UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

NORDSTROM, INC.,

Defendant.

Case No.: 14cv2062-MMA (JMA)

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

[Doc. No. 26]

Defendant Nordstrom, Incorporated ("Defendant" or "Nordstrom") moves to dismiss Plaintiff Kevin Branca's Second Amended Complaint ("SAC") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [Doc. No. 26.] The Court found the matter suitable for determination on the papers and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, the Court **DENIES** Defendant's motion to dismiss.

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BACKGROUND

Plaintiff alleges the following in his Second Amended Complaint.[1] Plaintiff Kevin Branca is an individual and resident of San Marcos in San Diego County. Nordstrom is a Washington corporation with its principal place of business in Seattle, Washington. Nordstrom owns and operates Nordstrom Rack, which is a company-owned outlet and off-price retail division of Nordstrom. As of 2013, Nordstrom operated thirty-seven Nordstrom Rack stores in California.

On July 12, 2013, Plaintiff visited a Nordstrom Rack store located in San Marcos, California. Plaintiff noticed that some items had price tags that listed a "Compare At" price and then directly below listed a significantly reduced price. The reduced price was paired with a corresponding percentage amount labeled "% Savings."[2] Plaintiff observed that other items did not have the "Compare At" tags, but rather had price tags with only a retail price. Believing the items with the "Compare At" tags were discounted from a former price, while the items without such tags were not discounted, Plaintiff purchased three items with "Compare At" tags from the store. Specifically, Plaintiff believed the listed "Compare At" price constituted the price at which Nordstrom's mainline stores, or at least other retailers, had sold or were currently selling the same item. Enticed by the idea of paying significantly less than what Plaintiff would pay for the same item at mainline Nordstrom stores or other retail stores, Plaintiff purchased one pair of cargo shorts for $29.97 with a "Compare At" price of $49.50, one hooded sweatshirt for $29.97 with a "Compare At" price of $65.00, and one pair of pants for $79.97 with a "Compare At" price of $150.00. Plaintiff claims that based on the price tags, he was led to believe that he had saved 40%, 54%, and 46% respectively on his purchases.

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[1] Because this matter is before the Court on a motion to dismiss, the Court must accept as true the allegations set forth in the complaint. *See Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 740 (1976).

[2] Plaintiff alleges that all the tags with "Compare At" language also include the corresponding "% Savings" language. As such, the Court will hereinafter refer to Nordstrom Rack price tags with the "Compare At" and "% Savings" combination as the "Compare At" tags.

Plaintiff alleges that Nordstrom intentionally misrepresents the "existence, nature, and amount of price discounts" of Nordstrom Rack products[3] in order to advertise "sham" markdowns and induce consumers into purchasing them. Plaintiff claims that Nordstrom fabricated the "Compare At" prices because Nordstrom never sold nor intended to sell the items he purchased in their mainline stores, no other stores ever sold the items, and thus there could not be a legitimate "former price" or a prevailing market price for the items. Plaintiff alleges that the false price comparisons deceived him into paying what were actually full retail prices without discounts. He alleges that he would not have made these purchases but for the "Compare At" prices and corresponding percentage of savings listed on each price tag.

On September 2, 2014, Plaintiff filed this putative class action against Nordstrom. In the operative Second Amended Complaint, Plaintiff brings claims for violations of the California Unfair Competition Law ("UCL"), California Business and Professions Code sections 17200, *et. seq.*; violations of California's False Advertising Law ("FAL"), California Business and Professions Code sections 17500, *et. seq.*; and violations of the Consumers Legal Remedies Act ("CLRA"), California Civil Code section 1750 *et seq*. Nordstrom moves to dismiss Plaintiff's Second Amended Complaint pursuant to Federal Rules of Civil Procedure[4] 12(b)(1) and 12(b)(6) on the grounds that Plaintiff lacks standing under the FAL, UCL, and CLRA, and fails to allege sufficient facts under both the general pleading standard as well as Rule 9(b)'s heightened pleading standard.

LEGAL STANDARD

A. Rule 12(b)(1)

Pursuant to Rule 12(b)(1), a party may seek dismissal of an action for lack of subject matter jurisdiction "either on the face of the pleadings or by presenting extrinsic evidence." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003);

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[3] Plaintiff expressly excludes those products sold at Nordstrom Rack that were previously offered for sale at Nordstrom mainline retail stores.

[4] All further reference to "Rule" refers to a Federal Rule of Civil Procedure unless otherwise noted.

see also White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). Where the party asserts a facial challenge, the court limits its inquiry to the allegations set forth in the complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "If the challenge to jurisdiction is a facial attack . . . the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made." *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of the Interior*, 905 F. Supp. 2d 1158, 1167 (E.D. Cal. 2012) (internal citation and quotation omitted). "Lack of standing is a defect in subject-matter jurisdiction and may be properly challenged under Rule 12(b)(1)." *Wright v. Incline Village Gen. Imp. Dist.*, 597 F. Supp. 2d 1191, 1199 (D. Nev. 2009) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)).

B. Rule 12(b)(6)

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

In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not take legal conclusions as true merely because they are cast in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

Similarly, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

In determining the propriety of a Rule 12(b)(6) dismissal, courts generally may not look beyond the complaint for additional facts. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). "A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *Id.*; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). "However, [courts] are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295–96 (9th Cir. 1998). Where dismissal is appropriate, a court should grant leave to amend unless the plaintiff could not possibly cure the defects in the pleading. *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009).

C. Rule 9(b)[5]

In alleging fraud or mistake, the plaintiff must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Failure to satisfy this heightened pleading requirement can result in dismissal of the claim. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). In general, the plaintiff's allegations of fraud or mistake must be "specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* at 1106. This heightened pleading standard requires the plaintiff to allege fraud or mistake by detailing "the who, what, when, where, and how" of the misconduct charged. *Id.* at 1106–07. In other words, the plaintiff must specify the time, place, and content of the alleged fraudulent or mistaken misconduct. *See id.* However, "malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

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[5] Both parties acknowledge that Rule 9(b)'s heightened pleading standard applies to Plaintiff's claims.

DISCUSSION

A. Standing

As an initial matter, Defendant argues that the Court lacks subject matter jurisdiction over this action based on Plaintiff's lack of standing to bring his claim. Defendant contends that Plaintiff lacks standing for two reasons. First, Defendant alleges that Plaintiff does not have standing to raise claims arising out of reliance on the Nordstrom Rack website, store name, or any other advertising besides the "Compare At" tags. [Doc. No. 26, at 12:6–13:6.] Second, Defendant contends that Plaintiff lacks standing to represent individuals who purchased different Nordstrom Rack products than Plaintiff. [Doc. No. 26, at 13:7–19.]

1. Plaintiff's Standing to Bring Claims Based on Nordstrom Rack Name, Website, and General Advertising

Defendant alleges that Plaintiff does not have standing to raise claims arising out of reliance on the Nordstrom Rack website, store name, or advertising aside from the Nordstrom Rack price tags. [Doc. No. 26, at 12:6–13:6.] The Court agrees. The Court previously addressed this issue in its Order addressing Defendant's Motion to Dismiss Plaintiff's First Amended Complaint. [*See* Doc. No. 18.] In Plaintiff's First Amended Complaint ("FAC"), Plaintiff did not allege he ever saw or relied on Nordstrom Rack's website, store name, or any advertisements or statements apart from those on the price tags. [*See* Doc. No. 3.] In the SAC, Plaintiff generally discusses two statements on Nordstrom Rack's website and the implications of the Nordstrom Rack store name, but he again fails to allege he ever saw or relied on them in making his purchases. Accordingly, the Court finds no reason to alter its previous holding that Plaintiff has standing only insofar as his claims arise from reliance on Nordstrom Rack price tags.

2. Plaintiff's Standing to Represent Individuals Who Purchased Different Items

Second, Defendant contends that Plaintiff lacks standing to represent a class of individuals who purchased different items from Nordstrom Rack than Plaintiff. [Doc.

No. 26, at 13:7–19.] Plaintiff contends this argument should not be addressed at this stage, but rather analyzed under Rule 23 upon a motion for class certification. [Doc. No. 27, at 11:20–21.] In support of its proposition, Defendant points the Court to *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861 (N.D. Cal. 2012). [Doc. No. 26, at 13:16–17.] In *Miller*, the plaintiff, Miller, brought claims against Ghirardelli under the FAL, CLRA, and UCL after he bought a package of Ghirardelli white chocolate chips. *Miller*, 912 F. Supp. 2d at 863. He sued on the basis that the chocolate chips that he bought and four other Ghirardelli products that he did not purchase were misleadingly marketed as containing white chocolate. *Id.* Ghirardelli moved to dismiss on the basis that Miller did not have standing to allege claims based on products he did not purchase. *Id.*

The *Miller* court found that there was no controlling authority on this issue and after its own inquiry, the Court is satisfied that there is still none today. *Id.* at 868. The *Miller* court pointed out that some federal courts have held as a matter of law that a plaintiff lacks standing to assert such claims, others have held that the inquiry is more appropriate upon a motion for class certification, and the majority of courts—as well as the *Miller* court—have analyzed the similarity between the various products and alleged misrepresentations at issue. *Id.* at 868–69 ("The majority of the courts that have carefully analyzed the question hold that a plaintiff may have standing to assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged misrepresentations are substantially similar."); *see also Cortina v. Goya Foods, Inc.*, No. 14-CV-169-L (NLS), 2015 WL 1411336, at *18 (S.D. Cal. Mar. 19, 2015).

In *Miller*, the court applied the substantial similarity approach and determined that Miller did not have standing to sue based on the four products he did not purchase because the products and the labels were too dissimilar. *Miller*, 912 F. Supp. 2d at 872. The court found it pertinent that the products were all different—baking chips, wafers, and drink mixes—and had different uses. *Id.* at 870 (noting "confectionary wafers are

different than chips for cookies"). Even the target consumers varied, as two products were marketed to retailers and the others were not. *Id.* Also, the court found it material that the products' labels, although they each included the word "white" in the product name, described the products using different language or, in one case, did not describe the product at all. *Id.* at 870–72. For example, two products had labels using "flavor" or "flavored" while the others did not. *Id.* at 871. Lastly, one product was "sold alongside a Ghirardelli product that actually contained white chocolate" while Miller did not allege the same for the other products. *Id.* In concluding the allegations did not satisfy the substantial similarity test, the court noted that because the labels varied across the products, it was not a case where "an identical label [was] stamped on different products," which would be "more obviously the same labeling practice" and would satisfy the test. *Id.* at 872.

The *Miller* court also explained that, in cases "[w]here product composition is less important," courts have modified the substantial similarity approach slightly, focusing more on "whether the alleged *misrepresentations* are sufficiently similar across product lines." *See Miller*, 912 F. Supp. 2d at 869 (emphasis added) (citing *Koh v. S.C. Johnson & Son, Inc.*, No. C-09-00927 RMW, 2010 WL 94265, at *1–3 (N.D. Cal. Jan. 5, 2010)). For example, in *Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000 (N.D. Cal. 2012), the plaintiff alleged that the "All Natural" labels on Jamba Juice smoothie kits were deceptive. *Id.* at 1001. The plaintiff had only bought two of many flavors of the kits. *Id.* However, the court held that the plaintiff had standing to bring claims on behalf of purchasers of the other flavors because "the same alleged misrepresentation was on all of the smoothie kit[s] regardless of flavor; all smoothie kits [were] labeled 'All Natural,' and all smoothie kits contain[ed] allegedly non-natural ingredients." *Id.* at 1006. Thus, the court found it particularly salient that the labels remained consistent across the products.

Similarly, in *Astiana v. Dreyer's Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 WL 2990766 (N.D. Cal. July 20, 2012), the plaintiffs alleged the

defendant made misrepresentations regarding the "natural" quality of its ice creams' ingredients. *Id.* at *13. The court found the plaintiffs had standing to sue based on flavors of ice cream they did not purchase because many of the contested ingredients were the same across all of the ice creams at issue and their labels were nearly identical. *Id.* Some labels stated "All Natural Flavors" while others stated "All Natural Ice Cream." *Id.* The court stated, "[t]hat the different ice creams may ultimately have different ingredients is not dispositive as [the plaintiffs] are challenging the same basic mislabeling practice across different product flavors." *Id.*

Although the products in *Jamba Juice* and *Astiana* were of the same type and here, the products vary like in *Miller*, this case is more analogous to *Jamba Juice* and *Astiana*. Here, as in *Jamba Juice* and *Astiana*, the differences across the products are of little import to the alleged misrepresentations. In *Jamba Juice* and *Astiana*, the plaintiffs alleged the labels misrepresented some of the products' ingredients and many of those ingredients overlapped regardless of the products' varying flavors. In *Miller*, however, the differences between the products were far-reaching and material. The products, their names, uses, and ingredients, and the target purchasers all varied. Here, Plaintiff does not allege that his claims depend on what type of product a consumer purchased from Nordstrom Rack; it is immaterial for the purposes of his claims whether one purchased a pair of shoes versus a hat, so long as the item bore a "Compare At" tag. His allegations do not relate to the exact prices, percentages of savings listed on the tags, or specific characteristics of the underlying products, which would vary by product. Rather, his claims relate to the consistent format of the tags, *i.e.*, the juxtaposition of two prices, one higher than the other, the term "Compare At" and a percentage, labeled "% Savings." Moreover, all of the products are marketed to the same consumers, Nordstrom Rack shoppers. Thus, product composition is of little importance and the similarity amongst the purported misrepresentations is most important, such as in *Jamba Juice* and *Astiana*. *See Miller*, 912 F. Supp. 2d at 869.

Looking to the alleged misrepresentations, they are essentially identical, also analogous to *Jamba Juice* and *Astiana*. The "Compare At" tags are substantially similar because the characteristics and format that Plaintiff complains of remain consistent across such tags. Accordingly, the Court finds that Plaintiff has standing to sue on behalf of purchasers of other Nordstrom Rack items with "Compare At" tags because he is challenging "the same basic mislabeling practice" across products.[6] *See Astiana*, 2012 WL 2990766, at *13.

B. Plaintiff's FAL, UCL, and CLRA Claims

Plaintiff alleges that Nordstrom's "Compare At" price tags violate the FAL, UCL, and CLRA because they are interpreted as listing former price comparisons yet neither Nordstrom's mainline stores nor other retailers formerly sold the same merchandise at the "Compare At" price. Nordstrom moves to dismiss Plaintiff's FAL, UCL, and CLRA claims under Rules 12(b)(6) and 9(b) on the grounds that Plaintiff fails to identify a false or misleading statement made by Nordstrom, fails to plead Nordstrom knew or should have known of a false statement, and fails to identify a harm caused by a false advertisement. [Doc. No. 26.]

1. California's FAL, UCL, and CLRA

California's FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof. Code § 17500. The FAL provides, in relevant part:

> 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

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[6] Recently, the Court came to a different conclusion in a similar, but materially different case, *Oxina v. Lands' End, Inc.*, No. 14-CV-2577-MMA NLS, 2015 WL 4272058 (S.D. Cal. June 19, 2015). There, the Court found that the plaintiff lacked standing to bring claims on behalf of all purchasers of the defendant's apparel because the purported misrepresentation—"Made in USA"—was listed on the defendant's website and the Court could not distinguish which items the "Made in USA" statement was mistakenly applied to and where each item of apparel also had its own unique physical tag that affected the Court's assessment of the statement on the website. *Id.* at *6. Thus, unlike this case, the purported misrepresentations as well as the products themselves varied from item to item.

> 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. "This statute makes it unlawful for a business to disseminate 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[.]'" *Arevalo v. Bank of Am. Corp.*, 850 F. Supp. 2d 1008, 1023–24 (N.D. Cal. 2011) (internal citation omitted). "The statute has been interpreted broadly to encompass not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. . . . Consequently, even a perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under this section." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012) (internal citations, quotations, and alterations omitted).

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The UCL provides a separate theory of liability under each of the three prongs: "unlawful," "unfair," and "fraudulent." *Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212, 1222 (C.D. Cal. 2012) (citing *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007)). "The UCL expressly incorporates the FAL's prohibition on unfair advertising as one form of unfair competition." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1103 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013). Accordingly, any violation of the FAL also violates the UCL. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citing *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002)).

Finally, California's CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770. Specifically, the CLRA prohibits, among other things, "[a]dvertising goods or services with intent not to sell them as

advertised" and "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions." Cal. Civ. Code § 1770(a)(9), (13).

2. The Reasonable Consumer Test

To state a claim under the FAL, UCL, or the CLRA, the plaintiff must allege the defendant's purported misrepresentations are likely to deceive a reasonable consumer. *See Williams*, 552 F.3d at 938 (explaining that unless the advertisement at issue targets a particularly vulnerable group, courts must evaluate claims for false or misleading advertising from the perspective of a reasonable consumer); *see also Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) ("It is true that violations of the UCL, FAL, and CLRA are evaluated from the vantage point of a 'reasonable consumer.'"); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 967 (S.D. Cal. 2012) ("To state a claim under the [UCL and FAL] one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'"). "A reasonable consumer is 'the ordinary consumer acting reasonably under the circumstances.'" *Davis*, 691 F.3d at 1161–62 (quoting *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682 (2006)). "Likely to deceive implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *In re Sony*, 903 F. Supp. 2d at 967 (citing *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003)). Instead, "the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be mislead [sic]." *Id.* "In determining whether a statement is misleading under the statute, the primary evidence in a false advertising case is the advertising itself." *Bruton v. Gerber Products Co.*, 961 F. Supp. 2d 1062, 1092 n.20 (N.D. Cal. 2013) (quoting *Colgan*, 135 Cal. App. 4th at 679) (internal quotation marks omitted).

Finally, courts have recognized that "[w]hether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires consideration and weighing of

evidence from both sides and which usually cannot be made on [a motion to dismiss]." *Williams*, 552 F.3d at 939 (internal quotations removed) (citing *Linear Technology Corp. v. Applied Materials, Inc.*, 61 Cal. Rptr. 3d 221, 237 (2007)).

3. Analysis

First, Defendant contends that Plaintiff does not sufficiently plead facts indicating that Nordstrom's "Compare At" prices are misleading or false. [Doc. No. 26, at 16:16–18:20.] Specifically, Defendant contends that neither the consumer survey evidence nor the Nordstrom Full Line and Rack Supplier Compliance Manual that Plaintiff now includes in the SAC sufficiently support his allegations. [*Id.*]

The Court finds Plaintiff sufficiently alleges his claim that the tags are deceptive. Plaintiff pleads with particularity how and why he was personally deceived by the "Compare At" tags. "[A] plaintiff must set forth what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994). Plaintiff alleges, upon seeing the combination of "Compare At" with "% Savings," he believed the "Compare At" price was a former price, or at least the prevailing market price, of the same item because he believed one could only have "savings" with regard to the same product. He states that he saw items with "Compare At" tags and items without and believed that those with the "Compare At" tags must be discounted, while the others were not.

Plaintiff correctly points out that his claims are subject to the reasonable consumer test. [Doc. No. 27, at 13:15–28]; *see Williams*, 552 F.3d at 938. Plaintiff sufficiently alleges that reasonable consumers would be deceived by Nordstrom's tags. He states reasonable consumers would be deceived in the same way and for the same reasons as he was. He alleges that survey results demonstrate 90% of 206 participants reported interpreting a Nordstrom Rack "Compare At" tag to mean that "the associated item was previously sold for [the "Compare At" price]." [SAC ¶¶ 72–76.] Defendant urges the Court to disregard this "expert evidence." Defendant argues that Plaintiff does not provide enough information regarding the survey methodology to enable the Court to

determine whether it satisfies the *Daubert* standard for expert scientific opinions. [Doc. No. 26, at 17:12–18:4]; *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995). However, the Court finds this argument premature, as Plaintiff need not *prove* his claims at the motion to dismiss stage. The consumer survey data is incorporated into Plaintiff's SAC, therefore the Court must presume its truth. Further, even upon a motion for summary judgment, the Ninth Circuit has held that while consumer survey evidence may be offered to prove reasonable consumers would be deceived, mere anecdotal evidence may suffice. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008). Moreover, whether reasonable consumers would be deceived is a question of fact, usually inappropriate for the Court's determination at the motion to dismiss stage. *See Gerber*, 552 F.3d at 939 (stating decisions granting motions to dismiss are rarely appropriate where the reasonable consumer test applies to the underlying claims). Accordingly, the Court is satisfied that Plaintiff alleges sufficient facts to show a likelihood that reasonable consumers would be deceived by Nordstrom's tags.

Further, Plaintiff alleges *why* the "Compare At" prices are false as former prices—because they necessarily cannot be former prices or prevailing market prices, as the items were never sold elsewhere for any other price besides the Nordstrom Rack retail price. As further support, Plaintiff attaches the Nordstrom Full Line and Rack Supplier Compliance Manual to his complaint. [SAC Exh. A "Manual."] Plaintiff points out that the Manual gives diagrams of Nordstrom Rack tags and describes the "Compare At" price as "Higher (original) price" in one place, and "MSRP" in another. [SAC ¶ 42.] The Manual refers to the lower price on the diagrams as "Regular Retail." [*Id.*] Plaintiff alleges this "illustrates how Nordstrom requires its suppliers and vendors to (1) create a phony MSRP to include in the "COMPARE AT" space on the hang tag, and (2) list the actual MSRP, or "REGULAR RETAIL" price, in the purported sales price line." [*Id.*] Defendant counters that the Manual does not give any information regarding how Nordstrom calculates its "Compare At" prices. [Doc. No. 26, at 17:2–4.] This may be

true, but on a motion to dismiss, the Court must construe allegations in the light most favorable to Plaintiff. Plaintiff alleges that Nordstrom's usage of "Higher (original) price" and "MSRP" in its Manual support his claim of Nordstrom's deceptive and misleading price tags.

Plaintiff pleads that the "Compare At" prices are necessarily false as what they are purportedly interpreted as being—former prices—and why. Moreover, the Rule 9(b) heightened pleading standard is relaxed as to facts supporting allegations of fraud that are exclusively within the defendant's possession and of which a plaintiff cannot be expected to have personal knowledge prior to discovery. *See, e.g.*, *Estate of Migliaccio v. Midland Nat'l. Life Ins. Co.*, 436 F. Supp. 2d 1095, 1106 (C.D. Cal. 2006) (applying the relaxed standard in a case of corporate fraud); *In re Gupta Corp. Sec. Litig.*, 900 F. Supp. 1217, 1228 (N.D. Cal. 1994) (citing *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987)). Plaintiff cannot be expected to have detailed personal knowledge of Nordstrom's internal pricing policies and procedures at this stage in the litigation. Taking Plaintiff's allegations as true, the Court finds Plaintiff sufficiently alleges that Nordstrom's "Compare At" tags are misleading.

Second, Defendant argues that Plaintiff fails to plead that Nordstrom knew or should have known of a false statement. [Doc. No. 26, at 18:21–19:14.] The Court disagrees. Plaintiff goes beyond alleging that Defendant *knew* or *should have known* its tags were misleading; he repeatedly alleges Nordstrom *intended* them to be so. Plaintiff states, "[b]y designing its price tags [the way it has], Nordstrom *intended* for reasonable consumers to understand [them as reduced prices]." [SAC ¶ 8, emphasis added.] "Nordstrom [. . .] *intentionally* failed to disclose to, Plaintiff, and others similarly situated, the truth about its 'Compare At' prices." [SAC ¶ 13, emphasis added.] "Nordstrom *intentionally* sought to convey to consumers that they were receiving a true markdown." [SAC ¶ 36, emphasis added.] "Nordstrom has *intentionally* and *deliberately* implemented a labeling scheme *intentionally* designed to convey to its customers that the 'Compare At' price is the same thing as an 'original' price." [SAC ¶

39, emphasis added.] Pursuant to Rule 9(b), while the circumstances of fraud must be pleaded with particularity, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Under this standard, Plaintiff's allegations regarding Nordstrom's intent are sufficient.

Third, Defendant contends that Plaintiff fails to identify a harm caused by a false advertisement. [Doc. No. 26, at 19:15–20:2.] Defendant states that Plaintiff does not establish that he did not get the deal he thought he was getting, that the goods were priced unfairly, or how the goods he purchased were deficient. [*Id.*] However, such allegations are not required to state claims pursuant to the FAL, UCL, or CLRA. The FAL prohibits advertisers from advertising former prices unless the former price was the prevailing market price within the preceding three months or unless the date the former price was the prevailing market price is clearly and obviously stated on the advertisement. *See* Cal. Bus. & Prof. Code § 17501. As for the UCL, where Plaintiff states a claim under the FAL, Plaintiff states a claim under the UCL. *See Williams*, 552 F.3d at 938. Under the CLRA, advertisers shall not make "false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions." Cal. Civ. Code § 1770(a)(9), (13). The existence of these statutes demonstrate that deceptive or false price reductions harm consumers and, as discussed, Plaintiff sufficiently pleads Nordstrom's "Compare At" tags constitute false price reductions due to their deceptive nature. In any event, Plaintiff explicitly alleges harm. He states, "purchasers, including [himself], reasonably perceived that they were receiving products that regularly sold in the non-outlet retail marketplace at substantially higher prices (and were, therefore, worth more) than what they paid." [SAC ¶ 92.]

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CONCLUSION

The Court, having considered all of Defendant's arguments, and for all of the reasons stated above, **DENIES** Defendant's motion to dismiss.

IT IS SO ORDERED.

Dated: October 9, 2015

Hon. Michael M. Anello
United States District Judge