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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRYON STAFFORD, Individually and
on Behalf of All Others Similarly
Situated,

Plaintiff,

v.

RITE AID CORPORATION,

Defendant.

Case No.: 17-cv-01340-AJB-JLB

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS
PLAINTIFF’S FIRST AMENDED
COMPLAINT**

(Doc. No. 19)

Pending before the Court is Defendant Rite Aid Corporation’s (“Defendant”) motion to dismiss Plaintiff Bryon Stafford’s (“Plaintiff”) first amended complaint (“FAC”). (Doc. No. 19.) Plaintiff opposes the motion. (Doc. No. 24.) Pursuant to Civil Local Rule 7.1.d.1, the Court found this matter suitable for determination on the papers and without oral argument. For the reasons set forth more fully below, the Court **GRANTS** Defendant’s motion to dismiss.

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1 **I. BACKGROUND¹**

2 The gravamen of Plaintiff’s operative complaint is that Defendant charges a
3 copayment that exceeds its “usual and customary” price for generic drugs. (Doc. No. 18 ¶¶
4 7, 8.) Thus, Defendant purportedly engages in the illegal practice of overcharging
5 customers enrolled in public or private health care plans for generic prescription drugs by
6 submitting to third-party payors claims for payment at prices that Defendant knowingly
7 and intentionally inflates. (*Id.* ¶ 8.) As a result, customers like Plaintiff, who purchase
8 generic prescription drugs through third-party plans, pay copayments that are drastically
9 more than Defendant’s “usual and customary” prices for the same drugs. (*Id.*)

10 A. Prescription Drug Payment Process

11 In the United States, patients have a public or private health care plan that covers all
12 or a portion of their medical pharmaceutical expenses, also known as a third-party payor.
13 (*Id.* ¶ 21.) The portion that is not covered by the third-party payor is then paid by the patient
14 out-of-pocket, which includes copayments. (*Id.*)

15 The National Council for Prescription Drug Programs (“NCPDP”) provides a
16 standardized form for Defendant and pharmacies like Defendant to fill out and send to
17 third-party payors when filling prescriptions. (*Id.* ¶ 25.) This form includes the
18 Transmission Pricing Record Field No. 426-DQ, where Defendant is required to report its
19 “usual and customary” price of the prescription being filled. (*Id.*) According to the NCPDP
20 Reference Manual on Flat File format the term “usual and customary” is defined as the
21 “[a]mount charged cash customers for the prescription exclusive of sales tax or other
22 amounts claimed.” (*Id.*) The California Welfare and Institutions Code section 14105.455
23 similarly defines “usual and customary” as the “lesser of either the lowest price reimbursed
24 to the pharmacy by other third-party payors in California or the lowest price routinely
25

26
27 ¹ The following facts are taken from Plaintiff’s complaint and are accepted as true by the
28 Court for the purpose of resolving this motion. *See Vasquez v. L.A. Cty.*, 487 F.3d 1246,
1249 (9th Cir. 2007).

1 offered to any segment of the general public.” (*Id.*)

2 Defendant charges the customer the copayment at the time the customer makes the
3 purchase. (*Id.* ¶ 24.) In general, the copayment cannot exceed Defendant’s “usual and
4 customary” price for the drug. (*Id.* ¶ 27.) After the copayment amount is paid by the
5 customer, the remainder of the drug price is reimbursed to Defendant by the third-party
6 payor. (*Id.*) In some situations however, the copayment may only be charged as a
7 percentage of the “usual and customary” price. (*Id.* ¶ 28.) Plaintiff contends that Defendant
8 is well aware of both the definition of usual and customary and how the usual and
9 customary price of a particular prescription drug is ascertained. (*Id.* ¶ 29.)

10 B. Background on Plaintiff’s Allegation that Defendant Inflates its Usual and
11 Customary Price

12 Plaintiff is a citizen of San Diego who purchases prescription generic drugs from
13 Defendant’s pharmacies located in California. (*Id.* ¶ 17.) To purchase these generic drugs,
14 Plaintiff uses his private health insurance. (*Id.*) Defendant operates a chain of retail
15 drugstores that sells prescriptions drugs, over-the-counter medications, as well as
16 household items, food, and beverages. (*Id.* ¶ 19.)

17 Beginning in 2006, “big box” retailers with pharmacy departments began offering
18 various generic prescription drugs at significantly reduced prices. (*Id.* ¶ 31.) In response to
19 these drastic reductions, Plaintiff contends that Defendant decided to also reduce the prices
20 of many of its prescription generic drugs through its discount drug program titled Rx
21 Savings Program (“RSP”). (*Id.* ¶ 33.) Defendant’s RSP program allows cash-paying
22 customers to purchase their prescription generic drugs for a discounted price—\$9.99 for a
23 thirty-day prescription and \$15.99 for a ninety-day prescription, with some limited
24 exceptions. (*Id.*)

25 Defendant’s RSP is not a special, limited, or one-time offer. (*Id.* ¶ 34.) Instead,
26 Defendant continuously offers the RSP for multiple benefit years. (*Id.*) Moreover, any
27 cash-paying customer can join the RSP and avail themselves of the discounted prices. (*Id.*)

28 Beginning in late 2008, and continuing to the present, Plaintiff alleges that

1 Defendant reports to its third-party payors an artificially inflated “usual and customary”
2 price for the same prescription drugs that Defendant also offers for lower prices under its
3 RSP program. (*Id.* ¶ 51.) Thus, Plaintiff contends that as a customer of Defendant’s
4 pharmacies, he pays false and inflated copayments for prescription generic drugs. (*Id.*) This
5 scheme that Defendant employs is allegedly made possible because third-party payors are
6 not informed of the prices Defendant charges its cash-paying customers, including those
7 using the RSP to purchase generic prescription drugs. (*Id.* ¶ 49.) In fact, Plaintiff argues
8 that the third-party payors have no way of determining on their own whether the price
9 Defendant submits as its “usual and customary” price is actually the price offered to its
10 cash-paying members. (*Id.*) Thus, by purportedly failing to report the more common RSP
11 prices as its “usual and customary” prices, Defendant continues to report prices that are
12 significantly higher than the prices it offers to the general public. (*Id.* ¶ 50.)

13 Plaintiff filed his initial complaint on June 30, 2017. (Doc. No. 1.) Thereafter, on
14 July 28, 2017, pursuant to the joint motion granted by the Court, Plaintiff filed an amended
15 complaint. (Doc. Nos. 15, 16, 18.) Plaintiff alleges causes of action for violation of (1)
16 Unfair Competition law (“UCL”) against Defendant on behalf of the subclass; (2)
17 California Consumer Legal Remedies Act (“CLRA”) against Defendant on behalf of the
18 subclass; (3) Unjust Enrichment against Defendant on behalf of the class and subclass; and
19 (4) Negligent Misrepresentation against Defendant on behalf of the class and the subclass.
20 (*See generally* Doc. No. 18.) In his prayer for relief, Plaintiff requests the Court certify his
21 action as a class action, award compensatory, consequential, and general damages, grant
22 permanent injunctive relief, and award statutory treble, punitive, or exemplary damages
23 among other things. (*Id.* at 27.)

24 **II. LEGAL STANDARD**

25 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings
26 and allows a court to dismiss a complaint upon a finding that the plaintiff has failed to state
27 a claim upon which relief may be granted. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
28 2001). The court may dismiss a complaint as a matter of law for: “(1) lack of a cognizable

1 legal theory or (2) insufficient facts under a cognizable legal claim.” *SmileCare Dental*
2 *Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted).
3 However, a complaint survives a motion to dismiss if it contains “enough facts to state a
4 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
5 (2007).

6 Notwithstanding this deference, the reviewing court need not accept legal
7 conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for
8 the court to assume “the [plaintiff] can prove facts that [he or she] has not alleged”
9 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S.
10 519, 526 (1983). On the other hand, “[w]hen there are well-pleaded factual allegations, a
11 court should assume their veracity and then determine whether they plausibly give rise to
12 an entitlement to relief.” *Iqbal*, 556 U.S. at 679. The court only reviews the contents of
13 the complaint, accepting all factual allegations as true, and drawing all reasonable
14 inferences in favor of the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th
15 Cir. 2002).

16 **III. DISCUSSION**

17 A. Plaintiff’s Claims are Time-Barred

18 The Court will first analyze whether Plaintiff’s causes of action for UCL, CLRA,
19 unjust enrichment, and negligent misrepresentation are time-barred by their respective
20 statutes of limitations. Defendant argues that each of these claims should be dismissed as
21 they are time-barred. (Doc. No. 19-1 at 31–32.) Plaintiff’s complaint alleges that the statute
22 of limitations should be tolled as Defendant engaged in a secret scheme that did not reveal
23 facts that would have put Plaintiff on notice of Defendant’s allegedly unlawful conduct.
(Doc. No. 18 at 19–20.)

24 The statute of limitations for the foregoing causes of action are as follows (1) UCL—
25 four years, *Beaver v. Tarsadia Hotels*, 29 F. Supp. 3d 1294, 1303 (S.D. Cal. 2014) (citing
26 Cal. Bus. & Prof. Code § 17208), (2) CLRA—three years, Cal. Civ. Code § 1783, (3) unjust
27 enrichment—three years, *In re Maxim Integrated Prod., Inc., Deriv. Lit.*, 574 F. Supp. 2d
28

1 1046, 1072 (N.D. Cal. 2008), and (4) negligent misrepresentation—three years, Cal Civ.
2 Proc. Code § 338(d).

3 To be entitled to equitable tolling of a statute of limitations a litigant must establish
4 two elements: “(1) that he has been pursuing his rights diligently, and (2) that some
5 extraordinary circumstance stood in his way and prevented timely filing.” *Holland v.*
6 *Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks and citation omitted).
7 Generally, equitable tolling applies when there is an “excusable delay” by the plaintiff.
8 *Rodriguez v. JP Morgan Chase & Co.*, 809 F. Supp. 2d 1291, 1298 (S.D. Cal. 2011)
9 (granting a motion to dismiss when the plaintiffs did not allege that they did anything to
10 discover the claims or that something prevented them from investigating during the
11 limitations period). Moreover, a plaintiff seeking equitable tolling must allege “specific
12 facts explaining the failure to learn the basis for the claim within the statutory period.”
13 *Pedersen v. Greenpoint Mortg. Funding, Inc.*, 900 F. Supp. 2d 1071, 1079 (E.D. Cal.
14 2012).

15 Plaintiff alleges that Defendant began reporting an artificially inflated “usual and
16 customary” price to its third-party payors in late 2008. (Doc. No. 18 ¶ 51.) Thus, Plaintiff’s
17 UCL cause of action expired in 2012, and Plaintiff’s CLRA, unjust enrichment, and
18 negligent misrepresentation claims were time-barred in 2011. Plaintiff filed his complaint
19 in 2017, well outside of the statute of limitations for his various claims. (Doc. No. 1.)
20 However, cognizant of this issue, Plaintiff’s complaint devotes an entire section to arguing
21 that his claims should be tolled. (Doc. No. 18 ¶¶ 70–76.)

22 Unfortunately, based on the pleadings, the Court finds that Plaintiff has not made
23 any showing that “extraordinary circumstances” prevented him from filing his claims
24 within the statute of limitations. *Karimian v. Caliber Home Loans Inc.*, No. 2:13-cv-07034-
25 CAS-(FFMx), 2013 WL 5947966, at *4 (C.D. Cal. Nov. 4, 2013). Primarily, the Court
26 takes issue with the various contradictions present in Plaintiff’s complaint that diminish his
27 defense of equitable tolling.

28 For example, Plaintiff argues that because Defendant’s scheme was kept secret,
Plaintiff was unaware of Defendant’s unlawful conduct and did not know that he was

1 paying artificially inflated prices for prescription generic drugs. (Doc. No. 18 ¶ 70.)
2 Additionally, Plaintiff asserts that Defendant actively concealed its RSP prescription
3 generic drug pricing scheme from the public and that Defendant failed to post drug prices
4 in a clear manner and in a way that would alert Plaintiff to the artificially inflated prices
5 charged by Defendant. (*Id.* ¶ 71.) Further, Plaintiff contends that he could not have
6 discovered the alleged unlawful activities at an earlier date because Defendant employed
7 deceptive practices and techniques of secrecy to avoid detection of its activities. (*Id.* ¶ 74.)
8 Moreover, Plaintiff states that “under the guise that its RSP was not available to the general
9 public, [Defendant] unlawfully continued to report its previous higher ‘usual and
10 customary’ prices to third-party payors.” (*Id.* ¶ 43.)

11 In comparison, the rest of the allegations in Plaintiff’s complaint directly contrast
12 the foregoing contentions. Plaintiff pleads that the RSP program listed generic drugs at
13 prices of \$9.99 for a thirty-day supply and \$15.99 for a ninety-day supply. (*Id.* ¶ 9.)
14 Additionally, Plaintiff alleges that any customer is eligible to participate in the RSP
15 program, that the RSP program is not a special, limited, or one-time offer, and that
16 Defendant has continuously offered the RSP to its customer’s for multiple benefit years.
(*Id.* ¶¶ 10, 34.)

17 Taking these allegations as a whole, and comparing them to each other, it would
18 seem that Plaintiff could have discovered, through little effort, that he was paying more for
19 his generic drugs than customers participating in the RSP Program. Moreover, curiously
20 enough, Plaintiff even attaches to his complaint a list of the RSP generic medications and
21 their prices supposedly found through Defendant’s website that clearly and prominently
22 advertises the RSP Program; thus further supporting the Court’s inference that this
23 information was public and not concealed. (*Id.* at 35.)

24 In Plaintiff’s opposition, he argues that he is entitled to rely on the doctrine of
25 fraudulent concealment to toll the applicable statutes of limitations because the complaint
26 adequately pleads facts that demonstrate that Defendant concealed its unlawful practice of
27 reporting falsely inflated “usual and customary” prices. (Doc. No. 24 at 30.) Additionally,
28 Plaintiff contends that he could not have discovered through the exercise of reasonable

1 diligence, the existence of the scheme at an earlier point in time. (*Id.* at 31.) Unfortunately,
2 the Court is unpersuaded by these assertions. Again, the Court reiterates that based on the
3 pleadings, the RSP program and its generic drug pricing were publicly advertised and
4 provided to any customer that was paying cash. (Doc. No. 18 ¶¶ 10, 34.) Accordingly, the
5 price difference between what Plaintiff was paying and what customer’s in the RSP
6 program were paying for their generic prescription drugs could have been easily
7 discoverable. This could have then exposed the alleged misrepresentations regarding the
8 pricing purportedly reported to Defendant’s third-party payor.

9 Furthermore, Plaintiff’s use of *Williams v. Countrywide Fin. Corp.*, No. 2:16-cv-
10 04166-CAS(AGRx), 2017 WL 986517, at *7–8 (C.D. Cal. Mar. 13, 2017), to support his
11 contention that the statute of limitations should be tolled under the doctrine of fraudulent
12 concealment is inapplicable. In *Williams*, the court noted that to establish fraudulent
13 concealment, the complaint must show: “(1) when the fraud was discovered; (2) the
14 circumstances under which it was discovered; and (3) that the plaintiff was not at fault for
15 failing to discover it or had no actual or presumptive knowledge of the fact sufficient to
16 put him on inquiry.” *Id.* at *7 (citation omitted). Plaintiff’s complaint is devoid of any
17 specific and sufficient allegations regarding the foregoing elements.

18 Consequently, the Court concludes that Plaintiff has not made any showing of
19 “extraordinary circumstances” that prevented him from filing his claims within the statute
20 of limitations. Thus, Plaintiff has not met his burden of demonstrating that he is entitled to
21 equitable tolling on any of his four causes of action. *See O’Donnel v. Vencor, Inc.*, 465
22 F.3d 1063, 1068 (9th Cir. 2006) (“Equitable tolling is generally applied to situations where
23 the claimant has actively pursued his judicial remedies by filing a defective pleading during
24 the statutory period, or where the complainant has been induced or tricked by his
25 adversary’s misconduct into allowing the filing deadline to pass.”) (internal quotation
26 marks omitted); *see also Hubbard v. Fidelity Fed. Bank*, 91 F.3d 75, 79 (9th Cir. 1996)
27 (finding that plaintiff was not entitled to equitable tolling of her TILA claim because
28 “nothing prevented [plaintiff] from comparing the loan contract, [the lender’s] initial
disclosures, and TILA’s statutory and regulatory requirements.”); *Marroquin v. OneWest*


1 *Bank, FSB*, No. CV 12-4688-JFW (FFMx), 2012 WL 12904071, at *1 (C.D. Cal. July 12,
2 2012) (finding the plaintiff was not entitled to equitable tolling as he failed to allege any
3 facts in his complaint that would justify tolling given that he had the necessary information
4 to discover the misrepresentation before the statute of limitations ran).

5 **IV. CONCLUSION**

6 As explained more fully above, the Court **GRANTS** Defendant's motion to dismiss
7 **WITHOUT PREJUDICE**.² Plaintiff may file a second amended complaint within
8 **twenty-one (21) days** of the date of this Order. Plaintiff is to only correct the deficiencies
9 noted herein and provide the Court with any further factual allegations to demonstrate that
10 equitable tolling applies to his four causes of action. Failure to file an amended complaint
11 will result in dismissal of this case.

12 **IT IS SO ORDERED.**

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14 Dated: December 19, 2017

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16 Hon. Anthony J. Battaglia
17 United States District Judge
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24 ² The Court notes that it is cognizant that “[b]ecause the applicability of the equitable
25 tolling doctrine often depends on matters outside the pleadings, it ‘is not generally
26 amenable to resolution on a Rule 12(b)(6) motion.’” *Supermail Cargo, Inc. v. United*
27 *States*, 68 F.3d 1204, 1206 (9th Cir. 1995) (citation omitted). However, within the District
28 Court’s discretion, dismissal based on equitable tolling is appropriate here as Plaintiff has
failed to allege facts demonstrating that he could not have discovered the alleged violations
by exercising due diligence. *See Meyer v. Ameriquest Morg. Co.*, 342 F.3d 899, 902–03
(9th Cir. 2003).