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GIOSTAR LABS, INC., ANAND SRIVASTAVA, M.S., PH.D., DEVEN PATEL,  
SIDDHARTH BHAVSAR and SCOTT KIRKPATRICK

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

CHRISTINA MENDEZ,  
individually  
and on behalf of all others similarly  
situated,

Plaintiff,

vs.

GLOBAL INSTITUTE OF STEM  
CELL THERAPY AND  
RESEARCH,  
USA, a California corp.;  
GIOSTAR  
LABS, INC., a California corp.;  
ANAND SRIVASTAVA, M.S.,  
PH.D, an Individual;  
DEVEN PATEL, an Individual;  
SIDDHARTH BHAVSAR, an  
Individual; and  
SCOTT KIRKPATRICK, an  
Individual;

Defendant.

**CASE NO. 20CV00915-CAB-BLM**

**MEMORADUM IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS  
PLAINTIFFS' FIRST AMENDED  
COMPLAINT PURSUANT TO FEDERAL  
RULE OF CIVIL PROCEDURE 12(b)(6)**

[Memorandum of Points and Authorities in  
Support of Motion to Dismiss, Declarations of  
Dr. Anand Srivastava, Deven Patel, Scott  
Kirkpatrick, Siddharth Bhavsar and Proposed  
Order Filed Concurrently Herewith]

**Hearing Date: October 12, 2020**

**Ctrm.: 4B, 4th Floor**

**Judge: Hon. Cynthia A. Bashant**

**NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT**

Complaint Filed: May 15, 2020

First Amended Complaint Filed: July 27, 2020

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## 1 I. INTRODUCTION

2 The First Amended Complaint (“FAC”) [Dkt. 15] is riddled with defects. Though  
 3 the entire Complaint and all of its allegations are shrouded in fraud surrounding the  
 4 Giostar USA webpage, the FAC is woefully lacking in factual specifics regarding the  
 5 who, what, where, when and why of the alleged fraud and even more so the specifics of  
 6 Plaintiff’s reliance. In particular the FAC lacks specific facts regarding when the alleged  
 7 reliance on the Giostar Website content took place, what specific incorrect content was  
 8 allegedly relied upon, where Ms. Mendez was when she allegedly relied upon the  
 9 incorrect content, with whom she discussed this content, when she decided to get the  
 10 stem cell treatment, how she decided to get the stem cell treatment, and whether it was  
 11 in consultation with her physician in Columbia.

12 The FAC does not allege that Giostar USA or any of the named defendants made  
 13 any treatment decision on her behalf and only speculates regarding whether the treatment  
 14 she received was not in fact the treatment she elected. The FAC also speculates regarding  
 15 damages. The FAC therefore fails to state any well pleaded cause of action. Plaintiff  
 16 does not state whether she was even in the United States or was in Columbia at the time  
 17 of the alleged reliance or when she paid for the treatment. She does not state that Giostar  
 18 USA or the individuals she names were paid for her treatment nor could she provide  
 19 factual basis for any such an assertion.

20 To the extent Ms. Mendez alleges she was induced into deciding to get the stem  
 21 cell treatment provided by Giostar, India by verbal statements that stem cell therapy was  
 22 a “cure-all”, again she provides no details when this occurred or who made this statement  
 23 or whether it was anyone at Giostar USA or someone from Bioscience Americas, who  
 24 first introduced Ms. Mendez to Giostar USA. Ms. Mendez does not provide any factual  
 25 details on exactly how she decided to get the stem cell treatment in India other than to  
 26 say she wished to avoid radiation or chemotherapy for her diagnosed lymphoma and  
 27 sought alternative treatment. Ms. Mendez does not state with whom she contracted to  
 28 get the treatment and when, only that she was sent “documents” in March of 2017. She

1 does not allege that those papers were sent by Giostar USA. She does not allege that  
 2 Giostar USA or the individual defendants performed this treatment, nor could she so  
 3 allege. The FAC takes disparate statements out of context and even when citing to  
 4 statements in emails or webpages does not provide copies thereof.

5 The FAC is also rife with conflicting allegations that do not reflect any well  
 6 pleaded cause of action. On one hand, Plaintiff acknowledges the Giostar USA  
 7 “lymphoma” webpage describes the classical stem cell treatment for lymphoma, which  
 8 requires bone marrow ablation and the infusion of bone marrow stem cells. On the other  
 9 hand, she alleges she sought an alternative treatment that did not involve radiation or  
 10 chemotherapy. On the third hand, she complains that she was not given the classical  
 11 stem cell treatment described on the Giostar USA webpage. Is her complaint stating a  
 12 cause of action that she contracted to get the classical stem cell treatment described on  
 13 the Giostar USA webpage for lymphoma and went to India expecting to have that same  
 14 treatment only but was given a different treatment than she expected? It cannot be so;  
 15 she went to India twice, six weeks apart for the stem cell treatment [FAC at ¶¶ 84-87]  
 16 indicating that it was in fact the stem cell treatment she sought.

17 On the fourth hand, to support her class action, Ms. Mendez speculates based upon  
 18 alleged hearsay that the stem cell therapy that she received at Giostar, India may not  
 19 have been in accordance with descriptions on the Giostar USA website [FAC at ¶¶ 44,  
 20 104]. She then further speculates from that original speculation that *if* she did not receive  
 21 the stem cell therapy described on the Giostar USA webpage, then it must never be  
 22 provided and therefore the description on the webpage must be fraudulent. Such  
 23 allegations fail to “raise a right to relief above the speculative level.” *Bell Atlantic Corp.*  
 24 *v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). *See Blantz v.*  
 25 *Cal. Dep’t of Corr. & Rehab.*, 727 F.3d 917 (9th Cir. 2013) (treating plaintiff’s allegations  
 26 made “upon information and belief” as insufficient conclusory allegations); *Delphix*  
 27 *Corp. v. Actifio, Inc.*, 2014 U.S. Dist. LEXIS 132310, \*5 (N.D. Cal. Mar. 19, 2014)  
 28 (pleading upon information and belief “creates a further inference that plaintiff likely

1 lacks knowledge of underlying facts to support the assertion, and is instead engaging in  
2 speculation to an undue degree.”).

3 The FAC also fails for want of well pleaded allegations giving rise to Article III  
4 standing or standing under California law because Ms. Mendez likewise makes  
5 speculative allegations of physical harm. Ms. Mendez parades a list of horrible side  
6 effects such as “jaundice” and “escalation” of cancer [FAC at ¶¶ 103, 110, 111] but does  
7 not and cannot provide well pleaded factual allegations tying either of these two  
8 conditions to her stem cell treatment provided by Giostar, India. Moreover, Plaintiff’s  
9 CLRA, UCL and FAL claims separately fail for lack of standing because California’s  
10 consumer protection laws were not intended to remedy [alleged] injuries caused and  
11 suffered outside California by a plaintiff who was not a citizen of California. Plaintiff’s  
12 CLRA claim for injunctive relief should also be stricken because there is no allegation  
13 that she will repeat the stem cell treatment.

14 Additionally, Plaintiff is an improper class representative as a matter of law  
15 because she cannot state her situation is typical. First, she was diagnosed with lymphoma  
16 but wanted to avoid radiation and chemotherapy so she sought alternative treatment and  
17 was channeled to Giostar USA though one or more individuals at former Defendant  
18 Bioscience Americas, who may well have been the people who made the alleged “cure-  
19 all” remark and or induced her to try an alternative to the classical treatment that did not  
20 involve radiation or chemotherapy and were first named and then dropped from the  
21 litigation. There is no numerosity here. Ms. Mendez does not and cannot allege that a  
22 single patient from the United States with lymphoma ever received any stem cell  
23 treatment at any Giostar related stem cell center. She is also not typical of a class because  
24 her factual circumstances involve former defendant Bioscience Americas with whom  
25 Giostar USA is currently in litigation arising out of a breach of contract. Giostar USA  
26 has reason to believe that she filed this complaint in cooperation with them both  
27 originally naming them and dropping them at their urging. Giostar USA would at a  
28 minimum be pursuing this in discovery and raising such coordination at trial in

1 connection with its counterclaims and/or request for attorney’s fees under the CLRA.  
 2 Moreover, to the extent that KamberLaw was involved in such cooperation with  
 3 Bioscience they could not be effective counsel as one or more of them would be potential  
 4 witnesses to any discussions or communications with that entity, there being no attorney  
 5 client privilege with a putative defendant.

## 6 **II. PROCEDURAL HISTORY**

7 Plaintiff Mendez filed her Complaint on May 15, 2020 and the FAC on July 27,  
 8 2020 asserting causes of action under Cal. Civ. Code § 1750 et seq. (Consumer Legal  
 9 Remedies Act (“CLRA”)), Cal. Bus. & Prof. Code § 17200 (Unfair Competition Law  
 10 (“UCL”)), and Cal. Bus. & Prof. Code. § 17500 (False Advertising Law (“FAL”)) on  
 11 behalf of herself, all others similarly situated as well as causes of action for breach of  
 12 express warranty, quasi-contract, breach of fiduciary duty, fraudulent concealment,  
 13 intentional misrepresentation, and negligent misrepresentation. The Original Complaint  
 14 named Bioscience Americas, LLC as a party but they are dropped as a party in the FAC.  
 15 The Original Complaint has some relevant things to say about Bioscience Americas  
 16 being the possible source of the alleged misrepresentation including the following: “in  
 17 addition to reiterating misrepresentations described herein, Defendant Bioscience  
 18 Americas LLC makes clear that it is participating in the stem cell therapy business purely  
 19 for financial gain.” Original Complaint [DKT 1] at ¶ 115.

## 20 **III. FACTUAL BACKGROUND**

21 In April 2016, Plaintiff Christina Mendez was diagnosed with Stage II Hodgkin  
 22 lymphoma. FAC at ¶ 71. The five- year survival rate for Stage I or Stage II is between  
 23 90-95%, according to Plaintiff. [FAC at ¶ 73]. The Complaint does not state what  
 24 conversations Ms. Mendez has with her oncologist when receiving her diagnosis, but it  
 25 can be inferred that the discussion involved the possibility of her having chemotherapy  
 26 or radiation therapy because Plaintiff alleges: “because she was reluctant to undergo  
 27 chemotherapy or radiation therapy for cancer treatment, Plaintiff sought alternative  
 28 treatments.” [FAC at ¶ 74]. Missing from the complaint are the facts regarding when

1 she decided to seek alternative treatments, how she sought the alternative treatment, and  
 2 how exactly she decided to get the alternative treatment, including who she spoke with  
 3 in deciding to proceed with it and whether her oncologist was involved in the decision.  
 4 Ms. Mendez does not state in her complaint who she spoke with while she sought  
 5 alternative treatment or when she decided to accept stem cell therapy as the alternative  
 6 treatment. She does state that someone told her that “stem cell therapy could be the cure-  
 7 all for her cancer.” [FAC at ¶ 75].<sup>1</sup> Who told her this Ms. Mendez does not say. Ms.  
 8 Mendez was personally known to more than one representative at [former] Defendant  
 9 Bioscience Americas (“Bioscience”). Bioscience at the time was working on opening a  
 10 clinic in Medellin, Columbia through a joint venture that involved Dr. Srivastava. Ms.  
 11 Mendez does not mention this relationship with Bioscience in her complaint, not does  
 12 she specify what discussions she had with Bioscience representatives and whether those  
 13 discussions included the “cure-all” comment.<sup>2</sup> She does reference a 2016 Fact Sheet  
 14 published by Bioscience for the proposition that Bioscience was seeking “exceptional  
 15 financial returns” and was “developing a global network of stem cell treatment centers  
 16 to generate high income.” [FAC at ¶ 113]. While it is not known what Bioscience  
 17 representatives told Ms. Mendez, someone not specifically identified by Ms. Mendez  
 18 “informed [Ms. Mendez] that the Treatment would take place outside of the United

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19  
 20 <sup>1</sup> Ms. Mendez does not identify any party to the lawsuit having made that statement.

21 <sup>2</sup> Ms. Mendez uses throughout the Complaint the collective term “Defendants” when  
 22 describing specific actions without identifying which defendant; e.g., “The treatment  
 23 was described by Defendants as a ‘cure-all’, as cutting-edge and as revolutionizing  
 24 the cancer industry.” FAC at ¶ 76. The Court should disregard as not well pleaded all  
 25 such allegations that include actions that are attributed collectively to Defendants,  
 26 particularly as that term was not changed even after Defendant Bioscience was  
 27 removed from the Complaint, and therefore the FAC does not distinguish in the  
 28 slightest between actions of former Defendant Bioscience and the remaining  
 Defendants.

1 States at a state of the art facility in Columbia” and then “changed the location of the  
2 treatment to India.” FAC at ¶¶ 80. What is known is that Ms. Mendez was introduced  
3 to Mr. Patel and Dr. Srivastava by Mr. Eric Stoffers, CEO of Bioscience Americas, who  
4 informed them that Ms. Mendez wished to have a stem cell treatment in India and  
5 requested them to provide Plaintiff with logistical support such as help obtaining a tourist  
6 visa to travel to India. Declaration of Dr. Anand Srivastava (“Srivastava Decl.”) at ¶¶  
7 15-22.

8 It is undisputable that Ms. Mendez had decided to have stem cell treatment before  
9 being introduced to Mr. Patel and Dr. Srivastava. Ms. Mendez does not state how she  
10 made this decision but apparently made this decision around January, 2017 in  
11 consultation with her oncologist in Columbia and during her discussions with Bioscience  
12 because Mr. Stoffers demanded a referral fee both for Bioscience and for the referring  
13 Columbian physician (who is also not named). There is no allegation that Ms. Mendez  
14 ever spoke with Mr. Patel or Dr. Srivastava before making this decision because she did  
15 not have any such discussions. In particular, Ms. Mendez never spoke with Dr.  
16 Srivastava about the difference between having the classical stem cell treatment which  
17 typically involves destruction of the bone marrow through radiation or chemotherapy  
18 and the infusion of bone marrow stem cells from a donor and the alternative treatment  
19 which involves only harvesting stem cells from the patient or another donor’s adult stem  
20 cells (which may for example be harvested from umbilical cord or adipose cells). What  
21 is clear however is that Ms. Mendez had decided she did not want the classical stem cell  
22 treatment before ever being introduced to anyone at Giostar.

23 The stem cell therapy she chose did not meet her desire to avoid  
24 chemotherapy/radiation therapy; rather she had to begin chemotherapy in December  
25 2017 and entered remission in or around August, 2018. [FAC at ¶¶ 104, 107].

26 Ms. Mendez seeks to make a case against Giostar because of an alleged  
27 misrepresentation in their webpage. But as Ms. Mendez in her own words alleges:

28 “On the lymphoma page of [Giostar USA’s] website,



1 [Giostar USA] describe[s] the disease and how stem cell  
 2 treatment can help. Among other things, [Giostar USA]  
 3 state[s] that the patient “has to undergo complete destruction  
 4 of his/her own bone marrow and undergo infusion of bone  
 marrow stem cells from allogeneically matched donor.”

5 FAC at ¶ 52.

6 But this general information regarding stem cells from Giostar’s webpage is  
 7 exactly correct and Ms. Mendez does not allege to the contrary. Plaintiff does not allege  
 8 that she was told that she would be given classical treatment and was then subsequently  
 9 given the alternative treatment without her knowledge. Ms. Mendez does not and cannot  
 10 point to anyone at Giostar having induced her to have the alternative treatment when she  
 11 herself had already chosen to not have any treatment involving chemotherapy or  
 12 radiation therapy, which would be needed to destroy the bone marrow under the classical  
 13 treatment. Ms. Mendez wanted and received alternative treatment, and this is evident  
 14 from the fact that she willingly visited India a second time to keep receiving the  
 15 treatment. [FAC at ¶¶ 84-87].

#### 16 **IV. ARGUMENT**

##### 17 **A. Legal Standard**

18 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
 19 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ.  
 20 P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). Rule 12(b)(6) permits  
 21 dismissal for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P.  
 22 12(b)(6). Federal Rule of Civil Procedure 8(a) provides that “[a] pleading that states a  
 23 claim for relief must contain . . . a short and plain statement of the claim showing that  
 24 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6)  
 25 is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to  
 26 support a cognizable legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696,  
 27 699 (9th Cir. 1990).

28 When reviewing a motion to dismiss, a court must accept as true all “well pleaded



1 factual allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, a court is  
 2 not “required to accept as true allegations that are merely conclusory, unwarranted  
 3 deductions of fact, or unreasonable inferences.” *Spewell v. Golden State Warriors*, 266  
 4 F.3d 979, 988 (9th Cir. 2001). “In sum, for a complaint to survive a motion to dismiss,  
 5 the non-conclusory factual content, and reasonable inferences from that content, must be  
 6 plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*,  
 7 572 F. 3d 962, 969 (9th Cir. 2009) (quotations omitted). Claims sounding in fraud or  
 8 mistake must additionally comply with the heightened pleading requirements of Federal  
 9 Rule of Civil Procedure 9(b), which requires that a complaint “must state with  
 10 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule  
 11 9(b) “requires . . . an account of the time, place, and specific content of the false  
 12 representations as well as the identities of the parties to the misrepresentations.” *Swartz*  
 13 *v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quotation omitted); see also *Vess v.*  
 14 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (averments of fraud must  
 15 be accompanied by “the who, what, when, where, and how of the misconduct charged”) (quotation omitted). See also *LT Int’l Ltd. v. Shuffle Master, Inc.*, 8 F. Supp. 3d 1238,  
 16 1243 (D. Nev. 2014) (“A complaint is subject to deeper scrutiny when it contains  
 17 allegations of fraud or mistake.”); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993,  
 18 998 (9th Cir. 2010) (Rule 9(b)’s “particularity” standard requires a plaintiff to “identify  
 19 the who, what, when, where, and how of the misconduct charged, as well as what is false  
 20 or misleading about the purportedly fraudulent statement, and why it is false.” )

22 “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s  
 23 liability, it stops short of the line between possibility and plausibility of ‘entitlement to  
 24 relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Despite the  
 25 deference the court must pay to the plaintiff’s allegations, it is not proper for the court to  
 26 assume that “the [plaintiff] can prove facts that [he or she] has not alleged or that  
 27 defendants have violated the . . . laws in ways that have not been alleged.” *Associated*  
 28 *Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526

1 (1983).

2 As a general rule, a court freely grants leave to amend a dismissed complaint. Fed.  
3 R. Civ. P. 15(a). However, leave to amend may be denied when “the court determines  
4 that the allegation of other facts consistent with the challenged pleading could not  
5 possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806  
6 F.2d 1393, 1401 (9th Cir. 1986).

## 7 **B. Plaintiff Lacks Standing**

### 8 **1. Plaintiff’s CLRA, UCL, and FAL Claims Fail for Lack of Standing**

9 Consumer Protection claims are governed by the laws of the jurisdiction in which  
10 the transaction took place. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 594 (9th  
11 Cir. 2012) The FAC does not allege Ms. Mendez was in California or even in the United  
12 States when she purchased the stem cell treatment that she received in India. By its own  
13 terms the FAL prohibits “false or misleading statements made ‘before the public in this  
14 state’ and ‘from this state before the public in any state.’” *Tidenberg*, 2009 WL 605249,  
15 at \*9 (quoting Cal. Bus. & Prof. Code § 17500). *See Churchill Village, LLC v. Gen. Elec.*  
16 *Co.*, 169 F.Supp.2d 1119, 1126-27 (N.D. Cal. 2000)(in-state sales in California alone are  
17 insufficient to show nexus with California to support UCL claim). Ms. Mendez’s  
18 California CLRA, UCL, and FAL claims fail for lack of standing.  
19

### 20 **2. All of Plaintiff’s Claims Fail for Lack of Standing**

21 Plaintiff has the burden of establishing Article III standing in order to maintain an  
22 action in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).  
23 Unnamed members of a class do not afford a plaintiff standing where plaintiff does not  
24 otherwise have it. *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 951 (S.D. Cal.  
25 2007). “[A] class representative must be part of the class and ‘possess the same interest  
26 and suffer the same injury’ as the class members.” *Amchem Prods., Inc. v. Windsor*, 521  
27 U.S. 591, 625-26, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). They have neither Article  
28

1 III standing nor standing under California law where they did not suffer injury-in-fact.  
 2 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Bower v. AT & T Mobility*,  
 3 LLC, 196 Cal. App. 4th 1545, 1554-56, 127 Cal. Rptr. 3d 569, 578 (2011).

4 Plaintiff also alleges: “[d]espite recognition of the procedure for cancer cell  
 5 destruction, Defendants do not perform the destruction of the bone marrow, nor do they  
 6 ensure that the required process has been followed prior to administration of the  
 7 Treatment. In addition, on information and belief, Defendants do not infuse bone  
 8 marrow stem cells from an allogeneically matched donor.” [FAC at ¶ 53].

9 But this is bad faith at its highest. Ms. Mendez cannot plead any factual basis for  
 10 injury-in-fact because the classical treatment described on the Giostar USA webpage  
 11 was not followed where she herself elected not to have the classical treatment and neither  
 12 Giostar USA nor the individual defendants are even alleged to have made the treatment  
 13 decision.

14 With regard to the alterative stem cell treatment she actually requested and  
 15 received, Plaintiff does not well plead a personal injury-in-fact because she speculates  
 16 upon information and belief that she received substandard stem cells and further  
 17 speculates that this caused jaundice. Plaintiff’s class action allegations based upon  
 18 speculative injury-in-fact should be dismissed for lack of standing.

### 19 **C. Plaintiff Fails To Satisfy Mandatory Pleading Requirements**

#### 20 **1. The FAC Allegations Regarding the Giostar USA Website Do Not** 21 **Comply With *Twombly* and *Iqbal***

22 Plaintiffs’ claims do not satisfy pleading requirements established by the United  
 23 States Supreme Court. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007);  
 24 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) Plaintiffs must plead “enough facts to  
 25 state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 545. “Factual  
 26 allegations must be enough to raise a right to relief above the speculative level ....” *Id.*  
 27 at 570. If plaintiffs “have not nudged their claims across the line from conceivable to  
 28

1 plausible, their complaint must be dismissed.” *Id.* *Twombly* requires “more than labels  
 2 and conclusions, and a formulaic recitation of the elements of a cause of action will not  
 3 do.” *Id.* at 555 (citation omitted). This heightened pleading standard applies to all civil  
 4 suits. *Ashcroft v. Iqbal*, 129 S. Ct. at 1953. Plaintiffs’ FAC comprises conclusory  
 5 statements of law and inadequate factual allegations. Its unsupported conclusions cannot  
 6 meet the requirements of *Twombly* and *Iqbal*.

7 Ms. Mendez sought an alternative treatment because she wished to avoid any  
 8 chemotherapy or radiation exposure. [FAC at ¶ 74]. Ms. Mendez now asserts in this  
 9 lawsuit that she was fraudulently induced into having an alternative stem cell treatment  
 10 for her lymphoma due to allegedly fraudulent content on the Giostar USA Webpage.  
 11 FAC at ¶ 16. But there is no plausible cause of action on the basis of the Giostar USA  
 12 webpage content because the general information provided on the Giostar USA webpage  
 13 regarding the classical treatment of lymphoma is indisputably correct and because the  
 14 Giostar USA webpage does not discuss any alternative treatment for lymphoma.

15 Specifically, Ms. Mendez alleges: “[o]n the lymphoma page of [Giostar USA’s]  
 16 website, [Giostar USA] describe[s] the disease and how stem cell treatment can help.  
 17 Amongst other things, [Giostar USA] state[s] that the patient ‘has to undergo complete  
 18 destruction of his/her own bone marrow and undergo infusion of bone marrow stem cells  
 19 from allogeneically matched donor.’” FAC at ¶ 52. Ms. Mendez makes no allegation that  
 20 these statements regarding classical stem cell treatment for lymphoma are false. Rather,  
 21 Ms. Mendez’s allegations correctly recognize the importance of the bone marrow  
 22 ablation and the infusion of new bone marrow stem cells in classical stem cell treatment  
 23 for lymphoma. See e.g., FAC at ¶ 29, 30. Indeed, this is the longstanding and widely  
 24 accepted approach for stem cell treatment for lymphoma. Srivastava Decl. at ¶¶ 22-24.  
 25 Thus, the pleadings show both that Giostar described and Ms. Mendez was aware of the  
 26 role and importance of bone marrow ablation and the infusion of new bone marrow stem  
 27 cells in the classical treatment of lymphoma, as discussed in the Giostar webpage.

28 Ms. Mendez does not and cannot point to anywhere that the Giostar USA website

encourages or describes any alternative treatment of lymphoma because no such content exists on the webpage. The only other portion of the lymphoma page of the Giostar USA website to which Plaintiff cites in reference to lymphoma is this:

“We have mastered the technology for isolating maximum number of viable stem cells allogeneically with the matched donor to treat various patients with SCAD [Lymphoma/ Thalassemia]. We are the licensed, private organization with the excellent, well equipped state of the art facility to isolate, process and enrich the viable number of stem cells, which can be reinfused back into the patient’s body.”

FAC at ¶ 49.

But this portion of the lymphoma webpage correctly describes how the stem cells are prepared and infused during the classical treatment for lymphoma. Srivastava Decl. at ¶¶ 23-24. Ms. Mendez does not and cannot allege that this statement made in the Giostar USA webpage is describing much less advocating any alternative treatment of lymphoma because Giostar USA’s webpage does not anywhere advocate or describe using any alternative treatment for lymphoma. *Id.*

As such, no plausible cause of action can be pleaded based upon any alleged inducement by Giostar USA for Ms. Mendez to elect to have alternative treatment for her lymphoma based upon any alleged fraudulent content on the Giostar USA webpage.

## **2. The FAC Allegations Regarding Other Alleged Fraudulent Statements Do Not Comply With Twombly and Iqbal**

Ms. Mendez also asserts that some [unnamed] person/s told her that “stem cell therapy could be the cure-all for her cancer.” [FAC at ¶ 75]. See also FAC at ¶ 76 (“[t]he treatment was described by Defendants as a “cure-all”, as cutting-edge, and as revolutionizing the cancer industry.”) Plaintiff does not specifically identify who is alleged to have made these representations, how or when they were made, any factual predicate for “but-for” reliance, and importantly does not distinguish either in the Original Complaint or in the FAC between the Bioscience Americas defendant who was originally named and dropped and the remaining Defendants, who she does not

1 specifically identify as having allegedly made this statement.<sup>3</sup> Ms. Mendez does not  
 2 state that these statements come from the content of the Giostar USA webpage, nor can  
 3 she.<sup>4</sup>

4 Ms. Mendez does not allege that Giostar USA or any of the individual defendants  
 5 were involved in making treatment decisions or performing the treatment.

6 But this does not give rise to a cause of action against the named defendants. Ms. Mendez  
 7 does not and cannot allege that Giostar USA or any of the individual defendants decided  
 8 her treatment plan or performed her treatment. Nor could any such allegation be made  
 9 in good faith. Giostar USA is a research and development company. Neither Giostar  
 10 USA nor the individual defendants operate stem cell clinics or treat patients anywhere.  
 11 The stem cell treatments provided at the Giostar, India clinic that Ms. Mendez went to  
 12 are provided by a separate organization formed under the laws and regulations of India  
 13 and are strictly performed under the control of treating physicians licensed in India who  
 14 decide the treatment plan in consultation with the patient and they were not involved in  
 15 making any treatment decisions for Ms. Mendez. Srivastava Decl. at ¶¶ 31, 36-38.  
 16 Declaration of Devel Patel (“Patel Decl.”) at ¶ 22, 24.

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17  
 18 <sup>3</sup> Ms. Mendez did, however, originally name Bioscience Americas as a Defendant in  
 19 her Original Complaint (Dkt. 1 at 19) and apparently was referring to someone within  
 20 that organization. This inference is further bolstered by Ms. Mendez’s statement that  
 21 “[a]lthough Plaintiff was originally informed that the Treatment would take place  
 22 outside of the United States at a state of the art facility in Columbia, Defendants  
 23 changed the location of the treatment to India.” But Giostar USA was informed by  
 24 Bioscience Americas that Ms. Mendez had already chosen to get the treatment in India  
 25 and requested Giostar USA’s logistical support to get her connected with Giostar,  
 26 India. *See* Srivastava Decl. 31, 36-38.

27 <sup>4</sup> The Giostar USA webpage also clearly states that its content is for information  
 28 purposes only and cannot replace medical advice of a physician. Srivastava Decl. at  
 ¶ 36.



## V. THE FAC FAILS TO STATE A CERTIFIABLE CLASS

### A. It is Appropriate to Deal with the Lack of a Certifiable Class on a Motion To Dismiss.

Rule 23(c)(1)(A), Fed.R.Civ.P., requires a court to consider issues of class certification “at an early practicable time after a person sues or is sued as a class representative.” The U.S. Supreme Court has recognized that “sometimes [class certification] issues are plain enough from the pleadings.” *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). Moreover, class issues may often be resolved without any discovery consistent with “just speedy and inexpensive” determination of such actions. Fed. R. Civ. P. 1.; *accord Picus v. Wal-Mart Stores, Inc.*, Nos. 07-cv-00682, 07-cv-00686, 07-cv-00689, 2009 BL 53475 (D. Nev. 2009) (staying discovery until the issue of class certification was decided.) Whether styled as a motion to dismiss, a motion to deny certification or a motion to strike the class allegations, courts have considered these motions under the standards governing motions to dismiss for failure to state a claim under Rule 12(b)(6) of the FRCP. See, e.g., *Walls v. Wells Fargo Bank, N.A.* (In re Walls), 262 B.R. 519, 524 (E.D. Cal. 2001)(“ . . . the motion to deny class certification, having been brought prior to any discovery, should be construed according to the same legal standards as a motion to dismiss under Rule 12”).

The purpose of a Rule 12(f) motion to strike is to “avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9<sup>th</sup> Cir. 1993), rev’d on other grounds by 510 U.S. 517 (1994). In furtherance of this goal, the Court may grant a motion to strike in order to “streamline the ultimate resolution of the action and focus the jury’s attention on the real issues.” *Util. Consumers’ Action Network v. Powernet Global Communs., PNG Telecomm., Inc.*, 2006 U.S. Dist. LEXIS 78546, \*14 (S.D. Cal. Oct. 20, 2006) (granting motion to strike nationwide class allegations). Moreover, class allegations may be stricken at the pleading stage. *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9<sup>th</sup> Cir. 1975); See, e.g., *Sandoval v. Ali*, 34 F. Supp. 3d 1031, 1043-44 (N.D. Cal.

2014) (striking class allegations); *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1146 (N.D. Cal. 2010) (granting motion to strike class allegations).

### **B. The Class Lacks Numerosity.**

Because this class action lawsuit is not brought in good faith, it contains a number of false foundational allegations. Regarding numerosity, Plaintiff alleges:

**Numerosity:** Members of the Class are so numerous that joinder of all members is impracticable. According to Defendants, they “successfully treated” 4,000 patients between 2011 and 2016. Upon information and belief, the Nationwide Class consists of thousands of patients, dispersed throughout the United States, who received Treatment from Defendants, and the California Subclass consists of hundreds or thousands of patients from California, who received Treatment from Defendants. Accordingly, it would be impracticable to join all members of the Class before the Court.

FAC at ¶ 119.

This is not so. First, only a handful of treatments were provided (at any time) by Giostar, India to anyone who came from the United States; those few were people personally known to members of Giostar USA, and none of them came for any blood cancer treatment of any kind. Srivastava Decl. at ¶¶ 27-29; Patel Decl. at ¶¶ 17-20.

### **C. Plaintiff’s Situation is Not Typical.**

Fed. R. Civ. P. 23 “imposes stringent requirements for certification that in practice exclude most claims.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). Plaintiffs have the burden of affirmatively demonstrating that their classes meet these requirements. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” What matters “is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.



1 Dissimilarities within the proposed class are what have the potential to impede the  
 2 generation of common answers.” *Dukes*, 131 S. Ct. at 2551(citation omitted). Pursuant  
 3 to Rule 23(b)(3), Plaintiff must establish that “questions of law or fact common to class  
 4 members predominate over any questions affecting only individual members, and that a  
 5 class action is superior to other available methods for fairly and efficiently adjudicating  
 6 the controversy.”

7 Regarding typicality, Plaintiff alleges:

8 **Typicality:** Plaintiff’s claims are typical of the claims of the  
 9 members of the Class she seeks to represent because Plaintiff, like  
 10 the Class members, relied on Defendants’ misrepresentations and  
 11 false statements in deciding to undergo Treatment by Defendants.  
 12 Defendants’ unlawful, unfair and/or fraudulent actions concern the  
 13 same business practices described herein irrespective of where  
 14 they occurred or were experienced. Plaintiff and the Class  
 15 sustained similar injuries arising out of Defendants’ conduct.  
 Plaintiff’s and Class member’s claims arise from the same  
 practices and course of conduct and are based on the same legal  
 theories.

16 FAC at ¶ 121.

17  
 18 There is no typicality here. As Ms. Mendez has pleaded, she was diagnosed with  
 19 lymphoma and did not want to undergo treatment involving radiation or chemotherapy.  
 20 She sought alternative treatment and apparently spoke with someone who she personally  
 21 knew at Bioscience America who told her that stem cell therapy is a “cure-all” for her  
 22 lymphoma.<sup>5</sup> There was nothing typical in her situation. Ms. Mendez’s unique  
 23 combination of illness, circumstances and alleged damages are not the proper subject  
 24 matter for a class action. Moreover, there are a number of particular facts regarding  
 25 Plaintiff’s relationship with [former] defendant Bioscience including whether or not Ms.  
 26 Mendez brought this action at the request of or in cooperation with them as part of an

27 <sup>5</sup> The Giostar website speaks to classical stem cell treatment for lymphoma, which  
 28 involves radiation or chemotherapy to destroy the bone marrow. It nowhere  
 recommends alternative stem cell treatment for lymphoma.

1 effort to discredit Giostar USA.

2 **D. Individual Questions Affecting Each Member and Plaintiff's Unique**  
 3 **Set of Circumstances are not, and Cannot Be, Alleged to be**  
 4 **Representative of a Class.**

5 It is again clear from the facts presented here that individualized issues will  
 6 predominate and defeat class certification. In addition to the non-typicality of Ms.  
 7 Mendez's situation, Plaintiff asserts state law claims, which will often vary from state to  
 8 state, and will require ascertaining where each individual class member resides, what  
 9 substantive law applies to each class member's claim, and an individualized choice of  
 10 law analysis for each class member, in addition to the individualized issues of fact such  
 11 as (a) for what reason were they seeking stem cell treatment, which could range from no  
 12 specific ailment to erectile dysfunction to diabetes; (b) how did they decide to have a  
 13 treatment; (c) how did they decide to have the treatment at a Giostar, India stem cell  
 14 treatment; (d) what was the result of the treatment; (d) how were they allegedly  
 15 fraudulently induced to having the treatment; (e) what is the asserted harm; (f) what was  
 16 the alleged misrepresentation in the content on the website that was allegedly relied  
 17 upon; (g) was the relied upon content inaccurate; (h) whether there was any damages; (i)  
 18 what is the amount of that damage; (j) under what alleged underlying cause of action;  
 19 (k) what state's laws apply. This is not the basis of a class action. Courts have refused  
 20 to certify nationwide classes based upon products liability and breach of contract theories  
 21 on the basis that there was no manageable way to deal with the variances in state laws.  
 22 See, e.g., *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001);  
 23 *McFarland v. Memorex Corp.*, 96 F.R.D. 357 (N.D. Cal. 1982); *Lozano v. AT&T*  
 24 *Wireless Servs.*, 504 F.3d 718, 728 (9th Cir. 2007).

25 A class that requires a court to determine the ultimate issue of liability in the case  
 26 cannot be certified because the court is unable to determine who is included in the class  
 27 before a trial on the merits since the burden of conducting mini-trials on the merits of  
 28 each putative class member's case negates the efficiency of the class action vehicle. See

1 *e.g., Forman v. Data Transfer*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) (plaintiff’s proposed  
 2 class definition was untenable where a determination of class membership “would  
 3 essentially require a mini-hearing on the merits of each case”). The same situation  
 4 applies here. The thousands of patients treated in India were just that, patients treated in  
 5 India. Only a handful of those came from the United States and none of them were  
 6 treated here. It is obvious from the proposed class definition in the complaint that there  
 7 is no realistic way to determine who belongs in the class in advance of a trial because  
 8 not only is each circumstance particularized but because membership in the class  
 9 depends upon the mental state of the putative class members. A mini-trial would be  
 10 required to determine who would be included in the class. For each person who was ever  
 11 given a stem cell injection determining whether or not there was even a putative case  
 12 would be based upon individual questions.

13 Given these facts and the unique nature of Plaintiff’s case, Ms. Mendez’s class  
 14 allegations cannot satisfy class requirements and should be stricken.

## 15 **VI. THE COURT SHOULD DREGARD OR STRIKE SCANDALOUS** 16 **MATTER**

17 Pursuant to Fed. R. Civ. P. 12(f), a party may move to strike from a pleading  
 18 any “insufficient defense or any redundant, immaterial, impertinent, or scandalous  
 19 matter.” “The language of [Federal Rule of Civil Procedure 12(f)] is permissive so that  
 20 the Court has a wide measure of discretion in determining whether to grant or deny a  
 21 motion under it.” *Sampath v. Concurrent Technologies Corp.*, Civ. No. 03-264J, 2006  
 22 WL 1207961, at \*3 (W.D. Pa. May 3, 2006) (citing *Higgins v. Shenango Pottery Co.*, 99  
 23 F.Supp. 522, 525 (W.D. Pa.1951)); *Korman v. Trusthouse Forte PLC*, Civ. A. No. 89-  
 24 8734, 1991 WL 3481, at \*1 (E.D. Pa. Jan.11, 1991) (“A district court has broad  
 25 discretion in deciding Rule 12(f) motions”). “‘Scandalous matter’ has been defined as  
 26 ‘that which improperly casts a derogatory light on someone, most typically on a party  
 27 to the action.’” *Donnelly v. Commonwealth Fin. Sys., Inc.*, 2008 WL 762085, at \*4  
 28 (M.D. Pa. Mar. 20, 2008) (quoting *Carone v. Whalen*, 121 F.R.D. 231, 233 (M.D. Pa.

1 1988) and 5 C. Wright & A Miller § 1382, at 826)).

2 Defendants request that the Court disregard or strike paragraphs 57-70 of the FAC.  
 3 Paragraphs 57-70 of the FAC contain scandalous matter backed by no factual allegation,  
 4 but only double hearsay from an LA Times article regarding primarily Dr. Srivastava's  
 5 background and work history and is controverted by Dr. Srivastava. Srivastava Decl. at  
 6 ¶ 34-36. There is no allegation that Ms. Mendez relied upon this content when she chose  
 7 to seek avid chemotherapy. These false and reckless allegations are clearly present for  
 8 character assignation as the contents are not admissible. *See Habibi v. Barr*, 2020  
 9 U.S. Dist. LEXIS 77482 \*15 (S.D. CA 2020) ("[T]he Court cannot take judicial notice of  
 10 the facts in the articles cited by [Plaintiff] because they are not generally known and are  
 11 not capable of accurate and ready determination by resort to indisputable sources."  
 12 (citing Fed. R. Evid. 201(b)); *see Von Saher v. Norton Simon Museum of Art*, 592 F.3d  
 13 954, 960 (9th Cir. 2010) (courts may take judicial notice of news articles as evidence of  
 14 "what was in the public realm at the time, not whether the contents of those articles were  
 15 in fact true"), *cert. denied*, 564 U.S. 1037, 131 S. Ct. 3055, 180 L. Ed. 2d 885 (2011).  
 16 Further, because the facts alleged in these articles are being offered for the truth of the  
 17 matter asserted, they contain hearsay and are not admissible pieces of evidence. *See Fed.*  
 18 *R. Evid. 801(c); AFMS LLC v. United Parcel Serv. Co.*, 105 F. Supp. 3d 1061, 1070  
 19 (C.D. Cal. 2015) ("It is axiomatic to state that newspaper articles are by their very nature  
 20 hearsay evidence and are thus inadmissible if offered to prove the truth of the matter  
 21 asserted[.]") (citation and internal quotations omitted), *aff'd sub nom.*, 696 F. App'x 293  
 22 (9th Cir. 2017). These allegations should be struck and disregarded.

## 23 **VII. GIOSTAR LABS, INC., SCOTT KIRKPATRICK AND SIDDHARTH** 24 **BHAVSAR SHOULD BE DISMISSED**

25 Giostar Labs, Inc., Mr. Kirkpatrick and Mr. Bhavsar are improperly named  
 26 parties, and should be dismissed pursuant to Fed. R. Civ. P. 21.

27 The FAC alleges at paragraphs 18, 21, 22 and 38 that Giostar Labs, Inc. and  
 28 Messrs. Kirkpatrick and Bhavsar are responsible for the contents of the Giostar USA

1 website and the claims brought. This is, as with other aspects of the FAC, fatally flawed.  
 2 First, Giostar Labs was not formed and did not exist until 2019, more than a year after  
 3 the alleged fraudulent inducement took place. *See* Declaration of Scott Kirkpatrick.  
 4 Second, like the other individual defendants, there is no allegation that they made any  
 5 treatment decision or performed any treatment of Ms. Mendez. Third, there are no  
 6 allegations how Giostar Labs or Mr. Kirkpatrick or Mr. Bhavsar were involved in or  
 7 responsible for any cause of action on any grounds. No plausible claim can be asserted  
 8 against these defendants; they should also be dismissed on these independent grounds.  
 9 *See* Declaration of Siddharth Bhavsar.

10 **VIII. PLAINTIFF’S CLAIMS FOR VIOLATION OF CALIFORNIA’S**  
 11 **UNFAIR COMPETITION AND FALSE ADVERTISING LAWS**  
 12 **FAIL**

13 Plaintiff alleges violation of California Business and Professions Code section  
 14 17200 (the "Unfair Competition Law" or "UCL") and California’s Business and  
 15 Practices Code section 17500 (the “Fair Advertising Law” or “FAL”). To state an FAL  
 16 claim, the plaintiff must show that (1) the statements in the advertising are untrue or  
 17 misleading and (2) the defendants knew, or by the exercise of reasonable care should  
 18 have known, that the statements were untrue or misleading. *People v. Lynam*, 253  
 19 Cal.App.2d 959, 965 (1967). To state an UCL claim, the plaintiff must show that (1) the  
 20 defendant engaged in unfair, deceptive, untrue or misleading advertising and (2) the  
 21 plaintiff suffered injury in fact and lost money or property. *Buckland v. Threshold*  
 22 *Enterprises, Ltd.*, 155 Cal. App. 4th 798, 819, (2007).

23 Plaintiff’s claims for UCL and FAL violations should be dismissed because they  
 24 lack factual predicate for any claim. The Giostar USA website gives general information  
 25 regarding many forms of stem cell treatment for many diseases. Regarding lymphoma,  
 26 the Giostar USA website gives general information regarding the classical treatment for  
 27 lymphoma. Ms. Mendez points to no information on the website encouraging or even  
 28 describing any alternative treatment for lymphoma.

**IX. PLAINTIFF'S CLAIMS FOR VIOLATION OF CALIFORNIA'S  
CONSUMER LEGAL REMEDIES ACT FAIL**

Plaintiff alleges violation of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et. seq.* To make out a CLRA violation, a plaintiff must show that the defendant committed one of 23 enumerated unlawful practices, including "representing that goods . . . have . . . characteristics, . . . uses, [or] benefits . . . that they do not have," and "representing that goods . . . are of a particular standard, quality, or grade . . . if they are of another." *Webb v. Carter's Inc.*, 2011 U.S. Dist. LEXIS 12597, \*34, 272 F.R.D. 489, 501. A plaintiff can only recover, however, if he suffers damage "as a result of" conduct forbidden by the statute. *Id.* § 1780(a). Thus, under the CLRA, a plaintiff must show that a "defendant's deception caused them harm." *Mass. Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 119 Cal. Rptr. 2d 190, 197 (Ct. App. 2002).

To establish a CLRA claim, all of the following elements must be met: (1) That plaintiff acquired, or sought to acquire, by purchase or lease, a specified product or service] for personal, family, or household purposes; (2) That defendant represented that [product or service] had characteristics, uses, or benefits that it did not have]; (3) That plaintiff was harmed; (4) That plaintiff's harm resulted from defendant's conduct. Judicial Council of California Civil Jury Instructions (May 2020 supplement) "CACI No. 4700."

Plaintiff's claim for a CLRA violation should be dismissed because it lacks factual predicate for any claim. Giostar USA website is not alleged to make factual misrepresentations regarding the classical stem cell treatment for lymphoma which Plaintiff did not elect to receive and does not describe any alternative treatment for lymphoma. And Ms. Mendez's speculations regarding the alternative treatment she elected to have do not well plead a violation of the CLRA. Moreover, CLRA claims are subject to a three-year statute of limitations. *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1130, (C.D. Cal. 2010). Plaintiff has not pleaded factual basis for



1 purchasing the stem cell treatment during the period and fails to state a plausible claim.  
 2 The CLRA causes of action should therefore be dismissed. *Yumul v. Smart Balance, Inc.*,  
 3 733 F. Supp. 2d 1117, 1133 (C.D. Cal. 2010) (complaint dismissed to the extent it alleges  
 4 conduct occurring outside the relevant statutes of limitations.)

#### 5 **X. PLAINTIFF’S CLAIMS FOR BREACH OF EXPRESS WARRANTY** 6 **FAIL**

7 Plaintiff alleges breach of express warranty (fourth cause of action.) To  
 8 successfully plead a cause of action for breach of express warranty, a plaintiff must  
 9 allege “the exact terms of the warranty, plaintiff’s reasonable reliance thereon, and a  
 10 breach of that warranty which proximately causes plaintiff injury.” *Stanley v. Bayer*  
 11 *Healthcare LLC*, No. 11CV862-IEG BLM, 2012 WL 1132920, at \*10 (S.D. Cal. Apr. 3,  
 12 2012) citing *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142, 229 Cal.  
 13 Rptr. 605, 608 (Ct. App. 1986).

14 Ms. Mendez allegations do not provide factual predicate that any general  
 15 information in the Giostar USA webpage constituted any written warranty, statement of  
 16 fact or promise to treatments given by Giostar, India. Nor do Ms. Mendez’s allegations  
 17 provide any well pleaded factual predicate for any allegation that the stem cell treatment  
 18 she elected to have and received was not as represented or that she was harmed or that  
 19 the alleged non-conformity was a substantial fact in causing her harm.

#### 20 **XI. PLAINTIFF’S CLAIMS FOR QUASI-CONTRACT FAIL**

21 Plaintiff alleges a breach of quasi-contract (fifth cause of action.) To state a claim  
 22 for quasi-contract under California law, Plaintiff must have “conferred a benefit on  
 23 defendant which defendant has knowingly accepted under circumstances that make it  
 24 inequitable for the defendant to retain the benefit without paying for its value.”  
 25 *Swearingen v. Late July Snacks LLC*, No. 13-CV-04324-EMC, 2017 WL 1806483, at \*8  
 26 (N.D. Cal. May 5, 2017). Plaintiff has not well pled allegation of quasi-contract.  
 27 Plaintiff has no factual predicate to support that she conferred a benefit on any defendant  
 28 who accepted or retained the benefit. Neither Giostar USA nor any of the individual

1 defendants are paid referral fees for stem cell treatment performed by Giostar, India and  
 2 were not in Ms. Mendez's case either. As a favor to Bioscience CEO Mr. Stoffers, Mr.  
 3 Patel personally forwarded the payment for Ms. Mendez's treatment to Giostar, India  
 4 and that is all. The FAC does not supply any well pleaded factual allegation that either  
 5 Giostar USA or individual defendants were paid for her treatment. Bioscience Americas  
 6 did take a referral fee for itself and for Ms. Mendez's physician in Columbia for Ms.  
 7 Mendez's stem cell treatment provided by Giostar, India.

## 8 **XII. PLAINTIFF'S CLAIMS FOR BREACH OF FIDUCIARY DUTY** 9 **FAIL**

10 Plaintiff alleges breach of fiduciary duty (sixth cause of action.) A cause of action  
 11 for breach of fiduciary duty requires the existence of a fiduciary relationship, its breach,  
 12 and damage proximately caused by that breach. *Knox v. Dean*, 205 Cal.App.4th 417,  
 13 432–433, 140 Cal.Rptr.3d 569 (2012). A fiduciary relationship ordinarily arises “where  
 14 a confidence is reposed by one person in the integrity of another, and in such a relation  
 15 the party in whom the confidence is reposed, if he voluntarily accepts or assumes to  
 16 accept the confidence, can take no advantage from his acts relating to the interest of the  
 17 other party without the latter's knowledge or consent. . . .” *Wolf v. Superior Court*, 107  
 18 Cal.App.4th 25, 29, 130 Cal.Rptr.2d 860 ((2003) (internal citations omitted.)

19 The FAC supplies no well pleaded factual allegations to support such a cause of  
 20 action against Giostar USA or the individual defendants. Ms. Mendez decided to go to  
 21 India for a stem cell treatment that was not described in the Giostar USA website as a  
 22 treatment for lymphoma because she wished to avoid bone marrow ablation. Ms.  
 23 Mendez does not allege that Giostar USA or any of the individual defendants participated  
 24 in making this treatment decision. Ms. Mendez does not allege that any of the Defendants  
 25 were acting in the capacity of her treating physician. Ms. Mendez provides no factual  
 26 basis for plausibly asserting this claim and it should be dismissed.

## 27 **XIII. PLAINTIFF'S CLAIMS FOR FRAUDULENT CONCEALMENT** 28 **FAIL**



1 Plaintiff alleges fraudulent concealment (seventh cause of action). Fraudulent  
 2 concealment consists of five elements: "(1) the defendant must have concealed or  
 3 suppressed a material fact, (2) the defendant must have been under a duty to disclose the  
 4 fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed  
 5 the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware  
 6 of the fact and would not have acted as he did if he had known of the concealed or  
 7 suppressed fact, and (5) as a result of the concealment or suppression of the fact, the  
 8 plaintiff must have sustained damage." *Kaldenbach v. Mutual of Omaha Life Ins. Co.*,  
 9 178 Cal.App.4th 830, 850 (Ct.App.2009); *Boschma v. Home Loan Center, Inc.* (2011)  
 10 198 Cal.App.4th 230, 248 [129 Cal.Rptr.3d 874]; *Appel v. Bos. Nat'l Title Agency, LLC*,  
 11 2020 U.S. Dist. LEXIS 101692.

12 The FAC supplies no well pleaded factual allegations supporting such a cause of  
 13 action against Giostar USA or the individual defendants. Ms. Mendez decided to go to  
 14 India for a stem cell treatment that was not described in the Giostar USA website as a  
 15 treatment for lymphoma because she wished to avoid bone marrow ablation. Ms.  
 16 Mendez does not allege that Giostar USA or any of the individual defendants participated  
 17 in making this treatment decision. Ms. Mendez does not allege that any of the Defendants  
 18 were acting in the capacity of her treating physician. Ms. Mendez provides no factual  
 19 basis for plausibly asserting this claim and it should be dismissed.

#### 20 **XIV. PLAINTIFF'S CLAIMS FOR INTENTIONAL & NEGLIGENT** 21 **MISREPRESENTATION FAIL**

22 Plaintiff alleges intentional misrepresentation (eighth cause of action) and  
 23 negligent misrepresentation (ninth cause of action).

24 The elements of a claim for intentional misrepresentation are: "(1) a  
 25 misrepresentation; (2) knowledge of falsity; (3) intent to induce reliance; (4) actual and  
 26 justifiable reliance, and (5) resulting damages." *Cisco Sys., Inc. v. STMicroelectronics,*  
 27 *Inc.*, 77 F. Supp. 3d 887, 897 (N.D. Cal. 2014). The elements for negligent  
 28 misrepresentation are the same, except there is no requirement of knowledge of falsity,

1 instead, there must be no reasonable ground for believing the misrepresentation to be  
 2 true. *Wells Fargo Bank, N.A. v. FSI Fin. Sols., Inc.*, 196 Cal. App. 4th 1559, 1573, 127  
 3 Cal. Rptr. 3d 589 (2011); *Appel v. Bos. Nat'l Title Agency, LLC*, 2020 U.S. Dist. LEXIS  
 4 101692.

5 The FAC supplies not well pleaded factual allegations supporting such a cause of  
 6 action against Giostar USA or the individual defendants. Ms. Mendez decided to go to  
 7 India for a stem cell treatment that was not described in the Giostar USA website as a  
 8 treatment for lymphoma because she wished to avoid bone marrow ablation. Ms.  
 9 Mendez does not allege that Giostar USA or any of the individual defendants participated  
 10 in making this treatment decision. Ms. Mendez does not allege that any of the Defendants  
 11 were acting in the capacity of her treating physician. Ms. Mendez provides no factual  
 12 basis for plausibly asserting this claim and it should be dismissed.

13 In light of at least the foregoing, the FAC should be dismissed.

14  
 15 Respectfully Submitted,

16 Dated: August 31, 2020

**SETHLAW PLLC**

17  
 18 By /s/ Sandeep Seth  
 19 SANDEEP SETH

20  
 21 Attorneys for Defendants  
 22 GLOBAL INSTITUTE OF STEM CELL  
 23 THERAPY AND RESEARCH, USA,  
 24 GIOSTAR LABS, INC., ANAND  
 25 SRIVASTAVA, M.S., PH.D., DEVEN PATEL,  
 26 SIDDHARTH BHAVSAR and SCOTT  
 27 KIRKPATRICK  
 28

**CERTIFICATE OF SERVICE**

I am employed in the County of Harris, State of Texas. I am over the age of 18 and not a party to the within action. My business address is Pennzoil Place, 700 Milam Street, Suite 1300, Houston, TX 77002.

On August 31, 2020, I served the within document(s) described as:

**DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

on each interested party in this action as stated below:

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*Counsel for Plaintiff Christina Mendez and the putative Classes*

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on August 31, 2020, at Houston, Texas.

By /s/ Anita Lal  
ANITA LAL