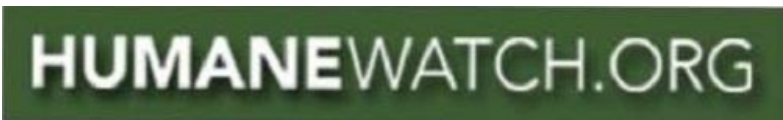


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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

JoDell Martinelli, et al.,	)	No. CV-09-529-PHX-DGC
Plaintiffs,	)	<b>ORDER</b>
vs.	)	
Petland, Inc.; and The Hunte Corporation,	)	
Defendants.	)	

14 Defendants Petland, Inc. and The Hunte Corporation have filed motions to dismiss the  
15 amended complaint pursuant to Rule 9(b) and Rule 12(b)(6) of the Federal Rules of Civil  
16 Procedure. Dkt. ##58, 59. The motions are fully briefed. Dkt. ##60, 61, 62, 67. For the  
17 reasons that follow, the amended complaint will be dismissed with prejudice for all Plaintiffs  
18 other than Elliot Moskow and Karen Galatis to the extent they assert certain claims against  
19 Petland.<sup>1</sup>

20 **I. Background.**

21 Petland is a large national retailer of pets. Petland and its franchisees sell puppies at  
22 more than 100 stores throughout the United States. Hunte supplies many of the puppies sold  
23 at Petland stores.

24 On March 16, 2009, six purchasers of Petland puppies – JoDell Martinelli, Stephanie  
25 Booth, Melia Perry, Abbigail King, Nicole Kersanty, and Ruth Ross – filed a class action

26 \_\_\_\_\_

27 <sup>1</sup>Plaintiffs have not requested oral argument. Defendants’ request is denied because  
28 the parties have fully briefed the issues and oral argument will not aid the Court’s decision.  
*See Fed. R. Civ. P. 78(b); Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 complaint against Petland and Hunte. Dkt. #1. Plaintiffs claimed that they bought Petland  
2 puppies with the understanding that they were “bred under safe and humane conditions by  
3 a reputable breeder with proper canine husbandry practices,” when the puppies actually were  
4 bred at a “puppy mill.” *Id.* ¶¶ 8-13. A puppy mill, according to Plaintiffs, is “a dog breeding  
5 operation in which the health of the dogs is disregarded in order to maintain a low overhead  
6 and maximize profits.” *Id.* ¶¶ 2, 18. Plaintiffs alleged that their puppies were sick at the time  
7 of purchase or became ill shortly thereafter. *Id.* ¶¶ 8-13. The complaint asserted a claim  
8 under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C.  
9 § 1962(c), which is predicated on alleged violations of the federal mail and wire fraud  
10 statutes, 18 U.S.C. §§ 1341 and 1343. *Id.* ¶¶ 67-88 (count one). The complaint also asserted  
11 a RICO conspiracy claim under 18 U.S.C. § 1962(d) (count two), violations of consumer  
12 protection laws from many states (count three), a claim for unjust enrichment (count four),  
13 and a violation of the Ohio Consumer Sales Practices Act (count five). *Id.* ¶¶ 89-121.

14 On August 7, 2009, the Court granted Defendants’ motions to dismiss the complaint.  
15 Dkt. #49. Because Plaintiffs sought an opportunity to file an amended complaint (Dkt. #44  
16 at 12), and because the pleading deficiencies possibly could be cured by amendment, the  
17 Court dismissed the complaint without prejudice. Dkt. #49.

18 Plaintiffs filed an amended complaint on September 11, 2009. Dkt. #54. The  
19 amended complaint asserts the five claims from the original complaint (*id.* at ¶¶ 123-81), but  
20 adds 26 new plaintiffs (*id.* ¶¶ 16-37). Defendants argue that the amended complaint suffers  
21 from the same defects as the original complaint.

## 22 **II. The RICO and RICO Conspiracy Claims.**

23 The RICO statute makes it unlawful for any person associated with an enterprise to  
24 participate in the conduct of such enterprise’s affairs, or to conspire to do so, through a  
25 pattern of racketeering. 18 U.S.C. § 1962(c), (d). The alleged pattern of racketeering in this  
26 case is mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. Dkt. #54 ¶ 135. To plead  
27 a violation of those statutes, Plaintiffs must allege that Defendants formed a scheme to  
28 defraud, used the United States mails and wires in furtherance of that scheme, and did so

1 with the specific intent to defraud. *See Schreiber Distrib. Co. v. Serv-Well Furniture Co.*,  
2 806 F.2d 1393, 1400-01 (9th Cir. 1986). Plaintiffs also must allege facts showing that the  
3 fraudulent scheme proximately caused Plaintiffs' injuries. *See Poulos v. Caesars World,*  
4 *Inc.*, 379 F.3d 654, 664 (9th Cir. 2004).

