UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MONICA RAEL, on behalf of herself and others similarly situated,

Plaintiff,

v.

NEW YORK & COMPANY, INC., *et al.*,

Defendants.

Case No. 16-cv-369-BAS(JMA)

ORDER:

(1) DENYING DEFENDANTS' MOTION TO DISMISS; AND

(2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STRIKE

[ECF No. 25]

On December 28, 2016, this Court granted Defendants' Motion to Dismiss the Second Amended Complaint with leave to amend the first through the third counts, finding that Plaintiff failed to allege sufficient facts to support her fraud allegations under Rule 9(b). (ECF No. 21.) Plaintiff has now filed a Third Amended Complaint ("TAC") (ECF No. 22), and Defendants once again move to dismiss or strike allegations. (ECF No. 25.) For the reasons stated below the Court **DENIES** the Motion to Dismiss, and **GRANTS IN PART** and **DENIES IN PART** the Motion to Strike.

I. STATEMENT OF FACTS[1]

Defendants sell clothing, accessories and fashion apparel at their retail stores, outlet stores and on-line stores. Plaintiff seeks to represent a class of individuals who were allegedly misled by Defendants' "false and misleading advertisement of 'regular' prices, and corresponding 'savings'" at their retail and outlet stores.[2]

Plaintiff claims that on or around November 24, 2015, she bought a pair of women's shoes at Defendants' retail store located at Westfield Mission Valley in San Diego. (TAC ¶ 14.) She was persuaded to buy the shoes by "a large, red, rectangular sign" that "advertised that all of the shoes in the store were 70% off." (*Id.*) The shoes she purchased had a price tag announcing a "regular" price of $49.95, and she was able to purchase them for $16.17. (*Id.*)

Plaintiff claims the shoes "had not been sold in any New York & Company retail store . . . at the regular price of $49.95 in the 90 days preceding her purchase. The shoes Ms. Rael purchased had been continuously, substantially discounted for at least several months according to Plaintiff's counsel's investigation, and possibly longer." (TAC ¶ 15.) As support for these assertions, Plaintiff's counsel indicates that he had investigators enter the New York & Co. retail stores "to record the prices of the ['regular' prices and the] corresponding discounts of products offered for sale." (*Id.* ¶¶ 27, 32.) Plaintiff concluded that "the retail stores frequently and continuously discounted all items offered for sale from the 'regular price.'" (*Id.* ¶ 33.) Plaintiff attaches to the TAC, as Exhibit E, "examples" "of the products Plaintiff's

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[1] The Court **GRANTS** Defendants' request to take judicial notice of the prior unpublished court opinions. (ECF No. 25-3.) Although not precedential, the reasoning is useful. The Court **DENIES** Defendants' request to take judicial notice of signs allegedly posted in Defendants' Westfield Mission Valley store on November 24, 2015. These signs are neither proper considerations for judicial notice nor appropriate for consideration in a Motion to Dismiss. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (courts may not usually consider material outside the complaint when ruling on a motion to dismiss).

[2] Although at oral argument, Plaintiff's counsel also claimed to be representing a class of individuals allegedly misled by their purchases at the on-line stores, in fact, the TAC does not include this claim. (*See* TAC ¶ 10.)

investigated and determined to be continuously discounted from their 'regular price' for 90 or more days in the retail stores[.]" (*Id.* ¶ 33.) Plaintiff claims she would not have purchased the shoes without Defendants' allegedly misrepresentation of the discount. (*Id.* ¶ 16.)

Additionally, Plaintiff alleges that "when a product is discounted online, it is usually simultaneously discounted in Defendants' retail stores." (TAC ¶ 31.) And items that were advertised on Defendants' website as "discounted" were also continuously offered at this discounted price in the 90 days preceding Ms. Rael's purchase. (*Id.* ¶ 35.)

Plaintiff alleges this was part of a continuous scheme where "Defendants would offer substantial continual discounts from their 'regular,' (i.e. the price listed on the original price tag) prices. Defendants' regular prices in their retail stores were false and misleading because their 'regular' prices were either never offered to the general public, or they were offered for an inconsequential period of time and then continuously discounted." (TAC ¶ 2.) Plaintiff claims this scheme "present[s] a continuous threat that members of the public will be deceived into purchasing products based on price comparisons of arbitrary and inflated 'regular' prices to 'sale' prices that created merely phantom markdowns and lead to financial damages for consumers like plaintiff." (*Id.* ¶ 74.)

Plaintiff also alleges Defendants made misrepresentations in their outlet stores by: (1) suggesting that merchandise sold in the outlet stores was discounted from their retail store, when in fact "Defendants manufacture and sell a completely different line of clothing in their outlet stores than those sold in their retail stores"; and (2) listing an "OUR PRICE" regular price suggesting that the item was sold at this price in their retail stores when it was not. (TAC ¶¶ 3, 5, 29, 33, 38-41.) Despite being given the opportunity to amend, Plaintiff does not allege that she ever shopped at the outlet stores, saw the "OUR PRICE" misrepresentation, or ever shopped or saw any merchandise on the NY&C website.

II. ANALYSIS

A. Motion to Dismiss

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept all factual allegations pleaded in the complaint as true and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

Claims brought pursuant to California's Unfair Competition Laws ("UCL"), False Advertising Laws ("FAL"), or Consumer Legal Remedies Act ("CLRA") are subject to the heightened pleading requirements of Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *see also* Fed. R. Civ. P. 9(b). To satisfy the particularity requirement of Rule 9(b), "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). Plaintiffs must plead enough facts to give defendants notice of the time, place, and nature of the alleged fraud, together with an explanation of the statement and why it was false or misleading. *See id.* at 1107. The circumstances constituting the alleged fraud must "be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* at 1106 (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (internal quotation marks omitted).

Rule 9(b) requirements may be relaxed as to matters that are exclusively within the opposing party's knowledge. *Rubenstein v. Neiman Marcus Grp., LLC*, — F. App'x. —, 2017 WL 1381147, at *2 (9th Cir. Apr. 18, 2017) (citing *Moore v. Kayport Packaging Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). "In those cases, a 'pleading is sufficient under Rule 9(b) if it identified the circumstances constituting

fraud so that a Defendant can prepare an adequate answer from the allegations.'"[3] *Id.* (quoting *Moore*, 885 F.2d at 540).

Defendants argue this Court should dismiss the TAC because: (1) Plaintiff does not and cannot adequately allege any facts to show that the prevailing price for the shoes was not $49.95 and thus the TAC does not comply with Rule 9(b); (2) Plaintiff fails to describe the allegedly deceptive advertisements with particularity; and (3) Plaintiff fails to allege sufficient facts to meet either the unfair or unlawful prong of the UCL.

1. Rule 9(b)

Defendants argue that Plaintiff still fails to allege sufficient facts of fraud because she does not describe the allegedly false statement with sufficient particularity and she fails to offer sufficient proof of falsity. First, the TAC adds sufficient detail about the false statements Plaintiff allegedly saw. She claims she was persuaded to purchase women's shoes at a retail store located at Westfield Mission Valley in San Diego by "a large, red, rectangular sign" that "advertised that all of the shoes in the store were 70% off." (TAC ¶ 14.) The shoes she purchased had a price tag announcing a "regular" price of $49.95, and she was able to purchase them for

[3] Plaintiff files three Notices of Supplemental Authority. (ECF Nos. 28, 31, 32.) All were decided after Plaintiff filed her Response in Opposition to the Motion to Dismiss. Defendants object to the Notice referencing *Rubenstein* (ECF No. 28), accurately pointing out that Plaintiff's notice includes argument on this authority without leave of the Court and without fair opportunity for rebuttal. (ECF No. 29.) The Court agrees. Plaintiff's Notice violates this Court's chambers rules which specifically direct that any supplemental authority "may not include any argument in the notice." (Standing Order for Civil Cases § 4F.) However, the Court held oral argument and both parties were given an opportunity to address the relevance of *Rubenstein*.

Additionally, Defendants object that the case is unpublished and, therefore, non-precedential. Once again, the Court agrees but points out that the conclusions in *Rubenstein* are not novel and have been applied in differing factual scenarios. *See, e.g.*, *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987), *overruled on other grounds Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1575 (9th Cir. 1990) (en banc) (allegations may pass Rule 9(b) muster if the matters are "peculiarly within the opposing party's knowledge" and "the allegations are accompanied by a statement of the facts upon which the belief is founded."). Therefore, Defendants' objections are overruled.

$16.17. (*Id.*) She attaches photographs of signs that were similar to the sign and price tag she saw. Although Defendants claim her statements are contradictory, at this stage of the proceedings she has adequately alleged that who, what, when and where of the alleged fraud.

