

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE
RESTORATION ROBOTICS, INC.
SECURITIES LITIGATION

Case No. [5:18-cv-03712-EJD](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS; GRANTING
DEFENDANTS' JOINDER MOTIONS**

Re: Dkt. Nos. 45, 47, 49, 50

This class action arises out of Defendants' alleged violations of Section 11 and 15 of the Securities Act of 1933 ("the Act") during its initial public offering ("IPO") of Restoration Robotics, a company dedicated to robotic hair restoration.

Lead Plaintiff Edgardo Guerrini purchased Restoration Robotics common stock pursuant to the "Offering Materials," see *infra* I.A., issued in connection with Restoration's IPO.¹ Plaintiff alleges violations of Section 11 and 15 of the Act and argues that the Offering Materials contained materially false or misleading statements regarding Restoration's marketing function, the functionality of the ARTAS System (Restoration's hair transplant technology), and the ARTAS System's sales and continuing revenue. See Consolidated Amended Complaint ("Compl.") ¶¶ 3, 15, 19, 129, Dkt. 36. Plaintiff also claims Defendants violated Item 303 of SEC Regulation S-K by failing to disclose known trends or uncertainties that existed at the time of the IPO.

¹ Plaintiff does not allege a specific Class Period. Cf. Compl. ¶ 94 ("Prior to the Class Period . . .").

Case No.: [5:18-cv-03712-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS; GRANTING DEFENDANTS' JOINDER MOTIONS

1 The Complaint names multiple defendants:² (1) Restoration Robotics; (2) Individual
 2 Defendants Ryan Rhodes (the Chief Executive Officer “CEO”), Charlotte Holland (Chief
 3 Financial Officer “CFO”), Frederic Moll (Chairman of the Board), Jeffrey Bird (Board member),
 4 Gil Kliman (Board member), Emmett Cunningham, Jr. (Board member), Craig Taylor (Board
 5 member), and Shelly Thunen (Board member); (3) Venture Capital Sutter Hill Ventures, L.P.,
 6 Clarus Lifesciences II, L.P., Clarus Ventures II, LLC, Alloy Ventures 2002, L.P., Alloy Ventures
 7 2005, L.P., Alloy Ventures 2002, LLC, Alloy Ventures 2005, LLC, Interwest Partners IV, L.P.,
 8 and Interwest Management Partners IX, LLC; and (4) Underwriter Defendants National Securities
 9 Corporation, Roth Capital Partners, LLC, and Craig-Hallum Capital Group LLC. *Id.* ¶¶ 21–43.³

10 I. BACKGROUND

11 A. Factual Background

12 *Company Overview.* Restoration Robotics is a medical technology company that
 13 “develop[s] and commercializ[es] a robotic device, the ARTAS System that assists physicians in
 14 performing many of the repetitive tasks that are part of a follicular unit extraction surgery, a type
 15 of hair restoration procedure.” Compl. ¶ 51, Dkt. 36. The ARTAS System is an all-in-one device
 16 comprised of a patient chair, a robotic arm, an integrated vision system, artificial intelligence
 17 algorithms, and a series of proprietary end effectors, which have a needle and punch to secure hair
 18 follicles from a patient’s scalp. *Id.* ¶ 52. It is designed to “robotically assist[] a physician through
 19 many of the most challenging steps of the hair restoration process.” *Id.* ¶ 54.

20 In April 2011, Restoration received clearance to market and sell the ARTAS system in 61
 21 countries. *Id.* ¶ 56. To sell the system domestically, Restoration relies on a direct sales and
 22

23 ² For clarity, this Court refers to Defendant Restoration Robotics as “Restoration.” Other
 24 Defendants are referred to by name or as part of their collective group, *i.e.*, “Individual
 25 Defendants.”

26 ³ Section 11 allows a cause of action against every person who: (1) signed the registration
 27 statement; (2) was a director of the company; (3) helped prepare the statement; or (4) was an
 28 underwriter. 15 U.S.C. § 77k(a)(1–5). Defendants do not contest that this governs them and so
 this Court does not address any arguments that certain defendants are improperly joined.

Case No.: [5:18-cv-03712-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 marketing team. This team is composed of Regional Sales Managers (“RSMs”), Clinical Trial
 2 Managers (“CTMs”), and Practice Success Managers (“PSMs”). *Id.* ¶ 66. RSMs are “responsible
 3 for coordinating with executing the direct sales of the ARTAS Systems.” *Id.* ¶ 67. CTMs provide
 4 “high quality, comprehensive training and education to physicians on the use of the ARTAS
 5 System and on how to build their hair restoration practices.” *Id.* ¶ 68. PSMs work alongside
 6 physician clients to help “build awareness and market the ARTAS procedure and increase ARTAS
 7 brand-awareness.” *Id.* ¶ 69. This system is meant to prioritize profits by working collaboratively
 8 with physician customers to increase the number of ARTAS procedures performed. *Id.* ¶ 73.
 9 Internationally, the Company sells the ARTAS System to independent, third-party distributors
 10 who then sell the systems to end-users. *Id.* ¶¶ 118–19. As an inducement to buy the system,
 11 Restoration promised doctors high quality patient leads. *Id.* 78–80.

12 ***Revenue Structure.*** Restoration generates revenue from the ARTAS system in three ways:
 13 (1) systems, (2) procedure based, and (3) service-related fees. *Id.* ¶ 59.

14 First, “systems” is the sale of the actual ARTAS system, which is a one-time revenue at an
 15 average price of \$225,000 to \$240,000. *Id.* ¶ 61. Domestic sale revenue is recorded upon delivery
 16 to customers. Declaration of Gavin M. Masuda in Support of Restoration Robotics Defendants’
 17 Motion to Dismiss (“Masuda Decl.”), Ex. A at 61, Dkt. 48. International sale revenue is recorded
 18 upon shipment to an international distributor. *Id.* Second, “procedure based” revenue is earned
 19 anytime there is a procedure; physician-customers must “pay in advance on a per-follicle basis for
 20 the follicles to be harvested, and on a per procedure basis for Site Making.” Compl. ¶ 62. Outside
 21 of the United States, physician-customers pay in advance on a per procedure basis for both follicle
 22 extraction and site making. *Id.* Third, Restoration generates “service-related fees” from post-
 23 warranty maintenance on the ARTAS Systems pursuant to “service and support contracts offered
 24 by the Company.” *Id.* ¶ 64. Because the purchase of an ARTAS System is a one-time occurrence,
 25 Restoration depended mainly on “procedure-based” revenue. *Id.* ¶ 59.

26 Internationally, the revenue system functioned a bit differently. Plaintiff alleges that, at the

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 end of the quarter, Restoration increased sales to foreign distributors to boost quarterly sales
 2 numbers. *Id.* ¶¶ 118–23. In these foreign sales, the products did not go directly to the physician-
 3 consumer; instead, a distributor purchased the system and then allowed it to lay dormant in their
 4 warehouses. *Id.* This resulted in “warehousing,” which resulted in limited “procedure based”
 5 profits and oversaturated foreign markets, ultimately causing “system” revenue to decrease. *Id.*
 6 ¶¶ 145–58. In response, Restoration announced a pivot to a U.S.-centric model in May 2018. *Id.*
 7 ¶ 161.

8 ***Pre-IPO.*** Plaintiff uses three confidential witnesses (“CWs”) to support its allegations. *Id.*
 9 ¶ 44. CW 1 was a PSM, employed by Restoration before the IPO. *Id.* ¶ 45. CW 2 was a PSM
 10 employed after the IPO. *Id.* ¶ 48. And, CW 3 was an RSM employed before and after the IPO.
 11 *Id.* ¶ 49. According to CW 1 and 2, Restoration was unable to provide doctors with the promised
 12 patient leads and marketing support. *Id.* ¶¶ 80–82. Those that Restoration did identify as potential
 13 leads often had “no idea” how they ended up on Restoration’s list. *Id.* ¶ 82. This problem was so
 14 widespread, it resulted in a number of internal complaints among the PSMs and physicians. *Id.*
 15 Ultimately, because patient leads were not provided, physicians allowed their ARTAS System to
 16 lay dormant, resulting in a significant drop in procedure-based revenue. *Id.* ¶¶ 85, 93.

17 Beyond the lack of patient leads, doctors also reported discontent with the amount of time
 18 and expense required to use the ARTAS System. *Id.* ¶¶ 97–99. Allegedly, the system had
 19 widespread product issues that resulted in lower follicle yields, which further caused doctors to
 20 abandon the system. *Id.* Specifically, the needles used for the procedure suffered from a material
 21 defect that caused the machine to damage a patient’s already limited number of donor grafts,
 22 lowering harvest yields and increasing costs to physicians, leading to more abandonment of the
 23 system. *Id.* ¶ 140. According to CW 1, thirteen percent of doctors in her region had abandoned
 24 the system. *Id.* ¶ 100.

