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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ABARCA RAUL VALENCIA, *et al.*,

Plaintiffs,

v.

MERCK & CO., INC., *et al.*,

Defendants.

1:07-CV-00388 OWW GSA

MEMORANDUM DECISION AND ORDER RE
BAC DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' EIGHTEENTH
CLAIM FOR FRAUD AND TO DISMISS
AND STRIKE CONSPIRACY TO COMMIT
FRAUD ALLEGATIONS OF PLAINTIFFS'
SIXTH AMENDED COMPLAINT (DOC.
486)

I. INTRODUCTION.

Defendants Merck & Co., Inc., Amsted Industries, Inc.,
Baltimore Aircoil Co., Inc., and Track Four, Inc. (collectively
"the BAC Defendants") move to dismiss the eighteenth claim for
relief, entitled "Fraud and Deceit," in Plaintiffs' sixth amended
complaint ("SAC"). The BAC Defendants also move to dismiss
Plaintiffs' nineteenth claim for conspiracy to the extent it is
based on fraud or concealment and to strike from Plaintiffs'

1 conspiracy claims paragraphs 280 and 281, which allege fraud and
2 concealment.

3 The BAC Defendants argue:

4 (1) That the fraud claims in the eighteenth and nineteenth
5 causes of action fail to satisfy the pleading requirements of
6 Federal Rule of Civil Procedure 9(b) because the SAC fails to
7 allege:
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9 (a) that any individual Plaintiff read or heard any of
10 the allegedly fraudulent statements; or

11 (b) that he or she took any specific action in reliance
12 on the allegedly fraudulent statements; and

13 (2) That Plaintiffs have not alleged facts sufficient to
14 demonstrate a duty of disclosure owed by the BAC to any
15 Plaintiff.
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17 II. STANDARD OF DECISION

18 Rule 9(b) requires that, in all averments of fraud, the
19 circumstances constituting fraud be stated with particularity. One
20 of the purposes behind Rule 9(b)'s heightened pleading requirement
21 is to put defendants on notice of the specific fraudulent conduct
22 in order to enable them to adequately defend against such
23 allegations. *See In re Stac Elec. Litig.*, 89 F.3d 1399, 1405 (9th
24 Cir. 1996). Further, Rule 9(b) serves "to deter the filing of
25 complaints as a pretext for the discovery of unknown wrongs, to
26 protect [defendants] from the harm that comes from being subject to
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1 fraud charges, and to prohibit plaintiffs from unilaterally
2 imposing upon the court, the parties and society enormous social
3 and economic costs absent some factual basis." *Id* (internal
4 citations and quotations omitted).

5 As a general rule, fraud allegations must state "the time,
6 place, and specific content of the false representations as well as
7 the identities of the parties to the misrepresentation."

8 *Schreiber Distrib. v. Serv-Well Furniture Co.*, 806 F.2d 1393,
9 1401 (9th Cir. 1986). In other words, an allegation of fraud must
10 describe the "who, what, when, where, and how" of the alleged
11 misconduct." *Cooper v. Picket*, 137 F.3d 616, 627 (9th Cir. 1997).
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14 III. ANALYSIS

15 A. Duty to Disclose.

16 The twenty-third claim in Plaintiffs' fifth amended complaint
17 "FAC," entitled "Civil Conspiracy," was dismissed with leave to
18 amend on May 18, 2009. Doc. 419. Acknowledging "[a] long line of
19 cases establishes that there is no independent cause of action for
20 civil conspiracy under California Law," the ruling held that
21 "Plaintiffs may maintain a separate civil conspiracy count based
22 upon [] incorporated allegations of nuisance and trespass." *Id.* at
23 12-14.
24

25 In addition, Plaintiffs attempted to base their conspiracy
26 claim on allegedly fraudulent conduct. *Id.* at 14. Specifically,
27 the FAC alleged that BAC Defendants conspired to "conceal and/or
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1 misrepresent the nature and extent of ... contamination emanating
2 from the former BAC facility." FAC ¶295. Whether such an
3 allegation raises fraudulent misrepresentation or fraudulent
4 concealment, Plaintiffs must comply with the requirements of
5 Federal Rule of Civil Procedure 9(b). Doc. 419 at 14. Because
6 Plaintiffs "appear[ed] to restrict their argument to fraudulent
7 concealment," Plaintiffs "must allege that the BAC Defendants had a
8 duty to disclose the allegedly concealed facts to the plaintiffs."
9 *Id.* at 14-15 (citing *Hahn v. Mirda*, 147 Cal. App. 4th Cal. App.
10 4th 740, 745 (2007)).
11

