaintiffs repeatedly cite their own pleading for propositions of law. That is
22 improper on its face. More importantly, however, Plaintiffs materially misstate the law.

23
24 ² Plaintiffs never say "physical" pet store, but the statutory definition of "pet store" is a
25 retail establishment open to the public. So, an online pet store is not, for purposes of the
statute, a "pet store."

26 ³ Another glaring example: Plaintiffs allege that their dogs were not seen by a vet before
27 adoption, but then go on to allege that they were given a link to a medical portal which
28 reflected vaccinations, among other things. And, they allege that they were told to come
back to get the next vaccination, and that they received vouchers to get vaccinations and
have the dogs fixed by a licensed veterinarian at appropriate ages.

⁴ Indeed, it is impossible to adequately discuss all the contradictory nonsense contained in
the 48-page FAC in 15 pages of moving papers.

1 For example, in the first sentence of their Factual Background Section, Plaintiffs tell the
2 Court that:

3

4 On April 20, 2016, Los Angeles County began prohibiting the
5 sale of “commercially bred dogs, cats and rabbits in pet stores,
6 retail businesses or other commercial establishments.” See
7 FAC, ¶ 1 citing Section 53.73 to Article 3, Chapter 5 of the Los
8 Angeles Municipal Code. Opp., 2:8-10.⁵

7

8 That claim is problematic on its face. The Los Angeles Municipal Code is a city law, not a
9 county law. And, the citation should not be to the FAC, but rather to the Code. But, much
10 more importantly, Plaintiffs materially misstated the law.

11

12 Section 53.73 of the Los Angeles Municipal Code did not prohibit the sale of dogs.
13 In the Opposition to the Demurrer, Plaintiffs omitted the key phrase, “**unless the dog is . .
14 . obtained from an animal shelter [or] a non-profit rescue organization registered
15 with the Department of Animal Services.**”⁶ And yes, Wagmor Pets is a non-profit and
16 has registered, so the omission is critical. Plaintiffs’ citation to their own FAC is doubly
17 ironic, in that the FAC actually cites the Municipal Code correctly, including the passage
18 omitted in the Opposition to the Demurrer.

19

20 Similarly, Plaintiffs’ Opposition asserts that, “A rescue group providing these types
21 of animals for adoption...must not have obtained animals in exchange for payment from
22 any person.” Opp., at ¶¶ 2 and 36 and Opp., 2:16-18, emphasis in original.⁷ Again,

23

24 ⁵ The Court may recall the first status conference in which there was a brief discussion of
25 this passage in the FAC. Defense counsel pointed out that the allegation seemed
26 irrelevant, in that Plaintiffs are not suing on the Los Angeles Municipal Code, and there
27 was a discussion about whether a motion to strike would be appropriate to handle it.
28 Based on the Opposition to the Demurrer, it now seems that Plaintiffs may be planning on
asserting such a claim. If so, then they need to say so explicitly, as the claim may well be
pre-empted by State law.

⁶ The Opposition to the Demurrer repeats the incorrect citation to the Municipal Code,
again dropping the exception for rescue organizations, at Opp., 12:20-22.

⁷ Plaintiffs repeat that same language at Opp., 3:15-16.

1 Plaintiffs cite their own pleading instead of the statute. And again, Plaintiffs misstated the
2 law by omitting key language, this time underlying their own false claim.

3

4 Health & Safety Code §122354.5(e)(1)(A)(2), the section on which Plaintiffs rely in
5 the FAC, says that a rescue group offering dogs for adoption in a pet store cannot, “obtain
6 animals in exchange for payment or compensation **from any person that breeds or**
7 **brokers animals.**” Emphasis added. Plaintiffs simply omitted the last eight words of the
8 relevant statute. Under the actual law, it is permissible for a rescue organization to bribe
9 an abusive or irresponsible dog owner to turn over a puppy, for example, so long as the
10 owner is not a breeder or broker.⁸

11

12 The Opposition even goes so far as to cite an unpublished decision, “Pretscher-
13 Johnson v. Aurora Bank FSB, 2015 WL 9455465, n.10 at *7 (Cal. Ct. App. Dec. 23,
14 2015).” The fact that there is no California Reporter citation might have given counsel a
15 clue that the case was not certified for publication, and no doubt there is a red marker at
16 the top of the page on Westlaw. And, yet again, Plaintiffs’ citation is not even accurate;
17 the unpublished opinion says the exact opposite of what they claim it says.

18

19 The balance of Plaintiffs’ Opposition is similarly unreliable. It is unreliable in its
20 citations to the law, in its citations to the pleadings and in its failure to respond to the
21 arguments made in the moving papers.

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⁸ And again, Plaintiffs miscite their own pleading. The Court will note that Plaintiffs cited to paragraphs 2 and 36 of the FAC, both of which correctly include the last five words of the statute. Plaintiffs got it right again in paragraph 9 of the FAC. But, in their Opposition, they decided to modify the statute to suit their needs.

1 **3. PLAINTIFFS ALLEGE THAT THEY ADOPTED ONLINE, AND THUS THE PET**
2 **STORE ANIMAL CARE ACT DOES NOT APPLY**

3
4 The PSAC applies only to animals adopted at a “pet store,” which is defined as a
5 **retail** location **open to the public**, which **sells** animals. While Plaintiffs repeatedly make
6 conclusory allegations of having adopted dogs from a “pet store,” their specific factual
7 allegations contradict that conclusion.

8
9 For example, plaintiff Moore expressly alleges that she found a dog on Instagram,
10 signed paperwork online and paid online. FAC, 18:3-22. When she did those things, she
11 adopted the dog. She owned the dog, and if Defendants had not turned it over, Moore
12 could have sued. She did not adopt a dog from a pet store,⁹ nor any other physical
13 location. The fact that Moore later collected the dog from Defendants’ premises does not
14 matter one whit, because that is not where she adopted it.¹⁰ Even if Defendants were
15 otherwise in violation of the law, which they absolutely were not, Moore has no claim.

16
17 And this is not an issue with Moore alone. Quite to the contrary, Plaintiffs
18 specifically allege that adoptions are all online. The FAC specifically states:

19
20 Puppies are “adopted” sight unseen. Potential “adopters” must
21 fill out an application online prior to seeing any dog or puppy in
22 person. If a potential “adopter” is contacted, they are told to
23 pay for the animal in advance... FAC, 11:9-11.

24
25 _____
26 ⁹ Even a website that sells dogs is not a retail location open to the public, and there is not
27 a “pet store” within the meaning of the PSAC, which explains why there are, in fact
28 numerous websites that do in fact sell dogs. As noted in the moving papers, the statutes
specifically allow breeders to sell dogs, without a limit on price, and of course they do so.
No one, including a breeder, can have a retail location that sells dogs, so online or
through print advertisements is the way it is usually done.

¹⁰ Counsel will not make the obvious joke about Schrodinger’s dog.

1 As Plaintiffs are fond of saying, the Court must accept the allegations as true for purposes
2 of demurrer.¹¹ It does not matter how many times Plaintiffs say, “pet store,” it does not
3 change the fact that dogs are -- according to Plaintiffs’ own FAC – adopted online.

4
5 Plaintiffs ignore another important issue with respect to the PSAC: the difference
6 between adoption and sale. Plaintiffs specifically allege that Wagmor Pets is a non-profit,
7 and they refer to “adoption” of dogs no less than 64 times in the FAC. They refer to
8 “donations” 18 times. Plaintiffs specifically allege that they thought that 100% of their
9 “donations” went to medical bills. FAC, 39:23-25. Donations are: (1) made to a non-
10 profit (such that it is plausible that 100% of donations go to medical bills); and (2) tax
11 deductible. That is very different than a sale. Pet stores are for-profit entities that sell
12 animals in a retail location open to the public. They do as they wish with the purchase
13 money. Under the law, they cannot sell dogs, cats or rabbits – at all, at any price. Non-
14 profits can display dogs for adoption at a pet store, with the provisions set forth in Health
15 & Safety Code §122354.5.

16
17 A non-profit that adopts out dogs from its own facility is not a “pet store”¹² within the
18 statutory scheme because it does not “sell” animals. And, unless it sells other goods on
19 the side, it is not a “retail” establishment either. That would be true, even if the facility
20 were “open to the public,” which Wagmor Pets’ facility is not.¹³ But again, Plaintiffs have
21 expressly alleged that the dogs were not adopted in person, but rather online.

22
23
24 ¹¹ And, in this instance, Plaintiffs are actually correct. Defendants have never operated a
25 pet store, not under any definition. One defendant did operate a doggie hotel, which
26 closed as a result of the Covid crisis. The non-profit defendant housed dogs in the former
27 doggie hotel, but the facility was no longer open to the public and the dogs were not
28 displayed for adoption. As Plaintiffs allege, adoptions were online or at special events
held in various locations.