5 **A. Causation.**

6 The Court dismissed the original RICO claims, among other reasons, for failure to  
7 plead proximate causation adequately. Dkt. #49 at 6-8. The Court found insufficient the  
8 conclusory allegation that Plaintiffs unwittingly purchased puppy mill dogs “[a]s a direct  
9 result of Defendants’ fraudulent scheme” (Dkt. #1 ¶¶ 87, 99). *Id.* at 7. The complaint  
10 alleged that Plaintiffs purchased a Petland puppy “with the understanding that he was bred  
11 under safe and humane conditions by a reputable breeder with proper canine husbandry  
12 practices” (Dkt. #1 ¶¶ 8-13), but the basis for this belief was not provided, and the complaint  
13 did not otherwise allege that Plaintiffs relied on misrepresentations about the origin of  
14 Petland puppies when they made their purchases. *See id.* at 6-7. The Court therefore  
15 concluded that Plaintiffs had failed to plead causation sufficient to state claims for relief  
16 under the RICO statute. *Id.* at 8.

17 Defendants argue that the amended complaint again fails to plead causation  
18 adequately. Dkt. #58 at 12-15, 59 at 5-7. The Court agrees with respect to all but two  
19 Plaintiffs, who have sufficiently alleged damages proximately caused by Petland. The  
20 amended complaint alleges a fraud scheme based on misrepresentations, but, with two  
21 exceptions, fails to allege that Plaintiffs relied on the scheme’s misrepresentations when  
22 deciding to purchase a Petland puppy.

23 **1. The general failure to plead causation.**

24 Defendants created the scheme to defraud, in Plaintiffs’ words, by “misrepresenting  
25 that the puppies sold at Petland retail stores across the nation to Plaintiffs and the Class were  
26 ‘healthy,’ ‘the finest available,’ and by deliberately misrepresenting puppy mills who bred  
27 the dogs as ‘professional and hobby breeders who have years of experience in raising quality  
28 family pets,’ and by deliberately misrepresenting that the puppies were from USDA-licensed

1 breeders, thereby misrepresenting the true origin and value of the dogs sold at Petland.”  
2 Dkt. #54 ¶ 137. Petland’s misrepresentations purportedly were made pursuant to Petland’s  
3 “uniform standards for selling puppies through a written health certificate and/or warranty  
4 provided at the time of sale” (*id.* ¶ 3) and in statements made on Petland’s website and in  
5 written brochures “mailed and/or provided to consumer[s] in its retail locations” (*id.* ¶¶ 5, 64,  
6 71-72, 92). Hunte is claimed to have made the following misrepresentations on its website:  
7 the puppies it provides to Petland are “the healthiest puppies on the planet” (*id.* ¶¶ 3), the  
8 puppies are from “the most reputable USDA-approved breeders” (*id.* ¶ 73, 153), Hunte is  
9 dedicated to providing “the absolute best care possible to every single puppy no matter what  
10 it costs” (*id.*), and Hunte has established “comprehensive musculoskeletal criteria for  
11 accepting puppies from breeders” (*id.* ¶¶ 3, 74, 151).

12 Conspicuously missing from the amended complaint, however, is the allegation that  
13 Plaintiffs relied on any of these misrepresentations when deciding to purchase their Petland  
14 puppies. In fact, not a single Plaintiff has alleged that he or she ever visited Defendants’  
15 websites, received Defendants’ written brochures, or relied on a written health certificate or  
16 warranty. Each Plaintiff alleges that his or her puppy was bought “with the specific  
17 understanding that he was healthy, and bred under safe and humane conditions by a reputable  
18 breeder with proper canine husbandry practices” (Dkt. #54 ¶¶ 10-37), but, with the exception  
19 of Plaintiffs Elliot Moskow and Karen Galatis (*id.* ¶¶ 31, 33), Plaintiffs do not explain the  
20 basis for this belief or allege that it arose from Defendants’ misrepresentations.

21 Moskow and Galatis allege that they received specific representations by individual  
22 Petland employees that their puppies either were healthy or not bred at a puppy mill.  
23 Dkt. #54 ¶¶ 31, 33. These Plaintiffs will be discussed separately below. The Court first will  
24 consider whether the remaining Plaintiffs have sufficiently pled causation.<sup>2</sup>

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26 <sup>2</sup> Plaintiffs JoDell Martinelli and Cheryl and Allen Huston allege that they were  
27 provided a warranty of good health (*id.* ¶¶ 10, 28), but they do not allege that they relied on  
28 the warranty in deciding to purchase their puppies (*id.*). Indeed, Plaintiff Martinelli alleges  
that she thought the puppy “might not be well” when she purchased it. *Id.* ¶ 10. Plaintiffs  
Rachel and Eric Camilleri allege that “[a]t the time of sale, Plaintiff[s] Camilleri [were] given

## 2. Plaintiffs other than Moskow and Galatis.

“Proximate causation requires ‘some direct relation between the injury asserted and the injurious conduct alleged.’” *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 981 (9th Cir. 2008) (quoting *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). The Court made clear in its order dismissing the original complaint that, absent some allegation of reliance, Plaintiffs have not pled a “‘direct and proximate causal relationship’ between Plaintiffs’ injuries and [the] purported fraudulent scheme.” Dkt. #49 at 8 (quoting *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 774 (9th Cir. 2002)). No specific allegation of reliance is made in the amended complaint. Given that Plaintiffs were on notice that reliance is required to state a claim for relief under the RICO statute (*see id.* at 7), the Court assumes this omission is intentional and will not infer reliance where it has not been alleged. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (the plausibility standard set forth in *Twombly* “asks for more than a sheer possibility that a defendant has acted unlawfully,” demanding instead sufficient factual allegations to allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged”); *In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037, 1051 (N.D. Cal. 2009) (“The court will not make the unsupported inference that the individual plaintiffs purchased the drug as a result of defendant’s fraudulent conduct.”).

