UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER KELLER, a New Hampshire Citizen; CURTIS KELLER, a New Hampshire Citizen; and LINDA KELLER, a New Hampshire Citizen,

Plaintiffs,

v.

NARCONON FRESH START d/b/a SUNSHINE SUMMIT LODGE; ASSOCIATION FOR BETTER LIVING AND EDUCATION INTERNATIONAL; NARCONON INTERNATIONAL; NARCONON WESTERN UNITED STATES and DOES 1–100, ROE Corporations I–X, inclusive,

Defendants.

Case No. 14-cv-2168 BAS (RBB)

ORDER:

1. **GRANTING IN PART WITH LEAVE TO AMEND AND DENYING IN PART ASSOCIATION FOR BETTER LIVING AND EDUCATION INTERNATIONAL'S, NARCONON INTERNATIONAL'S, AND NARCONON WESTERN UNITED STATES' MOTION TO DISMISS; AND**
2. **GRANTING IN PART WITH LEAVE TO AMEND AND DENYING IN PART NARCONON FRESH START'S MOTION TO DISMISS**

[ECFs 10, 11]

On September 11, 2014, Plaintiffs Christopher Keller ("Christopher"), Curtis Keller ("Curtis"), and Linda Keller ("Linda") commenced this suit against Defendants Narconon Fresh Start d/b/a Sunshine Summit Lodge ("Fresh Start"),

Association for Better Living and Education International ("ABLE"), Narconon International ("NI"), and Narconon Western United States ("Western") arising out of Christopher's experience in Fresh Start's drug rehabilitation program. Plaintiffs allege the following causes of action: (1) breach of contract; (2) fraud; (3) negligent misrepresentation; (4) violation of the California Unfair Competition Law ("UCL", Cal. Bus. & Prof. Code §§ 17200, *et seq.*); and (5) violation of 18 U.S.C. § 2520, a federal statute prohibiting wiretapping.

NI, Western, and ABLE together moved to dismiss the Complaint against them. ECF 10. Plaintiffs opposed (ECF 16) and NI, Western, and ABLE replied (ECF 18). Fresh Start moved separately to dismiss the Complaint. ECF 11. Plaintiffs opposed (ECF 15) and Fresh Start replied (ECF 20). The Court finds these motions suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS IN PART WITH LEAVE TO AMEND** and **DENIES IN PART** NI's, Western's, and ABLE's motion to dismiss, and **GRANTS IN PART WITH LEAVE TO AMEND** and **DENIES IN PART** Fresh Start's motion to dismiss. ECFs 10, 11.

I. BACKGROUND

Plaintiffs claim that on or about April 28, 2014, Linda began searching the internet for a drug rehabilitation facility for her son, Christopher. Compl. ¶ 16, ECF 1. They claim several unrelated websites directed them to Fresh Start representative Josh Penn ("Penn"). *Id.* ¶¶ 17–18. Plaintiffs claim Fresh Start recorded Linda's calls. *Id.* at ¶ 123.

Penn allegedly made the following false statements: Fresh Start's program was scientifically and medically proven to be effective; Christopher would be supervised by a doctor or nurse while undergoing detoxification; Fresh Start would provide Christopher extensive drug and addiction counseling; Fresh Start staff was properly trained to treat persons with addiction; Fresh Start's treatment program had a success rate of 76%; and Christopher needed to be enrolled immediately

because there were very limited spots available. Compl. ¶¶ 19–21, 26, 50–55. Plaintiffs also claim Penn stated the program cost $33,000. *Id.* at ¶ 25. Linda and Curtis decided to place Christopher in the Fresh Start program based on these representations. *Id.* at ¶ 22. Linda and Curtis executed the contract, which stated that the Fresh Start program was secular in nature. *Id.* at ¶ 22, Ex. A.

Plaintiffs claim there were numerous empty beds when Christopher entered the program; Christopher was not supervised by a doctor or nurse when he underwent detoxification; Christopher shared a small dirty room with two other people; Christopher witnessed the presence of alcohol and drugs in Fresh Start's facility; Christopher was aware of people having sexual relations in Fresh Start's facility while he was there; Fresh Start was staffed with recent patients who were still at risk of relapse; and Christopher never received any counseling on substance abuse. Compl. ¶¶ 27–30, 64–65. Christopher claims he left Fresh Start early because he did not feel safe and because Fresh Start's staff was unfit to treat him. *Id.* at ¶ 68.

Plaintiffs also state that Fresh Start's program is actually the Narconon Treatment Program, which uses course materials designed by the Church of Scientology. Compl. ¶¶ 31–34. Fresh Start allegedly had Christopher study material that was copied directly out of Scientology scriptures and which had almost no information about substance abuse. *Id.* at 34–37. Plaintiffs claim Fresh Start directed Christopher to perform "Training Routines[,]" such as asking another patient "do fish swim?" for hours on end. *Id.* at ¶ 39. They also claim Christopher underwent a Scientology ritual called the "Purif." disguised by Fresh Start as "New Life Detoxification[.]" *Id.* at ¶¶ 42–43. Under this ritual, each day Fresh Start required patients to exercise vigorously, ingest large dosages of niacin and a "vitamin bomb", and then spend five hours in a sauna at temperatures between 160 and 180 degrees Fahrenheit. *Id.* at ¶¶ 45–46. Plaintiffs assert Fresh Start is using the Narconon program to introduce Scientology to "unwitting patients seeking

drug rehabilitation." *Id.* at ¶ 60.

Plaintiffs further allege that Fresh Start is a mere instrumentality of NI, ABLE, and Western, and that the latter defendants "govern and control nearly every aspect of Narconon Fresh Start's business activities." Compl. ¶¶ 70–71. Plaintiffs claim NI requires individual centers, such as Fresh Start, to abide by manuals NI prints. *Id.* at ¶ 72. The manuals prohibit Fresh Start from demoting, transferring, or dismissing a permanent staff member without approval from NI; Fresh Start staff members may file "Job Endangerment Chit[s]" with NI if they believe Fresh Start has given orders or denied materials that make work difficult; and Fresh Start employees are required to report misconduct to NI, which is then investigated by both NI and Western. *Id.* at ¶¶ 73–76. Plaintiffs further claim that NI requires Fresh Start to send detailed weekly reports containing statistics of more than 40 metrics, which both NI and Western review. *Id.* at ¶ 78.

Finally, Plaintiffs state NI, Western, and ABLE are intimately involved in Fresh Start's operations in the following ways: they require Fresh Start to seek their approval before circulating promotional materials and starting new websites; they assist Fresh Start in creating advertising materials and dictate the materials' content; they conduct "tech inspections" at Fresh Start to determine whether Fresh Start is delivering the Narconon program correctly; they work with individual centers like Fresh Start on legal issues, including patient requests for refunds and complaints to the Better Business Bureau; and they exercise final authority over Fresh Start relating to hiring and firing, delivery of services, finances, advertising, training, and general operations. *Id.* at ¶¶ 79–80, 83–88.

II. LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept all factual allegations pleaded in the complaint as true and must

construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations, rather, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (alteration in original). A court need not accept "legal conclusions" as true. *Iqbal*, 556 U.S. at 678. Despite the deference the court must pay to the plaintiff's allegations, it is not proper for the court to assume that "the [plaintiff] can prove facts that [he or she] has not alleged or that defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Generally, courts may not consider material outside the complaint when ruling on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, documents specifically identified in the complaint whose authenticity is not questioned by parties may also be considered. *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on other grounds). Moreover, the court may consider the

full text of those documents, even when the complaint quotes only selected portions. *Id.* It may also consider material properly subject to judicial notice without converting the motion into one for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

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

III. DISCUSSION[1]

A. Plaintiffs Have Alleged an Agency Relationship Between Defendants

NI, Western, and ABLE move for dismissal of all claims against them, arguing Plaintiffs' experience was solely with Fresh Start and that the Complaint's allegations are insufficient to establish an agency relationship between them and Fresh Start. ECF 10-1, 9–12. Defendants rely on *Patterson v. Domino's Pizza, LLC*, 60 Cal.4th 474 (2014) for support.

In *Patterson*, the California Supreme Court discussed principals of agency at length in the context of a franchisor-franchisee relationship. Under California law, a franchisor is the franchisee's principal when the franchisor has the right to control the "means and manner" of the franchisee's operations. *Patterson*, 60 Cal.4th at 495 (quoting *Cislaw v. Southland Corp.*, 4 Cal. App. 4th 1284, 1288 (1992)). "[C]ontrol over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees[]" support a finding of agency. *Id.* at 497–98. Both

[1] Fresh Start requests the Court take judicial notice of an order written by Judge Gonzalo Curiel in a similar case. ECF 11-2. The Court **GRANTS** Fresh Start's request. ECF 11-2. *See* Fed. R. Evid. 201(b)(2) (a court may take judicial notice of a fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 966 F.Supp.2d 1018, 1024 n.4 (C.D. Cal 2013).

Plaintiffs and Defendants agree the principles articulated in *Patterson* are applicable here. ECF 10-1, 10–12; ECF 16, 4–7.

Plaintiffs allege the following: (1) NI has ultimate control over the demotion, transfer, or dismissal of a permanent Fresh Start employee; (2) Fresh Start employees may file grievances with NI concerning misconduct by Fresh Start; (3) NI and Western investigate reported misconduct concerning Fresh Start; (4) NI requires Fresh Start to send detailed weekly reports, which are reviewed by NI and Western; (5) ABLE, NI, and Western require Fresh Start to seek authorization before circulating new advertising; (6) ABLE, NI, and Western conduct "tech inspections" at Fresh Start to ensure employees are correctly conducting the Narconon program; and (7) ABLE, NI, and Western instruct Fresh Start employees exactly how they want Fresh Start to provide services. Accepting these allegations as true and drawing all inferences in favor of Plaintiffs, the Complaint sufficiently alleges that ABLE, NI, and Western control the "means and manner" of Fresh Start's operations. Plaintiffs have thus alleged an agency relationship between ABLE, NI, Western and Fresh Start.

B. Plaintiffs' Breach of Contract Claim

ABLE, NI, and Western argue that Plaintiffs' breach of contract claim must be dismissed as to them because they were not parties to the contract and because Plaintiffs did not adequately allege an agency relationship between them and Fresh Start. ECF 10-1, 12–13. They further argue that even if they are principals of Fresh Start, they are not liable because the contract did not contain their names or state the "fact of agency." *Id.* (citing *Van Haaren v. Whitmore*, 2 Cal.App.2d 632, 634 (1934)). As discussed above, Plaintiffs have adequately alleged an agency relationship between the agent, Fresh Start, and the principals, ABLE, NI, and Western.[2] In *Van Haaren*, individual defendants were liable for the unpaid balance

[2] ABLE, NI, and Western also reiterate their argument that there is no agency relationship between them and Fresh Start. The Court has already addressed this argument. *See supra*, Section III.A.

of a note. These individual defendants claimed they had acted as agents of a principal, but because the note did not explicitly refer to the existence of the principal, they were individually liable for the note's payment. However, *Van Haaren* does not apply to the present case. While *Van Haaren* does support finding agents liable for a principal's failure to pay, it is silent on the principal's liability.

Fresh Start argues that Christopher has no standing to bring the breach of contract claim because he was not a party to the contract. ECF 11-1, 5–6. Fresh Start also argues Curtis and Linda have not alleged an injury, an essential element of breach of contract. *Id.* First, a third party beneficiary has standing to sue for enforcement or breach of a contract. *See H.N. and Frances C. Berger Found. v. Perez*, 218 Cal. App. 4th 37, 43 (2013). The contract here was clearly made for the benefit of Christopher. Second, the Complaint states the treatment program cost $33,000. Because Fresh Start allegedly did not perform on the contract, Linda and Curtis may recover for Fresh Start's breach.

Plaintiffs' Complaint states a claim for breach of contract. Defendants' motions to dismiss Plaintiffs' breach of contract claim are **DENIED**. ECFs 10, 11.

C. Plaintiffs' Fraud Claim

All Defendants contend that Plaintiffs have failed to meet Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements for fraud claims. ECF 10-1, 13–16; ECF 11-1, 6–10. The elements of fraud include (1) a misrepresentation; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. *Khan v. CitiMortgage, Inc.*, 975 F. Supp. 2d 1127, 1139 (E.D. Cal. 2013). To meet Rule 9(b)'s requirements, Plaintiffs must have pled the "who, what, when, where, and how[,]" of the misrepresentations, so that Defendants are aware of the particular misconduct alleged and can prepare an adequate response. *Id.* at 1139–40 (citations omitted).

Plaintiffs allege Fresh Start employee Josh Penn made the previously described misrepresentations during a phone call made around April 28, 2014.

Compl. ¶¶ 16–21, 96. These allegations satisfy the "who, what, when, where, and how" of the fraud. Plaintiffs further allege that Penn knowingly made the misrepresentations, and that they relied on them, suffering injury as a result. Compl. ¶¶ 22, 97–100. These allegations are sufficient to put Defendants on notice of their alleged misconduct. Plaintiffs have therefore adequately pled their fraud claim. *See Amato v. Narconon Fresh Start*, No. 3:14–cv–0588, 2014 WL 5390196, at *5–*6 (S.D. Cal. Oct. 23, 2014) (applying similar analysis to similar facts). Defendants' motions to dismiss Plaintiff's fraud claim are **DENIED**. ECFs 10, 11.

D. Plaintiffs' Negligent Misrepresentation Claim

"The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243 (2007). Defendants argue Plaintiffs have failed to allege that the misrepresentations were made without reasonable ground for believing them to be true. ECF 10-1, 17; ECF 11-1, 8–9.

Plaintiffs allege that Penn falsely represented that the treatment program had a 70% to 80% success rate and that Penn directed them to Fresh Start's website, which stated the treatment program had a 76% success rate. Compl. ¶ 21. Plaintiffs further allege that ABLE, NI, and Western must authorize all of Fresh Start's advertising and websites before they "go live." *Id.* at ¶ 79. Finally, Plaintiffs allege that an NI official had knowledge in 2009 that the 76% success rate claim was not scientifically proven. *Id.* at ¶ 54. Taken together, these allegations are sufficient to support Plaintiffs' negligent misrepresentation claim because NI had no reasonable basis to believe its success rate was 76%, and it authorized Fresh Start to make that claim on its website. Plaintiffs have thus pled sufficient facts to support this claim. Defendants' motions to dismiss Plaintiffs' negligent misrepresentation claim are

therefore **DENIED**. ECFs 10, 11.

E. Plaintiffs' UCL Claim

Defendants argue Plaintiffs lack standing to bring their UCL claim. ECF 10-1, 18–20. To have standing to bring a UCL claim, a person must have "suffered injury in fact and[ ]lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. Under the express language of the California Business and Professions Code, Christopher does not have standing to bring a UCL claim because the Complaint contains no allegations that he "lost money or property as a result" of Defendant's conduct. *Id.* However, Plaintiffs have alleged that Curtis and Linda lost $33,000. Compl. ¶ 25. They therefore have standing to bring the UCL claim.

The remedies available under the UCL are limited to injunctive relief and restitution. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003) (citations omitted). Standing for injunctive relief requires plaintiffs to show an actual injury and "a real and immediate threat" the injury will occur again. *Bates v. United Postal Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citations omitted). Plaintiffs lack standing to pursue injunctive relief because they do not allege there is any risk they will use Defendants' services again. This does not require dismissal of Plaintiffs' UCL claim, however, because Curtis and Linda may seek restitution.

Christopher lacks standing to bring the UCL claim. Curtis and Linda possess standing to bring the UCL claim seeking restitution. Accordingly, Defendants' motions to dismiss Curtis' and Linda's UCL claim are **DENIED**. ECFs 10, 11.

F. Plaintiffs' Claim for Violation of 18 U.S.C. § 2520

Title 18, Section 2520 of the United States Code provides: "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used *in violation of this chapter* may in a civil action recover from the person or entity. . . ." (emphasis added). It is not "unlawful under th[e same]

chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act." 18 U.S.C. § 2511(2)(d).

Under the express language of these statutes, only one party need consent to recording. Plaintiffs do not allege that Defendants did not consent to recording. Further, Plaintiffs do not allege that Defendants recorded calls for the purpose of committing a criminal or tortious act. They do allege that Defendants recorded the calls so they could instruct employees on how to improve their sales technique, which is not a criminal or tortious purpose. *See* Compl. ¶ 121. Accordingly, Plaintiffs have failed to state a claim under 18 U.S.C. § 2520 and Defendants' motions are **GRANTED** as to this claim. ECFs 10, 11.

IV. CONCLUSION & ORDER

In light of the foregoing, the Court **ORDERS**:

1. Christopher's UCL claim is **DISMISSED** with leave to amend;
2. Plaintiffs' UCL injunctive relief is **DISMISSED** with leave to amend;
3. Plaintiffs' claim for violation of 18 U.S.C. 2520 is **DISMISSED** with leave to amend; and
4. Defendants' motions are otherwise **DENIED**. ECFs 10, 11.
5. Plaintiff's Complaint (ECF 1) remains operative except for the dismissed claims, but Plaintiffs may amend it **within 21 days** of this Order.

IT IS SO ORDERED.

Dated: April 22, 2015

Hon. Cynthia Bashant
United States District Judge