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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SELENA MOORER, individually  
and on behalf of all others similarly  
situated,

Plaintiffs,

v.

STEMGENEX MEDICAL GROUP,  
INC., a California Corporation;  
STEMGENEX, INC., a California  
Corporation; STEM CELL  
RESEARCH CENTRE, INC., a  
California Corporation; ANDRE P.  
LALLANDE, D.O., an individual;  
SCOTT SESSIONS, M.D., an  
individual; RITA ALEXANDER, an  
individual; and Does 1-100,

Defendants.

Case No. 3:16-cv-02186-AJB-NLS

**DEFENDANTS' REPLY BRIEF IN  
SUPPORT OF MOTION TO  
DISMISS PLAINTIFFS' SECOND  
AMENDED COMPLAINT**

Date: April 13, 2017  
Time: 2:00 p.m.  
Courtroom: 3B (3<sup>rd</sup> Floor – Shwartz)  
Judge: Hon. Anthony J. Battaglia

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1 Defendants StemGenex Medical Group, Inc., StemGenex, Inc., Stem Cell Research  
2 Centre, Inc., Andre P. Lallande, D.O., and Rita Alexander (“Defendants”) respectfully  
3 submit this reply brief in further support of their Motion to Dismiss Plaintiffs Selena  
4 Moorer, Stephen Ginsberg, and Alexander Gardner’s (“Plaintiffs”) Second Amended  
5 Complaint.

6 **I. INTRODUCTION**

7 Defendants’ motion to dismiss makes three principal arguments. First, Plaintiffs’  
8 Second Amended Complaint should be dismissed in its entirety for failure to satisfy Fed.  
9 R. Civ. P. 9(b) and 8(a)’s pleading requirements. Second, Plaintiffs’ claims based solely  
10 upon the advertised efficacy of Defendants’ stem cell treatment should be dismissed  
11 because these “lack of substantiation” claims are not available to private plaintiffs and  
12 Plaintiffs have not plead with a specific factual basis that Defendants’ representations  
13 regarding the efficacy of its stem cell treatments are actually false. Third, Plaintiffs’ claims  
14 for (1) fraud, (2) negligent misrepresentation, (3) unfair competition, (4) false advertising,  
15 (5) financial elder abuse, (6) human experimentation, (7) RICO, and (8) the CLRA claim  
16 do not state a claim for relief.

17 Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss  
18 (“Response”) does little to refute the deficiencies in Plaintiffs’ Second Amended  
19 Complaint. Plaintiffs’ admit that the Second Amend Complaint sounds in fraud. However,  
20 Plaintiffs’ Response does not clarify where, how, and when the alleged fraudulent conduct  
21 occurred or how Defendants’ claims are false or misleading, as required by Rule 9(b).  
22 Further, Plaintiffs argument that the efficacy of Defendants’ stem cell treatment is not the  
23 focus of this case is unpersuasive. A plain reading of the Second Amended Complaint  
24 demonstrates that this is solely a “lack of substantiation” case. In addition, Plaintiffs’  
25 argument that because there is no substantiation for the effectiveness of Defendants’  
26 treatment, it must be a “medical experiment” belies the statutory language defining a  
27 medical experiment. To the extent that Plaintiffs argue that the heart of their claims is the  
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1 alleged misrepresentations regarding “patient satisfaction,” the Second Amended  
2 Complaint on its face demonstrates that Defendants’ representations regarding patient  
3 satisfaction are not misleading. Plaintiffs’ Response also fails to cite any authority for their  
4 proposition that StemGenex’s Patient Advocates occupied a position of trust and owed a  
5 fiduciary duty to customers, as required for their financial elder abuse claim. Accordingly,  
6 Plaintiffs’ Second Amended Complaint should be dismissed in its entirety.

## 7 **II. PLAINTIFFS’ CLAIMS ARE INSUFFICIENTLY PLED**

### 8 **A. Plaintiffs do not rehabilitate their inadequately pled fraud claims**

9 Plaintiffs’ concede the Second Amended Complaint sounds in fraud and therefore  
10 the pleading as a whole is subject to the heightened pleading requirements of Fed. R. Civ.  
11 P. 9(b). (Doc. 37, Response, at p. 10).

12 Plaintiffs fraud claims fail for two main reasons: (1) the Second Amended Complaint  
13 does not particularize the “who, what, where, when, and how” of the alleged fraudulent  
14 scheme; and (2) the Second Amended Complaint does not explain what is false or  
15 misleading about the representations or how they are false.

16 Rule 9(b) requires a party to “state with particularity the circumstances constituting  
17 fraud or mistake.” Courts interpret the “circumstances” reference in Rule 9(b) to require  
18 plaintiff to plead the identity of the person who made the representation, the time, place  
19 and content of the misrepresentation, and the method by which the misrepresentation was  
20 communicated to the plaintiff. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th  
21 Cir. 2003) (“Averments of fraud must be accompanied by ‘the who, what, where, when,  
22 and how’ of the misconduct charged.” (citation omitted). In addition to pleading facts of  
23 the who, what, where, when and how of the alleged fraud, a plaintiff must also explain  
24 “what is false or misleading about a statement and why it is false.” *In Re GlenFed Inc. Sec.*  
25 *Litig.*, 42 F.3d 1541, 1547-48 (9th Cir. 1994)).

26 In California, a fraud claim has five elements: (1) the defendant made a false  
27 representation as to a past or existing material fact; (2) the defendant knew the  
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1 representation was false at the time it was made; (3) in making the representation, the  
2 defendant intended to deceive the plaintiff; (4) the plaintiff justifiably and reasonably relied  
3 on the representation; and (5) the plaintiff suffered resulting damages. *Lazar v. Superior*  
4 *Court*, 12 Cal. 4th 631, 638 (1996).

5 In response to Defendants' motion to dismiss, Plaintiffs first argue that the  
6 allegations in the Second Amended Complaint are sufficient for purposes of Rule 9(b).  
7 Plaintiffs' Response repeats several of the Second Amended Complaint's allegations,  
8 including language taken out of context from StemGenex's website, but provides little  
9 further information. There is no doubt that the Second Amended Complaint fails to  
10 differentiate among the five Defendants by identifying each defendant's specific role in the  
11 alleged fraud. As one emblematic example, Plaintiffs' fraud claim alleges that  
12 "StemGenex<sup>1</sup> also perpetrated this fraud on Plaintiffs and members of the Class by  
13 publishing or directing to be published false and fabricated reviews of its services on the  
14 internet" (Doc. 24, Second Amended Complaint, at ¶ 141; *see also* Doc. 37 at p. 16). The  
15 Second Amended Complaint contains no particularized facts or details explaining the basis  
16 for this allegation. Specifically, the Second Amended Complaint fails to identify who at  
17 StemGenex published the allegedly false reviews, the time and place of the alleged false  
18 reviews, and the method by which the alleged false reviews were communicated to  
19 Plaintiffs, or what about the reviews was false or inaccurate. In short, the Second Amended  
20 Complaint contains little of the "who, what, where, when and how" of StemGenex's  
21 allegedly fraudulent scheme, as required by Rule 9(b). The allegations relative to the other  
22 representations are equally lacking in detail, generally grouping the Defendants together  
23 and alleging they collectively communicated the alleged misrepresentations.

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26 <sup>1</sup> The Second Amended Complaint defines "StemGenex" to include StemGenex, StemGenex Medical  
27 Group, Inc., Stem Cell Research Centre, Inc. Rita Alexander and Dr. Lallande. (Doc. 24 at ¶ 136).  
28 However, by grouping the Defendants together Plaintiffs' fail to satisfy the particularity requirements of  
Rule 9(b).



1           Moreover, the Second Amended Complaint (as well as Plaintiffs' Response) does  
2 not specifically articulate how StemGenex's claims are false or misleading. *In Re GlenFed*  
3 *Inc. Sec. Litig.*, 42 F.3d at 1547-48. For example, Plaintiffs' argue that Defendants' patient  
4 satisfaction ratings falsely represent that 100% of StemGenex patients are satisfied with  
5 the outcome of their Stem Cell Treatment. (Doc. 24 at ¶ 2, 40, 52, 55, 56, 136; *see also*  
6 Doc. 37 at pp. 7, 8, 10, 13). However, Plaintiffs' purposely distort the information being  
7 conveyed by the pie graphs to create an actionable misrepresentation. Contrary to  
8 Plaintiffs' mischaracterization, the pie graphs do not measure the effectiveness or outcome  
9 of the stem cell treatment. Instead, the pie graphs explain that the patient satisfaction ratings  
10 measure overall patient experience, patient trust in StemGenex, and satisfaction with  
11 StemGenex's medical team as reported by patient exit surveys which only evaluate "patient  
12 experience, care, accommodations, staff and facilities." (Doc. 24 at ¶ 54). Importantly,  
13 Plaintiffs do not even plead that they, or any other patient, reported any dissatisfaction in  
14 the completed patient exit survey upon which the patient satisfaction ratings were based or  
15 that Defendants' intended the pie graphs to deceive Plaintiffs.

