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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

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

Plaintiff,

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

Defendants.

Case No. 16-cv-369-BAS(JMA)
**ORDER GRANTING
DEFENDANTS’ MOTION TO
DISMISS WITH LEAVE TO
AMEND**
[ECF No. 13]

20 Plaintiff Monica Rael brings this case pursuant to the Class Action Fairness
21 Act, 28 U.S.C. §1332(d)(2), asserting four causes of action for violations of: (1)
22 California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et*
23 *seq.*; (2) California’s False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §
24 17500 *et seq.*; (3) California’s Consumer Legal Remedies Act (“CLRA”), Cal. Civ.
25 Code § 1750 *et seq.*; and (4) Forty-one different consumer-protection laws on behalf
26 of classes in states with similar laws. Defendants New York & Company Stores, Inc.
27 and New York & Company, Inc. now move to dismiss the Second Amended
28 Complaint (“SAC”) pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6),

1 and 9. (ECF No. 13.) Alternatively, Defendants move to strike the fourth cause of
2 action. (*Id.*)

3 The Court finds this motion suitable for determination on the papers submitted
4 and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the
5 reasons discussed below, the Court **GRANTS** the motion to dismiss for lack of
6 particularity and **GRANTS** the motion with respect to the Fourth Cause of Action
7 and injunctive relief for lack of standing, and finds the motion to strike is, therefore,
8 moot. Because Plaintiff may be able to allege sufficient facts, the Court **GRANTS**
9 Plaintiff leave to amend the First, Second, and Third Causes of Action only.

10 11 **I. BACKGROUND**

12 Plaintiff is a resident of San Diego, California. (SAC ¶ 10.) Defendants sell
13 clothing and accessories via New York & Company (“NY&C”) retail stores, outlet
14 stores, and an online store throughout the United States, including California. (*Id.* ¶
15 13.) This case concerns allegations that Defendants engaged and continue to engage
16 in false discount pricing, commonly known as phantom markdowns, throughout their
17 retail and outlet stores. (*Id.* ¶ 1.)

18 In her original complaint, Plaintiff claims to have bought “a pair of women’s
19 pants” for \$16.17¹ from an NY&C store, referring to the store first as a retail store,
20 and later as an outlet store. (Compl. ¶¶ 10, 15.) In Plaintiff’s First Amended
21 Complaint (“FAC”), she claimed to have instead purchased “a pair of women’s
22 shoes” for \$16.17 at an NY&C store, again referring to the store first as a retail store,
23 and later as an outlet store. (FAC ¶¶ 10, 15.) In Plaintiff’s SAC, she maintains her
24 amended assertion that she bought a pair of shoes, specifically, Jute Espadrille
25 Wedges, for \$16.17. (SAC ¶¶ 10 n.1, 15.) Additionally, Plaintiff clarifies the previous

26
27 ¹ Plaintiff states that she purchased the product from Defendants for both \$14.98 and \$16.17
28 in all three of her complaints. (Compl. ¶¶ 15-16; FAC ¶¶ 15-16; SAC ¶¶ 15-16.) The Court assumes
that the \$14.98 price is the price before sales tax and the \$16.17 is the price Plaintiff actually paid,
although she does not clarify this discrepancy in any of her complaints.

1 inconsistencies in her SAC by stating that she “went shopping at an outlet mall” but
2 purchased the shoes at an NY&C retail store. (SAC ¶ 15.) Plaintiff alleges she bought
3 the shoes after observing both “signage within the store and the price tag on the
4 shoes,” advertising that the shoes were 70% off their original price of \$49.94. (*Id.*)
5 Specifically, the shoe’s price tag, according to Plaintiff, “indicated the ‘Original’ or
6 ‘Market’ price of the shoes was, ‘\$49.94,’” and that Defendants “offered [the shoes]
7 at a discount, described as: ‘70% off.’” (*Id.* ¶ 16.)

8 Plaintiff alleges that the shoes’ \$49.94 price was “false and misleading”
9 because it was not “the prevailing retail price for the shoes during the three months
10 immediately prior to [her] purchase,” as mandated by California’s FAL. (SAC ¶ 16.)
11 She further contends that Defendants “fraudulently concealed from and intentionally
12 failed to disclose . . . the truth about their advertised price and former prices.” (*Id.* ¶
13 19.) Without Defendants’ alleged misrepresentations, Plaintiff states that she would
14 not have purchased the shoes and suffered economic injury as a result. (*Id.* ¶ 17.)
15 Plaintiff seeks: (1) an order certifying the class; (2) damages to herself and the
16 proposed Class; (3) restitution and disgorgement of all profits; (4) unjust enrichment;
17 (5) declaratory and injunctive relief; (6) an order requiring Defendants to engage in
18 a corrective advertising campaign; and (7) attorneys’ fees and costs. (*Id.* ¶ 112.)

19 20 **II. STANDING**

21 **A. Legal Standard**

22 Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may move
23 to dismiss a claim based on the court’s lack of subject matter jurisdiction. “A federal
24 court is presumed to lack jurisdiction in a particular case unless the contrary
25 affirmatively appears.” *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225
26 (9th Cir. 1989) (citation omitted). “Article III of the Constitution confines the federal
27 courts to adjudication of actual ‘Cases’ and ‘Controversies.’” *Lujan v. Defenders of*
28 *Wildlife*, 504 U.S. 555, 590 (1992). “[T]he core component of standing is an essential

1 and unchanging part of the case-or-controversy requirement of Article III.” *Id.* at 560
2 (citation omitted). Consequently, a case that lacks Article III standing must be
3 dismissed for a lack of subject matter jurisdiction. *See Maya v. Centex Corp.*, 658
4 F.3d 1060, 1067 (9th Cir. 2001). Because standing is essential for a federal court to
5 have subject matter jurisdiction, the issue of standing is properly raised in a Rule
6 12(b)(1) motion to dismiss. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d
7 1115, 1122 (9th Cir. 2010) (citations omitted).

8 The “irreducible constitutional minimum” of Article III standing is comprised
9 of three elements: (1) “the plaintiff must have suffered an injury in fact” which is
10 both “concrete and particularized” and “actual or imminent, not conjectural or
11 hypothetical”; (2) “there must be a causal connection between the injury and the
12 conduct complained of”; and (3) “it must be likely, as opposed to merely speculative,
13 that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-61
14 (quotations omitted). The party soliciting federal jurisdiction has the burden of
15 establishing these elements. *Id.*

16 In a factual jurisdictional attack, the challenger provides evidence that an
17 alleged fact in the complaint is false, thereby resulting in a lack of subject matter
18 jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).
19 The allegations in the complaint are not presumed to be true under a factual attack,
20 and “the district court is not restricted to the face of the pleadings, but may review
21 any evidence, such as affidavits and testimony, to resolve factual disputes concerning
22 the existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.
23 1988). However, “when ‘the jurisdictional issue and the substantive issues are so
24 intertwined that the question of jurisdiction is dependent on the resolution of factual
25 issues going to the merits’” of a case, then the district court’s “jurisdictional finding
26 of genuinely disputed facts is inappropriate.” *Sun Valley Gasoline Inc. v. Ernst Enter.*
27 *Inc.*, 711 F.2d 138, 139 (9th Cir. 1983) (quoting *Augustine v. United States*, 704 F.2d
28 1074, 1077 (9th Cir. 1983)). Jurisdictional and substantive issues are “considered

1 intertwined where . . . ‘a statute provides the basis for both the subject matter
 2 jurisdiction of the federal court and the plaintiff’s substantive claim for relief.’” *Id.*
 3 (quoting *Timberland Lumber Co. v. Bank of Am.*, 549 F.2d 597, 602 (9th Cir. 1976)).
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5 **B. First (UCL), Second (FAL), and Third (CLRA) Causes of Action**

6 Defendants make a factual jurisdictional attack on Plaintiff’s allegations in in
 7 her first three causes of action in the SAC. (Defs.’ Mot. 4:11-28, 5:1-3.) Defendants
 8 argue that Plaintiff did not suffer any injury-in-fact, so she does not possess standing
 9 to bring this case. Specifically, Defendants offer into evidence a declaration from
 10 Christine Tracz, Vice President of Merchandising for NY&C outlet stores. (Tracz
 11 Decl. Ex. A, ECF No. 13-2.) Ms. Tracz asserts that “the only NY&C stores located
 12 in outlet malls are NY&C outlets,” and NY&C did not sell the “Jute Espadrille
 13 Wedges” in any San Diego outlets after August 2015. (Tracz Decl. ¶¶ 3-4.)
 14 Therefore, Defendants dispute the possibility that Plaintiff actually bought the shoes
 15 in question from an NY&C store because: (1) “NY&C’s price tags do not resemble
 16 those alleged in Plaintiff’s SAC,” and (2) “the Jute Espadrille Wedges did not sell in
 17 NY&C’s San Diego outlets at any time near the date of Plaintiff’s alleged purchase.”
 18 (Defs.’ Mot. 4:23-27.) Thus, Defendants maintain that “it is impossible that Plaintiff
 19 bought the shoes as alleged.” (*Id.* at 4:28.)

20 Because the issue disputed between parties is the validity of Plaintiff’s
 21 purchase of the shoes, which gives rise to the entirety of her claims, the Court
 22 determines that it is inappropriate to resolve this factual dispute at this time. The
 23 question of jurisdiction depends entirely on Plaintiff having purchased the shoes from
 24 an NY&C retail store, completely intertwining jurisdictional and substantive issues.
 25 As such, the Court declines to reach to issue of standing on Plaintiff’s causes of
 26 actions for violations of California’s UCL, FAL, and CLRA.

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1 C. Injunctive Relief

2 Plaintiff requests injunctive relief to enjoin Defendants from continuing their
3 alleged “unlawful practices.” (SAC ¶112.) In order for the Court to grant Plaintiff’s
4 request for injunctive relief, she must demonstrate a substantial likelihood that an
5 injunction will remedy her injury. *See Lujan*, 504 U.S. at 595 (citing *Duke Power Co.*
6 *v. Carolina Env’tl. Study Grp., Inc.*, 438 U.S. 59, 79 (1978)). Nowhere in Plaintiff’s
7 SAC does she allege that she is at risk of a future injury from Defendants. Defendants
8 properly call attention to the fact that Plaintiff has neither stated “that she is likely to
9 buy other shoes from NY&C [nor] that she continues to be misled by NY&C’s
10 pricing.” (Defs.’ Mot. 5:13-14); *see, e.g., Luman v. Theismann*, 647 F. App’x 804,
11 807 (9th Cir. 2016) (holding that the district court properly dismissed the plaintiff’s
12 request for injunctive relieve when the plaintiffs did not allege that they intended to
13 purchase the defendants products in the future).

14 Plaintiff asserts in her opposition that courts in California’s federal districts
15 have found plaintiffs to have standing to seek injunctive relief in “company-wide
16 false sales schemes.” (Pl.’s Opp’n 5:22-26). However, there is a split among districts
17 as to whether plaintiffs have standing to seek injunctive relief on consumer-protection
18 claims where the plaintiff faces no threat of future harm. *Compare Henderson v.*
19 *Gruma Corp.*, No. CV 10–04173 AHM (AJWx), 2011 WL 1362188, at *7 (C.D. Cal.
20 Apr. 11, 2011) (“If the Court were to construe Article III standing for FAL and UCL
21 claims as narrowly as the Defendant advocates, federal courts would be precluded
22 from enjoining false advertising under California consumer protection laws because
23 a plaintiff who had been injured would always be deemed to avoid the case of the
24 injury there after[.]”), with *Mason v. Nature’s Innovation, Inc.*, No. 12cv3019
25 BTM(DHB), 2014 WL 1969957, at *5 (S.D. Cal. May 13, 2013) (“[A]s important as
26 consumer protection is, it is not within the Court’s authority to carve out an exception
27 to Article III’s standing requirements to further the purpose of California consumer
28 protection laws.”). The Court agrees with what has previously been held in this

1 district. Article III’s requirement that an injury is likely to be redressed by a favorable
2 decision is not met where “there is no likelihood of injury in the future [because] a
3 plaintiff has no interest in purchasing the product at issue again.” *Mason*, 2014 WL
4 1969957, at *4.

5 As previously acknowledged, Plaintiff does not state in her pleadings that she
6 is likely to purchase a pair of Jute Espadrille Wedges, or any other product, from an
7 NY&C store again, and as such, she is not at risk of any future injury from
8 Defendants. Consistent with previous holdings from this district this Court finds
9 Plaintiff thus lacks standing to seek injunctive relief.

10 11 **D. Fourth Cause of Action**

12 Plaintiff brings the Fourth Cause of Action of her SAC “under the laws of
13 California and on behalf of all other persons who have purchased merchandise in
14 states having similar laws regarding consumer fraud and deceptive trade practices.”
15 (SAC ¶ 65.) For Plaintiff to have standing, she “must demonstrate standing for each
16 claim [she] seeks to press.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352
17 (2006). “To demonstrate standing ‘named plaintiffs who represent a class must allege
18 and show that they personally have been injured, not that injury has been suffered by
19 other, unidentified members of the class to which they belong and which they purport
20 to represent.’” *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1107 (N.D.
21 Cal. 2007) (quoting *Lewis v. Casey*, 518 U.S. 343, 347 (1996)). If a named plaintiff
22 is “lacking for a particular state, all claims based on *that* state’s laws are subject to
23 dismissal.” *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1164 (N.D.
24 Cal. 2009) (citing *Ditropan*, 529 F. Supp. 2d at 1106-07) (emphasis in original).

25 Plaintiff is a resident of California and allegedly purchased the shoes in
26 question from a NY&C retail store in California. (SAC ¶ 10.) Although Plaintiff
27 asserts claims under the consumer-protection laws of forty other states and the
28 District of Columbia, no other plaintiffs are named in the SAC to represent claims

1 from these states. (See SAC ¶¶ 68-111.) Subsequently, Plaintiff lacks standing to
2 bring consumer-protection claims in these forty states and District of Columbia,
3 warranting dismissal of Plaintiff's fourth cause of action. See, e.g., *Morales v.*
4 *Unilever United States, Inc.*, No. 2:13-2213 WBS EFB, 2014 WL 1389613, at *4
5 (N.D. Cal. Apr. 9, 2014) (dismissing plaintiffs' claims for lack of standing where
6 plaintiffs sought to represent a nationwide class for twenty-one other states where
7 neither plaintiffs lived nor purchased defendant's products).

8 9 **III. SUFFICIENCY OF CLAIMS**

10 **A. Legal Standard**

11 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
12 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
13 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court must
14 accept all factual allegations pleaded in the complaint as true and must construe them
15 and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill*
16 *v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). To avoid a Rule
17 12(b)(6) dismissal, a complaint need not contain detailed factual allegations, rather,
18 it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell*
19 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility
20 when the plaintiff pleads factual content that allows the court to draw the reasonable
21 inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*,
22 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "Where a complaint
23 pleads facts that are 'merely consistent with' a defendant's liability, it stops short of
24 the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S.
25 at 678 (quoting *Twombly*, 550 U.S. at 557).

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1 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
2 relief’ requires more than labels and conclusions, and a formulaic recitation of the
3 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (quoting
4 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (alteration in original). A court need
5 not accept “legal conclusions” as true. *Iqbal*, 556 U.S. at 678. Despite the deference
6 the court must pay to the plaintiff’s allegations, it is not proper for the court to assume
7 that “the [plaintiff] can prove facts that [he or she] has not alleged or that defendants
8 have violated the . . . laws in ways that have not been alleged.” *Associated Gen.*
9 *Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526
10 (1983).

11 Generally, courts may not consider material outside the complaint when ruling
12 on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d
13 1542, 1555 n.19 (9th Cir. 1990). However, documents specifically identified in the
14 complaint whose authenticity is not questioned by parties may also be considered.
15 *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superseded by statutes on
16 other grounds). Moreover, the court may consider the full text of those documents,
17 even when the complaint quotes only selected portions. *Id.* It may also consider
18 material properly subject to judicial notice without converting the motion into one
19 for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

20 21 **1. Claims Sounding in Fraud**

22 When fraud is alleged, Rule 9(b) requires that “a party must state with
23 particularity the circumstances constituting fraud” in the pleading. Fed. R. Civ. P.
24 9(b). “Averments of fraud must be accompanied by ‘the who, what, where, and how’
25 of the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106
26 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1993)).
27 Specificity includes an account of the “time, place, and specific content of the false
28 representations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting

1 *Edwards v. Marin Park Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (citation omitted)).
2 This heightened pleading standard “serves three purposes: (1) to provide defendants
3 with adequate notice to allow them to defend the charge and deter plaintiffs from the
4 filing of complaints notice to allow them to defend the charge and deter plaintiffs
5 from the filing of complaints ‘as a pretext for the discovery of unknown wrongs’; (2)
6 to protect those whose reputation would be harmed as a result of being subject to
7 fraud charges; and (3) to ‘prohibit [] plaintiff[s] from unilaterally imposing upon the
8 court, the parties and society enormous social and economic costs absent some
9 factual basis.’” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)
10 (quoting *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996)).

11 “Irrespective of the source of subject matter jurisdiction, and irrespective of
12 whether the substantive law at issue is state or federal,” federal courts will apply the
13 Federal Rules of Civil Procedure. *Vess*, 317 F.3d at 1102 (citing *Hanna v. Plumer*,
14 380 U.S. 460 (1965)). “Rule 9(b)’s heightened pleading standards apply to claims for
15 violations of the CLRA and UCL.” *Kearns*, 567 F.3d at 1125 (citing *Vess*, 317 F.3d
16 at 1102-05). Additionally, because Rule 9(b) applies to claims that are “grounded in
17 fraud”, Rule 9(b) applies to claims under the FAL as well. *In re Ferrero Litig.*, 794
18 F. Supp. 2d 1107, 1114 (S.D. Cal. 2011).

20 2. Claims under the FAL, UCL and CLRA

21 California’s UCL prohibits unfair competition, which is defined as “any
22 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue
23 or misleading advertising[.]” Cal. Bus. & Prof. Code § 17200. Unfair competition
24 under the UCL “expressly incorporates [California’s] FAL prohibition on unfair
25 advertising as one form of unfair competition.” *Hinojos v. Kohl’s Corp.*, 718 F.3d
26 1098, 1103 (9th Cir. 2013). The FAL prohibition on unfair advertisings states that:

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

8 Cal. Bus. & Prof. Code § 17501. “To pursue a UCL claim, [p]laintiffs are required
9 to establish that they have suffered an injury in fact and lost money or property as a
10 result of the unfair competition.” *Rosales v. Fitflop USA, LLC*, 882 F. Supp. 2d 1168,
11 1174 (S.D. Cal. 2012) (Whelan, J.).

12 California’s CLRA outlaws “unfair methods of competition and unfair or
13 deceptive practices acts or practices undertaken by any person in a transaction
14 intended to result . . . in the sale . . . of goods . . . to any consumer.” Cal. Civ. Code
15 § 1770. Unfair methods of competition or deceptive practices include, but are not
16 limited to, “[a]dvertising goods or services with intent not to sell them as advertised”
17 and “[m]aking false or misleading statements of fact concerning reasons for,
18 existence of, or amounts of, price reductions.” Cal. Civ. Code § 1770(a)(9), (13).
19 “Similar to the standing requirement for the UCL, a CLRA action may be brought by
20 ‘[a]ny consumer who suffers any damage as a result of the use or employment by any
21 person of a method, act, or practice declared to be unlawful by Section 1770.’”
22 *Rosales*, 882 F. Supp. 2d at 1177 (quoting Cal. Civ. Code § 1780(a)).

23 To allege a claim under the UCL, FAL, and CLRA, “[p]laintiffs must allege
24 facts showing that the advertisement in question is misleading to the reasonable
25 consumer.” *Jacobo v. Ross Stores, Inc.*, No. CV-15-04701-MWF-AGR, 2016 WL
26 3482041, at *3 (C.D. Cal. Feb. 23, 2016) (citing *Williams v. Gerber Prods. Co.*, 552
27 F.3d 934, 938 (9th Cir. 2008)). “A reasonable consumer is ‘the ordinary consumer
28 acting reasonably under the circumstances.’” *Davis v. HSBC Bank Nevada, N.A.*, 691
F.3d 1152 (9th Cir. 2012) (quoting *Colgan v. Letherman Tool Grp., Inc.*, 135 Cal.
App. 4th 663, 682 (2006)).

B. Discussion

1 **B. Discussion**
2 Plaintiff fails to meet Rule 9(b)'s pleading standards requiring particularity.
3 Plaintiff states that the regular price of the shoes, \$49.94, and the discounted price of
4 \$16.17 were "false and misleading" because the retail or market price for the shoes
5 three months before her purchase was never \$49.94. (SAC ¶ 16.) Plaintiff offers this
6 conclusory allegation only and does not provide any facts that demonstrate why or
7 how the original retail price of \$49.94 is false.

8 Furthermore, to decide whether to purchase the shoes or not, Plaintiff alleges
9 that she "relied on Defendants' misrepresentations and false and deceptive
10 advertising," which she describes only as "signage within the store and the price tag
11 on the shoes." (*Id.* ¶¶ 15-16.) Nowhere does Plaintiff give details as to what signs she
12 relied on, what the signs said or looked like, or where they were located. The only
13 concrete facts Plaintiff asserts are the date she allegedly purchased the shoes, what
14 type of shoes she bought, the shoes' former price, and the price she purchased the
15 shoes at. (SAC ¶¶ 10 & n.1, 15.) Plaintiff does not even specify which NY&C store
16 she visited, only that she visited an NY&C store located somewhere in San Diego.
17 (*Id.* ¶¶ 10.) The SAC further contends that Defendants "intentionally concealed and
18 failed to disclose material facts regarding the truth about false former price
19 advertising" in their "retail store" and on their "Internet website." (*Id.* ¶ 23.) Nowhere
20 does Plaintiff allege in her SAC that she ever visited NY&C's online store or provide
21 specific details of any online false representations.

22 In Plaintiff's opposition, she states that her "experience" and "an investigation
23 conducted by her attorneys demonstrate the reality of Defendants' false pricing
24 practices." (Pl.'s Opp'n 8:20-21.) Disturbingly, Plaintiff attaches to her opposition a
25 declaration from her attorney Todd Carpenter who seemingly purports to be the fact
26 and expert witness in this case.² (Carpenter Decl., ECF No. 14-1.) In his declaration,
27

28 ² One might question who the Plaintiff is in this case, Ms. Rael or Mr. Carpenter. Mr. Carpenter would do well to consider the Professional Ethical rule that prohibits an attorney from

1 Mr. Carpenter claims he has personal knowledge that Plaintiff purchased the Jute
2 Espadrille Wedges in November 2015 from a New York & Co. retail store, and that
3 the receipt attached to his Declaration as Exhibit A is, in fact, a true and correct copy
4 of Plaintiff's receipt for this purchase. (Carpenter Decl. ¶¶ 1-3.) Mr. Carpenter further
5 asserts that he "conducted an extensive investigation" and subsequently "determined
6 that Defendant routinely and systematically discounts its products beyond the
7 permissible 90-day time period." (*Id.* ¶¶ 6-7.)

8 The Court's determination when ruling on a motion to dismiss is generally
9 limited to the plaintiff's complaint only. *See Hal Roach Studios*, 896 F.2d at 1555
10 n.19. Even if the Court takes into account the new facts presented by Mr. Carpenter,
11 his declaration does not specify a single detail of his alleged investigation. The
12 declaration is simply a restatement of the conclusory allegations that Plaintiff states
13 in her SAC.

14 Plaintiff's UCL, FAL, and CLRA claims are, therefore, legally insufficient
15 under Rule 9(b) standards for failure to plead with specificity any factual allegations
16 to support her contention that Defendants engaged in phantom markdown practices.

17 In addition to her individual and class claims under California law, Plaintiff
18 asserts a claim for "violations of the consumer protection laws on behalf of classes in
19 states with similar laws." (SAC ¶¶ 64-111.) Even if Plaintiff possessed standing to
20 bring this claim, which she does not, she fails to offer any facts supporting her
21 allegations that consumers in other states faced similar misrepresentations. She
22 merely "repeats and re-alleges the allegations contained in every preceding
23 paragraph" of the SAC. (*Id.* ¶ 64.) Because the Court determined that Plaintiff's
24 preceding claims do not meet Rule 9(b)'s standards, her fourth cause of action is
25 likewise legally insufficient and warrants dismissal.

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being a witness in his own case. *See* Cal. Rules of Prof. Conduct, Rule 5-210.

1 **IV. LEAVE TO AMEND**

2 As a general rule, a court freely grants leave to amend a complaint that has
3 been dismissed “when justice so requires.” Fed. R. Civ. P. 15(a). However, leave to
4 amend may be denied when “the court determines that the allegation of other facts
5 consistent with the challenged pleading could not possibly cure the deficiency.”
6 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.
7 1986). The court may also deny amendments to the pleadings for ‘undue delay, bad
8 faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies
9 by amendments previously allowed, undue prejudice to the opposing party by virtue
10 of allowance of the amendment, [and] futility of amendment.” *Foman v. Davis*, 371
11 U.S. 178, 182 (1962).

12 Defendants request that the Court deny Plaintiff leave to amend, for she has
13 twice amended her complaint and “is still no closer to stating a claim than she was in
14 her original complaint.” (Def.’ Mot. 18:4-5.) Defendants also put forward the
15 possibility that Plaintiff filed her claim in bad faith because of her continuously
16 changing story. (*Id.* at 1:11-17.) Plaintiff asserts that the modifications as to exactly
17 what product she purchased was due to a “scrivener’s error” and was not made in bad
18 faith. (Pl.’s Opp’n 14:24-25.) She does not provide an explanation for the confusion
19 of whether she purchased the shoes from a retail or outlet store.

20 Plaintiff has twice amended her complaint regarding the where and what she
21 purchased from Defendants. Additionally, her complaint fails to meet Rule 9(b)’s
22 heightened pleading standards. However, this is the first time Defendants have
23 challenged her pleadings and, moreover, the first time the Court has determined the
24 insufficiency of her pleadings. At the moment, the Court does not find that Plaintiff’s
25 case was filed in bad faith, and because justice so requires, Plaintiff shall be given
26 leave to amend the First, Second, and Third Causes of Action for the third time.

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1 With respect to the Fourth Cause of Action, Plaintiff alleges she is a California
2 resident and that she purchased Defendants' product in California. Therefore, any
3 amendment with respect to the fourth cause of action alleging violations of forty-one
4 other state laws is futile.

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6 **V. CONCLUSION & ORDER**

7 Plaintiff alleges that Defendants engaged in fraudulent behavior, but has yet to
8 plead facts with enough specificity to meet Rule 9(b)'s heightened pleading
9 standards. Additionally, Plaintiff lacks standing to seek (1) injunctive relief because
10 she does not assert that she will continue to engage in consumer activities with
11 Defendants, and (2) her fourth cause of action because she is a California resident
12 and purchased Defendants' product in California.

13 In light of the foregoing, the Court **GRANTS** Defendants' motion to dismiss
14 and dismisses the SAC in its entirety. (ECF No. 13.) However, the Court **GRANTS**
15 **LEAVE TO AMEND** Plaintiff's First, Second, and Third Causes of Action only.
16 The scope of leave to file an amended complaint is limited to amending *only* the three
17 aforementioned causes of action in order to allege additional facts that cure the
18 defects identified in this order. Plaintiff may not plead additional claims, add
19 additional parties, or add allegations that are not intended to cure the specific defects
20 the Court has noted. Should any amended complaint exceed the scope of leave to
21 amend granted by this order, the court will strike the offending portions under Rule
22 12(f). *See* Fed. R. Civ. P. 12(f) ("The court may [act on its own to] strike from a
23 pleading an insufficient defense or any redundant, immaterial, impertinent, or
24 scandalous matter."); *see also Barker v. Avila*, No. 2:09-cv-00001-GEB-JFM, 2010
25 WL 3171067, at *1-2 (E.D. Cal. Aug. 11, 2010) (striking an amendment to federal-
26 law claim where the court had granted leave to amend only state-law claims). The
27 Court **DISMISSES WITHOUT LEAVE TO AMEND** Plaintiff's Fourth Cause of
28 Action.

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If Plaintiff chooses to file an amended complaint, she must do so no later than **January 23, 2017.**

IT IS SO ORDERED.

DATED: December 28, 2016


Hon. Cynthia Bashant
United States District Judge