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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SIMON LEVAY, JUDITH WILLIS, and)	Case No. 17-09041 DDP (PLAx)
LIONEL BROWN, Individually and on)	
Behalf of All Others Similarly Situated,)	ORDER RE: DEFENDANTS'
)	MOTIONS TO DISMISS
Plaintiffs,)	
)	[Dkts. 39, 40, 41]
v.)	
)	
AARP, INC., AARP SERVICES, INC.,)	
UNITEDHEALTH GROUP, INC.,)	
UNITED HEALTHCARE INSURANCE)	
COMPANY, NEW YORK LIFE)	
INSURANCE COMPANY and DOES 1)	
through 60,)	
)	
Defendants.)	

Presently before the court are Defendants' Motions to Dismiss. Having considered the parties' submissions and heard oral argument, the court adopts the following Order.

I. BACKGROUND

Plaintiffs Simon Levay, Judith Willis, and Lionel Brown ("Plaintiffs") bring this

1 putative class action challenging Defendants’ marketing of AARP-branded insurance
2 policies. Defendants are AARP, Inc. (“AARP”); AARP Services, Inc. (“ASI”), a wholly
3 owned subsidiary of AARP; UnitedHealth Group, Inc.; UnitedHealthcare Insurance Co.,
4 a wholly owned subsidiary of United Health Group, Inc.¹; and New York Life Insurance
5 Co. (“New York Life”) (collectively, “Defendants”). (See First Amended Complaint
6 (“FAC”), Dkt. 20, ¶¶ 1-12.)

7 The FAC alleges that Plaintiffs “are prospective insureds who are at least 65 years
8 of age and have seen and/or heard offers of insurance services, joined AARP and pay
9 membership fees to obtain the advertised insurance, and/or have purchased insurance
10 from United Healthcare and New York Life.” (*Id.* ¶ 44.) However, UnitedHealth records
11 show that Simon Levay was the only plaintiff who ever purchased UnitedHealth
12 Medigap insurance coverage.² (Sheak Decl., Dkt. 40-7, ¶¶ 14-15.) Similarly, New York
13 Life’s policyholder records show that none of the plaintiffs ever purchased New York
14 Life insurance policies. (Horan Decl., Dkt. 39-1, ¶3.)

15 Plaintiffs allege that Defendants have created an unlawful scheme under which
16 AARP profits from marketing, advertising, endorsing, soliciting, offering, and selling
17 AARP-branded insurance policies on behalf of UnitedHealth and New York Life. (FAC
18 ¶¶ 18-19, 31.) Specifically, Plaintiffs assert that AARP receives a 4.95% “royalty” for each
19 AARP-branded insurance policy sold or renewed on behalf of UnitedHealth and New
20 York Life. (*Id.* ¶ 18, 28.) Plaintiffs contend that these “royalties” are disguised
21 commissions that create hundreds of millions of dollars in profit for AARP, (*Id.* ¶ 17), and
22 that “artificially inflat[e]” the price of AARP-branded insurance policies when

23
24 ¹ Defendants UnitedHealth Group, Inc. and UnitedHealthcare Insurance Company are
25 collectively referred to here and in the First Amended Complaint as “UnitedHealth.”

26 ² Medigap insurance is designed to offer extra coverage to Medicare beneficiaries beyond
27 Medicare benefits, including coverage of copays and deductibles that would otherwise be
28 the patient’s responsibility. See 42 U.S.C. § 1395ss(g)(1).

1 “competing policies offering identical benefits are offered at a lower cost.” (*Id.* ¶¶ 50, 59.)
2 Plaintiffs also allege that AARP’s endorsements and branding misleads consumers “into
3 believing that AARP is a non-profit organization when the advertisements, offer, and
4 sale of insurance services are actually by an affiliated for-profit organization [ASI]
5 disguised as the non-profit organization.” (*Id.* ¶ 78.)

6 On the basis of these allegations, Plaintiffs brought suit against Defendants for (1)
7 negligence, (2) violations of California Insurance Code §§ 785 and 787, (3) violations of
8 California’s Unfair Competition Law (“UCL”), Cal. Business & Professions Code §§ 17200
9 *et seq.*, (4) violations of California’s False Advertising Law (“FAL”), Cal. Business and
10 Professions Code § 17500 *et seq.*, and (5) financial elder abuse. Defendants now move to
11 dismiss the complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6).

