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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FAITH BAUTISTA,
Plaintiff,

v.

VALERO MARKETING AND SUPPLY
COMPANY,
Defendant.

Case No. [15-cv-05557-RS](#)

**ORDER GRANTING VALERO'S
MOTION TO DISMISS**

I. INTRODUCTION

Defendant Valero Marketing and Supply Company (“Valero”) moves to dismiss one claim in plaintiff Faith Bautista’s Second Amended Complaint. Pursuant to Civil Local Rule 7-1(b), the motion is suitable for disposition without oral argument, and the hearing set for December 8, 2016, is vacated. For the reasons that follow, Valero’s motion is granted.

II. DISCUSSION

Valero operates a network of gas station franchises. These stations use “split pricing” to communicate the cost of gas; customers paying cash are charged one price, while customers paying by credit card are charged a higher price. Since July 2011, Bautista has purchased gas from a Valero station in Daly City, California. Bautista pays for gas with a debit card, and alleges Valero deceived her by charging the credit card price to debit card purchases, without indicating the credit card price applied to such purchases. As a result, she filed this putative class action.

Bautista’s First Amended Complaint brought claims under the Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, et seq., False Advertising Law (“FAL”), Cal. Bus. & Prof.

United States District Court
Northern District of California

1 Code § 17500, et seq., and Unfair Competition Law (“UCL”), § 17200, et seq.¹ The UCL claim
2 was predicated on Valero’s alleged CLRA and FAL violations, as well as an alleged violation of
3 California Financial Code section 13081(b). Valero moved to dismiss all three claims, arguing
4 Bautista failed to plead sufficient facts showing Valero had control over the allegedly unlawful
5 pricing practice. Valero also argued section 13081(b) only applied to transactions requiring entry
6 of a personal identification number (“PIN”), while Bautista only claimed to have entered her ZIP
7 code when purchasing gas at Valero. Valero’s motion was granted for both reasons,² and Bautista
8 was given leave to amend her complaint.

9 Bautista filed a Second Amended Complaint, reasserting the same three claims, and Valero
10 filed this motion to dismiss. Valero’s motion challenges only Bautista’s UCL claim, and only to
11 the extent it relies on an alleged section 13081(b) violation. Valero’s motion rests on Bautista’s
12 continuing failure to allege that any debit card purchases at Valero required PIN entry.³ Indeed,
13 the Second Amended Complaint admits Bautista never entered a PIN in connection with a debit
14 card purchase at Valero, but instead raises the new legal argument that section 13081(b) is not
15 limited to debit card transactions requiring PIN entry. This argument should have been raised in
16 response to Valero’s first motion to dismiss, but it was not. Bautista’s response to Valero’s first
17 motion was altogether silent on the reach of section 13081(b). Through this silence, Bautista

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19 ¹ The First Amended Complaint also brought a claim for accounting. Bautista abandoned the
claim in response to Valero’s motion to dismiss that complaint.

20 ² The order granting Valero’s motion did not conclusively hold that Bautista’s CLRA claim
21 required a showing Valero had control over the allegedly unlawful pricing practice. Instead, the
22 order put off resolution of the issue because it would become moot if an amended complaint
23 sufficiently alleged such control — an allegation unquestionably necessary to sustain Bautista’s
FAL and UCL claims. Valero does not dispute that the Second Amended Complaint sufficiently
alleges such control. As such, the issue is now moot and need not be resolved.

24 ³ Bizarrely, Bautista argues “Valero’s . . . devices do require a PIN for debit card authentication
25 and . . . Valero unilaterally elects to also process debit card payments with non-PIN technology in
26 a futile attempt to circumvent the statute’s . . . requirements.” P.’s Mem. in Opp’n at 7. This
27 argument does not succeed. Either Valero requires PIN entry or it does not. The Second
Amended Complaint makes clear Bautista made debit card purchases without PIN entry. Thus,
her purchases did not require PIN entry, and do not fall within the purview of section 13081(b) if
it applies only where a transaction requires PIN entry.

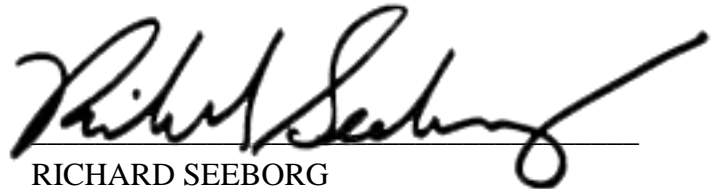
1 waived the right subsequently to argue section 13081(b) applies to transactions not requiring PIN
2 entry.⁴ See *Farnham v. Windle*, 918 F.2d 47, 51 (7th Cir. 1990) (“But [plaintiff] did not take
3 advantage of his opportunity to brief these additional theories to the district court in his
4 memorandum in opposition to [defendant’s] motion to dismiss, and his failure to do so results in
5 waiver.”). Thus, Bautista’s Second Amended Complaint is deficient in the same manner as her
6 first: It fails to allege any of her debit card purchases at Valero required PIN entry. Valero’s
7 motion is therefore granted.

8 **III. CONCLUSION**

9 Valero’s motion to dismiss is granted, and to the extent Bautista’s UCL claim is predicated
10 upon Valero’s alleged section 13081(b) violation, it is dismissed with prejudice.

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12 **IT IS SO ORDERED.**

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14 Dated: November 18, 2016



RICHARD SEEBORG
United States District Judge

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22 _____
23 ⁴ In rare circumstances, it is appropriate for a litigant to seek leave to file a motion for
24 reconsideration of a prior order in order to raise a new legal argument. See Civ. Local R. 7-9.
25 Leave to file a motion for reconsideration of the prior order would not be appropriate in this
26 instance, because the party seeking leave “must specifically show reasonable diligence in bringing
27 the motion” for leave. Civ. Local R. 7-9(b). Bautista cannot make such a showing. She
28 inexplicably failed to raise any argument about the reach of section 13081(b) in her response to
Valero’s first motion to dismiss, which was granted on July 21, 2016. Raising a new legal
argument in the Second Amended Complaint, filed two months later on September 23, 2016, does
not constitute “reasonable diligence,” nor would now filing a motion for leave to file a motion for
reconsideration.