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 6 Performance Enhancers LLC  
 and Ideal Brands Limited Partnership  
 7

8 **UNITED STATES DISTRICT COURT**  
 9 **NORTHERN DISTRICT OF CALIFORNIA**

10 NORTHERN CALIFORNIA  
 DIAGNOSTIC LABORATORIES, INC.,  
 11 MICHAEL SPENCER-SMITH,

12 Plaintiffs,

13 v.

14 NEUTRONICS ENTERPRISES, INC.,  
 KEITH A. FINKENBINER,  
 15 PERFORMANCE ENHANCERS, L.L.C.,  
 PERFORMANCE ENHANCERS, INC.,  
 16 GARY J. BETHUREM, WALTER  
 WIGGINS, WILLIAM WOZNYJ,  
 17 WALKINGTON, INC., an Ohio  
 corporation, IDEAL BRANDS LIMITED  
 18 PARTNERSHIP, RICHARD HEALEY,  
 JAMES A. RUTLEDGE, RICHARD  
 19 RIDER, KEITH TERRY, Individually and  
 doing business as TERRY  
 20 COMPONENTS, DOES 1 through 10,  
 and ROES 1 through 10, Inclusive,

21 Defendants.  
 22 \_\_\_\_\_/

Case No. C-03-1563 VRW

**DEFENDANTS PERFORMANCE  
 ENHANCERS LLC, AND IDEAL  
 BRANDS LIMITED PARTNERSHIP'S  
 NOTICE OF MOTION AND MOTION  
 TO DISMISS  
 [Rule 12(b)(6)]**

**DATE: July 31, 2003**  
**TIME: 2:00 p.m.**  
**CTRM: 6**

23 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

24 PLEASE TAKE NOTICE that on July 31, 2003, at 2:00 p.m. or as soon thereafter  
 25 as counsel may be heard before the Honorable Vaughn R. Walker, United States  
 26 District Judge, in Courtroom 6 of the above-entitled Court, located at 450 Golden Gate  
 27 Avenue, San Francisco, California, defendants Performance Enhancers LLC and Ideal  
 28 Brands Limited Partnership will and hereby do move to dismiss plaintiff's Fourth Cause

1 of Action as alleged in the Complaint for failure to state a claim upon which relief can be  
2 granted.

3           This Motion is based upon Rules of Civil Procedure 12(b)(6), this Notice of  
4 Motion and Motion and the attached Memorandum of Points and Authorities, the  
5 papers, pleadings and other documents on file in this action, and such other and further  
6 oral or documentary evidence as may be presented at or before the hearing.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Defendants Performance Enhancers, LLC (“PELLC”) and Ideal Brands Limited  
4 Partnership (“Ideal”) move to dismiss plaintiffs’ fourth cause of action for fraud because  
5 it fails to allege fraud with particularity. Even though plaintiffs have already amended  
6 their fraud allegations once, they still do not identify what role, if any, plaintiffs contend  
7 that PELLC and Ideal played in the alleged fraud. Instead plaintiffs allege a series of  
8 misrepresentations, which they attribute to ten defendants, without attributing any  
9 specific statement to any specific defendant. Indeed, plaintiffs do not even allege who  
10 made the actual alleged representations, as they allege that each defendant made the  
11 representations “individually and/or through their agents and authorized  
12 representatives.” First Amended Complaint, ¶ 47. The Complaint does not identify the  
13 “agents and authorized representatives.”

14 The Complaint does not provide Ideal or PELLC with sufficient information to  
15 understand why they have been included in plaintiffs’ fraud claim. Neither Ideal nor  
16 PELLC can determine whether plaintiffs believe that Ideal or PELLC made fraudulent  
17 representations, or that plaintiffs seek to impute statements made by other defendants  
18 to Ideal and PELLC. If plaintiffs believe an individual made statements as an agent or  
19 representative of Ideal or PELLC, they have not identified who that individual is, so  
20 defendants cannot investigate what that person said, or whether that person was  
21 actually authorized to speak on Ideal’s or PELLC’s behalf. In short, Ideal and PELLC  
22 do not have sufficient notice of the basis of plaintiffs’ claims to prepare a response.

23 The particularity requirement of Rule 9(b) prohibits this sort of vague pleading for  
24 the protection of potential defendants. Even spurious fraud allegations may have an  
25 immediate impact on a defendant’s business and reputation. Rule 9(b) therefore  
26 requires specific notice of the alleged role of each separate defendant in an alleged  
27 fraud, so each defendant can respond to the specific factual allegations.