12 Plaintiffs cited no authority for their claims that because
13 "the BAC Defendants had a duty to disclose to the Regional Water
14 Quality Control Board ('Regional Board') all relevant factual
15 information necessary for the Regional Board to adequately oversee
16 the remediation of this contamination site," this duty "reasonably
17 extends" to Plaintiffs." Doc. 419 at 19-21. Plaintiffs'
18 alternative contention was also rejected, namely "that a special
19 relationship existed between the residents located within a mile of
20 the BAC facility (of which plaintiffs' herein are included) and the
21 BAC defendants ... demonstrated [by] the fact that the Regional
22 Board instructed the BAC defendants to send out 'Fact Sheets'
23 related to the contamination and designated that [these] be sent
24 out to the residents living within a one mile radius of the
25 facility." *Id.* at 21. Plaintiffs made "absolutely no mention of
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1 any duty to disclose on the part of the BAC Defendants" in the FAC.
2 *Id.* at 22.

3 Plaintiffs requested leave to amend the conspiracy claim to
4 better articulate their theory of duty. *Id.* at 22. The BAC
5 Defendants suggested that leave to amend would be futile because
6 the law does not support the imposition of a duty to disclose under
7 the circumstances here. *Id.* The May 18, 2009 Decision reviewed
8 the circumstances in which a duty to disclose might arise:
9

10 ...*Heliotis v. Schuman*, 181 Cal. App. 3d 646, 651
11 (1986), held that, There are "four circumstances in which
12 nondisclosure or concealment may constitute actionable
13 fraud: (1) when the defendant is in a fiduciary
14 relationship with the plaintiff; (2) when the defendant
15 had exclusive knowledge of material facts not known to
16 the plaintiff; (3) when the defendant actively conceals a
17 material fact from the plaintiff; and (4) when the
18 defendant makes partial representations but also
19 suppresses some material facts."

20 Assuming Plaintiffs invoked the second circumstance, that defendant
21 had exclusive knowledge of material facts not known to the
22 plaintiff, the decision provided:

23 *LiMandri [v. Judkins]* explained that "where material
24 facts are known to one party and not to the other,
25 failure to disclose them is not actionable fraud unless
26 there is some relationship between the parties which
27 gives rise to a duty to disclose such known facts." [52
28 Cal. App. 4th 326,] 336-37. "As a matter of common
sense, such a relationship can only come into being as a
result of some sort of transaction between the parties."
Id.; see also *Shin v. Kong*, 80 Cal. App. 4th 498, 509
(2000) ("A duty to disclose facts arises only when the
parties are in a relationship that gives rise to the
duty, such as seller and buyer, employer and prospective
employee, doctor and patient, or parties entering into
any kind of contractual agreement.").

Here, Plaintiffs seek an extension of the law, one that
would find a relationship, and therefore a duty to
disclose, existed between the BAC Defendants and
Plaintiffs by virtue of the fact that the Regional Board

1 ordered the BAC Defendants to issue Fact Sheets to
2 Plaintiffs explaining the BAC Site contamination. This
3 is a novel theory for which Plaintiffs offer no legal
4 support. Such a theory would create a private right of
5 action for failing to disclose the subject matter of any
6 Board order to a site owner or operator to promote
7 information disclosure. Such a decision is the province
8 of the legislature. The BAC Defendants' motion to
9 dismiss is GRANTED WITH LEAVE TO AMEND as to any civil
10 conspiracy based on fraudulent concealment....

11 *Id.* at 23-24 (emphasis added).

12 In the currently-operative SAC, Plaintiffs invoke the fourth,
13 rather than the second, circumstance described in *Heliotus*, which
14 imposes a duty to disclose when the defendant makes partial
15 representations but also suppresses some material facts. In other
16 words, half-truths can trigger fraud liability. As the California
17 Supreme Court explained in *Warner Constr. Corp. v. City of Los*
18 *Angeles*, even the half-truths doctrine requires a transactional or
19 other special relationship:

20 In transactions which do not involve fiduciary or
21 confidential relations, a cause of action for non-
22 disclosure of material facts may arise [where] ... the
23 defendant makes representations but does not disclose
24 facts which materially qualify the facts disclosed, or
25 which render his disclosure likely to mislead....

26 2 Cal. 3d 285, 294 (1970).

