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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MOJDEH OMIDI and AURORA
TELLERIA, individually and on behalf of
others similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC., A
Delaware corporation, et. al.,

Defendant.

Case No.: 14cv00857 JAH-BLM

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS
[Doc. Nos. 22, 25]**

Pending before the Court are Wal-Mart Stores, Inc.’s motion to dismiss (Doc. No. 22) and Defendant FirstSight Vision Services’ motion to dismiss (Doc. No. 25). Plaintiff opposes the motions. After a thorough review of the parties’ submissions and for the reasons discussed below, the Court GRANTS Defendants’ motions.

BACKGROUND

Plaintiffs originally filed a class action complaint in Superior Court of the State of California, County of San Diego on November 5, 2013. Defendant Wal-Mart removed the action to federal court on April 9, 2014. Plaintiff filed a First Amended Complaint (“FAC”) on January 29, 2016, against Wal-Mart Stores, Inc. and FirstSight Vision Services, Inc. asserting claims for unlawful, fraudulent and unfair business practices in violation of

1 California’s Unlawful Business Practices Law (“UCL”), Business and Professions Code
2 section 17200; violation of California False Advertising Law (“FAL”), California Business
3 and Professions Code section 17500; and violation of California’s Consumer Legal
4 Remedies Act (“CLRA”), California Civil Code section 1750.

5 Defendants Wal-Mart and FirstSight filed separate motions to dismiss the FAC for
6 lack of standing and failure to sufficiently allege facts to state a claim. Plaintiff filed
7 separate oppositions to the motions and Defendants filed separate replies. The motions
8 were set for hearing but were taken under submission without oral argument pursuant to
9 Local Rule 7.1.

10 LEGAL STANDARDS

11 I. Rule 12(b)(1)

12 Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a defendant may seek
13 to dismiss a complaint for lack of jurisdiction over the subject matter. The federal court is
14 one of limited jurisdiction. See Gould v. Mutual Life Ins. Co. v. New York, 790 F.2d 769,
15 774 (9th Cir. 1986). As such, it cannot reach the merits of any dispute until it confirms its
16 own subject matter jurisdiction. See Steel Co. v. Citizens for a Better Environ., 523 U.S.
17 83, 95 (1998). When considering a Rule12(b)(1) motion to dismiss, the district court is
18 free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving
19 factual disputes where necessary. See Augustine v. United States, 704 F.2d 1074, 1077
20 (9th Cir. 1983). In such circumstances, “[n]o presumptive truthfulness attaches to
21 plaintiff’s allegations, and the existence of disputed facts will not preclude the trial court
22 from evaluating for itself the merits of jurisdictional claims.” Id. (quoting Thornhill
23 Publishing Co. v. General Telephone & Electronic Corp., 594 F.2d 730, 733 (9th Cir.
24 1979)). Plaintiff, as the party seeking to invoke jurisdiction, has the burden of establishing
25 that jurisdiction exists. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377
26 (1994).

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1 II. Rule 12(b)(6)

2 Rule 12(b)(6) tests the sufficiency of the complaint. Navarro v. Block, 250 F.3d
3 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where the complaint
4 lacks a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530,
5 534 (9th Cir. 1984); see Neitzke v. Williams, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6)
6 authorizes a court to dismiss a claim on the basis of a dispositive issue of law.”).
7 Alternatively, a complaint may be dismissed where it presents a cognizable legal theory
8 yet fails to plead essential facts under that theory. Robertson, 749 F.2d at 534. While a
9 plaintiff need not give “detailed factual allegations,” he must plead sufficient facts that, if
10 true, “raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly,
11 550 U.S. 544, 545 (2007).

12 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
13 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
14 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 547). A claim is facially
15 plausible when the factual allegations permit “the court to draw the reasonable inference
16 that the defendant is liable for the misconduct alleged.” Id. In other words, “the non-
17 conclusory ‘factual content,’ and reasonable inferences from that content, must be
18 plausibly suggestive of a claim entitling the plaintiff to relief. Moss v. U.S. Secret Service,
19 572 F.3d 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible
20 claim for relief will ... be a context-specific task that requires the reviewing court to draw
21 on its judicial experience and common sense.” Iqbal, 556 U.S. at 679.

22 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
23 truth of all factual allegations and must construe all inferences from them in the light most
24 favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002);
25 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal
26 conclusions need not be taken as true merely because they are cast in the form of factual
27 allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003); Western Mining
28 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to dismiss,

1 the Court may consider the facts alleged in the complaint, documents attached to the
2 complaint, documents relied upon but not attached to the complaint when authenticity is
3 not contested, and matters of which the Court takes judicial notice. Lee v. City of Los
4 Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that a complaint fails
5 to state a claim, the court should grant leave to amend unless it determines that the pleading
6 could not possibly be cured by the allegation of other facts. See Doe v. United States, 58
7 F.3d 494, 497 (9th Cir. 1995).

8 DISCUSSION

9 Defendant Wal-Mart argues Plaintiffs fail to allege facts establishing harm or
10 causation to support Article III standing and statutory standing, fail to satisfy rule 9(b), fail
11 to allege likelihood of future injury for injunctive relief, and the request for disgorgement
12 is not allowed and must be dismissed.

13 Defendant FirstSight argues Plaintiffs fail to allege facts establishing injury in fact
14 and causation, fail to adequately allege Defendant engaged in unlawful conduct, fail to
15 allege facts sufficient to seek injunctive relief under the CLRA, and fail to satisfy Rule
16 9(b)'s pleading requirements. Defendant FirstSight seeks an order dismissing the action
17 with prejudice.

18 I. Standing

19 A. Parties' Arguments

20 1. Defendant Walmart's Motion

21 Defendant Wal-Mart argues Plaintiffs do not allege facts establishing injury or
22 causation to support their claims. In the FAC, Defendant maintains, Plaintiffs assert their
23 optometrists were not independent, and they lost money in the form of the \$58 they paid
24 for their exams. Defendant contends the FAC generally alleges optometrists leasing space
25 from Defendant FirstSight are subject to influence and control, but it fails to allege
26 Plaintiffs' doctors were, in fact, influenced and controlled in some way that prevented them
27 from being independent. Defendant Wal-Mart further contends the FAC does not allege
28 Plaintiffs' doctors performed their exams without exercising their independent medical

1 judgment or they did something they were not supposed to do or did not do something they
2 were supposed to do, and Plaintiffs never allege the doctors wrongly prescribed treatment
3 options. Defendant argues Plaintiffs do not tie their theory that the business model between
4 Wal-Mart and FirstSight creates the possibility of influence and control over optometrists
5 to their actual experience or any actual injury.

6 In opposition to Wal-Mart's motion, Plaintiffs argue they have standing to pursue
7 unlawful UCL claims. They maintain they would not have been able to purchase their
8 exams but for Walmart's violations of California law by indirectly entering into landlord-
9 tenant arrangements with optometrists, and even if it could legally maintain optometrists
10 in its stores, Wal-Mart violated California law by asserting control and influence over the
11 optometrists. Plaintiffs further argue they adequately allege economic injury to support
12 standing when they allege Plaintiffs bargained for and were entitled to a healthcare provider
13 who was independent and thus free from conflicts of interest but instead were seen by
14 doctors beholden to Wal-Mart. Plaintiff argues it is sufficient to allege that Plaintiffs would
15 not have purchased the exams but for the deception regarding a material component of the
16 exam.

17 In reply, Defendant Wal-Mart maintains Plaintiffs concede they needed to obtain
18 eye exams from someone and did not allege they could obtain those exams elsewhere at a
19 lower price. Defendant argues Plaintiffs allege no facts establishing any actual and
20 concrete economic injury. Defendant further argues Plaintiffs concede they would have
21 obtained an exam somewhere, while not alleging that anything was deficient or that they
22 could have paid less, and, therefore, Plaintiffs fail to allege harm or causation, which is
23 fatal to all their claims.

24 **2. Defendant FirstSights' Motion**

25 Defendant FirstSight argues Plaintiffs lack standing under Article III, and the UCL
26 and FAL because they fail to allege facts establishing a cognizable injury in fact.
27 Defendant contends Plaintiffs do not allege they failed to receive the benefit of the eye
28 exams they purchased, and do not allege they did not want eye exams, that their eye exams

1 were in any way deficient or defective, or that their eye exams were not worth the \$58 they
2 each paid for the exams. Defendant further contends Plaintiffs do not allege the
3 optometrists they visited were not properly licensed, or that because of the arrangement
4 between FirstSight and Wal-Mart, they paid more for their eye exams. Defendant argues
5 Plaintiffs do not alleged injury in fact, and, consequently, they lack standing to pursue a
6 UCL or FAL claim.

7 Defendant FirstSight further argues even if Plaintiffs' payment of \$58 for an eye
8 exam could be construed as an injury, Plaintiffs fail to allege facts establishing a causal
9 connection between the alleged harm and the conduct of which they complain. Defendant
10 contends the mere allegation that it collects rent from optometrists based upon a percentage
11 of the optometrists' gross revenues does not lend itself to a plausible conclusion that it
12 coerced optometrists to perform a high volume of eye exams. Furthermore, Defendant
13 contends there are no allegations in the FAC that it actually pressured the optometrists into
14 performing more eye exams than performed by other optometrists or that the doctors
15 performed the eye exams in a manner inconsistent with the standard of care or in a rushed
16 or hurried fashion, and were not actually independent or that the optometrists were actually
17 controlled or influenced by Defendant FirstSight. At best, Defendant argues, Plaintiffs'
18 allegations raise the specter that the lease terms could improperly influence the
19 optometrists. Defendant also argues Plaintiffs do not allege anywhere in the FAC that it
20 advertised the availability of eye examinations from an independent doctor of optometry
21 at Wal-Mart and thus, have not alleged a causal connection between Defendant FirstSight
22 and any purported misrepresentations about the optometrists that Plaintiffs relied upon.

23 In opposition to FirstSight's motion, Plaintiffs argue they adequately allege they
24 suffered an economic injury to support standing. They maintain they allege the exams
25 were deficient, in that, they bargained for an independent healthcare provider but instead
26 were seen by doctors beholden to Defendants' control. They further maintain they had a
27 right protected by California law, to be examined by an optometrist who is unfettered by
28 any conflicts of interest and had been led to believe that this is what they would receive by

1 purchasing an exam. Plaintiffs contend had they known the purportedly independent
2 doctors were under Defendants' control and influence, they would have chosen to purchase
3 an exam from a different healthcare provider and, therefore, have suffered economic injury.

4 Plaintiffs further argue they adequately allege a casual nexus between their
5 willingness to pay for the exam and Defendant FirstSight's unfair business practices. They
6 maintain the FAC creates a prima facie case that the optometrists were subject to
7 Defendants' indirect control and influence through the master agreement between Wal-
8 Mart and FirstSight in which Wal-Mart gave FirstSight exclusive control over the lease
9 rights by mandating optometrists' rent be based on a percentage of monthly revenues. They
10 contend this gave Defendant a vested interest in the optometrists' exam volume. Plaintiffs
11 further contend the lease provisions provided Defendants control over when the
12 optometrists could see patients, provided Defendant FirstSight with the ability to audit
13 optometrists, and the ability to terminate the lease at any time and for any reason which
14 allowed FirstSight to control fundamental aspects of its tenant-optometrists practices.
15 Additionally, Plaintiffs maintain the FAC expressly alleges Dr. Ho was a tenant of
16 FirstSight/Wal-Mart under the exact same lease described in the FAC and, therefore, was
17 subject to Defendants' control and influence. They further maintain the FAC contains
18 specific allegations from which to infer the veracity of Plaintiffs' assertion that
19 optometrists were operating under the same leases, and thus the same control and influence
20 as every other Wal-Mart tenant-optometrist.