16           Accordingly, the Court should dismiss Plaintiffs' claims that sound in fraud  
17 because Plaintiffs' did not (and cannot) meet the heightened pleadings requirements of  
18 Rule 9(b).

19           **B. Plaintiffs' UCL, FAL, CLRA, fraud and misrepresentation claims are**  
20 **all "Lack of Substantiation" claims.**

21           A private plaintiff cannot sue an advertiser under the UCL, FAL or CLRA for  
22 making unsubstantiated advertising claims. *See Nat'l Council Against Health Fraud, Inc.*  
23 *v. King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336, 1342 (Cal. Ct. App. 2003). Thus, to the  
24 extent Plaintiffs intend to prove their UCL, FAL, CLRA and fraud claims on the theory  
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1 that Defendants’ Stem Cell Treatments are not as effective as advertised, such claims are  
2 barred.<sup>2</sup>

3 Plaintiffs admit in their Response that they intend to “move forward and present  
4 experts who will challenge claims of efficacy by Defendants.” (Doc. 37, Response, at p.  
5 11).<sup>3</sup> Nevertheless, Plaintiffs attempt to minimize the fact that this is a “lack of  
6 substantiation” case through an ad hoc re-characterization of the nature of their claims.

7 In an effort to avoid dismissal, Plaintiffs argue that the efficacy of Defendants’ Stem  
8 Cell Treatments is not the focus of this case. (Doc. 37 at p. 18). However, a plain reading  
9 of the Second Amended Complaint demonstrates otherwise. Indeed, the Second Amended  
10 Complaint helpfully includes a specific paragraph describing exactly what the action is  
11 based upon: “[T]his action is based upon the material omission of important information  
12 from any communication by Stemgenex to its consumers: That StemGenex has no data or  
13 reasonable basis to support the efficacy of its Stem Cell Treatments, meaning, that they are  
14 different from a placebo effect in any significant way, at actually treating, curing,  
15 mitigating, relieving or impacting any disease, condition or malady” (Doc. 24, Second  
16 Amended Complaint, at ¶ 61). The Second Amended Complaint (as well as Plaintiffs’  
17 Response) is replete with allegations that StemGenex falsely advertised that its “‘adult  
18 adipose-derived stem cell therapy’ is ‘effective’ to ‘treat diseases.’”<sup>4</sup> (Doc. 37 at p. 15; *see*  
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21 <sup>2</sup> In their Response, Plaintiffs suggest that Defendants will be unable “to prove medical or scientific  
22 substantiation of the efficacy” of its product. (Doc. 37 at p. 18). However, it is not Defendants’ burden  
23 to prove its treatment is effective for every patient. Plaintiffs seek to improperly shift the burden of proof  
24 to Defendants, when Plaintiffs bear the burden of proving that Defendants’ advertising claims are false or  
25 misleading. *Nat’l Council Against Health Fraud, Inc.*, 107 Cal. App. 4th at 1342.

26 <sup>3</sup> They also admit that “[I]lack of substantiation is a concerning issue for Plaintiffs,” that it is “a part of the  
27 ‘scheme’ related to the RICO charge,” and that it is the “framework and further supporting evidence for  
28 actual fraud.” (Doc. 37 at p. 18).

<sup>4</sup> Notably, this statement does not actually appear on Defendants’ website and is not contained in any of  
the quoted language in the Second Amended Complaint. Rather, Plaintiffs cobbled together various words  
and phrases found on Defendants’ website in an effort to create a soundbite misrepresentation.

1 *also* Doc. 24 at ¶¶ 137, 138, 150, 151). As bluntly stated in the Second Amended  
2 Complaint, this allegation is the crux of all of Plaintiffs’ causes of actions.

