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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 LILLIAN SHALLOW, by and through
11 her Guardian ad Litem, KATHLEEN
12 SHALLOW, individually and on behalf of
13 others similarly situated,

14 Plaintiff,

15 v.

16 TARGET CORPORATION, a Minnesota
17 corporation, et. al.,

18 Defendant.

Case No.: 14cv00294 JAH-BLM

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS [Doc. No. 67]**

19 **INTRODUCTION**

20 Pending before the Court is Defendant Target Corporation's motion to dismiss
21 (Doc. No. 67). Defendant seeks dismissal of the Third Amended Complaint ("TAC") in
22 its entirety with prejudice for failure to sufficiently plead any claims against Target.
23 Plaintiff opposes the motion. After a thorough review of the pleadings and for the reasons
24 discussed below, the Court GRANTS IN PART AND DENIES IN PART Defendant's
25 motion to dismiss.

26 **LEGAL STANDARD**

27 Rule 12(b)(6) tests the sufficiency of the complaint. *Navarro v. Block*, 250 F.3d
28 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where the complaint

1 lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530,
2 534 (9th Cir. 1984); *see Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6)
3 authorizes a court to dismiss a claim on the basis of a dispositive issue of law.”).
4 Alternatively, a complaint may be dismissed where it presents a cognizable legal theory
5 yet fails to plead essential facts under that theory. *Robertson*, 749 F.2d at 534. While a
6 plaintiff need not give “detailed factual allegations,” he must plead sufficient facts that, if
7 true, “raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*,
8 550 U.S. 544, 545 (2007).

9 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
10 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
11 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 547). A claim is facially plausible
12 when the factual allegations permit “the court to draw the reasonable inference that the
13 defendant is liable for the misconduct alleged.” *Id.* In other words, “the non-conclusory
14 ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive
15 of a claim entitling the plaintiff to relief. *Moss v. U.S. Secret Service*, 572 F.3d 962, 969
16 (9th Cir. 2009). “Determining whether a complaint states a plausible claim for relief will
17 ... be a context-specific task that requires the reviewing court to draw on its judicial
18 experience and common sense.” *Iqbal*, 556 U.S. at 679.

19 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
20 truth of all factual allegations and must construe all inferences from them in the light most
21 favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002);
22 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal
23 conclusions need not be taken as true merely because they are cast in the form of factual
24 allegations. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003); *Western Mining*
25 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to dismiss,
26 the Court may consider the facts alleged in the complaint, documents attached to the
27 complaint, documents relied upon but not attached to the complaint when authenticity is
28 not contested and matters of which the Court takes judicial notice. *Lee v. City of Los*

1 *Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that a complaint fails
2 to state a claim, the court should grant leave to amend unless it determines that the pleading
3 could not possibly be cured by the allegation of other facts. *See Doe v. United States*, 58
4 F.3d 494, 497 (9th Cir. 1995).

5 **DISCUSSION**

6 In the TAC, Plaintiff asserts Defendants Target and Luxottica Retail North America,
7 Inc. (“Luxottica”) engaged in fraudulent and unfair business practices in violation of
8 California’s Business & Professions Code section 17200, engaged in unfair business
9 practices in violation of California Civil Code 1750, *et seq*, and disseminated false and
10 misleading advertisements throughout the State of California in violation of California’s
11 Business & Professions Code section 17500. Defendant contends Plaintiff’s claims are
12 based upon a theory of a misrepresentation or omission, specifically, its supposedly
13 misleading marketing regarding the independence of the optometrists located in Target
14 Optical store locations. Defendant argues Plaintiff fails to sufficiently allege its
15 involvement in any misrepresentation, that it aided and abetted in any misleading
16 marketing, or that it could be found liable under a nondisclosure or omissions theory of
17 liability.

18 **I. Defendant’s Participation**

19 Defendant maintains Plaintiff makes no allegations that it made any statements to
20 her and she fails to identify what advertisements and materials by Target give rise to her
21 false advertising claim. Her specific allegations, Defendant contends, are limited to her
22 seeing signs within the Target Optical space, an entity separate from Defendant Target, and
23 fail to identify the “who, what, when where and how” about the purportedly fraudulent
24 statement. Defendant argues Plaintiff’s allegations fail to meet Rule 8 of the Federal Rules
25 of Civil procedure and the heightened pleading requirement of Rule 9(b) of the Federal
26 Rules of Civil Procedure. Additionally, Defendant argues Plaintiff’s general claims which
27 do not relate to her personal experience are irrelevant as she lacks standing to bring claims
28 for representations upon which she did not rely. Because Plaintiff does not allege that she

1 saw or relied on any marketing conducted by Defendant and her general allegations are
2 irrelevant and lack particularity, Defendant argues, all of Plaintiff's causes of action fail
3 and should be dismissed.

4 Defendant also contends Plaintiff fails to plead it aided and abetted in any allegedly
5 misleading marketing. Defendant maintains Plaintiff makes no factual allegation that it
6 gave substantial assistance or encouragement to Target Optical regarding the relevant
7 marketing, nor does she identify any person or activity that supposedly aided and abetted
8 in such representations. Without any allegations that it gave substantial assistance or
9 encouragement to Target Optical, Defendant argues Plaintiff cannot establish an aiding and
10 abetting theory of liability.

11 Plaintiff argues the complaint adequately alleges Defendant Target's direct
12 involvement in misleading marketing and points to various allegations in support. She
13 contends these allegations plainly identify the representations and omissions, the time and
14 location of the misrepresentations and why the statements are misrepresentations. Plaintiff
15 further argues the TAC alleges Target gave Luxottica substantial assistance or
16 encouragement by helping Luxottica obtain control over the optometrists' practices
17 through the leases between Target and the optometrists and providing Luxottica the forum
18 to post signs within Target's stores and supplying a steady stream of customers.

19 In reply, Defendant argues Plaintiff's only allegations that Target made the allegedly
20 false representation upon which she relied are conclusory. Defendant maintains she
21 improperly conflates Luxottica's and Target's actions as acting as a single entity.
22 Defendant contends Plaintiff's factual allegations, as opposed to conclusory ones, make it
23 clear that she alleges Luxottica doing business as Target Optical created or controlled the
24 allegedly misleading signs. Additionally, Defendant argues Plaintiff's conclusory
25 allegations fail to allege "the who, what, when, where, and how" of Target's alleged
26 control, participation, or approval of the purportedly misleading signs Plaintiff saw at the
27 Target Optical store. Defendant also contends Plaintiff provides no legal authority for her
28 contention that Target's lease agreement with Luxottica equates to substantial assistance

1 because it provided Luxottica the forum in which to post these signs and a steady stream
2 of customers. If Plaintiff's position is adopted, Defendant argues it would essentially
3 render every landlord an "aider and abettor" of its tenants. Defendant also contends
4 Plaintiff's reliance on allegations about Target's financial interest in Luxottica's success,
5 at most, support a purported motive which is insufficient to demonstrate substantial
6 assistance which requires an affirmative act.

7 Under Rule 8, a complaint "must contain (1) a short and plain statement of the
8 grounds for the court's jurisdiction. . . (2) a short and plain statement of the claim showing
9 the pleader is entitled to relief; and (3) a demand for the relief sought." Rule 8 is designed
10 to provide defendants with fair notice of the claims against them and the grounds on which
11 those claims rest. *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

12 Pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, "[i]n alleging fraud
13 or mistake, a party must state with particularity the circumstances constituting fraud or
14 mistake." Under Ninth Circuit case law, Rule 9(b) imposes two distinct requirements on
15 complaints alleging fraud. First, the basic notice requirements of Rule 9(b) require
16 complaints pleading fraud to set forth "the who, what, when, where, and how" of the
17 misconduct charged." *Vess v. Ciba-Geigy Corp., U.S.A.*, 317 F.3d 1097, 1106 (9th Cir.
18 2003); *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). Second, the Rule requires
19 that the complaint "set forth an explanation as to why the statement or omission complained
20 of was false and misleading." *Yourish v. California Amplifier*, 191 F.3d 983, 993 (9th Cir.
21 1999).

22 In the TAC, Plaintiff alleges Defendants Target and Luxottica operated under a
23 master agreement in which Target leased space to Luxottica to run an optical department
24 inside of Target stores known as "Target Optical." TAC ¶ 21. Pursuant to the master
25 agreement Target signed standard lease agreements with individual optometrists to lease
26 space within the Target Optical location and assigned its rights under the leases to
27 Luxottica. *Id.* ¶¶ 25, 26. Plaintiffs further allege the lease terms allowed Defendants to
28 exert influence and control over the optometrists by controlling material aspects of the

1 optometrists' practice. *Id.* ¶¶ 31 - 41. Additionally, Plaintiff alleges Luxottica and Target
2 posted signs immediately adjacent to or inside the Target Optical locations reading
3 "Independent Doctors of Optometry" in large typeface. *Id.* ¶ 45. She also alleges Target
4 and Luxottica advertised the availability of "Independent Doctors of Optometry" on a
5 webpage maintained by Target Optical. *Id.* ¶ 46. She further alleges Target intentionally
6 omitted any affirmative disclosures of the fact that the optometrists were subject to its and
7 Luxottica's control and influence regarding material aspects of their practice. *Id.* ¶ 49.

8 Plaintiff specifically alleges she visited the Target Optical location in the Target
9 store located at 3245 Sports Arena Boulevard, in San Diego, California, with her mother
10 on or about July 2, 2013 and encountered signs in the Target Optical department advertising
11 the availability of eye examinations from an "Independent Doctor of Optometry." *Id.* ¶¶
12 53, 54. Based on the statement "Independent Doctor of Optometry" on those signs, Plaintiff
13 alleges she, by and through her mother, expected that she would be examined and treated
14 by a licensed doctor motivated solely by her best interests and who was not subject to the
15 control of any third parties or influenced by any financial incentives. *Id.* ¶ 55. Instead,
16 she alleges, the optometrist was under Defendants' control and influence because he was a
17 tenant subject to the provisions of a lease agreement providing Defendants control over
18 material aspects of the optometrist's practice. *Id.* ¶¶ 56, 57.

19 Liability under California's Unfair Competition Law ("UCL") cannot be predicated
20 on vicarious liability but a defendant who participates in the unlawful practices, either
21 directly or by aiding and abetting the principal, may be subject to liability. *People v.*
22 *Toomey*, 157 Cal.App.3d 1, 14-15 (1984). Plaintiff sets forth allegations that both Target
23 and Luxottica posted signs in and adjacent to Target optical locations and online
24 advertising "Independent Doctors of Optometry." She viewed a sign in Target Optical
25 during a visit to a Target store advertising an optometrist as independent and she relied on
26 the statement in purchasing an eye exam. Plaintiff sufficiently alleges Defendant Target's
27 direct participation in the misrepresentation of the optometrists being independent and
28 satisfies the pleading standards of Rules 8 and 9(b). The Court is not persuaded by

1 Plaintiff's unsupported assertion that leasing out space equates to aiding and abetting.
2 However, because Plaintiff sufficiently alleges Defendant Target's direct participation the
3 motion seeking to dismiss for failing to allege Target's participation is DENIED.

4 **II. Omission or Nondisclosure**

5 Defendant argues Plaintiff fails to plead a nondisclosure or omissions theory of
6 liability to support her fraud claim and false advertising claim. Specifically, Defendant
7 argues Plaintiff fails to allege it owed her a duty to disclose the allegedly concealed fact
8 that the doctors were not independent. Defendant contends she does not allege any
9 statement by Defendant that it was required to cure and she fails to allege any underlying
10 relationship between Defendant and Plaintiff that would give rise to a fiduciary obligation.
11 Because Plaintiff cannot establish the required duty, Defendant argues, its alleged
12 omissions are not actionable, and Plaintiff's first and third causes of action should be
13 dismissed.

14 Plaintiff argues the TAC adequately alleges Target violated the UCL and FAL by
15 omission. She contends a fiduciary relationship is not required to hold Target liable for its
16 omission because she alleges Target made the statement regarding the independent doctors
17 without making necessary qualifiers, namely, the fact that the optometrists were subject to
18 Defendants' control and influence regarding material aspects of their practices and she
19 alleges only Defendants knew the truth about the optometrists. Additionally, she maintains
20 the TAC alleges Target actively concealed the true nature of the eye exams conducted by
21 the doctors from Plaintiff and the class.

22 Even if a fiduciary relationship is required, Plaintiff contends she sufficiently alleges
23 one. She maintains the TAC alleges Target and Luxottica attempted to control the eye
24 exams the optometrists performed, the equipment they could use, and the therapies they
25 offered, and thus engaged in the unlicensed practice of optometry.

26 In reply, Defendant argues Plaintiff's TAC fails to allege the existence of any
27 relationship between Plaintiff and Target giving rise to a duty to disclose. Even if she
28 alleged such a relationship, Defendant argues Plaintiff still fails to state a claim for fraud

1 by omission because Plaintiff fails to allege any acts by Target of “active concealment.”
2 Defendant also argues Plaintiff’s contention that Target owed her a fiduciary duty because
3 it was somehow her physician fails because a corporate retail store cannot serve as
4 Plaintiff’s physician, Plaintiff has never alleged Target entered into a canonical fiduciary
5 relationship with her or knowingly undertook such relationship, and Plaintiff fails to allege
6 conditions giving rise to fiduciary duties owed to patients by medical doctors.

7 Under California law, a cause of action for fraudulent concealment requires an
8 allegation that the defendant owed a duty to disclose the concealed fact. *See Levine v. Blue*
9 *Shield of California*, 189 Cal.App.4th 1117, 1126–1127 (2010). “There are four
10 circumstances in which a duty to disclose may arise such that nondisclosure or concealment
11 constitutes actionable fraud: (1) when a fiduciary relationship exists between the parties;
12 (2) when the defendant has exclusive knowledge of material facts not known to the
13 plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and
14 (4) when the defendant makes a partial representation to the plaintiff while suppressing
15 other material facts.” *LiMandri v. Judkins*, 52 Cal.App.4th 326, 336 (1997) (citations
16 omitted). “The first circumstance requires a fiduciary relationship; each of the other three
17 ‘presupposes the existence of some other relationship between the plaintiff and defendant
18 in which a duty to disclose can arise.’” *Deteresa v. Am. Broad. Cos.*, 121 F.3d 460, 467
19 (9th Cir. 1997) (quoting *LiMandri*, 52 Cal.App.4th at 336-7). “Such relationships ‘are
20 created by transactions between parties from which a duty to disclose facts material to the
21 transaction arises under certain circumstances.’ Examples are ‘seller and buyer, employer
22 and prospective employee, doctor and patient, or parties entering into any kind of
23 contractual agreement.’” *Id.* (quoting *LiMandri*, 52 Cal.App.4th at 337).

24 Plaintiff fails to allege facts demonstrating a relationship or transaction with
25 Defendant Target to support the failure to disclose theory. Plaintiff’s allegations assert
26 Target engaged in a master agreement with Luxottica and lease agreements with individual
27 optometrists, including the optometrist who examined Plaintiff and, through the leases,
28 controlled material aspects of the optometrists’ practices. She further alleges Target posted

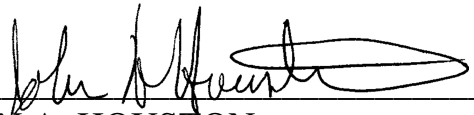
1 signs advertising independent doctors of optometry. The TAC does not set forth any
2 allegations showing a transaction or contractual agreement between Plaintiff and
3 Defendant Target. Additionally, there are no facts to support a fiduciary relationship
4 between Plaintiff and Target. The control over the optometrists' practices provided by the
5 leases, which Plaintiff alleges included setting the optometrist's office hours, requiring the
6 optometrist seek consent to bring in optometric equipment, tracking the volume of eye
7 exams performed and requiring consent for advertising, did not result in Target engaging
8 in the unlicensed practice of medicine. The allegations of the TAC fail to demonstrate
9 Target knowingly undertook the obligations of a fiduciary. *See Apollo Capital Fund, LLC*
10 *v. Roth Capital Partners, LLC*, 158 Cal.App.4th 226, 246, (2007) (Recognizing imposition
11 of a fiduciary obligation requires a person either knowingly undertakes to act on behalf of
12 and for the benefit of another or enters into a relationship which imposes the duty as a
13 matter of law.). Accordingly, the motion is GRANTED as to Plaintiff's claims based upon
14 nondisclosure or omissions.

15 Defendant seeks dismissal with prejudice because, it argues, Plaintiff has not and
16 cannot allege any fiduciary relationship between herself and Target that would support any
17 alleged nondisclosure claim. Plaintiff requests leave to amend. Leave to amend a pleading
18 is generally freely granted and is within the discretion of this Court. *See* FED. R. CIV. P.
19 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *DCD Programs, Ltd. v. Leighton*, 833
20 F.2d 183, 186 (9th Cir. 1987). Moreover, leave to amend should be granted unless the
21 district court "determines that the pleading could not possibly be cured by the allegation of
22 other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Plaintiff failed to allege
23 facts demonstrating a duty to disclose to support their claims based upon a nondisclosure
24 or omission theory despite this Court's prior order and the opportunity to amend to cure
25 the deficiency noted. The Court finds this demonstrates Plaintiffs are unable to allege facts
26 to support their failure to disclose theory. Accordingly, the claims based upon the
27 nondisclosure theory are dismissed without leave to amend.
28

1 **CONCLUSION AND ORDER**

2 Based on the foregoing, IT IS HEREBY ORDERED Defendants' motion to dismiss
3 is **GRANTED in part and DENIED in part**. The motion is **GRANTED** as to Plaintiff's
4 claims based upon nondisclosure or omissions. The claims are **DISMISSED with**
5 **prejudice**. The motion is otherwise **DENIED**.

6 DATED: February 4, 2021

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9 JOHN A. HOUSTON
10 United States District Judge
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