27 The parties disagree as to whether this rule nevertheless
28 requires a transactional or special relationship. *Warner*, for
example, which specifically indicated that half-truths could result
in liability "[i]n transactions which do not involve fiduciary or
confidential relations," *id.* at 294 (emphasis added), involved
parties in privity to a contract for construction, *id.* at 285.

1 But, other cases suggest a broader application of the rule.

2 *Vega v. Jones, Day, Reavis & Pogue*, 121 Cal. App. 4th 282,
3 292 (2004), involved the omission of material facts from statements
4 made by an attorney to opposing parties during a corporate merger
5 transaction. Nevertheless, *Vega* explicitly rejected a rule that
6 fraud based on nondisclosure requires an "independent duty of
7 disclosure." Assuming without discussion that plaintiff, who was
8 not a client of defendants, could not allege any special
9 circumstances that would give rise to an independent duty of
10 disclosure, the *Vega* court emphasized: "In some but not all
11 circumstances, an independent duty to disclose is required; active
12 concealment may exist where a party while under no duty to speak,
13 nevertheless does so, but does not speak honestly or makes
14 misleading statements or suppresses facts which materially qualify
15 those stated." *Id.* at 293-94 (internal citations and quotations
16 omitted).

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19 Similarly, *Cicone v. URS Corp.*, 183 Cal. App. 3d 194, 201
20 (1986), involved alleged representations made by an attorney to a
21 third party in connection with the sale of a business. The BAC
22 Defendants emphasize that *Cicone* and *Vega* were decided in the
23 context of a transactional relationship. Yet, like *Vega*, *Cicone*
24 also relied upon the general rule that disclaims any need for a
25 special relationship:
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1 Although a duty to disclose a material fact normally
2 arises only where there exists a confidential relation
3 between the parties or other special circumstances
4 require disclosure, where one does speak he must speak
5 the whole truth to the end that he does not conceal any
6 facts which materially qualify those stated. One who is
7 asked for or volunteers information must be truthful, and
8 the telling of a half-truth calculated to deceive is
9 fraud.

10 *Id.* at 201 (internal citations omitted).

11 Likewise, *Moore v. IMCO Recycling of Cal., Inc.*, 2005 WL
12 5887179 (C.D. Cal. 2005), involved parties to a real estate
13 transaction who allegedly failed to disclose environmental
14 contamination. In negotiating the sale, the subsidiary stated in
15 writing that “[t]he only environmental issues on the property that
16 involved the local environmental regulatory agencies were the
17 underground storage tank (UST) removal projects,” even though the
18 defendants allegedly had knowledge of other environmental issues on
19 the property. *Id.* at *10. Moore held that when defendants
20 “volunteered to speak on the Property’s environmental issues, they
21 took on a duty of full disclosure of known environmental issues.”
22 *Id.*

23 The BAC Defendants again emphasize that *Moore* applied this
24 rule in the context of a real estate transaction, but fail to
25 acknowledge that *Moore* relied on *Vega* for the general proposition
26 that an independent duty to disclose is not always required:
27 “active concealment may exist where a party while under no duty to
28 speak, nevertheless does so, but does not speak honestly or makes

1 misleading statements or suppresses facts which materially qualify
2 those stated." *Id.* at *9.

3 Plaintiffs rely on *Randi W. v. Muroc Joint Unified Sch.*
4 *Dist.*, 14 Cal. 4th 1066 (1997), in which the California Supreme
5 Court applied *Warner's* misleading half-truths doctrine to find that
6 a school district could be liable for fraudulent misrepresentation
7 for issuing a letter of recommendation for a vice principal that
8 implied he was fit to interact safely with female students, despite
9 the fact that defendants knew he had been charged with relevant
10 sexual improprieties. The *Randi W.* court "view[ed] [the] case as a
11 'misleading half-truths' situation in which defendants, having
12 undertaken to provide some information regarding [the vice-
13 principal's] teaching credentials and character, were obliged to
14 disclose all other facts which 'materially qualify' the limited
15 facts disclosed." *Id.* at 1082. To support this rule, the
16 California Supreme Court cited *Warner*, 2 Cal. 3d at 294, and
17 California Civil Code § 1710(3), which provides that "deceit"
18 within the meaning of § 1709's cause of action for "fraudulent
19 deceit"¹ means "the suppression of a material fact by one who gives
20 misleading information of other facts."
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24 *Randi W.* discussed the issue of "special relationship."
25 First, defendants had alternative courses of conduct to avoid

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¹ Section 1709 explains that "fraudulent deceit" involves "[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

1 liability, "namely, (1) writing a 'full disclosure' letter
2 revealing all relevant facts regarding [the employee's] background,
3 or (2) writing a 'no comment' letter omitting any affirmative
4 representations regarding [the employee's] qualifications, or
5 merely verifying basic employment dates and details." *Id.* at 1078.
6 Absent a special relationship between the sender and recipient of
7 those types of communications, "liability may not be imposed for
8 mere nondisclosure or other failure to act." *Id.* However, despite
9 the absence of such a special relationship between the original
10 employer and the hiring entity, the California Supreme Court
11 considered whether it would be appropriate to "expand a tort duty
12 of care" to the writer of a letter of recommendation, taking into
13 consideration the "potential social and economic consequences."
14 *Id.* at 1079.

17 On the one hand, the *Randy W.* court acknowledged a strong
18 public policy in favor of protecting children from sexual or
19 physical abuse. *Id.* at 1078-79. At the same time, *Randy W.*
20 considered "that the threat of potential tort liability [might]
21 inhibit employers from freely providing reference information,
22 restricting the flow of information prospective employers need and
23 impeding job applicants in finding new employment." *Id.* at 1080.
24 Balancing these interests, *Randi W.* held that the author of a
25 letter of recommendation "owes to prospective employers and third
26 persons a duty not to misrepresent the facts in describing the
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1 qualifications and character of a former employee, if making these
2 misrepresentations would present a substantial, foreseeable risk of
3 physical injury to the prospective employer or third persons." *Id.*
4 at 1081.

5 The BAC Defendants argue that *Randi W.* is distinguishable
6 because it was, in fact, based on the employment relationships at
7 issue, implying the presence of a "special relationship." But,
8 *Randi W.* explicitly disclaimed the existence of any special
9 relationship between the former and present employer, yet
10 nevertheless imposed liability "if making these misrepresentations
11 would present a substantial, foreseeable risk of physical injury to
12 the prospective employer or third persons." The latter
13 qualification was necessary to balance the competing public policy
14 interests.
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16 Here, in contrast, there are no such competing policy
17 interests. Plaintiffs assert that in four separate public
18 communications, allegedly directed at Plaintiffs, the BAC
19 Defendants issued statements that contamination at their site was
20 non-hazardous and/or relatively innocuous. See SAC ¶¶ 259-263.
21 Plaintiffs further allege that the BAC defendants knowingly omitted
22 material information pertaining to the nature and extent of the
23 contamination. Here, there is no public policy that justifies
24 qualifying the general rule, articulated in numerous California
25 cases and California Civil Code § 1710(3), that one who "volunteers
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1 information must be truthful, and the telling of a half-truth
2 calculated to deceive is fraud.”

3 Plaintiffs have sufficiently alleged that the BAC Defendants
4 had a duty not to tell half-truths because the BAC Defendants spoke
5 about contamination and spoke misleadingly. Proof is not required
6 at the pleading stage.
7

8 B. Specificity of Pleading.

9 The BAC Defendants next object that Plaintiffs have not pled
10 their fraud claim with sufficient specificity. The BAC Defendants
11 protest that Plaintiffs have “at best identified four documents
12 without: (a) specifying any parts of those documents that they
13 contend are false or (b) naming any individual plaintiffs who
14 allegedly heard or read the (unspecified) allegedly false part(s)
15 of the documents.” Doc. 556 at 2.
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17 The first objection is without merit. Plaintiffs have
18 identified four documents that are alleged public statements made
19 by the BAC Defendants, which allegedly constitute instances in
20 which the BAC Defendants volunteered “half-truths calculated to
21 deceive.” Plaintiffs do not allege that any particular statement
22 made in those documents is *per se* false. Rather, they allege that
23 these documents misleadingly imply the absence of other, contrary,
24 material facts. Plaintiffs specifically explain the ways in which
25 they allege the four communications were materially misleading:
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1 Each of the above referenced communications directly from
2 the MERCK DEFENDANTS to the public including plaintiffs
3 herein, while discussing certain aspects of the
4 contamination and remediation at the former BAC facility,
5 failed to include material information concerning the
6 contamination which rendered the information contained
7 within these communications as half-truths calculated to
8 deceive plaintiffs. Specifically, none of these
9 communication initiated by the MERCK DEFENDANTS to
10 plaintiffs herein, included any of the following material
11 information related to the contamination and its
12 potential health affects on plaintiffs: 1) that the MERCK
13 DEFENDANTS were first notified of significant
14 contamination of the facility in at least 1983 through
15 the County Health Department, yet continued to utilize
16 the chemicals in their wood processing operations for
17 another eight years before discontinuing the treatment of
18 lumber at the facility; 2) the amount of chemicals
19 contaminating the soil and groundwater was significant
20 and that the MERCK DEFENDANTS continued use of the
21 chemicals for some eight years after it was made aware of
22 the contamination significantly increased the amount of
23 chemicals contaminating the environment and also resulted
24 in the significant migration of the pollution plume into
25 plaintiffs' neighborhood; 3) that a storm water pond on
26 the facility was confirmed to have high levels of
27 Hexavalent Chromium in excess of drinking water standards
28 and that the pond had been connected for decades to the
adjacent El Capitan Canal flowing immediately to the east
of the Beachwood neighborhood, resulting in the El
Capitan Canal being described by the Regional Water
Quality Control Board as a "main pollutant pathway" from
the facility; 4) that significant portions of bare soil
at the BAC facility was contaminated and that dust from
the facility could have caused contaminants to become
airborne exposing plaintiffs' to the contamination; 5)
that airborne contaminants could have historically and
currently contaminated home grown vegetables and fruit as
a result of the deposit of the airborne contaminants on
the produce and the transmigration of contaminants in
groundwater and soil through the roots of vegetables and
trees located on plaintiffs' property; 6) that the storm
water retention pond identified above was originally
required to be remediated, pursuant to the Toxic Pits
Cleanup Act because it was hazardous according to the
Department of Toxic Substances; 7) that exposure to
Hexavalent Chromium and Arsenic could result in a host of
physical ailments, symptoms and diseases, including but

1 not limited to cancer, pulmonary conditions and diseases,
2 respiratory conditions and diseases, dermatological
3 conditions and diseases, neurological conditions and
4 diseases, reproductive toxicity and birth defects,
5 ophthalmological conditions and diseases could result in
6 the above-identified health issues; 9) that certain
7 private drinking water wells had in fact been impacted
8 with contaminants from the BAC facility; 10) that the
9 MERCK DEFENDANTS had received a violation as early as
10 1987, with regard to the presence of hazardous materials
11 located onsite, and were specifically informed that soil
12 samples at the site showed "hazardous levels" of Copper
13 and Chromium and that if the cleanup did not occur, the
14 Health Department could pursue administrative, civil and
15 criminal action against the facility; 11) that the MERCK
16 DEFENDANTS had been informed in 1987 of the presence of
17 contaminated soil and pond sediment at the facility that
18 exceeded background levels; 12) that in 1988, the MERCK
19 DEFENDANTS were informed that the pond sediment exceeded
20 by ten fold acceptable limits for the presence for
21 Hexavalent Chromium and was informed that certain
22 groundwater wells showed Chromium above background
23 levels; 13) that in 1988, the MERCK DEFENDANTS were
24 informed that subsurface soils contained Copper at
25 hazardous amounts and that groundwater had been impacted
26 by the Chromium; 14) that in 1988, BAC was informed that
27 it was required to post a Proposition 65 warning on its
28 facility, due to its use of Hexavalent Chromium and
Hexavalent Chromium's link to cancer or reproductive
toxicity; 15) that in 1988, the Regional Board informed
the BAC that its investigations had confirmed "high
concentrations of Arsenic, Chromium and Copper in
subsoils" and that the Board was "concerned about the
potential for impacting water quality"; 16) that in
1990, the Department of Health Services informed MERCK
DEFENDANTS that the presence of hazardous waste at the
facility and the elevated levels of Chromium and Arsenic
at the facility required closure of the facility; 17)
that as early as 1992, the MERCK DEFENDANTS were aware
that the contaminants had impacted groundwater and had
migrated offsite into the Beachwood Neighborhood; 18)
that at least by 1994, the MERCK DEFENDANTS had been
specifically advised that risks to human health did exist
as a result of the contamination, including risk from
direct dermal contact with contaminated soil and airborne
particles exposing residents to contamination via wind,
dust, home gardens and home grown fruit; 19) that the
need for increased construction activities and property

1 access related to remediation of the site was as a result
2 of the continued expansion and migration of the
3 groundwater plume which had migrated into the Beachwood
4 Neighborhood placing the residents' drinking water at
5 risk; 20) that the groundwater plume was in fact located
6 beneath some of plaintiffs' real property; and 21) that
7 the highest concentrations of Hexavalent Chromium
8 contamination at the site were extensive and represented
9 one of the highest "hot spots" of Hexavalent Chromium
10 contamination in the county, and in particular, "hot
11 spots" in excess of 170,000 ppbs of Chromium.

12 SAC ¶262.

13 More compelling is the BAC Defendants' assertion that the SAC
14 does not allege with sufficient particularity the specific
15 Plaintiffs who received any misleading half-truths and/or the ways
16 in which those Plaintiffs relied upon any such statements. The BAC
17 Defendants cite *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1091-93,
18 which concerned allegations that a corporation intentionally
19 misrepresented its financial condition in order to inflate share
20 values. The California Supreme Court rejected corporate
21 shareholder plaintiffs' attempt to apply the "fraud-on-the-market"
22 doctrine to excuse them from pleading that they actually heard and
23 relied upon the misrepresentations. Although the *Mirkin* court
24 "[did] not doubt that stock prices adjust in response to the
25 dissemination of material information...., it does not follow that
26 investors will be left without a remedy unless we adopt the fraud-
27 on-the-market doctrine. Investors, including plaintiffs in this
28 case, already have remedies under federal and state law that do not
require the pleading or proof of actual reliance." *Id.* at 1101.

1 Plaintiffs rejoin by citing *Barnhouse v. City of Pinole*, 133
2 Cal. App. 3d 171, 191-192 (1992), for the proposition that
3 liability may be imposed where a representation was intended to be
4 relied upon by the public or a general class of persons that
5 includes the plaintiffs. Doc. 555 at 13. *Barnhouse* did indeed
6 hold that "[i]t is not necessary that the maker of the
7 representation have any particular person in mind. It is enough
8 that he intends or has reason to expect to have it repeated to a
9 particular class of persons and that the person relying upon it is
10 one of that class." *Id.* (internal citation and quotations
11 omitted). But, in so holding, *Barhhouse* was concerned with
12 whether a subsequent purchaser of a property, not in privity with
13 the developer, could sue the developer for deceit by nondisclosure.
14 *Id.* at 193. *Barnhouse* answered this question in the affirmative,
15 finding that "it is foreseeable that there will be [subpurchasers]
16 and that they will be the ones to suffer damage." *Id.*

19 Although *Barnhouse* arguably permits the participation of
20 Plaintiffs who were not owners of the properties at the time the
21 BAC Defendants made their alleged half-truth statements, it does
22 not excuse the requirement that the fraud be pled with
23 particularity. Here, although the complaint does specify who made
24 the statements on behalf of the BAC Defendants, Plaintiffs do not
25 identify who received the statements. Plaintiffs only allege that
26 the misrepresentations were aimed at the "BAC Contamination
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1 Plaintiffs," as opposed to the "Yosemite Plaintiffs," as those
2 categories are defined in the complaint. This is insufficient.

3 Likewise, Plaintiffs assert they have adequately pleaded
4 reliance in compliance with California Civil Code § 1711, which
5 provides:

6 Deceit upon the public, etc. One who practices a deceit
7 with intent to defraud the public, or a particular class
8 of persons, is deemed to have intended to defraud every
9 individual in that class, who is actually misled by the
deceit.

10 This concerns only the intent to defraud, and "simply points out
11 that one who makes false representations with fraudulent intent
12 need not have any particular victim in mind." *Mirkin*, 5 Cal. 4th
13 at 1092. Nevertheless, "[l]itigants who rely on section 1711 must
14 still plead and prove actual reliance." *Id.* Although the
15 complaint generally alleges that Plaintiffs "reasonably relied upon
16 [the information given by the BAC Defendants] in failing to take
17 appropriate measures to protect themselves and their families as
18 well as their real property from exposure to contamination and in
19 failing to seek redress...for their injuries," SAC at ¶267, the
20 lack of specificity in these allegations does not provide the BAC
21 Defendants with sufficient information upon which to build a
22 defense to a fraud claim. Plaintiffs must identify by name
23 specific Plaintiffs who received the allegedly misleading
24 information and relied upon it to their detriment.
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1 IV. CONCLUSION

2 For the reasons set forth above, Defendants' motion to dismiss
3 is GRANTED WITH LEAVE TO AMEND. Plaintiffs shall have ten (10)
4 days from electronic service to file an amended complaint.
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6 SO ORDERED

7 Dated: October 16, 2009

8 /s/ Oliver W. Wanger
9 Oliver W. Wanger
United States District Judge

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