Plaintiffs argue that causation should be inferred as a matter of “common sense” or as a logical explanation for their behavior in purchasing puppies from Defendants. In support of this argument, Plaintiffs cite the Ninth Circuit’s discussion in *Poulos*, which declined to find causation based on common sense. 379 F.3d at 667. As *Poulos* explained, Courts have found common-sense causation when the plaintiffs’ actions could not be explained in any way other than reliance on the defendants’ misrepresentations. In *Garner v. Healy*, 184 F.R.D. 598 (N.D. Ill. 1999), for example, the plaintiffs clearly would not have bought the

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the assurance that their puppy was in good health” (*id.* ¶ 34), but they do not identify the form of the assurance and, more importantly, do not allege that they relied on it (*id.*).

1 product labeled “car wax” if they knew it contained no car wax, had “minimal value,” and  
2 did “nothing to protect a car or enhance its appearance.” *Id.* at 599. The defendant’s  
3 representation that it was “car wax” necessarily contributed to the plaintiffs’ decision to  
4 purchase it as car wax. In *Peterson v. H&R Block Tax Services, Inc.*, 174 F.R.D. 78 (N.D.  
5 Ill. 1997), the plaintiffs would not have purchased the tax refund service if they had known  
6 they were not eligible to use it. As the district court explained, “[i]t is inconceivable class  
7 members would rationally choose to pay a fee for a service they knew was unavailable[.]”  
8 *Id.* at 85.

9 The Ninth Circuit concluded in *Poulos* that the obvious causation in these cases does  
10 not arise where the plaintiffs’ motive for acting might be unrelated to the alleged  
11 misrepresentations. The alleged misrepresentations in *Poulos* concerned the nature and risks  
12 of computerized slot and poker machines. The Ninth Circuit recognized that representations  
13 about such matters may have had nothing to do with why plaintiffs choose to gamble on the  
14 machines. Plaintiffs’ reasons for playing “may be an addiction, a form of escape, a casual  
15 endeavor, a hobby, a risk-taking money venture, or scores of other things.” 379 F.3d at 668.  
16 Because there is “no single, logical explanation for gambling,” the Ninth Circuit concluded,  
17 the court could not conclude, as a matter of common sense, that the plaintiffs relied on the  
18 misrepresentations. A showing of individual reliance was required. *Id.*

19 In this case, as in *Poulos*, there is no single, common-sense reason for a puppy  
20 purchase. A person might buy a puppy because he falls in love with it in the store window,  
21 he has heard it will make a good guard dog, he likes the price, he is referred to the store by  
22 a friend, or he finds the store convenient. It is not necessarily true that every purchaser  
23 would base his or her decision on the fact that the puppy was “the finest available” or was  
24 bred by professional, hobby, or USDA-approved breeders – key misrepresentations identified  
25 in the amended complaint. Dkt. #54 ¶¶ 5, 137.

26 In making their common-sense causation argument, Plaintiffs focus exclusively on the  
27 health of the puppies, asserting that “it is illogical that Plaintiffs would purchase their sickly  
28 or dying puppy mill puppy absent a misrepresentation as to its health.” Dkt. #61 at 17. This

1 argument has a certain appeal – rational people generally would not pay hundreds or  
2 thousands of dollars for a sick puppy – but the Court finds it insufficient to invoke common-  
3 sense causation. A person who falls in love with a puppy in the store window might well  
4 purchase the puppy in the absence of any representation concerning its health. However  
5 unwise, some people may even buy a sick puppy in order to provide it a good home and  
6 nurse it back to health. It simply cannot be said that a representation concerning the puppy’s  
7 health is obviously relied on in the same way that a consumer looking for car wax relies on  
8 the product’s label as “car wax” or in the same way that a person paying for a tax service  
9 relies on the assumption that the service will be available. Plaintiffs conspicuously have  
10 failed to allege that they relied on representations concerning the puppies’ health, and the  
11 Court cannot assume that such representations were the reason Plaintiffs purchased the  
12 puppies.

