UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANTHONY RAMIREZ, MYNOR VILLATORO ALDANA, AND JANET HOBSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

Case No.: 4:22-cv-00859-YGR

ORDER DENYING DEFENDANT'S MOTION TO DISMISS;

DENYING PLAINTIFFS' MOTION FOR RELIEF FROM NONDISPOSITIVE PRETRIAL ORDER

Re: Dkt. Nos. 73; 81

Pending before the Court is defendant Bank of America, N.A.'s ("BANA") motion to dismiss plaintiffs' Second Amended Complaint ("SAC"), (Dkt. No. 73), and plaintiffs' motion for relief from a nondispositive pretrial order. (Dkt. No. 81.) Having carefully considered the papers submitted and for the reasons set forth below, the Court **DENIES** defendant's motion to dismiss the SAC and **DENIES** plaintiffs' motion for relief. This Order addresses both.

I. PROCEDURAL BACKGROUND

On June 15, 2022, this Court granted defendant's motion to dismiss the initial complaint. (Dkt. No. 36.) Plaintiffs then filed their First Amended Complaint ("FAC") on July 13, 2022, updating their allegations and adding two new plaintiffs. (Dkt. No. 40.) Defendant again moved to dismiss. The Court denied defendant's motion to dismiss the FAC, finding plaintiffs sufficiently alleged that representations were false when made, identified actionable misrepresentations, and adequately alleged damages. (Dkt. No. 48.)

On October 5, 2023, the parties stipulated to plaintiffs filing a SAC based on newly obtained facts learned in discovery. (Dkt. No. 69.) Plaintiffs Anthony Ramirez, Mynor Villatoro Aldana, and Janet Hobson now assert claims for unjust enrichment on behalf of a putative nationwide class, and under New Jersey law on behalf of a New Jersey subclass, as well as claims for violation of California's Unfair Competition Law (Bus. & Prof. Code § 17200) ("UCL") and violation of New Jersey's Unfair Trade Practices Law (N.J. Stat. Ann. §§ 56:8-1, 56:8-2, 56:8-19) ("NJCFA") on behalf of California and New Jersey subclasses, respectively.

Separately, on February 15, 2024, plaintiffs filed their motion for relief from nondispositive pretrial order (Dkt. No. 81), seeking relief from Magistrate Judge Illman's February 1, 2024 Order Denying Plaintiffs' Discovery Letter Brief (Dkt. No. 79).

II. FACTUAL BACKGROUND

The Court assumes the parties' familiarity with the background in this case, which was detailed in its previous order denying defendant's motion to dismiss. (Dkt. No. 48.) Plaintiffs allege that, during the early months of the COVID-19 pandemic, BANA represented it would take COVID-related hardship into consideration when assessing requests for overdraft ("OD") and non-sufficient funds ("NSF") fee relief. (SAC ¶ 10.) In reliance on those representations, plaintiffs incurred fees rather than taking steps to avoid them. (*Id.* ¶ 52.) When plaintiffs requested relief, BANA did not take their Covid-related hardship into consideration because BANA had quietly ended its relief program without alerting its customers. (*Id.* ¶ 73-75.)

Previously, this Court denied defendant's motion to dismiss plaintiffs' FAC, holding plaintiffs had plausibly alleged that BANA promised customers additional support for those impacted by the pandemic, but did not provide any additional relief. (Dkt. No 48 at 9.) Now, in their SAC, plaintiffs acknowledge, based on discovery conducted after the Court's previous order, that BANA actually did provide some additional relief. (SAC ¶¶ 67 ("[I]t appears that [BANA] did modify the number of OD and NSF fees that could be refunded at the beginning of the pandemic . . . ."), 68.) Plaintiffs allege, however, that BANA ended its COVID-relief program prematurely and without notice, and that plaintiffs relied to their detriment on BANA's promises that it would offer a program to process requests for waivers and refunds of fees incurred due to COVID-related

hardship throughout the pandemic. (*Id.* ¶¶ 152-53.) Specifically, plaintiffs allege that BANA ended its relief program on August 31, 2020 (*Id.* ¶ 74), but continued to promote the program over a year after it had ended. (*Id.* ¶¶ 77-78.) Defendant now moves to dismiss plaintiffs' updated claims under Federal Rule of Civil Procedure 12(b)(6).