12 **II. LEGAL STANDARD**

13 A complaint will survive a motion to dismiss when it contains “sufficient factual
14 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*
15 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
16 When considering a Rule 12(b)(6) motion, a court must “accept as true all allegations of
17 material fact and must construe those facts in the light most favorable to the plaintiff.”
18 *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint need not include
19 “detailed factual allegations,” it must offer “more than an unadorned, the-defendant-
20 unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. Conclusory allegations or
21 allegations that are no more than a statement of a legal conclusion “are not entitled to the
22 assumption of truth.” *Id.* at 679. In other words, a pleading that merely offers “labels and
23 conclusions,” a “formulaic recitation of the elements,” or “naked assertions” will not be
24 sufficient to state a claim upon which relief can be granted. *Id.* at 678 (citations and
25 internal quotation marks omitted).

26 However, a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction
27 may challenge a complaint’s allegations on their face or with facts. *Safe Air for Everyone v.*

1 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual challenge, the court is not required
2 to accept the allegations of the complaint as true and may consider additional evidence
3 outside of the pleadings. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir.2011). Once
4 the moving party has presented evidence showing a lack of subject matter jurisdiction,
5 the burden shifts to “the party opposing the motion [to] furnish affidavits or other
6 evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” *Safe*
7 *Air*, 373 F.3d at 1309 (citations omitted). If the plaintiff cannot meet its burden of
8 establishing the jurisdiction it seeks to invoke, the court must dismiss the case under Rule
9 12(b)(1).

10 **III. DISCUSSION**

11 **a. Motions to Dismiss Under Rule 12(b)(1)**

12 Defendants argue that this court lacks subject-matter jurisdiction over the action
13 because no plaintiff has standing to sue. Federal courts are courts of limited jurisdiction,
14 whose authority under Article III of the Constitution is restricted to “actual cases or
15 controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997). To establish Article III standing, a
16 plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable to the
17 challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable
18 judicial decision.” *Spokeo, Inc. v. Robbins*, 136 S.Ct. 1540, 1547 (2016).

19 In this case, Plaintiffs allege that they have been injured by Defendants’ marketing
20 of AARP-branded insurance policies. Specifically, Plaintiffs claim that Defendants sold
21 insurance policies that were “artificially inflated in light of AARP’s 4.95 percent
22 commission,” which AARP received on each policy sold or renewed. (FAC ¶ 17, 59.)
23 Moreover, Plaintiffs contend that AARP’s endorsements and branding misled consumers
24 “into believing that AARP is a non-profit organization when the advertisements, offer,
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1 and sale of insurance services are actually by an affiliated for-profit organization [ASI]
2 disguised as the non-profit organization.”³ (FAC ¶ 78).

3 To begin with, the court observes that none of the allegations in the FAC identify
4 injury to Plaintiffs resulting from the advertisement or purchase of insurance policies
5 from Defendant New York Life. Defendants confirm, and Plaintiffs do not contest, that
6 none of the plaintiffs has ever purchased an AARP-branded New York Life policy.
7 (Horan Decl. ¶3). Based on the facts alleged, the court finds Plaintiffs lack standing to
8 pursue claims for damages against Defendant New York Life.

9 Moreover, to have Article III standing to seek the remedy of prospective injunctive
10 relief, a plaintiff must allege an “actual and imminent,” or “*certainly impending*” injury.
11 *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018). Here, Plaintiffs do not
12 indicate that they intend to purchase AARP-branded policies from New York Life, such
13 that there might exist a “credible threat of real and immediate harm.” *Krottner v.*
14 *Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010). Mere exposure to the advertisements,
15 or even a bare allegation of intent to purchase, will not do. *See Lujan v. Defenders of*
16 *Wildlife*, 504 U.S. 555, 565 (1992) (“[P]rofession of an intent. . . is simply not enough.”)
17 (quotations and alternations omitted). Plaintiffs must, in the case of impending future
18 harm, plead facts sufficient to demonstrate that the injury will “proceed with a high
19 degree of immediacy.” *Id.* at 564 n.2. Mere professions of “‘some day’ intentions—
20 without any description of concrete plans or indeed any specification of when the some
21 day will be—do not support a finding of the ‘actual or imminent’ injury that our cases
22 require.” *Id.* at 564.