13       The Court notes that this is not an omissions case. Plaintiffs repeatedly allege that  
14 they were harmed by Defendants’ affirmative misrepresentations concerning the health and  
15 origins of the puppies, not by Defendants’ omissions. Indeed, in response to the original  
16 motions to dismiss, Plaintiffs made clear that they “do not allege that Petland had a duty to  
17 speak,” stating instead that their claims are based on the fact that “Petland knowingly  
18 misrepresents the origin of the puppies it sells[.]” Dkt. #44 at 14-15. In response to  
19 Defendants’ renewed motions, Plaintiffs again confirm that their claims “are based upon a  
20 number of misrepresentations made by Defendants.” Dkt. #61 at 13. They also state,  
21 however, that “to the extent that the Amended Complaint can be read as a failure to  
22 disclose,” it should be sustained. *Id.* This ambiguous statement does not alter the fact that  
23 the amended complaint focuses almost exclusively on misrepresentations. Because this is  
24 a misrepresentation case, Plaintiffs cannot rely on the presumption of reliance recognized in  
25 some securities-fraud omissions cases such as *Affiliated Ute Citizens of Utah v. United States*,  
26 406 U.S. 128, 153-54 (1972). As the Ninth Circuit explained in *Poulos*, “the *Affiliated Ute*  
27 presumption should not be applied to cases that allege both misstatements and omissions  
28 unless the case can be characterized as one that primarily alleges omissions.” 379 F.3d at

1 667 (quotation marks and citation omitted). Consistent with this law, Plaintiffs never argue  
2 in response to Defendants' motions that reliance should be presumed because of alleged  
3 omissions.

4 Because Plaintiffs other than Moskow and Galatis do not allege that they relied on any  
5 of Defendants' alleged misrepresentations, the Court concludes that they have not pled the  
6 causation necessary for their RICO claims. "Causation lies at the heart of a civil RICO  
7 claim." *Id.* at 664. Plaintiffs conclusory allegation that they unwittingly purchased puppy  
8 mill dogs "[a]s a direct result of Defendants' fraudulent scheme" (Dkt. #54 ¶¶ 143, 159) is  
9 insufficient to survive the motions to dismiss. *See Iqbal*, 129 S. Ct. at 1954 (the Federal  
10 Rules "do not require courts to credit a complaint's conclusory statements without reference  
11 to its factual content"); *In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d at 1053 (RICO claims  
12 dismissed where the plaintiffs failed "to do more than formulaically recite an injury that is  
13 proximately related to the injurious conduct alleged"); *Abalos v. Bronchick*, No. C07-  
14 844RSL, 2008 WL 1929893, at \*3 (W.D. Wash. Apr. 28, 2008) (denying leave to amend  
15 where the plaintiff failed to allege "how the RICO violation caused his damages"). The  
16 amended complaint contains no other allegation of causation. The Court, therefore, will  
17 grant Defendants' motions to dismiss the RICO claims with respect to Plaintiffs other than  
18 Moskow and Galatis. *See Greenstein v. Peters*, No. CV 08-6104 PSG, 2009 WL 722067,  
19 at \*3 (C.D. Cal. Mar. 16, 2009) (dismissing amended complaint where the plaintiff failed to  
20 allege that his purchase decision was affected by the fraudulent conduct); *see also Bridge v.*  
21 *Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131, 2144 (2008) (noting that "the complete  
22 absence of reliance may prevent the plaintiff from establishing proximate cause"); *Mulligan*  
23 *v. Choice Mortgage Corp. USA*, No. CIV. 96-596-B, 1998 WL 544431, at \*7 (D.N.H.  
24 Aug. 11, 1998) (for RICO action stemming from mail and wire fraud, "plaintiffs must . . .  
25 demonstrate that they relied upon defendant's scheme or artifice to defraud.").<sup>3</sup>

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28 <sup>3</sup> In support of their causation argument, Plaintiffs cite the three-part test in *Newcal Industries, Inc. v. Ikon Office Solutions*, 513 F.3d 1038 (9th Cir. 2008): "(1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate



1                   **3. Plaintiffs Moskow and Galatis.**

2           Plaintiff Elliott Moskow alleges that he “specifically asked the Petland representative  
3 at the time of purchase whether ‘Petland received their puppies from puppy mills’ to which  
4 he was assured they did not.” Dkt. #54 ¶ 31. Plaintiff Karen Galatis alleges that she was  
5 specifically assured by Petland employee Bill Sturgeon that her puppy was healthy: that it  
6 “(1) had never been sick, (2) was up to date on his shots, (3) was not hypoglycemic, and  
7 (4) was lethargic and quiet only because he was stuck in a cage all day long.” *Id.* ¶ 33.  
8 Although neither Plaintiff specifically alleges that he or she relied on these representations,  
9 the Court can fairly infer that the representations influenced their purchase decisions. For  
10 Moskow, the inference arises from the fact that he specifically asked whether the puppy was  
11 from a puppy mill, showing that this issue was relevant to his decision. For Galatis, the  
12 inference reasonably arises from the fact that she discussed the puppy’s health in some detail  
13 with employee Sturgeon, including why the puppy was lethargic. In both cases, the factual  
14 allegations of the amended complaint reasonably suggest that the Plaintiffs relied on what  
15 they were told by Petland employees. Moreover, the amended complaint generally alleges  
16 that Plaintiffs “were misled to believe [the puppies] were healthy” (*id.* ¶ 65), an allegation  
17 that has meaning in the case of Plaintiffs Moskow and Galatis given the detail provided  
18 concerning their purchases.

19           Although the amended complaint focuses primarily on a broad scheme to defraud that  
20 includes websites, brochures, and health certificates, none of which is alleged to have been  
21 seen by Plaintiffs Moskow and Galatis, it also alleges that “Petland misrepresented the  
22 puppies sold to Plaintiffs and members of the Class as healthy during each transaction in  
23 conjunction with the Petland ‘System’ orally or through written health certificate and/or

24 \_\_\_\_\_  
25 the law as private attorneys general; (2) whether it will be difficult to ascertain the amount  
26 of the plaintiff’s damages attributable to defendant’s wrongful conduct; and (3) whether the  
27 courts will have to adopt complicated rules apportioning damages to obviate the risk of  
28 multiple recoveries.” *Id.* at 1055 (quotation omitted). *See* Dkt. #61 at 15. This test, quoted  
from *Association of Washington Public Hospital Districts v. Phillip Morris Inc.*, 241 F.3d  
696, 701 (9th Cir. 2001), is a standing inquiry used to determine whether an injury is “too  
remote.” *Id.* Defendants have not alleged that Plaintiffs lack RICO standing.

1 warranty provided at the time of sale.” *Id.* ¶ 61 (emphasis added). The oral representations  
2 Petland made to Plaintiffs Moskow and Galatis are thus part of the scheme alleged in the  
3 amended complaint.

4 In sum, the Court concludes that the amended complaint alleges facts giving rise to  
5 a reasonable inference of reliance by Moskow and Galatis on oral representations made by  
6 Petland. As to these Plaintiffs, the Court will not dismiss for lack of causation the RICO  
7 claim asserted against Petland in count one of the amended complaint.

#### 8 **4. Allegations concerning Hunte’s misrepresentations.**

9 The oral representations that influenced the purchase decisions of Moskow and  
10 Galatis were made by Petland, not Hunte. Dkt. #54 ¶¶ 31, 33. The amended complaint  
11 contains no allegation that either Moskow or Galatis visited Hunte’s website. *See id.* ¶¶ 73,  
12 74, 151, 153. The allegations of the amended complaint do not show, nor do they otherwise  
13 give rise to a reasonable inference, that Plaintiffs Moskow and Galatis purchased their  
14 puppies in reliance on representations made by Hunte.

15 Plaintiffs assert that while Petland created and managed the fraudulent scheme,  
16 “it relied on Hunte to provide a constant supply of puppy mill puppies, and deliver those  
17 puppies to Petland stores[.]” Dkt. #60 at 9. But unlike the puppies purchased by some  
18 Plaintiffs (Dkt. #54 ¶¶ 16, 17, 19, 20, 22, 24, 30, 35), the puppies purchased by Moskow and  
19 Galatis are not alleged to have been from Hunte (*id.* ¶¶ 31, 33). *See also id.* ¶ 152 (noting  
20 that only some Plaintiffs “purchased Petland puppies provided by Hunte”). Hunte may not  
21 be held liable for the alleged misconduct of other puppy breeders or brokers where the  
22 amended complaint contains no allegations tying Hunte to these other companies. *See*  
23 *Twombly*, 550 U.S. at 570.

24 In short, Moskow and Galatis have failed to allege facts showing the “direct relation”  
25 between their injuries and Hunte’s representations necessary to plead proximate cause.  
26 *Canyon County*, 519 F.3d at 981. Their RICO claims asserted against Hunte in count one  
27 of the amended complaint will be dismissed.

28

1           **B. Sufficiency of Fraud Allegations.**

2           Petland argues that the amended complaint fails to satisfy the pleading requirements  
3 of Rule 9(b). Dkt. #58 at 10-12. That rule “requires a pleader of fraud to detail with  
4 particularity the time, place, and manner of each act of fraud[.]” *Lancaster Cmty. Hosp. v.*  
5 *Antelope Valley Dist.*, 940 F.2d 397, 405 (9th Cir. 1991). The “[a]llegations of fraud must  
6 be accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.”  
7 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted).

8           Petland asserts that as to the alleged oral representations, Plaintiffs “fail to allege who  
9 made them, who they were made to (such as to which plaintiffs), or what was actually said.”  
10 Dkt. #58 at 10. This is incorrect as to Plaintiffs Moskow and Galatis.

11           Plaintiff Moskow alleges who said what to whom: a Petland employee told him that  
12 Petland does not receive its puppies from puppy mills. Dkt. #54 ¶ 3. Moskow also alleges  
13 the time (October 2008) and place (the Petland store in Topsham, Maine) of the  
14 representation. *Id.* These allegations are sufficiently particular to satisfy Rule 9(b). *See*  
15 *Odom v. Microsoft Corp.*, 486 F.3d 541, 554-55 (9th Cir. 2007).

16           The allegations made by Plaintiff Galatis also provide sufficient particularity. *See*  
17 *Vess*, 317 F.3d at 1106. Galatis alleges that she purchased her puppy on August 3, 2008 from  
18 the Petland store in Manchester, New Hampshire, and Petland employee Bill Sturgeon told  
19 her that the puppy had never been sick, was up to date on his shots, was not hypoglycemic,  
20 and was lethargic and quiet only because he was stuck in a cage all day long. Dkt. #54 ¶ 33.

21           In short, Plaintiffs Moskow and Galatis have sufficiently “identifi[ed] the  
22 circumstances of the fraud so that [Petland] can prepare an adequate answer from the  
23 allegations.” *Odom*, 486 F.3d at 553. The Court will not dismiss their RICO claims against  
24 Petland under Rule 9(b).

