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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MARY PERKS, and STANLEY ALEXANDER, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

ACTIVEHOURS, INC. d/b/a/ EARNIN,

Defendant.

CASE NO. 5:19-cv-05543-BLF

DEFENDANT ACTIVEHOURS, INC. D/B/A/ EARNIN'S NOTICE OF MOTION AND MOTION TO DISMISS CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Hearing Date:	April 2, 2020
Time:	9:00 a.m.
Courtroom:	3, 5th Floor
Judge:	Hon. Beth L. Freeman
Complaint Filed:	September 3, 2019

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NOTICE OF MOTION AND MOTION TO DISMISS

TO PLAINTIFFS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE THAT on April 2, 2020 at 9:00 a.m., or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, San Jose Courthouse, located at 280 South 1st Street, San Jose, California 95113, 5th Floor, Courtroom 3, before the Honorable Beth Labson Freeman, Defendant Activehours, Inc. d/b/a/ Earnin ("Earnin") will, and hereby does, move the Court for an order dismissing Plaintiffs Mary Perks and Stanley Alexander's Class Action Complaint (Dkt. 1) (the "Complaint").

This Motion is based on the Notice of Motion and Motion, the attached Memorandum of Points and Authorities, related documents filed in connection with this motion, the papers and records on file in this action, and such other written or oral argument that may be presented to the Court.

STATEMENT OF THE ISSUES TO BE DECIDED

1. Whether Plaintiffs, non-residents of California, may bring claims under the California Unfair Competition Law ("UCL") and California Consumer Legal Remedies Act ("CLRA");
2. Whether Plaintiffs fail to state a claim under the CLRA, because their claims involve an intangible chattel;
3. Whether Plaintiffs fail to state a claim under the CLRA and UCL, because they do not adequately allege Earnin made actionable misrepresentations or omissions that they relied on;
4. Whether Plaintiffs fail to state a claim under the CLRA, because they fail to allege the Terms of Service were unconscionable;
5. Whether Plaintiffs lack standing to seek injunctive relief, because they fail to allege a threat of future harm; and may bring a CLRA claim for non-injunctive relief after failing to comply with the notice requirement.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' claims suffer from a host of problems. At the core, however, they reduce to two. First, the omission on which they predicate their claim—Earnin's failure to disclose that use

of the service may result in an overdraft imposed by a bank—was not, in fact, omitted. As quoted in the complaint, Earnin's terms of service specifically disclose that it "is not responsible for any overdraft fees, over-the-limit fees, or insufficient fund charges…that result from [users'] failure to maintain a balance or available credit in the bank account that is sufficient to fund all payments [they] initiate." *See* Complaint (Compl.) ¶ 52. Second, and this is also fatal to their claim of unwarranted overdrafts, they have sued the wrong party. Earnin does not control whether a given bank will in a specific circumstance charge an overdraft fee. Banks determine their fee schedules and control their overdraft policies.

Americans pay a ridiculous amount of money every year in bank overdraft fees. Estimates of the amount of money range between $17 billion and $34 billion.[1] Those fees are wildly disproportionate to the benefit received. The median amount of a transaction that leads to an overdraft fee is $50, and the majority are repaid within three days.[2] In exchange for providing consumers the use of $50 for less than half a week, banks charge, on average, $34 per overdraft.

Companies like Earnin offer consumers a service to combat overdrafts. Earnin gives customers access to some of the money they have earned through their work before they are paid to help them pay bills that come due prior to payday. Earnin does not charge a fee for this service. Instead, it lets users decide whether to pay and, if they choose to pay for the service, how much to pay. In signing up for Earnin service, Plaintiffs agreed that Earnin was not responsible

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[1] Maria LaMagna, "Overdraft fees haven't been this bad since the Great Recession," MARKETWATCH, Apr. 2, 2018, available at https://www.marketwatch.com/story/overdraft-fees-havent-been-this-bad-since-the-great-recession-2018-03-27; "A Closer Look: Overdraft and the Impact of Opting-In," CONSUMER FINANCIAL PROTECTION, January 19, 2017, available at https://files.consumerfinance.gov/f/documents/201701_cfpb_Overdraft-and-Impact-of-Opting-In.pdf.

[2] Data Point: Checking Account Overdraft, CONSUMER FINANCIAL PROTECTION BUREAU, July 2014, available at https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf.

for the fees charged by their banks if they did not have sufficient funds available when Earnin attempted to recover the advances that it provides. There was no omission and no deception.

Plaintiffs have not pled any claims upon which relief may be granted for the reasons above and others articulated below. They involve the wrong state laws, fail to state a claim under those laws, and likewise fail to satisfy Federal Rule of Civil Procedure 9(b). The Complaint should be dismissed.

II. BACKGROUND

A. Plaintiffs' Factual Allegations

Earnin is a technology company incorporated in California that gives people access to the pay that they have earned, without waiting for payday (each, a "payout").[3] Compl. ¶¶ 1, 6, 19. Earnin provides its payout product without mandatory fees, generating income only through non-mandatory, voluntary tips (Compl. ¶¶ 1, 14, 28, 41, 50). Earnin users could therefore choose to pay nothing to obtain a payout, if desired. Once Earnin verifies the hours a user has worked, Earnin allows the user to accelerate the distribution of his or her paycheck, based on the user's expected take-home pay. Compl. ¶¶ 23–24. Earnin deposits the funds directly into the user's bank account, then on the user's next anticipated payday, Earnin automatically withdraws the payout from the user's bank account, as authorized. Compl. ¶ 24.

Plaintiff Mary Perks claims to have signed up for Earnin "on or around summer 2018" (Compl. ¶ 17) and Plaintiff Stanley Alexander claims to have signed up "on or around 2018." Compl. ¶ 18. They provided "banking information" as part of the sign-up process. Compl. ¶ 30. They were also provided and agreed to Earnin's Terms, which govern its payout product. Compl. ¶ 56. After Plaintiffs signed up for Earnin, in October 2018 and May 2019 respectively, Plaintiffs Perks and Alexander each allege that their respective financial institutions charged them overdraft fees after authorized payments to Earnin were posted to their account. *See* Compl. ¶¶ 32–37. Earnin did not charge them any undisclosed fees. *Id.* At the time Earnin withdrew these

[3] Though unnecessary to the determination of this Motion, Earnin notes that Plaintiffs are mistaken in calling their Earnin transactions "payday loans." *See generally* Compl.

payments, Plaintiffs "did not have sufficient funds to cover the transactions." Compl. ¶¶ 33, 36. Plaintiffs claim that Earnin withdrew the payments authorized for each transaction separately. *E.g.*, Compl. ¶¶ 32, 34. Plaintiffs thus claim that because Earnin does not unilaterally cancel payments in such an instance, users are "regularly" charged bank fees. Compl. ¶ 31.

Plaintiffs claim Earnin misled them and/or omitted information from them, which led to the belief that, despite agreeing to pay Earnin back on their next anticipated payday, they could overspend without being responsible for any associated bank fees. Compl. ¶ 30. Plaintiffs state that based on "Earnin's marketing" (Compl. ¶ 30) they believed Earnin would automatically suspend any payments they failed to fund. Compl. ¶ 39. Plaintiffs do not state what marketing they actually saw or relied on, but allege generally that Earnin represents it is "simple", "convenient", and "low-fee" (Compl. ¶ 42); and Earnin "withdraw[s] its deductions '[t]he next time your paycheck hits your bank account'" (Compl. ¶ 47).

Significantly, Plaintiffs also acknowledge Earnin represents in its Terms that "'[Earnin] is not responsible for any overdraft fees, over-the-limit fees, or insufficient fund charges (including finance charges, late fees, or similar charges) that result from your failure to maintain a balance or available credit in the bank account that is sufficient to fund all payments you initiate.'" Compl. ¶ 52. Plaintiffs claim such terms are unconscionable. Compl. ¶¶ 52–58.

B. Plaintiffs' Alleged Causes of Action

Based on these facts, Plaintiffs, who purport to represent a nationwide class of "[a]ll persons who used the Earnin Service and paid tips to Earnin", plead two California state law claims: violation of the Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq*. ("CLRA"); and violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"). Plaintiffs allege that Earnin violated both the CLRA and UCL by making misrepresentations and/or omissions. *See, e.g.*, Complaint at ¶¶ 76, 86. Plaintiffs also allege Earnin violated the CLRA because its Terms are unconscionable. *Id.* at ¶ 77.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) requires dismissal where the complaint fails to "contain 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). The court, however, need 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). The court may also "reject, as implausible, allegations that are too speculative to warrant further factual development." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013).

IV. ARGUMENT

A. Named Plaintiffs Have No Claims Under the CLRA or UCL as Non-Residents, and a Nationwide Class Cannot Be Certified

The CLRA and UCL do not apply to Plaintiffs. They do not reside in California, and a nationwide class cannot be certified under either California law.

1. California Consumer Protection Laws Do Not Apply to Plaintiffs

It is ordinarily presumed that the UCL and CLRA do not apply outside California. *E.g., Figy v. Frito-Lay N. Am., Inc.*, 67 F. Supp. 3d 1075, 1086–87 (N.D. Cal. 2014) (dismissing UCL and CLRA against non-Californian plaintiffs with prejudice and dismissing class claims without prejudice to reassert on behalf of a class limited to Californians). Courts in this district have held that consumer protection laws are meant "to address harm suffered by residents of California, or harm to non-residents that occurred in California." *Silverman v. Wells Fargo & Co.*, No. 18-cv-03886-YGR, 2018 WL 6046209, at *3 (N.D. Cal. Nov. 19, 2018). Neither Plaintiff claims to have received or relied on any representation from Earnin while in California, nor do they allege that they engaged in their complained of transactions in California or that their purported injuries occurred while in California. This is sufficient for dismissal. *See In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 964–65 (S.D. Cal. 2012) (dismissing UCL and CLRA claims with prejudice as to non-resident named plaintiffs because alleged misrepresentations were received outside California).

Plaintiffs' only allegation tying the complained of conduct to California is that Earnin has its principal place of business in California, and conducts business there. Compl. ¶¶ 19, 21. This is insufficient to apply the CLRA or UCL to nonresident plaintiffs. *See, e.g., Silverman*, 2018 WL 6046209, at *3 (dismissing UCL claim where the "only allegations that connect

[Defendants'] alleged wrongful conduct to the State of California are their allegations that (1) [Defendants] have their principal places of business in San Francisco, California; (2) [Defendant] is headquartered in San Francisco, California; and (3) [Defendant] 'engage[s] in substantial sales and marketing of their financial products and services in the State of California'"). Accordingly, Plaintiffs cannot avail themselves of California's consumer protection laws. Their claims should be dismissed with prejudice.

2. Plaintiffs Do Not Satisfy the Choice of Law Test

Similarly, Plaintiffs, who are both non-residents of California, cannot satisfy California's choice of law test, and thus California law cannot be applied to their claims individually or on a class-wide basis. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 591–94 (9th Cir. 2012) (holding California consumer protection laws could not apply to nationwide class). Under California's three-step governmental interest test, the Court must determine: (1) that the law of the other state is not materially different from California law; (2) whether the other state has an interest in having its law applied, and (3) which state's interest would be most impaired if its policy were subordinated to the law of another state. *Id.* at 590.

First, there are material differences between consumer protection laws in California, and Plaintiffs' home states of New York and Minnesota (Compl. ¶¶ 17-18). For example, California requires plaintiffs to demonstrate reliance under the CLRA and UCL, while New York and Minnesota laws differ, particularly if only injunctive relief is sought. *Mazza*, 666 F.3d at 591; *Darisse v. Nest Labs, Inc.*, No. 5:14-cv-01363-BLF, 2016 WL 4385849, at *10 (N.D. Cal. Aug. 15, 2016); *Parkhill v. Minnesota Mut. Life Ins. Co.*, 188 F.R.D. 332, 345 (D. Minn. 1999), *aff'd*, 286 F.3d 1051 (8th Cir. 2002). The remedies and fees available under California law, Minnesota law, and New York law also differ. *See Darisse*, 2016 WL 4385849, at *10; Minn. Stat. Ann. § 325D.45; *see also Frezza v. Google Inc.*, No. 5:12-cv-00237-RMW, 2013 WL 1736788, at *6 (N.D. Cal. Apr. 22, 2013) (finding differences in remedies material where other states permitted treble damages and attorney's fees and UCL only permits restitution and injunctive relief).

Second, Plaintiffs' home states have an interest in having their own laws applied. It is well recognized that each state "has an interest in balancing the range of products and prices

offered to consumers with the legal protections afforded to them." *Mazza*, 666 F.3d at 592. Indeed, the Ninth Circuit in *Mazza* held the foreign jurisdiction always has the greater interest in governing consumer transactions. *Id.* at 591–94; *see also Schwartz v. Lights of America*, No. CV 11-1712-JVS (MLGx), 2012 WL 4497398, at *8 (C.D. Cal. Aug 31, 2012) ("Second, the federalism analysis in *Mazza* is broad and categorical"). This is sufficient to dismiss Plaintiffs' claims, regardless of balancing applied. Plaintiffs have provided no allegations that would raise doubt that New York and Minnesota have an interest in providing their consumers with protection from fraudulent misrepresentations.

Third, Plaintiffs' home states would be more impaired than California if their laws were subordinated. California law "recognizes that 'with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.'" *Mazza*, 666 F.3d at 593–94 (refusing to certify nationwide class under California consumer protection laws, even though defendant was headquartered in California, because "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place").

As explained above, neither Plaintiff claims to have received or relied on any representation from Earnin while in California, nor do they allege that they engaged in their complained of transactions in California or that their purported injuries occurred while in California. *See Frezza*, 2013 WL 1736788, at *5 (holding that non-California residents could not invoke the UCL where the defendant was "headquartered in California, and the allegedly fraudulent representations originated from California, but the *transactions* at the center of the dispute (enrollment in [online service]) occurred in the plaintiffs' state of North Carolina.") (emphasis in original).

The Authority from around this Circuit including controlling authority in *Mazza* thus contains that the California claims of these non-resident Plaintiffs should be dismissed with prejudice.

3. Plaintiffs' Class Allegations Should Be Dismissed

Plaintiffs' claims also cannot be brought as class allegations. As was the case in *Mazza*, here too "each class member's consumer protection claim[s] should be governed by the consumer protection laws of the jurisdiction in which the transaction took place." 666 F.3d at 594. As explained above, Plaintiffs have not shown that California law applies to their own consumer protection laws, or that choice of law rules have been satisfied. Accordingly, for the reasons herein, Plaintiffs' "claims on behalf of the putative national class must also be dismissed, both because they are precluded under *Mazza*, and because the underlying individual claims are deficient." *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1010 (N.D. Cal. 2014).

B. No Reasonable Consumer Would Be Misled by Earnin's Product

Even if Plaintiffs could invoke California law, they have failed to state claims that would cause a reasonable consumer to be misled under the CLRA or UCL.

1. Plaintiffs Failed to Satisfy Rule 9(b)

It is well established that Rule 9(b)'s "heightened pleading standards apply to claims for violations of the CLRA and UCL" that sound in misrepresentation. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Here, all of Plaintiffs' claims (aside from their unconscionable contract claim) come within Rule 9(b) because they are based on Earnin's alleged misrepresentations and omissions. *Id*. at 1125–26; *see, e.g.,* Compl. ¶ 1.

Plaintiffs fail to meet the pleading requirements of Rule 9(b). Plaintiffs fail to allege "the who, what, when, where, and how of the misconduct charged" in their CLRA and UCL claims. *Kearns*, 567 F.3d at 1125 (internal quotation marks omitted). Plaintiffs must sufficiently identify which representations they saw, when they saw them, what was false or misleading, or why it was false. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), *superseded by statute on other grounds as stated in SEC v. Todd*, 642 F.3d 1207, 1216 (9th Cir. 2011).

Plaintiffs do not sufficiently identify which representations they saw, or when they saw them. Plaintiffs only generally allege how Earnin currently markets its products, which they claim "all users view during the sign-up process[.]" Compl. ¶ 49. A mere inference that

Plaintiffs viewed certain representations is insufficient to state a claim. *Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163, 1175 (C.D. Cal. 2014), *aff'd*, 649 F. App'x 424 (9th Cir. 2016).

Plaintiffs must also allege what Earnin advertisements they actually relied on to allege actionable misrepresentation or omission claims under the CLRA or UCL. Plaintiff cannot just receive an alleged misrepresentation or omission; they must also "see, read, or hear" it "and rely on it." *Graham v. VCA Antech, Inc.*, No. 2:14-cv-08614-CAS-JC, 2016 WL 5958252, at *5 (C.D. Cal. Sept. 12, 2016), *aff'd sub nom. Graham v. VCA Animal Hosps., Inc.*, 729 F. App'x 537 (9th Cir. 2018); *and see Kearns*, 567 F.3d at 1126 (affirming dismissal of non-disclosure claims). Plaintiffs' general recitations of how Earnin currently markets its products are also insufficient to meet their pleading burden. "[A]bsent an express allegation that [Plaintiffs] viewed the misleading content, there can be no reliance and the claim fails under Rules 8(a) and 9(b)." *Boris*, 35 F. Supp. 3d at 1175; *see also Mazza*, 666 F.3d at 596 (all Plaintiffs must actually see misleading advertisements for omissions to be actionable).

Plaintiffs also fail to explain what was false or misleading about any of Earnin's representations that they rely on (having identified no representation that they relied on at all). Instead, Plaintiffs make vague allegations of providing bank information. Compl. ¶ 30. Yet they do not explain why providing bank information is a representation of how it would mislead someone to believe payments would not be initiated when the user did not fund them. Plaintiffs' covered CLRA and UCL claims, in short, fail to meet Rule 9(b)'s requirements and should be dismissed.

2. Plaintiffs Have Not Plausibly Pled Misrepresentations or Omissions

Substantively, Plaintiffs also fail to allege actionable misrepresentations or omissions under the CLRA or UCL. Plaintiffs' claims under the CLRA and UCL are both "governed by the 'reasonable consumer' test." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). "Under this standard, Plaintiff must 'show that "members of the public are likely to be deceived."'" *Id.*; *Freeman v. Time*, Inc., 68 F.3d 285, 289 (9th Cir. 1995). There must be "more than a mere possibility" that Earnin's representations "'might conceivably be misunderstood by some few consumers viewing it in an

unreasonable manner.'" *Ebner*, 838 F.3d at 965 (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 508 (2003)). It must be probable "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id.*

a. Plaintiffs Failed to Allege Affirmative Misrepresentations

In order to state a claim for a misrepresentation under the UCL or CLRA, Plaintiffs would need to allege Earnin made affirmative representations likely to deceive reasonable consumers. *Frenzel*, 76 F. Supp. 3d at 1010–11. "'Although misdescriptions of specific or absolute characteristics of a product are actionable, generalized, vague, and unspecified assertions constitute mere puffery upon which a reasonable consumer could not rely.'" *Id.* at 1011–12.

Here, Plaintiffs allege (1) that Earnin obtained their banking information and (2) that it did so through "marketing," which misled them about whether Earnin would withdraw funds on the consumer's scheduled paydays if they failed to maintain sufficient funds to cover the payment. Compl. ¶¶ 30, 47. Plaintiffs also claim Earnin failed to disclose that if a user did not fund its account to cover payments to Earnin, there was a risk of incurring overdraft fees from their financial institution. Compl. ¶ 41. Earnin was not the entity that charged Plaintiffs the fees that they claim Earnin misrepresented. Compl. ¶¶ 33, 36. Substantial authority confirms Plaintiffs' theories are legally insufficient.

The fact that Plaintiffs provided bank account information to Earnin does not mean that Earnin misrepresented when it withdraws funds or whether an actual or attempted withdrawal might trigger a fee by a third-party. For example, in *Boris v. Wal-Mart Stores*, the Court determined that using red packaging over green packaging for one kind of migraine medication did not amount to a representation about the product's strength, as it would be too speculative to ascribe meaning to the color of packaging. *See Boris*, 35 F. Supp. 3d at 1169–70. Here too, the fact that Earnin obtained banking information could not plausibly be understood as communicating anything. *See id.*; *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1304–05 (2011) (dismissing UCL and CLRA claims because it was unreasonable for consumers to believe

that a "green drop" on a water bottle label suggested "the product is endorsed for environmental superiority by a third party organization").

Next, none of the "marketing" Plaintiffs generally point to, constitutes a misrepresentation. Earnin representing that it will withdraw money on the next anticipated paycheck (Compl. ¶ 47) is not alleged to be false. Nor does Earnin's failure to clarify that it will not cancel such payment when its customers overspend make such representation false or misleading. *See, e.g., Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1161–62, 1169 (9th Cir. 2012) (credit card marketing not misleading for advertising rewards without noting fees, because no reasonable consumer would understand this to mean there were no fees). Plaintiffs also do not dispute that Earnin's Terms condition that users must keep sufficient funds to fund payments to Earnin or bear risks of third party fees. Compl. ¶ 52. Likewise, Earnin's alleged marketing of being simple, low-cost, and without hidden fees, is also not an alleged misrepresentation. Plaintiffs have not asserted that *Earnin* charged them *any* high and/or undisclosed fees. *See Williamson v. Reinalt-Thomas Corp.*, No. 5:11-CV-03548-LHK, 2012 WL 1438812, at *10 (N.D. Cal. Apr. 25, 2012) (no deception in cost of service where plaintiff paid the agreed price). Plaintiffs' contention that wholly separate bank fees charged by a different company (for a failure to maintain sufficient funds in their accounts) are viewable as altering the cost of a product is untenable.

The other marketing that Plaintiffs point to is no more than generalized puffery. Earnin stating that its "members appreciate not having to pay extra fees and penalties to banks and the like…" (Compl. ¶ 48) is simply a statement of customer preference, not an actionable representation. *See Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008), *aff'd*, 322 F. App'x 489 (9th Cir. 2009) (vague product superiority claims are "non-actionable puffery").

b. Plaintiffs Failed to Allege Omissions

Earnin also did not fail to disclose any risks of its product that would mislead a reasonable consumer. For there to be actionable deception under California consumer protection laws based on an omission, "'the omission must be contrary to a representation actually made by the

defendant, or *an omission of a fact the defendant was obliged to disclose*.'" *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 861 (9th Cir. 2018) (emphasis in original). "A duty to disclose under California law does not extend to 'all information [that] may persuade a consumer to make different purchasing decisions.'" *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 665 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 460 (9th Cir. 2018). To determine whether there is a duty to disclose, it must be alleged (1) that the "omission was material"; (2) that "the defect was central to the product's function"; and (3) that Defendant was either a fiduciary, had exclusive knowledge of a material defect, actively concealed a material fact or made misleading partial representations. *Hodsdon*, 891 F.3d at 862–63.

As noted above, Plaintiffs point to no contrary representation Earnin made about whether overdraft fees could be incurred while using its product. Nor would it be reasonable for a consumer to assume that Earnin marketing its benefits, without specifically mentioning overspending can result in overdrafts, meant that such fees could not be incurred, particularly here, where the fees are from other companies that the consumer has contracted with directly. Controlling authority has held that consumers cannot reasonably expect typical fees not to be present when a product is promoted without specifically mentioning those fees. *See Davis*, 691 F.3d at 1161–62. For example, the Ninth Circuit has affirmed that it is not misleading to promote a credit card's rewards without specifically mentioning the card's annual fee, since a customer should reasonably expect there to be fees for a credit card, "such as monthly interest charges, late-payment fees, and over-the-limit fees." *Id*. at 1162; *see also Stuart v. Cadbury Adams USA, LLC*, 458 F. App'x 689, 691 (9th Cir. 2011) (no failure to disclose from lack of clarification that a whitening chewing gum only works in conjunction with proper oral hygiene). Here too, Plaintiffs should have reasonably expected that they could incur overdraft fees charged by their bank for failing to fund their payments to Earnin. This is an expected cost of authorizing payments from a bank when not enough funds are present. *Azoulai v. BMW of N. Am. LLC*, No. 16-cv-00589-BLF, 2017 WL 1354781, at *9 (N.D. Cal. Apr. 13, 2017) (that automatic car door could close on one's fingers was an expected risk of a door closing and not a defect that required disclosure).

There are also no special circumstances legally requiring disclosure here. For example, Plaintiffs do not allege that Earnin was a fiduciary or exclusively knew that a payment that a user authorizes carries a risk that such transaction will result in an overdraft fee if the user fails to sufficiently fund the account. Earnin was therefore not legally obligated to disclose what fees other entities may generally charge when users authorize payments that they do not fund.

Overall, Plaintiffs' belief that a product that provides early access to earned pay could never result in bank fees is simply not reasonable. Whether considered as misrepresentations or omissions, Plaintiffs' claims are the kind that "def[y] common sense." *Davis*, 691 F.3d at 1162. Bank fees are incurred from authorizing a greater amount in payments than there are funds in an account. Earnin tries to solve this by providing its users with earlier access to their earned wages to cover payments that come due before payday. That does not mean Earnin authorizes its customers to spend beyond their means; rather, as Plaintiffs acknowledge, Earnin provides early access to money users have earned that it deducts, as authorized by the user, *on their scheduled payday*. It is not reasonable to believe that overspending will not lead to overdrafts or result in such payment being automatically canceled. *See, e.g., Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012) (not reasonable for Plaintiffs to be deceived into thinking a box of crackers was "'*healthy* and contain[ed] a *significant amount* of vegetables,'" since "a reasonable consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables") (emphasis in the original); *Williamson v. Apple, Inc.*, No. 5:11-cv-00377 EJD, 2012 WL 3835104, at *6 (N.D. Cal. Sept. 4, 2012) (dismissing UCL and CLRA claims related to durability of cell phone glass, because it would require a "suspension of logic" for a consumer to "expect that glass could not break if dropped").

3. Earnin's Terms Disclose What Plaintiffs Claim Was Omitted

Even if there were any ambiguity in Earnin's representations, such ambiguity is dispelled by Earnin's Terms that expressly disclaim responsibility for its users incurring fees for failing to maintain sufficient balances to fund payments to Earnin. Compl. ¶ 52. Allegations do not satisfy the reasonable consumer test where there were disclosures that make "the meaning of the representation clear." *Dinan v. Sandisk LLC*, 18-cv-05420-BLF, 2019 WL 2327923, at *4 (N.D.

Cal. May 31, 2019). A reasonable consumer will not be misled "where '[a]ny ambiguity that [reasonable consumers] would read into any particular statement is dispelled by the promotion as a whole.'" *See Holt v. Noble House Hotels & Resort, Ltd*, 370 F. Supp. 3d 1158, 1167–68 (S.D. Cal. 2019) (quoting *Freeman*, 68 F.3d at 290).

Here, Plaintiffs admit that Earnin's Terms were provided to them and agreed to during the sign-up process. Compl. ¶ 56. A reasonable consumer could not be deceived into believing Earnin's provision of access to earned wages could never result in an overdraft, because the Terms expressly disclaimed Earnin's liability for such fees. Just as in *Castagnola v. Hewlett-Packard Co.*, No. C 11- 05772- JSW, 2012 WL 2159385, at *9–10 (N.D. Cal. June 13, 2012), where the Court held a reasonable consumer would not be deceived into thinking a web subscription service was free where offer details noting the fees were available during the sign up process, so too here. *See also Freeman*, 68 F.3d at 289–90 (promotion not misleading where statement plaintiff had won millions of dollars was qualified by other language).

Thus, under the reasonable consumer test, Plaintiffs' UCL and CLRA claims must be dismissed, because (a) they have not identified an actionable misrepresentation, (b) they have not identified an omission that Earnin was required to disclose and/or which it did not disclose, and/or (c) they make claims that the law has rejected as insufficient to constitute a representation at all.

C. Plaintiffs Have Not Alleged Conduct Covered by the CLRA

1. Earnin Does Not Provide Goods or Services Under the CLRA

Plaintiffs' CLRA claims must also be dismissed, because Earnin providing users with advancement of earned wages is also not a "good" or "service" subject to the CLRA. *See* Cal. Civ. Code § 1761(a), (b). In *Fairbanks v. Superior Court,* the California Supreme Court held that "intangible goods—investment securities, bank deposit accounts and loans" are not "goods" or "services" covered by the CLRA. 46 Cal. 4th 56, 65 (2009) (holding that insurance was not covered by the CLRA).

Courts have similarly made clear that the CLRA does not cover extension of money to consumers. In *Berry v. Am. Express Publ'g, Inc.*, 147 Cal. App. 4th 224 (2007), for example, the

Court held that the CLRA did not extend to consumers who acquire "money and credit." *Id.* at 232 (internal quotations omitted); *see also Ball v. FleetBoston Fin. Corp.*, 164 Cal. App. 4th 794, 798 (2008) ("the act of extending credit alone is not covered by the CLRA"); *Gutierrez v. Wells Fargo & Co.*, 622 F. Supp. 2d 946, 957 (N.D. Cal. 2009) (overdrafts are not covered by the CLRA because "an overdraft provides an extension of money"). The law now agrees that the "CLRA does not apply to claims involving debit cards or overdrafts associated with those cards …." *Lloyd v. Navy Fed. Credit Union*, No. 17-cv-1280-BAS-RBB, 2018 WL 1757609, at *20 (S.D. Cal. Apr. 12, 2018).

Earnin provides users with the ability to electronically authorize deposits and payments to their financial accounts to gain additional access to funds between paychecks. Compl. ¶ 6. It is an extension of money, entirely divorced from the purchase or lease of any goods and services, and is therefore, not a "good" or "service" covered by the CLRA. *Gutierrez*, 622 F. Supp. 2d at 957 ("Indeed, plaintiffs likely bought goods and services in many instances with the money extended because of overdrafts. But not from the bank."). As such, Plaintiffs are not "consumers" for purposes of the CLRA, and their CLRA claims should be dismissed with prejudice. *Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101, 1117, 1121 (N.D. Cal. 2016), Cal. Civil Code § 1761(d) ("'Consumer' means an individual who seeks or acquires, by purchase or lease, any ***goods or services*** for personal, family, or household purposes") (emphasis added).

2. Plaintiffs Have Not Alleged Misrepresentations or Omissions

Even if the CLRA were to apply to Earnin's payout product, for the reasons above, Plaintiffs' CLRA claims based on Earnin's alleged misrepresentations are not actionable. *See Williamson v. Reinalt-Thomas Corp.*, 2012 WL 1438812, at *9–10 (dismissing CLRA claim predicated on misrepresentations and/or omissions for failing to meet reasonable consumer test); Section IV.B. *supra*. Likewise, because the CLRA includes reliance as a required element, *see Joseph v. Nordstrom, Inc.*, No. CV 16-2252 PSG (AJWx), 2016 WL 6917279 at *3 (C.D. Cal. June 17, 2016) (dismissing CLRA claim for the lack of alleged reliance), Plaintiffs' CLRA claims should be dismissed for the same reasons as stated in Section IV.B.1. Accordingly, Plaintiffs'

CLRA claims under Cal. Civ. Code § 1770(a)(5), (9), and (14), which are all based on Earnin's alleged misrepresentations and/or omissions should be dismissed.

3. Plaintiffs Have Not Alleged Substantive and Procedural Unconscionability Under the CLRA

Plaintiffs also allege that Earnin violated the CLRA by inserting an unconscionable provision in the Terms. Compl. ¶¶ 52–58, 77. Plaintiffs have not alleged facts sufficient to support that Earnin disclaiming responsibility for bank fees assessed as a result of their user's failure to maintain a bank balance sufficient to fund all authorized payments is substantively and procedurally unconscionable, as required to be actionable. *See, e.g., In re Apple iPod iTunes Anti-Tr. Litig.*, No. C 05-00037 JW, 2010 WL 2629907, at *6 (N.D. Cal. June 29, 2010) (no CLRA violation where Terms of Service required allegedly unnecessary upgrades with no benefits, since it was not alleged that such terms were hidden or were so harsh as to shock the conscious). Procedural unconscionability requires "'oppression and surprise'" and substantive unconscionability requires contract provisions that are "'overly harsh'" or "'one-sided'" as to "'shock the conscience.'" *Id.* "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 912 (2015). Plaintiffs have not met this standard.

Plaintiffs admit that the Terms were provided to customers during the sign-up process, and cannot claim they were hidden, as required to be procedurally unconscionable. And, while Plaintiffs allege such Terms "contradict[]" "Earnin's marketing" (Compl. ¶ 53), that just confirms their misrepresentation and omission claims must be dismissed. Plaintiffs do not provide facts to support such Terms being so harsh or one-sided as to shock the conscious, as required to be substantively unconscionable. In fact, holding otherwise would result in perverse incentives. *See, e.g., Leong v. Square Enix of Am. Holdings, Inc.*, No. CV 09-4484 PSG (VBKx), 2010 WL 1641364, at *10 (C.D. Cal. Apr. 20, 2010), *aff'd*, 462 F. App'x 688 (9th Cir. 2011) (terminating accounts and removing users from game where users ceased paying monthly game subscription fee was not unconscionable under CLRA, as the opposite result would require gaming companies

to make all games available in perpetuity). It is not unconscionable for Earnin to disclaim responsibility for fees it does not charge and for which Plaintiffs by their own conduct could avoid. Companies regularly disclaim liability for such avoidable injuries. *See Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 621–22 (1996), *as modified* (Aug. 13, 1996), *as modified* (Aug. 21, 1996) (not unconscionable for ski equipment rental company to disclaim liability for injuries, since the choice to ski already has inherent risks, which could be avoided by not skiing). If it were unconscionable to disclaim responsibility for insufficient fund fees or overdraft fees, essentially any customer could shift the cost of their writing bad checks to the merchant that they wrote the check to.

D. Plaintiffs Have Not Alleged Conduct Covered by the UCL

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200; *see also Cel–Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). The UCL applies separately to business practices that are (1) unlawful, (2) fraudulent, or (3) unfair. *See In re Nexus 6P Prods. Liab. Litig.*, 293 F. Supp. 3d 888, 929 (N.D. Cal. 2018); *Pastoria v. Nationwide Ins.*, 112 Cal. App. 4th 1490, 1496 (2003). Plaintiffs have failed to sufficiently allege that Earnin's conduct has violated any of the three prongs.

1. Plaintiffs Have Not Alleged Any Unlawful Act or Practice

Plaintiffs' sole basis for invoking the unlawful prong was based on Earnin violating the CLRA. For the reasons above no CLRA claim can be stated. Because Plaintiffs have not alleged any conduct that violates the CLRA, Plaintiffs cannot allege a violation of the UCL based on an unlawful act or practice. *See, e.g., Davis*, 691 F.3d at 1168 (holding that "[t]o be 'unlawful' under the UCL," the conduct "must violate another 'borrowed' law").

2. Plaintiffs Have Not Alleged Any Fraudulent Act or Practice

For the reasons stated in Section IV.B., Plaintiffs cannot invoke the fraudulent prong. No reasonable consumer would be deceived by Earnin's representations. Accordingly, Plaintiffs have not alleged any fraudulent business act or practice. *See Hodsdon*, 891 F.3d at 865.

3. Plaintiffs Have Not Alleged Any Unfair Act or Practice

Plaintiffs also have not sufficiently alleged an unfair business act or practice. Plaintiffs' cannot invoke "the unfair prong of the UCL" for claims that "overlap entirely with the business practices addressed in the fraudulent and unlawful prongs of the UCL…if the claims under the other two prongs of the UCL do not survive." *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1104–05 (N.D. Cal. 2017). Because Plaintiffs rely on the same alleged misrepresentations and/or omissions for all claims, their "unfair" prong claims must also fail.

Plaintiffs also have not alleged any "unfair" business acts or practices under any standard. While the UCL does not define "unfair," and there is a lack of argument on the test that should apply, *see Hodsdon* 891 F.3d at 866, Plaintiffs do not satisfy any of the tests that are used to evaluate unfair conduct under the UCL.

a. Plaintiffs Do Not Satisfy the *Cel-Tech* Test

Plaintiffs do not satisfy the "unfair" prong test articulated by the California Supreme Court in *Cel–Tech Communications, Inc.* (the "*Cel-Tech* test"). 20 Cal.4th at 187. Under the *Cel-Tech* test, conduct is only unfair if it "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id.* Essentially, "any finding of unfairness" must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id.* at 186–87.

Plaintiffs have not alleged Earnin violated any laws or fraudulently misled consumers. *See* Sections IV.B. *supra*. Plaintiffs have provided no facts showing that Earnin has violated any other legislative policy, or that its business practices harm competition in any way. For example, Plaintiffs point to no statutory obligation to unilaterally cancel payments for users with insufficient funds. *See, e.g.*, *Graham*, 2016 WL 5958252, at *11–12 (not unfair for a for-profit business to charge a fee where there is no statutory or case law precluding such fee). Accordingly, Plaintiff have not met the *Cel-Tech* test requirements.

b. Plaintiffs Do Not Satisfy the *Camacho* Test

Some Courts have endorsed using a different test when the business practice is alleged to injure consumers rather than competitors, as *Cel-Tech* was a competitor case. In *Camacho v. Auto. Club of S. California*, the court stated the following test should be used: "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided" (the "*Camacho* test"). 142 Cal. App. 4th 1394, 1403 (2006); *see also, e.g., Delacruz v. Cytosport, Inc.*, No. C 11-3532 CW, 2012 WL 1215243, at *10 (N.D. Cal. Apr. 11, 2012). Plaintiffs fail under this test, too. Earnin only debited Plaintiffs' accounts for payments that Plaintiffs authorized, which does not violate Plaintiffs' rights, and any fees would have been avoided had Plaintiffs maintained the funds to cover such payment. *Camacho*, 142 Cal. App. 4th at 1406. Plaintiffs have not satisfied *Camacho*.

c. Plaintiffs Do Not Satisfy the *South Bay* Test

Plaintiffs finally fail to meet even the "amorphous" test for an unfair practice, which the California Supreme Court has cautioned against using. *Cel-Tech*, 20 Cal.4th at 185. Prior to *Cel-Tech*, courts in California found the unfair prong of the UCL could be met where conduct "'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886–87 (1999). "The test of whether a business practice is unfair involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer" (the "*South Bay* test"). *Id.* at 886 (internal quotation omitted).

As explained above, Earnin did not make any misrepresentations or omissions about its payout product. *See* Section IV.B. *supra*. Already well known to Earnin consumers is the risk that a failure to fund payments causes their bank to charge fees and Plaintiffs have pointed to nothing that would give rise to a duty to disclose such run-of-the-mill, third-party fees. *Id.* Earnin's "failure to disclose information it had no duty to disclose in the first place is not substantially injurious, immoral, or unethical." *Hodsdon*, 891 F.3d at 867. There is nothing

separately immoral, oppressive or unscrupulous about Earnin's practice of withdrawing payments on the day it represented, in the same number of withdrawals as there were transactions. *See Camacho*, 142 Cal. App. 4th at 1406 ("The public is well served when [a debtor] responds to his or her obligations"). Nor is such a practice substantially injurious to consumers, as any overdraft fees incurred were the result of Plaintiffs' own behavior.[4] *See Davis*, 691 F.3d at 1170 (holding that conduct did not cause harm for purposes of the unfair prong of UCL where "any harm [Plaintiff] suffered was the product of his own behavior[.]") Plaintiffs, therefore, cannot even satisfy the now nearly disregarded *South Bay* test. Plaintiffs' UCL claims should be dismissed.

E. Plaintiffs Failed to Comply with the Notice Requirements for a CLRA Claim

Plaintiffs have improperly commenced this action for violation of the CLRA, without complying with the notice requirements of the statute. Plaintiffs are not entitled to commence an action for damages unless they comply with the requirement of Cal. Civ. Code § 1782(a) to provide written notice of claims and a demand for relief via certified or registered mail, return receipt requested, at least 30 days prior to commencing an action; although they may commence an action solely for injunctive relief. Cal. Civ. Code § 1782(d) (stating that only "[a]n action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with subdivision (a)"); *see also Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 644 (2009) ("section 1782, subdivision (d) contemplates the filing of a CLRA action for injunctive relief alone"). Plaintiffs claim they "mailed Earnin a notice" of its CLRA violations "[i]n conjunction with" commencing this action (Compl. ¶ 81), and therefore did not comply with the 30-day notice requirement.

Plaintiffs do not seek only injunctive relief here. Rather, they claim to "seek injunctive and equitable relief" for violations of the CLRA, "including restitution and disgorgement." Compl. ¶ 79. Plaintiffs also generally seek "compensatory, direct, and consequential damages" in their prayer for relief, as well as "statutory damages, punitive damages, and/or treble damages[.]"

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[4] Plaintiffs omit facts about the broader context of their use of Earnin payouts. Accordingly, it is possible that Plaintiffs actually avoided far more overdraft fees than the few complained of.

Compl. pp. 15–16. Since Plaintiffs' cause of action for violation of the CLRA is Plaintiffs' only cause of action where monetary damages are available, Plaintiffs must be seeking such damages pursuant to their CLRA claims. Plaintiffs cannot seek damages without first complying with the CLRA notice provisions. *See Romero v. Flowers Bakeries, LLC*, No. 14-cv-05189-BLF, 2015 WL 2125004, at *8 (N.D. Cal. May 6, 2015). Even Plaintiffs' proposed "equitable" remedies of restitution and disgorgement would amount to essentially the same remedy as monetary damages. *Herron v. Best Buy Stores, L.P.*, No. 12-cv-02103-GEB-JFM, 2014 WL 5514176, at *3 (E.D. Cal. Oct. 31, 2014); *see also Dufresne v. Veneman*, 114 F.3d 952, 954 (9th Cir. 1997) (restitution is "redundant of" a "compensatory damage claim"). Where remedies for restitution and disgorgement are no more than "a sum of money to pay for some benefit" defendant received from them, the distinction between them and damages is "illusory", and such remedies will be subject to the CLRA's notice requirement. *Herron*, 2014 WL 5514176, at *3 (internal quotations omitted). Plaintiffs' CLRA claims should be dismissed.

V. CONCLUSION

For the reasons set forth herein, Earnin respectfully requests that the Court dismiss the Complaint in its entirety.

DATED: November 15, 2019

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