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25 ³ In order to purchase AARP-branded insurance policy, an individual must first become
26 an AARP member. (*Id.* ¶ 24). Although the AARP membership fee could conceivably
27 factor into the calculation of damages, Plaintiffs do not dispute that the present
28 allegations fail to articulate a claim with respect to whether Defendants misled Plaintiffs
about the benefits of AARP membership itself. (*See* AARP Reply at 2.)

1 Applying this standard, the court concludes that Plaintiffs have failed to plead
2 facts demonstrating that any future injury is “actual and imminent,” which would
3 provide Plaintiffs with standing to seek injunctive relief against Defendant New York
4 Life. *Davidson*, 889 F.3d at 967. As to the UnitedHealth Defendants, two of the three
5 plaintiffs have never purchased AARP-branded Medigap policies from UnitedHealth, or
6 even expressed the intention of doing so. (Sheak Decl. ¶¶ 14-15.) Therefore, for similar
7 reasons, the court finds that Plaintiffs Judith Willis and Lionel Brown have failed to
8 establish Article III standing to seek relief against the UnitedHealth Defendants.⁴

9 The only plaintiff to have purchased an AARP-branded Medigap policy is Simon
10 Levay. (Sheak Decl. ¶¶ 14-15). Even assuming that Levay relied upon AARP’s
11 representations to his detriment in purchasing a Medigap policy, he does not allege how
12 he will *continue* to be harmed by Defendants’ representations, thereby meriting the
13 remedy of prospective injunctive relief. In *Davidson v. Kimberly-Clark*, the Ninth Circuit
14 outlined the limited circumstances under which a “previously deceived consumer who
15 brings a false advertising claim can allege that her inability to rely on the advertising in
16 the future is an injury sufficient to grant her Article III standing to seek injunctive relief.”
17 *Id.* Although a “close question,” *id.* at 971, the *Davidson* Court concluded that a
18 previously harmed consumer who had a reasonable desire to purchase a product if it
19 were to perform as advertised, but who could no longer rely upon the “validity of the
20 information advertised,” had Article III standing to pursue injunctive relief. *Id.* None of
21 those facts, however, are present here.

22 Therefore, the court grants Defendants’ motion to dismiss for lack of subject-
23 matter jurisdiction with respect to Plaintiffs Judith Willis and Lionel Brown. It also

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25 ⁴ The court will not, at this preliminary stage, evaluate the standing of prospective class
26 members or the definition of the prospective class. Rather, the court bases its analysis on
27 the standing of the named plaintiffs. See *Bates v. United Parcel Servs., Inc.*, 511 F.3d 974, 987
28 (9th Cir. 2007).

1 dismisses Plaintiffs' request for injunctive relief, and Plaintiffs' claims against Defendant
2 New York Life.

3 **b. Motions to Dismiss Under Rule 12(b)(6)**

4 Because Plaintiffs have not indicated whether amendment would cure the various
5 standing deficiencies identified above, the court proceeds to examine only whether
6 Levay's allegations against the UnitedHealth Defendants state a claim for relief under
7 Rule 12(b)(6).

8 **i. California Insurance Code Sections 785 and 787**

9 Plaintiffs contend that Defendants' actions are in violation of California Insurance
10 Code Sections 785 and 787. Even assuming that Plaintiffs have a private right of action to
11 enforce these code provisions, however, they do not apply to the Medigap insurance
12 policy that Levay purchased from UnitedHealth.

13 Section 785 states: "Except where explicitly provided to the contrary, this article
14 shall not apply to . . . Medicare supplement insurance as defined in subdivision (m) of
15 Section 10192.4."⁵ Cal. Ins. Code § 785. Subdivision (m), in turn, defines Medicare
16 supplement insurance, to include, subject to certain exceptions, a policy "advertised,
17 marketed, or designed primarily as a supplement to reimbursements under Medicare."
18 Cal. Ins. Code § 10192.4(m). The parties do not dispute that Levay's Medigap insurance
19 policy falls within the definition of "Medicare supplement insurance," *id.*, and is
20 therefore excluded from the scope of Sections 785 and 787.

21 Furthermore, there is no reason to believe that Levay has standing to enforce these
22 code provisions with respect to other kinds of insurance policies. *See supra* Part III.a.
23 Article III standing requirements apply with equal force to state law causes of action
24 brought in federal court. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001).
25 Accordingly, Levay cannot rely upon the bare allegation that a misleading advertisement

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27 ⁵ Sections 785 and 787 are both part of Article 6.3 of the California Insurance Code.

1 exists, or that UnitedHealth has a statutory duty to prospective insureds, in order to
2 create an “actual or imminent” injury to himself for Article III standing purposes.
3 *Davidson*, 889 F.3d at 967. Therefore, the court dismisses with prejudice Levay’s insurance
4 code claims against the UnitedHealth Defendants.⁶

5 **ii. UCL and FAL Claims**

6 For the purposes of statutory standing, both the UCL and the FAL require that
7 Levay plead an economic injury related to the purchase of his AARP-branded Medigap
8 policy. *See Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1105 (9th Cir. 2013), *as amended on denial*
9 *of reh’g and reh’g en banc* (July 8, 2013); *see also* Cal. Bus. & Prof. Code § 17204 (limiting
10 UCL actions to those brought “by a person who has suffered injury in fact and has lost
11 money or property as a result of the unfair competition”). “To properly plead an
12 economic injury, a consumer must allege that she was exposed to false information about
13 the project purchased, which caused the product to be sold at a higher price, and that she
14 ‘would not have purchased the goods in question absent this misrepresentation.’”
15 *Davidson*, 889 F.3d at 966.

16 In *Davidson*, the Ninth Circuit concluded that a plaintiff adequately alleged
17 economic injury when the complaint stated that, “had [the defendant] not
18 misrepresented (by omission and commission) the true nature of [the advertised
19 product,” the plaintiff would not have purchased the product at a premium price. *Id.* at
20 966. The FAC contains similar allegations here:

21 But for Defendants’ deceptive and unlawful acts, Plaintiffs and Putative
22 Class would not have been required to join AARP to obtain the advertised

23
24 ⁶ To the extent Plaintiffs’ other claims are premised on violations of Sections 785 and 787,
25 they too must be dismissed. In particular, Plaintiffs’ negligence claim is exclusively
26 premised on the existence of “statutory duties” derived from the insurance code. (FAC ¶
27 63; *see also* UnitedHealth MTD at 25; Trans. at 35:3-6, Dkt. 56). Similarly, Plaintiffs’ UCL
28 claim is based, at least in part, on violations of the insurance code. As currently pled,
these claims will rise and fall with Plaintiffs’ insurance code claims.

1 insurance, would not have had to pay the AARP membership fees, would
2 not have had to pay AARP the illegal commission as part of their purchase
3 and/or renewal of their AARP policies, and would not of [sic] had to pay the
4 high rates for the AARP branded insurance when competing policies offering
5 identical benefits are offered at a lower cost. (FAC ¶ 30.)

6 The court concludes that these allegations, considered together with the rest of the
7 FAC, adequately set forth a basis for economic injury under the UCL and FAL.

8 When, as here, the challenged conduct under the UCL and FAL involves
9 “misrepresentation and deception,” a plaintiff must also plead actual reliance. *Durell v.*
10 *Sharp Healthcare*, 183 Cal. App. 4th 1350, 1363 (2010). In the UCL context, “actual
11 reliance . . . is inferred from the misrepresentation of a material fact.” *Chapman v. Skype,*
12 *Inc.*, 220 Cal. App. 4th 217, 229 (2013). Defendants contend, however, that “no reasonable
13 consumer could have been deceived into purchasing AARP-branded Medigap coverage
14 at regulator-approved rates—over allegedly less expensive policies—based on the
15 characterization of United’s royalty payment to AARP.” (UnitedHealth MTD at 14.)

16 The court need not address this issue, however, because Plaintiffs have conceded
17 that their theory of injury does not concern the price of the insurance policy *per se*, but
18 instead centers on the membership fee paid to AARP. (*See Opp.* at 9.) Specifically,
19 Plaintiffs have declared that “this case is not about the payment of fees to an unlicensed
20 insurance agent, but rather the advertising, offering, and selling of insurance via a
21 perceived non-profit organization to vulnerable elder California consumers.” (*Opp* at 20.)
22 In keeping with this representation, counsel for Plaintiffs stated during oral argument
23 that that the only damages sought here concern the payment of AARP membership fees.
24 (*Trans.* at 39:2-6, 39:20-40:2; 40:20-41:1, Dkt. 56.) Put differently, Plaintiffs’ prevailing
25 theory of injury is that consumers were “duped” into joining AARP and paying
26 membership fees in order to access the AARP-branded policies from UnitedHealth, who
27 they believed had been selected by AARP as “the best insurance company for all of its

1 members when in actuality it [was] the for-profit AARP company [ASI] making a
2 commission on each sale it makes.” (FAC ¶¶ 20, 81.)

3 Finally, Defendants contend that Levay must have actually seen the allegedly
4 misleading representations before purchasing his AARP-branded Medigap policy in
5 order to plead reliance. (UnitedHealth MTD at 17). *See McVicar v. Goodman Glob., Inc.*, 1 F.
6 Supp. 3d 1044, 1052 (C.D. Cal. 2014) (dismissing UCL claim where the plaintiff had not
7 plead that he “ever saw any alleged misrepresentation”); *Letizia v. Facebook Inc.*, 267 F.
8 Supp. 3d 1235, 1244 (N.D. Cal. 2017) (collecting cases where courts have dismissed FAL
9 and UCL claims for failure to plead that plaintiffs had seen the challenged
10 representations). However, Levay has not alleged that he saw any of the advertisements
11 or representations of AARP-branded insurance that he now challenges. Therefore, the
12 court dismisses Levay’s UCL and FAL claims against UnitedHealth on this basis with
13 leave to amend.

14 **iii. Fraud Allegations**

15 Defendants contend that the claims in the FAC do not plead fraud with specificity,
16 as required under Rule 9(b). *See Fed. R. Civ. P. 9(b)*. Although a complaint need not
17 mention the word “fraud” to be subject to Rule 9(b)’s heightened pleading requirement,
18 it must contain allegations “that necessarily constitute fraud.” *Vess v. Ciba-Geigy Corp.*
19 *USA*, 317 F.3d 1097, 1105 (9th Cir. 2003).

20 In California, the elements of a fraud claim are “a false representation, knowledge
21 of its falsity, intent to defraud, justifiable reliance, and damages.” *Moore v. Brewster*, 96
22 F.3d 1240, 1245 (9th Cir. 1996) (quotations omitted). Here, the FAC alleges that
23 Defendants falsely represented information about AARP-branded insurance policies; that
24 Defendants did so knowingly; that Defendants intended to defraud consumers; and that
25 consumers relied upon Defendants’ representations. *See, e.g.*, FAC ¶ 18 (“Defendants,
26 together, have orchestrated an elaborate scheme whereby AARP markets, advertises,
27 endorses, solicits, offers, and sells AARP branded insurance”); *id.* ¶ 19 (“Defendants have

1 deceptively and unlawfully schemed against senior citizens who put their trust in the
2 AARP name”); *id.* ¶ 45 (“Defendants mislead and deceive . . . by advertising, marketing,
3 and insurance services and products with the AARP logo, brand and name”); *id.* ¶ 59
4 (“Plaintiffs and the class were . . . deceived into joining AARP . . . and taken advantage
5 of by Defendants’ insurance scheme to deceive and manipulate persons over 65 years of
6 age.”); *id.* ¶ 78 (“Defendants violated and continue to make untrue and misleading
7 statements to senior citizens with the intent to induce them to purchase insurance.”); *id.* ¶
8 81 (“Defendants committed financial elder abuse by using misrepresentations to trick
9 and deceive Plaintiffs into purchasing insurance policies branded and endorsed by
10 AARP which is not only illegal, but improper as it is used to intentionally and
11 deliberately confuse . . .”). In one case, Plaintiffs expressly label this conduct “fraud.” *Id.*
12 ¶ 84 (“Defendants planned and engaged in their pattern of financial elder abuse with
13 malice, oppression, and fraud. . .”).

14 The court finds that the allegations in the FAC necessarily constitute fraud. When
15 a plaintiff alleges a “unified course of fraudulent conduct and rel[ies] entirely on that
16 course of conduct as the basis of a claim,” a claim sounds in fraud and is subject to Rule
17 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). In some
18 circumstances, however, “fraud is not an essential element of the claim.” *Id.* If so, “the
19 proper route is to *disregard* averments of fraud for not meeting Rule 9(b)’s standard and
20 then ask whether a claim has been stated.” *Id.* at 1105.

21 The question here is whether the fraud-based allegations in the FAC are part of a
22 “unified course of fraudulent conduct” central to Defendants’ theory of liability, rather
23 than non-essential elements of the claims. *Id.* at 1103. Stripped of the fraudulent
24 allegations, however, the court finds that the FAC fails to state a claim for relief under the
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1 UCL or FAL, or for financial elder abuse.⁷ If Levay is to retain these allegations in the
2 complaint, he must plead fraud with specificity, and allege the “who, what, when, where,
3 and how” of Defendants’ misconduct.⁸ *Id.* at 1106. Put differently, he must do more than
4 “adequately plead that reasonable consumers are likely to be deceived.” *Davidson*, 889
5 F.3d at 964. Rather, he must “set forth what is false or misleading about a statement, and
6 why it is false.” *Vess*, 317 F.3d at 1106.⁹ Accordingly, the court dismisses the remaining
7 claims for failure to allege fraud with specificity pursuant to Rule 9(b).

8 **c. Additional Arguments Favoring a Dismissal or Stay**

9 Although the court grants the motion to dismiss, it must address two additional
10 theories of dismissal that may influence whether this action should instead be stayed or
11 dismissed with prejudice. These two theories ask whether the present action is barred by
12 the first-to-file doctrine or, alternatively, by the filed-rate and primary jurisdiction
13 doctrines.

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16 ⁷ Although one can plead financial elder abuse by claiming that property was taken “for
17 a wrongful use or with an intent to defraud,” Cal. Welf. & Inst. Code 15610.30 (a)(1), the
18 allegations here rely upon the latter theory. (*See* FAC ¶¶ 81, 84.)

19 ⁸ Plaintiffs claim that this court did not dismiss a UCL claim for failure to plead fraud
20 with specificity in a similar case, *Friedman v. AARP*, No. 14-56765. Yet that outcome is
21 attributable to the fact that the court in *Friedman* dismissed the action on other dispositive
22 grounds and had no need to reach the issue of whether dismissal for failure to satisfy
23 Rule 9(b) was appropriate.

24 ⁹ The court notes that there is some imprecision surrounding the attribution of conduct
25 among Defendants, specifically AARP and ASI. For example, Plaintiff alleges that
26 “AARP markets, advertises, endorses, solicits, offers, and sells AARP branded
27 insurance.” (FAC 18.) Yet this statement appears to be contravened by later statements
28 that it is not AARP but ASI “disguised as the non-profit organization” that “actually”
makes the “advertisements, offer, and sale of insurance services.” (FAC ¶ 78.) *See also*
Destfino v. Reiswig, 630 F.3d 952, 958 (9th Cir. 2011) (Rule 9(b) “does not allow a complaint
to . . . lump multiple defendants together but require[s] plaintiffs to differentiate their
allegations when suing more than one defendant.”).

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17 **i. First-to-File Doctrine**

The first-to-file doctrine traditionally operates when similar actions are pending in different courts, or before different judges. *See, e.g., Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982); *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 769 (9th Cir. 1997); *Henderson v. JPMorgan Chase Bank*, No. CV 11-3428 PSG PLAX, 2011 WL 4056004, at *2 (C.D. Cal. Sept. 13, 2011), *reversed on other grounds*, 651 F. App'x. 669 (9th Cir. 2016). Defendants claim that the first-to-file doctrine should lead to a stay or dismissal of this case because it is substantially similar to an earlier case, *Friedman v. AARP*, No. 14-56765, pending before the same judge.

While the purpose of the first-to-file doctrine is to enhance “efficiency and judicial economy,” these concerns are typically mitigated when the actions are pending before the same judge. *Cedars-Sinai Med. Ctr.*, 125 F.3d at 769. For this reason, the court concludes that the first-to-file doctrine does not warrant dismissal or a stay of the present action. Nonetheless, the court reserves the right to determine at a later stage in the proceedings whether it would be appropriate for case management reasons to stay or consolidate this case with the putative class action in *Friedman*.

17 **ii. Filed Rate & Primary Jurisdiction Doctrines**

18 In *Friedman v. AARP*, 283 F. Supp. 3d 873, 878-79 (C.D. Cal. 2018), this court held
19 that neither a state filed-rate doctrine nor primary jurisdiction doctrine barred the
20 plaintiff’s challenges to the marketing of AARP-branded Medigap insurance policies. The
21 court reaches the same result here.

22 California courts are split as to whether a general state filed-rate doctrine exists.
23 *Compare Fogel v. Farmers Group, Inc.*, 160 Cal. App. 4th 1403, 1418 (2008), *with MacKay v.*
24 *Superior Court*, 188 Cal. App. 4th 1427, 1449 (2010). Under a state filed-rate doctrine,
25 “rates duly adopted by a regulatory agency are not subject to collateral attack in court.”
26 *MacKay*, 188 Cal. App. 4th at 1448. Even assuming that this doctrine exists with respect to
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1 state regulator-approved rates, it does not bar actions—as here—where “the underlying
2 conduct challenged was not the charging of an approved rate.” *Id.* at 1450.

3 As in *Friedman*, the court deems that the claims in this case are essentially about
4 false or misleading advertising, and not challenges to the reasonableness of the actual
5 rates that were approved by the California Department of Insurance (“DOI”). The
6 gravamen of the FAC is that Defendants “illegally advertise for insurance services and
7 products,” (*id.* ¶ 29); “deceptively and unlawfully schemed against senior citizens,” (*id.* ¶
8 19); and engage in “improper, deceptive, and misleading marketing advertisements,” (*id.*
9 ¶ 14). *See also id.* ¶ 26 (collecting internet, television, and print materials advertising
10 AARP-branded insurance). Therefore, the DOI’s rate “determination is different from
11 what is at issue here—whether the lender . . . mischaracterize[d] the nature of the
12 charges.” *Canon v. Wells Fargo* No. C-12-1376 EMC, 2014 WL 324556 at *5 (N.D. Cal. Jan.
13 29, 2014). Under this theory of recovery, the adjudication of Plaintiffs’ claims would not
14 improperly encroach on the DOI’s rate-making authority.

15 For similar reasons, the court concludes that the primary jurisdiction doctrine does
16 not bar Levay’s claims. The doctrine of primary jurisdiction doctrine operates when
17 “enforcement of the claim requires the resolution of issues which, under a regulatory
18 scheme, have been placed within the special competence of an administrative body.”
19 *Farmers Ins. Exchange v. Superior Ct.*, 2 Cal. 4th 377, 390 (1992) (en banc). The court finds
20 that the claims raised in the FAC are “within the conventional competence of the courts,”
21 and therefore do not require the specialized ratemaking expertise of the DOI. *Id.* at 390.
22 For this reason, the court declines to refer this case to the DOI under the primary
23 jurisdiction doctrine.

24 **IV. CONCLUSION**

25 For the reasons stated above, Defendants’ Motions to Dismiss are GRANTED.

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Plaintiff shall file an amended complaint within fourteen (14) days after the date of this Order, or by November 16, 2018.

IT IS SO ORDERED.

Dated: 11/2/18



DEAN D. PREGERSON

UNITED STATES DISTRICT JUDGE