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ALBERTSONS COMPANIES, INC.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELEISHA REDMOND, individually and on behalf of all others similarly situated,

Plaintiff,

v.

ALBERTSONS COMPANIES, INC., and DOES 1-10,

Defendants.

Case No. 3:20-cv-3692-JSC

DEFENDANT ALBERTSONS COMPANIES, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS COUNT II OF PLAINTIFF'S CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAME

Date: September 17, 2020
Time: 9:00 a.m.
Courtroom.: E
Judge: Hon. Jacqueline Scott Corley

TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT ON September 17, 2020 at 9:00 a.m., or as soon thereafter as the matter may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102 (Courtroom E–15th Floor), Defendant Albertsons Companies, Inc. ("Albertsons") will move the Court to dismiss Count II of Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because Plaintiff's Complaint fails to state a claim upon which relief can be granted. Albertsons moves on the grounds that Plaintiff has not adequately alleged a legal duty breached by Albertsons, a statutory violation, nor a compensable injury. Moreover, Plaintiff fails to allege a feasible Nationwide Class: too many individual issues predominate over any common ones, including the materially different state laws that must be applied for class members across the country to obtain relief, and the vast number of products, states, stores, and supply chains, among other issues. Further grounds for dismissal exist because Plaintiff's Count II is uncertain and does not provide adequate notice to Defendant Albertsons regarding the specific nature of the cause of action.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Albertsons, by its undersigned attorneys, hereby requests that this Court dismiss Count II of Plaintiff's Complaint with prejudice. Albertsons is concurrently filing a *Memorandum in Support of Defendant Albertsons Companies, Inc.'s Motion to Dismiss Count II of Plaintiff's Class Action Complaint*, which is incorporated herein by reference and more fully sets out the grounds for the relief requested. Prior to filing this Notice of Motion and Motion, the undersigned conferred with Plaintiff's counsel on August 6 and 7, 2020 in an effort to avoid motion practice.

Dated: August 10, 2020

Respectfully submitted,

RILEY SAFER HOLMES & CANCILA LLP

By: */s/ Kathleen A. Stimeling*
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ALBERTSONS COMPANIES, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Albertsons Companies, Inc. ("Albertsons"), by its undersigned attorneys, submits this Memorandum in support of its Motion to Dismiss Count II of Plaintiff's Class Action Complaint ("Complaint").

INTRODUCTION

Plaintiff Eleisha Redmond ("Plaintiff"), a California resident, seeks to represent a class of all customers nationwide who purchased "any consumer food items or goods, goods used for emergency cleanup, emergency supplies, or medical supplies" from an Albertsons' store at any time after January 31, 2020 "at a price 10 percent greater than the price charged" for that product on January 30, 2020 ("Nationwide Class"). On behalf the Nationwide Class, Plaintiff asserts a claim for negligence (or perhaps negligence *per se*)[1] ("Count II") and seeks unspecified injunctive relief, compensatory damages, punitive damages, and restitution.

As set forth below, regardless of whether Plaintiff intends to state a claim for negligence or negligence *per se*, Count II fails as a matter of law. Plaintiff has not adequately alleged a legal duty breached by Albertsons, a statutory violation, nor a compensable injury. Moreover, Plaintiff fails to allege a feasible Nationwide Class: too many individual issues predominate over any common ones, including the materially different state laws that must be applied for class members across the country to obtain relief, and the vast number of products, states, stores, and supply chains, among other issues. Albertsons accordingly requests the dismissal of Count II and the Nationwide Class, with prejudice.

PLAINTIFF'S ALLEGATIONS

Plaintiff is a citizen and resident of the State of California. Compl., Dkt. 1, ¶ 5. Defendant Albertsons owns a large number of supermarket chains under a variety of names, including Safeway stores. *Id.* ¶ 24. Plaintiff made an unspecified "number" of purchases from a Safeway store located at 2020 Market Street, San Francisco, California, at unspecified times after the governor of California declared a state of emergency relating to the COVID-19 pandemic. *Id.*

[1] Oddly, while Plaintiff characterizes Count II as a "Negligence" claim (Compl. ¶ 47), she appears to advance a negligence *per se* theory of liability (*id.* ¶ 55 ("Defendant's conduct constitutes negligence *per se*.")).

¶¶ 20, 25. Plaintiff identified a singular purchase: "on or about April 13, 2020, Plaintiff paid $18.99 for Angel Soft toilet paper normally priced at $10-11." *Id.* ¶ 26. According to Plaintiff, the toilet paper and other unnamed items she purchased from Albertsons were priced at more than 10% higher than their pre-emergency prices. *Id.* ¶ 25.

Under the hypothesis that Albertsons has engaged in unlawful price gouging, Plaintiff filed the instant class action lawsuit. *Id.* ¶ 27. According to her Class Action Allegations, Plaintiff sues on behalf of herself and a class defined as follows:

> All persons who purchased, in the United States, any consumer food items or goods, good used for emergency cleanup, emergency supplies, or medical supplies from a store owned by Albertsons Companies, Inc., on or after January 31, 2020 at a price 10 percent greater than the price charged such store for the same such good or service on January 30, 2020, or immediately prior to any declaration of a state of emergency relating to the COVID-19 pandemic.

Id. ¶ 30. Plaintiff also proposes a narrower "California Class," defined as follows:

> All persons who purchased, in California, any consumer food items or goods, goods used for emergency cleanup, emergency supplies, medical supplies, home heating oil, or other goods or services encompassed by Cal. Penal Code § 396(b), from a store owned by Albertsons Companies, Inc., on or after February 4, 2020 at ap rice 10 percent greater than the price charged such store for the same such good or service on February 2, 2020, or immediately prior to any declaration of a state of emergency relating to the COVID-19 pandemic.

Id. ¶ 29. Plaintiff has asserted two causes of action: violation of California's Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200 *et seq.* (on behalf of the California Class), and Negligence (on behalf of the Nationwide Class).

ARGUMENT

I. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint that fails to state a claim upon which relief can be granted. When considering a Rule 12(b)(6) motion to dismiss, a court must accept "factual matter" in the complaint as true but need not accept "bald allegations" or "legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Under that standard, a complaint must be

dismissed unless its well-pleaded factual allegations establish "a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Determining whether the allegations in a complaint state a "plausible" claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

II. Plaintiff's Negligence Claim (Count II) Must Be Dismissed for Failure to State a Claim.

As an initial matter, the nature of Plaintiff's second cause of action is wholly unclear. While Plaintiff styles Count II as a claim for "Negligence" (Compl. ¶ 47), she simultaneously alleges that Albertsons' conduct amounted to "negligence *per se*" (*id.* ¶ 55). For this reason alone, Count II should be dismissed. *See Twombly*, 550 U.S. 544, 545 (holding that Rule 8(a)(2) requires "fair notice of what the claim is"); *e.g.*, *Buckhorn v. Hettinger*, 800 F. App'x 542, 543 (9th Cir. 2020) (("[F]ederal notice pleading standards do not relieve Plaintiffs of the basic obligation to articulate a cause of action."). Regardless of whether Plaintiff intends to state a claim for negligence or negligence *per se*, Count II fails as a matter of law and must be dismissed.

A. Plaintiff Has Not Alleged a Duty Breached by Albertsons.

Under California law, the elements of a negligence cause of action are: (1) the existence of a duty to exercise due care; (2) breach of that duty; (3) causation; and (4) damages. *See Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 500 (2001). The question of whether a duty of care exists is a question of law. *See Lueras v. BAC Home Loans Servicing, LP*, 221 Cal.App.4th 49, 62 (2013).

Plaintiff claims that Albertsons had a broad "duty to ensure that, during a declared public emergency, it does not sell food, consumer goods including toilet paper, and other goods and services including those described in California Penal Code § 396(b) at excessive prices." Compl. ¶ 49. Plaintiff's allegation misstates California law, under which there is no general duty of care to avoid causing purely economic losses to third parties. *See S. Cal. Gas Leak Cases*, 7 Cal 5th 391, 400 (2019) ("Negligently inflicted economic loss that results from some other kind of injury may be recoverable, but recovery stand-alone economic loss is frequently rejected.") (internal quotations and citations omitted). To the extent Plaintiff intends to assert a claim for negligence in Count II, she has failed to identify a legitimate duty.

B. Plaintiff Has Not Alleged the Violation of a Statute.

If Plaintiff instead seeks to accuse Albertsons of negligence *per se*, her claim fares no better. Negligence *per se* (as codified in California Evidence Code section 669) requires the plaintiff to establish four elements: (1) that the defendant violated a statute, (2) the violation proximately caused injury to person or property, (3) death or injury resulted from an occurrence of the nature of which the statute was designed to prevent, and (4) the injured party was one of the class of persons for whose protection the statute was adopted. *Spriesterbach v. Holland*, 215 Cal. App. 4th 255, 263–64 (2013).

Plaintiff misunderstands the most basic element of a negligence *per se* claim: violation of a statute. Plaintiff must "borrow" a statute "to prove duty of care and standard of care." *Johnson v. Honeywell Int'l Inc.*, 179 Cal. App. 4th 549, 558 (2009); *see also Millard v. Biosources, Inc.*, 156 Cal. App. 4th 1338, 1353 (2007) (holding that negligence *per se* "concerns the standard of care, rather than the duty of care"). While Plaintiff references California Penal Code section 396(b) ("Section 396(b)"), that statute is not the predicate for her negligence *per se* claim. Rather, according to Plaintiff, Albertson owes a separate duty that is merely "***reinforced*** by California Penal Code § 396(b) … [and] other states' similar price gouging laws." Compl. ¶ 50 (emphasis added); *see also id.* ¶¶ 52, 54 ("Defendant, its agents, and/or employees ***failed to exercise ordinary care***….Defendant knew that, because of its ***failure to exercise reasonable care***, consumers such as Plaintiff throughout the country would be overcharged.") (emphasis added). Plaintiff's failure to base her negligence *per se* claim on any violation of a statute by Albertsons is fatal.

C. A Violation of Section 396(b) Cannot Serve as the Basis of a Negligence *Per Se* Claim.

Even assuming Plaintiff's passing mention of California Penal Code § 396(b) is sufficient, Count II fails because no court has ever recognized a negligence *per se* claim based on a violation of this anti-price-gouging statute. To date, all judicial applications of Section 396(b) in the civil context have relied on the UCL as Plaintiff does in Count I of her Complaint. Section 396(b) expressly identifies the UCL as the proper mechanism of enforcement: "A violation of this

section shall constitute an unlawful business practice and an act of unfair competition within the meaning of ***Section 17200*** of the Business and Professions Code [the UCL]." (emphasis added). Notably, Section 396(b) does ***not*** authorize a private right of action under negligence *per se*—a decision by the legislature that should be given full effect. *See City and County of San Francisco v. Trump*, 897 F.3d 1225, 1239 (9th Cir. 2018) ("Under the doctrine of *inclusio unius est exclusion alterius* (the inclusion of one is the exclusion of the other), when a statue limits a thing to be done in a particular mode, it includes a negative of any other mode.") (internal quotations omitted); *Dean v. Superior Court (Lever)*, 62 Cal. App. 4th 638, 641 (1998) ("Legislature is presumed to have meant what it said, and the plain meaning of the language governs."). Plaintiff's attempt to assert a negligence *per se* claim under Section 396(b) is an unprecedented and unjustified expansion of the statute and should be rejected as such.

D. Plaintiff Has Not Alleged a Non-Economic Injury.

Finally, Count II must be dismissed because the only injury Plaintiff has alleged patently runs afoul of the economic loss rule. "California courts have generally applied the economic loss rule to limit liability in strict products liability or negligence actions to damages for ***physical injuries***, barring recovery for economic loss alone." *Andrews v. Plains All Am. Pipeline, LP*, 2020 WL 3105423, at *10 (C.D. Cal. May 21, 2020) (emphasis added) (citing *San Francisco Unified Sch. Dist. v. W.R. Grace & Co.*, 37 Cal. App 4th 1318, 1327 (Cal. App. Ct. 1995) ("Until ***physical injury*** occurs—until damage rises above the level of mere economic loss—a plaintiff cannot state a cause of action for strict liability or negligence.") (emphasis added)). The economic loss rule applies with equal force to claims for negligence *per se*. *See id.* ("Plaintiffs' arguments that their statutory claims create an exception to the economic loss rule are unavailing … negligence *per se* is not an exception to the economic loss rule."). Here, Plaintiff concedes that her only injury is economic loss: "Defendant's negligence was the proximate cause and substantial factor in the ***economic loss*** suffered by Plaintiff and other Nationwide Class members." Compl. ¶ 56 (emphasis added) (further describing injury as the "excessive amounts" paid). Therefore, even if Plaintiff had adequately alleged that Albertsons owed a duty or violated a statute, which she has not, her claim fails as a matter of law because she has not alleged an appropriate injury.

In summary, Plaintiff has not alleged a duty breached by Albertsons, the violation of a statute, or a compensable physical injury. Because Count II fails as a matter of law, it should be dismissed with prejudice. *See, e.g.*, *SurvJustice Inc. v. DeVos*, 2018 WL 4770741, at *12 (N.D. Cal. Oct. 1, 2018) (M.J. Corley) (dismissing claim with prejudice "given that amendment would be futile" because plaintiff cannot satisfy essential element "as a matter of law").

III. Plaintiff's Proposed Nationwide Class is Impracticable.

Beyond Plaintiff's failure to properly plead the elements of negligence or negligence *per se* claim, the Nationwide Class proposed under Count II must be dismissed as impracticable.

Plaintiff's Nationwide Class allegations assume that after "any declaration of a state of emergency relating to the COVID-19 pandemic," it would be unlawful for Albertsons to charge "a price 10 percent greater than the price charged" in that same store for "any consumer food items or goods, goods used for emergency cleanup, emergency supplies, or medical supplies." Compl. ¶¶ 30, 52. This description is taken nearly verbatim from § 396(b), California's anti-price-gouging statute. But the California standard is not applied uniformly across the 49 other states. The differences in each state's anti-price-gouging laws—where those laws even exist—are too significant for Plaintiff to overcome.

Plaintiff's Nationwide Class fails because price-gouging is not illegal nationwide. Because there is no federal anti-price-gouging statute, Plaintiff must establish that price-gouging is illegal under each state's laws[2]—a requirement Plaintiff has attempted to meet by alluding to both California's anti-price-gouging statute and "other states' similar price gouging laws." Compl. ¶ 50. But in some states, such as Arizona and North Dakota, price-gouging is not even illegal. *See, e.g.*, Howard Fischer, *State lacks price gouging laws during crises*, ARIZONA CAPITOL TIMES (Mar. 14, 2020), https://azcapitoltimes.com/news/2020/03/14/state-lacks-price-gouging-laws-

[2] Nor does Plaintiff allege that all members of the Nationwide Class can pursue claims pursuant to California law. Such an assertion, if made, would be wrong: the United States Supreme Court has held that it is constitutionally impermissible to apply the law of a particular state to the claims of non-resident plaintiffs absent that state's "significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (internal quotations omitted); *e.g.*, *Montgomery v. New Piper Aircraft, Inc.*, 209 F.R.D. 221, 228-29 (S.D. Fla. 2002) (unconstitutional to apply Florida law to claims of putative class members who did not reside or purchase the product at issue in Florida); *Caterpillar v. Lyon*, 194 F.R.D. 206, 213 (E.D. Pa. 2000) (same).

during-crises (summarizing statement from Attorney General Mark Brnovich that 'The Attorney General's Office does not have the authority to enforce price gouging protections under existing consumer protection laws … ***There is no prohibition in existing statute that would prevent a business or an individual from engaging in price gouging tactics***") (emphasis added); *I Want to File a Complaint*, NORTH DAKOTA ATTORNEY GENERAL, attorneygeneral.nd.gov/sites/ag/files/documents/Complaints.pdf ("Price Gouging: There is no state law restricting the amount of profit a retailer can set for gasoline or any other retail product; therefore, ***a retailer can charge any price he wants over wholesale***. Because ***there is no state law restricting or limiting retail prices***, the Attorney General's office cannot take a complaint.") (emphasis added). Consequently, Plaintiff cannot possibly hold Albertsons liable for alleged price-gouging with respect to the members of her Nationwide Class in Arizona or North Dakota, for example.

Even in states where price-gouging is prohibited, the definition of such conduct greatly varies. Plaintiff, in reliance on California's statute, seeks to hold Albertsons liable for any price increase greater than 10%. But in Oregon, for example, a merchant or wholesaler may charge a price up to ***15%*** greater than the price charged prior to a "declaration of an abnormal disruption of the market." Or. Rev. Stat. § 401.965(3) (emphasis added); *see also* Wis. Admin. Code ATCP § 106.02(a) (applying the same 15% standard). Similarly, in Pennsylvania, sellers like Albertsons have even more leeway and can charge up to ***20%*** more than the pre-emergency price. *See* 73 Pa. Stat. § 232.4. Alabama's and Kansas's statutes appear to be among the most lenient in the country, permitting price increases of up to ***25%***. *See* Ala. Code § 8-31-4; Kan. Stat. Ann. § 50-6, 106(b)(1). Finally, other states, like Iowa, do not rely on percentages whatsoever. *See* Iowa Admin. Code r. 61-31.1(714).[3] As these states' laws demonstrate, Plaintiff's claim that a class of consumers nationwide can hold Albertsons liable for a 10% price increase is completely baseless.

[3] Rather than naming any specific percentage, the Iowa regulation simply provides, "An 'excessive price' is one that is not justified by the seller's actual costs of acquiring, producing, selling, transporting, and delivering the actual product sold, plus a reasonable profit…. The existence of an excessive price shall be presumed from a substantial increase over the price at which the merchandise was sold in the usual course of business immediately prior to the onset of the emergency or from a substantial increase in the markup from cost if wholesale prices or costs have increased." Iowa Admin. Code r. 61-31.1(714).

Not only is Plaintiff wrong to rely on the 10% metric, she also ignores the differences between each state's points of comparison. Plaintiff wrongly assumes that to impose liability on Albertsons, she and other Nationwide Class members need only prove that the price at the same store was more than 10% higher immediately before the state of emergency took effect. But the Pennsylvania statute allows the seller to compare its post-emergency price to the "***average price*** … during the last ***seven days*** immediately prior to the declared state of emergency." *Id.* As another point of contrast, the Alabama statute compares the post-emergency price to the average price in the affected area during the ***30 days*** immediately prior to the state of emergency. *See* Ala. Code § 8-31-4. Plaintiff thus fails to allege a feasible Nationwide Class based on pre- and post-pandemic prices at individual Albertsons' stores.

Finally, Plaintiff's attempt to allege a Nationwide Class based on the prices of "consumer food items or goods, goods used for emergency cleanup, emergency supplies, or medical supplies," further reveals the flaws in her approach. Not every state imposes pricing restrictions on those types of products. In Illinois, for example, price-gouging regulations apply only to petroleum products—not retail products. *See* 14 Ill. Admin. Code § 465: Price Gouging. Accordingly, Plaintiff has no means by which she can hold Albertsons liable to the members of her Nationwide Class in Illinois for the excessive pricing of food items or medical supplies.

As these examples demonstrate, the assertion of a Nationwide Class is plainly improper when the claims of its members do not rise and fall in unison, and individualized inquiries predominate. The differences amongst the claims of class members in California versus those in Arizona, Pennsylvania, or Illinois are material—in many instances, they determine whether a claim succeeds or fails and whether it is cognizable at all. *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 591 (9th Cir. 2012) (rejecting putative class action after finding that differences among states' consumer protection laws were material). As each putative class member's claim against Albertsons is governed by the laws of his or her home state, Plaintiff's Nationwide Class must be dismissed.

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CONCLUSION

For the reasons stated above, Albertsons respectfully requests that this Court dismiss Count II of Plaintiff's Class Action Complaint with prejudice for failure to state a claim.

Dated: August 10, 2020

Respectfully submitted,

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