21 In reply, Defendant FirstSight argues, to establish the requisite economic injury,
22 Plaintiffs are required to allege that the eye exams performed by Doctors Ho or Mendoza
23 were not worth the \$58 they paid or that they could have obtained an eye exam elsewhere
24 for less but they failed to do so. As a result, Defendant contends, Plaintiffs do not allege
25 any economic injury. Defendant further contends Plaintiffs also fail to allege the
26 optometrists were, in fact, not independent. Defendant argues Plaintiffs' theory, that lease-
27 terms in a business arrangement between Wal-Mart, FirstSight and optometrists is devoid
28 of facts and speculative. Defendant contends Plaintiffs do not allege any facts in the FAC

1 that show Defendants actually exercised the kind of control and influence over the tenant-
2 optometrists that the applicable statutes and regulations foreclose. Defendant maintains
3 the California Legislature has endorsed the challenged lease terms in the recent
4 amendments to California Business and Professions Code sections 655 and 2556, which
5 undercuts Plaintiffs' theory of control and influence. Defendant argues because the current
6 statutes endorse Defendants' arrangements, Plaintiffs' claims fail as a matter of law.
7 Defendant further argues Plaintiffs' allegations of control and influence are entirely based
8 on speculation and conjecture, in that the FAC does not explain how these lease terms
9 impeded Dr. Ho's and Dr. Mendoza's independence, or that Defendant FirstSight actually
10 controlled Dr. Ho's and Dr. Mendoza's day-to-day practice. Because Plaintiffs do not
11 adequately allege facts to support a plausible causal connection between any unfair
12 business practice or false advertising and any actual harm they suffered, Defendant
13 FirstSight argues Plaintiffs have not demonstrated standing to bring a UCL or FAL claim.

14 **B. Analysis**

15 A federal court's judicial power is limited to "cases" or "controversies." U.S. Const.,
16 Art. III § 2. A necessary element of Article III's "case" or "controversy" requirement is
17 that a litigant must have "'standing' to challenge the action sought to be adjudicated in the
18 lawsuit." Valley Forge Christian College v. Americans United for Separation of Church
19 and State, Inc., 454 U.S. 464, 471 (1982); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1152 (9th
20 Cir. 2000). The "irreducible constitutional minimum" of Article III standing has three
21 elements. LSO, 205 F.3d at 1152. First, the plaintiff must have suffered "an injury in fact
22 — an invasion of a legally protected interest which is (a) concrete and particularized, and
23 (b) actual and imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife,
24 504 U.S. 555, 560 (1992). Second, the plaintiff must show a causal connection between
25 the injury and the conduct complained of; i.e., "the injury has to be fairly . . . trace[able] to
26 the challenged action of the defendant, and not . . . th[e] result [of] the independent action
27 of some third party not before the court." Id. (quoting Simon v. Eastern Ky. Welfare Rights
28 Organization, 426 U.S. 26, 41-42 (1976)) (alterations in original). Third, it must be

1 “likely,” and not merely “speculative,” that the plaintiff’s injury will be redressed by a
2 favorable decision. Id. at 561.

3 Additionally, the UCL, the FAL and the CLRA require a plaintiff allege he or she
4 suffered economic injury to have standing to pursue a claim. See Kwikset Corp. v. Superior
5 Court, 51 Cal.4th 310, 321-22 (2011); see also In re Vioxx Class Cases, 180 Cal.App.4th
6 116, 129 (2009).

7 In the FAC, Plaintiffs allege Wal-Mart and FirstSight executed an agreement by
8 which Wal-Mart leases office space immediately adjacent to the optical department in Wal-
9 Mart retail locations throughout California to enable FirstSight to sublease the space to
10 California-licensed optometrists for the purpose of conducting eye exams out of those
11 office locations. FAC ¶ 46. Under the agreement FirstSight charges optometrists a
12 percentage of their gross revenue as rent. Id. ¶ 47. Plaintiffs assert this arrangement allows
13 Wal-Mart to exert indirect control over the optometrists because FirstSight has an incentive
14 to ensure the optometrists perform a high number of eye exams to increase its profits and
15 ensures a steady stream of customers to purchase eyewear. Id. ¶ 49. Plaintiffs also allege
16 FirstSight enters into lease agreements with optometrists which provide Defendants control
17 and influence over the optometrists, including: giving FirstSight the right to terminate the
18 lease at any time with 60 days written notice, and the right to change the office location
19 with just one week’s notice; preventing an optometrist from encouraging his or her patients
20 to leave or follow the optometrist to another practice; permitting the optometrists to
21 conduct business using only a telephone line approved by FirstSight; setting forth the days
22 and times the optometrist must see patients; dictating what fees the optometrists are
23 allowed to charge; and precluding optometrists from placing signs or advertisements in
24 her or her leased space without the consent of FirstSight. Id. ¶¶ 52-55. Plaintiffs further
25 allege Defendants exert control over which therapies an optometrists can provide and what
26 referrals they make. Id. ¶ 56. Additionally, Plaintiffs allege optometrists are required to
27 hire a person to staff the reception area when the office is open but, cannot hire another
28 optometrist or staff member without FirstSight’s permission. Id. ¶ 57. Plaintiffs assert the

1 leases required optometrists to turn over patient medical records to FirstSight and mandates
2 the records are owned by FirstSight, and requires optometrists to use FirstSights' s practice
3 management system that dictates how to manage the office, how the optometrist collects
4 payments, how the optometrists records patient transactions, and requires optometrists to
5 obtain patient signatures on certain forms, including patient informed consent forms. Id. ¶
6 58. They further allege FirstSight has the right to audit the optometrists' records allowing
7 Defendants to assess the optometrists' performance, and those deemed to be below the
8 acceptable threshold are notified of the deficiency and warned the deficiency will result in
9 termination. Id. ¶ 59. Additionally, the FAC alleges FirstSight has the right to inspect the
10 office to determine whether an optometrist is complying with the terms of the lease. Id. ¶
11 61. Plaintiffs assert Wal-Mart is consulted before a lease is renewed which confirms Wal-
12 Mart has a significant role in dictating whether an optometrist is terminated or retained. Id.
13 ¶ 60. Plaintiffs also assert Wal-Mart advertises the availability of eye exams from
14 independent doctors in various media, including signs and displays throughout the Wal-
15 Mart optical department but fails to disclose the optometrists are under Wal-Mart's
16 influence. Id. ¶¶ 65, 71.

17 The FAC also alleges Plaintiff Omid visited the optical department at a Wal-Mart
18 store located in San Diego, California after having seen Defendants' advertisements
19 regarding the availability of onsite eye exams from an "Independent Doctor of Optometry"
20 and purchased an eye exam from Dr. Ho for \$58. Id. ¶¶ 75, 76. Plaintiffs allege Dr. Ho
21 was a tenant of FirstSight and Wal-Mart, and was, therefore, operating under their control
22 and influence, as to the hours of operation, fees charged, services advertised, therapies
23 offered, drugs prescribed, referrals made, length and scope of exams, staffing office and
24 records maintenance. Id. ¶ 78. They also allege had Defendants not made eye exams
25 available to Omid at the Wal-Mart location, she would not have purchased the eye exam
26 from the location and she would not have purchased the eye exam had she known they
27 were unlawful and the optometrist was not independent. Id. ¶¶ 81, 82. Plaintiffs assert
28 Omid lost money in the amount of \$58 by paying for an exam from Wal-Mart's tenant-

1 optometrist that she would not have purchased but for Defendants' unlawful business
2 practices and Defendants' misrepresentation. Id. ¶ 83.

3 The FAC further alleges Plaintiff Telleria visited the optical department at a Wal-
4 Mart store located in Chula Vista, California after having seen Defendants' advertisements
5 regarding the availability of onsite eye exams from an "Independent Doctor of Optometry"
6 and she purchased an eye exam from Dr. Mendoza for \$58. Id. ¶¶ 84, 85. Plaintiffs further
7 allege Dr. Mendoza was a tenant of FirstSight and Wal-Mart, and was, therefore, operating
8 under their control and influence, as to hours of operation, fees charged, services
9 advertised, therapies offered, drugs prescribed, referrals made, length and scope of exams,
10 staffing and records maintenance. Id. ¶ 87. They also allege had Defendants not made eye
11 exams available to Telleria at the Wal-Mart location, she would not have purchased the eye
12 exam from the location and she would not have purchased the eye exam had she known
13 they were unlawful and the optometrist was not independent. Id. ¶¶ 89, 90, 91. Plaintiffs
14 assert Telleria lost money in the amount of \$58 by paying for an exam from Wal-Mart's
15 tenant-optometrist that she would not have purchased but for Defendants' unlawful
16 business practices and Defendants' misrepresentation. Id. ¶ 92.

