

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES - GENERAL

CASE NO.: CV 14-07155 SJO (JPRx) DATE: December 12, 2014

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

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**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

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**PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT [Docket No. 13]**

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 October 17, 2012. Plaintiff Linda Rubenstein ("Plaintiff") submitted an Opposition to Defendant's Motion ("Opposition") on July 23, 2012, to which Defendant replied ("Reply") on July 27, 2012. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for December 1, 2014. 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 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. (Notice of Removal Ex. A ("Compl.") ¶ 1, ECF No. 1-1.) 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. (Compl. ¶ 2.) Defendant sells its clothing and accessories to consumers in California and throughout the nation. (Compl. ¶ 2.)

Neiman Marcus offers upscale apparel, accessories, jewelry, beauty and decorative home products and operates 41 stores across the United States. (Compl. ¶ 9.) These store operations total more than 6.5 million gross square feet with over \$400 million in sale revenues in 2013. (Compl. ¶ 9.) Defendant also operates thirty six Last Call clearance stores. (Compl. ¶ 10.) 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. (Compl. ¶ 10.)

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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. (Compl. ¶ 11.) To mitigate any more losses on the clothing, the retail stores will sell this clothing at various outlet malls for a discount. (Compl. ¶ 11.) Shoppers have become accustomed to seeing products at outlet stores that once were sold at the traditional retail store. (Compl. ¶ 12.) Apparel sales at factory outlets rose 17.8% in 2011, according to some estimates, while apparel sales industry-wide rose a meager 1.4%. (Compl. ¶ 13.)

Plaintiff and other Outlet Store shoppers (also referred to as the "Putative Class") were looking to obtain benefits from Defendant's discounted stores, which included buying the alleged same exact clothing after season and/or excess clothing that Defendant's traditional stores once carried, but for a discounted price. (Compl. ¶ 14.) Defendant labels its Last Call clothing with a tag that shows a markedly lower price from the "Compared to" price which corresponds to the price that appears to be used in traditional Neiman Marcus retail stores. (Compl. ¶ 15.) Plaintiff was lured in by this price difference and as a result purchased multiple items of clothing from Defendant's Last Call Store in July of 2014. (Compl. ¶ 15.)

Defendant's marketing techniques purposely suggest that the "Compared to" price corresponds to the exact same article of clothing when sold at the traditional Neiman Marcus retail store, but at a substantial discount, when in fact it is not. (Compl. ¶ 16.) Defendant's Last Call clothing is actually not intended for the sale at the traditional Neiman Marcus stores but rather strictly for the Last Call Store. (Compl. ¶ 17.) Therefore, Defendant's price tags on the Last Call clothing are labeled with arbitrary inflated "Compared to" prices that are purely imaginative because the clothing was never sold at a traditional Neiman Marcus store, and the implied discount is false and misleading. (Compl. ¶ 17.)

Due to Plaintiff's belief that the Last Call Store was an "outlet" store, she believed the clothing was authentic and once sold at a traditional Neiman Marcus retail store since this is how outlet stores market themselves. (Compl. ¶ 20.) She subsequently was under the impression that Last Call clothing was made with the same quality as all Neiman Marcus clothing, which is not true. (Compl. ¶ 20.) The Last Call clothing does not have the same qualities as the traditional Neiman Marcus clothing. (Compl. ¶ 20.)

Defendant's misleading pricing techniques led Plaintiff and the Putative Class to believe the Last Call clothing was authentic Neiman Marcus clothing, and in reliance thereon, decided to purchase the clothing from Defendant's Last Call Store. (Compl. ¶ 21.) As a result, Plaintiff was damaged in purchasing the Last Call clothing because she paid for clothing based on Defendant's representations and perceived discounts, but she did not experience any of Defendant's promised benefits shopping at the Last Call Store. (Compl. ¶ 21.)

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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. Plaintiff's Complaint brings claims for violation of California false advertising law, California unfair competition law, and the Consumer Legal Remedies Act. (See *generally* Compl.)

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.

B. Rule 9(b)

To begin with, the parties disagree about whether Plaintiff is required to plead with particularity under Rule 9(b). Then, they dispute whether the Complaint satisfies Rule 9(b)'s requirements.

"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

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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.

Defendant argues that 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). Plaintiff responds that this is only true if Plaintiff's claims sound in fraud, and that Plaintiff's complaint does not in fact sound in fraud because Plaintiff has not pled knowledge or scienter. *See id.* at 1125. *Kearns*, however, is clear that "Rule 9(b)'s particularity requirement applies" to CLRA and UCL claims. *Id.* The complaint explicitly alleges that Defendant acted with knowledge: "Defendant's marketing techniques **purposely** suggest[] that the 'Compared to' price corresponds to the exact same article of clothing . . . ." (Compl. ¶ 16.) And Plaintiff's FAL claims arise out of the same facts as the CLRA and UCL claims. Accordingly, the Court finds that Plaintiff's claims sound in fraud and applies Rule 9(b).

C. 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 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.

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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 . . . .

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(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.

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

Cal. Civ. Code § 1770(a). (See Compl. ¶ 51.)

Plaintiff's UCL and CLRA claims allege that Defendant's price tags with a "Compared To" price and marketing techniques mislead consumers that clothing of identical quality would have been sold at flagship Neiman Marcus stores at the "Compared To" price. (Compl. ¶¶ 15-17, 41-42.) However, Plaintiff does not allege with particularity what marketing techniques were used, other than the "Compared To" price tag, or how any of Plaintiff's marketing techniques falsely suggested that the "Last Call" stores sold the same clothing as flagship stores. (See *generally* Compl.) The Court, then, is left to determine whether a reasonable consumer would be misled by a "Compared To" price tag on a garment into believing that the flagship store previously sold identical garments at the listed price.

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 Compl. ¶ 18-19.) 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).

In this case, Plaintiff 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 Complaint further alleges that Defendant's omissions violate the UCL, but Plaintiff fails

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to identify any specific omissions. (Compl. ¶ 46.) 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.

D. 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.

As discussed above, the facts as currently pleaded are 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.

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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.