

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

JUL 23 2018

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

MOJDEH OMIDI, individually and as
representatives of the class and AURORA
TELLERIA, individually and as
representatives of the class,

Plaintiffs-Appellants,

v.

WAL-MART STORES, INC., a Delaware
corporation and FIRSTSIGHT VISION
SERVICES, INC., a California corporation,

Defendants-Appellees.

No. 17-55539

D.C. No.

3:14-cv-00857-JAH-BLM

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted July 9, 2018
Pasadena, California

Before: PAEZ, FISHER,** and CHRISTEN, Circuit Judges.

Mojdeh Omidh filed this putative class-action suit against appellees Wal-Mart

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

Stores, Inc., and FirstSight Vision Services, Inc. Wal-Mart operates as a registered optician within California and leases space in its stores to FirstSight, a licensed vision health care plan. FirstSight, in turn, leases space to individual optometrists, who provide routine eye exams for a fee. Wal-Mart and FirstSight advertise the availability of “Independent Doctors of Optometry” at Wal-Mart, and Omidi claims that this representation induced her to purchase an eye exam at a San Diego-area location from Dr. Ho. Omidi’s complaint alleges that Dr. Ho was not “independent” as advertised, and that she would not have purchased the eye exam if she had known this. Omidi seeks relief under various California consumer protection statutes.¹ The District Court dismissed the complaint for lack of standing, concluding that Omidi failed to establish an economic injury in fact. For the reasons stated below, we vacate in part, reverse in part, and remand for further proceedings.

To establish standing under Article III, a plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). At the pleading stage, the complaint must “clearly allege facts demonstrating’ each element” of standing. *Id.* (ellipsis omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). An injury in fact is the invasion

¹ The Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, *et seq.*, the False Advertising Law (FAL), Cal. Bus. & Prof. Code § 17500 *et seq.*, and the Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1750 *et seq.*

of a legally protected interest which is both “concrete and particularized,” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), as opposed to merely “conjectural or hypothetical,” *id.* (internal quotation marks omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Under California law, a plaintiff suffers an economic injury in fact for purposes of statutory standing if she “would not have bought [a] product but for [some] misrepresentation.” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (quoting *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 890 (Cal. 2011)).

The key question in this case is whether Omidi has adequately alleged that her optometrist lacked independence. The complaint lacks specific allegations about Dr. Ho, and instead points to various lease provisions indicating that Wal-Mart and FirstSight were able to exercise undue influence over all of their resident optometrists. These provisions include: setting rent as a percentage of revenue, prescribing minimum operating hours, and permitting the lessor to terminate leases at will. In addition, the complaint contains several anecdotes concerning other optometrists at other Wal-Mart locations, all of which suggest that Dr. Ho was constrained in the rates he could charge and the therapies he could recommend. “[I]njury in fact is not a substantial or insurmountable hurdle,” *Kwikset* at 886, and the complaint’s allegations are sufficient to raise Omidi’s claimed injury—paying for an eye exam that she would not have purchased had she known Dr. Ho was not

independent—above the conjectural or hypothetical level. Because this injury is fairly traceable to the misleading advertisements and is likely to be redressed by a favorable judicial decision, Omidi has established standing under Article III and the relevant state statutes.

Independent of the misleading advertisements, Omidi claims entitlement to relief under the “unlawful” prong of the UCL because the business arrangement between Wal-Mart, FirstSight, and Dr. Ho was illegal under then-prevailing California law. *See* Cal. Bus. & Prof. Code § 655 (2015) (amended 2017); Cal Bus. & Prof. Code § 2556 (2015) (amended 2016). Setting aside the legality or illegality of appellees’ arrangement, Omidi fails to establish how her injury was fairly traceable to the purported statutory violations, rather than the misleading advertisements themselves. The District Court properly concluded that Omidi lacks standing on this claim, but improperly dismissed it with prejudice. *See Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 847 (9th Cir. 2017). We vacate this judgment and remand for dismissal of Omidi’s “unlawful” claim without prejudice.

The judgment of the District Court is VACATED in part, REVERSED in part, and REMANDED for consideration under Federal Rules of Civil Procedure 12(b)(6) and 9(b).

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
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* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk