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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROD DIAMOND et al., Plaintiffs and Appellants, v. FRESH & EASY NEIGHBORHOOD MARKET, INC., Defendant and Respondent.	B234324 (Los Angeles County Super. Ct. No. BC441808)

APPEAL from a judgment of the Superior Court of Los Angeles County. John P. Shook, Judge. Affirmed.

Weinberg, Roger & Rosenfeld, David A. Rosenfeld, Roberta D. Perkins, and Kristina M. Zinnen for Plaintiffs and Appellants.

Keller and Heckman, Daniel J. Herling, Michelle Gillette, Douglas J. Behr, and Amy L. Blackwood for Defendant and Respondent.

Plaintiffs and appellants Rod Diamond (Diamond), Thomas E. Elbert, Jr. (Elbert), and Richard P. Eiden, Jr. (Eiden) (collectively, plaintiffs) appeal from the judgment entered in favor of defendant and respondent Fresh & Easy Neighborhood Market, Inc. (defendant) following a court trial in this action concerning alleged violations of the Rosenthal-Roberti Item Pricing Act (Civ. Code, §§ 7100-7106) (the Pricing Act).[1] The Pricing Act requires grocery retailers who use a point-of-sale system to have a clearly readable price indicated on 85 percent of packaged consumer commodities offered for sale. Plaintiffs contend the Pricing Act requires a readable price to be affixed onto every individual item offered for sale and that the trial court erred by concluding that pricing information can be communicated to consumers by other methods such as shelf edge labels and signs. Plaintiffs further contend the trial court erred by dismissing the action on the ground that they failed to establish a violation of the Pricing Act.

We hold that the trial court did not err by dismissing the action based on plaintiffs' failure of proof and affirm the judgment on that ground.

BACKGROUND

Plaintiffs filed this action on July 15, 2010, alleging that defendant intentionally violated the Pricing Act by using shelf tags or other markers indicating the price of items offered for sale in its stores instead of affixing a price onto each item, as purportedly required by section 7100. They sought civil penalties and injunctive relief. A court trial was held on March 30 and April 1, 2011.

1. Testimony of Elbert

At the trial, Elbert testified that he had worked in the grocery industry for 15 years from 1984 through 1999, and that he was currently the grievance director for the United Food and Commercial Workers Union (UFCW), Local 135. In June 2010, Elbert visited two California Fresh & Easy stores -- one in Chula Vista and one in Point Loma -- after being directed to do so by the director of the UFCW. Elbert spent between 45 minutes to an hour in each store, walked the aisles, picked up 100 or more items, and looked for

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[1] All further statutory references are to the Civil Code, unless stated otherwise.

prices on the items. The only items he found marked with a readable price were in the meat section, where approximately half of the products were item priced.

Two weeks before the trial, Elbert visited two additional Fresh & Easy stores in San Diego County -- one in Spring Valley and another in El Cajon During the approximately one and a half hours Elbert spent in the Spring Valley store, he counted 5,080 shelf tags for items offered for sale in the store. He did not examine every item on a shelf to determine whether each item had a readable price affixed to it, but he picked up and examined "a couple of hundred" items. Of the items he examined, 76 of them had readable prices affixed onto them. The remaining items had prices indicated on labels attached to the shelves on which the items were stacked.

During Elbert's testimony, the following colloquy took place between Elbert and the trial court:

> "THE COURT: [Y]ou indicated in your 15-year career in the food business you have taken inventory of stores, right?
>
> "THE WITNESS: Correct.
>
> "[¶] . . . [¶]
>
> "THE COURT: How long would it normally take to inventory the entire store?
>
> "THE WITNESS: A couple of hours.
>
> "THE COURT: Two hours? How many people on the team?
>
> "THE WITNESS: I mean, I would have to guess. It was -- I mean, it would be speculative to remember how many were on the team.
>
> "THE COURT: But it was more than two?
>
> "THE WITNESS: Correct.
>
> "THE COURT: At least 10 or more than 10?
>
> "THE WITNESS: Probably more than 10."

2. Testimony of Diamond

Diamond testified that he worked in the grocery industry from 1955 to 1971, that he currently works for the UFCW, and that he has done so since 1971. Diamond further testified that he was involved in lobbying on behalf of the UFCW during the enactment of the Pricing Act. He stated that the purpose of the Pricing Act was to provide consumers with pricing information to enable them to comparison shop but acknowledged that the statute did not provide a definition of item pricing. Diamond further acknowledged that shelf tagging was one means of complying with the statutory pricing requirement.

Diamond went to a Fresh & Easy store in Newbury Park on June 4, 2010, after being directed to do so by the UFCW's director. During the 10 minutes Diamond spent in the store, he "browsed around and . . . looked up and down in the refrigerated section, and . . . looked at some of the products." He did not count the items on the shelves and he did not see any individually priced items.

The week before the trial, Diamond spent 20 to 30 minutes in a Fresh & Easy store in Van Nuys where he "walked up and down each aisle [and] looked to see if I could identify any items that were priced." During that time, he observed approximately 20 individual items that were marked with a price. Diamond took no notes or photographs while in any of the Fresh & Easy stores he visited.

3. Testimony of Eiden

Eiden had experience in the grocery industry dating back to 1976, but had only four months of grocery store experience in California. He was employed by the UFCW. At the direction of the UFCW's director, Eiden visited Fresh & Easy stores in the cities of Anaheim, Buena Park, Orange, and Long Beach.

Eiden visited the Anaheim store once in 2008 when it opened, and again on June 4, 2010. He spent approximately 30 minutes in the store, walked down every aisle, examined over 200 items, and looked at 200 more. Eiden did not look at every item in the store, but "guesstimate[d]" that a minimum of 15 to 20 units of a given item, such as

barbeque sauce, was offered for sale in the store. He did not notice any items that were individually priced in the Anaheim store.

Eiden spent approximately 30 minutes in the Buena Park store, and 40 minutes in the Chapman store located in the City of Orange. Eiden walked the aisles in both stores, picked up approximately 200 items, and looked at 200 more. In the Chapman store bags of chips and approximately 30 different cuts of meat were item priced; the balance of the products in the store were not. In the Buena Park store, 25 different cuts of meat were the only products that were item priced.

Eiden took no notes during his visits to the Fresh & Easy stores, nor did he keep a record of the items he examined in the stores. During his testimony, Eiden had the following exchange with the trial court:

"THE COURT: How did you keep track of over 200 items?

"THE WITNESS: Well, as I went down each aisle, I kind of had a mental idea. I wanted to look at as many items as possible. There were eight to ten aisles in each of the -- and I know that I kept mental track and I was trying to look at 50 different items in each of those aisles and verify that 12 of the 15 or 20 different items within there, and I tried to pick up quite a few of those items to make sure that none of them had individually, even with a sticker or some kind of imprint that was item priced.

"THE COURT: Could there have been items on the shelf where you were looking that were actually marked?

"THE WITNESS: Yes.

"THE COURT: You didn't look at all of them?

"THE WITNESS: That's correct.

"THE COURT: So your opinion is more of a -- you used the word 'guesstimate.' Is that right? That's what it was?

"THE WITNESS: That's correct, yes."

4. Testimony of former Fresh & Easy employee Robert Frey (Frey)

Former employee Frey testified that he worked at various Fresh & Easy stores for 13 months from November 2007 until his employment was terminated in December 2008. According to Frey, the only individually priced items in the stores in which he worked were approximately 40 varieties of meat products and 30 types of chips. Frey testified that most product pricing was done by shelf edge labels, which were changed twice a week. Although price changes were supposed to be completed before the store opened in the morning, Frey stated that price changes were completed only 10 to 15 percent of the time. As a result, customers were not aware of the correct price and often complained about pricing discrepancies.

5. Testimony of former Fresh & Easy employee Antoine Reyes (Reyes)

Reyes worked as a manager for Fresh & Easy from July 2007 until July 2008 at stores in Glassell Park, Arcadia, Hollywood, and Compton. He testified that Fresh & Easy did not individually price any items other than clearance items, approximately 45 different cheese products, and approximately 24 different meat products. Shelf tags containing pricing information needed to be changed approximately three times per week before the store opened, but often would not be completed. Reyes received telephone complaints approximately three to four times per week from customers about pricing errors.

6. Testimony of Michael Magner (Magner)

Magner, defendant's trading law director and person most knowledgeable about pricing matters, testified through deposition excerpts that Fresh & Easy has 90 to 100 stores in California and that there are between 4,500 and 5,500 different categories of items in any given store. Magner stated that he understood the Pricing Act to require a clearly readable price for a consumer commodity but that the statute did not specify where the price must be placed. A readable price could therefore be indicated on a shelf edge label, on the package itself, or on a sign or sales flyer. Magner testified that at least 99 percent of the packaged consumer commodities sold in Fresh & Easy stores have prices indicated on shelf edge labels.

7. Defendant's motion for judgment and trial court's statement of decision

At the close of plaintiffs' case, defendant moved for judgment under Code of Civil Procedure section 631.8. The trial court granted the motion after concluding that plaintiffs failed to meet their burden of proving that each Fresh & Easy store failed to have a clearly readable price indicated on 85 percent of the nonexempt consumer commodities sold in the store, as required by section 7100 subdivision (a). The court observed that although the Pricing Act "does not set forth a method or means of proving noncompliance" and plaintiffs need not have presented "an item-by-item inventory," the statutory language required plaintiffs "to show a quantitative analysis establishing the lack of a clearly readable price on 85 percent of nonexempt consumer commodities." The court noted that "[p]laintiffs do not know exactly how many items they viewed in their visits to the Fresh & Easy stores, do not know the total number of packaged consumer commodities that have either a sticker or an ink impression price offered for sale by Fresh & Easy, and do not know the total number of consumer commodities or the number of exempt articles offered for sale by Fresh & Easy stores." The trial court accordingly found that plaintiffs had failed to "present clear evidence to persuade the Court that they employed either a reliable methodology for their self-styled surveys, or that the surveys themselves establish noncompliance under the Act."

The trial court further found that the testimony of plaintiffs' witnesses lacked credibility. The court noted that the witnesses who were union representatives lacked recent experience in the grocery industry and had entered the Fresh & Easy stores not as consumers but at the direction of the union director for the express purpose of looking for statutory violations. The trial court found that the witnesses who were former Fresh & Easy employees were biased against Fresh & Easy because they had been fired.

Finally, the trial court concluded that defendant could comply with the Pricing Act by a method other than a readable price tag affixed onto each unit of a consumer commodity offered for sale. The court stated: "Section 7100 et seq. does not specify that a clearly readable price can only be accomplished by a sticker or an ink impression or a quick mark stamp. If the [L]egislature had wanted to limit the means of statutory

compliance to sticker prices or ink impressions adhered to individual packages, the operative statute would have so stated. It does not." The court noted that plaintiffs' own evidence demonstrated that lobbying efforts to include specific methods of compliance in the statutory language had been rebuffed by the Legislature and that Diamond had conceded that shelf tags were an acceptable method of compliance.

Judgment was subsequently entered in favor of defendant, and this appeal followed.

DISCUSSION

I. Issues presented and standard of review

As framed by the plaintiffs, two issues are presented in this appeal. The first issue concerns the trial court's interpretation of the Pricing Act. Plaintiffs contend the trial court erred in its interpretation because the Pricing Act requires a "clearly readable price" to be affixed onto 85 percent of every nonexempt item offered for sale in a retail grocery store. They maintain that prices displayed elsewhere, such as on shelf tags, signs, or fliers near or in the vicinity of the items do not comply with the statutory requirement. Defendant and the California Grocers Association (CGA), who filed an amicus brief in this case, disagree with plaintiffs' interpretation of the statute. Defendant and the CGA argue that multiple units of an item bearing the same stock keeping unit (SKU) number are considered a single "consumer commodity" under the Pricing Act and that pricing information for that commodity can be displayed on a shelf label or sign rather than on the units themselves. This issue of statutory interpretation is subject to de novo review. (*Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1491.)

The second issue concerns the trial court's determination that plaintiffs failed to sustain their burden of proving that defendant violated the Pricing Act. De novo review of this issue is not appropriate. Rather, the proper inquiry is "'whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."' [Citation.]" (*Sonic*

Manufacturing Technologies, Inc. v. AAE Systems, Inc. (2011) 196 Cal.App.4th 456, 466.)

Our review of the record leads us to conclude that plaintiffs' evidence does not compel a finding in their favor. Plaintiffs failed to sustain their burden of proving a violation of the Pricing Act, even under their interpretation of the statute. We affirm the judgment on that basis, and therefore need not address the statutory interpretation issue.

II. The Pricing Act

The Pricing Act requires retail grocery stores that use a point-of-sale system to have a clearly readable price indicated on 85 percent of the packaged consumer commodities offered for sale. Section 7100, subdivision (a) provides in relevant part:

> "Every retail grocery store or grocery department within a general retail merchandise store which uses a point-of-sale system shall cause to have a clearly readable price indicated on 85 percent of the total number of packaged consumer commodities offered for sale which are not exempt pursuant to subdivision (b)."

A "point-of-sale system" is defined under the statute as "any computer or electronic system used by a retail establishment such as, but not limited to, Universal Product Code scanners, price lookup codes, or an electronic price lookup system as a means for determining the price of the item being purchased by a consumer." (§ 7100, subd. (c)(1).)

The term "consumer commodity" is defined in section 7100, subdivision (c)(2) as follows:

> "'Consumer commodity' includes:
>
> "(A) Food, including all material whether solid, liquid, or mixed, and whether simple or compound, which is used or intended for consumption by human beings or domestic animals normally kept as household pets, and all substances or ingredients added to any such material for any purpose. This definition shall not apply to individual packages of cigarettes or individual cigars.
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> "(B) Napkins, facial tissues, toilet tissues, foil wrapping, plastic wrapping, paper toweling, and disposable plates and cups.

"(C) Detergents, soaps, and other cleansing agents.

"(D) Pharmaceuticals, including nonprescription drugs, bandages, female hygiene products, and toiletries." (*Ibid*.)

Subdivision (b) of section 7100 exempts from the statutory requirements certain consumer commodities and small businesses. It provides:

"(b) The provisions of this section shall not apply to any of the following:

"(1) Any consumer commodity which was not generally item-priced on January 1, 1977, as determined by the Department of Food and Agriculture pursuant to subdivision (c) of Section 12604.5 of the Business and Professions Code, as in effect July 8, 1977.

"(2) Any unpackaged fresh food produce, or to consumer commodities which are under three cubic inches in size, weigh less than three ounces, and are priced under forty cents ($0.40).

"(3) Any consumer commodity offered as a sale item or as a special.

"(4) Any business which has as its only regular employees the owner thereof, or the parent, spouse, or child of such owner, or, in addition thereto, not more than two other regular employees.

"(5) Identical items within a multi-item package.

"(6) Items sold through a vending machine." (*Ibid*.)

In addition to the item pricing requirements described above, section 7100 requires retail grocers to determine the number of consumer commodities normally offered for sale on a daily basis and to maintain a list of exempt consumer commodities. The list of exempt commodities must be posted in a prominent place in the store. (§ 7100, subd. (a).)[2]

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[2] Section 7100, subdivision (a) provides in part: "The management of any such retail grocery store or grocery department shall determine the number of consumer

Section 7101, subdivision (e) allows "any person" to bring an action to enjoin a violation of section 7100. A person or entity found to have violated section 7100 may be held liable to any person injured for losses and expenses incurred, plus the sum of $50. (§ 7102.)

An intentional violation of section 7100 is punishable by a civil penalty of not less than $25 nor more than $500. (§ 7101, subd. (a).) Failure to have a clearly readable price indicated on 12 units of the same item required to be item-priced is a presumption of intent to violate section 7100. (§ 7101, subd. (b).)

III. Plaintiffs' evidence does not compel reversal

Plaintiffs contend section 7100 requires a retail grocer to affix a "clearly readable price" onto each unit of every nonexempt item offered for sale. Under plaintiffs' interpretation of the statute, every can of peas, beans, corn, and tomatoes (to name just a few of the hundreds of individual items offered for sale in a retail grocery store), must have a readable price affixed to it. Plaintiffs further contend that a price displayed on a shelf edge label, sign, or other method that is not affixed to the item itself does not comply with the statute.

Under their interpretation of section 7100, plaintiffs had to demonstrate that 15 percent of the total number of every individual item of a nonexempt consumer commodity offered for sale in defendant's stores had no readable price affixed to it. To do so, plaintiffs had to provide evidence of the total number of individual items of nonexempt consumer commodities offered for sale in the stores, as well as the total

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commodities normally offered for sale on a daily basis, shall determine the consumer commodities to be exempted pursuant to this subdivision, and shall maintain a list of those consumer commodities exempt pursuant to this subdivision. The list shall be made available to a designated representative of the appropriate local union, the members of which are responsible for item pricing, in those stores or departments that have collective bargaining agreements, seven days prior to an item or items being exempted pursuant to this subdivision. In addition, the list shall be available and posted in a prominent place in the store seven days prior to an item or items being exempted pursuant to this subdivision."

number of nonexempt individual items that did not have an affixed readable price. They provided neither.

There was no testimony as to the total number of nonexempt items offered for sale in any Fresh & Easy store. Although Elbert testified that he counted 5,080 shelf tags in the Spring Valley store, he did not count the number of individual cans, packages, or boxes of each product identified by a shelf tag. Diamond and Eiden both admitted that they did not count items on the shelves of the stores they visited. The testimony presented was insufficient for the trial court to determine the number of individual items that required readable prices within the various stores or to find by a preponderance of the evidence that defendant had violated section 7100. Plaintiffs failed to prove a Pricing Act violation under their interpretation of the statute.

Plaintiffs argue that they presented evidence that defendant failed to have a clearly readable price on 12 units of the same product and that this evidence was sufficient to establish a violation of section 7100. Failure to have a readable price on 12 units of the same item required to be item-priced creates a presumption of intent to violate section 7100 for purposes of determining liability for civil penalties under section 7101. (§ 7101.) Presumption of an intent to violate a statute for purposes of a civil penalty assessment is not the same as a violation of the statute. Liability for civil penalties can be imposed only after a statutory violation has been established. (*Ibid*.) Plaintiffs' evidence of failure to have a readable price on 12 units of the same item did not establish a prima facie violation of section 7100.

Plaintiffs cite a different statute -- Business and Professions Code section 13000 et seq., which governs the accuracy of a retail establishment's point-of-sale system -- as support for their argument that "a random sample of items" was sufficient to establish a violation of section 7100. Plaintiffs fail to show not only why the sampling protocol set forth in a wholly separate statutory scheme should apply here, they also fail to show that they satisfied the protocol set forth in the Business and Professions Code sections upon which they rely.

Business and Professions Code section 13350 provides that a city or county agency seeking to verify the accuracy of a retail establishment's point-of-sale system must test a minimum random sample of 10 items for a retail establishment with three or fewer point-of-sale checkout registers; a minimum random sample of 25 items for an retail establishment with 4 to 9 point-of-sale checkout registers; and a minimum random sample of 50 items for retail establishments with 10 or more point-of-sale checkout registers. (Bus. & Prof. Code, § 13350, subds. (a)(2)-(a)(4).) Business and Professions Code section 13351 defines a "random sample" of items as "the selection process shall be modeled after the National Institute of Standards and Technology Handbook 130, 2005 Edition (HB 130) – Examination Procedures for Price Verification, randomized sample collection; stratified sample collection." Plaintiffs presented no evidence that the "random samples" they took of items offered for sale at defendant's various stores complied with these criteria.

IV. The trial court did not misallocate the burden of proof

Plaintiffs contend the trial court imposed an improper evidentiary burden, holding them to a "clear and substantial evidence" standard and requiring them to undertake a complete inventory of defendant's stores, and to perform a quantitative analysis inconsistent with the language and purpose of the statute. The statement of decision sets forth the evidentiary analysis the trial court applied in this case. That analysis, read in context and in its entirety, was neither improper nor inconsistent with the statutory language:

> "The applicable burden of proof does not require that Plaintiffs establish an absolute certainty, and the Court has not held them to such a standard. . . . Plaintiffs need only have provided clear and substantial evidence in support of their cause of action. They failed to do so. The Court did not necessarily hold them to the strictures of an item by item accounting of each store's inventory. However, such an inventory provides useful guidance in establishing procedures for assessing the total number of packaged consumer commodities in a store, the number of packaged consumer commodities that are subject to the Act, and the total number of packaged consumer commodities that are exempt from the Act. Each of the three Plaintiffs admitted they did not perform anything remotely

> approximating an item-by-item inventory of the respective stores they visited. Elbert conceded that it would take a team of 10 people at least several hours to do an item-by-item count to determine the exact number of packaged consumer commodities, and that copious notes would be taken to document the protocol. Diamond testified that such an inventory would normally be performed at night when the store was closed, to ensure the integrity of the process. Further, it can be reasonably inferred from Eiden's testimony that a counting device or some mechanical or electronic assistance would be beneficial to maintain an accurate and reliable item count. Not one of Plaintiffs performed any of these validating procedures to even establish a reference count of the total number of packaged consumer commodities in the respective Fresh & Easy locations they visited. [¶] Based on the evidence, the Court is left to 'guesstimate' (as Eiden phrased it) as to each element of Plaintiffs' statutory claim. 'If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.' Evid. Code § 412. Where they did not produce stronger evidence despite opportunities to do so, Plaintiffs' case-in-chief was not persuasive."

Section 7100 imposes a quantitative standard. The statute requires that a clearly readable price be indicated on 85 percent of the total number of nonexempt consumer commodities offered for sale. (§ 7100, subd. (a).) Plaintiffs did not come close to demonstrating that defendant failed to comply with this requirement.

Plaintiffs argue that because section 7100 requires grocery stores to determine the number of consumer commodities offered for sale and to maintain a list of exempt consumer commodities, the Legislature intended to shift to retail grocers the burden of demonstrating compliance with the statute. Nothing in the statutory language supports their interpretation, however, and plaintiffs provide no evidence of legislative intent to shift the burden of proof.

The trial court did not err by concluding that plaintiffs failed to sustain their burden of proving that defendant violated section 7100. Plaintiffs' evidence does not compel a finding in their favor as a matter of law.

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST