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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES PRESCOTT KNAPP,
Plaintiff,
v.
ART.COM, INC.,
Defendant.

Case No. 16-cv-00768-WHO

**ORDER DENYING MOTION TO
DISMISS AND STRIKE**

Re: Dkt. No. 19

INTRODUCTION

Plaintiff James Knapp brings this putative class action against defendant Art.com, Inc. (“Art.com”), accusing it of violating California’s consumer protection laws by conducting “perpetual sales” that deceive consumers into believing that they are receiving significant bargains on Art.com’s merchandise, when in fact they are not. Art.com moves to dismiss or strike certain portions of Knapp’s first amended complaint (“FAC”). Knapp has not plausibly alleged that Art.com’s advertising falls within the scope of 15 U.S.C. § 52(a), and his claim based on that statute is DISMISSED WITH LEAVE TO AMEND. In all other respects, Art.com’s motion is DENIED.

BACKGROUND

I. FACTUAL BACKGROUND

Art.com is a California corporation headquartered in Emeryville, California. FAC ¶ 6 (Dkt. No. 6). It owns and operates several online commerce websites selling posters and other home décor products, including www.art.com, www.posters.com, and www.allposters.com. *Id.* ¶¶ 1-2.

On October 11, 2015, Knapp was browsing www.art.com in search of a piece of framed artwork. *Id.* ¶ 61. He saw an item he liked but was “not immediately prepared to purchase [it],”

1 until he saw that there was a 40% off sale ending at midnight that day. *Id.* “Enticed by the idea of
 2 saving 40% off his purchase,” Knapp decided to purchase the item. *Id.* In placing his order, he
 3 entered an optional coupon code, which triggered the 40 percent discount off the non-sale price of
 4 \$172.99. *Id.* at fig. 16.

5 The next day, shortly after midnight, the sale at www.art.com “automatically renewed,”
 6 although this time at a discount of 45 percent instead of 40 percent. *Id.* ¶ 62. Knapp states that he
 7 “was induced to purchase the product at ‘40% off’ because he believed that the sale was ending
 8 that day,” and that he “would not have purchased the product if it were not for the ‘40% off sale’
 9 advertised on the www.art.com website.” *Id.* He also states that “[h]ad [he] waited until just after
 10 midnight – when the sale that induced him to make the purchase ended – he could have gotten
 11 ‘45% off’ the product he purchased.” *Id.*

12 Knapp accuses Art.com of conducting “perpetual sales” on www.art.com, as well as
 13 www.posters.com and www.allposters.com (collectively, the “accused websites”). *Id.* ¶ 31. He
 14 alleges that the sales (1) are “automatically generate[d]” such that they run back-to-back with
 15 “zero lag time between the end of one sales and the beginning of another,” (2) consistently offer
 16 discounts ranging from 30 to 50 percent; and (3) are “prominently advertise[d]” on each of the
 17 accused websites with language such as “40% OFF EVERYTHING* ENDS TODAY” or “45%
 18 OFF ALL ORDERS* – TODAY ONLY.” *Id.* ¶¶ 38, 48-49. He also notes that in connection with
 19 each sale, the accused websites provide a six-character coupon code which consumers “enter at the
 20 time of checkout in order to take advantage of the purported sale.” *Id.* ¶ 34. Knapp contends that
 21 Art.com’s sales are “designed to falsely induce consumers to purchase their products under the
 22 mistaken belief that they are getting a significant bargain,” and that the sales “deceive consumers
 23 into believing they are being offered a discount from Art.com’s regular prices when, in fact, they
 24 are not.” *Id.* ¶¶ 31, 38.¹

25 **II. PROCEDURAL BACKGROUND**

26 Knapp filed his original complaint on February 16, 2016 and his FAC on March 23, 2016.
 27

28 ¹ Each party’s unopposed request for judicial notice is GRANTED. *See* Dkt. Nos. 19-8, 22.

1 Dkt. Nos. 1, 6. He asserts four causes of action against Art.com: (1) violation of California's
 2 False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*; (2) violation of the
 3 unfair and unlawful prongs of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.
 4 Code § 17200 *et seq.*; (3) violation of California's Consumer Legal Remedies Act ("CLRA"), Cal.
 5 Civ. Code § 1750 *et seq.*; and (4) unjust enrichment and common law restitution. FAC ¶¶ 77-112.

6 He seeks to represent a class defined as

7 All natural persons located within the United States who purchased
 8 any product online from Art.com through the e-commerce websites,
 9 www.art.com, www.posters.com, and/or www.allposters.com, at
 any time beginning four (4) years prior to the filing of this action on
 February 16, 2016, and ending at the time this action settles or
 proceeds to final judgment.

10 *Id.* ¶ 65.

11 Art.com filed its motion to dismiss and strike on May 2, 2016. Dkt. No. 19 ("Mot.").
 12 Art.com does not seek to dismiss or strike Knapp's FAC in its entirety. Art.com's arguments are
 13 limited to (1) the first cause of action for violation of the FAL, and (2) certain aspects of the
 14 second cause of action for violation of the UCL. *See, e.g.*, Mot. at 1-4. I heard argument from the
 15 parties on June 8, 2016. Dkt. No. 29.

16 LEGAL STANDARD

17 I. RULE 12(b)(6): MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

18 Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain
 19 statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), in
 20 order to "give the defendant fair notice of what the claim is and the grounds upon which it rests,"
 21 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and alterations
 22 omitted).

23 A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure
 24 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
 25 2001). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable
 26 legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela*
 27 *Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). While a complaint "need not contain
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1 detailed factual allegations” to survive a Rule 12(b)(6) motion, “it must plead enough facts to state
 2 a claim to relief that is plausible on its face.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th
 3 Cir. 2009) (internal quotation marks and citations omitted). A claim is facially plausible when it
 4 “allows the court to draw the reasonable inference that the defendant is liable for the misconduct
 5 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

6 In considering whether a claim satisfies this standard, the court must “accept factual
 7 allegations in the complaint as true and construe the pleadings in the light most favorable to the
 8 nonmoving party.” *Manzarek v. St. Paul Fire & Marines Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir.
 9 2008). However, “conclusory allegations of law and unwarranted inferences are insufficient to
 10 avoid a Rule 12(b)(6) dismissal.” *Cousins*, 568 F.3d at 1067 (internal quotation marks omitted). A
 11 court may “reject, as implausible, allegations that are too speculative to warrant further factual
 12 development.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013).

13 **II. RULE 9(b): HEIGHTENED PLEADING STANDARD FOR FRAUD OR MISTAKE**

14 Federal Rule of Civil Procedure 9(b) requires that claims sounding in fraud or mistake
 15 “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b).² To
 16 satisfy this standard, a plaintiff must identify “the time, place, and content of [the] alleged
 17 misrepresentation[s],” as well as the “circumstances indicating falseness” or “manner in which the
 18 representations at issue were false and misleading.” *In re GlenFed Inc. Sec. Litig.*, 42 F.3d 1541,
 19 1547-48 (9th Cir. 1994) (internal quotation marks and alterations omitted). “In other words, the
 20 plaintiff must set forth an explanation as to why the statement or omission complained of was
 21 false or misleading.” *Siegel v. Lyons*, No. 95-cv-03588-DLJ, 1996 WL 438793, at *3 (N.D.Cal.
 22 Apr. 26, 1996) (internal quotation marks omitted). The allegations of fraud “must be specific
 23 enough to give defendants notice of the particular misconduct which is alleged to constitute the
 24 fraud charged so that they can defend against the charge and not just deny that they have done
 25 anything wrong.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

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 28 ² Knapp’s claims sound in fraud and are thus subject to Rule 9(b). See *Kearns v. Ford Motor Co.*,
 567 F.3d 1120, 1125 (9th Cir. 2009); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th
 Cir. 2003).

1 **III. RULE 12(f): MOTION TO STRIKE**

2 Federal Rule of Civil Procedure 12(f) authorizes a court to “strike from a pleading an
3 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
4 Civ. P. 12(f). The function of a motion to strike “is to avoid the expenditure of time and money
5 that must arise from litigating spurious issues by dispensing with those issues prior to trial.”
6 *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Such motions are
7 generally disfavored and “should not be granted unless the matter to be stricken clearly could have
8 no possible bearing on the subject of the litigation.” *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F.
9 Supp. 2d 1048, 1057 (N.D. Cal. 2004).

10 **DISCUSSION**

11 **I. FIRST CAUSE OF ACTION: VIOLATION OF THE FAL**

12 The FAL prohibits businesses from disseminating advertising “which is untrue or
13 misleading, and which is known, or which by the exercise of reasonable care should be known, to
14 be untrue or misleading.” Cal. Bus. & Prof. Code § 17500. The basic standard for finding a
15 section 17500 violation is the “reasonable consumer” test, which requires a showing that members
16 of the public are likely to be deceived by the advertising at issue. *Williams v. Gerber Products*
17 *Co.*, 552 F.3d 934, 938 (9th Cir. 2008). “A reasonable consumer is [an] ordinary consumer acting
18 reasonably under the circumstances [who] is not versed in the art of inspecting and judging a
19 product.” *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 682 (2006) (internal
20 quotation marks and citations omitted); *accord Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d
21 843, 854 (N.D. Cal. 2012).

22 An advertised discount off a seller’s regular price can be deceptive where (1) the alleged
23 sale price does not in fact differ from the regular price at which the product is ordinarily sold; or
24 (2) “the alleged original price constituted a false valuation of the product.” 1A Callmann on
25 Unfair Comp., Tr. & Mono. § 5:59 (4th ed. 2015); *see also Hinojos v. Kohl’s Corp.*, 718 F.3d
26 1098, 1102 (9th Cir. 2013) (noting that the plaintiff alleged both (1) “that he purchased several
27 items that were advertised as being substantially reduced from their ‘original’ or ‘regular’ prices
28 but that were, in reality, routinely sold by [the defendant] at the advertised ‘sale’ prices,” and

1 (2) “that the advertised ‘original’ or ‘regular’ prices did not reflect prevailing retail market
2 prices”); 16 C.F.R. § 233.1(a) (an advertised “reduction from the advertiser’s own former price for
3 an article” is legitimate where “the former price is the *actual, bona fide price* at which the article
4 was offered to the public on a regular basis for a reasonably substantial period of time”) (emphasis
5 added). In line with the second of these two scenarios, California Business & Professions Code
6 section 17501 provides that “[n]o price shall be advertised as a former price of any advertised
7 thing, unless the alleged former price was the prevailing market price . . . within three months next
8 immediately preceding the publication of the advertisement or unless the date when the alleged
9 former price did prevail is clearly, exactly and conspicuously stated in the advertisement.” Cal.
10 Bus. & Prof. Code § 17501.

11 Knapp’s FAL cause of action cites to both section 17500 and 17501 and alleges that
12 Art.com’s “perpetual sales” are deceptive in that they “mislead consumers into believing they are
13 getting a significant discount, when in actuality, they are paying the regular or even greater price
14 for the item they are purchasing.” FAC ¶¶ 78-80.

15 Art.com moves to dismiss the FAL cause of action on the grounds that (1) it is based
16 exclusively on section 17501, not section 17500, and Knapp has not adequately alleged either that
17 Art.com’s advertised sales involve “former price” advertising within the meaning of section
18 17501, or that any advertised former price was not the “prevailing market price” at the relevant
19 time, Mot. at 12-16; and (2) Knapp lacks statutory standing under section 17501, both because he
20 does not specifically allege that he believed that the “40% off” language he viewed was a former
21 price comparison, and because his only claimed harm is that “he did not know that Art.com would
22 offer a better sale the next day,” Mot. at 19-21.

23 These arguments do not support dismissing the FAL cause of action (or striking from it all
24 references to section 17501, as Art.com requests in the alternative, *see* Reply at 9). First, the cause
25 of action is not based exclusively on section 17501. Knapp cites to both section 17501 and section
26 17500 within the FAL cause of action, *see* FAC ¶¶ 78, 80, and the bulk of his allegations are
27 directed at the theory that Art.com’s “perpetual sales” have caused its purported sale prices to be
28 no different from the prices at which it regularly sells its products. As I understand the interaction

1 between section 17501 and section 17500, this is a section 17500 theory, not a section 17501
2 theory. That is, Knapp’s principal theory of liability appears to be that Art.com does not
3 ordinarily sell its products at the advertised regular prices (in violation of section 17500), not that
4 the advertised regular prices are out of step with prevailing market prices (in violation of section
5 17501).

6 Further, even if the FAL cause of action were limited to section 17501, the allegations in
7 the FAC are sufficient to state a claim under that statute. Art.com argues that section 17501 does
8 not apply because Knapp does not “identify any advertising by Art.com that uses any language
9 denoting a former price,” such as words like “formerly” or “regularly.” Mot. at 13-14. But
10 Art.com cites no authority indicating that such language is required. Each of the cases it cites
11 rejected former price comparison claims based on “Compare At” or “Compared To” advertising.
12 *See Jacobo v. Ross Stores, Inc.*, No. 15-cv-04701, at *2, *9 (C.D. Cal. Feb. 23, 2016) (dismissing
13 claim that the defendant violated section 17501 by advertising a sale price and a “Compare At”
14 price representing the amount charged for similar products by other merchants in the area); *Branca*
15 *v. Nordstrom, Inc.*, No. 14-cv-02062, 2015 WL 1841231, at *7-8 (S.D. Cal. Mar. 20, 2015)
16 (dismissing claim that “the ‘Compare At’ price listed on the Nordstrom Rack price tags . . . is
17 likely to deceive reasonable consumers into believing the listed ‘Compare At’ price is the former
18 price at which Nordstrom or other retailers previously sold the same merchandise”); *Rubenstein v.*
19 *Neiman Marcus Grp. LLC*, No. 14-cv-07155, 2015 WL 1841254, at *3, *5-6 (C.D. Cal. Mar. 2,
20 2015) (rejecting claim that the “Compared To” advertising used at the defendant’s outlet store
21 could be “interpreted by reasonable consumers to be a price comparison with the price of the exact
22 same product when it was previously for sale at [the] defendant’s regular retail store”). The
23 language at issue here – e.g., “40% off” or “45% OFF ALL ORDERS* – TODAY ONLY” – is
24 substantially different, and substantially more indicative of a former price comparison than
25 “Compare At” or “Compare To.” A reasonable consumer does not need language such as,
26 “Formerly \$9.99, Now 40% Off \$9.99,” or, “40% Off the Former Price of \$9.99,” to reasonably
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1 understand “40% off” to mean 40% off the former price of the product.³

2 Art.com contends that the section 17501 claim fails because Knapp does not specifically
3 allege that he interpreted the “40% off” language he viewed as a former price comparison. Mot. at
4 14. But Knapp alleges that he “noticed the 40% off sale,” “saw that the sale ended at midnight,”
5 and was “[e]nticed by the idea of saving 40% off his purchase.” FAC ¶ 61. Elsewhere in the
6 FAC, he alleges that Art.com’s purported sales “deceive consumers into believing they are being
7 offered a discount from Art.com’s regular prices when, in fact, they are not.” *Id.* ¶ 31. Viewed in
8 the light most favorable to the nonmoving party, these allegations are sufficient to plausibly
9 establish that Knapp interpreted the “40% off” language as advertising a discount from Art.com’s
10 former prices. Indeed, it is not clear how else Knapp could have reasonably understood the “40%
11 language” other than as advertising a discount from Art.com’s former prices.

12 Art.com asserts that section 17501 does not apply because Art.com’s sales require
13 consumers to enter a coupon code to obtain the advertised sale price, meaning that its sales merely
14 compare “two current prices” – i.e., the coupon price and the non-coupon price – not a former
15 non-sale price and a current sale price. Mot. at 13; *see also id.* at 14 (“Because the alleged regular
16 price is offered simultaneously with the discounted sale price and the customer can pay the regular
17 price to purchase the item, the alleged regular price is not a former price.”). I am not convinced.
18 Knapp has plausibly alleged that the “40% off” language he viewed objectively qualifies as former
19 price advertising within the meaning of section 17501, and that he subjectively interpreted the
20 language as advertising a discount from Art.com’s former prices. Against this backdrop, it is not
21 clear why it matters that he was required to enter a coupon code to obtain the advertised 40 percent

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23 ³ The “Former Price Comparison” regulation issued by the Federal Trade Commission, which both
24 *Branca* and *Rubenstein* cite in their analysis, adds further support to the conclusion that language
25 such as “formerly” or “regularly” is not required. The regulation explains that “[i]f the former
26 price is set forth in the advertisement, *whether accompanied or not* by descriptive terminology
27 such as ‘Regularly,’ ‘Usually,’ ‘Formerly,’ etc., the advertiser should make certain that the former
28 price is not a fictitious one.” 16 C.F.R. § 233.1(e) (emphasis added). In addition, a regulation
interpreting section 17501 issued by the California Bureau of Electronic and Appliance Repair,
Home Furnishings and Thermal Insulation lists “___% off” – the same language used by Art.com
– as an example of former price advertising under section 17501. *See* Cal. Code Regs. tit. 4 §
1301 (“The term ‘former price’ as used in [section 17501] includes but is not limited to the
following words and phrases when used in connection with advertised prices: “formerly -,”
“regularly -,” “usually -,” “originally -,” “reduced from ___,” “was ___ now ___,” “___% off.”).

1 discount. As described in the FAC, the requirement that a consumer enter a coupon code to obtain
2 the advertised discount is merely a routine, procedural step in the purchase transaction and is not
3 material to whether Art.com’s advertising constitutes former price advertising under section
4 17501.⁴

5 Art.com’s argument that Knapp has not adequately alleged that any advertised former price
6 was higher than the prevailing market price is also unpersuasive. Art.com faults Knapp for not
7 “identify[ing] any prices charged by other retailers.” Reply at 9. Given that Knapp has plausibly
8 alleged that Art.com consistently sells its products at prices significantly (i.e., 30 to 50 percent)
9 lower than its advertised former prices, Knapp does not need to identify prices charged by other
10 retailers to plausibly establish that Art.com’s advertised former prices are higher than prevailing
11 market prices. The alternative inference is that Art.com consistently sells its products at prices 30
12 to 50 percent lower than prevailing market prices. Art.com does not identify any reasonable basis
13 for this inference.

14 This leaves Art.com’s attacks on Knapp’s statutory standing under section 17501. As
15 discussed above, Knapp has plausibly alleged that he understood the “40% off” language as
16 advertising a discount from Art.com’s former prices. And while Knapp states that he could have
17 received an even larger discount had he waited one more day to make his purchase, he also states
18 that he “would not have purchased the product if it were not for the ‘40% off sale’ advertised on
19 the www.art.com website.” FAC ¶ 62. This latter allegation is sufficient to establish statutory
20 standing under section 17501, even assuming that the former is not. *See Hinojos v. Kohl’s Corp.*,
21 718 F.3d 1098, 1107 (9th Cir. 2013) (“[W]hen a consumer purchases merchandise on the basis of
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23 ⁴ Moreover, I am skeptical that section 17501 cannot be applied to a comparison between a current
24 coupon price and a current non-coupon price, merely because both prices are currently available to
25 consumers. Art.com cites no on-point authority to support its position that a former price under
26 section 17501 must be one that is not currently offered, and thus cannot be a currently offered
27 “regular” or “non-sale” price. The cases cited by Art.com hold that “comparable value
28 comparisons” – i.e., advertising comparing the advertiser’s price to that of “merchandise of like
grade and quality . . . sold by the advertiser or others in the area” – are distinct from former price
comparisons. *See Branca*, 2015 WL 1841231, at *7-8; *Rubenstein*, 2015 WL 1841254, at *5-6.
They do not address whether a comparison between an advertiser’s current coupon price on an
item and its current non-coupon price on the same item qualifies as former price advertising under
section 17501.

1 false price information, and when the consumer alleges that he would not have made the purchase
2 but for the misrepresentation, he has standing to sue under the UCL and FAL because he has
3 suffered an economic injury.”).

4 Knapp’s claims under section 17500 and section 17501 may proceed. Art.com’s motion to
5 dismiss or strike the FAL cause of action is DENIED.

6 **II. SECOND CAUSE OF ACTION: VIOLATION OF THE UCL**

7 Knapp brings claims under the unlawful and unfair prongs of the UCL.⁵ FAC ¶¶ 83-96.
8 His claims under the unlawful prong are based on Art.com’s alleged violations of section 17501,
9 16 C.F.R. § 233.1(a),⁶ 15 U.S.C. § 52(a),⁷ and California Civil Code sections 1770(a)(9) and
10 (a)(13).⁸ *Id.* ¶¶ 90-94. In support of his claim under the unfair prong, he accuses Art.com of
11 “misrepresenting a false sale price to induce consumers into believing they are getting a discount,
12 when they are not,” thereby “induc[ing] reasonable consumers . . . to buy Art.com merchandise,
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14 ⁵ In his opposition brief, Knapp contends that he has also brought claims under the UCL’s
15 fraudulent prong. *Oppo.* at 20. That is not how I read the FAC. If Knapp wants to bring claims
16 under the fraudulent prong, he should include allegations to that effect in a second amended
17 complaint.