25 Finally, before the IPO, device sales stalled because interested doctors were waiting for the
 26 new product (the ARTAS iX). *Id.* ¶¶ 112, 152. Representatives were told to avoid mentioning

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 this during sales for fear of stagnation of sales. *Id.* ¶ 167, 169. Sales of the original ARTAS
 2 System were slowing because of this potential new product—doctors did not want to buy an out-
 3 of-date system. *Id.*

4 ***The IPO.*** On September 1, 2017, Restoration filed its Registration Statement with the
 5 Securities and Exchange Commission (“SEC”). *Id.* ¶ 5. After several amendments, the statement
 6 became effective on October 11, 2017. *Id.* ¶ 6. On October 13, 2017, Restoration filed a
 7 Prospectus pursuant to Rule 424(b)(4) with the SEC, commencing the public offering of 3,575,000
 8 Restoration shares of common stock priced at \$7.00 per share, raising over \$23 million in net
 9 proceeds. *Id.* ¶ 128. The Registration Statement and the Prospectus, together the “Offering
 10 Materials,” form the basis of this action. *Id.* ¶ 7. The Offering Materials contained disclosures
 11 regarding Restoration’s sales and marketing strategy, the quality and design of the ARTAS
 12 System, and ARTAS system sales and continuing revenue. *Id.* ¶¶ 130–46.

13 ***Post-IPO.*** Following the IPO, the Company’s stock traded consistently below its offering
 14 price of \$7.00 per share. *Id.* ¶ 13. Plaintiff identifies three significant events: first, on January 5,
 15 2018, Restoration announced Chris Aronson was replacing long-time Vice President of Global
 16 Sales Brent Nixon, causing the stock price to drop 14%. *Id.* ¶¶ 163–64. Second, on May 14,
 17 2018, Restoration announced its first quarter earnings for 2018, which showed a loss and caused
 18 the share price to drop 14.42% (falling to \$3.68 per share). *Id.* ¶¶ 150–51. Third, on November 5,
 19 2018, Restoration announced quarterly earnings for the third quarter of 2018 of \$4.8 million,
 20 based on the sale of 11 ARTAS iX Systems. Despite an increase in total system sales, procedure-
 21 based revenue dropped to \$1.28 million. *Id.* ¶ 152. Analyst Roth Capital Partners, and other
 22 analysts, lowered their price target to \$4 per share. *Id.* ¶ 153. The share price decreased to \$1.13
 23 per share as of November 29, 2018. *Id.*

24 **B. Alleged Material Misstatements/Omissions**

25 Plaintiff alleges the Offering Materials contained 10 materially false, misleading, and
 26 incomplete statements concerning the Company’s marketing function, the quality and design of

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 the ARTAS System, and the number of ARTAS Systems installed and their prospects for revenue
 2 generation. *Id.* ¶¶ 130–47. For clarity, the Court has numbered Plaintiff’s alleged actionable
 3 statements. Bold and italics are copied from Plaintiff’s Complaint and indicate the part of the
 4 statement alleged to be materially false and misleading.

5 **Statements Concerning Restoration’s Marketing Function**

6 ***Statement 1***

7 We strategically market the ARTAS System to hair restoration surgeons, dermatologists, plastic
 8 surgeons and aesthetic physicians. We believe we are able to reach our target physician customers
 9 effectively through focused marketing efforts. These efforts include participation in trade shows,
 10 scientific meetings, educational symposiums, webinars and other activities. ***For physicians who
 11 purchase the ARTAS System, we provide comprehensive clinical training, practice-based
 12 marketing support, as well as patient leads. For example, we believe we help our physician
 13 customers increase the number of procedures performed by assigning a practice success
 14 manager, or PSM, to provide assistance in building the physician-customer’s hair restoration
 15 practice.*** Support from a PSM includes the deployment of patient marketing materials, assisting
 16 with social media and digital marketing strategies, and other marketing and sales support.

17 Compl. ¶ 131.

18 ***Statement 2***

19 ***Drive increased utilization of the ARTAS System by working collaboratively with our physician
 20 customers to increase the number of ARTAS procedures that are performed.***

21 Compl. ¶ 132.

22 ***Statement 3***

23 ***Drive Increased Utilization.*** In addition to revenues from system sales and servicing, we also
 24 generate revenue from procedure based fees. We will continue to work collaboratively with our
 25 physician customers to increase utilization by introducing new functionalities, technology and
 26 innovations. ***In addition, we believe we can increase procedure revenues by helping physicians
 27 build their practice through our marketing and training support. To achieve all of these goals,
 28 we intend to utilize our teams of clinical training managers, or CTMs, PSMs and field service
 engineers to work with and to support our physician customers in developing profitable ARTAS
 practices.***

Compl. ¶ 133.

Statement 4

Practice Success Managers

Our PSMs are responsible for helping our physician customers build awareness and market the
 ARTAS procedure and increase ARTAS brand-awareness. Our PSMs average over ten years of

Case No.: [5:18-cv-03712-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 experience in developing hair restoration practices and aesthetics practices. *They form strong*
 2 *relationships with our customers and consult on how to integrate the ARTAS System into their*
 3 *practices, while raising awareness of the procedure among potential patients.* This process often
 4 begins before the ARTAS System is installed at the customer site. *Our PSMs work closely with*
 5 *the team that will manage the ARTAS business at the practice level to establish goals and*
 6 *develop detailed strategies to achieve these goals. This includes extensive training and*
 7 *coaching with respect to the patient consultation process. We provide easily implemented*
 8 *marketing tools allowing practices to create individually tailored website content, direct mail*
 9 *advertisements, print ads for magazines and newspapers and brochures.* In addition, PSMs
 10 consult on methods to raise awareness of the ARTAS procedure through practice events, public
 11 relations, television, and radio advertising and other channels.

12 Compl. ¶ 134.

13 ***Statement 5***

14 *We sell the ARTAS System, provide service and generate procedure based revenue by helping*
 15 *our physician customers build their hair restoration practice, through a direct sales force in the*
 16 *U.S. which, as of May 31, 2017, included seven regional sales managers, or RSMs, seven CTMs,*
 17 *and seven PSMs.*

18 Compl. ¶ 135.

19 **Statements Concerning the Quality and Design of the ARTAS System**

20 ***Statement 6***

21 The ARTAS System's image-guided robotic capabilities allow *physicians to perform hair*
 22 *restoration procedures with fewer staff required than a traditional strip surgery or a manual*
 23 *FUE procedure.* Procedures can also be performed with less physician and technician fatigue.

24 Compl. ¶ 138.

25 ***Statement 7***

26 The needle travels at approximately 2,500 mm to 3,000 mm per second when it contacts the skin.
 27 *This provides targeted precision and a cleanly scored incision.*

28 Compl. ¶ 140.

Statement 8

The punch then spins at 3,000 rpm and loosens the grafts from the surrounding tissue. In a clinical
 setting, we have observed that the dissection cycle takes between one to two seconds per graft,
 depending on the length of the graft. In a clinical setting, the ARTAS System has been shown to
 move from graft to graft at a rate of approximately one to three seconds, thereby enabling the
 ARTAS System to dissect a graft every two to five seconds, or approximately 720 to over 1,800
 grafts per hour. The ARTAS System enables the physicians to adjust dissection parameters to
 accommodate for different types of skin, and manipulate graft selection algorithms based on
 patient needs. *The ARTAS System can be programmed to dissect as many grafts as appropriate*
thus maximizing the use of the donor area. It can also be programmed to dissect grafts with
more than two hairs each, thereby increasing the hair yield or the number of hairs per graft.

Case No.: [5:18-cv-03712-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO
 DISMISS; GRANTING DEFENDANTS' JOINDER MOTIONS

1 *Id.*

2 **Statements Concerning the Number of ARTAS Systems Installed & Revenue Generation**

3 ***Statement 9***

4 Historically, the majority of our revenue and our revenue growth has been generated through
 5 system sales. While we would expect our procedure based fees to continue to increase as our
 6 installed base of ARTAS Systems grows worldwide, the total number of procedures has not
 7 increased proportionally with the increase in our installed base and the number of procedures
 8 performed tends to vary from quarter-to-quarter. During the twelve months ended December 31,
 9 2016, we sold 32 ARTAS Systems and, during the six months ended June 30, 2017, we sold 27
 10 additional systems ***representing an aggregate installed base growth of approximately 34% from***
 11 ***December 31, 2015, or 174 to 233 systems***, yet our procedure based fee for the six months ended
 12 June 30, 2017 increased by approximately 10%, or \$0.3 million, from the six months ended June
 13 30, 2016.