Defendants next claim that Plaintiff inadequately alleges the "how" because she provides inadequate support for her claim that the shoes regularly were not $49.95. District courts have reached different conclusions regarding the amount of detail required in such a claim. *Compare, e.g.*, *Dennis v. Ralph Lauren*, No. 16-cv-1056 WQH-BGS, 2016 WL 7387356, at *4 (S.D. Cal. Dec. 20, 2016) (granting motion to dismiss because "plaintiff does not allege facts to support an inference that the 'original or market' prices allegedly advertised by defendant are false"); *Rael v. Dooney & Bourke*, No. 16-cv-0371 JM (DHB), 2016 WL 3952219 (S.D. Cal. July 22, 2016) (granting motion to dismiss because plaintiff alleges no facts to illustrate why original price of purchased handbag was false or misleading); *with Branca v. Nordstrom, Inc.*, No. 14-cv-2062 MMA (JMA), 2015 WL 10436858, at *7 (S.D. Cal. Oct. 9, 2015) (denying motion to dismiss because "[p]laintiff alleges *why* the 'Compare At' prices are false as former prices—because they necessarily cannot be former prices or prevailing market prices, as the items were never sold elsewhere for any other price besides the Nordstrom Rack retail price"); *Stathakos v. Columbia Sportswear Co.*, No. 15-cv-45430-YGR, 2016 WL 1730001, at *4 (N.D. Cal. May 2, 2016) (denying motion to dismiss because plaintiffs allege what they bought, where, when, what the price was, what the price was represented to be, and they need not allege more); *Knapp v. Art.com, Inc.*, No. 16-cv-768-WHO, 2016 WL 3268995 (N.D. Cal. June 15, 2016) (denying motion to dismiss because plaintiff alleges that defendant's representation that the item was on sale was false because it offered "perpetual sales"); *Chester v. TJX Companies, Inc.*, No. 5:15-cv-1437-CDW (DTE), 2016 WL 4414768 (C.D. Cal. Aug. 18, 2016) (denying motion to dismiss because question of whether advertisers actions are deceptive is usually not a proper decision

at the pleading stage); *Horosny v. Burlington Coat Factor of Cal., LLC*, No. CV-15-5005 SJO (MRWx), 2015 WL 12532178 (C.D. Cal. Oct. 26, 2015) (same).

In this case, with respect to the shoes Plaintiff allegedly purchased in reliance on a 70% off representation, Plaintiff alleges the shoes "had not been sold in any New York & Company retail store . . . at the regular price of $49.95 in the 90 days preceding her purchase. The shoes Mr. Rael purchased had been continuously, substantially discounted for at least several months according to Plaintiff's counsel's investigation, and possible longer." (TAC ¶ 15.) For purposes of this motion, the Court must assume these allegations are true. *Cahill*, 80 F.3d at 337-38. With respect to the class allegations, Plaintiff attaches to the TAC, as Exhibit E, "examples" "of the products Plaintiff investigated and determined to be continuously discounted from their 'regular price' for 90 or more days in the retail stores[.]" (TAC ¶ 33.) Exhibit E lists the date, the store, and the product that was investigated. The Court finds this is sufficient. It gives Defendants notice as to the basis for Plaintiff's claim that the 70% off representation was false, and the information about the discounts offered by Defendants is primarily within the Defendants' knowledge. *See Rubenstein*, 2017 WL 1381147, at *2 (citing *Moore*, 885 F.2d at 540). Therefore, at this stage of the proceedings, the Court finds Plaintiff's representations are sufficient to satisfy Rule 9(b).

2. UCL

California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, prohibits business acts or practices that are "unlawful," "unfair," or "fraudulent." *Id.* § 17200. Each of these three prongs constitutes a separate and independent cause of action. *See Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Defendants argue the Court should dismiss the unlawful and unfair prongs of the UCL claim.

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a. Unlawful Prong

The UCL's "unlawful" prong is essentially an incorporate-by-reference provision. *See Cel-Tech*, 20 Cal. 4th at 180 ("By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the [UCL] makes independently actionable."). "Violation of almost any federal, state, or local law may serve as the basis for a[n] [unfair competition] claim." *Plaxcencia v. Lending 1st Mortg.*, 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008) (citing *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994)). A violation of the FAL's prohibition on unfair advertising can form the basis of a UCL "unlawful" prong claim. *See Chester*, 2014 WL 4414768, at *9 (citing *Williams v. Gerber Prods., Co.*, 552 F.3d 934, 938 (9th Cir. 2008)). "When a statutory claim fails, a derivative UCL claim also fails." *Aleksick v. 7-Eleven*, 205 Cal. App. 4th 1176, 1185 (2012).