25           Nor will their claims be dismissed on the ground that the alleged misrepresentations  
26 are non-actionable puffery. *See* Dkt. #58 at 8. Whether Petland received dogs from a puppy  
27 mill – as described in the complaint – is capable of being proven true or false. Similarly,  
28 representations that a dog had never been sick, was up to date on his shots, and was not

1 hypoglycemic (*see id.* ¶ 33), are statements of fact, not vague opinions.

2 **C. RICO Conspiracy.**

3 Count two asserts a RICO conspiracy claim in violation of 18 U.S.C. § 1962(d).  
4 Dkt. #54 ¶¶ 145-60. An agreement to violate RICO is the essential element of a RICO  
5 conspiracy claim. *See Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 774 (9th  
6 Cir. 2002). “The illegal agreement need not be express so long as its existence may be  
7 inferred from the words, actions, or interdependence of activities and persons involved.” *Id.*  
8 at 775. The Court dismissed the RICO conspiracy claim asserted in the original complaint  
9 (Dkt. #1 ¶¶ 89-100) because the complaint’s allegations did not permit the Court to infer  
10 more than the mere possibility of a conspiratorial agreement between Hunte and Petland.  
11 Dkt. #49 at 10. Hunte argues that the amended complaint fares no better. The Court agrees.

12 The amended complaint alleges no facts showing an express agreement to violate  
13 RICO. The complaint alleges that Hunte’s agreement to participate in the Petland scheme  
14 “can be inferred from its distribution of puppy mill puppies and its supportive false  
15 statements concerning those puppies’ health and welfare.” Dkt. #54 ¶ 154. In support of this  
16 purported inference, Plaintiffs recite the statements Hunte made on its website about the  
17 health and welfare of the puppies it supplies (*id.* ¶¶ 151, 153) and note that Hunte has been  
18 cited for violations of the Animal Welfare Act (*id.* ¶ 150).

19 The Supreme Court’s decision in *Twombly* “adds a new bite to the RICO requirement  
20 that the Plaintiffs describe the agreement to conspire in the complaint.” *Solomon v. Blue*  
21 *Cross & Blue Shield Ass’n*, 574 F. Supp. 2d 1288, 1292 (S.D. Fla. 2008). *Twombly* makes  
22 clear that Rule 8(a)(2) requires factual allegations possessing “enough heft to ‘show that the  
23 pleader is entitled to relief.’” 550 U.S. at 557. To satisfy this pleading requirement for a  
24 conspiracy claim, the complaint must include allegations “plausibly suggesting (not merely  
25 consistent with) agreement.” *Id.*

26 The allegations of the amended complaint lack the heft under *Twombly* to permit the  
27 Court to infer more than the mere possibility of a conspiratorial agreement between Hunte  
28 and Petland. The complaint has therefore “alleged – but it has not ‘shown’ – that [Plaintiffs

1 are] entitled to relief.” *Iqbal*, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)); *see*  
2 *Solomon*, 574 F. Supp. 2d at 1292 (dismissing RICO conspiracy claim where the complaint’s  
3 allegations primarily concerned the substance of the agreement but contained “no other  
4 allegations about who made the agreement, when the agreement was made, or how the  
5 Defendants made the agreement”). The Court will dismiss the RICO conspiracy claim  
6 asserted in count two of the amended complaint.

### 7 **III. The State Law Claims.**

8 Count three of the original complaint asserted violations of many state consumer  
9 protection statutes. Dkt. #1 ¶¶ 101-11. Count five asserted a claim under the consumer sales  
10 practices act of Ohio, Petland’s principal place of business. *Id.* ¶ 116-21. In response to  
11 Petland’s initial motion to dismiss, Plaintiffs did not dispute that proximate causation is an  
12 essential element of claims brought under state consumer protection statutes. *See* Dkt. ##34  
13 at 14, 44 at 15-17. The Court dismissed the state law claims on the ground that Plaintiffs’  
14 allegations of proximate cause were entirely too general to satisfy Plaintiffs’ “obligation  
15 under Rule 8(a) to allege facts *showing* an entitlement to relief [.]” Dkt. #49 at 8 (emphasis  
16 in original). Defendants argue that the state law claims asserted in the amended complaint  
17 fail for the same reason. Dkt. ##58 at 13-14, 59 at 6-7.

18 As explained more fully above, Plaintiff Moskow has alleged facts from which  
19 causation reasonably may be inferred. Moskow is a resident of Maine (Dkt. #54 ¶ 31), and  
20 the amended complaint asserts a claim under the Maine Unfair Trade Practices Act (*id.* ¶  
21 170(6)). The Court will not dismiss that claim for lack of causation to the extent it is asserted  
22 against Petland.

23 Plaintiff Galatis also has alleged facts from which causation reasonably may be  
24 inferred, but she is a resident of Massachusetts. *Id.* ¶ 33. No claim is asserted under  
25 Massachusetts law. *See id.* ¶ 170.

26 Plaintiffs other than Moskow and Galatis have not alleged facts sufficient to  
27 adequately plead causation. Dkt. #54 ¶¶ 10-30, 32, 34-37. Count three alleges generally that  
28 Plaintiffs have suffered a loss and are entitled to relief “[a]s a proximate result of Defendants’

1 misrepresentations[.]” *Id.* ¶ 169. Similar conclusory allegations of causation are made with  
2 respect to each state statute. *Id.* ¶ 170(1)-(20). The sole allegation of causation in count five  
3 is that Plaintiffs suffered damage “[a]s a direct result of the deceptive practices of the  
4 Defendants[.]” *Id.* ¶ 181.

5 The Court previously made clear to Plaintiffs that their pleading obligation under  
6 Rule 8(a) “requires more than labels and conclusions, and a formulaic recitation of the  
7 elements of a cause of action will not do.” Dkt. #49 at 8 (quoting *Twombly*, 127 S. Ct. at  
8 1965); see *Iqbal*, 129 S. Ct. at 1949 (“Threadbare recitals of the elements of a cause of  
9 action, supported by mere conclusory statements, do not suffice.”). The Court will dismiss  
10 for lack of causation all state law claims other than Plaintiff Moskow’s claim against Petland  
11 under the Maine Unfair Trade Practices Act (Dkt. #54 ¶¶ 31, 170(6)). See *In re Actimmune*  
12 *Mktg. Litig.*, 614 F. Supp. 2d at 1054 (dismissing claims where the complaint failed to satisfy  
13 “the requirement that there be a connection between the misdeed complained of and the loss  
14 suffered under state law”).

15 Citing statutes and case law from various states, Plaintiffs assert that *reliance* is not  
16 an element of many state consumer protection claims. Dkt. #60 at 12 & n.2. But Plaintiffs  
17 do not dispute that *causation* is an essential element. Indeed, “whether it be termed an issue  
18 of reliance or an issue of proximate cause, an appropriate rule is that where the defendant is  
19 alleged to have made material misrepresentations or misstatements, there must be a *cause*  
20 *and effect relationship* between the defendant’s acts and the plaintiff’s injuries.” *Lilly v.*  
21 *Hewlett-Packard Co.*, No. 1:05-CV-465, 2006 WL 1064063, at \*5 (S.D. Ohio Apr. 21, 2006)  
22 (emphasis added); see *Lieblang v. Crown Media Holdings, Inc.*, No. 07 C 4250, 2008 WL  
23 320470, at \*7 (N.D. Ill. Jan. 31, 2008) (“[R]eliance is not an element of statutory consumer  
24 fraud, but a valid claim must show that the consumer fraud proximately caused plaintiff’s  
25 injury.”); *Schnall v. AT&T Wireless Servs., Inc.*, 161 P.3d 395, 401-02 (Wash. Ct. App.  
26 2007) (causation required under Washington consumer protection statute even though  
27 “reliance is not the only means by which causation can be proven”); *N. Am. Clearing, Inc.*  
28 *v. Brokerage Computer Sys., Inc.*, No. 607-cv-1503-Orl-19KRS, 2009 WL 15113389, at \*13-

1 14 (M.D. Fla. May 27, 2009) (causation an essential element under Florida statute); *Picus*  
2 *v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657-58 (D. Nev. 2009) (reading causation element  
3 into Nevada statute); *Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545, 550 (N.M. App. 2003)  
4 (New Mexico statutes “require proof of a causal link between conduct and loss”); *Weinberg*  
5 *v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001) (Pennsylvania statute requires the plaintiff to  
6 show an “ascertainable loss *as a result of* the defendant’s prohibited action”) (emphasis in  
7 original); *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001)  
8 (causation an essential element of Minnesota consumer protection claims); *Mulligan v.*  
9 *Choice Mortgage Corp. USA*, No. CIV. 96-596-B, 1998 WL 544431, at \*11 (D.N.H. Aug.  
10 11, 1998) (plaintiff bringing a claim under New Hampshire statute must “establish a causal  
11 link between the conduct at issue and his or her injury”). Thus, regardless of whether  
12 reliance is a required element under state consumer protection statutes, Plaintiffs “must at  
13 least allege that they were exposed to the offensive conduct.” *Harvey v. Ford Motor Credit*  
14 *Co.*, 8 S.W.3d 273, 276 (Tenn. Ct. App. 1999). Plaintiffs other than Moskow and Galatis  
15 have made no such allegation.

#### 16 **IV. The Unjust Enrichment Claim.**

17 The Court dismissed the original unjust enrichment claim on the ground that it was  
18 predicated on fraud (*see* Dkt. #1 ¶ 113), and Plaintiffs had failed to plead the underlying  
19 fraud-based claims sufficiently. Dkt. #49 at 9 (citing *Oestreicher v. Alienware Corp.*, 544  
20 F. Supp. 2d 964, 975 (N.D. Cal. 2008); *Martis v. Grinnell Mut. Reinsurance Co.*, 905 N.E.  
21 2d 920, 928 (Ill. Ct. App. 2009)). The unjust enrichment claim asserted in the amended  
22 complaint is unchanged. It again alleges that “Defendants have profited and benefitted from  
23 their scheme to defraud purchasers of puppies from Petland.” Dkt. #54 ¶ 173; *see* Dkt. #1  
24 ¶ 113. Because Plaintiffs other than Moskow and Galatis have failed to plead causation in  
25 the underlying fraud claim adequately, the Court will grant the motions to dismiss the unjust  
26 enrichment claim with respect to those Plaintiffs. Plaintiffs Moskow and Galatis have pled  
27 an adequate fraud-based claim against Petland, but not Hunte. Their unjust enrichment  
28 therefore will be dismissed to the extent it is asserted against Hunte.

