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7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 KEVIN BRANCA, individually
and on behalf of all others similarly
12 situated,

13 Plaintiff,

14 vs.

15 NORDSTROM, INC.,

16 Defendant.
17

Case No. 3:14-CV-02062-MMA-JMA

Hon. Michael M. Anello

**DEFENDANT NORDSTROM, INC.’S
NOTICE OF MOTION AND MOTION
TO DISMISS PLAINTIFF’S SECOND
AMENDED COMPLAINT PURSUANT
TO FEDERAL RULE OF CIVIL
PROCEDURE 12(B)(1) AND 12(B)(6)**

[Memorandum of Points and Authorities;
Request for Judicial Notice; and (Proposed)
Order filed concurrently herewith]

Date: July 6, 2015
Time: 2:30 p.m.
Place: Courtroom 3A

Complaint Filed: Sept. 2, 2014
FAC Filed: Oct. 10, 2014
SAC Filed: May 4, 2015

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24 **TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:**

25 PLEASE TAKE NOTICE THAT on July 6, 2015, at 2:30 p.m. or as soon
26 thereafter as the matter may be heard in Courtroom 3A, located at the United States
27 District Court for the Southern District of California, 221 West Broadway, San
28 Diego, California, Defendant Nordstrom, Inc. (“Nordstrom Rack”) will and hereby

1 does move for an order to dismiss the Second Amended Complaint (“SAC”) filed
 2 by Plaintiff Kevin Branca (“Plaintiff”) pursuant to Federal Rule of Civil Procedure
 3 12(b)(1) and 12(b)(6) because Plaintiff fails to state a claim against Nordstrom
 4 Rack upon which relief can be granted and lacks standing to sue based on the
 5 allegations of the SAC.

6 This motion is brought on the ground that Plaintiff has not alleged — and
 7 cannot allege — facts sufficient to maintain his causes of action under California
 8 Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et. seq.* (the “UCL”);
 9 California False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et. seq.* (the
 10 “FAL”); and the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et. seq.* (the
 11 “CLRA”). Specifically, Plaintiff’s claims fail because Plaintiff: (1) fails to allege
 12 facts sufficient to state a claim under the general pleading standard or the
 13 heightened pleading standard under FRCP 9(b); (2) fails to actual reliance as to the
 14 Nordstrom brand and/or anything other than the “Compare At” price tags, and
 15 therefore lacks standing to sue under the CLRA, UCL and FAL; (3) lacks standing
 16 to represent the putative class, which would include individuals that purchased
 17 different products than plaintiff.

18 This motion will be based on this Notice of Motion and Motion, the attached
 19 Memorandum of Points and Authorities in support of the Motion, the Request for
 20 Judicial Notice in Support of the Motion, the [Proposed] Order filed concurrently
 21 herewith, the Court’s file in this case, and on all other matters which may be
 22 judicially noticed or adduced at the hearing of this matter.

23 Dated: June 3, 2015

MORGAN, LEWIS & BOCKIUS LLP

25 By /s/ Joseph Duffy
 26 Joseph Duffy
 27 Attorneys for Defendant
 Nordstrom, Inc.

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CERTIFICATE OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 300 South Grand Avenue, Twenty-Second Floor, Los Angeles, California 90071-3132. On June 3, 2015, I served the within document(s):

DEFENDANT NORDSTROM, INC.’S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1) AND 12(B)(6)

on the interested parties in this action as follows:

Electronic Service via the Court’s CM/ECF system pursuant to Civ.L.R. 5.4(c).

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct.

Dated this 3rd day of June, 2015 at Los Angeles, California.



Joyce McCosco

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Case No. 3:14-CV-02062-MMA-JMA

Hon. Michael M. Anello

**DEFENDANT NORDSTROM, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S
SECOND AMENDED COMPLAINT
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 12(B)(1) AND
12(B)(6)**

[Notice of Motion and Motion to Dismiss;
Request for Judicial Notice in Support of
Motion to Dismiss; and (Proposed) Order
filed concurrently herewith]

Date: July 6, 2015
Time: 2:30 p.m.
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MEMORANDUM OF POINTS AND AUTHORITIES

Nordstrom, Inc.¹ respectfully submits this Memorandum of Points and Authorities in support of its motion to dismiss the Second Amended Class Action Complaint (“SAC”) filed by Plaintiff Kevin Branca (“Plaintiff”).

I. INTRODUCTION

The SAC fails to address and fix the many fatal flaws in Plaintiff’s First Amended Complaint (“FAC”), dismissed in part by this Court on March 19, 2015 (Docket No. 18). Most notably, despite having amended his complaint *three times*, Plaintiff fails to:

sufficiently allege that Nordstrom intentionally fabricated the ‘Compare At’ price listed on the Nordstrom Rack price tags or that the Nordstrom Rack price tag, standing alone, is likely to deceive reasonable consumers into believing the listed ‘Compare At’ price is the former price at which Nordstrom or other retailers previously sold the same merchandise.

Docket No. 18 11:15-28, Court Order on Nordstrom’s Motion to Dismiss the FAC. The SAC fails for several additional basic reasons:

First, Plaintiff lacks standing to raise each claim because he cannot establish reliance. Specifically, Plaintiff cannot support a claim based on any advertising other than the “Compare At” prices because Plaintiff fails to plead reliance on anything other than the “Compare At” price tags. Similarly, Plaintiff cannot represent individuals that purchased products different from those purchased by the plaintiff. Accordingly, Plaintiff’s claims are narrowly limited by his standing.

Second, Plaintiff again fails to allege any facts showing that the “Compare At” prices are false, or that a reasonable consumer would view them as former prices. Plaintiff fails to identify a *single* instance when Nordstrom Rack’s pricing was false or misleading. Rather, he alleges in conclusory fashion that the “Compare At” prices are false because the merchandise was not previously sold at

¹ Nordstrom, Inc. will be referred to throughout the Motion as “Nordstrom Rack” given the focus of Plaintiff’s claims and to distinguish the stores at issue from Nordstrom main line retail stores.

1 non-outlet retail stores. The SAC simply does not contain factual allegations
2 supporting this conclusory claim.

3 Third, Plaintiff fails to plead fraud with particularity. Each of cause of action
4 is subject to the heightened pleading standard for fraud or deceit under Federal Rule
5 of Civil Procedure (“FRCP”) 9(b). Yet Plaintiff fails to allege the who, what,
6 when, how or why of the fraud. Plaintiff merely alleges that the “Compare At”
7 prices are false because they are not former prices. There is simply no support for
8 that conclusion and it is insufficient to meet the pleading standard.

9 Finally, Plaintiff fails to plead facts showing that the false advertising and
10 CLRA statutes are applicable to the “Compare At” price tags. For example,
11 Plaintiff’s allegations are generally premised on the assertion that Nordstrom
12 Rack’s “Compare At” prices were in violation of a California law that requires that
13 the advertisement of a “former price” use the price that was the “prevailing market
14 price” for the three months preceding its publication. This statute is inapplicable
15 here because the price tags referenced in the SAC never mention a “former price,”
16 or any other language that would indicate a former price.

17 **II. PROCEDURAL HISTORY**

18 On October 10, 2014, Plaintiff filed the FAC. Docket No. 3. On November
19 14, 2014 Nordstrom Rack filed a motion to dismiss the FAC. Docket No. 9. On
20 March 30, 2015, this Court entered an order granting in part Nordstrom Rack’s
21 motion to dismiss the FAC. Docket No. 18. The Court held that Plaintiff: (1) only
22 alleged reliance on the “Compare At” price tags and therefore only had standing to
23 assert claims based on the “Compare At” price tags, (2) failed to sufficiently allege
24 that Nordstrom Rack intentionally fabricated the “Compare At” price listed on the
25 “Compare At” price tags, (3) failed to show that a reasonable consumer is likely to
26 be deceived into believing the listed “Compare At” price is the former price at which
27 the merchandise was previously sold, and (4) failed to allege fraud with the requisite
28 specificity under FRCP 9(b). Docket No. 18 at 7:14-8:27; 11:15-28. On May 4,

1 2015, Plaintiff filed the SAC, his third complaint in this action. Docket No. 25.

2 **III. PLAINTIFF'S ALLEGATIONS**

3 **A. Plaintiff Repeats the Same Deficient Allegations as in The FAC.**

4 The gravamen of Plaintiff's claims is that Nordstrom Rack pricing practices
5 are unfair because they purport to offer a false discount off of false "Compare At"
6 prices on "Nordstrom Rack Products." SAC ¶¶ 3-8. Plaintiff defines "Nordstrom
7 Rack Products" as "products sold in Nordstrom Rack stores . . . [with a] 'Compare
8 At' price." SAC ¶ 3. Expressly excluded from the definition of Nordstrom Rack
9 Products are: "products sold at Nordstrom Rack stores that were actually previously
10 offered for sale at Nordstrom main line retail stores." SAC ¶ 3. Plaintiff alleges
11 that the "Compare At" prices on Nordstrom Rack Products:

12 were overstated and did not represent a bona fide price at
13 which the Nordstrom Rack Products were previously
14 sold. Nor were the advertised "Compare At" prices
15 prevailing market retail prices within three months
 immediately preceding the publication of the advertised
 former prices.

16 SAC ¶ 3.

17 Plaintiff alleges that Nordstrom Rack, through the "Compare At" prices,
18 advertised a discount off false former prices because "Nordstrom [Rack] 'Compare
19 At' is synonymous with a higher 'original' price." SAC ¶ 7. Plaintiff claims that
20 the "Compare At" prices were a "sham" because:

21 (1) "Nordstrom sells certain goods manufactured by
22 third-party designers for *exclusive* sale its Nordstrom
23 Rack stores and other outlet stores, which means that
 such items were never sold—or even intended to be
 sold—at the 'Compare At' prices advertised on the price
 tags" and;

24 (2) "Nordstrom Rack Products were never offered for
25 sale in non-outlet retail stores in California, or in any
 other state."

26 Plaintiff further alleges that Nordstrom Rack's website:

27 falsely suggests that the Nordstrom Rack Products are
28 equivalent to the products sold at Nordstrom's main line
 retail stores: "Why Shop the Rack? Because we have the

1 most current trends and the brands you love for 30-70%
 2 off *original* prices—each and every day.’ The truth is
 3 that the Nordstrom Rack Products are not discounted off
 4 ‘original prices.’ The Nordstrom Rack Products are
 5 never offered for sale at the Nordstrom main line retail
 6 stores (or any other retail stores) and are typically of
 7 lesser quality than the goods sold in those main line retail
 8 stores.

9 SAC ¶ 7.²

10 Plaintiff pleads that he purchased a pair of dress pants, cargo shorts, and
 11 herringbone pants from the Nordstrom Rack on July 12, 2013. SAC ¶¶ 56-59.
 12 Plaintiff also alleges that he “reasonably believed the truth of the price tags attached
 13 to the products he purchased at the Nordstrom Rack, which expressly advertised
 14 that he was getting a significant percentage discount off the original price.³ SAC ¶
 15 16. Finally, Plaintiff claims the “Compare At” price cannot be a *bona fide* price
 16 merely because the product was not formerly sold at Nordstrom’s main line store or
 17 a non-outlet retail store (although Plaintiff fails to allege any facts showing that the
 18 “Compare At” prices were not the prevailing market price in the relevant time
 19 period). SAC ¶¶ 3-8, 56-66.

20 Plaintiff’s allegations in the SAC suffer the same defects as Plaintiff’s two
 21 prior complaints—indeed, the SAC’s allegations are substantively identical to those
 22 of the FAC with respect to the notion that Nordstrom Rack “misled” consumers
 23 with its “Compare At” prices.

24 **B. Plaintiff’s New Allegations Are Irrelevant and Deficient.**

25 Plaintiff states that he cures the concerns that the Court identified in its ruling
 26 on Nordstrom Rack’s prior motion to dismiss by adding supposed evidence of:

27 (1) an admission by Nordstrom [through a pricing
 28 manual] that its ‘Compare At’ price is meant to convey to
 the consumer an “original” price—and instructions to its
 suppliers to arbitrarily invent this false ‘original’ price,

² Plaintiff does not allege that he or the class relied on this statement or that the merchandise he purchased lacked qualities or were defective in any way.

³ Plaintiff fails to allege *any* facts showing that the Nordstrom Rack price tags expressly advertised an original price to any consumer, including Plaintiff.

1 and (2) expert testimony from the leading expert in
2 consumer perceptions relating to price discounts . . .

3 SAC ¶ 2. Both categories fail to achieve Plaintiff’s objective.

4 First, the Nordstrom Full Line and Rack Supplier Compliance Manual
5 (“Manual”) cited by Plaintiff for the proposition that Nordstrom Rack has made
6 some admission regarding its pricing does not in fact contain *any* such admission by
7 Nordstrom Rack or provide any evidence of its intent—it merely provides
8 Nordstrom Rack’s suppliers with instructions on how to format price tags on
9 Nordstrom Rack merchandise. Docket No. 25-1. It does not provide any
10 information on how the prices are calculated or the source of the prices. *Id.*
11 Accordingly, the Manual is irrelevant and does not show Nordstrom Rack’s intent
12 to deceive customers.

13 Second, the “expert” opinions are similarly flawed. As an initial matter,
14 Plaintiff fails to provide sufficient information to qualify them as expert opinions.
15 Moreover, it is facially apparent that Plaintiff mischaracterizes the “expert”
16 opinions. For example, Dr. Compeau’s opinions are based on the assumption that
17 the comparison price is in fact false. SAC ¶ 70-72. Plaintiff has not alleged any
18 facts showing that the “Compare At” prices can reasonably be construed as former
19 prices under the law or that Nordstrom Rack’s “Compare At” prices are false or
20 misleading. In essence, what Plaintiff is asking the Court to do is accept an expert’s
21 opinion in place of pled facts to permit this case to proceed. There is simply no
22 legal justification to do so and this unique approach to “fact pleading” cannot be the
23 basis of a putative class action.

24 **C. Plaintiff Fails to Allege Facts Necessary to State a Claim.**

25 Plaintiff’s entire argument is premised on various faulty assumptions and
26 misleading statements about the “Compare At” prices and Nordstrom Rack’s
27 practices generally and he fails to include, or ignores, numerous actual facts. Each
28 of these issues weave through the various arguments below, but it warrants

1 discussing them comprehensively here as the entire SAC fails when viewed in
2 connection with these “missing” facts.

3 As an initial matter, Plaintiff does not plead that any “Compare At” price
4 listed on any exemplary item listed in the SAC was false or inaccurate. Instead,
5 Plaintiff baselessly insists that if an item was not previously sold at Nordstrom’s
6 main line stores or other non-outlet retail stores, then it cannot have an “original
7 price,” and therefore, the Court can assume that the “Compare At” price *must* be
8 false. Plaintiff’s assumption is unsupported and irrelevant based on the actual law.

9 First, Plaintiff does not provide any facts – because he cannot – to
10 demonstrate that if an item was not sold previously at a non-outlet retail store, it
11 cannot have an “original price.” There are many sources for items sold at
12 Nordstrom Rack and there is no obligation, by law or otherwise, that all items need
13 to come from a non-outlet retail store.

14 Second, Plaintiff does not allege that Nordstrom Rack’s price tags referenced
15 in the SAC informed consumers that any item was sold at a Nordstrom main line
16 store – or any store – for a particular, or “original” price. And, in fact, the
17 Nordstrom Rack tags, indeed do not state that the items were previously sold at any
18 particular prior store, or that the “Compare At” price is an “original” price. The tag
19 referred to in the SAC merely reads “Compare At.” Plaintiff demands that this
20 Court add additional meaning to that phrase; specifically, Plaintiff asks this Court to
21 interpret “Compare At” to mean, “Compare the price listed to a price that
22 Nordstrom sold this identical product in a main line or non-outlet retail store.” The
23 tag does not make or even suggest that assertion and *Plaintiff has not cited to a*
24 *single example of Nordstrom Rack making those statements through any medium.*
25 Importantly, Plaintiff pleads nothing to get around the fact that the “Compare At”
26 price could be to a manufacturer’s suggested retail price (known as an “MSRP”), a
27 price at which Nordstrom Rack’s suppliers confirmed was the pre-discount market
28 retail price, a price charged by other retail stores, or the price of like, non-identical

1 goods in the relevant market.

2 Indeed, the Manual, which Plaintiff cites in a failed effort to show that the
3 “Compare At” price is false and intended to represent a former price, merely
4 provides Nordstrom Rack’s suppliers with detailed instructions on how to format
5 price tags.⁴ Docket 25-1. Despite Plaintiff’s allegations, the Manual actually
6 shows that the “Compare At” price may be any of the following: (1) an original
7 price, (2) the MSRP or, (3) a higher retail price. Docket 25-1 at 41-44. But the
8 Manual *does not* provide any information regarding the source of the “Compare At”
9 price, how it is calculated, or how it is determined whether an item will have a
10 “Compare At” price. Docket 25-1. In other words, the Manual shows *nothing* of
11 whether an item has an “original price,” much less Nordstrom Rack’s intent to
12 deceive customers by putting a “Compare At” price on its merchandise.

13 Plaintiff further attempts to bolster his argument that Nordstrom Rack
14 intended to deceive consumers by way of “expert” opinion. SAC ¶¶ 53-55; 70-71.
15 Plaintiff cites to the opinions of Dr. Compeau to show that comparative price
16 advertising provides an incentive for retailers to engage in false and fraudulent
17 behavior. SAC ¶¶ 53-55; 70-71. Plaintiff offers no information that would allow
18 the Court to qualify Dr. Compeau as an expert. Moreover, his opinions state no
19 facts that show that the Nordstrom Rack “Compare At” prices are false or that
20 Nordstrom Rack intended to deceive consumers. Instead, Plaintiff makes a gross
21 generalization from Dr. Compeau’s opinion and infers that Nordstrom Rack must
22 have intended to deceive its customers. In addition, Dr. Compeau’s purported
23 “expert opinions” are also flawed because they are based on the assumption that the
24 comparative price *is in fact false* – but Plaintiff fails to allege *any* facts showing that
25 the “Compare At” prices are false. Accordingly, Dr. Compeau’s opinions are non-
26 expert, irrelevant opinions that do not support Plaintiff’s claims.

27 _____
28 ⁴ Notably, the Manual does not exclusively apply to “Nordstrom Rack Products,”
which are the only products at issue here.

1 Third, Plaintiff does not allege facts sufficient to show that a “reasonable
2 consumer” would be misled by the “Compare At” price meant. Instead, Plaintiff
3 ignores what “Compare At” could legally mean and asks this Court to apply a
4 meaning not suggested by the words on the tag. In an attempt to fix this deficiency,
5 Plaintiff alleges that he:

6 did not understand the “Compare At” prices to indicate
7 only a comparison to a non-identical product because the
8 price tag did not specify that the savings was in relation
9 to a different product, nor did it specify what the different
10 product might have been.

11 [Plaintiff] also understood the Nordstrom Rack Product
12 price tags to indicate a true former price because many
13 items in Nordstrom Rack stores (and which are excluded
14 from the definition of Nordstrom Rack Products) do not
15 carry “Compare At”/”%”Savings price tags. Branca
16 understood that the plain-price tags did not offer a
17 “savings” or a “bargain compared to a higher former
18 price, but the “Compare At”/”%”Savings” price tags did.

19 SAC ¶¶ 63-65. Plaintiff’s allegations here suffer the same flaws as in the FAC.
20 Foremost, Plaintiff ignores the fact that under California and Federal law many
21 types of price comparisons are permissible. For example, price comparisons to like
22 products are permissible – even if the products are not identical. Just as in the FAC,
23 Plaintiff ignores what is permissible under the law.

24 In addition, Plaintiff’s reference to Nordstrom Rack merchandise that does
25 not have a “Compare At” price is irrelevant – he is not alleging that those price tags
26 are false and the representations on those tags do not bear on whether the “Compare
27 At” prices are false. SAC ¶ 56. Plaintiff cannot rely on items excluded from the
28 definition of “Nordstrom Rack Products” to support his claim that “Compare At”
prices on “Nordstrom Rack Products” are false or misleading.

Plaintiff attempts to show that the “Compare At” prices are likely to deceive
by adding the “expert” opinion of Dr. Maronick. Again, Plaintiff does not offer
sufficient information to allow the Court to qualify Dr. Maronick as an expert.

SAC ¶ 72-77. Nevertheless, Plaintiff cites to an online survey conducted by Dr.

1 Maronick “of California consumers who have shopped at Nordstrom Rack to assess
 2 their perception of the ‘Compare At’ price tags.” SAC ¶ 72. Plaintiff provides no
 3 information regarding the methodology used, how participants were recruited
 4 and/or “pre-cleared as having recently shopped at a Nordstrom Rack store,” what
 5 information they were provided when they took the survey, the list of questions that
 6 participants responded to in the survey, and many other details *or facts* necessary
 7 for the survey to constitute relevant evidence in this case. SAC ¶¶ 72-77. Despite
 8 these flaws, Plaintiff alleges that the survey results “demonstrate that [Plaintiff]’s
 9 interpretation of the label was objectively reasonable.” SAC ¶ 75.

10 Even ignoring all of the faults of the survey, the “verbatim” responses of
 11 survey participants, who “were asked in to describe in their own words what the
 12 price tag represented,” show that the participants *do not* necessarily have the same
 13 understanding of “Compare At” that Branca says he has. SAC ¶¶ 72-77. For
 14 example, some of the responses show that the participants understood that the price
 15 was compared to prices of other retailers or the MSRP, not an “original” price
 16 (which is very different than Plaintiff’s purported understanding of the price):

- 17 • “That it’s a great bargain, and a lower price than you would find
 18 *anywhere else*. That it costs 60% less than its *retail value*.” SAC ¶76
 19 (emphasis added).
- 20 • “It’s cheaper than *other retailer*.” SAC ¶ 76 (emphasis added).
- 21 • “It’s cheaper.” SAC ¶ 76.

22 Other responses are unclear and simply do not support Plaintiff’s allegation that the
 23 participant shares his understanding of “Compare At”:

- 24 • “198.00” SAC ¶ 76.
- 25 • “80” SAC ¶ 76.
- 26 • “it’s on clearance.” SAC ¶ 76.
- 27 • “you save money.” SAC ¶ 76.

28 Indeed, most of the responses do not provide enough information to allow the Court

1 to tell what each participant understood the “Compare At” price to mean, much less
 2 that the participants have the same understanding as Plaintiff. SAC ¶ 76. In
 3 addition, Plaintiff only provides 76 of these “verbatim” responses – even though
 4 there were 206 participants in the study. SAC ¶¶ 74-77. In short, the study fails to
 5 show that Plaintiff’s “understanding of the ‘Compare At’ and ‘%Savings’ price tags
 6 at Nordstrom Rack was objectively reasonable.” SAC ¶ 77.

7 Finally, Plaintiff’s argument also is flawed because he assumes that
 8 Nordstrom main line stores or other non-outlet retail stores must have been the one
 9 to sell the product at the “Compare At” price. Plaintiff’s argument ignores the fact
 10 that the standard under California Business & Professions Code § 17501 for
 11 “former price” comparisons is the “prevailing market price,” not what was the price
 12 that an individual retailer sold the product for before the comparison. Moreover,
 13 under California law a “Compare At” price can be a comparison to a like product
 14 sold at another store in the relevant market. The price comparison need *not* be to
 15 the price of the exact same item at a “non-outlet retail store.” Put another way,
 16 Plaintiff’s entire theory is based on the presumption that a “Compare At” price that
 17 was based on something other than a “Nordstrom” legacy price or non-outlet retail
 18 price would violate the law. In fact, there are many alternative sources for the
 19 “Compare At” price, none of which are addressed by Plaintiff’s allegations. Yet
 20 Plaintiff repeatedly asserts that the “Compare At” prices are false because they were
 21 not sold at Nordstrom main line stores or any other “non-outlet retail store.” In
 22 short, Plaintiff’s allegations are premised on a faulty understanding of the law and
 23 fail to allege the requisite facts necessary to show Nordstrom Rack used a false or
 24 misleading comparative price that would support any of Plaintiff’s claim.

25 In sum, Plaintiff has not alleged any factual evidence that Nordstrom Rack
 26 has made any misleading statement or offered any actionable price comparison.
 27 Instead, Plaintiff makes conclusory statements about the meaning of “Compare At,”
 28 and points to general statements about the outlet industry and vague statements

1 from the Federal Trade Commission to suggest that those statements *may* apply to
 2 some products that Nordstrom Rack sells. Plaintiff’s failure to bring forth actual
 3 facts and his reliance on speculative assumptions renders the SAC fatally deficient.

4 **IV. ARGUMENT**

5 **A. Plaintiff Lacks Standing to Sue Under The UCL, FAL and CLRA.**

6 Standing is a jurisdictional requirement, and the party invoking federal
 7 jurisdiction has the burden of establishing it. *Lujan v. Defenders of Wildlife*, 504
 8 U.S. 555, 561, (1992). To establish standing under Article III of the U.S.
 9 Constitution: “(1) the party invoking federal jurisdiction must have suffered some
 10 actual or threatened injury; (2) the injury must be fairly traceable to the challenged
 11 conduct; and (3) a favorable decision would likely redress or prevent the injury.”
 12 *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 868 (2012). In addition
 13 to Article III standing, a plaintiff must also establish standing under the UCL, FAL,
 14 and CLRA. *Id.* As the *Cattie* court held, “[t]o the extent state law does not
 15 recognize Plaintiff’s standing, [plaintiff] would lack a ‘legally protected interest’
 16 and would thus lack standing under federal law.” *Cattie v. Wall-Mart Stores, Inc.*,
 17 504 F. Supp. 2d 939, 943 (S.D. Cal. 2007). For there to be such standing, Plaintiff
 18 “must ... demonstrate injury in fact and a loss of money or property *caused by*
 19 unfair competition.” *Peterson v. Cellco P’ship* 164 Cal. App. 4th 1583, 1590 (Cal.
 20 Ct. App. 2008) (emphasis added).

21 Moreover, a plaintiff asserting false advertising claims under the UCL, FAL,
 22 and CLRA lacks standing to bring claims based on products different than the
 23 products purchased by plaintiff. *Miller*, 912 F. Supp. 2d at 870-72 (granting
 24 defendant’s motion to dismiss on the ground that plaintiff lacked standing to
 25 represent a class of individuals that purchased different products than plaintiff). In
 26 *Miller*, plaintiff brought false advertising claims and sought to represent a class
 27 based on five Ghirardelli products – baking chips, three drink powders, and wafers.
 28 *Id.* at 870. Plaintiff only purchased the baking chips. *Id.* While the *Miller* court

1 found that the products had some similarities in packaging, composition, and
 2 labeling, the court nevertheless found that plaintiff lacked standing to represent
 3 individuals that purchased the products that plaintiff did not purchase because: (1)
 4 the products were dissimilar, (2) were labeled differently, and (3) had different uses
 5 and customers. *Id.* at 870-71.

6 **1. Plaintiff Fails to Allege Actual Reliance to Support Standing**
 7 **Under the UCL, FAL and CLRA Based on the Nordstrom**
 8 **Brand or Advertising.**

9 For fraud-based claims under the UCL, FAL and CLRA, the named class
 10 representative must allege actual reliance to have standing. *In re Sony Litigation*,
 11 903 F. Supp. 2d at 969. Conclusory allegations of reliance are insufficient to
 12 establish standing under the CLRA, UCL or FAL. *Cattie*, 504 F. Supp. 2d at 943.
 13 Plaintiff's allegations here are substantively similar to the plaintiff's allegations in
 14 *Cattie*. Plaintiff fails to identify any public advertising schemes or campaigns he
 15 relied on. Plaintiff references a statement on Nordstrom Rack's website, but does
 16 not say that he saw or relied on this statement. SAC ¶ 7. Nor does Plaintiff allege
 17 that he relied on the Nordstrom Rack brand. *See generally*, SAC. Rather, Plaintiff
 18 makes conclusory statements that he "relied on" Nordstrom Rack's "Compare At"
 19 prices and that he would not have purchased the items but for the purportedly false
 20 pricing. *See e.g.*, SAC ¶ 65. The conclusory nature of Plaintiff's allegations is
 21 facially apparent, and insufficient to show actual reliance on anything other than the
 22 "Compare At" price tags. *Cattie*, 504 F. Supp. 2d at 947, 949; *see also Miller*, 912
 23 F. Supp. 2d at 874 (disregarding plaintiff's allegations about defendant's employees
 24 and website because plaintiff did not allege that he relied on those factors in his
 25 purchasing decisions). Although Plaintiff references Nordstrom Rack's website
 26 (which again, he never even says he read), pricing on Nordstrom Rack products that
 27 do not have "Compare At" prices, and Nordstrom Rack's advertising generally,
 28 Plaintiff does not ever allege actual reliance on anything other than the "Compare
 At" prices. Thus, as this Court previously held, Plaintiff does not have standing to

1 bring a claim under the UCL, FAL or CLRA based on anything other than the
 2 “Compare At” prices because he fails to allege reliance on anything other than the
 3 “Compare At” prices. Docket No. 18 at 8:4-27; *Miller*, 912 F. Supp. 2d at 874. For
 4 these reasons, to the extent Plaintiff’s claims arise from the Nordstrom Rack
 5 website, name, or advertising generally, Plaintiff has not sufficiently alleged
 6 standing to raise such claims and these claims should be dismissed with prejudice.

7 **2. Plaintiff Lacks Standing to Represent a Class of Individuals**
 8 **That Purchased Different Products Than Plaintiff.**

9 Plaintiff here only purchased three items from Nordstrom Rack.
 10 Nevertheless, Plaintiff seeks to represent a class of individuals that purchased
 11 “Nordstrom Rack Products,” which includes a multitude of products different from
 12 the products purchased by Plaintiff, and which have different uses and customers.
 13 For example, although Plaintiff did not purchase a handbag from Nordstrom Rack,
 14 he seeks to represent all individuals that purchased handbags from Nordstrom Rack
 15 with a “Compare At” price. SAC ¶ 79. Plaintiff cannot represent any individuals
 16 that purchased different merchandise than Plaintiff purchased. *Miller*, 912 F. Supp.
 17 2d at 870-72. Accordingly, to the extent Plaintiff seeks to represent a class of
 18 individuals that purchased products different from the products Plaintiff purchased,
 19 Plaintiff lacks standing and these claims should also be dismissed with prejudice.

20 **B. Plaintiff’s SAC Fails to State a Claim Upon Which Relief can be**
 21 **Granted as to All Causes of Action.**

22 To survive a motion to dismiss, “a complaint must contain sufficient factual
 23 matter, accepted as true, to state a claim to relief that is plausible on its face.”
 24 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). As
 25 clarified by the Supreme Court, a claim has facial plausibility “when the plaintiff
 26 pleads factual content that allows the court to draw the reasonable inference that the
 27 defendant is liable for the misconduct alleged.” *Id.* A pleading that offers “labels
 28 and conclusions” or a “formulaic recitation of the elements of a cause of action will

1 not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Nor will a pleading
 2 suffice if it simply tenders “naked assertion[s]” devoid of “further factual
 3 enhancement.” *Id.* at 557. Conclusory allegations are “disentitle[d] . . . to the
 4 presumption of truth.” *Iqbal*, 556 U.S. at 681.

5 In this case, each of Plaintiff’s claims is grounded in fraud, and is therefore
 6 also subject to the heightened pleading standard under FRCP 9(b). *In re Sony*
 7 *Litigation*, 903 F. Supp. 2d 942, 953 (S.D. Cal. 2012) (“Complaints alleging fraud
 8 must satisfy the heightened pleading requirements of Federal Rule of Civil
 9 Procedure 9(b).”). Further, “[i]t is well-settled that Rule 9(b) applies to state law
 10 claims sounding in fraud that are brought in a federal action, regardless of the basis
 11 of federal jurisdiction.” *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1138,
 12 1142 (N.D. Cal. 2010) order vacated in part on reconsideration, 771 F. Supp. 2d
 13 1156 (N.D. Cal. 2011) (citing *Vess v. Ciba–Geigy Corp. USA*, 317 F. 3d 1097,
 14 1102–03 (9th Cir. 2003)).

15 The heightened pleading standard under Rule 9(b) requires that “. . . in all
 16 averments of fraud or mistake, the circumstances constituting fraud or mistake shall
 17 be stated with particularity.” *In re Sony Litigation*, 903 F. Supp. 2d at 953.
 18 Moreover, “*the plaintiff must plead facts explaining why the statement was false*
 19 *when it was made.*” *Id.* (emphasis added). General allegations that a plaintiff was
 20 exposed to deceptive advertising for many months, without identifying a specific
 21 statement made by the defendant, is insufficient to meet the pleading requirement
 22 for fraud. *Marchante v. Sony Corp. of Am.*, 801 F. Supp. 2d 1013, 1019 (S.D. Cal.
 23 2011).

24 Here, Plaintiff has not met either the general pleading requirement described
 25 in *Iqbal* and *Twombly* or the heightened pleading requirement under FRCP 9(b),
 26 and thus fails to state a claim under the UCL, FAL or CLRA.

27 1. SAC Fails To Support Any False Advertising Claim.

28 The elements of a cause of action for fraudulent advertising under the FAL are:

1 (1) that Defendant intentionally or negligently
2 disseminated an untrue or misleading statement with an
intent to dispose of goods or services;

3 (2) that the statement was made in California and
4 disseminated to the public in any state; and

5 (3) that the statement deceived and harmed the plaintiff
6 and was likely to deceive all unnamed class members
(after Proposition 64).

7 Bus. & Prof. Code § 17500; *see also People v. Forest E. Olson, Inc.*, 137 Cal. App.
8 3d 137, 139 (Cal. Ct. App. 1982) (the false advertising law requires proof of
9 negligent or intentional misrepresentation); *Kwikset Corp. v. Superior Court*, 51
10 Cal. 4th 310, 246 P.3d 877 (Cal. 2011) (plaintiff must allege that plaintiff suffered
11 harm as a result of the false or misleading statement). To state a cause of action for
12 fraudulent advertising, plaintiff must plead “(1) that the statements in the
13 advertising are untrue or misleading, and (2) the defendants knew, or by the
14 exercise of reasonable care should have known, that the statements were untrue or
15 misleading” Cal. Bus. & Prof. Code § 17500; *Miller v. Ghirardelli Chocolate Co.*,
16 912 F. Supp. 2d 861, 873 (2012); *see also Kowalsky v. Hewlett-Packard Co.*, 771 F.
17 Supp. 2d 1156, 1162 (N.D. Cal. 2011); *Nat’l Council Against Health Fraud, Inc. v.*
18 *King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336, 1342 (Cal. Ct. App. 2003).

19 Plaintiff here (a) fails to identify any false statement made by Nordstrom
20 Rack; (b) fails to plead that Nordstrom Rack knew or should have known of any
21 such false statement; (c) fails to identify a harm caused by a false advertisement,
22 and (d) fails to show the likelihood that a reasonable consumer would be deceived
23 by any statement made by Nordstrom Rack. The law does not allow Plaintiff to
24 plead by guess or speculation. Plaintiff does not establish – or even purport to
25 establish – that any “Compare At” pricing claim made by Nordstrom Rack was
26 intentionally or negligently false or that anyone was deceived by the statement. As
27 such, the SAC should be dismissed with prejudice.

28

1 Plaintiff purports to add in new facts showing that Nordstrom Rack’s
 2 “Compare At” prices are false or misleading. As discussed above, the new
 3 allegations are (1) the Manual, which does not provide any information regarding
 4 the source of “Compare At” prices or how they are calculated; and (2) “expert”
 5 opinions that are irrelevant and insufficient to support Plaintiff’s claims. Plaintiff’s
 6 mischaracterization of the Manual is evident from the plain language of the Manual.
 7 Moreover, the Manual is publicly available online for suppliers and anyone else
 8 interested in reviewing it, which shows that Nordstrom Rack is not attempting to
 9 hide its vendor guidelines, nor is there any reason to infer that publicly available
 10 guidelines demonstrate some wrongful intent of Nordstrom Rack to deceive
 11 customers.

12 The “expert” opinions are also deficient. First, Plaintiff fails to provide *any*
 13 allegations showing the basis of the expert opinions or the methodology used, such
 14 as the recruiting and sampling methodology used, the format of the survey, whether
 15 the questions were open-ended or called for a “yes/no” response, or whether each
 16 participant shopped at the Nordstrom Rack within the relevant time frame. For the
 17 same reasons, the “expert” opinions wholly fail to meet the standard under *Daubert*
 18 *v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (determining the
 19 standard for admitting expert opinions). Under *Daubert*, expert testimony is
 20 admissible if it (1) “reflects ‘scientific knowledge,’ . . . [is] ‘derived by the
 21 scientific method,’ and [the] work product amounts to ‘good science’”; and (2) “is
 22 ‘relevant to the task at hand . . . [or] logically advances a material aspect of the
 23 proposing party’s case.’” *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 43 F. 3d
 24 1311, 1315 (9th Cir. 1995). The Court would need the information Plaintiff failed
 25 to provide – the basis of the “expert” opinions and the methodology used – in order
 26 to determine whether the opinions meet the scientific standard under *Daubert*.
 27 More importantly at this stage in the proceedings, without this pertinent
 28 information, the Court and Nordstrom Rack are deprived of the ability to analyze

1 the validity and applicability of the “expert” opinions to Plaintiff’s claims – or
 2 whether they “logically advance[] a material aspect” of Plaintiff’s case. *Id.* at 1320.
 3 Thus, the opinions are not relevant to Plaintiff’s claims and do not provide a factual
 4 basis upon which Plaintiff may state a claim.

5 Second, Plaintiff admits that Dr. Compeau’s opinion is based on the
 6 assumption that the comparison price at issue is in fact false. SAC ¶¶ 70-72. Yet
 7 Plaintiff pleads no facts showing that Nordstrom Rack’s “Compare At” prices are
 8 false. Without such allegations, Dr. Compeau’s opinion is not consistent with
 9 Plaintiff’s factual allegations in this case, and the opinion is therefore not relevant
 10 to this case. Rather, the expert opinion is essentially the same as a third party non-
 11 percipient witness testimony – which is entirely irrelevant to whether Plaintiff can
 12 state a claim. *Daubert*, 43 F. 3d 1311 at 1320; F.R.E. 702 (2015). Accordingly, the
 13 “expert” testimony cannot properly be considered by the Court at this stage in the
 14 proceedings because: (1) it is unclear if the opinions are “expert” opinions rather
 15 than lay opinion testimony, and (2) the opinions are not relevant to the issues in this
 16 case.

17 Rather than bolstering his claims, Plaintiff’s “new” allegations merely
 18 amount to Plaintiff asserting that he thinks the “Compare At” prices might have
 19 been false or misleading. The rules do not provide for a “maybe” standard of
 20 pleading.

21 **b. SAC Fails to Establish that Nordstrom Rack Knew or**
 22 **Should Have Known of a False Statement.**

23 Plaintiff fails to make even conclusory allegations that Nordstrom Rack knew
 24 or should have known of any purportedly false statements and certainly does not
 25 state facts sufficient to infer that it knew or should have known of the false nature
 26 of any statement. As noted above, Plaintiff makes *no* factual allegations supporting
 27 his conclusion that Nordstrom Rack pricing, including the pricing on the items
 28 purchased by Plaintiff, is false or misleading. Plaintiff merely cites to unfounded,

1 third-party sources describing outlet pricing practices in general, and then asserts
 2 that Nordstrom Rack uses such practices, without alleging any facts to support this
 3 inductive leap. SAC ¶¶ 30-36. Plaintiff makes no specific allegations regarding
 4 Nordstrom Rack’s own pricing scheme and certainly nothing with respect to
 5 Nordstrom Rack’s knowledge. *See, e.g.* SAC ¶¶ 30-55.

6 Without any facts supporting the underlying inference that Nordstrom Rack
 7 used the fraudulent pricing scheme alleged by Plaintiff, there is no basis to infer
 8 that Nordstrom Rack had knowledge of any false statement allegedly made to
 9 Plaintiff. For these reasons, Plaintiff fails to allege facts sufficient to show that
 10 Nordstrom Rack knew or should have known that any statement was false and
 11 therefore fails to meet the pleading requirements for fraudulent advertising. Cal.
 12 Bus. & Prof. Code § 17500; *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d
 13 1156, 1162 (N.D. Cal. 2011); *see also Nat’l Council Against Health Fraud, Inc. v.*
 14 *King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336, 1342 (2003).

15 **c. SAC Fails to Identify any Harm Caused by an**
 16 **Advertisement.**

17 Plaintiff’s own alleged purchases are a good example of the flaws in his
 18 individual claims – and those on behalf of the purported class. Plaintiff claims that
 19 he purchased a pair of cargo shorts at Nordstrom Rack because of the deal he
 20 thought he was getting. SAC ¶ 56. Plaintiff does not establish that the deal was in
 21 fact false, or any basis to infer this fact. Plaintiff does not establish that he did not
 22 get the deal he intended. Nor does Plaintiff even allege that he saw – or relied upon
 23 – any advertisement from Nordstrom Rack relating in any way to his purchase.
 24 Plaintiff also does not allege that Nordstrom Rack knew the deal was false or even
 25 that it was negligent in determining whether the deal was false. Plaintiff even fails
 26 to allege that the goods he purchased were priced unfairly or too high, any facts
 27 regarding the characteristics of the goods Plaintiff purchased which make them “of
 28 lesser quality,” what characteristics or qualities Plaintiff believes the goods should

1 have had, or that he could have obtained similar products on the market at a better
2 price. Indeed, Plaintiff fails to allege any actual harm.

3 Accordingly, Plaintiff's FAL claim should be dismissed with prejudice.

4 **2. Plaintiff's FAC, UCL, and CLRA Claims Fail Because**
5 **Plaintiff Fails to Show the Likelihood that a Reasonable**
6 **Consumer Would be Deceived.**

7 Under the reasonable consumer standard, the plaintiff must show that
8 members of the public are likely to be deceived by the statement. *Miller*, 912 F.
9 Supp. 2d at 873. The "reasonable consumer" test also governs false advertising and
10 unfair or fraudulent business practice claims under the UCL and CLRA. *Id.*
11 Dismissal of such claims is appropriate where the plaintiff fails to show the
12 likelihood that a reasonable consumer would be deceived. *Id.*

13 Here, plaintiff makes conclusory allegations that he was deceived, which are
14 all based on unsupported factual and legal assumptions. Plaintiff also cites to
15 "expert" opinions to show that the reasonable consumer would be misled. As
16 discussed above, these opinions are irrelevant and fail to show that the reasonable
17 consumer would be deceived by the "Compare At" price tags.

18 While allegations in a complaint are due a certain amount of deference, the
19 Court is not required to turn a blind eye to common sense. Plaintiff's failures with
20 his own claims only highlight the failures of the SAC on behalf of a purported
21 class. Without specific allegations showing the likelihood that a reasonable
22 consumer would be deceived, Plaintiff's FAL, UCL, and CLRA claims are
23 defective and should be dismissed with prejudice.

24 **3. SAC Fails to State Facts Sufficient to Support a UCL Claim**
25 **Based on Unlawful Conduct.**

26 To state a cause of action based on an "unlawful" business act or practice
27 under the UCL, a plaintiff must allege facts sufficient to show a violation of some
28 underlying law. *See Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (Cal. Ct.
App. 1999). Thus, a UCL unlawfulness claim stands or falls depending on the fate

1 of antecedent substantive causes of action. *See Krantz v. BT Visual Images, LLC.*,
 2 89 Cal. App. 4th 164, 178 (Cal. Ct. App. 2001). As discussed throughout this
 3 motion, all of Plaintiff’s causes of action fail as a matter of law and as a result, so
 4 too does his UCL claim.

5 The violations of law that Plaintiff relies upon are all grounded in the same
 6 theory—that Nordstrom Rack’s “Compare At” price was a false or misleading
 7 “former price.”⁸ Under each purported underlying violation, Plaintiff’s pleading
 8 suffers the same flaws. For example, California’s “former price advertisement”
 9 statute, Business & Professions Code § 17501, reads in pertinent part:

10 no price shall be advertised *as a former price* of any
 11 advertised thing, unless the alleged former price was the
 12 prevailing market price as above defined with three
 months next immediately preceding the publication of the
 advertisement...

13 Cal. Bus. & Prof. Code § 17501 (2015) (emphasis added).

14 In paragraph nine of the SAC, Plaintiff includes a photograph of a Nordstrom
 15 Rack price tag. The price tag clearly contains *no* language stating any price on it is
 16 a former price, or any language that might indicate a former price comparison, such
 17 as: “formerly,” “was,” “previously,” etc. Accordingly, Plaintiff fails to plead facts
 18 sufficient to show that this statute is applicable.

19 And, even if the statute were applicable, Plaintiff fails to include any factual
 20 allegations indicating that the “Compare At” prices listed on the tags of
 21 merchandise he purchased were not the “prevailing market price as above defined
 22 with three months next immediately preceding the publication of the
 23 advertisement.” Cal. Bus. & Prof. Code § 17501. In fact, Plaintiff offers no factual
 24 allegations that establish that any “Compare At” price is false. For the same
 25 reasons, Plaintiff’s additional underlying UCL unlawfulness claims, based on the
 26 CLRA and FTCA, also fail. Thus, as Plaintiff has failed to generally plead facts

27 _____
 28 ⁸ Plaintiff alleges Nordstrom’s purported violations of the FAL, CLRA and Federal
 Trade Commission Act are the basis for Plaintiff’s “unlawful” UCL claim.

1 that could possibly support a finding of a violation of any law, let alone facts with
 2 the level of specificity required by FRCP 9(b), Plaintiff's unlawful claim under the
 3 UCL fails and should be dismissed with prejudice.

4 **4. SAC Fails to State Facts Sufficient to Support a UCL Claim**
 5 **Based on Unfair Conduct.**

6 Plaintiff's UCL claim fails under the "unfair" prong as he again fails to meet
 7 either the general or heightened pleading standard. For the purposes of the UCL, a
 8 business practice is "unfair" when the conduct offends an established public policy
 9 or when the practice is immoral, unethical, oppressive, unscrupulous, or
 10 substantially injurious to consumers. *See S. Bay Chevrolet v. Gen. Motors*
 11 *Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87 (Cal. Ct. App. 1999). A plaintiff
 12 alleging unfair business practices "must state with reasonable particularity the facts
 13 supporting the statutory elements of the violation." *Khoury v. Maly's of Cal., Inc.*
 14 14 Cal. App. 4th 612, 619 (Cal. Ct. App. 1993). Plaintiff has failed to plead facts
 15 sufficient to establish a right to relief based on "unfair" business practices.

16 As set forth above, Plaintiff asserts liability based on allegedly deceptive
 17 pricing and the quality of the goods offered for sale—yet Plaintiff fails to allege any
 18 facts regarding these claims. Specifically, Plaintiff fails to allege facts showing (1)
 19 what price he believes he should have paid; (2) why he believes he should have
 20 paid a particular price; (3) any specific advertising campaign or statement; (4)
 21 whether and how the "Compare At" pricing was false or misleading; (5) the
 22 characteristics and quality of the goods he purchased; or (6) how those
 23 characteristics and qualities are less than what they allegedly should have been.
 24 Plaintiff's claims rest on "naked assertions," and are devoid of any factual
 25 allegations supporting Plaintiff's theory. For this reason alone, the SAC is
 26 inadequate to state a claim for relief, and should be dismissed accordingly. *See*
 27 *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678.

28

1 **5. SAC Fails to State Facts Sufficient to Support a UCL Claim**
 2 **Based on Fraud.**

3 A claim for fraudulent business acts under the UCL requires that Plaintiff
 4 allege that the public is likely to be deceived by the alleged business acts. *Klein v.*
 5 *Earth Elements Inc.*, 59 Cal. App. 4th 965, 970 (Cal. Ct. App. 1997). This claim
 6 also is subject to the heightened pleading standard under FRCP 9(b).

7 Plaintiff’s allegations regarding Nordstrom Rack’s purportedly false or
 8 misleading statements fall far short of the pleading standard in numerous respects.
 9 For example, each of Plaintiff’s claims is based upon the conclusory allegation that
 10 Nordstrom Rack engaged in false or misleading pricing, which purportedly led
 11 Plaintiff to be misled into believing he was purchasing items at a discount. *See e.g.*,
 12 SAC ¶¶ 13-17. To support these claims, however, Plaintiff merely relies on
 13 allegations about outlet store pricing practices in general, and then infers, *without*
 14 *alleging any facts specific to Nordstrom Rack’s pricing scheme*, that Nordstrom
 15 Rack also uses such practices. SAC ¶¶ 13-17; 30-55. Similarly, Plaintiff alleges in
 16 conclusory fashion that, “[t]hrough its false and deceptive marketing, advertising
 17 and pricing scheme, Nordstrom violated . . . California law . . .” SAC ¶ 22. Again,
 18 Plaintiff fails to identify specific advertisements, when and where they were shown,
 19 or why they were untrue or misleading. Although Plaintiff references a statement
 20 made on Nordstrom Rack’s website, Plaintiff fails to allege when the statement was
 21 made and to whom, or why the statement is false or misleading.

22 The only “advertising” that Plaintiff alleges exposure to prior to purchasing
 23 merchandise from the Nordstrom Rack is the “Compare At” price on the items that
 24 he purchased. For the reasons stated above, Plaintiff failed to allege why the
 25 “Compare At” pricing on the item he purchased was false or misleading. Indeed,
 26 the SAC is wholly silent on facts regarding *how* the pricing was false or misleading
 27 or what the correct pricing should have been. For example, as to the items he
 28 purchased Plaintiff fails to allege any facts regarding either: (1) the prior price of

1 the item charged by the third-party vendor from which the item was sourced, or (2)
 2 the prevailing market price of the item at the time of purchase. For these reasons,
 3 Plaintiff's UCL allegations lack the level of particularity required under FRCP
 4 (9)(b). *See In re Sony Gaming Networks and Customer Data Security Breach*
 5 *Litigation*, 903 F. Supp. 2d at 953.

6 Accordingly, each of Plaintiff's UCL claims should be dismissed.

7 **6. SAC Fails to State Facts Sufficient to Support a CLRA**
 8 **Claim.**

9 Plaintiff asserts a CLRA claim under paragraphs 9 and 13 of California Civil
 10 Code section 1770(a). Paragraph 9 prohibits "advertising goods or services with
 11 intent not to sell them as advertised." Paragraph 13 concerns, "making false or
 12 misleading statements of fact concerning reasons for, existence of, or amounts of
 13 price reductions." These claims are grounded in fraud or deceit and are therefore
 14 also subject to the heightened pleading standard under FRCP 9(b).

15 Again, however, the SAC contains no factual allegations demonstrating any
 16 such conduct prohibited by the CLRA. Nowhere does Plaintiff identify any
 17 statements by Nordstrom Rack regarding the characteristics, qualities or features of
 18 any product. *See* Cal. Civil Code § 1770(a)(5), (7), (9). Nor has Plaintiff alleged
 19 any "false or misleading statements of fact" regarding "price reductions." *See* Cal.
 20 Civ. Code § 1770(a)(13). Rather, Plaintiff simply alleges that the price tags on
 21 certain merchandise at Nordstrom Rack stores contain a "Compare At" price. But
 22 this comparison price is *not* alleged to be the basis for a "price *reduction*." In other
 23 words, there is no allegation that the price tag states anything along the lines of
 24 "marked down from," reduced from," "previously," "was," etc. The price tags are
 25 merely alleged to state, "Compare At" and a "%Savings" that shows the percentage
 26 difference between the "Compare At" price and the Nordstrom Rack sale price.
 27 Plaintiff merely makes conclusory allegations about Nordstrom Rack's misleading
 28 advertising, and alleges that the "Compare At" prices must be false because the

1 goods were not previously sold at non-outlet stores. Plaintiff simply fails to plead
 2 the “who, what, when, where, and how” of the misconduct alleged. *Vess*, 317 F. 3d
 3 at 1106; *Kearns v. Ford Motor Co.*, 567 F. 3d 1120, 1124 (9th Cir. 2009). These
 4 allegations fail to show that the comparison pricing even falls within the
 5 governance of the CLRA. Moreover, such conclusory pleading is insufficient to
 6 meet the FRCP 9(b) pleading standard.

7 **V. THE COURT SHOULD GRANT NO FURTHER LEAVE TO AMEND**

8 The Court should not grant Plaintiff yet another chance to plead, which
 9 would only unnecessarily prolong this action. In the Ninth Circuit where, as here, a
 10 plaintiff has previously amended the complaint, the court’s discretion to deny leave
 11 to amend is particularly broad. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*
 12 540 F. 3d 1049, 1072 (9th Cir. 2008). Moreover, “[w]here . . . an amended
 13 complaint simply ‘restate[s] the prior [dismissed claims] without curing their
 14 deficiencies,’ the Court properly dismisses with prejudice.” *Rofer v. County of San*
 15 *Diego*, 2013 WL 1629208, at *2 (S.D. Cal. Apr. 15, 2013). This is precisely what
 16 happened here. The Court has already explained, in a detailed opinion, why
 17 Plaintiff’s prior complaint was defective. Docket No. 18. Yet Plaintiff fails to cure
 18 the defects in his pleading. Accordingly, this Court should not grant further leave
 19 to amend.⁹

20 **VI. CONCLUSION**

21 For the foregoing reasons, Nordstrom Rack respectfully requests that the
 22 Court grant its motion to dismiss for failure to state a claim under which relief can
 23 be granted and for lack of standing.

24
 25 _____
 26 ⁹ In a nearly identical case, *Rubenstein v. The Neiman Marcus Group LLC*, Judge Otero recently
 27 granted defendant’s motion to dismiss plaintiff’s second amended complaint without leave to
 28 amend for failure to properly allege that Neiman Marcus’ “Compare to” price was untrue or
 misleading. *Rubenstein v. The Neiman Marcus Group LLC*, Case No. 2:14-cv-07155-SJO-JPR
 (C.D. Cal.), dated May 12, 2015 (Docket No. 45), attached as Exhibit B to Nordstrom Rack’s
 request for judicial notice in support of this motion.

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Dated: June 3, 2015

MORGAN, LEWIS & BOCKIUS LLP

By /s/ Joseph Duffy
Joseph Duffy
Attorneys for Defendant
Nordstrom, Inc.

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CERTIFICATE OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 300 South Grand Avenue, Twenty-Second Floor, Los Angeles, California 90071-3132. On June 3, 2015, I served the within document(s):

DEFENDANT NORDSTROM, INC.’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1) AND 12(B)(6)

on the interested parties in this action as follows:

Electronic Service via the Court’s CM/ECF system pursuant to Civ.L.R. 5.4(c).

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct.

Dated this 3rd day of June, 2015 at Los Angeles, California.



Joyce McCosco

1 MORGAN, LEWIS & BOCKIUS LLP
Joseph Duffy, California Bar No. 241854
2 jduffy@morganlewis.com
Meghan Phillips, California Bar No. 272095
3 meghan.phillips@morganlewis.com
300 South Grand Avenue
4 Twenty-Second Floor
Los Angeles, CA 90071-3132
5 Tel: 213-612-2500 Fax: 213-612-2501

6 Attorneys for Defendant NORDSTROM, INC.

7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

11 KEVIN BRANCA, individually
and on behalf of all others similarly
12 situated,

13 Plaintiff,

14 vs.

15 NORDSTROM, INC.,

16 Defendant.
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Case No. 3:14-CV-02062-MMA-JMA

Hon. Michael M. Anello

**DEFENDANT NORDSTROM, INC.'S
REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF ITS
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S
SECOND AMENDED COMPLAINT
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 12(B)(1) AND
12(B)(6)**

[Nordstrom Inc.'s Notice of Motion and
Motion; Memorandum of Points and
Authorities; and [Proposed] Order filed
concurrently herewith]

Date: July 6, 2014
Time: 2:30 p.m.
Place: Courtroom 3A

Complaint Filed: Sept. 2, 2014
FAC Filed: Oct. 10, 2014
SAC Filed: May 4, 2015

1 **TO PLAINTIFF AND HIS COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that pursuant to Federal Rule of Evidence 201
3 Defendant Nordstrom, Inc. (“Nordstrom Rack”) hereby requests that this Court take
4 judicial notice of the documents attached to this Request for Judicial Notice
5 (“RJN”) as Exhibits A-B.

6 **Exhibit A:** The court’s Order Granting Defendant’s Motion To
7 Dismiss Plaintiff’s Complaint in *Linda Rubenstein v. The Neiman*
8 *Marcus Group LLP*, case no. 2:14-cv-07155-SJO-JPR (C.D. Cal.),
9 dated March 2, 2014 (Docket No. 32).

10 **Exhibit B:** The court’s Order Granting Defendant’s Motion To
11 Dismiss Plaintiff’s Second Amended Complaint in *Linda Rubenstein v.*
12 *The Neiman Marcus Group LLP*, case no. 2:14-cv-07155-SJO-JPR
13 (C.D. Cal.), dated May 12, 2015 (Docket No. 45).

14 Nordstrom Rack makes this request based on the attached Memorandum of
15 Points and Authorities, all pleadings and records on file in this action, and such
16 briefing, papers and argument as may be permitted in this matter.

17
18 Dated: June 3, 2015

MORGAN, LEWIS & BOCKIUS LLP

19
20 By /s/ Joseph Duffy
21 Joseph Duffy
22 Attorneys for Defendant
23 Nordstrom, Inc.

1 official court records on file with the United States District Court for the Central
2 District of California in Case No. 2:14-cv-07155-SJO-JPR.

3 For the foregoing reasons, Nordstrom Rack respectfully requests that this
4 Court take judicial notice of Exhibits A-B attached hereto as public records.

5
6 Dated: June 3, 2014

MORGAN, LEWIS & BOCKIUS LLP

7
8 By /s/ Joseph Duffy
9 Joseph Duffy
10 Attorneys for Defendant
11 Nordstrom, Inc.
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CERTIFICATE OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 300 South Grand Avenue, Twenty-Second Floor, Los Angeles, California 90071-3132. On June 3, 2015, I served the within document(s):

DEFENDANT NORDSTROM, INC.’S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ITS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1) AND 12(B)(6)

on the interested parties in this action as follows:

Electronic Service via the Court’s CM/ECF system pursuant to Civ.L.R. 5.4(c).

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct.

Dated this 3rd day of June at Los Angeles, California.



Joyce McCosco

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

CASE NO.: CV 14-07155 SJO (JPRx) DATE: March 2, 2015

TITLE: Linda Rubenstein v. The Neiman Marcus Group LLC, et al.

PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Not Present
Courtroom Clerk Court Reporter

COUNSEL PRESENT FOR PLAINTIFF: COUNSEL PRESENT FOR DEFENDANT:

Not Present Not Present

PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT [Docket No. 25]

This matter comes before the Court on Defendant The Neiman Marcus Group LLC's ("Defendant" or "Neiman Marcus") Motion to Dismiss Case ("Motion"), filed on January 6, 2015. Plaintiff Linda Rubenstein ("Plaintiff") submitted an Opposition to Defendant's Motion ("Opposition") on January 15, 2015, to which Defendant replied ("Reply") on January 26, 2012. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for February 9, 2015. See Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS** Defendant's Motion.

I. FACTUAL AND PROCEDURAL HISTORY

In this putative class action suit, the Complaint makes the following allegations. Plaintiff is a citizen and resident of California who purchased two items of clothing from the Neiman Marcus Last Call Store ("Last Call") in Camarillo, California, that was purportedly sold for markedly lower than the "Compared to" price that a consumer would pay at traditional Neiman Marcus retail stores. (First Am. Compl. ("FAC") ¶ 1.) Defendant is a Delaware limited liability company, with its principal place of business in Irving, Texas, that markets, distributes, and/or sells men's and women's clothing and accessories. (FAC ¶ 2.) Defendant sells its clothing and accessories to consumers in California and throughout the nation. (FAC ¶ 2.)

Neiman Marcus offers upscale apparel, accessories, jewelry, beauty and decorative home products and operates 41 stores across the United States. (FAC ¶ 7.) These store operations total more than 6.5 million gross square feet with over \$400 million in sale revenues in 2013. (FAC ¶ 7.) Defendant also operates thirty six Last Call clearance stores. (FAC ¶ 8.) These Last Call Stores are an alternative way for large retail companies to capture a larger pool of consumers because they offer clothing and accessories at discounted prices from in-demand retail stores. (FAC ¶ 8.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO.: CV 14-07155 SJO (JPRx)

DATE: March 2, 2015

Outlet stores are a popular avenue for sale-seeking consumers because in-demand retail stores, such as Neiman Marcus, will often sell clothes that are "after season" or clothing that had very little popularity and did not sell. (FAC ¶ 9.) To mitigate any more losses on the clothing, the retail stores will sell this clothing at various outlet malls for a discount. (FAC ¶ 9.) Shoppers have become accustomed to seeing products at outlet stores that once were sold at the traditional retail store. (FAC ¶ 10.) Apparel sales at factory outlets rose 17.8% in 2011, according to some estimates, while apparel sales industry-wide rose a meager 1.4%. (FAC ¶ 11.)

Defendant's use of "Neiman Marcus" in the name of the Last Call Stores caused Plaintiff and other Last Call Store shoppers (also referred to as the "Class") to reasonably believe that the Last Call Stores are outlet stores of traditional Neiman Marcus retail stores and that the Last Call Stores sell "after season" and unsold products that were previously sold at traditional Neiman Marcus retail stores. (FAC ¶¶ 12-13.) Defendant labels its Last Call products with a tag that shows a markedly lower price from the "Compared to" price. (FAC ¶ 14.) Plaintiff and the Class reasonably believed that this "Compared to" price represented the price that the exact same product would be sold at the traditional Neiman Marcus retail store. (FAC ¶ 14.)

Plaintiff and the Class, reasonably relied on the large price differences and made purchases at the Last Call Stores believing that they were receiving a substantial discount on the exact same product that could have been purchased at traditional Neiman Marcus retail stores for the "Compared to" price. (FAC ¶ 15.) Plaintiff, like other putative Class members, was lured in, relied on, and damaged by these tactics carried out by Defendant. (FAC ¶ 15.) Defendant's Last Call products are actually not for sale at the traditional Neiman Marcus stores as the "Compared to" pricing strategy suggests but rather are manufactured strictly for sale at the Last Call Stores. (FAC ¶ 16.) These Last Call products are of inferior grade and quality to the products sold at the traditional Neiman Marcus stores. (FAC ¶ 16.) Defendant's price tags on the Last Call products are labeled with arbitrary inflated "Compared to" prices that are purely imaginative because the products were never sold at traditional Neiman Marcus stores and therefore cannot be compared to any price. (FAC ¶ 16.) Thus the insinuated discount is false and misleading. (FAC ¶ 16.)

Due to Plaintiff's and the Class' reasonable belief that the Last Call Store was an "outlet" store they believed that the products were items previously sold at a traditional Neiman Marcus retail store since this is how outlet stores (including Defendant's Last Call Stores) market themselves. (FAC ¶ 17.) Based on this reasonable belief, Plaintiff and the Class further reasonably believed that Last Call products were made of like grade and quality as the products sold at traditional Neiman Marcus stores. (FAC ¶ 17.) The Last Call products made for the outlet stores, however, are not of like grade and quality as the products sold at traditional Neiman Marcus stores, in fact, they are of inferior grade and quality. (FAC ¶ 17.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO.: CV 14-07155 SJO (JPRx)

DATE: March 2, 2015

Defendant's misleading pricing techniques led Plaintiff and the Class to believe the Last Call products were authentic Neiman Marcus products, and in reliance thereon, decided to purchase said products from Defendant's Last Call Store. (FAC ¶ 18.) As a result, Plaintiff and each Class member was damaged in purchasing the Last Call products because they paid for products based on Defendant's representations and perceived discounts, but did not experience any of Defendant's promised benefits shopping at the Last Call Store. (FAC ¶ 18.)

Defendant's misrepresentations regarding the Last Call products and the purported origin of the products led Plaintiff and the putative Class to believe that the Last Call products were of equal quality and sold at the traditional Neiman Marcus retail store before it became an item for sale at the Last Call Store. (FAC ¶ 19.) Further, Plaintiff and members of the Class relied on Defendant's misrepresentations and would not have paid as much, if at all, for the products but for Defendant's misleading advertising and representations. (FAC ¶ 19.)

The Federal Trade Commission has also heard complaints by many members of Congress that see this practice occurring throughout large retail stores. (FAC ¶ 20.) Specifically, the Congressional members state, "it is a common practice at outlet stores to advertise a retail price alongside the outlet store price - even on made-for-outlet merchandise that does not sell at regular retail locations. Since the item was never sold in the regular retail store or at the retail price, the retail price is impossible to substantiate. We believe this practice may be a violation of the FTC's Guides Against Deceptive Pricing (16 CFR 233)." (FAC ¶ 20.)

Unlike the use of the words "Compared to" in the context of a regular retail store, where a price comparison might suggest the price for similar product sold at a competing store, when used in connection with Defendant's Last Call outlet store, the words "Compared to" can reasonably be interpreted by reasonable consumers to be a price comparison with the price of the exact same product when it was previously for sale at Defendant's regular retail store. (FAC ¶ 21.) Defendant's very name for its outlet stores, "Last Call," reinforces that belief, that is, that the outlet stores are the "last call" for the sale of products previously sold at Defendant's retail stores. (FAC ¶ 21.) Thus, in the context of the Last Call Stores, when Plaintiff and the Class viewed the words "Compared to" next to a price, they reasonable believed that the "Compared to" price was the price the product previously sold at Defendant's retail stores, and not a comparable price simply for goods of a like grade and quality that might be sold elsewhere. (FAC ¶ 21.)

This case was filed in the Superior Court of California for the County of Los Angeles on August 7, 2014, and the complaint was served on August 13, 2014. (See *generally* Notice of Removal.) The case was removed to this Court on September 12, 2014. The original complaint was dismissed on December 12, 2014. Plaintiff's First Amended Complaint, filed December 22, 2014, brings claims for violation of California false advertising law, California unfair competition law, and the Consumer Legal Remedies Act. (See *generally* FAC.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO.: CV 14-07155 SJO (JPRx)DATE: March 2, 2015

In the instant Motion, Defendant contends that the Complaint should be dismissed pursuant to Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6) because Plaintiff lacks standing, provides inadequate pleadings, and fails to state a claim. (See *generally* Mot.)

II. DISCUSSIONA. Legal Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of the claims asserted in the complaint." *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-200 (9th Cir. 2003). In evaluating a motion to dismiss, a court accepts the plaintiff's factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); see *Ileto*, 349 F.3d at 1200. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To plead sufficiently, Plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) demands that "when averments of fraud are made, 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." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation and internal quotations omitted). Averments of fraud must be accompanied by "the who, what, when, where, and how" of the misconduct charged, setting forth "what is false or misleading about a statement, and why it is false." *Id.* (citation omitted). A complaint that fails to meet these standards will be dismissed. *Id.* at 1107.

The heightened particularity requirements of Rule 9(b) apply to state-law "false advertising" claims under statutes such as the UCL, CLRA and FAL. See, e.g., *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009). The Court determined in its December 12, 2014 Order that Rule 9(b) applies here, and there appears to be no reason to deviate from that determination now.

B. Reasonable Consumer Test

UNITED STATES DISTRICT COURT
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CIVIL MINUTES - GENERAL

CASE NO.: CV 14-07155 SJO (JPRx)

DATE: March 2, 2015

The UCL prohibits any "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The CLRA similarly prohibits "unfair methods of competition and unfair or deceptive acts or practices," such as "[r]epresenting that goods . . . have . . . characteristics, ingredients, uses, benefits, or quantities which they do not have." Cal. Civ. Code § 1770(a)(5). To state a claim under the UCL or CLRA, "one need only show that members of the public are likely to be deceived." *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (quoting *Bank of the West v. Super. Ct.*, 833 P.2d 545, 553 (Cal. 1992)) (internal quotation marks omitted). To determine whether members of the public are likely to be deceived, courts apply a "reasonable consumer" standard. *Davis*, 691 F.3d at 1161; *see also Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 506-07 (2003) ("[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer."). "A reasonable consumer is 'the ordinary consumer acting reasonably under the circumstances.'" *Davis*, 691 F.3d at 1162 (quoting *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 682 (2006)). The reasonable consumer analysis requires that advertisements be "read reasonably and in context." *Freeman*, 68 F.3d at 290.

Plaintiff brings claims under the following paragraphs of the CLRA:

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

(9) Advertising goods or services with intent not to sell them as advertised.

(13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

Cal. Civ. Code § 1770(a). (See FAC ¶ 53.)

Plaintiff's UCL and CLRA claims allege that Defendant's misleading pricing techniques, advertising, and misrepresentation mislead consumers that clothing of identical quality would have been sold at flagship Neiman Marcus stores. (FAC ¶¶ 18-19, 42-44.) However, Plaintiff's First Amended Complaint still does not allege with particularity what marketing techniques were used, other than the "Compared To" price tag and the "Last Call" name, or how any of Plaintiff's marketing techniques falsely suggested that the "Last Call" stores sold the same clothing as flagship stores. (See *generally* FAC) The Court, then, is left to determine whether a reasonable consumer would be misled by a "Compared To" price tag on a garment at a store entitled "Last Call" into believing that the flagship store previously sold identical garments at the listed price.

UNITED STATES DISTRICT COURT
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CIVIL MINUTES - GENERAL

CASE NO.: CV 14-07155 SJO (JPRx)

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Plaintiff cites the FTC's Guides Against Deceptive Pricing ("Guides"), 16 C.F.R. § 233, and the Court finds this a useful guide to how a reasonable consumer might interpret a price tag. (See FAC ¶ 20.) The Guides distinguish between "former price comparisons," "retail price comparisons," and "comparable value comparisons." Former price comparisons indicate that the retailer formerly offered the good at the listed price, and are indicated by language such as "Formerly sold at \$____" or "Were \$10, Now Only \$7.50!" 16 C.F.R. §§ 233.1(b)-(c). Other language to indicate a former price includes "Regularly," "Usually," "Formerly," or "Reduced to." 16 C.F.R. §§ 233.1(e). Retail price comparisons indicate that the same article is sold by other merchants at a particular price, and are indicated by language such as "Price Elsewhere \$10, Our Price \$7.50" or "Retail Value \$15.00, My Price \$7.50." 16 C.F.R. §§ 233.2(a)-(b). Comparable value comparisons merely indicate that merchandise of "like grade and quality" are sold by the advertiser or others in the area at the listed price, and can be indicated by language such as "Comparable Value \$15.00." 16 C.F.R. §§ 233.2(c).

Plaintiff argues that, because of the alleged implication that a "Last Call" outlet store is the "last call" for the sale of products previously sold at Defendant's retail store, a consumer would believe that "Compared to" means that the product was previously sold at the listed price at a flagship store, contrary to the FTC's guidance. (FAC ¶ 21.) But again, there is no evidence that Plaintiff advertised that its "Last Call" stores sold merchandise previously for sale at the flagship stores. (See generally FAC.) "Last Call" could just as easily refer to the last call for merchandise from a prior season or the last call for a third-party manufacturer's clearance items.

Plaintiff still claims that Last Call's price tags were essentially a former price comparison, indicating that Neiman Marcus flagship stores sold the same goods at the listed price. However, the price tags, with their "Compared To" language, would most likely be interpreted by a reasonable consumer as a comparable value comparison. See 16 C.F.R. §§ 233.2(c). Thus, the "Compared To" price tags are not sufficient to support Plaintiff's UCL and CLRA allegations. Plaintiff's FAC further alleges that Defendant's omissions violate the UCL, but Plaintiff again fails to identify any specific omissions. (FAC ¶ 48.) Nor is any other evidence provided to substantiate Plaintiff's UCL and CLRA allegations. Accordingly, the Court dismisses Plaintiff's second and third causes of action with leave to amend.

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C. False Advertising Law

Plaintiff also brings claims under California's False Advertising Law ("FAL"):

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO.: CV 14-07155 SJO (JPRx)

DATE: March 2, 2015

It is unlawful for any . . . corporation . . . with intent . . . to dispose of . . . personal property . . . to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated . . . from this state before the public in any state, in any newspaper or other publication, or any advertising device, . . . or in any other manner or means whatever, including over the Internet, any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading

Cal. Bus. Prof. Code § 17500. Further, the FAL provides that:

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

Cal. Bus. Prof. Code § 17501.

As discussed above, the facts as pleaded in the First Amended Complaint are still not sufficient to support allegations that Defendant used misleading advertising techniques or improperly advertised a former price. Accordingly, the Court dismisses Plaintiff's first cause of action with leave to amend.

III. RULING

For the foregoing reasons, the Court **GRANTS** Defendant's Motion. Plaintiff's Complaint is **DISMISSED WITH LEAVE TO AMEND**. Plaintiff shall have fifteen days to file an amended complaint, and Defendant shall have fifteen days thereafter to respond.

IT IS SO ORDERED.

EXHIBIT B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

CASE NO.: CV 14-07155 SJO (JPRx) DATE: May 12, 2015

TITLE: Linda Rubenstein v. The Neiman Marcus Group LLC, et al.

=====
PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Not Present
Courtroom Clerk Court Reporter

COUNSEL PRESENT FOR PLAINTIFF: COUNSEL PRESENT FOR DEFENDANT:

Not Present Not Present

=====
PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT [Docket No. 34]

This matter comes before the Court on Defendant The Neiman Marcus Group LLC's ("Defendant" or "Neiman Marcus") Motion to Dismiss Case ("Motion"), filed on April 6, 2015. Plaintiff Linda Rubenstein ("Plaintiff") submitted an Opposition to Defendant's Motion ("Opposition") on April 20, 2015, to which Defendant replied ("Reply") on April 27, 2015. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for May 11, 2015. See Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS** Defendant's Motion.

I. FACTUAL AND PROCEDURAL HISTORY

A. Prior Allegations

The following allegations in the Second Amended Complaint are essentially identical to the allegations in the First Amended Complaint. Plaintiff is a citizen and resident of California who purchased two items of clothing from the Neiman Marcus "Neiman Marcus Last Call" store ("Last Call") in Camarillo, California, that was purportedly sold for markedly lower than the "Compared to" price that a consumer would pay at traditional Neiman Marcus retail stores. (Second Am. Compl. ("SAC") ¶ 1.) Defendant is a Delaware limited liability company, with its principal place of business in Irving, Texas, that markets, distributes, and/or sells men's and women's clothing and accessories. (SAC ¶ 2.) Defendant sells its clothing and accessories to consumers in California and throughout the nation. (SAC ¶ 2.)

Neiman Marcus offers upscale apparel, accessories, jewelry, beauty and decorative home products and operates 41 stores across the United States. (SAC ¶ 7.) These store operations total more than 6.5 million gross square feet with over \$400 million in sale revenues in 2013. (SAC ¶ 7.) Defendant also operates thirty six Last Call clearance stores. (SAC ¶ 8.) These

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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CASE NO.: CV 14-07155 SJO (JPRx)

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"Neiman Marcus Last Call" stores are an alternative way for large retail companies to capture a larger pool of consumers because they offer clothing and accessories at discounted prices from in-demand retail stores. (SAC ¶ 8.)

Outlet stores are a popular avenue for sale-seeking consumers because in-demand retail stores, such as Neiman Marcus, will often sell clothes that are "after season" or clothing that had very little popularity and did not sell. (SAC ¶ 9.) To mitigate any more losses on the clothing, the retail stores will sell this clothing at various outlet malls for a discount. (SAC ¶ 9.) Shoppers have become accustomed to seeing products at outlet stores that once were sold at the traditional retail store. (SAC ¶ 10.) Apparel sales at factory outlets rose 17.8% in 2011, according to some estimates, while apparel sales industry-wide rose a meager 1.4%. (SAC ¶ 11.)

Defendant's use of "Neiman Marcus" in the name of the "Neiman Marcus Last Call" stores caused Plaintiff and other "Neiman Marcus Last Call" store shoppers (also referred to as the "Class") to reasonably believe that the "Neiman Marcus Last Call" stores are outlet stores of traditional Neiman Marcus retail stores and that the "Neiman Marcus Last Call" stores sell "after season" and unsold products that were previously sold at traditional Neiman Marcus retail stores. (SAC ¶¶ 12-13.) Defendant labels its Neiman Marcus Last Call products with a tag that shows a markedly lower price from the "Compared to" price. (SAC ¶ 14.) Plaintiff and the Class reasonably believed that this "Compared to" price represented the price that the exact same product would be sold at the traditional Neiman Marcus retail store. (SAC ¶ 14.)

Plaintiff and the Class, reasonably relied on the large price differences and made purchases at the "Neiman Marcus Last Call" stores believing that they were receiving a substantial discount on the exact same product that could have been purchased at traditional Neiman Marcus retail stores for the "Compared to" price. (SAC ¶ 15.) Plaintiff, like other putative Class members, was lured in, relied on, and damaged by these tactics carried out by Defendant. (SAC ¶ 15.) Defendant's Neiman Marcus Last Call products are actually not for sale at the traditional Neiman Marcus stores as the "Compared to" pricing strategy suggests but rather are manufactured strictly for sale at the "Neiman Marcus Last Call" stores. (SAC ¶ 16.) These Neiman Marcus Last Call products are of inferior grade and quality to the products sold at the traditional Neiman Marcus stores. (SAC ¶ 16.) Defendant's price tags on the Neiman Marcus Last Call products are labeled with arbitrary inflated "Compared to" prices that are purely imaginative because the products were never sold at traditional Neiman Marcus stores and therefore cannot be compared to any price. (SAC ¶ 16.) Thus the insinuated discount is false and misleading. (SAC ¶ 16.)

Due to Plaintiff's and the Class' reasonable belief that the "Neiman Marcus Last Call" store was an "outlet" store they believed that the products were items previously sold at a traditional Neiman Marcus retail store since this is how outlet stores (including Defendant's Last Call Stores) market themselves. (SAC ¶ 17.) Based on this reasonable belief, Plaintiff and the Class further reasonably believed that Neiman Marcus Last Call products were made of like grade and quality

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as the products sold at traditional Neiman Marcus stores. (SAC ¶ 17.) The Neiman Marcus Last Call products made for the outlet stores, however, are not of like grade and quality as the products sold at traditional Neiman Marcus stores, in fact, they are of inferior grade and quality. (SAC ¶ 17.)

Defendant's misleading pricing techniques led Plaintiff and the Class to believe the Neiman Marcus Last Call products were authentic Neiman Marcus products, and in reliance thereon, decided to purchase said products from Defendant's Neiman Marcus Last Call store. (SAC ¶ 18.) As a result, Plaintiff and each Class member was damaged in purchasing the Neiman Marcus Last Call products because they paid for products based on Defendant's representations and perceived discounts, but did not experience any of Defendant's promised benefits shopping at the Neiman Marcus Last Call store. (SAC ¶ 18.)

Defendant's misrepresentations regarding the Neiman Marcus Last Call products and the purported origin of the products led Plaintiff and the putative Class to believe that the Neiman Marcus Last Call products were of equal quality and sold at the traditional Neiman Marcus retail store before it became an item for sale at the Neiman Marcus Last Call store. (SAC ¶ 19.) Further, Plaintiff and members of the Class relied on Defendant's misrepresentations and would not have paid as much, if at all, for the products but for Defendant's misleading advertising and representations. (SAC ¶ 19.)

The Federal Trade Commission has also heard complaints by many members of Congress that see this practice occurring throughout large retail stores. (SAC ¶ 20.) Specifically, the Congressional members state, "it is a common practice at outlet stores to advertise a retail price alongside the outlet store price - even on made-for-outlet merchandise that does not sell at regular retail locations. Since the item was never sold in the regular retail store or at the retail price, the retail price is impossible to substantiate. We believe this practice may be a violation of the FTC's Guides Against Deceptive Pricing (16 CFR 233)." (SAC ¶ 20.)

Unlike the use of the words "Compared to" in the context of a regular retail store, where a price comparison might suggest the price for similar product sold at a competing store, when used in connection with Defendant's Last Call outlet store, the words "Compared to" can reasonably be interpreted by reasonable consumers to be a price comparison with the price of the exact same product when it was previously for sale at Defendant's regular retail store. (SAC ¶ 21.) Defendant's very name for its outlet stores, "Last Call," reinforces that belief, that is, that the outlet stores are the "last call" for the sale of products previously sold at Defendant's retail stores. (SAC ¶ 21.) Thus, in the context of the Neiman Marcus Last Call stores, when Plaintiff and the Class viewed the words "Compared to" next to a price, they reasonably believed that the "Compared to" price was the price the product previously sold at Defendant's retail stores, and not a comparable price simply for goods of a like grade and quality that might be sold elsewhere. (SAC ¶ 21.)

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The following allegations have been newly alleged in the Second Amended Complaint. Even in the situation where the "Compared to" price was reasonably interpreted to mean a comparable price for goods of a like grade and quality that were sold elsewhere than at Defendant's own retail stores, however, 16 C.F.R. 233.2(c) specifically addresses comparable value comparisons in the context of such advertising. (SAC ¶ 22.) The regulation governs situations where the retailer's "form of bargain advertising is to offer a reduction from the prices being charged either by the advertiser or by others in the advertiser's area for other merchandise of like grade and quality - in other words, comparable or competing merchandise - to that being advertised." (SAC ¶ 22 (quoting 16 C.F.R. 233.2(c))). The language used by Defendant, "Compared to," at the very least, would be interpreted by a reasonable consumer as a comparable value comparison under 16 C.F.R. 233.2(c). (SAC ¶ 23.)

Even in the case of a comparable value comparison, however, 16 C.F.R. 233.2(c) provides that a Defendant must "be reasonably certain, just as in the case of comparisons involving the same merchandise, that the price advertised as being the price of comparable merchandise does not exceed the price at which such merchandise is being offered by representative retail outlets in the area." (SAC ¶ 24.) Contrary to the requirements of 16 C.F.R. 233.2, Defendant was not reasonably certain that the "Compared to" price listed for products sold at its Neiman Marcus Last Call stores was the price at which merchandise of like grade and quality was being offered by representative retail outlets in the area at the time the product was being sold at the Neiman Marcus Last Call stores. (SAC ¶ 25.) Rather, the prices listed as the "Compared to" price appear to listed regardless of whether the actual product or similar product was currently being sold for that price in the area, or even if it had ever been sold at that price. (SAC ¶ 25.)

C. Procedural History

This case was filed in the Superior Court of California for the County of Los Angeles on August 7, 2014, and the complaint was served on August 13, 2014. (See *generally* Notice of Removal.) The case was removed to this Court on September 12, 2014. The original complaint was dismissed on December 12, 2014. Plaintiff's First Amended Complaint, filed December 22, 2014, was dismissed on March 2, 2015. Plaintiff's Second Amended Complaint, filed March 17, 2015, brings claims for violation of California false advertising law, California unfair competition law, and the Consumer Legal Remedies Act; the causes of action are identical to those brought in the First Amended Complaint. (See *generally* First Am. Compl. ("FAC"), SAC.)

In the instant Motion, Defendant contends that the Complaint should be dismissed pursuant to Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6) because Plaintiff lacks standing, provides inadequate pleadings, and fails to state a claim. (See *generally* Mot.)

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A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of the claims asserted in the complaint." *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-200 (9th Cir. 2003). In evaluating a motion to dismiss, a court accepts the plaintiff's factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); see *Ileto*, 349 F.3d at 1200. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To plead sufficiently, Plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) demands that "when averments of fraud are made, 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." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation and internal quotations omitted). Averments of fraud must be accompanied by "the who, what, when, where, and how" of the misconduct charged, setting forth "what is false or misleading about a statement, and why it is false." *Id.* (citation omitted). A complaint that fails to meet these standards will be dismissed. *Id.* at 1107.

The heightened particularity requirements of Rule 9(b) apply to state-law "false advertising" claims under statutes such as the UCL, CLRA and FAL. See, e.g., *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009). The Court determined in its December 12, 2014 and March 2, 2015 Orders that Rule 9(b) applies here, and there appears to be no reason to deviate from that determination now.

B. Reasonable Consumer Test

The UCL prohibits any "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The CLRA similarly prohibits "unfair methods of competition and unfair or

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deceptive acts or practices," such as "[r]epresenting that goods . . . have . . . characteristics, ingredients, uses, benefits, or quantities which they do not have." Cal. Civ. Code § 1770(a)(5). To state a claim under the UCL or CLRA, "one need only show that members of the public are likely to be deceived." *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (quoting *Bank of the West v. Super. Ct.*, 833 P.2d 545, 553 (Cal. 1992)) (internal quotation marks omitted). To determine whether members of the public are likely to be deceived, courts apply a "reasonable consumer" standard. *Davis*, 691 F.3d at 1161; *see also Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 506-07 (2003) ("[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer."). "A reasonable consumer is 'the ordinary consumer acting reasonably under the circumstances.'" *Davis*, 691 F.3d at 1162 (quoting *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 682 (2006)). The reasonable consumer analysis requires that advertisements be "read reasonably and in context." *Freeman*, 68 F.3d at 290.

Plaintiff brings claims under the following paragraphs of the CLRA:

- (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have
- (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
- (9) Advertising goods or services with intent not to sell them as advertised.
- (13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

Cal. Civ. Code § 1770(a). (See SAC ¶ 57.)

Plaintiff's UCL and CLRA claims allege that Defendant's misleading pricing techniques, advertising, and misrepresentation mislead consumers that clothing of identical quality would have been sold at flagship Neiman Marcus stores. (SAC ¶¶ 18-19, 47-48.) The Court has already held in its previous orders of dismissal that these claims are facially deficient because the price tag implies a comparable value rather than an actual price at a flagship store. (See *generally* March 2, 2015 Order.)

Plaintiff, however, provides new allegations regarding comparable value comparisons. Comparable value comparisons merely indicate that merchandise of "like grade and quality" are sold by the advertiser or others in the area at the listed price, and can be indicated by language such as "Comparable Value \$15.00." 16 C.F.R. § 233.2(c). Plaintiff's new allegations acknowledge that "compared to" would be interpreted by a reasonable consumer as a comparable

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value comparison as defined by 16 C.F.R. § 233.2(c). (SAC ¶ 23.) Plaintiff now alleges that Defendant was not "reasonably certain" that the 'Compared to' price listed was in fact a price at which merchandise of like grade and quality would be offered. (SAC ¶ 25.) Plaintiff specifically notes that 16 C.F.R. § 233.2(c) provides that a merchant must "be reasonably certain, just as in the case of comparisons involving the same merchandise, that the price advertised as being the price of comparable merchandise does not exceed the price at which such merchandise is being offered by representative retail outlets in the area." (SAC ¶ 24.)

Critically, however, Plaintiff never alleges that merchandise of like grade and quality was not in fact offered by other merchants at the "Compared to" price. (See *generally* SAC.) Plaintiff does not explain how any of Defendant's statements were actually false or misleading. Rather, Plaintiff's only allegation is that Defendant was not "reasonably certain" of the statements' truth in violation of guidelines set by the Federal government. (See SAC ¶ 24.) Thus, Plaintiff has still failed to identify any specific statements that were in fact false or misleading for the purposes of California's UCL and CLRA. Nor is any other evidence provided to substantiate Plaintiff's UCL and CLRA allegations. Accordingly, the Court **DISMISSES** Plaintiff's second and third causes of action.

C. False Advertising Law

Plaintiff also brings claims under California's False Advertising Law ("FAL"):

It is unlawful for any . . . corporation . . . with intent . . . to dispose of . . . personal property . . . to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated . . . from this state before the public in any state, in any newspaper or other publication, or any advertising device, . . . or in any other manner or means whatever, including over the Internet, any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading

Cal. Bus. Prof. Code § 17500. Further, the FAL provides that:

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

Cal. Bus. Prof. Code § 17501.

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The facts as pleaded in the Second Amended Complaint are still not sufficient to support allegations that Defendant used untrue misleading advertising techniques or improperly advertised a former price. Plaintiff suggests that Defendant is liable for its omissions of details of the "former price" under Cal. Bus. Prof. Code § 17501. (Opp'n 9-10.) However, as discussed above and in the Court's prior orders, advertising a price as a "Compared to" price is not advertising a price as a former price, and Plaintiff has not properly alleged that the "Compared to" price is untrue or misleading. Accordingly, the Court **DISMISSES** Plaintiff's first cause of action.

D. Leave to Amend

Federal Rule of Civil Procedure Rule 15 provides that "leave to amend shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Absent prejudice, or a 'strong showing' of the other factors, such as undue delay, bad faith, or dilatory motive, 'there exists a presumption under Rule 15(a) in favor of granting leave to amend.'" *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 957 (9th Cir. 2006) (citation omitted). Here, however, Plaintiff has already had multiple chances to allege more specific facts. As such, the Court's dismissal of Plaintiff's Second Amended Complaint is **WITHOUT LEAVE TO AMEND**.

III. RULING

For the foregoing reasons, the Court **GRANTS** Defendant's Motion. Plaintiff's Complaint is **DISMISSED WITHOUT LEAVE TO AMEND**. This matter shall close.

IT IS SO ORDERED.