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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

RADY CHILDREN'S HOSPITAL-SAN DIEGO,

Defendant.

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

Honorable Barry Ted Moskowitz
Courtroom 15B

REPLY TO PLAINTIFFS' OPPOSITION TO 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.

Trial Date: None Set

Defendant, RADY CHILDREN'S HOSPITAL- SAN DIEGO ("RCHSD") submits the following reply to Plaintiffs' opposition to RCHSD's Motion to Dismiss portions of Plaintiff's First Amended Complaint.

I. KYLER PRESCOTT'S SEVENTH CAUSE OF ACTION FOR VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTIONS 17500 ET SEQ. SHOULD BE DISMISSED DUE TO FAILURE TO ALLEGE ACTUAL RELIANCE BY KYLER PRESCOTT

Plaintiffs oppose RCHSD's motion to dismiss arguing that the FAL claim is brought by Katharine Prescott only and is not brought on behalf of Kyler. (Pl.'s Oppo. ECF No. 28, 14:8-9.) However, the First Amended Complaint ("FAC") alleges a FAL claim on behalf of Kyler by stating:

> 115. ***Plaintiffs*** incorporate by reference each and every allegation in the foregoing paragraphs of this Complaint….
>
> 118. ***Plaintiffs are*** informed and believe, and thereupon allege, that RCHSD intended to sell services by engaging in advertising…
>
> 119. As a direct and proximate result of RCHSD's unfair acts and practices described herein, Katharine and ***Kyler have*** suffered economic injury, including but not limited to the loss of money and/or property, such as medical and hospital costs, counseling fees, travel expenses, and other out-of-pocket expenses…
>
> 122. ***Plaintiffs are*** entitled to restitution of all monies paid to RCHSD as a result of Defendant's false advertising.
>
> 123. ***Plaintiffs have*** assumed the responsibility of enforcement of the laws and lawful claims specified herein….
>
> 124. ***Plaintiffs*** seek relief as set forth below.

(emphasis added, FAC ECF No. 24, 22.)

In the Order dated September 27, 2017, this Court granted RCHSD's Motion to Dismiss Kyler Prescott's FAL claim after determining the Complaint did "not allege that Kyler actually relied on RCHSD's misrepresentations" and the Complaint "failed to allege actual reliance as to Kyler." (Order, 17:27, ECF No. 22.) The FAC has not cured this defect. Actual reliance by Kyler Prescott is not alleged anywhere in the FAC. For this reason, RCHSD's motion to dismiss should be granted as to the purported FAL claim brought on behalf of Kyler Prescott.

II. KATHARINE PRESCOTT LACKS STANDING, INCLUDING ASSOCIATIONAL STANDING, TO BRING CAL. GOV'T CODE § 11135 CLAIMS ON HER OWN BEHALF

In her opposition, Katharine Prescott appears to contend she allegedly suffered a separate and direct injury supporting a purported independent associational discrimination claim. (Pl. Oppo. ECF No. 28, 5:12-16.) However, Katharine Prescott's associational standing argument fails.

Glass v. Hillsboro Sch. Dist. IJ, 142 F. Supp. 2d 1286. 1292 (D. Or. 2001), cited in Footnote 5 of Plaintiff's Opposition to RCHSD's motion to dismiss, supports a dismissal of Ms. Prescott's Cal. Gov't Code § 11135 claims (herein "Section 11135 claims"). In *Glass v. Hillsboro*, parents of students brought a lawsuit against a defendant school district alleging violation of the Americans with Disabilities Act and the Rehabilitation Act contending their independent autism specialists were denied the same type of access to the district's special education classrooms that the district allowed in regular education classrooms. *Id*. at 1287. The parents alleged purported associational discrimination claims contending their individual right to sue arose out of their association with their disabled children. *Id*. at 1287-1288. The defendant school district filed a motion to dismiss the claims of the plaintiff parents arguing the parents failed to allege a separate, direct injury as a result of the alleged discrimination. *Id*. at 1287.

Recognizing the distinction between a separate, direct injury, which is actionable, and a derivative-type injury, which is not, the district court granted the motion to dismiss. *Id*. at 1290 citing *Simenson v. Hoffman*, 1995 U.S. Dist. LEXIS 15777, 1995 WL 631804 (N.D.Ill. 1995). It held the parents failed to allege any specific, direct, and separate injury as a result of association with their disabled children. *Glass v. Hillsboro*, 142 F. Supp. 2d at 1293. The parents had no personal right, separate and independent of their children's placement in the district's school, to have their experts observe the district's classrooms. The school district thus did not deny the parents any separate benefit to which they were entitled. The parents'

attempt to gain access for their experts to the special education classroom related solely to their children's education, and was not an attempt to exercise some independent and separate right to have access to the classroom for their own benefit. *Id*. at 1292.

The analysis set forth in *Simenson v. Hoffman*, No. 95 C 1401, 1995 U.S. Dist. LEXIS 15777, (N.D. Ill. Oct. 20, 1995) is also helpful to understanding whether a parent has standing to bring an associational discrimination claim. In *Simenson v. Hoffman*, a two-year old child, Jonathan, was disabled by, among other things, a severe genetic skin disorder that caused numerous visible lesions on his face and chest. Jonathan became ill with what his regular pediatrician diagnosed as probable flu, but eventually became much worse, causing his parents to seek medical treatment from different providers. Jonathan was scheduled on an emergency basis to see Dr. Hoffman, a physician near retirement who no longer took pediatric patients. In the examining room and without first looking at Jonathan, Dr. Hoffman asked the parents to describe his condition. The mother recounted the various symptoms. The father removed Jonathan's coat, at which point Dr. Hoffman saw the lesions and "yelled that he would not treat 'that sick child.'" *Simenson*, 1995 U.S. Dist. LEXIS 15777, *3. The opinion describes:

> Hoffman then yelled at the Simensons, telling them to take Jonathan to his own pediatrician. [The mother] replied that they had tried, but Dr. Greenwald was on vacation and they were concerned about Jonathan's condition. She asked Hoffman to listen to Jonathan's lungs to see if he had pneumonia. Hoffman refused, became hostile, said loudly that he was "not getting in the middle of this," and said that Jonathan should see other doctors. * * * He then yelled at the Simensons to "get out of the office", pointed to the door, and walked out of the examining room.

1995 U.S. Dist. LEXIS 15777, *4.

Plaintiffs brought suit alleging: (1) violation of the public accommodations provision of the ADA, 42 U.S.C. § 12182(a) by discriminating against Jonathan, because he had a disability; (2) violation of 42 U.S.C. § 12182(b)(1)(E) by

discriminating against the Simensons for associating with Jonathan; (3) violation of the Rehabilitation Act of 1973, Sec. 504, 29 U.S.C. § 794(a); and (4) intentional infliction of emotional distress on plaintiffs due to Dr. Hoffman's actions. 1995 U.S. Dist. LEXIS 15777, at *5. Defendants argued the plaintiff parents failed to state a claim because they suffered no discrimination (i.e., the child, not the parents, was denied medical services) and had no standing to sue. Plaintiffs had not stated a cause of action in Count II for associational discrimination because the Simensons suffered no discrimination as a result of their association with a disabled individual. Defendants argued Jonathan, not the Simensons, was denied medical services, and therefore the Simensons had no standing to sue under Title III of the ADA. 1995 U.S. Dist. LEXIS 15777, at *13-14. The parents, in turn, argued that the denial of medical services to the child was a separate and distinct denial of services to them, in that "they were ejected from the medical center because of Hoffman's refusal to treat Jonathan, and thus were barred from the medical center based on Jonathan's disability." 1995 U.S. Dist. LEXIS 15777, *16.

In determining whether the parents had standing to bring their claim, the *Simenson* court noted "the treatment of the child is at the center of the dispute." 1995 U.S. Dist. LEXIS 15777, *16. The only relevant question "is whether the [parents] suffered a separate injury when Hoffman refused to treat their child and ejected him from the facility." *Id.* The court rejected the parents' theory of separate injury, reasoning that:

> Denial of admission to a movie theater or a hotel constitutes a separate injury because the companion is denied the use of the service or facility. The [parents] were not at the medical center for any purpose other than to seek treatment for Jonathan. Jonathan's ejection, and that of his parents, was merely the final act in the decision to deny him medical treatment. The [parents'] claim for associational discrimination must be dismissed.

1995 U.S. Dist. LEXIS 15777, *16.

The *Simenson* court's movie theater analogy sheds light on Katharine

Prescott's purported associational discrimination claim. Everyone, generally, has the right to go into a movie theater. If a non-disabled companion is excluded from the theater because of his/her association with a disabled individual (for example, no room in the theater for wheelchairs), then the non-disabled companion suffers direct harm to his/her own independent right to be in the theater because of the association with a disabled person. Contrast this with the situation at issue in *Simenson*, where the reason the parents were in Dr. Hoffman's office was to obtain treatment for their son. They sought no treatment for themselves, and his ejection from the clinic, while arguably may have caused them distress, did not deny them some separate benefit to which they were entitled. If the parents were also sick and had expected treatment but were ejected from the clinic because of their son's disability, it would likely be a different case.

In the present matter, Katharine Prescott cannot align her Section 11135 claims with the *Simenson* theater analogy. Katharine Prescott cannot allege and prove that she, not Kyler, had a right to defendant's services, and that she was discriminated against in obtaining those services solely because she was associated with Kyler, a purported disabled individual. Katharine Prescott's situation is analogous to those in which associational discrimination claims have been dismissed including *Glass v. Hillsboro* and *Simenson v. Hoffman*. Therefore, her individual Section 11135 claims should be dismissed.

III. *LOEFFLER V. STATEN* IS DISTINGUISHABLE

The matter of *Loeffler v. Staten Island Univ. Hosp*., 582 F.3d 268, (2d Cir. 2009), relied upon by plaintiffs to support Ms. Prescott's alleged associational standing argument, is distinguishable. The issue in *Loeffler*, was whether 29 U.S.C. § 794(a) limits the broader language of 29 U.S.C. § 794a(a)(2) so that non-disabled persons have standing for denied benefits when a hospital relies on them to help interpret for a deaf patient. In *Loeffler*, the hospital conscripted 17-year-old and 13-year-old plaintiffs, children of a deaf patient, to serve as interpreters, going so far as

to give one of the children a pager so she could be "on call," and causing both children to miss more than a week of school. *Id*. at 272-73. The children had statutory standing under the Rehabilitation Act ("RA") to bring suit for being compelled to provide sign language interpretation, forced truancy from school and involuntary exposure to their father's suffering in the hospital during his hospitalization. *Id*. at 280-281.

The *Loeffler* court construed the standing provision of 29 U.S.C. § 794a(a)(2) as being distinct from the provision prohibiting discriminatory conduct, 29 U.S.C. § 794(a). *Loeffler*, 582 F.3d at 280. The court construed the standing provision of the RA as broadly as possible under the Constitution, irrespective of 29 U.S.C. § 794(a). *Id*. It held that "the type of injury a 'person aggrieved' suffers need not be 'exclusion from the participation in, ... denial of the benefits of, or ... subjection to discrimination under any program or activity receiving Federal financial assistance.'" *Id*. at 280. Instead, a non-disabled plaintiff need only establish "an injury causally related to, but separate and distinct from, a disabled person's injury under the [RA]."[1] *Id*.

The reasoning and facts of *Loeffler* are distinguishable. Katharine Prescott's standing is not subject to the requirements and provisions of the Rehabilitation Act of 1973. Moreover, there are no facts showing Ms. Prescott was compelled to provide sign language interpretation. Nor are there any facts showing Ms. Prescott experienced forced truancy from school. Therefore, the claims brought by the parents in *Glass v. Hillsboro* and *Simenson v. Hoffman* are more analogous to Ms. Prescott's claims. Consequently, Ms. Prescott lacks standing.

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[1] The *Loeffler* court observed "[A]ny person aggrieved by any act or failure to act by any recipient of Federal assistance" under the RA may bring suit. *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 280 (2d Cir. 2009), citing 29 U.S.C. § 794a(a)(2). However, Cal. Gov't Code § 11135 contains no language similar to 29 U.S.C. § 794a(a)(2). Thus, the broad interpretation by the *Loeffler* court of the standing provision of the RA does not apply to the present case.

IV. *D. K. V. SOLANO CTY. OFFICE OF EDUC.* SUPPORTS DISMISSAL OF MS. PRESCOTT'S PURPORTED SECTION 11135 CLAIMS

The matter of *D.K. ex rel. G.M. v. Solana Cty. Office of Educ*., 667 F. Supp. 2d. 1184 (N.D. Cal. 2009) addressed whether a parent of a child alleged to have been the subject of discrimination could bring an associational claim under Section 11135(d). In *D.K. v. Solano Cty. Office of Educ*., the Defendant "purportedly told [a plaintiff parent] that she could no longer visit [the child's] classroom without receiving permission from her county supervisor. *D.K. v. Solano Cty. Office of Educ*., 667 F. Supp. 2d 1184, 1188 (E.D. Cal. 2009); see also *D.K. v. Solano Cty. Office of Educ.*, No. 2:08-cv-00534-MCE-DAD, 2008 U.S. Dist. LEXIS 101169, at *6-7 (E.D. Cal. Dec. 12, 2008) (stating "[o]n or around April 23, 2007, SCOE purportedly told GM that she could no longer visit DK's classroom without receiving permission from her county supervisor.")

As to the plaintiffs' First Amended Complaint, the district court dismissed the parent plaintiff's purported Section 11135 claims. *D.K. v. Solano Cty. Office of Educ. (SCOE)*, No. 2:08-cv-00534-MCE-DAD, 2008 U.S. Dist. LEXIS 101169, at *18 (E.D. Cal. Dec. 12, 2008). In dismissing the parental claims, the district court held that the plaintiff parent who had been told she could no longer visit her child's classroom could not bring an individual claim under Section 11135 because the parent did not allege any facts suggesting that she had been denied any benefits or was discriminated under any program or activity that has been funded directly by the State of California. *Id*.; see also Cal. Gov. Code § 11135. Consequently, the *D.K.* court considered not only the federal claims, but also the parent's claims brought under the associational provision under Section 11135.

Similarly, in the present matter medical and healthcare services provided by RCHSD to Kyler Prescott were not services provided to Ms. Prescott. Ms. Prescott was not a patient of RCHSD. She was not the individual receiving the medical care

and treatment at the RCHSD facility.

A plaintiff's obligation is to "provide the grounds of his entitle[ment] to relief" which requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal quotations omitted). Katharine Prescott's status as the mother of Kyler Prescott alone does not create standing to bring a Section 11135 claim.[2] The FAC does not set forth any facts showing because of her association with Kyler Prescott, Ms. Prescott was denied full and equal access to the benefits of, or was subjected to discrimination under, any program or activity. Cal. Gov't Code § 11135. Instead, the FAC alleges that RCHSD "discriminated against Kyler, resulting in *his inability* to access necessary services and treatment during a dire medical crisis." (emphasis added, FAC, ¶ 8.) However, the FAC does not allege facts showing denial of any services, programs and activities to Ms. Prescott because of her association with Kyler. (See FAC, ¶ 87.) A formulaic recitation of the elements of a Section 11135 claim on Ms. Prescott's behalf is insufficient to overcome RCHSD's motion to dismiss.

Because Katharine Prescott was not the one allegedly denied medical services and benefits, Ms. Prescott's purported Section 11135 claims fail to state a cause of action. Katharine Prescott lacks standing to sue for any purported violation of Cal. Gov't Code § 11135 under the facts alleged in Plaintiffs' FAC.

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[2] This is analogous in many respects to state cases holding a duty of care is not extended to patient relatives. See *Huggins v. Longs Drug Stores Cal., Inc*., 6 Cal. 4th 124, 127, 24 Cal. Rptr. 2d 587, 588, (1993) [no duty to parent who administered overdose of drugs to child based on pharmacist's missatement of treating physician's instructions]; *Ess v. Eskaton Props*., 97 Cal. App. 4th 120, 129, 118 Cal. Rptr. 2d 240, 247 (2002) [sister of woman who developed pressure ulcer in nursing home and was sexually assaulted could not seek damages for emotional distress as a direct victim because her sister was the patient and she had no special relationship with the nursing home]; *Klein v. Children's Hosp. Med. Ctr*., 46 Cal. App. 4th 889, 899, 54 Cal. Rptr. 2d 34, 40 (1996) [parents' negligent infliction of emotional distress claims failed because no duty was owed by the healthcare provider to the parents when their child was negligently misdiagnosed with a lethal form of cancer].

V. THE FAC FAILS TO ESTABLISH KYLER PRESCOTT IS 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.

In *Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 4th 1134 (2003), the Court, after setting forth the definition of a "person in interest" as a person "who had an ownership interest in the property or those claiming through that person," stated:

> The remedy sought by plaintiff in this case is not restitutionary because plaintiff does not have an ownership interest in the money it seeks to recover from defendants. First it is clear that plaintiff is not seeking the return of money or property that was once in its possession…. Any award that plaintiff would recover from defendants would not be restitutionary as it would not replace any money or property that defendants took directly from plaintiff. Further, the relief sought by plaintiff is not restitutionary under an alternative theory because plaintiff has no vested interest in the money it seeks to recover.

Id. at 1149.

The two restitution "tests" articulated by the California Supreme Court are as follows: 1) the plaintiff has an ownership interest in and possessed the property before giving it to the defendant (a "possessory ownership interest"), or 2) the plaintiff did not possess the property, but has a vested ownership interest in it (a "non-possessory but vested ownership interest"). *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1093 (C.D. Cal. 2003), citing *Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 4th 1134, 1149 (2003).

Here, there are <u>*no*</u> <u>*facts*</u> alleged in the FAC showing Kyler has an "ownership interest" in any money sought to be recovered from RCHSD. For this reason, Kyler Prescott's claims brought under Section 11135 fail.

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VI. EXHAUSTION OF ADMINISTRATIVE REMEDIES BEFORE BRINGING THE SECTION 11135 CLAIMS WAS NOT MET

There is an exhaustion requirement for a claim brought pursuant to Cal. Gov't Code § 11135. *J.E.L. v. S.F. Unified Sch. Dist.*, 185 F. Supp. 3d 1196, 1201 (N.D. Cal. 2016). The facts alleged in the FAC do not show compliance with the exhaustion requirement and do not meet the pleading requirements. Consequently, plaintiffs' purported Section 11135 claims should be dismissed.

VII. CONCLUSION

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

DATED: December 1, 2017 LEWIS BRISBOIS BISGAARD & SMITH LLP

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