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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 KATHLEEN HOLT, *individually and on*  
12 *behalf of all others similarly situated,*

13 Plaintiff,

14 v.

15 NOBLE HOUSE HOTELS & RESORT,  
16 LTD; and DOES 1 TO 25,

17 Defendants.

Case No.: 17cv2246-MMA (BLM)

**ORDER GRANTING PLAINTIFF'S  
MOTION TO DISMISS AND STRIKE  
DEFENDANT'S COUNTERCLAIM**

18 NOBLE HOUSE HOTELS & RESORT,  
19 LTD,

20 Counter Claimant,

21 v.

22 KATHLEEN HOLT, *individually and on*  
23 *behalf of all others similarly situated,*

24 Counter Defendant.

[Doc. No. 20]

25 Plaintiff and Counter Defendant Kathleen Holt (“Plaintiff”), individually and on  
26 behalf of all others similarly situated, filed a putative class action Complaint against  
27 Defendant and Counter Claimant Noble House Hotels & Resort, LTD (“Noble House”)  
28 and Doe Defendants 1 to 25 alleging causes of action for violations of California’s False

1 Advertising Law (“FAL”), California Business and Professions Code sections 17500, *et*  
2 *seq.*; California’s Unfair Competition Law (“UCL”), California Business and Professions  
3 Code sections 17200, *et seq.*; and California’s Consumers Legal Remedy Act (“CLRA”),  
4 California Business and Professions Code sections 1750, *et seq.* Doc. No. 1-3  
5 (“Compl.”). Noble House filed an Answer largely denying the allegations of the  
6 Complaint, asserting twenty-one affirmative defenses, and asserting a counterclaim for  
7 attorneys’ fees pursuant to California Civil Code § 1780(e). Doc. No. 15 (“Answer”).  
8 Plaintiff moves to dismiss and strike Noble House’s counterclaim pursuant to Federal  
9 Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(f). Doc. No. 20-1 (“MTD”). Noble  
10 House opposes dismissal [Doc. No. 23 (“Oppo.”)] and Plaintiff replies [Doc. No. 24  
11 (“Reply”)]. The Court found the matter suitable for determination on the papers and  
12 without oral argument pursuant to Civil Local Rule 7.1.d.1. Doc. No. 25. For the  
13 reasons stated below, the Court **GRANTS** Plaintiff’s motion.

#### 14 **BACKGROUND**

15 The claims in Plaintiff’s Complaint arise out of a 3.5% surcharge of \$1.38, which  
16 was added to the balance of her bill on August 6, 2017, at Acqua California Bistro in San  
17 Diego, California, which is owned by Noble House. Compl., ¶¶ 17-23. Plaintiff alleges  
18 that Noble House is misleading the public by advertising prices for food and drinks in its  
19 menus and then adding the surcharge to the balance of the bill total at checkout “when it  
20 is too late to make an informed decision about the increased total bill.” Compl., ¶¶ 17,  
21 26. Plaintiff alleges Noble House “purposely added this ‘surcharge’ instead of raising the  
22 prices on its menu in order to mislead [and deceive] consumers into thinking that their  
23 meal would cost less than it actually does.” Compl., ¶¶ 25, 31. Accordingly, Plaintiff  
24 asserts causes of action for violations of the FAL, UCL, and CLRA. *See generally*,  
25 Compl.

26 On February 6, 2018, Noble House filed its Answer to Plaintiff’s Complaint. Doc.  
27 No. 15. In its Answer, Noble House substantially denied the allegations of the  
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1 Complaint, raised twenty-one affirmative defenses, and asserted a counterclaim for  
2 attorneys' fees pursuant to California Civil Code § 1780(e). *Id.*

### 3 LEGAL STANDARD

4 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro*  
5 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain “a short and plain  
6 statement of the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P.  
7 8(a)(2). However, plaintiffs must also plead “enough facts to state a claim to relief that is  
8 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); Fed. R. Civ.  
9 P. 12(b)(6). The plausibility standard demands more than “a formulaic recitation of the  
10 elements of a cause of action,” or “naked assertions devoid of further factual  
11 enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations and  
12 alterations omitted). Instead, the complaint “must contain sufficient allegations of  
13 underlying facts to give fair notice and to enable the opposing party to defend itself  
14 effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

15 In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth  
16 of all factual allegations and must construe them in the light most favorable to the  
17 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).  
18 The court need not take legal conclusions as true merely because they are cast in the form  
19 of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).  
20 Similarly, “conclusory allegations of law and unwarranted inferences are not sufficient to  
21 defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

### 22 DISCUSSION

23 Noble House has asserted a “counterclaim” for attorneys' fees pursuant to  
24 California Civil Code § 1780(e). Answer at 13. Plaintiff moves to dismiss and strike the  
25 counterclaim pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(f).  
26 MTD at 12-21. The Court addresses only Plaintiff's motion pursuant to Federal Rule of  
27 Civil Procedure 12(b)(6) in finding that Noble House has not stated a “claim.”  
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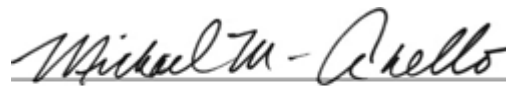
1 Federal Rule of Civil Procedure 54(d)(2)(A) requires demands for attorneys' fees  
2 to be made by motion, unless the substantive law requires those fees to be proved at trial  
3 as an element of damages. Fed. R. Civ. P. 54(d)(2)(A). Here, California Civil Code §  
4 1780(e) provides that "[t]he court shall award costs and attorney's fees to a prevailing  
5 plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be  
6 awarded to a prevailing defendant upon a finding by the court that the plaintiff's  
7 prosecution of the action was not in good faith." Cal. Civ. Code § 1780(e). Based upon  
8 this language, § 1780(e) does not require attorneys' fees to be proved at trial as an  
9 element of damages. *See id.* As a result, a demand for attorneys' fees pursuant to  
10 § 1780(e) must be made by motion and it is improper to assert a "claim" for attorneys'  
11 fees. *See* Fed. R. Civ. P. 54(d)(2)(A). As such, the Court **GRANTS** Plaintiff's motion  
12 and **DISMISSES WITH PREJUDICE** and without leave to amend Noble House's  
13 counterclaim for attorneys' fees. The Court notes that, when and if appropriate, Noble  
14 House may file a motion for attorneys' fees pursuant to Rule 54(d)(2) and that the Court  
15 will have jurisdiction to address such a motion. *See* Fed. R. Civ. P. 54(d)(2)(A).

#### 16 CONCLUSION

17 Based on the foregoing, the Court **GRANTS** Plaintiff's motion and **DISMISSES**  
18 **WITH PREJUDICE** Noble House's counterclaim for attorneys' fees. Doc. No. 20. The  
19 Clerk of Court is instructed to terminate the action as to Counter Claimant Noble House  
20 Hotels & Resort, LTD and Counter Defendant Kathleen Holt.

21 **IT IS SO ORDERED.**

22 Dated: March 28, 2018



23 Hon. Michael M. Anello  
24 United States District Judge