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4 **UNITED STATES DISTRICT COURT**
5 **SOUTHERN DISTRICT OF CALIFORNIA**
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7 LA JOLLA SPA MD, INC., and DIANNE
8 YORK-GOLDMAN,

9 Plaintiffs,

10 v.

11 AVIDAS PHARMACEUTICALS, LLC,

12 Defendant.

Case No.: 17cv1124-MMA (WVG)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS THE
COMPLAINT**

[Doc. No. 4]

13
14 On April 20, 2017, Plaintiffs La Jolla Spa MD, Inc. (“La Jolla Spa”) and Dianne
15 York-Goldman (collectively, “Plaintiffs”) filed this action alleging multiple causes of
16 action against Defendant Avidas Pharmaceuticals, LLC (“Avidas”) in the San Diego
17 Superior Court. See Doc. No. 1, Exhibit A (“Compl.”). On June 2, 2017, Avidas filed a
18 notice of removal based on diversity jurisdiction in this Court. See Doc No. 1. Avidas
19 now moves to dismiss all claims brought by Plaintiff York-Goldman, Plaintiffs’ first,
20 second, third, fourth, and sixth causes of action, and Plaintiffs’ prayer for attorney fees,
21 punitive damages, and disgorgement of profits pursuant to Federal Rules of Civil
22 Procedure 12(b)(6), 8(a), and 9(b). Doc. No. 4-1 (“MTD”). Plaintiffs filed a response in
23 opposition to Avidas’ motion to dismiss [Doc. No. 7 (“Oppo.”)] and Avidas filed a reply
24 in support of its motion to dismiss [Doc. No. 8 (“Reply”)]. The Court found this matter
25 suitable for determination on the papers and without oral argument pursuant to Civil
26 Local Rule 7.1.d.1. For the reasons set forth below, the Court **GRANTS IN PART AND**
27 **DENIES IN PART** Avidas’ motion to dismiss.
28

1 **BACKGROUND**¹

2 Plaintiff York-Goldman incorporated Plaintiff La Jolla Spa. Compl. ¶ 1. On
3 September 29, 2008, Avidas signed a contract titled “Know-How and Trademark License
4 and Purchase Agreement” (“Contract”) with Plaintiffs. Compl. ¶ 4. Under the Contract,
5 Plaintiffs agreed to grant Avidas licenses to the “Know-How” and trademark related to
6 Vitaphenol² and provided that Plaintiff would transfer ownership of the “Know-How”
7 and trademark for Vitaphenol to Avidas upon payment of \$1,500,000 in royalty
8 payments. Id. After payment of the \$1,500,000, Avidas was to continue paying Plaintiff
9 a 5% royalty. Id. In the event of termination of the Contract, Avidas was to discontinue
10 its use of the Vitaphenol trademark and the Know-How, and all rights were to revert to
11 Plaintiff York-Goldman. Compl. ¶ 9.

12 Avidas paid royalties until mid-2014. Id. On May 8, 2014, Avidas wrote a letter
13 terminating the agreement effective July 11, 2014, because of the death of the “lead
14 person” for Vitaphenol. Id. Avidas indicated it did not intend to replace the “lead
15 person” and would instead discontinue promoting and selling Vitaphenol after selling the
16 remaining Vitaphenol products on hand and paying the appropriate royalties. Id. Avidas
17 continued marketing and selling Vitaphenol products in contradiction to its letter and the
18 Contract’s termination provision. Compl. ¶ 9.

19 Accordingly, Plaintiffs allege the following causes of action: (1) breach of
20 contract; (2) breach of covenant of good faith and fair dealing; (3) fraud; (4) unjust
21 enrichment and/or quantum meruit; (5) unfair competition in violation of California
22 Business Code § 17200 et seq.; and (6) intentional interference with prospective
23 economic relations. See Compl. Plaintiff prays for compensatory and punitive damages,
24
25

26
27 ¹ The Court must accept as true the allegations set forth in the Complaint in determining the pending
28 motion to dismiss. See *Hosp. Bldg. Co. v. Trs. Of Rex Hosp.*, 425 U.S. 738, 740 (1976). However, the
Court does not make any findings of fact.

² Vitaphenol products are skincare products. See *Oppo.*, Exhibit A at 9.

1 attorneys' fees and costs, restitution and/or disgorgement of profits, for costs of suit, and
2 for further relief the court deems just and proper. See *id.*

3 LEGAL STANDARD

4 A Rule 12(b)(6) motion tests the legal sufficiency of the claims made in the
5 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must
6 contain “a short and plain statement of the claim showing that the pleader is entitled to
7 relief” Fed. R. Civ. P. 8(a)(2). However, plaintiffs must also plead “enough facts to
8 state a claim to relief that is plausible on its face.” Fed. R. Civ. P. 12(b)(6); *Bell Atl.*
9 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard demands more
10 than “a formulaic recitation of the elements of a cause of action,” or “naked assertions
11 devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
12 (internal quotations omitted). Instead, the complaint “must contain allegations of
13 underlying facts sufficient to give fair notice and to enable the opposing party to defend
14 itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

15 Under Rule 9(b), when the complaint includes allegations of fraud, a party must
16 “state with particularity the circumstances constituting fraud or mistake,” even though
17 “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged
18 generally.” Fed. R. Civ. P. 9(b). Failure to satisfy this heightened pleading requirement
19 can result in dismissal of the claim. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107
20 (9th Cir. 2003). In general, the plaintiff’s averments of fraud must be “specific enough to
21 give defendant[] notice of the particular misconduct . . . so that [defendant] can defend
22 against the charge and not just deny that they have done anything wrong.” *Id.* at 1106
23 (internal quotation marks and citation omitted). Specifically, plaintiffs are required to
24 supplement allegations of fraud with “the who, what, when, where, and how” of the
25 misconduct charged or, in other words, to specify the time, place, and content of the
26 alleged misrepresentation, in addition to why the statement in question is false or
27 misleading. *Id.* at 1106-07.

1 In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth
2 of all factual allegations and must construe them in the light most favorable to the
3 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).
4 The court need not take legal conclusions as true merely because they are cast in the form
5 of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).
6 Similarly, “conclusory allegations of law and unwarranted inferences are not sufficient to
7 defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

8 Where dismissal is appropriate, a court should grant leave to amend unless the
9 plaintiff could not possibly cure the defects in the pleading. *Knappenberger v. City of*
10 *Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009).

11 **JUDICIAL NOTICE**

12 Avidas requests the Court judicially notice the “Know-How and Trademark
13 License and Purchase Agreement,” which is alleged as the Contract in dispute in the
14 Complaint, and the “Trademark Status and Document Retrieval (‘TSDR’) report for
15 Vitaphenol trademark,” generated on June 1, 2017. Doc. No. 4-2 at 2. Avidas contends
16 the Court may take judicial notice of the Contract because it is referenced in Plaintiffs’
17 Complaint and is central to Plaintiffs’ claims, and may judicially notice the TSDR reports
18 because they “can be accurately and readily determined from sources whose accuracy
19 cannot reasonably be questioned.” *Id.* (citations omitted).

20 In determining the propriety of a Rule 12(b)(6) dismissal, courts generally may not
21 look beyond the complaint for additional facts. *United States v. Ritchie*, 342 F.3d 903,
22 908 (9th Cir. 2003). “A court may, however, consider certain materials—documents
23 attached to the complaint, documents incorporated by reference in the complaint, or
24 matters of judicial notice—without converting the motion to dismiss into a motion for
25 summary judgment.” *Id.*; see also *Fed. R. Evid. 201*; *Lee v. City of Los Angeles*, 250
26 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds by *Galbraith v. Cnty. of Santa*
27 *Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002). “[E]ven if a document is not attached to
28 a complaint, it may be incorporated by reference into a complaint if the plaintiff refers

1 extensively to the document or the document forms the basis of the plaintiff's claim."
2 Ritchie, 342 F.3d at 908 (internal citations omitted). A court "may consider a document
3 the authenticity of which is not contested, and upon which the plaintiff's complaint
4 necessarily relies." Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998), superseded
5 by statute on other grounds in abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006);
6 Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). The Court may take judicial
7 notice of matters that are either "generally known within the trial court's territorial
8 jurisdiction" or "can be accurately and readily determined from sources whose accuracy
9 cannot reasonably be questioned." Fed. R. Evid. 201(b).

10 The Complaint relies on and references the Contract, which accordingly is
11 appropriate for incorporation by reference. See Davis v. HSBC Bank Nevada, N.A., 691
12 F.3d 1152, 1159-61 (9th Cir. 2012). Additionally, the TSDR report is a matter of public
13 record and appropriate for judicial notice. See Fed. R. Evid. 201(b); see also Dahon N.
14 Am., Inc. v. Hon, No. 2:11-CV-05835-ODW (JCGx), 2012 WL 1413681, at *8 n.4 (C.D.
15 Cal. Apr. 24, 2012) (taking judicial notice of documents filed on the United States
16 trademark website); see also Clearly Food & Beverage Co. v. Top Shelf Bevs., Inc., 102
17 F. Supp. 3d 1154, 1161 (W.D. Wash. 2015) (taking judicial notice of trademark
18 applications obtained from the U.S. Patent and Trademark Electronic Search System);
19 Sebastian Brown Prods. LLC v. Muzooka Inc., No. 15-cv-1720-LHK, 2016 WL 5910817,
20 at *2 n.1 (N.D. Cal. Oct. 11, 2016) (judicially noticing TSDR documents).

21 Plaintiffs do not oppose Avidas' request, but claim that the Contract submitted by
22 Avidas omits a modification entered into on September 19, 2008. Oppo. at 7. Plaintiffs
23 attach the Contract, which is the same as Avidas' document, and the modification to the
24 Contract ("Modification") to their opposition. Oppo., Exhibit A ("Mod."). Accordingly,
25 the Court **GRANTS** Avidas' request for judicial notice. The Court also incorporates the
26 Modification provided by Plaintiffs into the Complaint by reference. Parrino, 146 F.3d
27 at 706; Swartz, 476 F.3d at 763.

28 //

1 DISCUSSION

2 Avidas moves the Court to dismiss all claims by Plaintiff Dianne York-Goldman,
3 Plaintiffs’ breach of contract, breach of covenant of good faith and fair dealing, fraud,
4 unjust enrichment or quantum meruit, and intentional interference with prospective
5 economic relations claims, as well as Plaintiffs’ prayer for punitive damages, attorney
6 fees, and non-restitutionary disgorgement. See MTD.

7 **1. The Second, Fourth, and Sixth Causes of Action**

8 Avidas argues that Plaintiffs’ second, fourth, and sixth causes of action and prayer
9 for attorney fees should be dismissed with prejudice. MTD at 11-15, 17-18; Reply at 8.
10 In response, Plaintiffs “voluntarily agree to the dismissal, without prejudice” of these
11 causes of action after reviewing relevant legal authority, relevant facts, and in considering
12 the likelihood of success of these claims upon amending the Complaint. Oppo. at 14, 16-
13 17, 19. Avidas contends that these claims and prayer for relief should be dismissed with
14 prejudice because Plaintiffs “confessed” that amending the Complaint would likely be
15 unsuccessful. Reply at 5. Based on Plaintiffs’ non-opposition, the Court **DISMISSES**
16 Plaintiffs’ breach of the covenant of good faith and fair dealing, unjust enrichment and/or
17 quantum meruit, and intentional interference with prospective economic relations claims,
18 as well as Plaintiffs’ prayer for attorney fees. Dismissal is without prejudice; however,
19 the Court cautions Plaintiffs that any future amendments will require the stipulation of
20 the parties or leave of court. See Fed. R. Civ. P. 15(a)(2).

21 **2. Claims by Plaintiff Dianne York-Goldman**

22 Defendant contends that each claim is “presumably” being brought by both
23 Plaintiffs and arises from Avidas’ alleged failure to meet its contractual obligations.
24 MTD at 9. Defendant asserts that Plaintiff York-Goldman is not a party to the Contract,
25 and accordingly, each claim must be dismissed as to Plaintiff York-Goldman. Id.
26 Plaintiffs counter that Plaintiff York-Goldman is a party to the Contract because the
27 Modification “very clearly confer[s] rights and duties” upon Plaintiff York-Goldman.
28 Oppo. at 7. Further, Plaintiffs assert that Plaintiff York-Goldman is a named party in the

1 Contract because she is the sole owner of La Jolla Spa, the registered owner of the
2 Vitaphenol Trademark, and the sole interest holder in York-Goldman Enterprises, Inc.,
3 which are named parties in the Contract and Modification. *Oppo.* at 8. If not a party,
4 Plaintiffs contend that the Contract intended a benefit be conferred upon Plaintiff York-
5 Goldman and makes her a proper plaintiff. *Oppo.* at 9.

6 To assert a claim based upon a contract, the plaintiff must generally be a signatory
7 to the contract or an intended third party beneficiary. See *Berclain America Latina v.*
8 *Baan Co.*, 74 Cal. App. 4th 401, 405 (Cal. Ct. App. 1999) (citing *Eastern Aviation*
9 *Group, Inc. v. Airborne Express, Inc.*, 6 Cal. App. 4th 1448, 1452 (Cal. Ct. App. 1992);
10 Cal. Civ. Code § 1559). A review of the Contract and Modification evince that the
11 signatories to both the Contract and Modification are La Jolla Spa, YGE, and Avidas.
12 Doc. No. 4-2, Exhibit 1 (“Contract”); Mod. Plaintiff York-Goldman, in her individual
13 capacity, is not listed as a party to the Contract or Modification, and did not sign either
14 document. Contract; Mod. The general rule in California is that one who is not a party to
15 a contract may not sue to enforce its terms. See *Gantman v. United Pac. Ins. Co.*, 232
16 Cal. App. 3d 1560, 1566 (Cal. Ct. App. 1991) (“Someone who is not a party to a contract
17 has no standing to enforce the contract”) (internal quotation marks and modifications
18 omitted); Cal. Jur. 3d Contracts § 391 (2014) (“A person who is not a party or privy to a
19 contract cannot show a wrong done to him or her for breach of any duty arising out of the
20 contractual relation”); see also, 13 Williston on Contracts § 37:1 (4th ed.) (“It is essential
21 to the maintenance of an action on any contract that there should subsist a privity
22 between plaintiff and defendant in respect of the matter sued on”) (internal quotation
23 marks omitted).

24 Plaintiffs argue that Plaintiff York-Goldman is a party because she owns La Jolla
25 Spa, YGE, and all right, title and interest in the “Vitaphenol Contract” as her sole and
26 separate property. *Oppo.* at 7-8. Defendant correctly asserts that that Plaintiff York-
27 Goldman’s ownership interests in YGE, La Jolla Spa, and the “Vitaphenol Contract” are
28 inconsequential to whether she has third-party standing to enforce the Contract or bring

1 claims based on the contractual relationship. See Reply at 5-9; see also *NovelPoster v.*
2 *Javitch Canfield Group*, No. 13-cv-05186-WHO, 2014 WL 5687344, at *5 (N.D. Cal.
3 Nov. 4, 2014); *Ambers v. Wells Fargo Bank, N.A.*, No. 13-cv-03940-N C, 2014 WL
4 883752, at *4 (N.D. Cal. Mar. 3, 2014) (“A person who is not a party to a contract does
5 not have standing either to seek its enforcement or to bring tort claims based on the
6 contractual relationship.”). YGE and La Jolla Spa are both corporations. See Compl. ¶1;
7 Contract (listing York-Goldman Enterprises, Inc. as a party to the Contract). “Because a
8 corporation is a legal entity separate from its shareholders . . . , when a corporation has
9 suffered an injury to its property the corporation is the party that possesses the right to
10 sue for redress.” *Desaigoudar v. Meyercord*, 108 Cal. App. 4th 173, 183 (Cal. Ct. App.
11 2003) (citing *Merco Constr. Engineers, Inc. v. Municipal Court*, 21 Cal. 3d 724, 729
12 (Cal. 1978); *Gagnon Co., Inc. v. Nevada Desert Inn*, 45 Cal. 2d 448, 453 (Cal. 1955)).
13 Thus, YGE and La Jolla Spa, not Plaintiff York-Goldman in her individual capacity,
14 would be proper plaintiffs to this action. See *id.*

15 Furthermore, Plaintiff York-Goldman cannot bring a derivative action on behalf of
16 La Jolla Spa because La Jolla Spa is a party in this case. See *Jones v. H.F. Ahmanson &*
17 *Co.*, 1 Cal. 3d 93, 105-08 (Cal. 1969) (explaining that a shareholder derivative suit is
18 appropriate where the corporation fails to act). Additionally, Plaintiffs have not alleged
19 that Plaintiff York-Goldman is suing Avidas by way of a derivative action on behalf of
20 YGE. See *Johnson v. Myers*, No. CV-11-00092 JF (PSG), 2011 WL 4533198, at *10
21 (N.D. Cal. Sept. 30, 2011) (stating the relevant requirements for establishing shareholder
22 standing in a derivative suit under California law); see also *Fladeboe v. American Isuzu*
23 *Motors, Inc.*, 150 Cal. App. 4th 42, 54-55 (Cal. Ct. App. 2007) (stating that even the sole
24 shareholder of a corporation does not have standing to assert corporate claims, except in a
25 derivative action). As a result, Plaintiffs have not sufficiently pleaded that Plaintiff York-
26 Goldman is a party to the Contract and she may only proceed on a breach of contract
27 claim if Plaintiffs sufficiently pleaded that she is a third-party beneficiary.
28

1 Pursuant to California law, in order to prove that Plaintiff York-Goldman is a third
2 party beneficiary, she would need to plead and prove that the Contract was made for her
3 benefit and that the intent to do so appears in the language of the Contract. See *Martin v.*
4 *Bridgeport Community Assn., Inc.*, 173 Cal. App. 4th 1024, 1034 (Cal. Ct. App. 2009)
5 (citing *Schonfeld v. City of Vallejo*, 50 Cal. App. 3d 401, 420 (Cal. Ct. App. 1975)). The
6 fact that a third party is incidentally named in the contract, or that the contract, if carried
7 out according to its terms, would inure to her benefit, is not sufficient to entitle her to
8 enforce it. *Id.* (citing *Jones v. Aetna Casualty & Surety Co.*, 26 Cal. App. 4th 1717,
9 1724-25 (Cal. Ct. App. 1994)).

10 Plaintiffs' causes of action arise out of Avidas' continued sale of Vitaphenol
11 products and use of the trademark after terminating the Contract, thereby depriving
12 Plaintiffs of royalties owed for the use of the Vitaphenol trademark and sale of
13 Vitaphenol products. See Compl. ¶ 11-37. The "Term and Termination" provision of the
14 Contract provides in relevant part that if Avidas terminates the Contract prior to paying
15 \$1,500,000 in royalties "Avidas shall discontinue its use of the Vitaphenol trademark and
16 the Know-How and all rights in respect of the Know-How and Vitaphenol trademark
17 shall revert to [YGE]" and if Avidas has paid \$1,500,000 in royalties, it "shall have no
18 further obligation to [YGE] unless Avidas resumes sale of the Vitaphenol Products or
19 conveys or licenses the Know-How and, or Vitaphenol trademark to a third party in
20 which case, the obligations of Section 4b shall become effective." Contract ¶ 8(g).
21 Conversely, the Modification indicates that Plaintiff York-Goldman, as an individual, has
22 a right to purchase products from Avidas for resale at La Jolla Spa, which is distinct from
23 Plaintiffs causes of action alleged in the Complaint. See Mod. ¶ 1(d); see also Contract ¶
24 4(c). Plaintiffs do not allege causes of action arising out of Avidas' conduct prohibiting
25 Plaintiff York-Goldman from purchasing Vitaphenol products from Avidas; rather,
26 Plaintiffs' causes of action all arise out of Avidas' alleged continued sale of Vitaphenol
27 products and use of the Vitaphenol trademark following termination of the Contract
28 without paying royalties. See Compl. After reviewing the Contract, Modification, and

1 the Complaint as currently pleaded, the Court finds that Plaintiffs fail to sufficiently plead
2 that Plaintiff York-Goldman is more than an incidental beneficiary.

3 Plaintiffs' conclusory allegation that Plaintiff York-Goldman is a party to the
4 Contract and Modification is insufficient to support a finding that she has standing to
5 bring any claims raised in the Complaint. Because Plaintiff York-Goldman is not a party
6 to the Contract or Modification with Avidas, and because Plaintiffs have not sufficiently
7 pleaded that she is an intended beneficiary, Plaintiff York-Goldman is not a proper
8 plaintiff in this action. Accordingly, the Court **GRANTS** Defendant's motion to dismiss
9 claims brought by Plaintiff York-Goldman without prejudice and with leave to amend.

10 **3. Breach of Contract Claim**

11 Avidas contends that it did not commit a material breach by terminating the
12 Contract because it had a valid reason for doing so and did not breach the Contract by
13 selling its remaining stock of Vitaphenol Products after termination. MTD at 10-11.
14 Plaintiffs explain that they "do not call into question the actual termination of the
15 [Contract, but] rather the actions of Defendant Avidas that took place after said
16 termination." *Oppo*. at 9. Specifically, Plaintiffs assert that Avidas breached the
17 Contract by selling Vitaphenol products after representing to Plaintiffs that the remaining
18 stock of Vitaphenol products had expired and were disposed of. *Id.* Thus, Plaintiffs
19 argue that Avidas continued to sell Vitaphenol products and use the trademark without
20 Plaintiffs' knowledge and without paying the requisite royalties. *Id.* at 9-10.

21 "Under California law, the elements of a breach of contract claim are: (1) the
22 existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3)
23 defendant's breach, and (4) resulting damage to plaintiff." *EPIS, Inc. v. Fidelity &*
24 *Guaranty Life Ins. Co.*, 156 F. Supp. 2d 1116, 1124 (N.D. Cal. 2001) (citing *Reichert v.*
25 *General Ins. Co.*, 68 Cal. 2d 822, 830 (Cal. 1968)).

26 Avidas contends Plaintiffs' fail to sufficiently allege a material breach of the
27 Contract because they allege the termination of the Contract was the material breach, and
28 concede that the termination was permissible. Reply at 9. The Court disagrees.

1 According to Plaintiffs, “Avidas materially breached the Contract by terminating the
2 Contract and indicating that it did not intend to replace the ‘lead person’ and would
3 instead be electing to discontinue promoting and selling Vitaphenol.” Compl. ¶ 11.
4 Plaintiffs do concede that “Avidas does have a valid reason for terminating the Contract,”
5 but allege that “Avidas is continuing to market and sell Vitaphenol” without providing
6 Plaintiffs royalty payments in breach of the Contract. Compl. ¶¶ 10, 12, 14. While their
7 allegations could be clearer, Plaintiffs satisfactorily allege that after termination of the
8 Contract, Avidas “continued exercising its licensing rights without honoring its
9 obligation to pay royalties” and has been “selling the Vitaphenol product line.” Compl. ¶
10 10.

11 Accordingly, the Court finds that Plaintiffs have sufficiently pleaded a breach of
12 contract cause of action and **DENIES** Avidas’ motion to dismiss this claim from the
13 Complaint.

14 **4. Fraud Claim**

15 In addition to the breach of contract claim, Plaintiffs bring a claim for fraud.
16 Compl. ¶ 20-22. Under California law, “[t]he elements of fraud are: (1) a
17 misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of
18 falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance;
19 and (5) resulting damage.” *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th
20 979, 990 (Cal. 2004) (citing *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (Cal. 1996)).
21 Rule 9(b) of the Federal Rules of Civil Procedure require that “a party must state with
22 particularity the circumstances constituting the fraud.”

23 Avidas asserts that Plaintiffs’ third cause of action for fraud should be dismissed
24 because the claim is not pleaded with particularity and because the economic loss rule
25 precludes the fraud claim. MTD at 12. The Court finds that Plaintiffs’ fraud claim is
26 barred by the economic loss rule, and therefore does not reach Avidas’ arguments with
27 respect to the claim’s particularity.
28

1 California's economic loss doctrine "requires a purchaser to recover in contract for
2 purely economic loss due to disappointed expectations, unless he can demonstrate harm
3 above and beyond a broken contractual promise." *Robinson Helicopter Co., Inc.*, 34 Cal.
4 4th at 988. Thus, the economic loss rule prohibits the recovery of tort damages in a
5 breach of contract case. See *Oracle USA, INC. v. XL Global Services, Inc.*, No. C 09-
6 00537 MHP, 2009 WL 2084154, at *4 (N.D. Cal. July 13, 2009) (citing *Butler-Rupp v.*
7 *Lourdeaux*, 134 Cal. App. 4th 1220, 1228-29 (Cal. Ct. App. 2005)). "Quite simply, the
8 economic loss rule prevents the law of contract and the law of tort from dissolving one
9 into the other." *Robinson Helicopter Co., Inc.*, 34 Cal. 4th at 988 (internal quotation
10 marks and citation omitted). "Courts have applied the economic loss rule to bar fraud
11 claims where 'the damages plaintiffs seek are the same economic losses arising from the
12 alleged breach of contract.'" *Foster Poultry Farms v. Alkar-Rapidpak-MP Equip., Inc.*,
13 868 F. Supp. 2d 983, 991-92 (E.D. Cal. 2012) (quoting *Multifamily Captive Group, LLC*
14 *v. Assurance Risk Managers, Inc.*, 629 F. Supp. 2d 1135, 1146 (E.D. Cal. 2009)); see also
15 *Alvarado Orthopedic Research, L.P. v. Linvatec Corp.*, No. 11-cv-246-IEG (RBB), 2011
16 WL 3703192, at *3 (S.D. Cal. Aug. 23, 2011).

17 Plaintiffs' fraud claim is based on the same factual allegations as the breach of
18 contract claim. See Compl. ¶¶11-14, 20-22. Plaintiffs allege that Avidas represented that
19 they would no longer sell Vitaphenol or use Plaintiffs' trademark after termination of the
20 Contract, but Avidas "continued to sell Vitaphenol and continued to use Plaintiffs'
21 trademark" after termination of the Contract. Compl. ¶ 21. Further, Plaintiffs allege that
22 they "relied on Avidas' misrepresentations and deceit," which caused lost revenue and
23 fair compensation for the use of Plaintiffs' trademark and selling of Vitaphenol for solely
24 Avidas' benefit via royalties. Compl. ¶ 22. Plaintiffs specify that this conduct
25 "violat[ed] the Contract." Compl. ¶ 22.

26 To give rise to tort liability, the duty must be either completely independent of the
27 contract or arise from conduct which is both intentional and intended to harm. *Robinson*
28 *Helicopter Co., Inc.*, 34 Cal. 4th at 989-90 (quoting *Erlich v. Menezes*, 21 Cal. 4th 543,

1 551-52 (Cal. 1999)). Plaintiffs’ fraud claim is identical to Plaintiffs’ breach of contract
2 claim, and therefore does not violate an independent duty. See *Applied Equipment Corp.*
3 *v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 515 (Cal. 1994); see also *JMP Securities LLP*
4 *v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1042 (N.D. Cal. 2012) (“The
5 economic loss rule, in summary, is that no tort cause of action will lie where the breach
6 of duty is nothing more than a violation of a promise which undermines the expectations
7 of the parties to an agreement.”). Further, the economic loss rule permits tort recovery
8 for “a defendant’s affirmative misrepresentations on which a plaintiff relies and which
9 expose a plaintiff to liability for personal damages independent of the plaintiff’s
10 economic loss.” *Robinson Helicopter Co., Inc.*, 34 Cal. 4th at 993 (emphasis added).
11 Plaintiffs offer no allegations that it has been exposed to liability for “personal damages,”
12 except its conclusory prayer for punitive damages for the fraud claim. See *JMP*
13 *Securities LLP*, 880 F. Supp. 2d at 1043.

14 Accordingly, the Court **GRANTS** Avidas’ motion to dismiss the fraud claim with
15 prejudice and without leave to amend. *Knappenberger*, 566 F.3d at 942 (stating that a
16 court should grant leave to amend unless the plaintiff could not possibly cure the defects
17 in the pleading).

18 **5. Punitive Damages**

19 Plaintiffs pray for punitive damages with respect to the “fraud claim only.”
20 Compl. at Prayer ¶ 2. Avidas argues that Plaintiffs’ prayer for punitive damages should
21 be dismissed because the request fails to meet federal pleading standards. MTD at 15-17.
22 Plaintiffs counter that they have sufficiently pleaded a prayer for punitive damages
23 pursuant to California law. See *Oppo*. at 17-19. Although California law provides the
24 governing substantive law for punitive damages, the Federal Rules of Civil Procedure
25 govern the Court’s determination regarding the adequacy of the pleadings. *Clark v.*
26 *Allstate Ins. Co.*, 106 F. Supp. 2d 1016, 1018 (S.D. Cal. 2000).

27 District courts are authorized to dismiss claims for damages when raised in a
28 motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Whittlestone, Inc. v.*

1 Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010); Linares v. CitiMortgage, Inc., No.
2 C-14-3435 EMC, 2015 WL 2088705, at *8 (N.D. Cal. May 5, 2015) (analyzing the
3 dismissal of punitive damages as a motion to dismiss); R Power Biofuels, LLC v. Chemex
4 LLC, No. 16-CV-00716-LHK, 2016 WL 6663002 , at *21 (N.D. Cal. Nov. 11, 2016)
5 (same). Punitive damages are only available for contract claims if the breach of contract
6 is also tortious. Harris v. Atlantic Richfield Co., 14 Cal. App. 4th 70, 77-78 (Cal. Ct.
7 App. 1993) (as modified) (stating that punitive damages are normally unavailable for
8 breach of contract claims unless the breach is also tortious). The Court has dismissed
9 Plaintiffs’ claim for fraud, and therefore the prayer for punitive damages must also be
10 dismissed. Accordingly, the Court **GRANTS** Avidas’ motion to dismiss the prayer for
11 punitive damages with prejudice and without leave to amend. R Power Biofuels, LLC v.
12 Chemex LLC, 2016 WL 6663002 , at *21 (N.D. Cal. Nov. 11, 2016) (dismissing
13 plaintiff’s prayer for punitive damages because the underlying tortious breach of contract
14 claim was dismissed).

15 **6. Disgorgement of Profits**

16 Plaintiffs also pray for restitution and/or disgorgement of profits. Compl. at Prayer
17 ¶ 4. Plaintiffs specifically allege that they “suffered lost royalties and suffered harms and
18 damages to be proven at trial.” Compl. ¶ 30. Avidas argues that Plaintiffs’ prayer for
19 disgorgement of profits should be dismissed because it is not a proper remedy under
20 California’s Unfair Competition Law (“UCL”). MTD at 18. Plaintiffs oppose,
21 contending that the law does permit them to seek “restitutionary disgorgement.” Oppo. at
22 14.

23 “[N]onrestitutionary disgorgement is not an available remedy in an individual
24 action under the UCL.” Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134,
25 1148-49 (Cal. 2003). Generally, restitutionary disgorgement focuses on the plaintiff’s
26 loss, while nonrestitutionary disgorgement focuses on the defendant’s gain from the
27 unfair practice. Feitelberg v. Credit Suisse First Boston, LLC, 134 Cal. App. 4th 997,
28 1013 (Cal. Ct. App. 2005). Plaintiffs’ Complaint appears to include a request for

1 restitutionary disgorgement because it focuses on Plaintiffs' losses. See Compl. ¶ 30
2 (stating that "Plaintiffs suffered lost royalties and suffered harms and damages").
3 However, to the extent that Plaintiffs request nonrestitutionary disgorgement of profits,
4 the request may not be granted as a matter of law. *Matoff v. Brinker Restaurant Corp.*,
5 439 F. Supp. 2d 1035, 1038-39 (C.D. Cal. 2006).

6 Accordingly, the Court **DENIES** Avidas' motion to dismiss Plaintiff's prayer for
7 disgorgement of profits, except that Plaintiffs are precluded from seeking
8 nonrestitutionary disgorgement of profits.

9 **CONCLUSION**

10 For the foregoing reasons, Defendant Avidas' motion to dismiss is **GRANTED IN**
11 **PART AND DENIED IN PART** as follows:

12 1. The Court **GRANTS** Avidas' motion and **DISMISSES WITHOUT**
13 **PREJUDICE** the second, fourth, and sixth causes of action, Plaintiffs' prayer for
14 attorney fees, and all claims brought by Plaintiff Dianne York-Goldman with leave to
15 amend;

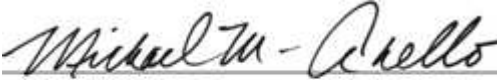
16 2. **DENIES** Avidas' motion to dismiss Plaintiffs' first cause of action for
17 breach of contract and Plaintiffs' prayer for disgorgement of profits, except that Plaintiffs
18 are precluded from seeking nonrestitutionary disgorgement of profits; and

19 3. **GRANTS** Avidas' motion and **DISMISSES WITH PREJUDICE**, the
20 third cause of action for fraud and Plaintiffs' prayer for punitive damages without leave
21 to amend.

22 Plaintiffs must file a First Amended Complaint ("FAC"), if any, on or before
23 **November 13, 2017**.

24 **IT IS SO ORDERED.**

25 Dated: October 27, 2017

26 
27 Hon. Michael M. Anello
28 United States District Judge