UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES—GENERAL

Case No. CV 18-8791-MWF (MAAx) **Date: July 9, 2019**
Title: Connie Lopez dba Building Blocks Preschool v. YP Holdings, LLC, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER GRANTING MOTION TO DISMISS SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) [23]

Before the Court is the Motion to Dismiss Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion"), filed by Defendants YP Holdings, LLC; YP, LLC; and Dex Media, Inc., on June 6, 2019. (Docket No. 23). Plaintiff Connie Lopez dba Building Blocks Preschool filed an Opposition on June 14, 2019. (Docket No. 24). Defendants filed a Reply on June 24, 2019. (Docket No. 25). The Court has read and considered the papers filed in connection with the Motion and held a hearing on July 8, 2019.

For the reasons discussed below, the Motion is **GRANTED *with leave to amend*** as to the remaining claims. Plaintiff's Second Amended Complaint ("SAC") is barely distinguishable from the First Amended Complaint ("FAC"), which the Court already found deficient. Plaintiff's SAC therefore fails for many of the same reasons that caused the FAC to fail. Plaintiff's claims for violation of California's Unfair Competition Law fail because they are tied to her nonviable claim for a violation of California's Automatic Renewal Law ("ARL") and because she fails to adequately allege facts to establish an injury in fact. Plaintiff's claim for money had and received is also deficient because she fails to allege that any money received by Defendants was not used for her benefit.

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I. BACKGROUND

On June 25, 2018, Plaintiff commenced this putative class action in the Ventura County Superior Court. (Notice of Removal ("NoR"), Ex. C (Docket No. 1-2)). On October 12, 2018, Defendants timely removed the action, invoking this Court's jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). (NoR at 4–6).

The Court's Order on March 26, 2019 (the "March 26 Order"), granting with leave to amend Defendants' Motion to Dismiss First Amended Complaint, contained a detailed explanation of the relevant allegations. (Docket No. 19). The following section is substantially similar but has been updated to reflect relevant additional allegations and citations to the SAC as the operative pleading.

Plaintiff operates Building Blocks Preschool in Ventura County, California. (*Id.* ¶ 11). YP, LLC is a Georgia corporation; YP Holdings, LLC is the parent corporation of YP, LLC; and Dex Media, Inc. purchased YP Holdings, LLC in 2017. (*Id.* ¶¶ 12–14). Damien Halliburton is an employee of YP, LLC, and alleged to have been "Plaintiff's point of contact." (*Id.* ¶¶ 10, 15). Defendants sell advertising subscriptions and operate a "media company dedicated to connecting local businesses with a ready-to-buy audience" throughout the United States. (*Id.* ¶¶ 20–21).

At some unspecified point time prior to the commencement of this action in June 2018, Plaintiff "contracted with Defendant[s] individually for the purposes of providing advertising services for herself as a caregiver working for Building Blocks Preschool." (*Id.* ¶ 11). Plaintiff alleges that, without her consent, Defendants "renewed the contract but did not provide services to [her], yet charged her for the renewal of the contract." (*Id.*).

Plaintiff also alleges that the automatic renewal occurred because Defendants "failed to state in clear and conspicuous language" in the agreement that it would continue until the consumer cancelled. (*Id.* ¶ 25). For example, the automatic renewal terms were not "in larger type than the surrounding text, or in contrasting type, font, or

color to the surround text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to [such] language . . . ." (*Id.*).

As a result of the automatic renewal, Defendants "charged and collected money from Plaintiff without providing any service to [her]." (*Id.* ¶ 27). Defendants also continued to charge Plaintiff monthly fees "without advising [her] that the contract is continuing and does not provide the service [to] Plaintiff . . . ." (*Id.* ¶ 28).

Plaintiff asserts three claims for relief: (1) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; (2) injunctive relief pursuant to Cal. Bus. & Prof. Code § 17535; (3) for money had and received; and (4) negligent misrepresentation. (*Id.* ¶¶ 33–62). Claim One through Three are against Defendants and Mr. Halliburton and claim four is against only Mr. Halliburton.

Plaintiff brings this putative class action on behalf of herself and the following class:

> [A]ll persons who entered into an "Advertising Contract" with Defendant[s] and to whom Defendant[s] charged and failed to provide the service contracted for.

(*Id.* ¶ 31).

II. LEGAL STANDARD

"Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

In ruling on the Motion under Rule 12(b)(6), the Court follows *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . .

to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id*. at 681 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Eclectic Properties E., LLC v. Marcus & Millichap Co*., 751 F.3d 990, 996 (9th Cir. 2014). "Although 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof is improbable,' plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.'" *Eclectic Properties*, 751 F.3d at 995 (quoting *Twombly*, 550 U.S. at 556–57) (internal citations omitted).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the FAC alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc*., 637 F.3d 1047, 1054 (9th Cir. 2011). "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (as amended) (quoting *Iqbal*, 556 U.S. at 679). Where the facts as pleaded in the FAC indicate that there are two alternative explanations, only one of which would result in liability, "plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Eclectic Properties*, 751 F.3d at 996–97; *see also Somers*, 729 F.3d at 960.

III. DISCUSSION

As an initial matter, Plaintiff argues that the Motion should be denied in its entirety because Defendants' counsel "did not email, call or fax any communication about this [M]otion and has not complied with [Local Rule 7-3]." (Opp. at 1; Declaration of Evan Selik ("Selik Decl.") ¶¶ 3–4 (Docket No. 23)). In response, Defendants explain counsel for the parties conferred on June 6, 2019, to discuss the

Motion, so Plaintiff's claim that Defendants "failed to meet their conference requirement prior to filing the [M]otion is without merit." (Reply at 4).

Although it appears that the parties failed to meet and confer in strict compliance with Local Rule 7-3, it does not appear that Plaintiff has suffered prejudice as a result of this failure. The Court, therefore, will proceed to the merits of the Motion. *See, e.g.*, *Reed v. Sandstone Props., L.P.*, No. 12-CV-5021-MMM (VBKx), 2013 WL 1344912, at *6 (C.D. Cal. Apr. 2, 2013) ("Because Reed suffered no real prejudice as result of the late conference, however, the court elects to consider the motion on the merits."). Counsel are warned to scrupulously comply with all Local Rules in the future.

Turning to the merits of the Motion, Defendants argue that all of Plaintiff's claims against them—violation of the UCL, for injunctive relief and restitution under the UCL, and for money had and received—should be dismissed for failure to state a claim. (Mot. at 4–8).

A. Violations of the UCL

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. "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice violates any of the foregoing prongs." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012). The UCL "does not proscribe specific activities," but rather, "borrows violations of other laws and treats them as unlawful practices that the [UCL] makes independently actionable." *Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal. App. 4th 638, 643–44, 72 Cal. Rptr. 3d 903 (2008) (internal quotation marks and citations omitted).

As a preliminary matter, it appears that Plaintiff is alleging a violation of the UCL under the unlawful and unfair prongs. For instance, Plaintiff alleges that Defendants "had a duty to comply with applicable laws protecting against, inter alia, ***unlawful and unfair*** business practices and acts"; "engaged in numerous acts and/or a

pattern and practice of ***unlawful and unfair*** business practices"; and "committed ***unlawful and unfair*** business acts and practices." (*See* SAC ¶¶ 34, 36–37 (emphasis added)). The Court will therefore address only those two prongs of the UCL.

Defendants offer two reasons why Plaintiff's UCL claims should be dismissed, both of which the Court finds persuasive:

First, Defendants argue that Plaintiff's UCL claims should be dismissed because they "continue to be based entirely upon the automatic renewal claim," a claim that the Court has already dismissed and that Plaintiff no longer alleges. (Mot. at 4–5).

In response, Plaintiff contends that her UCL claims are "no longer [] tied to the ARL" and instead are premised on the fact that she "paid for services from Defendant[s] and Defendant[s] did nothing." (Opp. at 4). She also contends that if "a consumer pays for a service and does not receive that service," then such conduct "can fall under the 'unfair' prong of the UCL." (*Id.*).

The Court is skeptical that Plaintiff's UCL claims are not tied to the automatic renewal claim. The SAC, for instance, is replete with references to the requirements imposed by the ARL, such as failing to provide clear and conspicuous disclosures that the advertising agreement would be renewed. (*See, e.g.*, SAC ¶¶ 22–27). Moreover, Plaintiff's argument contradicts her prior factual allegations. As pointed out by Defendants, Plaintiff "previously alleged that she did receive the advertising contracted for even though she did not want it and that she made a payment for that advertising even though she did not intend to renew the Contract." (Reply at 2). Indeed, the FAC specifically alleged that Plaintiff received advertising services from Defendants. (*See, e.g.*, FAC ¶¶ 45 ("[Plaintiff is entitled to] restitution of the monies paid to Defendant[s] for such automatic renewals and retention of the goods and/or services purchased through such Subscriptions."); 49 (same); 52 (same)).