28 Plaintiffs’ collective pleading approach denies every defendant the ability to

1 prepare a response. The Complaint does not identify which party actually made  
2 representations, nor does it identify the “agents and authorized representatives” who  
3 may have made representations on some defendants’ behalves. PELLC and Ideal  
4 move to dismiss this cause of action on the ground that it fails to allege fraud with  
5 specificity as required under Rule 9(b). Plaintiffs have not specified whether PELLC or  
6 Ideal have made any representations, nor have they identified exactly who made the  
7 alleged representations, nor have they explained why PELLC or Ideal would be liable  
8 for those representations. Plaintiffs cannot state a fraud claim by simply naming  
9 multiple defendants, and stating that all of them either made the same representations  
10 or were acting as each others’ agents. Although they have already amended these  
11 allegations once, plaintiffs have yet to specifically allege which defendant made each  
12 purported representation, most likely because plaintiffs are simply unable to do so.  
13 Accordingly, the Fourth Cause of Action should be dismissed.

#### 14 **POINTS AND AUTHORITIES**

##### 15 **1. Grounds For Motion To Dismiss.**

16 A complaint should be dismissed under Rule 12(b)(6) where “it appears beyond  
17 doubt that the plaintiff can prove no set of facts in support of his claim which would  
18 entitle him to relief.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990)  
19 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Dismissal can be based on the  
20 lack of a cognizable legal theory or the absence of sufficient facts alleged under a  
21 cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-  
22 34 (9th Cir. 1984). Moreover, a complaint or any claim should be dismissed without  
23 leave to amend where the deficiencies of the complaint cannot possibly be cured by  
24 amendment. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

25 Failure to plead fraud with particularity is grounds for dismissal. See *Jenkins v.*  
26 *Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 796 (9th Cir. 1996) (affirming dismissal  
27 of a fraud claim because it did not allege with particularity the time, place, or nature of  
28 the allegedly fraudulent conduct). Since plaintiff is unable to allege with particularity

1 who committed each fraudulent act asserted, plaintiff's fraud claim should be dismissed.

2 **2. Plaintiffs Have Not Pleaded Their Fraud Claim Against Ideal And PELLC**  
3 **With Particularity.**

4 Federal Rule of Civil Procedure 9(b) mandates that all averments of fraud be  
5 pleaded "with particularity." See *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-1023  
6 (9th Cir. 2000). Plaintiffs must specify the time, place, and nature of the allegedly  
7 fraudulent conduct, and the identities of the parties to the alleged fraud. See  
8 *Miscellaneous Serv. Workers, Drivers, & Helpers, Teamsters Local #427 v. Philco-Ford*  
9 *Corp.*, 661 F.2d 776, 782 (9th Cir. 1981); see also *Vess v. Ciba-Geigy Corp. USA*, 317  
10 F.3d 1097, 1106 (9th Cir. 2003)("Averments of fraud must be accompanied by 'the who,  
11 what, when, where, and how' of the misconduct charged."). The particularity  
12 requirement provides defendants "notice of the particular conduct which is alleged to  
13 constitute the fraud charged so that they can defend against the charge and not just  
14 deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731  
15 (9th Cir. 1985). This need for specificity is critical in fraud actions to provide the  
16 defendant the opportunity to minimize the damage to its reputation that may result from  
17 the mere allegation of fraud. *Id.*

18 Plaintiffs' sweeping allegations that every defendant and/or their agents and  
19 authorized representatives "individually and/or through their agents and authorized  
20 representatives, made fraudulent representations" fall far short of the particularity  
21 requirements under Rule 9(b). Allegations that lump every defendant into one group  
22 deprive each defendant of sufficient notice to respond to the fraud claim, because no  
23 single defendant can identify and respond to the specific facts on which plaintiffs base  
24 their claim. Where plaintiffs seek to hold multiple defendants liable for fraud, the  
25 complaint should "inform each defendant of the nature of his participation in the fraud."  
26 *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987). This  
27 requires identification of the persons or entities who actually made the representations,  
28 and an explanation of why the other defendants should be liable for those



1 information is critical to their defense of claims, so they can mitigate the harm and  
2 business disruption that may arise from the mere existence of plaintiffs' claims. Since  
3 plaintiffs have not and cannot meet the requirements under Rule 9(b), plaintiffs' Fourth  
4 Cause of Action for fraud as to PELLC and Ideal should be dismissed.

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6 FLEMING & PHILLIPS LLP

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9 By: \_\_\_\_\_ /s/  
THOMAS A. EVANS

10 Attorneys for Defendants  
11 Performance Enhancers, L.L.C. and  
12 Ideal Brands Limited Partnership

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