3 Plaintiffs’ claims fail because (1) “lack of substantiation” claims are not available to  
4 private plaintiffs, and (2) Plaintiffs have not pled with a sufficient factual basis (and  
5 ultimately cannot prove) that Defendants’ representations regarding the efficacy of its stem  
6 cell treatments are actually false. *See Eckler v. Wal-Mart Stores, Inc.*, No. 12-cv-727-  
7 LAB-MDD, 2012 WL 5382218, at \*3 (S.D. Cal. Nov. 1, 2012) (in order to maintain false  
8 advertising claim, plaintiff must point to evidence that advertised claim has “actually been  
9 disproved” in the scientific community); *Fraker v. Bayer Corp.*, No. CV F 08-1564 AWI  
10 GSA, 2009 WL 5865687, at \*8 (E.D. Cal. Oct. 6, 2009) (private litigants may only bring  
11 claims for false or misleading advertising, and must provide adequate factual bases for such  
12 allegations). Plaintiffs argue they “can point to evidence that directly conflicts with  
13 Defendants’ advertising claims,” but they fail to do so in the Second Amended Complaint.  
14 (Doc. 37 at p. 18). Plaintiffs do not cite to a single scientific study that disproves  
15 Defendants’ advertised claims. In order to state a claim for relief under UCL, FAL or  
16 CLRA, Plaintiffs must allege (with an adequate factual basis) that Defendants’ advertising  
17 claims have actually been disproved by the scientific community, not simply that the  
18 efficacy of its treatment is not backed up by sufficient scientific evidence.

19 It is clear from both the Second Amended Complaint and the Response that Plaintiffs  
20 do intend to challenge whether Defendants’ advertised claims are substantiated by  
21 scientific evidence. (Doc. 24 at ¶¶ 137, 138, 150, 151). Otherwise, are Plaintiffs conceding  
22 that the only underlying basis for their UCL, FAL, CLRA and fraud claims moving forward  
23 is that Defendants misrepresented the rate of customer satisfaction? This would not require  
24 proof by medical experts about the efficacy of the offered service. This would require  
25 proof that some patients reported dissatisfaction in the completed exit surveys upon which  
26 the reported patient data is based. In any event, Plaintiffs’ allegations regarding the  
27 misrepresentation of patient satisfaction are still based upon the fact that Defendants  
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1 allegedly knew the treatment was not effective for some patients. Again, this underscores  
2 that the crux of Plaintiffs’ claims is the “lack of substantiation” for Defendants’ statements  
3 regarding the effectiveness of its treatment.

4 **C. The Second Amended Complaint fails to demonstrate that Defendants**  
5 **misrepresented “patient satisfaction” ratings.**

6 In an effort to avoid dismissal for bringing “lack of substantiation” claims, Plaintiffs  
7 argue that the heart of their Second Amended Complaint is actually the alleged  
8 misrepresentations regarding “patient satisfaction.” However, the Second Amended  
9 Complaint demonstrates on its face that Defendants’ representations regarding patient  
10 satisfaction are not misleading. Plaintiffs include a screenshot of the pie graphs at issue.  
11 None of these pie graphs purport to reflect whether the treatment was “effective” for all  
12 patients. The pie graphs, as reproduced in the Second Amended Complaint, speak for  
13 themselves.<sup>5</sup> With or without the explanation at the bottom regarding the origin of the data,  
14 the language of the advertised Patient Satisfaction Ratings is clear as to what was being  
15 evaluated and what was reported by the patients. Plaintiffs intentionally mischaracterize  
16 the information relayed in the pie graphs in an effort to create a misrepresentation. None  
17 of these graphs purport to reflect that the treatment was “effective” for all patients.  
18 Furthermore, Plaintiffs do not even plead that Plaintiffs actually relied on the patient  
19 satisfaction ratings in deciding to purchase the service, that the purported inaccuracies in  
20 the pie charts are material, or that Plaintiffs would not have purchased the service if they  
21 had known that less than 100 percent of patients were satisfied.

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26 <sup>5</sup> This is why Plaintiffs’ request for the Court to take Judicial Notice of Defendants’ website is improper.  
27 Defendants did not go outside the four corners of the Second Amended Complaint in making their  
28 arguments in the Joint Motion to Dismiss. Plaintiffs’ ad hoc attempt to clarify the allegations in its Second  
Amended Complaint through outside evidence should not be permitted.

1           **D. StemGenex’s treatments are not “medical experiments” under the**  
2 **Human Subjects Act.**

3           A “medical experiment” under the Human Subjects Act is “the practice or research  
4 of medicine in a manner not reasonably related to maintaining or improving the health of  
5 the subject or otherwise directly benefitting the subject.” Cal. Health & Safe. Code  
6 §24174(a). The few reported cases to discuss the Human Subjects Act suggest that to  
7 constitute a “medical experiment,” the procedure at issue must be used “in the course of  
8 pure research” without any therapeutic purpose. *Trantafello v. Medical Center of Tarzana*,  
9 182 Cal. App. 3d 315, 320 n. 2 (Cal. Ct. App. 1986); *Perez v. Nidek Co., Ltd.*, 711 F.3d  
10 1109, 1115 (9th Cir. 2013). Here, the allegations in the Second Amended Complaint  
11 demonstrate that the treatments offered by StemGenex are “reasonably related to  
12 maintaining or improving the health of [its patients] or otherwise directly benefitting [its  
13 patients].” These treatments therefore do not constitute “medical experiments” under the  
14 Human Subjects Act. Moreover, Plaintiffs have once again underscored that their claims  
15 are all based on a “lack of substantiation.” In essence, Plaintiffs argue that because there  
16 is no substantiation for the effectiveness of Defendants’ treatment, it must be an  
17 experiment. Defendants’ use of certain words such as “pioneer,” and “latest  
18 advancements,” and references to “research” and “studies,” does not change the nature of  
19 its treatment from one intended to provide direct benefit to patients. Plaintiffs’ argument  
20 that “[g]iven the relative infancy of stem cell medicine, it is more likely to fall in the  
21 research realm,” is simply untrue and ignores the statutory language defining a medical  
22 experiment. (Doc. 37 at p. 23).

23           **E. Plaintiffs have failed to state a claim for Financial Elder Abuse.**

24           In their Response, Plaintiffs argue that StemGenex’s Patient Advocates occupied a  
25 position of trust and owed a fiduciary duty to customers. However, Plaintiffs do not cite to  
26 any legal authority to support this proposition. The only cases cited by Plaintiffs in this  
27 section of their brief do not involve any discussion of whether a salesperson occupies a  
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1 position of trust over a potential customer. *See Johnston v. Allstate Ins. Co.*, No. 13-CV-  
2 574-MMA BLM, 2013 WL 2285361, at \*2 (S.D. Cal. May 23, 2013) (discussing whether  
3 there had been a “taking”); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 927 F. Supp. 2d 870,  
4 891 (C.D. Cal. 2013) (discussing whether defendant’s purported financial abuse caused  
5 physical harm or mental suffering); *Abbit v. ING USA Annuity & Life Ins. Co.*, 999 F. Supp.  
6 2d 1189, 1200 (S.D. Cal. 2014) (discussing whether plaintiff established “intent to defraud”  
7 or “bad faith”). The allegations in the Second Amended Complaint fail to demonstrate that  
8 the Patient Advocates occupied a position of trust, had a special relationship with Plaintiffs,  
9 had authority over Plaintiffs, or exerted any undue influence on Plaintiffs. Moreover,  
10 because Plaintiffs have failed to state a claim for relief for fraud or misrepresentation, the  
11 Elder Abuse claim, which is based on the same alleged misconduct, falls as well.

12 **F. Plaintiffs have failed to state a claim under RICO**

13 Plaintiffs’ RICO claim is predicated on the same alleged misrepresentations as the  
14 fraud and negligent misrepresentation claim – i.e. that Stemgenex committed fraud by  
15 failing to disclose the lack of substantiation for its treatment and by misrepresenting  
16 “patient satisfaction.” Therefore, to the extent Plaintiffs’ have failed to state a claim for  
17 fraud or negligent misrepresentation, Plaintiff’s RICO claim should be dismissed for  
18 failure to state a claim.

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1 **III. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request the Court grant  
3 Defendants’ Motion to Dismiss Plaintiffs’ entire Second Amended Complaint with  
4 prejudice. However, if the Court does not dismiss the Second Amended Complaint in its  
5 entirety, Defendants respectfully request that the Court accept Plaintiffs’ admission in  
6 their Response that “*medical or scientific* substantiation of the efficacy of [Defendants’]  
7 product is **not the focus of this** case.” (Doc. 37 at p. 18) (italics, underlining and bolding  
8 in original ). Therefore, the Court should dismiss Plaintiffs’ claims under the CLF, FAL  
9 and CLRA as improper “lack of substantiation” claims or, in the alternative, permit  
10 Plaintiffs to file a Third Amended Complaint to delete all Plaintiffs’ allegations  
11 concerning false advertising claims based on the efficacy of StemGenex’s stem cell  
12 treatment to comport with Plaintiffs’ admission.

13  
14 Dated: February 24, 2017

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