Here, to the extent Plaintiff's UCL claims are tied to the automatic renewal claim, the UCL claims fail. The ARL makes it unlawful for any business making an automatic renewal offer to "consumers" in California to do any of the following:

> (1) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity . . . to the request for consent to the offer.
>
> (2) Charge the consumer's credit or debit card, or the consumer's account with a third party, for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms.
>
> (3) Fail to provide an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. If the offer includes a free trial, the business shall also disclose in the acknowledgement how to cancel, and allow the consumer to cancel before the consumer pays for the goods or services.

Cal. Bus. & Prof. Code § 17602(a)(1)–(3).

Plaintiff fails to allege sufficient facts for a violation of the ARL under any of the three prongs because she expressly agreed to the terms of the agreement, including the automatic renewal provision, and was provided an acknowledgment of the renewal terms. The language of the agreement explicitly states that "[t]he term of this Agreement will ***automatically renew***, unless terminated by as set forth in this Agreement . . . ." (SAC, Ex. B (emphasis added)).

Plaintiff has also failed to allege that she was automatically charged a fee to any of her accounts. Indeed, in previously opposing dismissal of her UCL claims, Plaintiff noted that on February 16, 2018, she "mailed a check payable to Defendants for $100.00 as a result of Defendants automatically renewing the contract." (*See* Docket No. 16).

Plaintiff finally fails to allege sufficient facts to establish that she is a "consumer" within the meaning of the ARL. Section 17601(d) defines "consumer" as "any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for ***personal, family, or household purposes.***" *Id.* (emphasis added). As pointed out by Defendants, Building Blocks Preschool, a small business, is the customer identified in the parties' agreement. (Mot. at 5; *see* SAC, Ex. B). Plaintiff also alleges that she entered into the agreement "for the purposes of providing advertising services for herself as a caregiver working for Building Blocks Preschool." (*See* SAC ¶ 11).

Second, to the extent Plaintiff's UCL claims are not tied to the automatic renewal claim, Defendants argue that the UCL claims should be dismissed because Plaintiff does not adequately allege facts to establish an injury in fact. (Mot. at 5–7).

To establish standing under the UCL, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., ***economic injury***, and (2) show that that economic injury was the result of, i.e., ***caused by***, the unfair business practice." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 322, 246 P.3d 877 (2011) (emphasis in original). "A plaintiff fails to satisfy the causation prong of the statute if he or she would have suffered 'the same harm whether or not a defendant complied with the law.'" *Junod v. Mortg. Elec. Registration Sys.*, 584 F. App'x 465, 469 (9th Cir. 2014) (quoting *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 156 Cal. Rptr. 3d 912 (2013)).

Here, Plaintiff fails to allege sufficient facts to establish how her alleged economic injury, if any, was ***caused by*** any alleged unlawful or unfair business practice of including an automatic renewal provision in the agreement. As noted above, Plaintiff has expressly agreed to the terms of the agreement, including the automatic renewal provision, and fails to allege that she paid the renewal fees because of any failure to disclose or improper conduct by Defendants. As pointed out by Defendants, there is no independent basis under the UCL to conclude that automatically renewing an agreement, as agreed upon in the parties, was unlawful or unfair. (*See* Reply at 2).

Indeed, other district courts routinely conclude that automatic renewal practices, without more, are insufficient for a claim under the UCL. *See, e.g.*, *McKee v. Audible, Inc.*, No. 17-CV-1941-GW (Ex), 2017 WL 7388530, at *21 (C.D. Cal. Oct. 26, 2017) ("Thus, the Court finds McKee has not sufficiently pled a violation of the UCL based on Defendant's automatic renewal practice."); *Williamson v. McAfee, Inc.*, No. 5:14-CV-158-EJD, 2014 WL 4220824, at (6 (N.D. Cal. Aug. 22, 2014) (concluding that the plaintiff's UCL claims fail "for a simple reason: Plaintiff does not allege reliance on Defendant's representation that his subscription would be automatically renewed at the 'then-current' price charged to other consumers").

At the hearing, Plaintiff again asserted that she paid for advertising services and did not receive anything in return. She also argued that to the extent Defendants contend that they provided advertising services, that issue should be left for discovery. She finally argued that to the extent she paid money to Defendants and did not receive a service in return, that is sufficient to support a claim under the unfair prong of the UCL. The Court disagrees.

As noted above, Plaintiff's argument in the Opposition and at the hearing contradicts her prior factual allegations where she explicitly alleged that she received advertising services from Defendants. *See Larson v. UHS of Rancho Springs, Inc.*, 230 Cal. App. 4th 336, 343, 179 Cal. Rptr. 3d 161 (2014) (concluding that the Superior Court properly considered the plaintiff's prior complaints and that "any inconsistencies with prior pleadings must be explained," and "if the plead fails to do so, the court may disregard the inconsistent allegations"). In addition, Plaintiff may not rely on the "speculative promises of discovery to survive a motion to dismiss." *Kabir v. Flagstar Bank, FSB*, No. 16-SACV-360-JLS (JCGx), 2016 WL 10999326, at *4 (C.D. Cal. May 11, 2016) (granting the defendant's motion to dismiss where the plaintiff argued that "future discovery will reveal evidence to prove its claims against Flagstar Bank") (citations omitted).

Accordingly, the Motion is **GRANTED *without leave to amend*** as to the claims for violation of the UCL and for injunctive relief and restitution under the UCL.

B. Money Had and Received

Defendants finally argue that the claim for money had and received should be dismissed because Plaintiff fails to allege that money received by Defendants was not used for Plaintiff's benefit. (*See* Mot. at 7–8). The Court agrees.

"To prove a claim for money had and received, a plaintiff must show all of the following: 1) the defendant received money that was intended to be used for the benefit of the plaintiff; 2) the money was not used for the plaintiff's benefit; and 3) the defendant has not given the money to the plaintiff." *English & Sons, Inc. v. Straw Hat Rests., Inc.*, 176 F. Supp. 3d 904, 926 (N.D. Cal. 2016) (internal quotation marks omitted).

The Court previously dismissed an identical claim in the FAC because Plaintiff previously acknowledged that the fees she paid was used to her benefit for business advertising. (*See* March 26 Order at 9–10). Plaintiff now argues that the money she paid "was not used for advertising services because Defendant failed to provide any services to [her]." (Opp. at 6). But as noted above, having previously alleged that the money she paid to Defendants was used for her business advertising, Plaintiff cannot now allege that she did not receive those same advertising services merely to avoid dismissal. *See, e.g.*, *Zelhofer v. Met. Life Ins. Co.*, No. 2:16-CV-773-TLN-AC, 2016 WL 4126724, at *5 (E.D. Cal. Aug. 3, 2016) ("Facts alleged in an amended complaint 'must not be inconsistent with those already alleged.'") (citing *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 939 (9th Cir. 2012) (en banc)).

Accordingly, the Motion is **GRANTED *without leave to amend*** as to the claim for money had and received.

C. Defendant Halliburton

At the hearing, the Court noted that Plaintiff has not filed a proof of service for Defendant Halliburton, who has been named as a Defendant since this action commenced in Superior Court in June 2018 and removed in October 2018. In

response, Plaintiff noted that she tried a serve Defendant Halliburton a number of times and, once motion practice began, stopped trying to do so.

It is well-established that a district court has authority to dismiss a plaintiff's action due to his failure to prosecute. *See* Fed. R. Civ. P. 41(b); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629–30 (1962) (noting that district court's authority to dismiss for lack of prosecution is necessary to prevent undue delays in the disposition of pending cases and avoid congestion in district court calendars).

Before ordering dismissal, the Court must consider five factors: (1) the public's interest in expeditious resolution of litigation; (2) the Court's need to manage its docket; (3) the risk of prejudice to defendant; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions. *See In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994) (failure to prosecute); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260–61 (9th Cir. 1992) (failure to comply with court orders).

Taking all of these factors into account, the Court concludes that dismissal of Defendant Halliburton for lack of prosecution is warranted. Allowing Plaintiff to serve Defendant Halliburton now would functionally be the same as adding a new party to the action. Moreover, the 90-day deadline to serve Defendant Halliburton has considerably passed. *See* Fed. R. Civ. P. 4(m).

Accordingly, Defendant Halliburton is **DISMISSED *without prejudice***.

IV. CONCLUSION

The Motion is **GRANTED *without leave to amend*** and Defendant Halliburton is **DISMISSED *without prejudice***. The action is **DISMISSED**.

This Order shall constitute notice of entry of judgment pursuant to Federal Rule of Civil Procedure 58. Pursuant to Local Rule 58-6, the Court **ORDERS** the Clerk to treat this Order, and its entry on the docket, as an entry of judgment.

IT IS SO ORDERED.