III. LEGAL STANDARD

A. Motion to Dismiss

A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless, courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

Federal Rule of Civil Procedure 9(b) heightens these pleading requirements for all claims that "sound in fraud" or are "grounded in fraud." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (citation omitted); Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). The Ninth Circuit has interpreted Rule 9(b) to require that allegations of fraud are "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (internal quotation omitted). A plaintiff must identify "'the

who, what, when, where, and how' of the misconduct charged." *Kearns*, 567 F.3d at 1124 (9th Cir. 2009). "Any averments that do not meet that standard should be 'disregarded,' or 'stripped' from the claim for failure to satisfy Rule 9(b)." *Id.*

B. Motion for Relief

In federal court, a motion for relief from a nondispositive order should only be granted when the moving party establishes that the nondispositive order by the magistrate judge is clearly erroneous or contrary to law. Fed. R. Civ. P. 72; *see Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir.1991) ("the magistrate's decision on a nondispositive issue will be reviewed by the district judge under the clearly erroneous standard"); *Barnes & Noble, Inc. v. LSI Corp.*, No. C–11–2709 EMC, 2013 WL 841334, at *1 (N.D.Cal. Mar. 6, 2013) (same). "In finding that the magistrate judge's decision is 'clearly erroneous,' the Court must arrive at a definite and firm conviction that a mistake has been committed." *Barnes & Noble*, 2013 WL 841334 at *1 (internal citations and quotations omitted). This standard of review is extremely deferential *(id.)*, conserves judicial resources, and discourages litigants from having multiple bites at the proverbial apple.

IV. MOTION TO DISMISS ANALYSIS

Defendant moves to dismiss on the grounds that plaintiffs do not sufficiently plead either (i) a fraudulent statement or omission or (ii) reliance on a specific misrepresentation resulting in injury. The Court addresses each.

A. False Statement or Omission

Here, plaintiffs' claims are governed by California's "reasonable consumer" test and New Jersey's "average consumer" test, respectively. *Williams v. Gerber Prod. Co.*, 552 F.3d 934 (9th Cir. 2008) (holding "claims under [Cal. Bus. and Prof.Code § 17200] are governed by the 'reasonable consumer' test."); *Union Ink Co., Inc. v. AT&T Corp.*, 352 N.J. Super. 617, 644 (N.J. Super. Ct. App. Div. 2002) ("[I]n an action under the [New Jersey] Consumer Fraud Act, the test is whether an advertisement has the capacity to mislead the average consumer.")

In California, the "reasonable consumer" test requires "a probability that a significant portion of the general consuming public or targeted consumers, acting reasonably in the circumstances, could be misled." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016).

"[W]hether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." *Williams*, 552 F.3d at 938. Similarly, in New Jersey, "[e]ven if an advertisement is literally true, it may be actionable if the overall impression it creates is misleading and deceptive to an ordinary reader. Whether an advertisement is misleading presents a question of fact in most cases." *Union Ink Co. v. AT&T Corp.*, 352 N.J. Super. 617, 645 (App. Div. 2002).

1. *Fraudulent Statements*

Plaintiffs allege that BANA touted the existence of a program to provide additional COVID-19 relief after the program had been terminated. They allege that BANA implemented a new program, the Client Assistance Program ("CAP"), increasing the numbers of OD and NSF fees that could be refunded to customer accounts. (SAC ¶ 67). This CAP existed from March 2020 to August 31, 2020, and after it ended, BANA continued to advertise the CAP across its website and mobile app. (SAC ¶ 78.) Specifically, plaintiffs allege:

- Until at least October 29, 2020, Bank of America continued to state on its website that "We are committed to helping our Consumer & Small Business clients experiencing hardship from impacts of the coronavirus and have activated the new Client Assistance Program. On a case-by-case basis, our additional assistance for clients impacted by the coronavirus includes . . . refunds [of] overdraft fees, nonsufficient funds fees and monthly maintenance fees."
- On October 8, 2020, BofA issued an updated "Coronavirus Fact Sheet," which, among other things continued to claim that: "We are helping our Consumer & Small Business clients experiencing hardship from impacts of the coronavirus through our Client Assistance Program. On a case-by-case basis, at various points to [sic] to-date, our additional assistance for clients impacted by the coronavirus has included refunds . . . [of] overdraft fees, non-sufficient funds fees and monthly maintenance fees."
- Until at least October 27, 2020, other sections of the BofA website, including a client information portal, continued to re-direct customers to the October 8, 2020 "Coronavirus Fact Sheet," which contained the false statement described above.

- And even a full year after the additional relief ended, consumers continued to be directed to the COVID overdraft relief program through the BofA mobile App.

(*Id.*)

Defendant argues that plaintiffs have not identified any statement in which BANA promised additional relief for the duration of the pandemic. Such a specific statement is not necessary. At this stage of litigation, plaintiffs need only plead that BANA's statements were likely to deceive the reasonable consumer (California), and mislead the average consumer (New Jersey). Plaintiffs have done so by pleading that defendant promised that a program existed when it did not. (*See* Dkt. No. 48 at 9, denying defendant's motion to dismiss because "BANA's representations were false when made."). Plaintiffs have sufficiently pleaded that a reasonable consumer and average consumer would see BANA's statement that it was helping "clients experiencing hardship from impacts of the coronavirus through [its] Client Assistance Program" and assume that such a program existed.

Defendant also contends that its statements were not misleading because "customers who suffered from COVID-related hardships remained eligible for NSF and OD fee refunds after August 2020 even under business-as-usual procedures, on a case-by-case basis." (Dkt. No 73 at 7:17-18.) Immediately after it raises this argument, however, defendant admits that less relief was available to customers under "business-as-usual procedures" than under the CAP. (*Id.* at 7:18-20) ("[C]ustomers could no longer qualify for 12 such refunds a year . . . ."). Therefore, plaintiffs have sufficiently pleaded that defendant advertised a program when none existed, and that the lack of a program made it less likely for customers to get relief.

2. *Fraudulent Omissions*

Next, defendant argues that its failure to disclose the end of its COVID-19 relief program was not deceptive. "For an omission to be actionable under the UCL, the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obligated to disclose." *Ahern v. Apple Inc.*, 411 F. Supp. 3d 541, 560–63 (N.D. Cal. 2019).

Here, plaintiffs plead that BANA omitted claims that were contrary to contemporaneous representations that: (1) "We are committed to helping our Consumer & Small Business clients experiencing hardship from impacts of the coronavirus and have activated the new Client

Assistance Program"; (2) "[O]ur additional assistance for clients impacted by the coronavirus includes . . . refunds [of] overdraft fees, non-sufficient funds fees and monthly maintenance fees"; and (3) "We are helping our Consumer & Small Business clients experiencing hardship from impacts of the coronavirus through our Client Assistance Program." (SAC ¶ 78.) Plaintiffs also allege that BANA directed customers to statements about its program on its website, mobile app, and social media accounts, when customers asked about the programs. (*See, e.g., Id.* ¶¶ 14, 78.d, 115, 129.) Plaintiffs, therefore, plead actionable claims because the omission of a statement clarifying that the CAP no longer existed was contrary to the above contemporary representations that were actually made by defendant.

Defendant counters that plaintiffs' omission claim fails because announcing the end of the COVID CAP program was not material. To be actionable under the UCL and NJCFA, the omitted fact must be material. *See Hodsdon v. Mars, Inc.*, 891 F.3d 857, 863 (9th Cir. 2018) (requiring plaintiff to allege that an omission is material to plead a claim under California consumer protection laws); N.J. Stat. Ann. § 56:8-2 (prohibiting the "knowing concealment, suppression, or omission of any material fact). A fact is material if a reasonable person would "attach importance to its existence . . . in determining [a] of action." *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1055 (9th Cir. 2017); *Peters v. U.S. Dep't of Housing & Urban Dev.*, 2006 WL 278916, at *5 (D.N.J. Feb. 1, 2006).

The Court finds that a reasonable person would attach importance to BANA's omission of an announcement ending the COVID CAP in determining an action. The SAC describes many ways in which plaintiffs undertook actions based on their understanding that the COVID CAP was in place, all of which demonstrate how a reasonable person might approach similar circumstances. (*See, e.g.*, SAC ¶ 118 (alleging plaintiff Ramirez's understanding of the CAP "influenced the way he used his checking account" by convincing him to avoid taking additional steps to ensure he did not incur fees, such as seek help from family members or obtain small loans to increase his balance. "[B]ecause of [BANA's] promises to help during the pandemic, he did not believe these less costly steps were necessary")); *id.* ¶¶ 131-32 (alleging that Plaintiff Aldana considered canceling several automatic payments scheduled to be drawn from his checking account but decided not to cancel

them "after he saw [BANA's] promise that it had a relief program in place to provide assistance to customers during the pandemic,"); *see also id.* ¶¶ 135, 138-39.

Defendant argues that plaintiffs do not have a reasonable basis for believing that their requests would be granted because none of defendant's representations promised that BANA would grant all requests to refund fees, and language in its statements clarified that relief would be granted on a "case by case basis." (Dkt. No. 73 at 11:26.) Defendant misstates plaintiffs' claims, however. Plaintiffs did not rely on a promise from BANA that all their fees would be automatically forgiven. Rather, they relied on statements that a program existed by which they may receive help, and acted according to the belief that they may be able to take advantage of such a program. Further, the "case by case basis" terms that defendant relies on here fall well short of the "unmistakable terms" at issue in the case defendant cites for authority. *See Hassler v. Sovereign Bank*, 644 F. Supp. 2d 509, 515–17 (D.N.J. 2009.) There, the agreement contained the terms that plaintiff alleged were concealed. *Id.* at 517. Here, the "case by case basis" terms describe the CAP – they do not disclose that the CAP no longer exists. Moreover, the Court does not resolve factual disputes at this juncture. Defendant's omission was plausibly deceptive.

B. Reliance

Defendant argues that plaintiffs do not have Article III standing because they do not plead reliance on specific misrepresentations by BANA and a resulting injury. (Dkt. No. 73 at 13:13-16.) To state a claim under the fraudulent business practice prong of the UCL, a plaintiff must show "misrepresentations" by which "members of the public are likely to be deceived." *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (Cal. 2009). A plaintiff must also show actual reliance on the misrepresentation, and reliance is presumed if the misrepresentation was material. *Id.* at 326-27. In New Jersey, "the CFA does not require proof of reliance, but only a causal connection between the unlawful practice and ascertainable loss." *Lee v. Carter-Reed Co., L.L.C.*, 203 N.J. 496, 528 (2010) (cleaned up).

Plaintiffs have met their burden of showing actual reliance on BANA's misrepresentations. As described above in Part II.A.2, BANA's misrepresentations were material, and plaintiffs described how they relied on those misrepresentations. Plaintiffs Ramirez and Hobson saw

BANA's statement advertising its CAP on its mobile app. (SAC ¶¶ 119, 137.) Plaintiff Aldana saw an article quoting a BANA executive offering help to those experiencing hardship due to COVID-19. (*Id.* ¶ 128.) Plaintiffs all specifically alleged how they relied on these representations. Plaintiff Ramirez states that if he had "known that [BANA] did not intend to continue providing customers relief from OD and NSF fees during the pandemic after August 31, 2020, he would have taken additional steps after this date to ensure that he did not overdraw his account and incur these fees, such as seek help from family members or obtain small loans to increase his balance." (*Id.* ¶ 118). Plaintiff Aldana left scheduled payments in place because he believed that if his account were overdrawn he could call and get OD or NSF fees waived or refunded, since he believed his hardship would qualify. (*Id.* ¶ 131.) Finally, plaintiff Hobson chose not to switch banks after seeing BANA's representations about COVID-19 relief. (*Id.* ¶ 139.)

Defendant argues that plaintiffs' claims are not sufficient to show that BANA's misrepresentations caused plaintiffs' injuries. (Dkt. No. 73 at 14:1-3.) The Court has already addressed this argument in a previous order, holding defendant's "representations may not have been the sole reason plaintiffs' incurred fees, but plaintiffs plausibly allege that the representations induced them to believe incurring fees was a better option than taking other steps, such as obtaining loans, and that defendant's alleged failure to follow through on its promises thus increased the 'magnitude' of the harm they suffered." Dkt. No 48 at 10 n.7. Here, too, plaintiffs' allegations pass muster.

V. MOTION FOR RELIEF ANALYSIS

The Court finds that plaintiffs have not satisfied their burden under Rule 72(a) of Federal Rules of Civil Procedure to show that Magistrate Judge Illman's order was "clearly erroneous or [] contrary to law."

Plaintiffs seek to compel defendant BANA (i) to produce internal communications about BANA's COVID CAP practices through custodial ESI searches, and (ii) to conduct ESI discovery related to the duration of BANA's other, non-CAP-related, COVID assistance programs. Plaintiffs served its initial requests on BANA on March 10, 2023. (Dkt. No. 77 at 1.) After roughly eight months of failing to resolve disputes regarding the requests, the parties submitted a joint discovery

letter brief on January 18, 2024. (*Id.*) Plaintiff argued that defendant had "not committed to using a single electronic search term in connection with any of the Requests, has not identified a single custodian of documents, and has only produced 138 files (i.e., documents and audio/video files)." (*Id.*) Defendant countered that plaintiffs' requests were cumulative, beyond the scope of the case, and not relevant. (*Id.* at 3.)

Magistrate Judge Illman considered whether plaintiffs' motion to compel was sufficiently detailed and whether plaintiffs met their burden of overcoming defendant's objections. (Dkt. No. 79 at 2-3 (citing *Lofton v. Verizon Wireless (VAW) LLC*, 308 F.R.D. 276, 280-81 (N.D. Cal. 2018); *AngioScore, Inc. v. TriReme Med., Inc.*, No. 12-CV-03393-YGR(JSC), 2014 WL 7188779, at *1 (N.D. Cal. Dec. 16, 2014)). Magistrate Judge Illman found that plaintiffs did not meet their burdens in any of their requests.

Plaintiffs now argue that their failure to explain their arguments fully was due to the two-page-limit on their initial letter brief, and that their objection now serves to "directly answer[] Judge Illman's questions." (Dkt. No. 81 at 1.) Much can be said in a two-page letter brief. The limits are intended to focus the parties on critical issues. Here, having reviewed the record, plaintiffs have failed to show that any of Magistrate Judge Illman's findings are clearly erroneous. It is doubtful that additional briefing would have mattered.

With regard to plaintiffs' request that the Court compel production of internal communications about BANA's COVID CAP practices through ESI searches for RFP No. 1, Magistrate Judge Illman found that plaintiff merely demanded documents without explaining their relevance or proportionality to the needs of the case. He then detailed how defendant met their burden of explaining how the sought-out documents are not relevant and would impose a burden on the defendant. (Dkt. No. 79 at 4.) He specifically highlighted BANA's argument that it "has always been willing to negotiate search protocols (including custodians and search terms) on a request-by-request basis" and "explained to Plaintiffs that custodians and search terms should be negotiated within the context of specific requests, since this sort of discovery is not a 'one-size-fits-all' proposition." (*Id.* at 3 citing Dkt. No. 77 at 1.) For their part, plaintiffs now cite authority holding that internal communications *could* be relevant to how misrepresentations affect consumers, (Dkt.

No. 81 at 2-4), however nothing in these cases compels the conclusion that plaintiffs' broad request, in this case, *should* be granted.[1] If plaintiffs had provided such authority in its initial letter and explained how their request here is analogous, they may have had a different result. As things stand now, there is no indication that Magistrate Judge Illman clearly erred by refusing to do plaintiffs' work for them.

Similarly, Magistrate Judge Illman found that plaintiffs' request for documents concerning BANA's other, non-CAP COVID-19 practices was overbroad. Plaintiffs request "documents related to pandemic duration that do not specifically discuss its COVID-related Fee relief program." (Dkt. No. 77 at 2.) He held that defendant had sufficiently argued that plaintiffs' broad request would encompass "materials that are entirely irrelevant to this case." (Dkt. No. 79. at 7.) Plaintiffs' motion for relief does not persuade otherwise. Plaintiffs now merely argue, without authority, that internal communications about other, non-CAP COVID programs are also relevant "because [BANA] promised pandemic-long COVID CAP." (Dkt. No 81 at 5.) Plaintiffs do not explain why the putative promise of a pandemic-long program is core to their claims or why BANA's internal communications about other programs would affect a consumer's interpretation of the bank's public statements about the CAP. Therefore, they have not demonstrated clear error. Consequently, plaintiffs' motion for relief from nondispositive order is **DENIED.**

VI. CONCLUSION

In conclusion, defendant's motion to dismiss is **DENIED** and plaintiffs' motion for relief from nondispositive order is **DENIED.**

[1] For example, plaintiffs argue that "communications can constitute 'common proof' that defendants designed their advertising to 'achieve' a certain consumer response. Dkt. No. 81 at 2 (citing *In re: Coca-cola Prods. Mktg. & Sales Pracs. Litig. (No. II)* 2016 WL 6245899, at *5. That case holds that such evidence "could be probative of common proof of whether [d]efendants expected a reasonable person to rely upon the representations," but stops short of holding that defendants *must* turn over such communications. That case also involved distinguishable representations to consumers, which plaintiffs have not attempted to analogize to the facts here. Therefore, they have come up short of demonstrating any clear error.

Defendant shall file an answer within fourteen (14) days of this order.

This terminates docket numbers 73 and 81.

IT IS SO ORDERED.

Date: April 3, 2024

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE