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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SIMON LEVAY, JUDITH WILLIS and LIONEL BROWN, Individually and on Behalf of all Others Similarly Situated,

Plaintiffs,

v.

AARP, INC., AARP SERVICES, INC., UNITEDHEALTH GROUP, INC., UNITEDHEALTHCARE INSURANCE COMPANY, NEW YORK LIFE INSURANCE COMPANY and DOES 1 through 60, inclusive,

Defendants.

Case No. 2:17-cv-09041-DDP-PLA

Judge: Hon. Dean D. Pregerson
Magistrate: Hon. Paul L. Abrams

AARP DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS THIRD AMENDED COMPLAINT

Date: February 11, 2019
Time: 10:00 a.m.
Place: Courtroom 9C

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on February 11, 2019, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 9C of the United States Courthouse, 350 West 1st Street, Los Angeles, CA, 90012, Defendants AARP, Inc. and AARP Services, Inc. (collectively, the "AARP Defendants") will move the Hon. Dean D. Pregerson for an order dismissing the Third Amended Complaint of Plaintiffs Simon Levay, Judith Willis, and Lionel Brown. This Motion is brought under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief may be granted.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on December 10, 2018.

Dated: December 17, 2018

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I. INTRODUCTION

This case has become a lawsuit in search of a grievance. Earlier complaints variously alleged illegal royalty payments by UnitedHealthcare and New York Life and violations of California insurance law. While remnants of these allegations remain in the Third Amended Complaint, the insurer-defendants have been dropped. And plaintiffs' theory has evolved into an assertion that AARP deceives members into joining AARP with purportedly false promises that AARP member benefits include access to high-quality insurance offerings.

This theory suffers many of the defects of the prior complaints, including lack of any identifiable injury and lack of the particular allegations required by Rule 9(b). Most telling, however, is the continuing lack of any actionable misrepresentation regarding AARP membership. Through four complaints, the only identified representations upon which plaintiffs rely – now found in paragraph 27 of the Third Amended Complaint – have not changed. They remain advertisements *by United Healthcare and New York Life* regarding the insurance products they offer. These ads contain no purported misrepresentations about the insurance being offered, no statements regarding the benefits of AARP membership and no statements by AARP at all. The ads are notable mainly in that they *disclose* the royalty paid to AARP for use of its trademark. Taking a cue from questioning at the last hearing, plaintiffs assert that use of AARP's intellectual property signifies that the United Healthcare and New York Life insurance products are "at a discounted rate and are the best products" for seniors. But the complaint identifies no such statements or promises, and the cited ads contain none. Despite being pressed repeatedly by the Court during the last hearing to identify "what is false" (*e.g.* 10/31/18 Transcript ("Tr.") at 28, 31, 35), plaintiffs completely fail to identify any misrepresentations by AARP.

Nor does the use of the AARP trademark itself operate as promise of specific product attributes. What insurance is "best" for a particular individual varies

widely. As this Court observed, a product that is lower-cost may offer poorer customer service (Tr. 32:8-9). Moreover, general statements of superiority are not actionable as a matter of California law. *See Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990); *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1139 (C.D. Cal. 2005). And unlike the Good Housekeeping seal of approval, no promise of testing or warranty against defects is offered through the use of the AARP name. *Cf. Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680 (1969). That is not to say, however, that AARP is indifferent to the quality of the products offered that carry its trademark and merely "sells to the highest bidder" as plaintiffs assert. To the contrary, the contracts that plaintiffs have placed at issue refute that very notion. The agreement between United Healthcare and AARP, for example, requires United Healthcare to design its program to further the social welfare needs of AARP members, establishes service and quality standards for United Healthcare's performance, and provides AARP with audit and oversight rights to ensure that the program "satisfies the needs of the AARP members and [] supports the social welfare mission of the AARP." Doc. 40-3 at §4.9.

The current complaint also fails – despite the Court's twice-repeated request – to supply even the most basic facts, such as when plaintiffs joined AARP, what materials they reviewed before joining and what product features they hoped to enjoy. In a case where their theory sounds in fraud, these omissions are fatal. And the complaint seeks relief in the form of disgorgement that is barred by law.

This Court has provided specific direction regarding what information Plaintiffs must allege to state a claim. They failed to heed that call, and the allegations in this pleading reveal that there is no set of facts available to support the theory they are trying to assert. The Court should dismiss the case with prejudice.

II. BACKGROUND

Plaintiffs' basic allegations have not changed substantially since the initial complaint and remain those assertions identified as insufficient in the Court's prior orders. We describe the key allegations again, as we have in prior briefing, to supply the newly-numbered paragraph citations, to highlight the handful of new allegations, and to identify the omissions and self-refuting claims of the new complaint.

A. AARP and the Insurance Programs

Defendant AARP, Inc. is a 501(c)(4) tax-exempt non-profit organization that advocates for the interests of seniors. Doc. 20, ¶¶ 15-16. AARP Services, Inc. ("ASI") is a wholly-owned subsidiary of AARP, Inc. ASI is AARP's "taxable 'for-profit' division that negotiates, oversees, and manages" AARP's relationships with the insurance companies selected to offer products to AARP members. Doc. 59, ¶ 4.[1]

In 1997, United and AARP entered into the AARP Health Insurance Agreement (together with its amendments, the "Agreement"), under which United agreed to provide Medicare supplemental insurance ("Medigap") to AARP members under a group policy, and AARP agreed to license its intellectual property for use in connection with that Medigap program. Doc. 20 at ¶ 25. In exchange for the use of this intellectual property, United pays AARP a royalty. Doc. 40-3, §§ 4.2.4, 6.1, 6.7, at 52, 58, 66-67.

The Agreement imposes extensive obligations on United Healthcare to help ensure the program's quality and adherence to AARP's social welfare mission.

[1] "AARP created ASI in 1999 pursuant to a settlement with the U.S. Internal Revenue Service ('IRS')[.]" *Id.* This structure follows conventional tax advice for nonprofit organizations, and as discussed in Defendants' Motion to Dismiss the Second Amended Complaint (Doc. 63 at 21-24), the IRS has repeatedly confirmed AARP's exemption status under 501(c)(4) of the Internal Revenue Code and currently identifies AARP as tax-exempt in IRS public records.

United Healthcare must for example "offer group health insurance products that, together with the other value-added features, differentiate the SHIP from insurance programs offered by other vendors" with a "competitive benefit and cost structure, determined on a basis that includes due consideration of the method of distribution and product design," taking "into account the social welfare needs of AARP members and of older persons generally." *Id*. at § 3.2.3. United agrees to "improve benefits and maintain premiums at competitive levels" and to modify the program "with a view towards providing for AARP members the best program of group health insurance available to older persons." *Id*.

The Agreement also provides for the establishment of "service and quality standards for specific administrative functions such as determining eligibility where underwriting is applicable, claim processing, handling telephone calls transferred from the Member Services Vendor, complaints, requests for information and general correspondence" and requires United Healthcare to "report the results" to AARP. *Id.* at § 3.2.5. The Agreement requires United Healthcare to submit a comprehensive Operating Plan, subject to AARP's approval, which among other things must describe how the insurance program "is addressing the social welfare needs of the AARP members." *Id.* at § 3.2.6. Under the Agreement, United Healthcare must furnish an annual audit to AARP and to produce other reports at AARP's request. *Id.* at §§ 3.2.7, 3.2.8. And the Agreement allows AARP to terminate the Agreement if United Healthcare "acts in a way materially adverse to the preservation and promotion of goodwill towards AARP and AARP Trust, or [] materially fails to employ such commercial and professional standards as will assist AARP in its goals of advancing the education, well being and social welfare of its members and older persons generally." *Id.* at § 10.2(f).

B. The Fourth Complaint

Plaintiffs Levay, Brown and Willis are, or were at some point, members of

AARP.[2] They seek to represent a class of AARP members that "has been induced to join AARP and pay membership fees, through unlawful, misleading and/or unfair representations of products, services and endorsements by AARP and/or concealment of AARP's unlawful 'for profit' business activities." TAC ¶ 11.

The only "representations of products, services and endorsements by AARP" identified in the TAC are images from United Healthcare and New York Life websites containing general information about the AARP-branded insurance products. TAC ¶ 27. The ads describe Medigap and life insurance coverage. They do not describe the benefits of AARP membership and are not alleged to be ads by AARP soliciting members. The only references to AARP membership state that, to obtain the branded coverage, a person must be a member of AARP. *See, e.g., id*. at ¶ 27(a), first example ("You must be an AARP member to enroll …."); *id*. at ¶ 27(a), fourth example ("The AARP Life Insurance Program from New York Life Insurance Company is exclusively for AARP members ….").

These websites also represent that "AARP endorses the AARP Medicare Insurance plans[,]" and expressly disclose the royalty fee paid to AARP for the use of its intellectual property. *Id*. ("United Healthcare Insurance Company pays royalty fees to AARP for the use of its intellectual property. These fees are used for the general purposes of AARP."). The cited materials make no reference to the quality or benefits of AARP membership, and do not represent that the insurance products are offered at a "discounted" rate.

Plaintiffs allege they saw these materials "in and around the time" they joined AARP and that "in reliance on endorsements and representations of the perceived quality and superiority of insurance products communicated to them by

[2] The Third Amended Complaint still does not identify the date that each plaintiff joined or renewed AARP. As of the date of the filing of the Second Amended Complaint, only plaintiff Willis was an AARP member; plaintiff Levay's membership lapsed on May 31, 2017 and plaintiff Brown's membership lapsed on May 31, 2018. Decl. of William Gale ("Doc. 63-2") at ¶¶ 5-8.

AARP," they were induced "to purchase the insurance products AARP endorsed" which they believed were "the best for seniors." TAC ¶¶ 28-31. At other points, the complaint alleges that the insurance policies "are at a discounted rate and are the best products for them as seniors." TAC ¶ 18. The complaint supplies no specifics to support these generic allegations other than to add that Mr. Levay allegedly was quoted a higher premium for AARP-branded life insurance from New York Life than for unidentified New York Life life insurance, with unidentified terms, outside the program.[3] *Id.*

Like the three prior complaints, the current complaint does not allege that plaintiffs failed to receive the benefits of AARP membership. Indeed, the complaint admits that plaintiffs were eligible to enroll in the AARP-branded Medigap and life insurance programs offered by United and NYL, respectively. But, as discussed in prior motions to dismiss and not contested by plaintiffs in prior briefing and hearings, only plaintiff Levay purchased AARP-branded insurance coverage.[4] Plaintiffs seek restitution of their AARP membership fees and "recovery of Defendant's unjust and unfair profits." TAC ¶ 50.

Also like its predecessors, the instant complaint remains devoid of facts regarding plaintiffs' own AARP memberships, such as when they joined, when they renewed, why they joined or renewed, how much they paid, what services they sought, what benefits they received or did not receive, or what advertisements or

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[3] Moreover, group insurance available through NYL cannot be compared to an individual policy offered by NYL. The two products are distinctly different in various features, including underwriting differences between group and individual policies.

[4] The latest complaint (Third Amended Class Action Complaint ("TAC"), ¶ 30) asserts for the first time that Lionel Brown purchased AARP-branded coverage from United HealthCare (while failing to acknowledge that it is Medicare Part D coverage and thus an entirely different arrangement from the Medigap coverage that has been central to the lawsuit to date). No advertisements referenced in the complaint refer to the Medicare Part D program. Also, unlike Medigap coverage, AARP membership is not required to purchase Medicare Part D coverage from United HealthCare and, thus, plaintiffs' membership theory goes nowhere as to Mr. Brown.

other communications they saw (beyond the United Healthcare and New York Life websites describing their insurance products, which have been reproduced in each of the prior complaints).

C. The Prior Complaints and Dismissal Orders

1. First Amended Complaint and First Motion to Dismiss

In its ruling granting the Defendants' motions to dismiss The First Amended Complaint, the Court expressly considered – and rejected – the theory that by becoming AARP members, plaintiffs contend they are injured by paying membership fees and facing the risk of being exposed to advertising for AARP-endorsed Medigap insurance policies. First, the Court dismissed plaintiffs Willis and Brown because neither had Article III standing. *Levay v. AARP, Inc.*, 2018 WL 3425014, at *3 (C.D. Cal. July 12, 2018) ("*Levay I*"). The remainder of the ruling focused on plaintiff Levay, the only plaintiff who actually purchased an AARP-branded Medigap policy. The court dismissed Levay's claim for injunctive relief, noting that he pled no facts suggesting he faced a risk of future injury. *Id*. Next, the court rejected plaintiffs' claims for violation of California Insurance Codes section 785 and 787 with prejudice because those provisions do not apply to Medigap insurance. *Id*. at *4.

The Court also dismissed the UCL and FAL claims because (1) the FAC did not satisfy Rule 9(b) and (2) "Levay has not alleged that he saw any of the advertisements or representations of AARP-branded insurance that he now challenges." *Id*. at *5. The Court's ruling granted leave to amend, warning that "[i]f Levay is to retain these allegations in the complaint, he must plead fraud with specificity, and allege the 'who, what, when, where, and how' of Defendants' misconduct." *Id*. at *6.

2. Second Amended Complaint and Motion to Dismiss

The SAC mostly regurgitated the FAC and the relationships established by the 1997 agreement, with a handful of vague additions. Defendants again moved to

dismiss. In their opposition to AARP's motion to dismiss, Plaintiffs raised the new, unpleaded theory that AARP may have somehow violated their privacy rights. Doc. 66 at 18-21.

At the hearing, Plaintiffs' counsel represented to the Court that there are additional facts they could allege regarding the advertisements they saw, their reasons for joining AARP, and their reliance on any misrepresentations. Tr. at 26:23-25; 31:3-4; 38:6-12. The Court granted Defendants' motions to dismiss, largely with prejudice, with leave to amend only to identify a representation that induced their AARP membership in a manner that caused them injury. *Levay v. AARP, Inc.*, 2018 WL 5819846, at *2 (C.D. Cal. Nov. 2, 2018) ("*Levay II*"). Specifically the Court "grants Plaintiffs a final opportunity to amend the SAC to state a theory of injury that corresponds to the measure of damages they seek, namely the cost of the AARP membership fees paid by Plaintiffs." *Id*.

The Court once again dismissed plaintiffs' insurance code claims with prejudice, and dismissed United and NYL with prejudice because "Plaintiffs lack standing to seek restitution of their membership fees from the insurance carrier defendants." *Id*. at *3. The Court also dismissed any claims based on the Internal Revenue Code because "[e]ven if Defendants' tax conduct were unlawful, Plaintiffs cannot show how they have been injured by it, or that a court ruling on this issue would remedy Plaintiffs' alleged injury regarding their purchase of AARP memberships." *Id*. at *5.

Further, the Court dismissed with prejudice any claims based on the theory that AARP misrepresented that the branded insurance policies were offered at a discount. "It is not reasonable to assume that, because certain AARP services are discounted, all AARP services are discounted. Nor do Plaintiffs point to any representation to this effect made by Defendants. As a result, the Court finds Plaintiffs' theory concerning the discounted status of AARP policies too attenuated to merit relief." *Id*. at *4.

Finally, the Court again held that plaintiffs' allegations sound in fraud and therefore require specificity under Rule 9(b), dismissing "Plaintiff[s'] claims with leave to amend in order for plaintiff[s] to allege the 'who, what, when, where, and how' of the alleged fraudulent conduct." *Id*. at *6. The Court warned that "[n]o amendments are permitted beyond those for which the court has expressly granted leave to amend." *Id*.

III. LEGAL STANDARD

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must determine whether the pleading contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). In making this determination, the court need not accept "[c]onclusory allegations and unwarranted inferences," *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011), or "legal conclusions couched as a factual allegation," *Dahlia v. Rodriguez*, 735 F.3d 1060, 1088 (9th Cir. 2013) (internal quotation marks omitted). Nor should the court credit allegations that contradict materials incorporated into the complaint. *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

IV. ARGUMENT

A. The Complaint Fails to State A Claim for Violation of the UCL or FAL

1. No Unfair or Fraudulent Conduct

California's UCL and FAL prohibit any "unfair, deceptive, untrue or misleading" advertising. Cal. Bus. and Prof. Code §§17200, 17500. At minimum, a plaintiff must identify an advertising statement made by the defendant that is unfair, deceptive, untrue or misleading. In determining whether conduct is deceptive under the UCL and FAL, courts apply the "reasonable consumer standard." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965-66 (9th Cir. 2016). This

standard requires a showing "that members of the public are likely to be deceived." *Id.* at 965 (internal quotation marks omitted). A plaintiff must show "more than a mere possibility that [the challenged materials] might conceivably be misunderstood by some few consumers viewing [them] in an unreasonable manner. Rather, the reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id.* (citation and internal quotation marks omitted). Courts, including this Court, test whether the alleged representations meet this standard as a matter of law on a motion to dismiss. *Stiles v. Trader Joe's Co.*, 2017 WL 3084267, at *5 (C.D. Cal. Apr. 4, 2017) (dismissing false advertising claim where the product's packaging made "it impossible for the [P]laintiff[s] to prove that a reasonable consumer [is] likely to be deceived"); *Ebner*, 838 F.3d at 965-66 (affirming dismissal of claim that lip balm was packaged deceptively). Plaintiffs fail to allege any "unfair" or "fraudulent" conduct, as they cannot show that "members of the public are likely to be deceived," *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1144 (2001), under the UCL and FAL's "reasonable consumer standard."

a. The Complaint Fails To Identify Any Misrepresentation By AARP About Membership Benefits.

The current complaint utterly fails to identify any statements that would mislead a "reasonable consumer" into joining AARP. None of the statements described in paragraph 27 of the TAC are identified as untrue and none concerns AARP membership. While plaintiffs allege that only AARP members have access to AARP-branded insurance coverage from providers, among many other member benefits, they admit that this requirement was plainly disclosed in the advertising and is, in fact, true. TAC ¶ 27. The complaint also fails to identify anything about membership that was not, in fact, provided (including AARP member programs and

services and AARP's advocacy for seniors). And the complaint alleges no statements by AARP, only advertisements run by United Healthcare and New York Life. Nor is there any allegation that AARP promised that the insurance was discounted or somehow "best" for all seniors irrespective of individual circumstances. Plaintiffs' continued failure to allege any actionable deception regarding membership requires dismissal of the UCL and FAL claims. *See In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) , *superseded by statute on other grounds as stated in Johnson v. Wal-Mart Stores, Inc.*, 544 F. App'x 696 (9th Cir. 2013) (requiring plaintiffs to allege "what is false or misleading about a statement, and why it is false").

And even if plaintiffs alleged a statement by AARP, their theory is flawed in its conception. Read generously, their theory is that they saw ads about AARP-branded insurance, thought it looked good, joined AARP to purchase insurance and then upon further investigation were disappointed by the insurance offerings in some unspecified way. Simply stating these steps exposes the illogic of the claim – if plaintiffs saw ads and were able to investigate the insurance before joining AARP, they cannot complain that they were duped into paying for membership. The cost and all features of the insurance (and any competing products) were available to them before joining AARP.

b. The Complaint Fails To Identify Any Actionable Misrepresentation

In addition to its failure to identify any misstatements about membership by AARP, the complaint pleads no actionable misrepresentations of fact. At the last hearing and in their TAC, Plaintiffs struggled to identify any misleading or false statements (Tr. 33). Knowing such allegations were key to the Court's analysis, plaintiffs still rely only on general statements of superiority that do not give rise to a legal claim.

Long-standing authority holds that general statements that a product is best,

superior, carefully selected, trustworthy, or low cost are not actionable statements because they are not specific factual statements that can be tested or measured. "Generalized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer could not rely, and hence are not actionable." *Anunziato*, 402 F. Supp. 2d at 1139. Thus, in *Anunziato*, the court held that claims that the product offered "outstanding quality, reliability, and performance" and the defendant "[stood] behind our value proposition to our customers—to provide best-of-class service and support in addition to high-quality, brand-name components at affordable prices[]" were non-actionable. *Id.* at 1139-41. *See also Beshwate v. BMW of N. Am., LLC*, 2017 WL 6344451 (E.D. Cal. Dec. 12, 2017) (dismissing UCL and CLRA claims based on CarMax's representations that its certified vehicles were "of higher quality than other similar vehicles on the market" and "we carefully select, renew, and protect every CarMax car ensures our commitment to quality is met" because these statements are non-actionable general statements of superiority); *Punian v. Gillette Co.*, 2016 WL 1029607, at *9 (N.D. Cal. Mar. 15, 2016) ("Defendants' representations that consumers 'will always have access to power' and can 'trust' Duralock Batteries are nonactionable puffery.").

As these cases demonstrate, the determination of whether an alleged misrepresentation is actionable is a question of law. *See Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008) ("[T]he determination of whether an alleged misrepresentation 'is a statement of fact' or is instead 'mere puffery' is a legal question that may be resolved on a Rule 12(b)(6) motion."); *accord Cohen v. Prudential–Bache Sec., Inc.*, 713 F. Supp. 653, 658 (S.D.N.Y. 1989) (considering whether a securities broker's statement was actionable on a motion to dismiss claim for securities fraud); *Metzner v. D.H. Blair & Co.*, 689 F. Supp. 262, 263–64 (S.D.N.Y. 1988) (dismissing a count alleging that brokerage firm's representatives made untrue statements of material facts because the alleged statements were "merely puffery" and therefore not actionable under the securities laws).

The complaint offers only generalized assertions regarding the insurance that would be available upon joining AARP. It alleges alternately that the insurance is "discounted" (TAC ¶ 18) or "best for seniors" (*id.*), that plaintiffs joined AARP "in reliance on endorsements and representations of the perceived quality and superiority of insurance products" (TAC ¶ 28), that they expected that AARP would be "picking and only endorsing the best products and services for seniors" (TAC ¶ 29), that AARP's endorsement is "AARP's actual stamp of approval for the best senior insurance company," (TAC ¶ 20), and that AARP "would place the interests of seniors first" (TAC ¶ 30). Plaintiffs' counsel made similar claims at the last hearing, asserting that the insurance was low cost, of unique value, can only be obtained through AARP, superior in the marketplace and a better value. Tr. at 35:7-15. Both the allegations of the complaint and the assertions by counsel, however, describe only general statements that have been repeatedly rejected under the cases cited above. The complaint, of course, nowhere alleges any such statements by AARP and reveals itself as deficient when saying that plaintiffs could rely "on the presumption" that the products would be superior or discounted. TAC ¶ 18. Indeed, this Court has already held that broad statements such as a claim that the insurance is discounted are "too attenuated to merit relief." *Levay II*, 2018 WL 5819846, at *4. [5/]

c. The Use of AARP's Name Does Not Give Rise To A Claim

Scattered references in the complaint suggest a claim based merely on the use of AARP's name by United Healthcare and New York Life in the marketing of their insurance products. *See* TAC ¶¶ 4, 9, 11, 14, 18, 20, 21, 23, 24, 28. While the case law on the use of such marks or endorsements is not extensive, it all points in

[5/] These allegations would fail even if puffery were actionable, because the complaint alleges no facts showing that AARP does not believe the insurance products are "best for seniors" and includes no allegations at all even suggesting the products are inferior.

the same direction and requires dismissal where, as here, there has been no specific misrepresentation regarding a product. Indeed, we are aware of no case holding that the mere use of a trademark or endorsement in these circumstances gives rise to a claim.

In *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680 (1969), the plaintiff alleged that she sustained injuries caused by a slippery shoe that carried Good Housekeeping Magazine's seal of approval. The plaintiff sued the magazine on a claim of negligent misrepresentation, asserting that the shoes were defective. In connection with the seal, the magazine had represented that "This is Good Housekeeping's Consumers' Guaranty" and "We satisfy ourselves that products advertised in Good Housekeeping are good ones and that the advertising claims made for them in our magazine are truthful." *Id.* at 682. Also, the Good Housekeeping Consumers' Guaranty Seal itself contained the promise that "If the product or performance is defective, Good Housekeeping guarantees replacement or refund to consumer." *Id.*

The Court of Appeals reversed the lower court's demurrer based on the content of the seal and certification. Key to the court's decision were the fact that the Good Housekeeping seal of approval contained an express promise that the product has been reviewed, met Good Housekeeping's testing standards and was not defective.[6/] These facts were critical to the *Hanberry* outcome but absent here. The instant complaint alleges no representation or promise by AARP regarding the insurance products, and certainly none that is untrue. Also critical to the outcome of *Hanberry* was the allegation that the product actually fell short of the promised

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[6/] Even today, Good Housekeeping makes this promise: "You can rest assured that any product bearing the Seal has been extensively vetted by our experts — our two-year limited warranty means we'll even offer a refund of the purchase price or replacement up to $2,000 if one of our Seal products is found to be defective." https://www.goodhousekeeping.com/institute/about-the-institute/a19748212/good-housekeeping-institute-product-reviews/#seals (last visited Dec. 3, 2018).

quality – it was defective and caused personal injury. There is no such allegation here.[7/]

Subsequent cases declining to apply *Hanberry* supply the contrast necessary to show that it does not apply here. In *Yanase v. Automobile Club of Southern California*, 212 Cal. App. 3d 468 (1989), a man was shot and killed in the parking lot of a motel which he had selected based on Auto Club's "Tourbook," a publication that listed and rated motels as a resource for its members. His heirs filed suit under a negligent representation theory, arguing that as a member of the Auto Club, the decedent relied on Auto Club's motel listing and rating in the Tourbook and that Auto Club failed to ensure the safety of the motel it recommended. The court rejected this theory and distinguished *Hanberry*, noting that the Auto Club endorsement made no representation regarding the motel's safety or security: "At a minimum, as we have seen, the 'products' in the present case, motel accommodations, are as represented in the endorsement in the Tourbook which does not deal with neighborhood safety or security measures." *Id.* at 477. The lack of specific representations was fatal to the claim and distinguished the case from *Hanberry*.

Similarly, in *McCulloch v. Ford Dealers Advertising Ass'n*, 234 Cal. App. 3d 1385 (1991), the plaintiff claimed that the use of the Ford logo on promotional material for a drag race constituted a promise by the Association that the statements

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[7/] To take another example, the Underwriters Laboratories' seal (UL) has an even more specific meaning and signifies that the product meets technical standards established by UL. *See United States v. 4500 Audek Model No. 5601 AM/FM Clock Radios*, 220 F.3d 539, 540-41 (7th Cir. 2000). Courts have held that, like the Good Housekeeping seal, liability based on the UL seal is limited to representations regarding specific characteristics of the product. *See, e.g., Dekens v. Underwriters Labs. Inc.*, 107 Cal. App. 4th 1177, 1185 (2003) (affirming summary judgment in UL's favor on negligent misrepresentation claim involving plaintiff's exposure to asbestos while repairing an appliance because UL "never made a representation that any small appliance was safe with respect to asbestos fiber release or pulmonary health; and never provided advice concerning the medical risks of small appliances containing asbestos").

in the race promoter's ads were true, specifically that the statement that the event was a "million dollar drag race." When plaintiff ran the race but failed to receive a million dollar prize, he sued. *Id*. at 1387. The court acknowledged that Ford's sponsorship gave the contest an "aura of legitimacy," but held that the use of its marks did not make Ford the guarantor of the truth of any statement published by the race organizer. "Unlike *Hanberry*, defendant here made no affirmative statement, such as that contained in the Good Housekeeping seal, that it had investigated the truth of the claims made in the promotional material." *Id*. at 1391. *Yanase* and *McCulloch* show that an endorsement alone is not actionable, that the representation regarding the product must be specific and that the product must fall short of the promises made – none of which are present here.

d. The Complaint Itself Refutes Any Claim That AARP Does Nothing To Benefit Seniors And Only Sells Its Mark To The Highest Bidder

The complaint repeatedly asserts that AARP sells its mark to the highest bidder in complete disregard of seniors' interests. TAC ¶¶ 14, 22. These pejorative assertions are completely conclusory and lack any well-pleaded facts. *Iqbal*, 556 U.S. at 678. They are also utterly false as demonstrated by documents central to the complaint. The Agreement between AARP and United shows the extensive obligations imposed on these insurers in exchange for licensing the AARP name. The agreement with United requires "best efforts to offer products having a competitive benefit and cost structure, determined on a basis that includes due consideration of the method of distribution and product design. The design and development of the [program] by United shall take into account the social welfare needs of AARP members and of older persons generally." Doc. 40-3 at § 3.2.3. It imposes quality standards, provides for AARP oversight and affords a right to terminate for failure to meet the social welfare mission of AARP. *Id*. at §§ 3.2.3-3.2.8, 10.2.

Of course, even if AARP "sold out to the highest bidder," AARP's motives are irrelevant to whether the AARP membership or the insurance was misrepresented.

2. No Unlawful Conduct

Following two dismissal motions, plaintiffs' sole theory of liability is for unfair or fraudulent conduct. To the extent plaintiffs attempt to resurrect a theory based on the UCL's unlawful prong, this fails because the Court has dismissed – with prejudice – each allegedly "unlawful" act raised by their prior pleadings.

a. No Insurance Code Violations

The Court has already twice dismissed plaintiffs' Insurance Code claims with prejudice, and the TAC adds nothing new to save these claims from dismissal with prejudice.[8] *Levay I*, 2018 WL 3425014, at *3-4; *Levay II*, 2018 WL 5819846, at *3. Plaintiffs do not and cannot allege any violation of these provisions, as discussed in Defendants' prior motions and the Court's two prior rulings, and there is no connection between any alleged Insurance Code violation and plaintiffs' claimed injury – their AARP membership fees.

b. No Privacy Violations

The Court has already rejected plaintiffs' invasion of privacy theory without leave to amend because "this generally alleged harm is not one that corresponds to any of Plaintiffs' claims." *Levay II*, 2018 WL 5819846, at *2 n.2. Even if plaintiffs were permitted to replead this theory, they have failed to allege any facts suggesting that Defendants invaded their privacy or shared any personal information in violation of any law. *See* Doc. 68 at 10-16.

c. No IRS Violations

The only other alleged unlawful act under the UCL and FAL is the purported

[8] *Benamar v. Air France-KLM*, 2015 WL 4606751, at *3 (C.D. Cal. July 31, 2015) (dismissing with prejudice two claims realleged in plaintiff's second amended complaint that the court had previously dismissed with prejudice).

Internal Revenue Code violation related to AARP's classification as a non-profit social welfare organization. The Court has dismissed these claims without leave to amend. *Levay II*, 2018 WL 5819846, at *5.

B. Plaintiffs' Third Amended Complaint Still Fails To Satisfy Rule 9(b) and Ignores This Court's Request For Allegations Regarding Plaintiffs' Inducement Theory

As the Court has ruled – twice – plaintiffs' allegations are subject to Rule 9(b)'s heightened pleading requirements, which require plaintiffs to allege "with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *Levay I*, 2018 WL 3425014, at *6; *Levay II*, 2018 WL 5819846, at *5-6. A claim triggers Rule 9(b)'s heightened pleading requirements if the facts alleged "necessarily constitute fraud." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-06 (9th Cir. 2003). Because plaintiffs' claims all depend on defendants' alleged deception, the circumstances constituting defendants' conduct must be alleged "with particularity." *Id.* at 1103; Fed. R. Civ. P. 9(b).

In ruling on the motions to dismiss the Second Amended Complaint, the Court specifically found that plaintiffs' inducement theory failed to satisfy Rule 9(b), explaining that "Plaintiffs would not be entitled to the return of their AARP membership fees if they were exposed to the insurance advertisements only *after* having already decided to purchase or renew their AARP memberships." *Levay II*, 2018 WL 5819846, at *2 (emphasis original). In order to prevail on plaintiffs' theory, "a necessary inference must be that Plaintiffs purchased or renewed their AARP memberships *as a result of* having been exposed to advertising for AARP-branded insurance that required AARP membership." *Id.* (emphasis original). Furthermore, the Court pointed out that plaintiffs did not identify any representations regarding, for example, AARP's alleged statement that it is the "protector of seniors" or any of the other statements that Plaintiffs impute to AARP: "THE COURT: Well, those are conclusions. I mean, what -- what -- where

is it said, words to the effect, we're the protectors of the seniors; we're like the consumers report for the seniors? We represent that we've done all this product testing, and we do all these things." Tr. 29:16-20. Because the SAC's allegations were conclusory, and did not clearly allege that plaintiffs viewed any representations *prior to* becoming AARP members, or explain how these representations induced their membership, the Court found that the SAC did not satisfy Rule 9(b), and granted leave to amend, once last time, to provide plaintiffs with a final opportunity to allege details regarding what they saw, when they saw it, how they saw it, and how it induced them to join AARP.

The Court's words still apply. Despite the Court's clear direction, plaintiffs do not allege they viewed these advertisements *before* joining or renewing their AARP memberships, or that these advertisements induced them to join AARP. The TAC contains only purposefully vague allegations regarding when and how each plaintiff viewed any alleged representation regarding AARP's endorsement of the insurance programs. TAC ¶¶ 29-31. No plaintiff commits to seeing any specific ad before joining, and each plaintiff alleges merely that they saw something similar to the ads alleged in paragraph 27 at some time around joining. *Id.*

Still missing are any allegations not only about when each plaintiff joined AARP, when each plaintiff saw any given advertisement, how they were viewed, and where they were viewed, but also about what plaintiffs were supposedly promised by AARP or an insurer, or how those promises were left unfulfilled. Similarly, the only allegation regarding reliance or inducement remains a bald conclusion that each plaintiff "justifiably and detrimentally relied on AARP's misrepresentations that it protected seniors and that it put their interests first." TAC ¶¶ 29-31. This sort of vague pleading is precisely what Rule 9(b) prohibits and prevents AARP from fully rebutting claims that plaintiffs were deceived or injured.

[9] *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (dismissal proper where plaintiff failed to specify sales material he relied upon in making his decision to buy); *In re Arris Cable Modem Consumer Litig.*, 2018 WL 288085, at *8 (N.D. Cal. Jan. 4, 2018) (Rule 9(b) requires plaintiffs to specify what they saw and relied upon); *McVicar v. Goodman Glob., Inc.*, 1 F. Supp. 3d 1044, 1052 (C.D. Cal. 2014) (dismissing UCL claim alleging fraudulent misrepresentations and omissions when plaintiffs failed to allege that either they or their agent "actually saw [the challenged] representations," "checked [the defendant's] website," or "saw any [defendant] advertisement"); *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 919 (C.D. Cal. 2010) (dismissing UCL claim when plaintiff "does not allege that, before he bought his [defective car], he reviewed any brochure, website, or promotional material that might have contained a disclosure of the cracking defect"). Plaintiffs have done nothing to remedy this fatal defect and have not added a single fact that would satisfy Rule 9(b).

For the same reason, the complaint also fails for lack of Article III or statutory standing. Under both the UCL and the FAL, a plaintiff must allege "particularized facts demonstrating a causal connection or reliance on the alleged misrepresentation." *Meyer v. Aabaco Small Bus., LLC*, 2018 WL 306688, at *3 (N.D. Cal. Jan. 5, 2018) (citing *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 (2011)). The complaint includes only one allegation regarding membership in AARP – a cursory reference, discussed above, that plaintiffs joined AARP and paid the membership fee to obtain insurance. As plaintiffs and the Court have acknowledged, plaintiff Simon Levay in fact obtained Medigap coverage and Judith Willis did not (and Brown misidentifies the coverage he purchased). Moreover, none of the plaintiffs plausibly alleges that they did not or were not able to receive

[9] It is fair to conclude that plaintiffs' continued failure to plead the respective dates they joined AARP is an attempt to evade the statute of limitations bar, as each joined AARP more than a decade ago. Doc. 63-2 at ¶¶ 5-8.

the benefits of AARP membership. Absent an allegation that plaintiffs did not receive the benefits of membership, the assertion that plaintiffs were "deceived" or "duped" into paying a membership fee cannot support a finding of economic injury. Put another way, even if plaintiffs could plausibly allege that AARP had impure motives in endorsing the insurance products, these motives did not injure plaintiffs.

Based on the Court's prior orders and the allegations of the latest complaint, this case must be dismissed for failure to satisfy Rule 9(b).

C. Plaintiffs Are Not Entitled To Disgorge AARP's Profits.

In addition to restitution, Plaintiffs now seek to disgorge AARP's profits. *See* TAC ¶ 50 (seeking "recovery of Defendant's unjust and unfair profits"). Plaintiffs are not entitled to this relief. California law recognizes two distinct types of disgorgement, namely "'restitutionary disgorgement, which *focuses on the plaintiff's loss*, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment.'" *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 800 (2015) (citation omitted) (emphases in original). In cases claiming restitution under California's consumer protection laws, the California Supreme Court has held that only restitutionary disgorgement may be available. *Id*. The Ninth Circuit recently confirmed that "[n]onrestitutionary disgorgement is unavailable in UCL actions." *Chowning v. Kohl's Dep't Stores, Inc.*, 733 F. App'x 404, 406 (9th Cir. 2018). Plaintiffs are not legally entitled to the nonrestitutionary disgorgement of AARP's profits, and the Court should deny this request.

V. THE COURT SHOULD DENY FURTHER LEAVE TO AMEND

Plaintiffs have now had four failed opportunities to state a claim against the AARP Defendants. Consequently, further amendment would be futile for the reasons explained above. *Lopez v. Smith*, 203 F.3d 1122, 1128 (9th Cir. 2000). Where further amendment would be futile, the court may exercise its discretion and deny leave to amend. *Id*. Furthermore, the trial court's discretion to refuse leave to

amend is particularly broad when, as here, the court has previously granted leave to amend numerous times, and has even specified the precise facts that plaintiffs need to include in order to survive dismissal. *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 879 (9th Cir. 1999); *Williams v. Touchtunes Music Corp.*, 639 F. App'x 504 (9th Cir. 2016) ("The district court did not abuse its discretion in dismissing the case with prejudice because [the plaintiff] failed to cure this pleading defect after the court gave [him] an opportunity to do so.").

VI. CONCLUSION

For the foregoing reasons, the Court should dismiss the Third Amended Complaint in its entirety with prejudice.

Dated: December 17, 2018

JOHN W. AMBERG
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By: */s/ Sarah Burwick*
Sarah Burwick
Attorneys for Defendants AARP, Inc., and AARP Services, Inc.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and not a party to the within action; my business address is 120 Broadway, Suite 300, Santa Monica, CA 90401-2386.

On December 17, 2018, I served the foregoing document, described as: **AARP DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS THIRD AMENDED COMPLAINT** on each interested party in this action, as follows:

I checked the CM/ECF docket for this proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):

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Executed on December 17, 2018, at Santa Monica, California.

☒ FEDERAL: I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Raul Morales
Raul Morales