¹² The first provision of the PSAC, Health & Safety Code §122350, defines “pet store” as
“a retail establishment open to the public and selling or offering for sale animals...”

¹³ It is the former doggie hotel, which is now used to house rescue dogs. It is not open to
the public.

1 4. **██████████ NEVER ADOPTED A DOG FROM DEFENDANTS AND HAS**
2 **NO STANDING TO SUE**

3
4 Jackson did not adopt a dog from Defendants, she did not sign any adoption
5 papers, and she did not pay/donate any money to Defendants. True enough, the FAC
6 makes general allegations that “each” of the plaintiffs adopted dogs and that they each
7 paid over \$500. See FAC, 5:9-11. Reading those general allegations, there were
8 supposedly three dogs adopted and over \$1,500 paid. But the FAC also makes more
9 specific allegations. In fact, there were just two dogs. And, in connection with the
10 adoption of the dog originally named Heron:

11
12 ██████████ was prescribed an Emotional Support Animal (“ESA”)
13 from his long-term therapist and was specifically searching a
14 dog to be his ESA. FAC 14:1-3.

15 And,

16 ██████████ boyfriend, executed the paperwork to
17 purchase “Heron” later named “Kali.” FAC 5:25-26.

18
19 Those allegations conflict with the claim that Jackson adopted Heron.¹⁴ Alfano, not
20 Jackson, adopted Heron. Alfano signed the paperwork and paid the adoption fee.

21
22 Where specific allegations conflict with general allegations, it is the specific
23 allegations which control. “Under this principle, it is possible that specific allegations will
24 render a complaint defective when the general allegations, standing alone, might have
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28 ¹⁴ Defendants note that, in this passage, Plaintiffs use the term “purchase.” But Defendants have also alleged the money was a donation and that it would all go to medical expenses.

1 been sufficient.”¹⁵ And so it is in this case. The FAC contains general allegations that
2 each Plaintiff adopted a dog and paid over \$500, but it also contains more specific
3 allegations that are to the contrary.

4
5 Jackson did not sign adoption papers, nor did she give Defendants any money –
6 not as a purchase price, a donation, nor anything else. That will be easy enough to prove.
7 Jackson should not ask for leave to amend to make factual allegations that conflict with
8 the FAC and which would be false.

9
10 **5. THE FRAUD CAUSES OF ACTION ARE HOPEFULLY VAGUE**

11
12 To survive a demurrer, Plaintiffs must allege how, when, where, to whom, and by
13 what means the representations were made.¹⁶ None of that appears in the FAC.
14 Instead, Plaintiffs offer a kitchen sink allegation:

15
16 Defendants made material representations to Plaintiffs, by
17 means of oral representations, labelling, advertisements,
18 promotions, and/or marketing, that 100% of donations received
go to medical bills, when, in fact, they do not. FAC, 39:23-25.

19 Which Defendant made that representation? When? In which “labelling, advertisements,
20 promotions, and/or marketing” do these misrepresentations appear? The fraud
21 allegations are not remotely specific enough to pass muster.

22
23 The allegations are, in fact, willfully vague. Note the word “labeling.”¹⁷ Were these
24 dogs labelled? And what about the phrase “and/or”? Which of the things in that list
25 actually happened? The allegations are nothing more than boilerplate. And these are
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¹⁵*Medical Marijuana, Inc. v. ProjectCBD.com*, 6 Cal.App.5th 602 at 619 (2016), citing
Perez v. Golden Empire Transit Dist., 209 Cal.App.4th 1228 (2012).

¹⁶ See *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal.App.4th 153 at 157 (1991).

1 fraud allegations. Plaintiffs contend that material misrepresentations were made to them,
2 that they relied on those misrepresentations, and that Defendants are now liable for fraud
3 and punitive damages. Yet, they cannot even allege the very basics.

4

5 Plaintiffs argue that they do not have to allege fraud specifically, because
6 Defendants know what they did. That is utter nonsense. Defendants have no clue what
7 “oral representations” were allegedly made, by whom or when. To Defendants’
8 knowledge, there were none. Moreover, Defendants know of no writings that say that
9 100% of all donations go to medical bills. Defendants have never heard of dogs being
10 labelled. Plaintiffs’ entire case is a complete fabrication, and Defendants cannot be told
11 “you know what you did” in lieu of the specific pleading requirements that apply in fraud
12 cases.

13

14 The fraud allegations are worse than just vague, they are, yet again, contradictory.
15 As noted above, Moore adopted online, based on an Instagram post. She does not claim
16 to have talked to anyone; she certainly does not claim to have even met defendant
17 Melissa Bacelar, whom Moore has sued for intentional fraud. Moore does not say she
18 heard or read anything beyond whatever was in that Instagram post. And she never says
19 what was in that post.

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¹⁷ Ironically, defense counsel inadvertently left out that word in the moving papers, but it appears in the FAC. Counsel noticed the error in drafting this Reply.

1 **6. PLAINTIFFS ARE NOT ENTITLED TO A CAUSE OF ACTION FOR UNJUST**
2 **ENRICHMENT, BECAUSE NO SUCH CLAIM EXISTS**

3
4 Unjust enrichment is a remedy, not a stand-alone cause of action.¹⁸ Plaintiffs
5 admit that, but nonetheless argue that they are allowed to have a stand-alone cause of
6 action for unjust enrichment so long as the facts alleged state any cause of action at all.
7 That, of course, is utter nonsense. If that were permissible, every plaintiff would simply
8 make their factual allegations, then assert every cause of action on the books, leaving the
9 defendants and the courts to sort it out. When challenged on demurrer, the plaintiff would
10 say, “well, maybe I do not have a cause of action for breach of fiduciary duty, but I do
11 state one for negligence, so my breach of fiduciary duty claim is ok, too, and I should be
12 allowed to keep it.”

13
14 In support of their position, Plaintiffs cite an unpublished case, *Pretschner-Johnson*
15 *v. Aurora Bank FSB*, 2015 WL 9455465, n.10 at *7 (Cal. Ct. App. Dec. 23, 2015). The
16 citation is improper, of course, but ironically the case says just the opposite. Plaintiffs cite
17 *Kamen v. Lindly*, 94 Cal.App.4th 197 (2001), which does not even mention unjust
18 enrichment. Then they cite *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th
19 Cir. 2015), which correctly states, “in California, there is not a standalone cause of action
20 for ‘unjust enrichment,’ which is synonymous with ‘restitution.’”

21
22 The 9th Circuit, while not controlling authority, is correct in its analysis of California
23 law. There is not a standalone cause of action for unjust enrichment under California law.
24 Plaintiffs are not entitled to one. If they have some other cause of action, then they

25
26
27 ¹⁸ See *City of Oakland v. Oakland Raiders*, 83 Cal.App.5th 458 at 477 (2022), citing *De*
28 *Havilland v. FX Networks, LLC*, 21 Cal.App.5th 845 at 870 (2018) and *Bank of New York*
Mellon v. Citibank, N.A., 8 Cal.App.5th 935 at 955 (2017).

1 should have pled it. If they think of one now, perhaps they will move for leave to amend to
2 add something new. But that seems unlikely, to put it mildly.

3

4 **7. CONCLUSION**

5

6 Plaintiffs' conduct in this matter has been despicable. They filed a frivolous,
7 vicious, insulting, and conflicting complaint, then published it all over the Internet, with
8 banners reminding Defendants that the Anti-SLAPP Statutes make it difficult to sue for
9 defamation based on material alleged in litigation. The FAC is propaganda; it is not an
10 appropriate pleading. The demurrer should be sustained, without leave to amend, and
11 this malicious action put to an end before it causes any further damage to Defendants or
12 wastes any more of this Court's time.

13

14 DATED: April 21, 2023

LEONARD, DICKER & SCHREIBER LLP

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By: Steve Schuman
Steven A. Schuman
Attorneys for Defendants

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PROOF OF E-SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am at least 18 years old and not a party to the within action; my business address is 10940 Wilshire Boulevard, Suite 2100, Los Angeles, California 90024-3963.

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I electronically served the following document(s): **REPLY IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT.**

I electronically served the documents as follows:

Name: Howard K. Alperin, Esq. **Email:** halperin@raineslaw.com
 Madeline J. Suchard, Esq. msuchard@raineslaw.com

on April 21, 2023, by use of computer and the transmission was reported as complete and without error.

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

Executed on April 21, 2023, at Los Angeles, California.

Peggy Young _____
Peggy Young