17 Plaintiffs allege Omid paid for and received an eye exam from Dr. Ho and Telleria
18 paid for and received an eye exam performed by Dr. Mendoza. They do not allege they
19 did not receive the eye exam they paid for, that they did not need the eye exam or that Dr.
20 Ho and Mendoza would not have performed the eye exam but for any alleged pressure.
21 Even if Plaintiffs allege a concrete non-speculative injury, they fail to sufficiently allege a
22 causal connection between their injuries and Defendants' conduct. There are no allegations
23 that FirstSight pressured Dr. Ho and Dr. Mendoza to perform a large number of eye exams
24 and it is not a reasonable inference that FirstSight did so simply because it had an incentive
25 to ensure tenant-optometrists increased their profits.

26 Furthermore, Plaintiffs does not allege Wal-Mart exerted any control over Dr. Ho or
27 Dr. Mendoza. They do not allege that Wal-Mart was a party to the lease between FirstSight
28 and Dr. Ho or the lease between FirstSight and Dr. Mendoza, and the allegation that a Wal-

1 Mart employee had a say in whether to renew a lease is not sufficient to suggest Wal-Mart
2 exerted any control of Dr. Ho's practice or Dr. Mendoza's practice, including determining
3 the number of patients they saw or the therapies they employed.

4 Additionally, Plaintiffs fail to sufficiently allegation Dr. Ho and Dr. Mendoza were
5 not independent because they were tenants of FirstSight. Plaintiffs do not allege FirstSight
6 threatened not to renew Dr. Ho's or Dr. Mendoza's lease, that they not increase their price
7 for eye exams or that they could not provide certain treatment to their patients. While
8 Plaintiffs allege the lease permitted FirstSight to check the optometrists' books to make
9 sure they were meeting quotas, there are no allegations that FirstSight did so in a manner
10 depicting influence or control. The remaining provisions of the lease fail to demonstrate
11 FirstSight pressured or exerted such control over Dr. Ho or Dr. Mendoza that the
12 optometrists were not independent.

13 The Court finds Plaintiffs fail to demonstrate they suffered an injury as a result of
14 Defendants' conduct. Accordingly, Plaintiff fails to establish subject matter jurisdiction
15 and Defendants' motions to dismiss are GRANTED.

16 **B. Remaining Grounds for Dismissal**

17 Because the Court finds it lacks subject matter jurisdiction over the action due to
18 Plaintiff's failure to sufficiently allege injury, it will not address Defendants' remaining
19 grounds for dismissal.

20 **CONCLUSION AND ORDER**

21 Based on the foregoing, IT IS HEREBY ORDERED:

- 22 1. Defendant Wal-Mart's motion to dismiss is **GRANTED**;
- 23 2. Defendant FirstSight's motion to dismiss is **GRANTED**;

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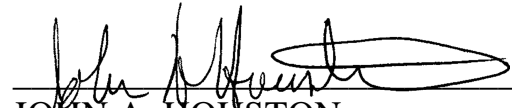
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1 3. The complaint is **DISMISSED with prejudice**.¹

2 DATED: March 23, 2017

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5 JOHN A. HOUSTON
6 United States District Judge
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26 _____
27 ¹ Defendant FirstSight contends the motion should be dismissed without leave to amend because the
28 FAC is the third attempt by Plaintiff’s counsel to state a plausible cause of action based upon the
purported business agreement in that they have tested similar allegations in three related cases before
this Court and have failed to survive motions to dismiss on successive occasions. The Court agrees.