14 Compl. ¶ 144.

15 ***Statement 10***

16 ***We believe that revenue from procedure based fees has not grown proportionally with the***
 17 ***increase in our installed base and varies from quarter-to-quarter due to a number factors,***
 18 ***including:***

- 19 • physician uptake causing a slow ramp-up to utilizing the ARTAS System, which is
 20 particularly evident with physicians who are new to hair restoration procedures or
 21 physicians who do not operate a solely hair restoration focused practice who are
 22 commonly the profile we are targeting;
- 23 • capacity limitations with the current installed base of ARTAS Systems, which can
 24 result in procedure based fees not growing as quickly as system sales, as high
 25 performing practitioners are limited in the number of procedures that can be performed
 26 in any given period;
- 27 • ***limited or no utilization of the ARTAS System after purchase as a result of a change***
 28 ***in physician preference or practice***
- the concentration of ARTAS procedures being performed on a limited number of
 ARTAS Systems leading to volatility between periods if particular high volume
 practitioners perform a smaller number of procedures in a given period which often
 happens during the summer period; and
- the number of procedures performed vary from quarter-to-quarter as the hair
 restoration industry is characterized by seasonally lower demand during the summer
 period when both physicians and prospective patients take vacations.

29 Compl. ¶ 146.

30 Case No.: [5:18-cv-03712-EJD](#)

31 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO
 32 DISMISS; GRANTING DEFENDANTS' JOINDER MOTIONS

1 **C. Procedural Background**

2 Following the continued stock decline, multiple lawsuits were filed against Defendants.
3 One of these—*Edgardo Guerrini v. Restoration et al.*—was randomly assigned to this Court. *See*
4 Complaint for Violations of Federal Securities Laws, Dkt. 1. This Court consolidated this case
5 with other related ones. *See* Order Granting Consolidation, Dkt. 32. On November 30, 2018,
6 Plaintiff filed a Consolidated Amended Complaint, which is the subject of Restoration and
7 Individual Defendants’ current motion to dismiss pursuant to Rule 12(b)(6). Restoration Robotics
8 Defendants’ Motion to Dismiss (“Mot.”), Dkt. 47. Defendants also request judicial notice
9 regarding facts pertaining to their motion to dismiss. *See* Request for Judicial Notice re Motion to
10 Dismiss (“Req. Jud. Not.”), Dkt. 49. Finally, both the Underwriter and Venture Capital
11 Defendants seek to join this motion to dismiss. *See* Motion for Joinder of Underwriter
12 Defendants, Dkt. 45; Motion for Joinder of Venture Capital Defendants, Dkt. 50.

13 **II. JUDICIAL NOTICE**

14 Defendants ask this Court to take judicial notice of Exhibit A, which is attached to the
15 declaration of Gavin M. Masuda (the “Masuda Decl.”). Req. Jud. Not. At 1.

16 **A. Legal Standard**

17 Generally, district courts may not consider material outside the pleadings when assessing
18 the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Lee v.*
19 *City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001); *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d
20 988, 998 (9th Cir. 2018); *see also* Fed. R. Civ. P. 12(d). This rule does not apply to the
21 incorporation by reference doctrine or judicial notice under Federal Rule of Evidence 201. *Khoja*,
22 899 F.3d at 998.

23 Rule 201 permits a court to take judicial notice of an adjudicative fact “not subject to
24 reasonable dispute,” that is “generally known” or “can be accurately and readily determined from
25 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Incorporation by
26 reference treats certain documents as though they are part of the complaint itself. *Daniels-Hall*,

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 629 F.3d at 998. These are situations where the complaint “necessarily relies” upon a document or
 2 where the complaint alleges the contents of the document and the documents authenticity and
 3 relevance is not disputed. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). A
 4 defendant may seek to incorporate a document into the complaint “if the plaintiff refers
 5 extensively to the document or the document forms the basis of the plaintiff’s claim.” *Khoja*, 899
 6 F.3d at 1002.

7 **B. Discussion**

8 Plaintiff does not object to the judicial notice of Exhibit A, which is Restoration’s
 9 Prospectus that was filed with the SEC on October 13, 2017. This is a publicly available
 10 document; thus, it is subject to judicial notice. *In re Extreme Networks, Inc. S’holder Deriv. Litig.*,
 11 573 F. Supp. 2d 1228, 1231 n.2 (N.D. Cal. 2008) (“Public records, such as SEC filings, are
 12 properly the subject of judicial notice, and routinely considered in deciding a motion to dismiss in
 13 a securities case.”). Further, Plaintiff explicitly and repeatedly refers to the Prospectus in his
 14 Complaint. *See* Compl. ¶¶ 2 n.2, 7, 63, 65, 67–71, 77, 112–14, 131–33. Therefore, Exhibit A is
 15 also incorporated by reference. Accordingly, this Court **GRANTS** Defendant’s request for
 16 judicial notice.

17 **III. JOINDER**

18 The Underwriter and Venture Capital Defendants seek to join Restoration and Individual
 19 Defendants’ motion to dismiss. Plaintiff does not oppose these joinder motions. This Court
 20 **GRANTS** these joinder motions.

21 **IV. MOTION TO DISMISS⁴**

22 Plaintiff alleges Defendants violated Section 11 and 15 of the Act. Plaintiff also contends
 23 that Defendants violated Item 303. Compl. ¶¶ 173–74. The Court addresses these allegations in

24
 25 ⁴ This Court disagrees with Defendants’ contention that Plaintiff’s Complaint was pled in “true
 26 puzzle style.” Mot. at 11. To the contrary, the Court found Plaintiff’s complaint to be clear and
 27 devoid of “long, rambling passages” without “specific reasons for the statements falsity.”
 28 *Strassman v. Fresh Choice, Inc.*, 1995 WL 743728, at *4 (N.D. Cal. Dec. 7, 1995).

1 turn.

2 In assessing a Rule 12(b)(6) motion to dismiss, courts consider the complaint in its
 3 entirety, “accept all factual all factual allegations . . . as true” and construe them in the light most
 4 favorable to the plaintiff. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).
 5 To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as
 6 true, to “state a claim for relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 7 (2009) (discussing Federal Rule of Civil Procedure 8(a)(2)). A claim has facial plausibility when
 8 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
 9 defendant is liable for the misconduct alleged. *Id.* The requirement that the court must “accept as
 10 true” all allegations in the complaint is “inapplicable to legal conclusions.” *Id.* “Threadbare
 11 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
 12 suffice.” *Id.*

13 **A. Section 11 Claim**

14 **1. Legal Standard**

15 To allege a claim under Section 11, a plaintiff must prove “(1) that the registration
 16 statement contained an omission or misrepresentation, and (2) that the omission or
 17 misrepresentation was material, that is, it would have misled a reasonable investor about the nature
 18 of his or her investment.” *Rubke v. Capital Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009)
 19 (quoting *In re Daou Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005)); *see also Matrixx Initiatives,*
 20 *Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (noting that fact is material when “a reasonable
 21 investor would [view] the nondisclosed information as having *significantly* altered the total mix of
 22 information made available” (citation and quotation marks omitted)). Section 11 creates a private
 23 cause of action in favor of securities purchasers who rely upon a materially false or misleading
 24 prospectus. *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1412 (9th Cir. 1994) (citing 15
 25 U.S.C. § 77k(a)). “No scienter is required for liability under § 11; defendants will be liable for

26
 27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 innocent or negligent material misstatements or omissions.”⁵ *In re Daou*, 411 F.3d at 1027.

2 For a misstatement to be actionable, the statement must be both false and material. *See*
 3 *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988). To survive a motion to dismiss, a complaint
 4 must “specify each statement alleged to have been misleading, [and] the reason or reasons why the
 5 statement is misleading.” *Metzler Inv. GmbH*, 540 F. 3d 1049, 1070 (9th Cir. 2008). Statements
 6 are misleading only if they “affirmatively create an impression of a state of affairs that differs in a
 7 material way from the one that actually exists.” *Brody v. Transitional Hosp. Corp.*, 280 F.3d 997,
 8 1006 (9th Cir. 2002). Silence, absent a duty to disclose, “is not misleading under Rule 10b-5.”
 9 *Basic*, 485 U.S. at 239 n.17; *see also City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v.*
 10 *Align Tech., Inc.*, 856 F.3d 605, 616 (9th Cir. 2017) (treating 10(b)(5) and Section 11 claims the
 11 same as to their applicability to “untrue statement[s] of fact”). “Often a statement will not mislead
 12 even if it is incomplete or does not include all relevant facts.” *Brody*, 280 F.3d at 1006.

13 Not all material adverse events must be disclosed to investors. *See In re Rigel Pharm., Inc.*
 14 *Sec. Litig.*, 697 F.3d 869, 880 n.8 (9th Cir. 2012) (discussing *Matrixx*, 563 U.S. at 38–45).
 15 Consequently, omissions are actionable only if a defendant has a duty to disclose information and
 16 fails to do so. *Basic*, 485 U.S. at 239 n.17. Hence, if the omission does not “make the actual
 17 statement[] misleading,” a company need not supplement the statement “even if investors would
 18 consider the omitted information significant.” *Rigel*, 697 F.3d at 880 n.8.

19 Finally, an actionable statement must also “be capable of objective verification.” *Retail*
 20 *Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268,
 21 1275 (9th Cir. 2017). For example, business puffery or opinion (vague, optimistic statements) are
 22 not actionable because they do not “induce the reliance of a reasonable investor.” *Or. Pub. Emps.*

23
 24 _____
 25 ⁵ The parties agree that this motion to dismiss is governed by Rule 8(a)(2). *See* Restoration
 26 Robotics Defendants’ Reply (“Reply”) at 1, Dkt. 55. While Section 11 does not contain an
 27 element of fraud, a plaintiff may be subject to Rule 9(b)’s particularity requirement if the
 28 complaint “sounds in fraud.” *In re Daou*, 411 F.3d at 1027. Here, the Complaint expressly
 “disclaims any allegation that could be construed as alleging fraud or intentional or reckless
 misconduct.” Compl. ¶ 1. Accordingly, Rule 8(a)(2) applies.

Case No.: [5:18-cv-03712-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 *Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 606 (9th Cir. 2014).

2 **2. Discussion**

3 In their Motion to Dismiss, Defendants challenge the sufficiency of Plaintiff’s Section 11
4 claim by arguing that the offering materials, which form the complaint, were not false or
5 misleading. Mot. at 11. The alleged material misstatements or omissions can be separated into
6 three categories: statements concerning Restoration’s marketing function, statements concerning
7 the quality and design of the ARTAS system, and statements concerning ARTAS systems’
8 “installed base.” In order to effectively address these categories of statements, the Court sorts the
9 statements into headings based on Defendants arguments for dismissal, *i.e.*, (1) General
10 Statements of Corporate Optimism and (2) Falsity (including the alleged omissions).⁶

11 **i. General Statements of Corporate Optimism**

12 In the Ninth Circuit, “vague, generalized assertions of corporate optimism or statements of
13 ‘mere puffing’ are not actionable material misrepresentations under federal securities laws”
14 because no reasonable investor would rely on such statements. *In re Fusion-io*, 2015 WL 661869,
15 at *14 (collecting cases). When valuing corporations, investors do not “rely on vague statements
16 of optimism like ‘good,’ ‘well-regarded,’ or other feel good monikers. This mildly optimistic,
17 subjective assessment hardly amounts to a securities violation.” *In re Cutera Sec. Litig.*, 610 F.3d
18 1103, 1111 (9th Cir. 2010). “Puffing” concerns expressions of opinion, as opposed to knowingly
19 false statements of fact. *Or. Pub. Emps. Ret. Fund*, 774 F.3d at 606. Statements that are capable
20 of “objective verification” are not “puffery” and can constitute material misrepresentations. *Id.*

21 **Statement 1.** This statement is inherently subjective “puffing” and would not induce
22 reliance of a reasonable investor. *See* Reply at 5. Defendants stated they “provide *comprehensive*
23 clinical training, practice-based marketing support, as well as patient leads” to customers and
24

25 _____
26 ⁶ The Court does not address the “bespeaks caution” arguments because it was unnecessary to do
27 so. This should not be construed, however, as rejecting or accepting the applicability of this
28 argument.

Case No.: [5:18-cv-03712-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 “*believe* [they] help [their] physician customers increase the number of procedures performed by
2 assigning a practice success manager.”⁷ Compl. ¶ 131 (emphasis added). The Ninth Circuit held a
3 similar statement inactionable puffery. *Or. Pub. Emps. Ret. Fund*, 774 F.3d at 606 (holding “[w]e
4 *believe* that our track record for enrollment and revenue growth is attributable to our offering
5 *comprehensive* services combining quality educational content, teaching resources and customer
6 service with formats that are accessible and easy to use for students as well as our corporate
7 clients” inactionable (alteration in original) (second emphasis added)). Here, as there, generic
8 phrases like “believe” and “comprehensive” are too vague to be actionable. *Id.* Moreover, terms
9 like “patient leads,” “marketing support” and “increase procedures” are too generic to be
10 actionable. *Id.* (concluding terms like “educational content” and “teaching resources” provided
11 “nothing concrete upon which [the Plaintiffs] could rely” (alteration in original)).

12 **Statement 2.** This statement addresses Defendants’ goals for the ARTAS System.
13 Plaintiff pleads only a phrase of the statement and omits the prefatory language, which states:
14 “Our *goal* is to expand the commercialization of the ARTAS System . . . [by] driv[ing] increased
15 utilization of the ARTAS System by working collaboratively with our physician customers.”
16 Masuda Decl., Ex. A, at ECF 11 (emphasis added). Investors neither rely on phrases like “goal”
17 nor “increased utilization”—these are too vague and constitute “non-actionable puffing.” *See,*
18 *e.g., Wozniak v. Align Tech., Inc.*, 850 F. Supp. 2d 1029, 1037 (N.D. Cal. 2012) (holding “[w]e are
19 confident the improved features for Orthos [orthodontists] and GPS will *increase* and sustain
20 *utilization*” to be “feel good” statements on which investors do not rely when valuing corporations
21 (emphasis added)); *In re Moody’s Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 508 (S.D.N.Y. 2009)
22 (“Statements of ‘*hope*, opinion, or belief about [the company’s] future performance’ are not
23 actionable.” (citation omitted)). “Hope” is a synonym of “goal.” Both refer to vague aspirations
24 for the future and investors “know how to devalue the optimism of corporate executives.” *In re*
25

26 _____
27 ⁷ Moreover, there is no allegation Defendants did *not* believe this.

28 Case No.: [5:18-cv-03712-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 *Cutera*, 610 F.3d at 1111.

2 **Statement 3.** Much like Statement 1, Statement 3 pertains to Defendants' belief in
 3 increasing ARTAS's profitability and its intention to develop the ARTAS system. Compl. ¶ 133
 4 (“[W]e *believe*⁸ we can increase procedure revenues [W]e *intend* to utilize our teams . . . to
 5 work with and to support our physician customers in developing profitable ARTAS systems.”).
 6 Such forward-looking statements are non-actionable. *See Or. Pub. Emps. Ret. Fund*, 774 F.3d at
 7 606. An “intention” to do something is forward-looking and thus non-actionable. *See Scritchfield*
 8 *v. Paolo*, 274 F. Supp. 2d 163, 176 (D.R.I. 2003) (holding statements in Prospectus “[w]e intend
 9 to become” “precisely [the] type of exempt ‘forward-looking’” statements).

10 The cases cited by Plaintiff to show that Statements 1–3 are actionable are inapposite; they
 11 deal with situations where the defendants made reassuring statements in response to direct
 12 questions from investors. Plaintiff's Opposition to the Motion to Dismiss (“Opp.”), Dkt. 53 at 24.
 13 For instance, in *Azar v. Yelp, Inc.*, “Defendants *assured* investors that ‘the fundamentals are all in
 14 place and really strong’ in the context of *responding to a specific question* about the local
 15 advertising program that Defendants allegedly knew was performing poorly.” 2018 WL 6182756,
 16 at *12 (N.D. Cal. Nov. 27, 2018) (emphasis added). Likewise, in *In re Signet Jewelers Limited*
 17 *Securities Litigation*, the defendants' made the statements “in response to *direct questions* about
 18 Signet's credit portfolio.” 2018 WL 6167889, at *12 (S.D.N.Y. Nov. 26, 2018) (emphasis added).
 19 Thus, the courts could not conclude (on a motion to dismiss) that the statements were so vague a
 20 reasonable investor would not reasonably rely on them because they were made in response to
 21 investor queries and addressed “specific aspects” of the company's health. 2018 WL 6182756, at
 22 *12. In contrast, here, Statements 1–3 were not made in response to investors; they were made in
 23 the Offering Materials and generally discussed Restoration's marketing strategy. Compl. ¶ 130.

24
 25 _____
 26 ⁸ Defendants argue that “belief” applies to Statement 4 as well. Mot. at 5. This Court disagrees.
 27 Nowhere before the phrase “easily implemented” is a vague, optimistic statement of belief.
 28 Accordingly, Statement 4 does not fit within the corporate optimism exception.

1 Plaintiff further argues the statements are actionable because they omit material facts
 2 known to the Defendants. Opp. at 25, Dkt. 53 (citing *Omnicare, Inc. v. Laborers Dist. Council*
 3 *Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1331 (2015) (“And the purpose of § 11 supports this
 4 understand of how the omissions clause maps onto opinion statements. Congress adopted § 11 to
 5 ensure that issuers ‘tell[] the whole truth’ to investors.” (citation omitted)). Plaintiff contends that
 6 Defendants falsely represented that the Company’s sales would help Restoration’s physician
 7 customers increase the number of procedures performed, despite knowing: “(1) the Company was
 8 unable to provide its customers with patient leads (¶ 82); (2) the Company’s marketing initiatives
 9 were ineffective (¶¶ 82–93); and (3) the design of the geographical regions to which a PSM was
 10 assigned were illogical and hindered practice growth (¶ 84).” Opp. at 25.

11 Plaintiff is correct that prefatory language like “we think” or “we believe,” does not alone
 12 absolve securities fraud liability because these phrases can preface statements capable of
 13 misleading investors. Opp. at 25. Plaintiff, however, is incorrect the undisclosed “facts” listed
 14 above render Defendants’ statements misleading. To the contrary, Defendants *did* provide “full
 15 and fair” disclosure of material information. *Id.* The Prospectus explicitly identifies Statements
 16 1–3 as “forward-looking statements” and informs investors that they “may turn out to be
 17 inaccurate.” Masuda Decl., Ex A at 50. These cautionary phrases are repeated throughout. *See,*
 18 *e.g., id.* at 5, 8, 12. Indeed, just after Statement 2 is a disclosure entitled “Risks Associated with
 19 Our Business.” *Id.* at 5. In it, Defendants note they have had “limited commercial history and
 20 have incurred significant losses since our inception. *We anticipate that we will continue to incur*
 21 *losses for the foreseeable future*, which, together with our limited operating history, makes it
 22 difficult to assess our future viability.” *Id.* (emphasis added). Thus, unlike *In re Allied Nevada*
 23 *Gold Corp. Securities Litigation*, a case Plaintiff cites as support, Defendants did not mislead
 24 investors as to the status of their financial viability. *Compare* 743 F. App’x 887, 888 (9th Cir.
 25 2018) (holding “forward-looking” optimistic statements actionable because Defendants made
 26 them knowing they were false *and* omitted cautionary language about the potential risk), *with*

27 Case No.: [5:18-cv-03712-EJD](#)
 28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 Masuda Decl., Ex. A at 12 (discussing Restoration’s limited financial commercial history and
 2 urging investors to “consider investing in [the] common stock” because of the significant risks
 3 facing Restoration).

4 Accordingly, given the abundance of cautionary language and honest disclosure regarding
 5 Defendants’ lack of commercial success, Statements 1–3 were not “half-truths.” *Cf. Omnicare*,
 6 135 S. Ct. at 1330 (“[A]n investor reads each statement within such a document . . . *in light of all*
 7 *its surrounding text* So an omission that renders misleading a statement of opinion when
 8 viewed in a vacuum may not do so once that statement is considered, as is appropriate, in a
 9 broader frame.”); Mot. at 16.

10 For these reasons, the Court holds that Statements 1–3 are nonactionable statements.
 11 Accordingly, this Court **GRANTS** Defendants’ motion to dismiss as to these claims.

12 **ii. Material Misrepresentation or Omission**

13 The standard for Section 11 falsity is more lenient than pleading a Rule 10(b)(5) violation.
 14 *See In re Countryside Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1156 (C.D. Cal. 2008) (noting
 15 that securities plaintiffs alleging fraud must meet “three separate pleading standards”). When a
 16 Section 11 complaint does not “sound in fraud,” it must only meet Rule 8(a)’s ordinary notice
 17 pleading requirements. *Id.* at 1162. Even without Rule 9(b), however, Plaintiff must still plead
 18 enough facts to state a facially plausible claim for relief under Section 11 and Section 15. *Bell Atl.*
 19 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In a Section 11 context, this means Plaintiff must
 20 allege sufficient facts from which this Court can infer “a statement was either false or misleading
 21 (in light of omitted information), and that [the] same statement was material.” *In re*
 22 *IAC/InterActiveCorp. Sec. Litig.*, 695 F. Supp. 2d 109, 117 (S.D.N.Y. 2010). Materiality is “fact-
 23 specific;” it “turns on context.” *Id.* Statements in a Prospectus, thus, must “be read in the context
 24 of the whole document” and “judged based on ‘the facts as they existed when the applicable
 25 registration statement became effective.’” *Id.* (quoting *In re Flag Telecom Holdings, Ltd. Sec.*
 26 *Litig.*, 618 F. Supp. 2d 311, 320 (S.D.N.Y. 2009)). Accordingly, the issue is not whether the

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 statements, taken separately, were “literally true.” *Id.* The issue is whether defendants’ statements
 2 “taken and in context, would have mislead a reasonable investor about the nature of the
 3 [investment].” *Id.* (alteration in original).

4 **Statement 1, 4, and 5.**⁹ Plaintiff argues Statement 1,¹⁰ 4, and 5 are misleading because,
 5 despite Defendants’ representations that PSMs formed “strong relationships” with customers,
 6 provided “extensive training and coaching,” and provided “easily implemented marketing tools:”

- 7 • “Restoration was not providing clinical training and marketing support to customers.
 8 Rather, sales personnel were geographically dispersed making it impossible to properly
 9 service doctors.”
- 10 • “Restoration was using antiquated methods of obtaining patient leads [and thus]
 11 PSMs were unable to provide patient leads to customers and the majority of leads the
 12 Company supposedly providing had never even heard of the Company.”
- 13 • “The assignment of a PSM did not correlate with an increased number of procedures
 14 by physicians” because “PSMs were often unequipped to actually help a new doctor
 15 get her practice off the ground” and thus the doctors did not receive the promised
 16 “marketing efforts.”

17 Compl. ¶ 136.

18 First, as to Statement 5, the Court is confused as to why this statement is alleged to be
 19 misleading. The Complaint alleges Defendants *did* sell the ARTAS system, provide services, and
 20 generate procedure-based revenue. *See id.* ¶ 150 (discussing sale of ARTAS Systems). To the
 21 extent the statement is false pursuant to the three allegations outlined, the argument is rejected for
 22 the reasons below.

23 The first allegation can be easily dismissed: Plaintiff repeatedly admits the Company *was*

24 _____
 25 ⁹ The Court addresses these Statements together because Plaintiff provides the same allegations of
 26 falsehood for them. *See* Compl. ¶ 136.

27 ¹⁰ Above, the Court concluded Statement 1 is inactionable corporate puffery. The Court analyzes
 28 here why the discussion of “patient leads” was not false.

Case No.: [5:18-cv-03712-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 providing clinical training and marketing support to customers. *See, e.g.*, ¶¶ 82–83 (discussing
2 patient leads provided and taking issue not with the *lack* of marketing capabilities, but the *form* of
3 marketing). The mere existence of the confidential witnesses informs the Court that customers
4 were supported. Hence, Plaintiff’s argument essentially crumbles into an efficacy, but not a
5 falsity, argument. Mot. at 12. Plaintiff takes issue with the methods used by Defendants and
6 grounds their argument in what would have ben “proper” to service doctors. Compl. ¶ 136. This
7 is not the standard—it is Plaintiff’s burden to show falsity, not inadequacy.

8 Next, Plaintiff takes issue with Defendants’ “antiquated marketing tools.” *Id.* As
9 described by CW 1, far from having “widespread digital marketing capabilities,” the Company
10 relied on traditional methods of marketing and advertising like brochures, pamphlets, and lobby
11 posters, which did not generate patient leads off the street. *Id.* ¶ 83. Defendants, however, do not
12 allege in the Prospectus to have “widespread digital marketing capabilities.” To the contrary, they
13 state they have “digital marketing strategies,” but do not state they are “widespread” or advanced.
14 *See* Masuda Decl., Ex. A at 80. Indeed, in Statement 4, the marketing tools stated *are* mainly non-
15 digital. Compl. ¶ 134. Thus, again, Plaintiff’s main contention is with the form, not the
16 substance, of the marketing strategies discussed in Statement 4.

17 Plaintiff finally argues that Defendants provided inadequate marketing support because
18 they failed to deliver “patient leads” as promised. *See* Compl. ¶¶ 131, 136. This claim is based on
19 CW 1’s statement that she only received “one actual patient customer *in her territory.*” *Id.* ¶ 82
20 (emphasis added). Plaintiff alleges the other patient leads were “false sign ups,” who had been
21 “‘signed up’ for restoration services and had ‘no idea’ about the Company,” and that this was a
22 widespread problem. *Id.* The main issue with this statement is that Defendant’s made *no*
23 representations as to the quality or quantity of leads. Masuda Decl., Ex. A at 80. To the contrary,
24 Defendant’s stated throughout the Prospectus that their marketing strategy may fail because
25 existing management and personnel “may not be adequate to support our future growth.” *Id.* at
26 28; *Id.* at 5 (discussing limited commercial history and incursion of significant loss); *Id.* at 7

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 (discussing risk of investing with Restoration); *see also In re IAC*, 695 F. Supp. 2d at 117 (noting
 2 court must view prospectus as a whole to determine if an investor would have been misled about
 3 the nature of the investment). Plaintiff may not now, with the benefit of hindsight, point to the
 4 inadequacy of the patient leads. *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d at 1419
 5 (“Plaintiffs cannot use the benefit of 20–20 hindsight to turn management’s business judgment
 6 into securities fraud.”).

7 For these reasons, the Court holds that Plaintiff failed to plead falsity for Statements 1, 4,
 8 and 5. Accordingly, this Court **GRANTS** Defendants’ motion to dismiss as to these statements.

9 **Statement 6.** Plaintiff alleges the statement that the ARTAS System “allow[s] physicians
 10 to perform hair restoration procedures with fewer staff than” non-ARTAS procedures was false or
 11 misleading because the number of personnel was “functionally equivalent” for both types of
 12 procedures. Compl. ¶ 138–39. Traditional hair-restoration procedures require a team of “between
 13 four and eight technicians.” *Id.* ¶ 139; Masuda Decl., Ex. A at 83. An ARTAS procedure,
 14 requires “at least four additional technicians to assist, rendering the manpower necessary to
 15 perform this procedure functionally equivalent to the others mentioned in the Offering Materials.”
 16 *Id.* ¶ 139. However, as Defendants point out, four is plainly “fewer” than eight, meaning the
 17 procedure *does* require less staff. Mot. at 17. Even if physicians chose to bring more personnel
 18 into the surgery, it does not render the statement false that they *could* have fewer personnel. Thus,
 19 this statement has not been shown to be false. *See* Reply at 8 (noting that Plaintiff does not
 20 oppose this and thus concedes it); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d
 21 1109, 1131 (N.D. Cal. 2008) (“Plaintiffs’ opposition does not address this claim or defendants’
 22 arguments, and thus the Court concludes that plaintiffs have abandoned this claim. The Court
 23 **GRANTS** defendants’ motion to dismiss this claim without leave to amend.”).

24 For these reasons, the Court holds that Plaintiff failed to plead falsity for Statement 6.
 25 Accordingly, this Court **GRANTS** Defendants’ motion to dismiss as to this statement without
 26 leave to amend.

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 **Statement 7.** Plaintiff challenges statements describing the performance of the ARTAS
2 System’s needle as false or misleading because the needle did not “provide[] targeted precision
3 and a cleanly scored incision.” Compl. ¶¶ 140–41. CW 1 alleges the needles were actually
4 “faulty” and “damaged the hair grafts.” *Id.* ¶¶ 96–97.

5 First, there are adequate facts from which this Court can infer the needle did *not* provide
6 targeted precision or a cleanly scored incision. *See id.*; *see also In re Bofi Holding, Inc. Sec.*
7 *Litig.*, 2016 WL 5390533, at *13 (S.D. Cal. Sept. 27, 2016) (finding that inference that CWs
8 credible where their title and job descriptions were identified was stronger than inference they
9 were disgruntled, low-level employees making unsubstantiated statements). Because Rule
10 8(a)(2)’s plausibility standard applies, this Court must draw inference in Plaintiff’s favor. The
11 stronger inference here is that CW 1, someone pled to have been employed during the relevant
12 time period with job duties, has adequate knowledge of the needles and is telling the truth. This
13 outweighs the inference that CW 1 is making unsubstantiated statements. Mot. at 25. Indeed, the
14 Court must infer that if CW 1 was having this experience with the needles, other PSMs and
15 physicians were as well. *Cf.* Mot. at 17 (arguing CW 1 does not testify as to experience of all
16 ARTAS users); *In re Bofi Holding*, 2016 WL 5390533, at *13.

17 Defendants argue that the statement is not misleading because there was an explicit risk
18 disclosure pertaining to the needle. The Prospectus, however, advises that patients could
19 experience “adverse treatment” if the system was used improperly. Masuda Decl., Ex. A at 23, 88.
20 The functionality of the needle itself has little to do with the ARTAS System being used
21 improperly.

22 Finally, there is no requirement that Defendants know the statement about the needles was
23 false when made. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983) (“Liability
24 against the issuer of a security is virtually absolute [under Section 11], even for innocent
25 misstatements.”); *but see* Opp. at 21 (“Plaintiff’s well-pleaded allegations that the defective needle
26 issues existed ‘[p]rior to the Class Period, and continuing through today’ (¶94) . . .”).

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 For these reasons, the Court holds that Plaintiff plead falsity for Statement 7. Accordingly,
2 this Court **DENIES** Defendants’ motion to dismiss as to this statement.

3 **Statement 8.** This statement alleges “[t]he ARTAS System can be programmed to dissect
4 as many grafts as appropriate thus maximizing the use of the donor areas. It can also be
5 programmed to dissect grafts with more than two hairs each, thereby increasing the hair yield or
6 the number of hairs per graft. Compl. ¶ 140. Plaintiff alleges this was materially misleading
7 because the machine “actually suffered from a defect that would cause [it] to damage the donor
8 graft, lowering harvest yield.” Compl. ¶¶ 140, 141.

9 The statements of performance results were obtained “in a clinical setting.” Compl. ¶ 140.
10 No CW claims to have knowledge of the clinical observations and Plaintiff does not allege the
11 summary of the clinical observations (restated in Statement 7) were objectively false. Mot. at 8;
12 *see also In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 543 (S.D.N.Y. 2015) (“Courts have
13 repeatedly held ‘publicly stated interpretations of the results of various clinical studies’ to be
14 ‘opinions’ because ‘[r]easonable persons may disagree over how to analyze data and interpret
15 results, and neither lends itself to objective conclusions.’” (citations omitted) (alteration in
16 original)). Plaintiff neither connect how the experiences of physicians in practice bears on the
17 truth of these clinical results nor alleges the results themselves are false. The cases Plaintiff cites
18 are equally unhelpful. *See Robb v. Fitbit*, 216 F. Supp. 3d 1017, 1029–30 (N.D. Cal. 2016)
19 (holding statements about clinical research actionable because Plaintiff identified “numerous
20 statements,” outside the Prospectus, that were false and showed the clinical results were false);
21 *3226701 Canada, Inc. v. Qualcomm, Inc.*, 2017 WL 4759021 (S.D. Cal. Oct. 20, 2017) (opinion
22 does not refer to clinical statements). Moreover, Plaintiff does not allege that the ARTAS System
23 could *not* be programmed to dissect as many grafts as possible or that it could not be programmed
24 to dissect grafts with more than two hairs. *Cf.* Opp. (failing to discuss Defendants’ rebuttal to this
25 effect).

26 For these reasons, the Court holds that Plaintiffs failed to plead falsity for Statement 8.

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 Accordingly, this Court **GRANTS** Defendants’ motion to dismiss as to this claim.

2 **Statement 9.**¹¹ Plaintiff alleges the statement “representing an aggregate installed base
3 growth of approximately 34% from December 31, 2015, or 174 to 233 systems” is materially
4 false, misleading, and incomplete because “a significant portion of ARTAS Systems purportedly
5 ‘sold’ internationally had not yet been installed.” Compl. ¶¶ 144–45. This misrepresented the
6 number of “installed” versus simply “sold” ARTAS Systems (this is important because it affects
7 procedure-based [as opposed to systems] revenue). Opp. at 10–11.

8 Defendant argues this fails because Restoration clearly disclosed: (1) how it derived
9 “installed base” figures (by reference to unit sales); (2) that “sales” were not translating
10 proportionally to procedure-based revenue, and (3) why sales might not translate proportionally to
11 procedure-based revenue. Reply at 2. First, this Court cannot infer from the Prospectus that the
12 phrase “installed base” excludes foreign sales; to the contrary, the Prospectus lumps all sales
13 together without clarifying if “growth of approximately 34%” includes or excludes foreign sales.
14 Masuda Decl., Ex. A at 65; Opp. at 12 (“[N]owhere in the Prospectus do Defendants disclose that
15 sales to distributors were subject to prolonged periods of warehousing and that doctors were not
16 actually purchasing the ARTAS Systems.”). Second, Defendants’ explanations for why
17 procedure-based revenue was declining is inappropriate at this stage—the question is not *why* the
18 revenue was declining, but whether Plaintiff pled adequate facts plausibly indicating that
19 Defendants mislead investors as to the rate of “installed” ARTAS Systems. *See* Opp. at 13 n.12;
20 *see also Iqbal*, 556 U.S. at 1948–51 (noting that when there are well pleaded factual allegations,
21 the court should assume their veracity and determine if they plausibly give rise to an entitlement to
22 relief).

23 If, as Plaintiff contends, Defendants were selling to international resellers, the sales would
24 not automatically convert into procedure-based revenue. *See* Compl. ¶ 157 (international sales
25

26 ¹¹ Because this Court does not address Defendants’ Madrid argument, the Court does not address
27 Plaintiff’s submission of a Recent Decision. *See* Dkt. 61.

28 Case No.: [5:18-cv-03712-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 resulted in distributors purchasing and holding product, while American sales resulted in
2 installation of the system). These facts, taken as true, are sufficient under Rule 8(a)(2) to show
3 “these systems remained uninstalled and unproductive,” rendering the “installed based” a half-
4 truth. *See* Opp. at 12 n.10. A reasonable person, drawing all factual inferences in Plaintiff’s
5 favor, could conclude the “34% growth” included foreign sales. Thus, Plaintiff has pled sufficient
6 facts showing a plausible claim that this is a materially misleading misstatement.

7 For these reasons, the Court holds that Plaintiff pled falsity for Statement 9. Accordingly,
8 this Court **DENIES** Defendants’ motion to dismiss as to this claim.

9 **Statement 10.** Defendants stated they “believe revenue from procedure based fees [had]
10 not grown proportionally with the increase in [the] *installed base*” because of “limited or no
11 utilization of the ARTAS System after purchase as a result of a change in physician preference or
12 practice.” Compl. ¶ 146. Plaintiff alleges this was materially misleading because it misstates and
13 omits the “fact” that: “(i) the Offering Materials misrepresented the ‘*installed base*’ as all units
14 sold, despite the fact that numerous units were being warehoused by third-party distributors and
15 were not installed or in use, and thus unable to contribute to procedure revenue; and (ii) the
16 “limited or no utilization” of the ARTAS System after purchase was . . . caused by the Company’s
17 failure to provide adequate marketing support, product defects with needles in the kits, and
18 software glitches.” *Id.* ¶ 147. The Court has already concluded the “ineffectiveness” of the
19 marketing effort, see *supra* IV.A.2.i, and the system issues/glitches, see *supra* IV.A.2.ii, are not
20 actionable.

21 Plaintiff has not pled why “installed-base” in this context is actionable. Read in context,
22 Defendants were explicit that they could not predict success and, in fact, predicted loss of funds.
23 Masuda Decl., Ex. A at 50; *see also In re IAC*, 695 F. Supp. 2d at 117 (noting that statements in a
24 prospectus must “be read in the context of the whole document”). Further, Defendants repeatedly
25 informed investors that sales to international distributors did not result in “installation.” *See*
26 Masuda Decl., Ex A at 18 (describing distributors that sell ARTAS Systems to international users

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 and the international sales process generally). Investors, thus, knew installed base did not per se
 2 include international sales in this context and so, unlike Statement 9, there is no confusion of
 3 whether *sales* and *installed base* were synonymous.

4 Moreover, Restoration merely opined on reasons why procedure-based fees were not
 5 tracking unit sales—Statement 10 did not provide limited reasons for the decline. *Cf.* Compl.
 6 ¶ 146 (“[D]ue to a number of factors, including . . .”). Plaintiff implies the disparity was solely
 7 due to warehousing, but this is directly contrary to their other claims. *See* Reply at 4 (discussing
 8 Opp. at 12–13); Compl. ¶ 147 (listing several reasons for the decline). The statement does not
 9 exclude the possibility that warehousing had something to do with the decline; it only lists
 10 “factors” contributing to the decline. Thus, it is possible warehousing and needle corruption did
 11 contribute to the decline. Defendants make no claim that the decline in stock price was due purely
 12 to limited use of the ARTAS Systems (both in the statement itself and contextually). Therefore,
 13 Plaintiffs have not pled that Statement 10 is false or materially misleading.

14 For these reasons, the Court holds that Plaintiff failed to plead falsity for Statement 10.
 15 Accordingly, this Court **GRANTS** Defendants’ motion to dismiss as to this claim.

16 **B. Section 15 Claim**

17 Plaintiff has stated a claim for an underlying violation of Section 11 and thus has stated a
 18 claim for a violation of Section 15. *Primo v. Pac Biosciences of Cal., Inc.*, 940 F. Supp. 2d 1105,
 19 1130–31 (N.D. Cal. 2013).

20 **C. Item 303 Claim**

21 Item 303 requires the Offering Materials to disclose “any known trends or uncertainties
 22 that have had or that the registrant reasonably expects will have a material favorable or
 23 unfavorable impact on net sales or revenues or income from continuing operations.” 17 C.F.R.
 24 §§ 229.303(a)(3)(ii). A “disclosure duty exists where a trend, demand, commitment, event or
 25 uncertainty is *both* [1] presently known to management and [2] reasonably likely to have material
 26 effects on the registrant’s financial condition or results of operation.” *Steckman v. Hart Brewing*,

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 *Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998). The Ninth Circuit has held that because Section 11
2 imposes liability if a registrant “omits to state a material fact required to be stated” in the
3 registration statement, “any omission of facts ‘required to be stated’ under Item 303 will produce
4 liability under Section 11.” *In re Violin Memory Sec. Litig.*, 2014 WL 5525946, at *15 (N.D. Cal.
5 Oct. 31, 2014) (quoting *Steckman*, 143 F.3d at 1296).

6 Defendants argue that “Item 303 is not actionable . . . under Section 11,” because recently,
7 in *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1055–56 (9th Cir. 2014), the Ninth Circuit held
8 that Item 303 “does not create a duty to disclose for the purposes of Section 10(b) and Rule 10b-
9 5.” Mot. at 20. Defendants contend that because the test for whether a statement is materially
10 misleading is “identical” for both Section 10(b) and Section 11 claims, *In re NVIDIA* applies to
11 Section 11 cases as well. Reply at 10. While it is true the Ninth Circuit has stated Section 10(b)
12 and Section 11 claims share the materiality element, *City of Dearborn Heights*, 856 F.3d at 616,
13 the *NVIDIA* Court was explicit in noting that *Steckman* was still good law. *See In re NVIDIA*, 768
14 F.3d at 1055–56 (“To put it differently, liability arises from ‘an omission in contravention of an
15 affirmative legal disclosure obligation.’ There is no such requirement under Section 10(b) or Rule
16 10b-5.” (citation omitted)). Thus, Plaintiff may bring an Item 303 claim.

17 Plaintiff must establish that Defendants “failed to disclose known trends and
18 uncertainties.” 17 C.F.R. §§ 229.303(a)(3)(ii). Plaintiff argues Defendants failed to establish
19 three trends: the trend related to warehousing by Foreign Defendants, the trend of Restoration’s
20 customers abandoning use of ARTAS, and the trend of uncertainty related to physicians stalling
21 purchases.

22 **1. Trend Related to Warehousing**

23 Plaintiff argues that leading up to the IPO, distributors overseas began to bulk purchase
24 ARTAS Systems and “warehouse” them. Opp. at 19. This resulted in a trend of the foreign
25 markets becoming saturated, causing system sales to decline abroad and resulting in Restoration
26 pivoting to a U.S. centric model of business. *Id.*

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 The Complaint alleges only one specific instance of purported “warehousing.” “CW 1
2 specifically recalls [warehousing] occurring with a distributor in Madrid, Spain, but stated the
3 practice was common.” Conclusory allegations like “the practice was common” must be
4 disregarded. *See Iqbal*, 556 U.S. at 1948–51; *In re Coty Inc. Sec. Litig.*, 2016 WL 1271065, *8
5 (S.D.N.Y. Mar. 29, 2016) (holding single allegation of “de-stocking” activity *prior* to IPO was
6 insufficient as a matter of law to support plausible inference that, at the time of the IPO, products
7 “were being destocked in such a material way as to require disclosure”). Thus, Plaintiff presents
8 *only one* instance of warehousing. Reply at 11. A trend under Item 303 requires an “observed
9 pattern that accurately reflects persistent conditions of the particular registrant’s business
10 environment.” *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1191 (11th Cir. 2002). Here,
11 “nothing in the [Complaint] creates a plausible inference that this was a trend rather than an
12 isolated event” because only *one* instance of “warehousing” is alleged. *In re Noah Educ.*
13 *Holdings, Ltd. Sec. Litig.*, 2010 WL 1372709, at *6 (S.D.N.Y. Mar. 31, 2010).

14 To combat this, Plaintiff points to post-IPO statements and actions to show a trend of
15 warehousing. *See* Opp. at 19. These events, however, took place seven-months *after* the IPO.
16 *See In re Coty*, 2016 WL 1271065, at *9 (“Plaintiffs’ one-two punch of poor *post-IPO* earnings
17 coupled with temporally nonspecific and substantively vague assertions of destocking by one
18 confidential informant is not enough to establish the falsity of the Registration Statement or the
19 existence of an omitted known trend.” (emphasis added); *In re CPI Card Group Inc. Securities*
20 *Litigation*. 2017 WL 4941597, at *4 (S.D.N.Y. Oct. 30, 2017) (finding actionable trend when
21 over-saturation was done *before* the IPO). *Id.* This is insufficient.

22 Finally, Plaintiff’s Complaint does not demonstrate that a material impact from any such
23 warehousing trend was “reasonably likely to occur” at the time of the IPO. *Compare* Compl.
24 ¶ 145 (alleging only that ARTAS Systems were being warehoused), *with Fresno Cty. Emps. Ret.*
25 *Ass’n v. Alphatec Holdings, Inc.*, 607 F. App’x 694, 695 (9th Cir. 2015) (holding no trend alleged
26 because complaint did not specify what portion of inventory was defective or how it affected

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 revenue projections). Accordingly, no trend related to warehousing is shown.

2 **2. Trend of Abandoning Use of ARTAS**

3 Plaintiff next argues that Defendants failed to disclose physician’s widespread discontent
4 with the ARTAS System due to lack of patient leads, effective marketing support, and needle
5 defects. Opp. at 20. This caused physicians to abandon the ARTAS System, which widened the
6 disproportionate relationship between systems and procedure-based revenues. Compl. ¶ 85.
7 Plaintiff argues this trend of customer dissatisfaction and non-use of the machine is “precisely the
8 type of information an investor would attach importance in making an investment decision.” *See*
9 *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 722 (2d Cir. 2011). The issue, however, is not
10 whether an investor would want to know of such discontent, but whether, at the time of the
11 statement, such a knowable trend existed.

12 Unlike in the Section 11 claims discussed above, Plaintiff must establish knowledge on the
13 part of Defendants regarding any alleged trend of abandonment. In the Complaint, Plaintiff does
14 not state (or allow the Court to infer) that Defendants *knew* of any of these problems. To the
15 contrary, Plaintiff alleges Defendants did not know of problems pertaining to marketing strategy,
16 product defects, or patient lead issues. *See* Compl. ¶ 107 (“[Defendants] attended these meetings.
17 Rather than re-evaluate the Company’s sales strategy *or address the lead and product issues at*
18 *these weekly meetings*”); *In re Coty*, 2016 WL 1271065, at *7 (“Instead, Plaintiffs merely
19 allege that there were meetings and describe only in broad, conclusory terms what was discussed
20 at those meetings. . . . As a result, Plaintiffs’ allegations are ‘[s]ketchy at best’ and ‘do not provide
21 enough detail to nudge plaintiffs’ claims across the line from conceivable to plausible.’”).

22 Finally, the Court finds Plaintiff’s use of *Panther Partners Inc. v. Ikanos Communications,*
23 *Inc.* unpersuasive. 681 F.3d 114 (2d Cir. 2012). There, the court concluded the defendant failed
24 to fully disclose the significance of a known chip defect because it “knew at the time it was
25 receiving an increasing number of calls . . . it would be unable to determine which chip sets
26 contained defective chips [despite indicating otherwise].” *Id.* at 121. In contrast, here, Defendants

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 were forthright about the limited commercial success of the ARTAS System: “We have limited
 2 commercial history and we have incurred significant losses since our inception. We anticipate that
 3 we will continue to incur losses for the foreseeable future Our operating expenses may
 4 fluctuate significantly.” Masuda Decl., Ex. A at 12–13. Investors were *explicitly* warned of a
 5 downward trend of ARTAS Systems. Thus, unlike Plaintiff’s assertion that Defendants were
 6 “touting the health and management” of Restoration, the opposite is shown. Opp. at 20.

7 Therefore, the Court does not find a trend shown.

8 **3. Trend and Uncertainty Related to Physicians Stalling Purchases**

9 Finally, Plaintiff alleges that there was a known trend of physicians stalling purchases of
 10 the ARTAS System at the time of the IPO. Compl. ¶¶ 112–15. Restoration was developing a new
 11 robotic implantation feature that had not received FDA approval. *Id.* ¶ 114 (information about
 12 new system was in Prospectus). It was supposed to receive approval in late 2017. *Id.* However,
 13 in the interim, Defendant Rhodes instructed members not to mention the forthcoming feature to
 14 customers so that it would not cause any more of a decline or delay in sales. *Id.* ¶¶ 116–17.
 15 Defendants first discussed this in a May 2018 conference call and indicated customers were
 16 hesitant to buy the ARTAS System because of the impending new system. *Id.* ¶ 167. Plaintiff
 17 argues this hesitancy was shown by the negative unit-sales at the time of the IPO. Opp. at 22.

18 Contrary to Plaintiff’s assertion, sales were actually increasing in the months prior to the
 19 IPO. Masuda Decl., Ex. A at 65. Plaintiff does not allege these figures were false. Further, CW 3
 20 does not allege *when* Defendant Rhodes instructed employees to avoid mention of the forthcoming
 21 implantation feature, but only alleges that in 2018, seven months after the IPO, the effect of the
 22 new technology was discussed. *See* Compl. ¶¶ 117, 167; *Mallen v. Alphatec Holdings, Inc.*, 861
 23 F. Supp. 2d 1111, 1127 n.8 (C.D. Cal. 2012) (“Plaintiffs’ citation to Defendants’ subsequent
 24 disclosure, on August 5, 2010, that there was a six-week delay in loading Scient’x’s products into
 25 Alphatec and vice versa . . . is insufficient by itself to show that those delays were either known or
 26 could reasonably be expected to have a material impact [on Prospectus Publication Date].”);

27 Case No.: [5:18-cv-03712-EJD](#)

28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS

1 *Ronconi v. Larkin*, 253 F.3d 423, 430 n.12 (9th Cir. 2001) (“Fraud by hindsight is not actionable.”
 2 (citation and quotation marks omitted)). Plaintiff does not allege sufficient facts to show, at the
 3 time the Prospectus was published, physicians were stalling purchases *or* that Defendants knew of
 4 this trend. Thus, the Court does not find a trend here either.

5 Accordingly, Plaintiff has not pled sufficient facts to show an Item 303 violation and thus
 6 Defendants’ motion to dismiss is **GRANTED** as to Item 303.

7 **V. LEAVE TO AMEND**


8 When dismissing a complaint for failure to state a claim (either in full or in part), a court
 9 should grant leave to amend “unless it determines that the pleading could not possibly be cured by
 10 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). The Court has
 11 determined that Plaintiffs fail to state a claim for Statements 1–6, 8, and 10. Because, however,
 12 Plaintiffs may salvage their Complaint, the Court finds amendment would not be futile for all but
 13 Statement 6. Plaintiffs’ claims are therefore dismissed with leave to amend.

14 **VI. CONCLUSION**

15 Defendants’ motion to dismiss Plaintiffs’ Complaint is **GRANTED** in part and **DENIED**
 16 in part. Plaintiff has leave to amend. Should Plaintiffs choose to file an amended complaint, they
 17 must do so by November 14, 2019. Failure to do so, or failure to cure the deficiencies addressed
 18 in this Order, will result in dismissal of the dismissed claims with prejudice. Plaintiffs may not
 19 add new claims or parties without leave of the Court or stipulation by the parties pursuant to
 20 Federal Rule of Civil Procedure 15.

21 **IT IS SO ORDERED.**

22 Dated: October 18, 2019

23 
 24 EDWARD J. DAVILA
 25 United States District Judge

26
 27 Case No.: [5:18-cv-03712-EJD](#)
 28 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO
 DISMISS; GRANTING DEFENDANTS’ JOINDER MOTIONS