18 ⁶ Section 233.1(a) explains that

19 One of the most commonly used forms of bargain advertising is to
20 offer a reduction from the advertiser's own former price for an
21 article. If the former price is the actual, bona fide price at which the
22 article was offered to the public on a regular basis for a reasonably
23 substantial period of time, it provides a legitimate basis for the
24 advertising of a price comparison. Where the former price is
25 genuine, the bargain being advertised is a true one. If, on the other
26 hand, the former price being advertised is not bona fide but fictitious
27 – for example, where an artificial, inflated price was established for
28 the purpose of enabling the subsequent offer of a large reduction –
the “bargain” being advertised is a false one; the purchaser is not
receiving the unusual value he expects. In such a case, the “reduced”
price is, in reality, probably just the seller's regular price.

16 C.F.R. § 233.1(a).

⁷ Section 52(a) prohibits the dissemination of false advertisements relating to the purchase of
“food, drugs, devices, services, or cosmetics.” 15 U.S.C. § 52(a).

⁸ Sections 1770(a)(9) and 1770(a)(13) prohibit “[a]dvertising goods or services with intent not to
sell them as advertised,” Cal. Civ. Code § 1770(a)(9), and “[m]aking false or misleading
statements of fact concerning reasons for, existence of, or amounts of price reductions,” Cal. Civ.
Code § 1770(a)(13).

1 which they otherwise would not have purchased.” *Id.* ¶¶ 87-88.

2 Art.com moves to strike (1) Knapp’s unlawful prong claims to the extent that they are
3 based on section 17501, section 233.1(a), or section 52(a); and (2) the entirety of Knapp’s claim
4 under the unfair prong. Mot. at 21-23; Reply at 13-15. Art.com does not explain why it is
5 appropriate to strike (as opposed to dismiss) any portion of Knapp’s UCL cause of action at this
6 juncture, and I construe this portion of its motion as a motion to dismiss under Rule 12(b)(6).

7 So construed, the motion is GRANTED WITH LEAVE TO AMEND with respect to
8 Knapp’s unlawful prong claim based on section 52(a). That statute is limited to false
9 advertisements relating to the purchase of “food, drugs, devices, services, or cosmetics.” 15
10 U.S.C. § 52(a); *see also* 15 U.S.C. § 55 (defining “food,” “drug,” “device,” and “cosmetic”).
11 Knapp does not explain how Art.com’s advertising falls within this scope, and instead concedes
12 that section 52(a) “may not be applicable here.” Oppo. at 17 n.5. Because the allegations in the
13 FAC do not support a plausible inference that Art.com has violated section 52(a), Knapp may not
14 base an unlawful prong claim on that statute.

15 In all other respects, Art.com’s motion is DENIED. The rest of Art.com’s attacks on
16 Knapp’s claims under the UCL’s unlawful and unfair prongs largely overlap with its arguments
17 regarding the FAL cause of action, discussed above, and fail for essentially the same reasons. *See*
18 Mot. at 21-23; Reply at 13-15. Knapp’s claims under the unlawful prong based on section 17501,
19 section 233.1(a), and sections 1770(a)(9) and 1770(a)(13), and his claim under the unfair prong,
20 may proceed.


21 CONCLUSION

22 For the foregoing reasons, Art.com’s motion to dismiss and strike is GRANTED IN PART
23 and DENIED IN PART. Knapp’s claims under the UCL’s unlawful prong are DISMISSED
24 WITH LEAVE TO AMEND to the extent that they are based on section 52(a). Knapp has not
25 stated a claim under the UCL’s fraudulent prong. In all other respects, Art.com’s motion is
26 DENIED. Knapp may file a second amended complaint within 20 days of the date of this Order.
27 If he chooses not to file a second amended complaint, Art.com shall file its answer within 20 days
28 of the date of his notice filed in the Court’s docket on ECF that he will not file a second amended

1 complaint, or within 40 days of the date of this Order, whichever is sooner.

2 **IT IS SO ORDERED.**

3 Dated: June 15, 2016

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5 WILLIAM H. ORRICK
6 United States District Judge

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United States District Court
Northern District of California