Because the Court finds Plaintiff adequately alleges a violation of the FAL and the CLRA, Plaintiff also adequately alleges a violation of the UCL "unlawful" prong.

b. Unfair Prong

Under the UCL, the California Supreme Court has defined the word "unfair" to mean conduct that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech*, 20 Cal. 4th at 187. Thus, a plaintiff generally must show that a defendant's conduct violated the spirit of anti-trust laws, "such as horizontal price fixing, exclusive dealing, or monopolization." *Celebrity Chefs Tour, LLC v. Macy's Inc.*, 16 F. Supp. 3d 1123, 1140 (S.D. Cal. 2014).

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Since the issuance of *Cel-Tech*, however, lower courts have struggled to apply these rules in the context of consumer cases. *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394 (2006). Although the Courts are directed not to apply their own purely subjective notions of unfairness, the definition remains elusive. In *Camacho*, the appellate court adopted a three-prong standard, requiring plaintiffs to show that: (1) the consumer injury was substantial; (2) the injury was not outweighed by a countervailing benefit to consumers or competition; and (3) the injury was not one consumers could reasonably have avoided. *Id.* at 1403.

At this stage of the proceedings the Court finds Plaintiff's allegations that Defendants' false sales substantially injured consumers by inducing them to buy products they would not otherwise have purchased (TAC ¶¶ 16, 74) is sufficient to meet the "unfair" prong as defined in *Camacho*.

B. Motion to Strike

Federal Rules of Civil Procedure, Rule 12(f) authorizes a court to strike from a pleading any matter that is "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). "The function of a motion to strike 'is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.'" *Knapp v. Art.com, Inc.*, No. 16-cv-768, 2016 WL 3268995, at *3 (N.D. Cal. June 15, 2016) (quoting *Sidney-Vinstein v. A.H. Robins, Co.*, 697 F.2d 880, 885 (9th Cir. 1983)). "Such motions are generally disfavored and 'should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation.'" *Id.* (quoting *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004).

Defendants request this Court to strike allegations concerning: (1) a nationwide, as opposed to a California-only class; (2) on-line purchasers; (3) outlet store practices; and (4) non-clearance items. Most of these issues are not appropriate subjects of a motion to strike and are more appropriately addressed at the time class

certification is sought. For example, although Defendants are correct that Plaintiff cannot sue on behalf of individuals who purchased items in reliance on similar signs in stores outside of California, she may be able to represent non-residents who made the purchases in California stores. Thus, striking reference to a nationwide class is inappropriate. Similarly, whether or not class members should include those who purchased non-clearance items is an issue that can be deferred until the time of class certification.

However, the Court does agree that all references to outlet store or website practices are redundant and impertinent in this case. Plaintiff does not allege she shopped in a New York & Co. outlet store. She does not claim she was ever exposed to the "OUR PRICE" scheme detailed in the TAC. The schemes, as alleged in the TAC, are different between the outlet and retail stores. The allegations that the outlet stores were misrepresenting that the items in the store came from and were discounted from the retail stores is not the same as the allegations made against the retail stores. Because they are different schemes, and Plaintiff was not exposed to the outlet store scheme, she cannot bootstrap the outlet store allegations to her claim to make it bigger or better.

Similarly, Plaintiff does not allege she ever saw or shopped online, nor does she assert class claims on behalf of individuals who did shop on-line. (*See* TAC ¶ 10.) Yet she uses the allegations from the Way-back machine to bolster her claims of false discounts in the retail stores. (TAC ¶¶ 31, 35.) The Court, therefore, **GRANTS** the Motion to Strike to the extent it moves to strike references to the outlet stores, the "OUR PRICE" scheme, or discounts on the website.

III. CONCLUSION & ORDER

For the reasons listed above, the Court **DENIES** Defendants' Motion to Dismiss, and **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion to Strike. (ECF No. 25.) With respect to the latter, the Court specifically strikes

paragraphs 3, 5, 6, 7, 29, 31, 33, 35, 38, 39, 40, 41 from the TAC, as well as all references to "outlet store(s)," "OUR PRICE" prices, or Defendants' website. In all other respects, the Court **DENIES** the Motion to Strike.

IT IS SO ORDERED.

DATED: July 17, 2017