

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 SUSAN CLARK, for herself and/or on behalf
10 of all others similarly situated,

11 Plaintiff,

12 v.

13 EDDIE BAUER LLC, and EDDIE BAUER
14 PARENT LLC,

15 Defendants.

CASE NO. C20-1106-JCC

ORDER

16 This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 16).

17 Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral
18 argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

19 **I. BACKGROUND**

20 Plaintiff Susan Clark brought this putative class action for what she alleges are Defendant
21 Eddie Bauer LLC's violations of Oregon's Unlawful Trade Practices Act ("UTPA"), Or. Rev.
22 Stat. § 646.605 *et seq.* (See generally Dkt. No. 1.) Ms. Clark takes issue with Eddie Bauer's use
23 of allegedly false and misleading tagged list prices, *i.e.*, reference prices, on the garments sold by
24 Eddie Bauer Outlet Stores in Oregon. She alleges that the Outlet Stores perpetually sell garments
25 at discounted prices and, as a result, the reference prices on the sales tags are inaccurate and
26 misleading. (*Id.*)

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1 Ms. Clark alleges that she purchased three garments at two Eddie Bauer Outlet Stores in
2 Oregon. (*Id.* at 12–14.) She claims that she purchased a fleece zip and a Microlight jacket in
3 March 2017 at the Troutdale store with tagged list prices of \$39.99 and \$99.99, respectively,
4 which were each subject to a 50% discount at checkout. (*Id.*) She returned the Microlight jacket
5 in April 2018 to the Woodburn store and used the resulting credit toward the purchase of a
6 Stormdown jacket with a tagged list price of \$229.00 and a tagged clearance price of \$199.99,
7 which was also subject to a 50% discount off the lowest marked price at checkout. (*Id.* at 14–15.)
8 Ms. Clark alleges that “the products were *always* offered at discounts of between 40% and 70%
9 off the listed prices printed on their tags” and, as a result, she was fraudulently induced into
10 buying these items based upon a false expectation that she was getting a deal when, in fact, she
11 was not. (*Id.* at 12–17.)

12 Ms. Clark filed a complaint on behalf of herself and other similarly situated persons who
13 purchased garments with allegedly misleading list prices at Eddie Bauer Outlet Stores in Oregon.
14 (*Id.* at 20–26.) She asserts that Eddie Bauer Outlet Stores’ pricing scheme is false and
15 misleading, and is intended to dupe consumers into thinking they are getting a bargain when, in
16 reality, they are not. (*Id.*) She argues that this violates the UTPA. (*Id.*) Ms. Clark seeks, on behalf
17 of herself and each putative class member, the greater of UTPA statutory or actual damages,
18 punitive damages under the UTPA, and equitable relief. (*Id.* at 26–27.) In seeking equitable
19 relief, Ms. Clark asks the Court for disgorgement, restitution, and an injunction barring Eddie
20 Bauer from continuing its unlawful pricing scheme at its outlet stores in Oregon. (*Id.*)

21 Eddie Bauer moves to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and
22 12(b)(6). (Dkt. No. 16.) It asserts that Ms. Clark lacks standing and that her claims are moot, and
23 that her complaint fails to state a claim for which the Court can provide relief. (*See generally id.*)

24 **II. DISCUSSION**

25 **A. Legal Standards**

26 A defendant may move to dismiss an action for lack of subject matter jurisdiction. Fed.

1 R. Civ. P. 12(b)(1). A Rule 12(b)(1) challenge to jurisdiction may be facial or factual. *Safe Air*
2 *for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “The district court resolves a facial
3 attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations
4 as true and drawing all reasonable inferences in the plaintiff’s favor,” and then determining
5 whether they are legally sufficient to invoke jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117,
6 1121 (9th Cir. 2014) (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)). A factual
7 attack, on the other hand, challenges the facts that serve as the basis for subject matter
8 jurisdiction. *Id.* As discussed in more detail below, Eddie Bauer brings factual challenges,
9 arguing that Ms. Clark lacks Article III standing and that her claims for monetary relief are moot.
10 (Dkt. No. 16 at 15–19.) In evaluating a factual attack, a court may look beyond the complaint
11 without converting the motion into a motion for summary judgment. *Wolfe v. Strankman*, 392
12 F.3d 358, 362 (9th Cir. 2004).

13 A defendant may also move for dismissal when a plaintiff “fails to state a claim upon
14 which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Under that Rule, “[t]o survive a motion to
15 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
16 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
17 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible “when the plaintiff
18 pleads factual content that allows the court to draw the reasonable inference that the defendant is
19 liable for the misconduct alleged.” *Id.* “A pleading that offers ‘labels and conclusions’ or ‘a
20 formulaic recitation of the elements of a cause of action will not do.’” *Id.* (quoting *Twombly*, 550
21 U.S. at 555).

22 **B. Subject Matter Jurisdiction**

23 “A suit brought by a plaintiff without Article III standing is not a ‘case or controversy,’
24 and an Article III federal court therefore lacks subject matter jurisdiction over the suit.” *City of*
25 *Oakland v. Lynch*, 798 F.3d 1159, 1163 (9th Cir. 2015). To establish Article III standing, “[a]
26 plaintiff must show that (1) he or she has suffered a ‘concrete and particularized’ injury to a

1 cognizable interest, (2) which is ‘fairly traceable to the challenged action of the defendant’ and
2 (3) which likely can be redressed by a favorable decision.” *Nat’l Council of La Raza v.*
3 *Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 167
4 (1997)). A cognizable injury must be both “concrete and particularized” and “actual or
5 imminent,” as opposed to “conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555,
6 560 (1992). In a false advertising case, a complaint meets the injury standard if it alleges that, by
7 relying on a misrepresentation on a product label, a consumer paid more for a product than they
8 otherwise would have paid, or bought it when they otherwise would not have done so. *Reid v.*
9 *Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015).

10 Ms. Clark alleges that Eddie Bauer utilized inflated reference prices when she made her
11 purchases in 2017 and 2018 and, absent those inflated prices, “she would not have purchased the
12 products at the prices she paid.” (Dkt. No. 1 at 16.) Eddie Bauer argues this is insufficient to
13 allege a concrete injury, given Eddie Bauer’s generous return policy. (Dkt. No. 16 at 16–19.)
14 While the parties debate whether Ms. Clark, in fact, qualified for Eddie Bauer’s lifetime return
15 policy or a later-adopted time-limited return policy, (*compare* Dkt. No. 21 at 12, *with* Dkt. No.
16 22 at 7–8), this distinction is not relevant for purposes of Eddie Bauer’s standing arguments.

17 Assuming, *arguendo*, that Eddie Bauer did, in fact, communicate a clear, return policy
18 without time limitations, this would not mean Ms. Clark lacks standing unless she *actually*
19 *returned* the merchandise prior to filing suit. *See Amkraut’s Luman v. Theismann*, 647 F. App’x
20 804, 807 (9th Cir. 2016); *Lawrence v. FCA US LLC*, 2017 WL 6940513, slip op. at 4 (C.D. Cal.
21 2017); *see also Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 154 (2016) (Thomas, J.,
22 concurring) (“A mere offer of the sum owed is insufficient to eliminate a court’s jurisdiction to
23 decide the case to which the offer related.”). Nor is the Court persuaded by Eddie Bauer’s
24 interpretation of *Hamilton v. General Mills, Inc.*, 2016 WL 4060310, slip op. (D. Or. 2016), and
25 2016 WL 6542840, slip op. (D. Or. 2016), as this case is distinguishable from Ms. Clark’s. (*See*
26 Dkt. Nos. 16 at 17–18, 22 at 8–9). Unlike here, *Hamilton* did not involve allegations of *willful*

1 false advertising, but an inadvertent error that resulted in inaccurate labeling. *See* 2016 WL
2 406310, slip op. at 1. Moreover, in *Hamilton*, General Mills engaged in a widely advertised
3 recall and refund program to ensure that no one was unintentionally misled and/or sickened by
4 the erroneous labeling on its packaging. *Id.* As a result, the nature of the harm is distinguishable
5 in that the likelihood of injury from General Mills’ error was much less than the injury incurred
6 by Ms. Clark, who had no basis to know, absent communication from current counsel, that she
7 had been duped into buying something at a price she would not otherwise have paid.

8 For the same reasons that Eddie Bauer’s return policy does not eliminate Ms. Clark’s
9 injury for standing purposes, it also does not moot her claims. (*See* Dkt. No. 16 at 19.) “[A]
10 claim becomes moot when a plaintiff *actually receives* complete relief on that claim, not merely
11 when that relief is offered or tendered.” *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1138 (9th Cir.
12 2016) (emphasis in original). Eddie Bauer’s mootness argument is, therefore, equally unavailing.

13 Nor does Eddie Bauer’s argument regarding Ms. Clark’s standing for purposes of
14 injunctive relief fare any better. According to the complaint, Ms. Clark “would shop at one of
15 Eddie Bauer’s Oregon Outlet Stores again if she could have confidence regarding the truth of
16 Eddie Bauer’s prices and the value of its products.” (Dkt. No. 1 at 16.) But due to Eddie Bauer’s
17 allegedly misleading pricing scheme, Ms. Clark asserted that she “will be harmed if, in the
18 future, she is left to guess as to whether Eddie Bauer is providing a legitimate sale or not, and
19 whether products are actually worth the amount that Eddie Bauer is representing.” (*Id.* at 17.)

20 Eddie Bauer suggests Ms. Clark lacks standing for injunctive relief because it has since
21 changed the reference pricing scheme it utilizes, now referencing a “comparable value” on its
22 sales tags for garments, rather than a reference price based on the garment’s allegedly fictitious
23 full retail price. (Dkt. No. 16 at 16–17; *see* Dkt. No. 16-1 at 6.) But according to the UTPA,
24 Eddie Bauer must provide the *origin* of any such reference price, Or. Rev. Stat. § 646.885(2). An
25 opaque reference to a “comparable value” does not meet this requirement. Nor does a reference
26 on the tag to a comparable value, without support for its basis, reduce the injury Ms. Clark would

1 suffer. An inflated reference price, regardless of the source, may still cause a consumer such as
2 Ms. Clark confusion in that she may still believe she is getting a deal when, in fact, she is not.

3 The Court has subject matter jurisdiction over Ms. Clark’s claims.

4 **C. Failure to State a Claim**

5 Even if the Court has subject matter jurisdiction, it must dismiss the complaint if it fails
6 to state a claim for which relief can be granted. *Twombly*, 550 U.S. at 555. Eddie Bauer makes a
7 number of arguments along these lines. It argues (1) Ms. Clark’s allegations are insufficient to
8 satisfy the heightened pleading standards for fraud, (2) her allegations fail to demonstrate that
9 she is entitled to equitable relief, (3) her UTPA claim is time-barred, and (4) she fails to allege an
10 ascertainable loss as required under the UTPA. (*See generally* Dkt. No. 16.) Each are addressed
11 below.

12 1. Rule 9(b) Pleading Standard

13 “[A] party must state with *particularity* the circumstances constituting fraud or mistake.”
14 Fed. R. Civ. P. 9(b) (emphasis added). This is frequently described as the “who, what, when,
15 where, and how” pleading requirement. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106
16 (9th Cir. 2003). It is necessary to “give defendants notice of the particular misconduct . . . so that
17 they can defend against the charge and not just deny that they have done anything wrong.” *Bly-*
18 *Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001). Eddie Bauer argues that Ms. Clark’s
19 complaint fails to meet this standard. (*See* Dkt. Nos. 16 at 22–24, 22 at 14–15.) The Court
20 disagrees. The complaint includes the details necessary to notify Eddie Bauer of the nature of
21 Ms. Clark’s fraud allegations. (*See* Dkt. No. 5–7, 10–16.) The information Eddie Bauer suggests
22 must be included in Ms. Clark’s complaint, such as the full price history of the garments Ms.
23 Clark purchased, is information that is “most certainly in Defendants’ possession” and “easily
24 discoverable.” *Nemykina v. Old Navy, LLC*, 461 F. Supp. 3d 1054, 1060 (W.D. Wash. 2020).
25 “No further specificity is required to enable Defendants to make a meaningful denial.” *Id.* Ms.
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1 Clark’s complaint satisfies the Rule 9(b) requirements.

2 2. Equitable Relief

3 Eddie Bauer also argues that Ms. Clark’s complaint fails to establish a basis for equitable
4 relief because it does not demonstrate that she lacks an adequate remedy at law. (Dkt. No. 16 at
5 13–15.) Ms. Clark, in response, argues that the Court should allow her to seek the full panoply of
6 remedies afforded by the UTPA. (Dkt. No. 21 at 8–11.) But state law cannot override a basic
7 principle of federal common law this Court is bound by. *See Sonner v. Premier Nutrition Corp.*,
8 971 F.3d 834, 842 (9th Cir. 2020).¹ Federal courts are “preclude[d] . . . from awarding equitable
9 relief when an adequate legal remedy exists.” *Id.* (citing *Byrd v. Blue Ridge Rural Elec. Co-op.*,
10 *Inc.*, 356 U.S. 525, 537–39 (1958)). And here, Ms. Clark’s complaint does not contain plausible
11 allegations explaining *why* her legal remedies are inadequate as to past and future harms—both
12 are financial and both can be cured by the monetary damages, *i.e.*, *legal relief*, afforded by the
13 UTPA. *See* Or. Rev. Stat. § 646.638(1).

14 Ms. Clark’s argument that equitable relief is appropriately pled as an alternate measure of
15 damages fares no better. (*See* Dkt. No. 21 at 10.) Even if equitable relief is pleaded as an
16 alternate measure of damages, the complaint must *first* provide sufficient allegations to plausibly
17 explain how a legal remedy, *i.e.*, the UTPA’s monetary damages, are inadequate. *See Rhynes v.*
18 *Stryker Corp.*, 2011 WL 2149095, slip op. at 4 (N.D. Cal. 2011) (“Where the claims pleaded by a
19 plaintiff *may* entitle her to an adequate remedy at law, equitable relief is unavailable.”) (emphasis
20 in original). The complaint provides no such plausible allegations.

21 Ms. Clark’s complaint fails to state a claim for equitable relief.

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23 ¹ The Court finds no merit to Ms. Clark’s argument that *Sonner* stands for the proposition
24 that only restitution is barred by this principle. (*See* Dkt. No. 21 at 9.) “The *Sonner* court derived
25 its rule from broader principles of federal common law and the historical division between courts
26 of law and courts of equity.” *Teresa Adams v. Cole Haan, LLC*, 2020 WL 5648605, slip op. at 2
(C.D. Cal. 2020). *Sonner* stands for the proposition that *any* form of equitable relief is barred, to
the extent an adequate legal remedy exists. *See* 962 F.3d at 1081 (citing *Schroeder v. United*
States, 569 F.3d 956, 963 (9th Cir. 2009)).

1 3. Statute of Limitations

2 All of Ms. Clark’s alleged purchases occurred beyond the UTPA’s one-year statute of
3 limitations. (Dkt. No. 16 at 20–22 (citing Or. Rev. Stat. § 646.638(6).) The parties disagree over
4 whether the discovery rule would act to preserve her claims. (*Compare id.*, with Dkt. No. 21 at
5 29–30.) According to the rule, “the period for fraud begins to run when the plaintiff knows or
6 should have known of the alleged fraud” which is “normally a question for the jury.” *Mathies v.*
7 *Hoeck*, 588 P.2d 1, 3 (Or. 1978). According to the complaint, Ms. Clark first became aware of
8 Eddie Bauer’s allegedly false advertising scheme on March 13, 2020. (Dkt. No. 1 at 16, 24, 25.)
9 But, as Eddie Bauer points out, the complaint fails to include the circumstances associated with
10 her discovery. (Dkt. No. 16 at 21, 22 at 14.) While this may seem like a minor technicality, it is a
11 requirement for application of the discovery rule. *See Sturgis v. Asset Acceptance*, 2016 WL
12 223708, slip op. at 7 (D. Or. 2016) (citing *FDIC v. Smith*, 328 Or. 420, 432 (1999)); *see also Hip*
13 *Hop Bev. Corp. v. Michaux*, 729 F. App’x. 599, 600 (9th Cir. 2018) (requiring “specific facts
14 regarding how [the plaintiff] ‘became aware’ of the records that revealed [the defendant’s]
15 wrongdoing.”) While this deficiency could possibly be cured through an amended complaint,
16 Ms. Clark’s UTPA claims, as pleaded, are time-barred.

17 4. Ascertainable Loss

18 A person bringing a private right of action under the UTPA must “suffer[] an
19 ascertainable loss of money or property,” meaning an economic injury. Or. Rev. Stat.
20 § 646.638(1). Ms. Clark’s complaint can be read to allege two forms of loss: (1) the monetary
21 loss from purchasing a product that she would not have otherwise purchased but for Eddie
22 Bauer’s allegedly misleading pricing and (2) the loss of the bargain she thought she was
23 receiving. (Dkt. No. 1 at 8, 12, 22, 23.) Eddie Bauer argues that neither represent economic
24 injuries, *i.e.*, ascertainable losses (a) because of the company’s generous return policy and (b)
25 because Ms. Clark, in fact, received the garments she wanted at prices she was willing to pay.
26 (Dkt. No. 16 at 26–32.)

1 Eddie Bauer’s return policy argument is, essentially, a restatement of its Article III
2 standing argument: Ms. Clark could not suffer an economic injury if she could return the
3 garments for a full refund. (Dkt. Nos. 16 at 25–26, 22 at 16.) For the same reasons that the
4 argument fails for standing purposes, *see supra* Part II.B, it fails here.² Ms. Clark continues to
5 suffer an injury until she “*actually receives* all of the relief to which . . . she is entitled on the
6 claim.” *Chen*, 819 F.3d 1145.

7 Eddie Bauer’s second argument is more persuasive. It is based on *Pearson v. Philip*
8 *Morris, Inc.*, 361 P.3d 3, 10 (Or. 2015), which was a putative UTPA class action brought against
9 a cigarette manufacturer that advertised certain cigarettes as being “light” and containing
10 “lowered tar and nicotine.” (*See* Dkt. No. 16 at 26.) In reality, neither assertion was true.
11 *Pearson*, 361 P.3d at 9. Those characteristics could only be achieved when the cigarettes were
12 smoked in a particular way. *Id.* Absent doing so, the cigarettes actually delivered *more* nicotine
13 than standard cigarettes. *Id.* The plaintiff alleged an ascertainable loss based upon both a
14 “diminished value” theory as well as a “purchase price” theory. *Id.* at 23–28. Ostensibly,
15 according to the plaintiff, a product has a diminished value, meaning it is worth less than it
16 otherwise would have been on the day a consumer purchased it, if it lacks the advertised
17 characteristic(s). *Id.* If so, the difference between the value of the product with and without the
18 characteristic is the ascertainable loss. *Id.* The purchase price theory is simpler: the ascertainable
19 loss *is* the purchase price because the consumer would not have purchased the product at all
20 absent the manufacturer’s false representations. *Id.*

21 Ms. Clark argues that she, in fact, did plead an ascertainable loss based on both of the
22 theories described in *Pearson*. (Dkt. No. 21 at 25–26.) Ms. Clark alleged that she “would not
23 have purchased the products at the prices she paid” but for Eddie Bauer’s misrepresentations as
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25 ² Similarly, for the same reasons that the Court was not persuaded by Eddie Bauer’s
26 interpretation of the holding in *Hamilton*, 2016 WL 4060310, above, *see supra* Part II.B., it is not
persuaded here.

1 to value. (Dkt No. 1 at 16.) But she fails to explain how this amounts to a false representation as
2 to the “character or quality” of the garments which, as discussed in *Pearson*, is necessary to
3 establish reliance on the allegedly misleading claims. 361 P.3d at 27. The cases Ms. Clark cites
4 only serve to reinforce this point. They all involve misrepresentations of the character or quality
5 of the items being sold. (See Dkt. No. 21 at 25 (citing *Weigel v. Ron Tonkin Chevrolet Co.*, 690
6 P.2d 488 (Or. 1984) (used car that was advertised as new); *Walters v. Vitamin Shoppe Indus.*,
7 *Inc.*, 701 F. App’x. 667 (9th Cir. 2017) (lower quantity of supplement than advertised); *Silva v.*
8 *Unique Bev. Co., LLC*, 2017 WL 4896097, slip op. (D. Or. 2017) (product lacked the advertised
9 ingredient)). Similarly, in *Simonsen v. Sandy River Auto, LLC*, on which Ms. Clark relies for her
10 diminished value argument, the car was allegedly advertised as being in “good running order”
11 when, in fact, it was far from it. 413 P.3d 982, 988 (Or. App. 2018). Finally, in *Feitler v.*
12 *Animation Celection, Inc.*, the ascertainable loss was the lack of exclusivity, *i.e.*, that the item
13 was not as rare as advertised, not simply that it was not as *valuable* as advertised. See 13 P.3d
14 1044, 1049–50 (Or. App. 2000). Value was derived from scarcity—a characteristic separate from
15 value. *Id.*

16 The bottom line is Ms. Clark points the Court to no instances where another court has
17 found that an ascertainable loss for UTPA purposes could be pled based *solely* on a plaintiff’s
18 failure to get as good of a deal as the plaintiff anticipated. (See *generally* Dkt. No. 21 at 24–29.)
19 Some misstatement as to a characteristic, quality, or feature of the product is required. Ms.
20 Clark’s complaint provides no such allegation. As a result, the Court must find that she did not
21 adequately plead an ascertainable loss.

22 Ms. Clark’s complaint fails to state a claim for which relief can be granted because it
23 lacks allegations supporting a legally cognizable ascertainable loss under the UTPA.

24 **III. CONCLUSION**

25 For the foregoing reasons, Eddie Bauer’s motion to dismiss (Dkt. No. 16) is GRANTED.
26 Ms. Clark’s claims are DISMISSED with prejudice and without leave to amend, as any

1 amendment would be futile given her inability to plead an ascertainable loss. *See Foman v.*
2 *Davis*, 371 U.S. 178, 182 (1962).

3 DATED this 1st day of April 2021.

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7 John C. Coughenour
8 UNITED STATES DISTRICT JUDGE
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