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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

RANDY NUNEZ, on Behalf of Himself  
and All Others Similarly Situated,  
  
Plaintiff,  
  
v.  
  
SAKS INCORPORATED, a Tennessee  
Corporation, and Does 1-50, inclusive,  
  
Defendant.

Case No.: 15cv2717-JAH (WVG)

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS (Doc. No. 38)**

**INTRODUCTION**

Pending before the Court is Defendant Saks Incorporated’s (“Defendant”) motion to dismiss Plaintiff Randy Nunez’s (“Plaintiff”) Third Amended Complaint (“TAC”) for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. No. 38. Defendant also moves to dismiss the complaint for a lack of standing pursuant to rule 12(b)(1). Id. Plaintiff filed an opposition to the motion. Doc. No. 39. After a careful review of the pleadings filed by both parties, the Court **GRANTS** Defendant’s motion to dismiss with prejudice.

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1 **BACKGROUND**

2 Defendant filed a motion to dismiss Plaintiff’s First Amended Complaint (“FAC”) on February 15, 2016. Doc. No. 11. The Court issued an order **GRANTING** Defendant’s motion to dismiss Plaintiff’s FAC.<sup>1</sup> Doc. No. 33. Plaintiff timely filed a Second Amended Complaint (“SAC”) Doc. No. 34. Thereafter, on June 15, 2017, the parties filed a joint motion for leave to file a Third Amended Complaint (“TAC”). Doc. No. 36. The Court granted the joint motion on June 16, 2017. Doc. No. 37. On July 17, 2017, Defendant filed a motion to dismiss Plaintiff’s TAC for failure to state a claim and lack of jurisdiction. Doc. No. 38.

10 **LEGAL STANDARD**

11 **I. Federal Rule of Civil Procedure 12(b)(1)**

12 Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a defendant may seek to dismiss a complaint for lack of jurisdiction over the subject matter. The federal court is one of limited jurisdiction. See Gould v. Mutual Life Ins. Co. v. New York, 790 F.2d 769, 774 (9th Cir. 1986). As such, it cannot reach the merits of any dispute until it confirms its own subject matter jurisdiction. See Steel Co. v. Citizens for a Better Environ., 523 U.S. 83, 95 (1998). When considering a Rule 12(b)(1) motion to dismiss, the district court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. See Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). In such circumstances, “[n]o presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” Id. (quoting Thornhill Publishing Co. v. General Telephone & Electronic Corp., 594 F.2d 730, 733 (9th Cir. 1979)). Plaintiff, as the party seeking to invoke jurisdiction, has the burden of establishing

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28 <sup>1</sup> The Court addressed the case’s prior procedural history in its order granting Defendant’s motion to dismiss Plaintiff’s FAC. Doc. No. 33.

1 that jurisdiction exists. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377  
2 (1994).

3 **i. Standing**

4 A federal court’s judicial power is limited to “cases” or “controversies.” U.S. Const.,  
5 Art. III § 2. A necessary element of Article III’s “case” or “controversy” requirement is  
6 that a litigant must have “‘standing’ to challenge the action sought to be adjudicated in the  
7 lawsuit.” Valley Forge College v. Americans United for Separation of Church and State,  
8 Inc., 454 U.S. 464, 471 (1982); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1152 (9th Cir. 2000).

9 The “irreducible constitutional minimum” of Article III standing has three elements.  
10 LSO, 205 F.3d at 1152 (internal quotations omitted). First, plaintiff must have suffered  
11 “an injury in fact — an invasion of a legally protected interest which is (a) concrete and  
12 particularized, and (b) actual and imminent, not conjectural or hypothetical.” Lujan v.  
13 Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal citations and quotations omitted).  
14 Second, plaintiff must show a causal connection between the injury and the conduct  
15 complained of; i.e., “the injury has to be fairly . . . trace[able] to the challenged action of  
16 the defendant, and not . . . th[e] result [of] the independent action of some third party not  
17 before the court.” Id. (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426  
18 U.S. 26, 41-42 (1976))(alterations in original). Third, it must be “likely,” and not merely  
19 “speculative,” that the plaintiff’s injury will be redressed by a favorable decision. Id. at  
20 561. If the Court finds plaintiff lacks Article III standing, it must dismiss plaintiff’s claim  
21 for lack of subject matter jurisdiction under Rule 12(b)(1). Nichols v. Brown, 859 F. Supp.  
22 2d 1118. 1127 (C.D. Cal. 2012).