1 Plaintiffs cite *Arnold & Associates, Inc. v. Misys Healthcare Systems*, 275 F. Supp.  
2 2d 1013 (D. Ariz. 2003), for the proposition that an unjust enrichment claim survives even  
3 where a fraud claim has been dismissed. Dkt. #60 at 15. But the unjust enrichment claim  
4 asserted in *Arnold* was predicated on a theory of contract, not on a scheme to defraud. *See*  
5 *Arnold*, 275 F. Supp. 2d at 1025 (“[I]t is reasonable that Plaintiff did not render its services  
6 gratuitously or officiously, but rather pursuant to a contract or agreement[.]”). The dismissal  
7 of the separate fraud claim in *Arnold* therefore had no impact on the contract-based unjust  
8 enrichment claim.

9 **V. The Economic Loss Doctrine.**

10 Petland contends that Plaintiffs’ claims are barred by the economic loss doctrine.  
11 Dkt. #58 at 15-16. “Broadly speaking, the economic loss doctrine is designed to maintain  
12 a distinction between damage remedies for breach of contract and tort.” *Giles v. Gen. Motors*  
13 *Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007). The doctrine “provides that certain  
14 economic losses are properly remedial only in contract.” *Id.* Petland asserts that because  
15 Plaintiffs’ allegedly received damaged goods (unhealthy puppies), they therefore assert  
16 “typical warranty claims giving rise to purely economic losses.” Dkt. #58 at 15. The Court  
17 does not agree.

18 “Tort law has traditionally protected individuals from a host of wrongs that cause  
19 only monetary damage[.]” including fraud. *Giles*, 494 F.3d at 875. Where tort claims have  
20 been barred by the economic loss doctrine, “they usually have amounted to nothing more  
21 than a failure to perform a promise contained in a contract.” *Id.* at 876. This is not the basis  
22 for Plaintiffs’ claims. Petland itself recognizes that Plaintiffs assert “fraud-based claims.”  
23 Dkt. #58 at 17.

24 “The key rationale underlying the economic loss doctrine presupposes that there has  
25 been a fair and equitable negotiation of the allocation of risk between the parties.” *KD & KD*  
26 *Enters., LLC v. Touch Automation, LLC*, No. CV-06-2083-PHX-FJM, 2006 WL 3808257,  
27 at \*2 (D. Ariz. Dec. 27, 2006). A fraudulent misrepresentation “undermines the ability of  
28 the parties to negotiate freely, and therefore negates the presumption that equitable



1 negotiation has occurred.” *Id.* In such a situation, the economic loss doctrine does not apply  
2 because it would be “unreasonable to restrict [the defrauded] party to contractual limitations  
3 of liability[.]” *Id.*

4 The amended complaint alleges that each puppy sold to Plaintiffs “was misrepresented  
5 as ‘healthy’ to facilitate its sale[.]” Dkt. #54 ¶ 63. While the misrepresentations allegedly  
6 were made both orally and in written warranties, Plaintiffs are not seeking damages based  
7 on Petland’s failure to honor its warranty. Rather, Plaintiffs seek damages for being  
8 fraudulently induced into purchasing sick puppies. The economic loss doctrine does not bar  
9 Plaintiffs’ claims. *See Giles*, 494 F.3d at 875; *KD & KD*, 2006 WL 3808257, at \*2-3; *Frank*  
10 *Lloyd Wright Foundation v. Kroeter*, Nos. CV-08-1112-PHX-DGC, CV-08-1125-FJM, 2008  
11 WL 5111092 (D. Ariz. Dec. 3, 2008).

12 **VI. Conclusion.**

13 The claims asserted against Defendant Hunte will be dismissed. All claims asserted  
14 against Defendant Petland will be dismissed except (1) Plaintiffs Elliot Moskow and Karen  
15 Galatis’ count-one RICO claim, (2) Plaintiffs Elliot Moskow and Karen Galatis’ unjust  
16 enrichment claim, and (3) Plaintiff Moskow’s claim under the Maine Unfair Trade Practices  
17 Act. Plaintiffs do not seek leave to file a second amended complaint. In addition, the Court  
18 concludes that Plaintiffs have been afforded an adequate opportunity to plead their claims.  
19 The dismissal therefore will be with prejudice.

20 **IT IS ORDERED:**

- 21 1. Defendant Petland, Inc.’s motion to dismiss (Dkt. #58) is **granted in part** and  
22 **denied in part.**
- 23 2. Defendant The Hunte Corporation’s motion to dismiss (Dkt. #59) is **granted.**
- 24 3. The Court will set scheduling conference by separate order.

25 DATED this 26th day of January, 2010.

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27 

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David G. Campbell  
United States District Judge