23 **II. Federal Rule of Civil Procedure 12(b)(6)**

24 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.  
25 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule  
26 12(b)(6) where the complaint lacks a cognizable legal theory or fails to allege sufficient  
27 facts to support a cognizable legal theory. Li v. Kerry, 710 F.3d 995, 999 (9th Cir. 2013).  
28 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,

1 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,  
2 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570  
3 (2007)). A claim is facially plausible when the factual allegations permit “the court to draw  
4 the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal,  
5 556 U.S. at 678. In other words, “the non-conclusory ‘factual content,’ and reasonable  
6 inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff  
7 to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (citing Iqbal, 556  
8 U.S. at 678). “Determining whether a complaint states a plausible claim for relief will . . .  
9 be a context-specific task that requires the reviewing court to draw on its judicial  
10 experience and common sense.” Iqbal, 556 U.S. at 679.

11 In reviewing a motion to dismiss under Rule 12(b)(6), a court must assume the truth  
12 of all factual allegations and construe the factual allegations in the light most favorable to  
13 the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996).  
14 However, legal conclusions need not be taken as true merely because they are “cast in the  
15 form of factual allegations.” Ileto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). “Nor  
16 does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual  
17 enhancement.’” Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 557). The court may  
18 consider facts alleged in the complaint, documents attached to the complaint, documents  
19 relied upon but not attached to the complaint when authenticity is not contested, and  
20 matters of which the court takes judicial notice. Lee v. City of Los Angeles, 250 F.3d 668,  
21 688–89 (9th Cir. 2001). If a court determines that a complaint fails to state a claim, the  
22 court should grant leave to amend unless it determines that the pleading could not possibly  
23 be cured by the allegation of other facts. Doe v. United States, 58 F.3d 494, 497 (9th Cir.  
24 1995).

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1 **III. Federal Rule of Civil Procedure 9(b)**

2 Under Rule 9(b) of the Federal Rules of Civil Procedure, “[i]n alleging fraud or  
3 mistake, a party must state with particularity the circumstances constituting fraud or  
4 mistake.” Under Ninth Circuit case law, Rule 9(b) imposes two distinct requirements on  
5 complaints alleging fraud. First, the basic notice requirements of Rule 9(b) require  
6 complaints pleading fraud to “state precisely the time, place, and nature of the misleading  
7 statements, misrepresentations, and specific acts of fraud.” Kaplan v. Rose, 49 F.3d 1363,  
8 1370 (9th Cir. 1994); see also Vess v. Ciba-Geigy Corp., U.S.A., 317 F.3d 1097, 1106 (9th  
9 Cir. 2003) (citation omitted) (stating that a plaintiff must set forth the “who, what, when,  
10 where and how” of the alleged misconduct). Second, Rule 9(b) requires that the complaint  
11 “set forth an explanation as to why the statement or omission complained of was false or  
12 misleading.” Yourish v. California Amplifier, 191 F.3d 983, 993 (9th Cir. 1999) (citation  
13 and quotation omitted).

14 **DISCUSSION**

15 The Court addresses whether Plaintiff has standing to assert his claims against  
16 Defendant and whether Plaintiff has properly plead his allegations under the heightened  
17 standard of Federal Rule of Civil Procedure 9(b).<sup>2</sup>

18 **I. Standing**

19 Defendant argues Plaintiff lacks standing to assert claims for products he did not  
20 purchase and representations he did not rely on. Doc. No. 38-1 at pgs. 11-13. Defendant  
21 also argues Plaintiff lacks standing for injunctive relief because Plaintiff does not face  
22 imminent or future harm. Doc. No. 38-1 at pgs. 13-14.

23 As previously stated in the Court’s order granting Defendant’s motion to dismiss  
24 Plaintiff’s FAC, a necessary element of Article III’s “case” or “controversy” requirement  
25 is that a litigant must have “standing” to challenge the action sought to be adjudicated in  
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28 <sup>2</sup> Because the Court finds that Plaintiff lacks standing and has failed to plead his TAC with the  
particularity required by Rule 9(b), the Court will not address the balance of Defendant’s motions.

1 the lawsuit.” Valley Forge Christian College v. Americans United for Separation of  
2 Church and State, Inc., 454 U.S. 464, 471 (1982); LSO, 205 F.3d 1146, 1152 (9th Cir.  
3 2000). To satisfy the standing requirement, both the UCL and the CLRA require a plaintiff  
4 to allege they have suffered economic injury and that the economic injury was caused by  
5 the unfair business practice or false advertising that is the mainstay of the claim. See  
6 Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 321 (2011); Stearns v. Ticketmaster  
7 Corp., 655 F.3d 1013 (9th Cir. 2011).

8 Defendant argues that Plaintiff’s allegations remain unchanged and are overbroad.  
9 Doc. No. 38-1 at pg. 11. Defendant argues that plaintiffs in a putative class action do not  
10 have standing under Article III to assert claims for items they did not purchase. Id. at pgs.  
11 11-12. Defendant also argues that numerous district courts in the Ninth Circuit now  
12 implement a bright line rule where the named plaintiff of a putative class action “cannot  
13 expand the scope of his claims to include a product he did not purchase or advertisements  
14 relating to a product that he did not rely upon.” See Id.; see also Johns v. Bayer Corp., No.  
15 09CV1935DMSJMA, 2010 WL 476688 (S.D. Cal. Feb. 9, 2010); Granfield v. NVIDIA  
16 Corp., No. C 11-05403 JW, 2012 WL 2847575 (N.D. Cal. July 11, 2012); Hairston v. S.  
17 Beach Beverage Co., No. CV 12-1429-JFW DTBX, 2012 WL 1893818 (C.D. Cal. May  
18 18, 2012).

19 Plaintiff reiterates that he purchased a pair of black penny slip-on shoes from  
20 Defendant. Doc. No. 36-2 at pg. 7. Plaintiff narrows the scope of his allegations by arguing  
21 that deceptive practices occurred only at Saks Off Fifth outlet stores, but still attempts to  
22 represent all “similarly situated” individuals who purchased a Saks Fifth Avenue labeled  
23 product from OFF 5TH locations in California after being exposed to material from Saks’s  
24 marketing campaigns. Id. at pg. 3; Id. pgs. 15-18. Defendant argues that Plaintiff still  
25 seeks to represent individuals regardless of the similarity of items purchased, a factor  
26 previously deemed important by the Court, and thus still does not have standing. Id. at  
27 pgs. 11-14. Defendant maintains that Plaintiff does not properly plead what advertisements  
28 are allegedly misleading. Id. In the TAC, Plaintiff adds arguments that purport to show

1 the different markdowns of Saks shoes at two Saks Off Fifth locations in San Diego  
2 County. Id. Otherwise, however, Plaintiff argues the same allegations already addressed  
3 in the Court’s order granting Defendant’s motion to dismiss FAC. Doc. No. 36-2.

4 This Court finds Plaintiff lacks standing to assert a claim of putative class  
5 representation in the instant matter. While the standard for reviewing standing at the  
6 pleading stage is lenient, the Court reiterates that a plaintiff cannot rely solely on  
7 conclusory allegations of injury or ask the court to draw unwarranted inferences in order  
8 to find standing. See Schmeir v. U.S. Ct. of Appeals for the Ninth Cir., 279 F.3d 817, 820  
9 (9th Cir. 2001). The Court finds that Plaintiff’s TAC did not remedy the deficiencies of  
10 the FAC.

## 11 **II. Plaintiff Claims Fail under the Rule 9(b) Standard**

12 Defendant argues Plaintiff’s claims fail because Plaintiff does not plead his claims  
13 with the specificity required under Rule 9(b). Doc. No. 38-1 at pgs. 15-22. Claims  
14 grounded in fraud must set forth allegations “specific enough to give defendants notice of  
15 the particular misconduct . . . so that they can defend against the charge and not just deny  
16 that they have done anything wrong.” See Vess v. Ciba-Geigy Corp. USA, 317 F.3d  
17 1097, 1103–04, 1108 (9th Cir. 2003) (applying Rule 9(b) when the allegations in the  
18 complaint described fraudulent conduct); In re Sony Gaming Networks & Customer Data  
19 Sec. Breach Litig., 903 F. Supp. 2d 942, 967, n. 20 (S.D. Cal. 2012) (“Rule 9(b)’s  
20 heightened pleading standards apply equally to claims for violation of the UCL . . . that  
21 are grounded in fraud”). As noted above, under Rule 9(b) of the Federal Rules of Civil  
22 Procedure, “[i]n alleging fraud or mistake, a party must state with particularity the  
23 circumstances constituting fraud or mistake.” This requires allegations of fraud to  
24 include the “who, what, when, where, and how” of the circumstances giving rise to the  
25 claim. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997) (citation omitted).

26 Defendant maintains Plaintiff’s complaint pleads generally vague and conclusory  
27 allegations, which fail to identify the “who, what, when, where and how” of Defendant’s  
28 misconduct. Doc. No. 38-1 at pg. 21. Defendant argues Plaintiff has failed to allege how

1 Defendant’s pricing was false or misleading. Doc. No. 38-1 at pgs. 16-20. Plaintiff still  
2 does not note the specific content of the allegedly misleading advertising and marketing  
3 he viewed, which specific representations were false, or which information was omitted  
4 from the representations provided. Doc. No. 38-1.

5 Plaintiff maintains the allegations detail that Defendant fraudulently misrepresented  
6 and concealed information about its merchandise, which allegedly caused subsequent  
7 damages to Plaintiff and to the class. Doc. No. 36-2 at pgs. 8-18. Plaintiff posits the  
8 allegations describe the product he purchased, when and where he purchased the product,  
9 and how he was misled by the product. Id. at pgs. 7-10. Plaintiff contends he relied on the  
10 shoes’ label that indicated he was saving forty-four percent of the market price, and that  
11 the label prompted him to buy the shoes. Id. at pg. 7.

12 In reply, Defendant maintains that Plaintiff fails to identify a misrepresentation and  
13 that Plaintiff fails to identify how Defendant’s advertisement was false. Doc. No. 38-1 at  
14 pgs. 16-20. Defendant argues that Plaintiff fails to plead with specificity what product he  
15 purchased. Id. at pgs. 20-22. Defendant posits Plaintiff lacks standing and should not be  
16 given injunctive relief because Plaintiff does not face any imminent harm. Id. at pgs. 11-  
17 14.

18 The Court finds Plaintiff fails to sufficiently allege the “who, what, where, how and  
19 why” of Defendant’s misconduct to sufficiently give notice so that Defendant may  
20 adequately defend against the allegations. The pleadings do not allege with specificity how  
21 Defendant misrepresented its prices, nor do the pleadings provide specific examples in  
22 which Defendant has misrepresented its prices and fraudulently advertised its pricing.  
23 Thus, the Court finds that Plaintiff’s TAC did not remedy deficiencies from the FAC that  
24 would demonstrate Plaintiff plead with particularity under the 9(b) heightened standard.

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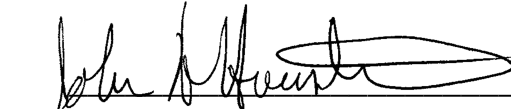


1 **CONCLUSION AND ORDER**

2 Based on the foregoing reasons, **IT IS HEREBY ORDERED THAT** Defendant's  
3 motion to dismiss Plaintiff's TAC (Doc. No. 38) is **GRANTED**, and Plaintiff's claims  
4 are **DISMISSED WITH PREJUDICE**.

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6 **IT IS SO ORDERED.**

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8 DATED: November 28, 2017

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11 JOHN A. HOUSTON  
12 United States District Judge  
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