UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MATTHEW AJZENMAN, et al., Plaintiffs, v. OFFICE OF THE COMMISSIONER OF BASEBALL d/b/a/ MAJOR LEAGUE BASEBALL, et al., Defendants.	CV 20-3643 DSF (JEMx) Order GRANTING in Part and DENYING in Part Defendants Athletics Investment Group LLC and San Francisco Baseball Associates L.P.'s Motion to Dismiss or, in the Alternative, to Compel Arbitration (Dkt. 78)

The Athletics Investment Group LLC (Oakland Athletics or A's) and San Francisco Baseball Associates LP (San Francisco Giants or Giants and, collectively, Bay Area Teams) move to dismiss Plaintiffs' Corrected Amended Class Action Complaint or, in the alternative, compel arbitration of the claims. Dkt. 78 (Mot.). Plaintiffs oppose. Dkt. 98 (Opp'n). The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons stated below, the motion is GRANTED in part and DENIED in part.

I. BACKGROUND

A. The Current Litigation

Each season, through the coordination of the Major League Baseball (MLB) Office of the Commissioner, MLB teams agree to play each other in a schedule of games. Dkt. 42 (Complaint or Corr. Am. Compl.) ¶ 35. A majority vote of the teams is required in order to take "[a]ny action related to scheduling for the [] season." Id. (first

alteration in original). The Commissioner, in coordination with eight teams of his choosing, is tasked with "carrying out discipline and decisions in the best interest of the national game of Baseball." Id. ¶ 34 (internal quotation marks omitted).

The 2020 MLB season was scheduled to begin on March 26, 2020 and run through the first week of October. Id. ¶ 74. Due to COVID-19, on March 12, 2020, MLB Commissioner Robert D. Manfred Jr. postponed the start of the season by two weeks. Id. ¶¶ 33, 75. Four days later, the MLB posted an online announcement that the season would be further postponed to at least mid-May 2020. Id. ¶ 76. At this point, millions of fans had already purchased tickets to 2020 MLB regular season games. Id. ¶ 75. Following this announcement, MLB teams posted various updates on ticketing policies online. Id. ¶¶ 77-78. As of the filing of the Complaint, no ticket refunds had been issued to ticketholders because the MLB had yet to formally cancel any games. Id. ¶ 79. The MLB had "not issued any refunds during this crisis despite the fact it is virtually impossible that a season [could] be played because (i) certain dates for games ha[d] already passed; (ii) government and health officials ha[d] indicated that games [were] not going to be played, and if so, likely without spectators; and (iii) MLB itself ha[d] given indications that games [would] not be rescheduled as usual." Id. ¶ 80.

Plaintiffs, eight individuals who purchased MLB tickets either directly from teams or from ticket merchants, bring this action on behalf of themselves and two putative classes – a class of persons and entities who bought tickets directly from MLB teams and a class of those who purchased tickets from ticket merchants. Id. ¶ 99. Plaintiffs bring claims for violations of California's Consumer Legal Remedies Act (CLRA) and California's Unfair Competition Law (UCL), civil conspiracy, and unjust enrichment. Id. ¶¶ 110-137.

Only one of the Plaintiffs alleges that he purchased tickets from the Bay Area Teams. Plaintiff Benny Wong purchased three individual game tickets from the San Francisco Giants and three season tickets from the Oakland Athletics. Id. ¶ 14. One other plaintiff, Alex Canela,

alleges that he purchased tickets to a San Francisco Giants game through Defendant StubHub, Inc. Id. ¶ 16.

Since this suit was filed, Wong has received a full refund on his tickets from both the Giants and the Athletics. Dkts. 78-1 (Bashuk Decl.) ¶¶ 8-9; 78-3 (Connor Decl.) ¶ 23. [1] The Giants refunded Wong's purchase on May 12, 2020. Connor Decl. ¶23. The A's provided the refund on July 1, 2020. Bashuk Decl. ¶ 8.

B. Wong's Arbitration Agreements

1. Oakland Athletics

On August 9, 2018, Wong purchased a 2019 ticket package from the Oakland Athletics. Bashuk Decl. ¶ 3. In conjunction with that purchase, he electronically signed a "Season Ticket Membership Agreement." Id. The Season Ticket Membership Agreement contains an Arbitration Agreement. In order to electronically sign the Season Ticket Membership Agreement, Wong had to open the full document, scroll to the bottom, and enter his electronic signature. Id. ¶ 4. The Season Ticket Membership Agreement also included an automatic renewal provision. Id. ¶ 7. Pursuant to the automatic renewal provision, on October 15, 2019, Wong purchased a ticket package for the 2020 season. Id.

2. San Francisco Giants

On February 8, 2020, Wong bought four tickets to a September 24, 2020 Giants game. Connor Decl. ¶ 3. The September 24 game was

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[1] The Court's consideration of these declarations on a motion to dismiss is proper. Whether a claim is moot goes to a court's subject matter jurisdiction, see Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 521 (9th Cir. 1999), and, therefore, a motion to dismiss based on mootness is brought as a 12(b)(1) motion, see Fed. R. Civ. P. 12(b)(1). "Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court." St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989).

a "Special Event" game styled as "Star Trek Night." Id. ¶ 4. Wong purchased his tickets through "SFGiants.com/specialevents." Id. ¶ 6. When a visitor to that website clicks "Buy Tickets" for a particular Special Event, a pop-up window from Fevo, a third-party ticketing platform, opens. Id. ¶¶ 6, 7. After the user selects seats and enters personal and payment information, the user must click a "CONFIRM" button on the Fevo pop-up window to complete the purchase. Id. ¶ 8. A statement directly above the "CONFIRM" button states: "By clicking 'Confirm,' you agree to the privacy policy and terms of use." Id. The terms "privacy policy" and "terms of use" are underlined, blue, and hyperlinked. Id. ¶¶ 8-9. The "terms of use" hyperlink takes users to Fevo.com. Id. ¶ 10. At the bottom of the Fevo landing page, the phrase "Terms" links to the Fevo terms of service (Fevo Terms). Id. ¶¶ 11-13. The third paragraph of the Fevo Terms provides: "if you access the Services via a third-party website (such as the website of a third-party Event provider), you will also be subject to the terms applicable to such third-party website, including any applicable terms of service, terms of use, and privacy policies." Id. ¶ 14.

SFGiants.com is a "third-party Event provider," so the contract incorporates the SFGiants.com terms of use (SFGiants.com Terms). Id. ¶ 15. In order to access the SFGiants.com Terms, a user clicks on a hyperlinked "Terms of Use" at the bottom of any page of SFGiants.com, including the homepage or the SFGiants.com/specialevents page. Id. ¶¶ 17, 19. The SFGiants.com Terms include an arbitration provision. Id. ¶ 21.

II. LEGAL STANDARD

A. Subject Matter Jurisdiction

Plaintiffs bear the burden of establishing subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). On a motion pursuant to Rule 12(b)(1), the Court accepts as true all factual allegations and construes the pleadings in the light most favorable to the plaintiff. Oklevueha Native Am. Church of Haw., Inc. v. Holder, 676 F.3d 829, 834 (9th Cir. 2012). "However, conclusory

allegations and unwarranted inferences are insufficient to defeat a motion to dismiss." Id.

"In support of a motion to dismiss under Rule 12(b)(1), the moving party may submit 'affidavits or any other evidence properly before the court . . . . It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.'" Colwell v. Dep't of Health & Hum. Servs., 558 F.3d 1112, 1121 (9th Cir. 2009) (alteration in original) (quoting St. Clair, 880 F.2d at 201).

"The Constitution limits Article III federal courts' jurisdiction to deciding 'cases' and 'controversies.'" Oklevueha, 676 F.3d at 835 (quoting U.S. Const. art. III, § 2). The Court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc).

B. Arbitration

"[T]he Federal Arbitration Act (FAA) makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2011) (quoting 9 U.S.C. § 2). "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); see also Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004) (If a valid arbitration agreement exists, "the court must order the parties to proceed to arbitration . . . in accordance with the terms of their agreement."). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Ferguson v. Corinthian

Colls., Inc., 733 F.3d 928, 938 (9th Cir. 2013) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

Generally, a court's role under the FAA is limited to determining "two 'gateway' issues: (1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute." Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015) (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002)).

C. 12(b)(6) Motion

"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93 (2007) (ellipsis in original; internal quotation marks omitted). But Rule 8 "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for failure to state a claim upon which relief can be granted. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." Erickson, 551 U.S. at 94. However, allegations contradicted by matters properly subject to judicial notice or by exhibit need not be accepted as true, Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); and a court is "not bound to accept as true a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." Id. (alteration in original; citation and internal quotation marks omitted). A complaint must "state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. This means that the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

Ruling on a motion to dismiss will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief." Id. at 679 (alteration in original; internal quotation marks and citation omitted). As a general rule, leave to amend a complaint that has been dismissed should be freely granted. Fed. R. Civ. P. 15(a).

III. DISCUSSION

The Bay Area teams bring this motion to dismiss or, in the alternative, to compel arbitration arguing: (1) the claims are moot because Wong has received full refunds under the Bay Area Teams' policies; (2) even if there were a live case or controversy, it would be subject to mandatory arbitration; and (3) any remaining claims should be dismissed for failure to state a claim. Mot. at 13-14.

A. Mootness

A court has no authority to issue opinions on moot questions. Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Arizonans for Official Eng. v. Arizona, 520 U.S. 43, 67 (1997). The central question of a mootness challenge is "not whether the precise relief sought at the time the [action] was filed is still available," but rather "whether there can be *any* effective relief." West v. Sec'y of Dep't of Transp., 206 F.3d 920, 925 (9th Cir. 2000) (quotation marks omitted). The party asserting mootness carries the "heavy burden" of persuading the court that the controversy is moot. Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 222 (2000) (quotation marks omitted).

The Bay Area Teams assert that Wong's claims against them are moot because he received refunds for his tickets. Mot. at 21. Plaintiffs argue that "even where a refund is accepted, where interest is not included in the offered refund, the refund cannot moot the underlying claims, because those Plaintiffs and consumers have not 'actually receive[d] *all* of the relief he or [she] could receive on the claim through further litigation.'" [2] Opp'n at 5-6 (first alteration in original) (quoting Chen v. Allstate Ins. Co., 819 F.3d 1136, 1144 (9th Cir. 2016).

In Van v. LLR, Inc., 962 F.3d 1160, 1162 (9th Cir. 2020), the Ninth Circuit held that a plaintiff's injury of under four dollars in interest was sufficient to support standing to bring a claim. There, defendant improperly charged sales tax but refunded the money to plaintiff. Id. at 1161. However, plaintiff did not receive interest "to account for her lost use of the money." Id. Though the analysis on mootness differs from that of injury-in-fact sufficient to support standing, the Court finds Van instructive. If prejudgment interest on money that was allegedly wrongfully taken or withheld is an injury that can support a claim for recovery, it can also save a claim from mootness.

The Bay Area Teams' response to Wong's interest argument is that Wong has not adequately pleaded his "novel 'interest' theory of recovery." Dkt. 106 (Reply) at 9. Plaintiffs do, however, ask for prejudgment interest in the operative complaint. Corr. Am. Compl., Request for Relief. It is unclear to the Court what more Defendants would require of Plaintiffs. Because the burden is on the party *asserting* mootness to persuade the Court the controversy is moot,

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[2] The Court notes that despite Wong's contention, Opp'n at 5 ("The Athletics held Plaintiff Wong's money for *nine* months before offering him a monetary refund, but never paid him interest for that intervening period."), the analysis as to interest would not be based on when Wong *bought* the tickets but rather when the alleged conspiracy *began*. See West Virginia v. United States, 479 U.S. 305, 310 n.2 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgement is entered . . . .).

Adarand Constructors, 528 U.S. at 222, and the Bay Area Teams have failed to do so, the Court finds the controversy is not moot and does not consider the remainder of the parties' mootness arguments.

B. Arbitration

Alternatively, Defendants move to compel arbitration on the grounds that Wong agreed to submit any claims against both the Oakland Athletics and the San Francisco Giants to binding arbitration. Mot. at 22.

When deciding whether there is an agreement to arbitrate, courts generally "apply ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Where "the parties contest the *existence* of an arbitration agreement, the presumption in favor of arbitrability does not apply." Goldman, Sachs & Co. v. City of Reno, 747 F.3d 733, 742 (9th Cir. 2014). Under California law, "[a]n essential element of any contract is the consent of the parties." Donovan v. RRL Corp., 26 Cal. 4th 261, 270 (2001), as modified (Sept. 12, 2001). "Courts must determine whether the outward manifestations of consent would lead a reasonable person to believe the offeree has assented to the agreement." Norcia v. Samsung Telecomms. Am., LLC, 845 F.3d 1279, 1284 (9th Cir. 2017) (quoting Knutson v. Sirius XM Radio Inc., 771 F.3d 559, 565 (9th Cir. 2014)).

1. Oakland Athletics Arbitration Agreement

Wong does not dispute that he entered into an agreement to arbitrate with the Oakland Athletics and that the agreement covers this dispute. Instead, he argues only that the arbitration provision is void and unenforceable under California law because it is an "improper attempt[] to preclude [him] from seeking public injunctive relief" in violation of the McGill Rule. Opp'n at 9-12. The Court has already addressed and rejected Plaintiffs' McGill argument. See dkt. 104 at 10-14. Its reasoning there – on Defendants StubHub, Inc. and Last Minute Transactions, Inc.'s Motion to Compel – applies with equal force

here. Therefore, the Court GRANTS the motion to compel arbitration of Wong's claims as to the Oakland Athletics. [3]

2. San Francisco Giants Arbitration Agreement

The Bay Area Teams also move to compel Wong to arbitrate his claims against the San Francisco Giants based on the arbitration provision contained in the SFGiants.com Terms. Mot. at 25-31. Plaintiffs argue that the arbitration terms were not sufficiently conspicuous to bind Wong. Opp'n at 13-15.

Under California law,[4] "an offeree, knowing that an offer has been made to him but not knowing all of its terms, may be held to have accepted, by his conduct, whatever terms the offer contains." Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal. App. 3d 987, 992 (1972). However, "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." Id. at 993; see also Com. Factors Corp. v. Kurtzman Bros., 131 Cal. App. 2d 133, 136 (1955) ("If a party wishes to bind in writing another to an agreement to arbitrate further disputes, such purposes should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto." (citation omitted)). Regardless, there is no special rule that an offeror of an adhesive consumer contract specifically highlight or otherwise bring an arbitration clause to the attention of the consumer to render the clause enforceable. See Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, 914 (2015).

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[3] Because the Court has already held that the Complaint does not adequately allege conspiracy liability, the remaining plaintiffs cannot allege a claim against the Oakland Athletics. See dkt. 103 at 5-12.

[4] Despite a choice-of-law provision in the SFGiants.com Terms to the contrary, the parties appear to agree that the Court should apply California law in determining whether an arbitration agreement existed.

As explained above, in purchasing Giants tickets through the Fevo pop-up window, a user agrees to the Fevo Terms. Connor Decl. ¶ 8. These terms incorporate the terms of a third-party website through which the user accessed Fevo. Id. ¶ 14. The specific third-party terms are not enumerated nor are they hyperlinked. To be on notice of the arbitration agreement, then, Wong would have had to have read and understood the third-party website clause, navigated back to SFGiants.com, found the terms, and read them. See id. ¶ 16.

In support of the validity of such an arbitration agreement, the Bay Area Teams rely heavily on In re Holl, 925 F.3d 1076 (9th Cir. 2019), and the corresponding district court case. Mot. at 28; Reply at 14-15. In that case, a user registering for UPS My Choice had to select a box confirming that she agreed to the UPS Technology Agreement and the UPS My Choice Service Terms. In re Holl, 925 F.3d at 1080. In the text adjacent to the box, the term "UPS My Choice Service Terms" hyperlinked to a three-page document that, in the first section, incorporated by reference the UPS Tariff/Terms and Conditions of Service (UPS Tariff/Terms). Id. at 1081. The UPS Tariff/Terms included an arbitration provision. Id. at 1082. The district court held that the plaintiff was bound by the arbitration provision. Id. at 1079. On a writ of mandamus,[5] the Ninth Circuit held only that it could not say with "definite and firm conviction" that the district court erred because the clear language of the My Choice Service Terms "expressly incorporated" the UPS Tariff/Terms; the user expressly acknowledged having "reviewed, understood and agree[d] to the UPS Tariff/Terms;" and "at all relevant times, users could access the UPS Tariff/Terms . . . on ups.com, as the My Choice Service Terms instruct[ed]." Id. at 1084 (first alteration in original). Further, the Court noted that "UPS ha[d] since made its arbitration provision more apparent." Id. at 1079.

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[5] As the Ninth Circuit pointed out, "[m]andamus is an extraordinary remedy, and 'only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this remedy.'" Id. at 1082 (quoting Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380 (2004)).

There are numerous differences between this case and Holl. Most importantly, the Fevo Terms did not explicitly name the terms of service being incorporated. In In re Holl, not only did the UPS My Choice Service Terms name the UPS Tariff/Terms, it also had the users expressly acknowledge that they had reviewed, understood, and agreed to the UPS Tariff/Terms. The UPS Tariff/Terms were also available on the same website as the UPS My Choice Service Terms. Here, the Fevo Terms incorporated terms from numerous third-party websites without notifying users if such terms even existed or where they could be found.

Typically, "[u]sers are put on constructive notice [of the terms of a contract] based on the conspicuousness and placement of the terms and conditions, as well as the content and overall design of the [media]." Wilson v. Huuuge, Inc., 944 F.3d 1212, 1220 (9th Cir. 2019). As the Ninth Circuit articulated in Wilson:

> [C]ourts will not enforce agreements where the terms are buried at the bottom of the page or tucked away in obscure corners of the website, especially when such scrolling is not required to use the site. Similarly, courts decline to enforce agreements where the terms are available only if users scroll to a different screen, complete a multiple-step process of clicking non-obvious links, or parse through confusing or distracting content and advertisements. Even where the terms are accessible via a conspicuous hyperlink in close proximity to a button necessary to the function of the website, courts have declined to enforce such agreements.

Id. at 1220-21 (citations and internal quotation marks omitted). In this agreement, a user had to find two sets of terms, both not hyperlinked but instead buried at the bottom of each page, had to navigate to different websites in order to find the terms, and had to complete a multi-step process of clicking non-obvious links. Given that, the Court finds Wong was not on constructive notice of the arbitration provision and, therefore, DENIES the Bay Area Teams' motion to compel arbitration of his claims against the Giants.

C. 12(b)(6) Motion

The Bay Area Teams argue that if the Court concludes that any claims may proceed in this forum, they should be dismissed under Federal Rule of Civil Procedure 12(b)(6). Because the Court has found Wong's claims against the Giants are not moot nor should arbitration be compelled, it considers whether Plaintiffs' claims can proceed against the Giants.

1. CLRA Claim (First Claim for Relief)

The Bay Area Teams argue that Plaintiffs fail to state a claim under the CLRA, which targets a class of "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770(a); Mot. at 32. A plaintiff may bring a claim under the CLRA so long as he has "suffer[ed] any damage as a result of" a proscribed practice under the CLRA. Cal. Civ. Code § 1780(a). Therefore, to adequately plead a CLRA claim, a plaintiff must allege that he *relied* on the defendant's alleged deception in a way that caused him harm. Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1367 (2010).

The Complaint alleges Defendants misrepresented that 2020 regular season MLB tickets would allow ticketholders to attend baseball games. Corr. Am. Compl. ¶ 114. However, Plaintiffs do not allege that they relied on this misrepresentation in purchasing their tickets. In fact, that seems unlikely. The Complaint alleges that each Plaintiff purchased tickets prior to the beginning of the MLB season but does not allege specifically when tickets were purchased. Id. ¶¶ 9, 11, 14, 16, 18, 23. The season was set to begin on March 26, 2020. Id. ¶ 74. The MLB commissioner first postponed games – rather than canceling them – the alleged misrepresentation – on March 12, 2020. Id. ¶ 75. Therefore, according to Plaintiffs' allegations, it would be possible for Plaintiffs, all of whom purchased tickets before March 26, 2020, to rely on the alleged misrepresentation only if they purchased tickets after March 12, 2020. In order for the claim to be plausible, Plaintiffs must allege the date on which they purchased the tickets and that they relied on the alleged misrepresentation in doing so.

If Plaintiffs desire to amend their complaint as to the CLRA claim, they must adequately allege standing. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."). If no Plaintiff in fact bought tickets between March 12, 2020 and March 26, 2020, Plaintiffs do not have standing to bring the CLRA claim because their injury is not traceable to Defendants' alleged misrepresentation. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Affidavits submitted with this and related motions indicate that no Plaintiff who purchased a ticket directly from an MLB team did so within that period. See Bashuk Decl. ¶ 7 (Wong purchased Oakland Athletics tickets on October 15, 2019); Connor Decl. ¶ 3 (Wong purchased San Francisco Giants tickets on February 8, 2020); dkt. 77-4 ¶¶ 3, 5 (Anne Berger purchased tickets on November 13, 2019 and Jeremy Woolley purchased tickets on November 14, 2019); dkt. 77-8 ¶ 3 (Matthew Ajzenman began paying for his ticket package in 2019); dkt. 77-10 ¶ 3 & n.1 (Krystal Moyer purchased tickets on February 24, 2020). Plaintiffs may address this evidence if they choose to proceed with their CLRA claim.

Plaintiffs' first cause of action is DISMISSED with leave to amend.

2. UCL Claims (Second and Third Claims for Relief)

Next, the Bay Area Teams move to dismiss Plaintiffs' claims under the UCL. The UCL addresses business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007). Plaintiffs allege that Defendants engaged in unfair business practices, Corr. Am. Compl. ¶¶ 118-125, and unlawful business practices, id. ¶¶ 126-129.

The unlawful prong of the UCL prohibits "anything that can properly be called a business practice and that at the same time is forbidden by law." Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999) (quoting Rubin v. Green, 4 Cal. 4th 1187, 1200 (1993)). To prove an unlawful prong UCL claim, Plaintiffs must show

that Defendants violated another law. In re Adobe Sys., Inc. Priv. Litig., 66 F. Supp. 3d 1197, 1225 (N.D. Cal. 2014). Because Plaintiffs have failed to adequately allege the underlying violation of law – the violation of the CLRA, Corr. Am. Compl ¶ 127 – their UCL "unlawful" prong claim fails as well. See Johnson v. Ocwen Loan Servicing, LLC, No. EDCV 17-01373 JGB (SPx), 2017 WL 10581088, at *7 (C.D. Cal. Dec. 11, 2017) (because plaintiff's other claims fail, "thus so too does her UCL claim under the unlawful prong").

The UCL does not define the term "unfair," and "the proper definition of 'unfair' conduct against consumers 'is currently in flux' among California courts." Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1169 (9th Cir. 2012) (quoting Lozano, 504 F.3d 718 at 735). "Before Cel-Tech, courts held that 'unfair' conduct occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" Id. (quoting S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-887 (1999) (the South Bay test). In Cel-Tech, the California Supreme Court established a more concrete definition of unfair as:

> "conduct that 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." It further required that "any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition."

Id. at 1169-70 (quoting Cel-Tech, 20 Cal. 4th at 186-87). However, the Cel-Tech test applied to actions by competitors, not consumers. Id. at 1170. "[S]ome courts in California have extended the Cel-Tech definition to consumer actions, while others have applied the [South Bay test]." Id. In Lozano, the Ninth Circuit held that, "[i]n the absence of further clarification

by the California Supreme Court," courts can apply either the Cel-Tech or South Bay test. 504 F.3d at 736.

The Court follows the California appellate courts in applying the Cel-Tech test. In Gregory v. Albertson's, Inc., the California Court of Appeal noted that Cel-Tech "may signal a narrower interpretation of the prohibition of unfair acts or practices in *all* unfair competition actions and provides reason for caution in relying on the broad language in earlier decisions that the court found to be 'too amorphous.'" 104 Cal. App. 4th 845, 854 (2002) (emphasis added); see also Durell, 183 Cal. App. 4th at 1365-66 (rejecting the "vague test of unfairness" under South Bay and collecting cases applying Cel-Tech in consumer UCL actions).

Plaintiffs fail to meet the Cel-Tech test. In order for a claim to be "sufficiently 'tethered' to a legislative policy for the purposes of the unfair prong," there must be a "close nexus between the challenged act and the legislative policy." Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018) (citing Cel-Tech, 20 Cal. 4th at 187). Plaintiffs have not identified any legislative policy Defendants have violated.

Plaintiffs' second and third claims are DISMISSED with leave to amend.

3. Civil Conspiracy (Fourth Claim for Relief)

Under California law, "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11 (1994). In any event, Plaintiffs do not oppose dismissal of this claim. See Allen v. Dollar Tree Stores, Inc., 475 F. App'x 159, 159 (9th Cir. 2012) (affirming district court's dismissal of plaintiff's claims where plaintiff's "opposition to the motion to dismiss failed to respond to [the defendant's] argument"); see generally Opp'n.

Plaintiffs' fourth claim is DISMISSED without leave to amend.

4. Unjust Enrichment (Fifth Claim for Relief)

Like civil conspiracy, "unjust enrichment is not a cause of action" but "[r]ather . . . a general principle underlying various doctrines and remedies." Jogani v. Superior Court, 165 Cal. App. 4th 901, 911 (2008). Here too, plaintiffs do not substantively oppose dismissal. See generally Opp'n. Therefore, Plaintiffs' fifth claim is DISMISSED without leave to amend.

IV. CONCLUSION

The Bay Area Teams' motion to compel arbitration is GRANTED in part and DENIED in part. The Court GRANTS the motion to compel arbitration as to Wong's claims against the Oakland Athletics and ORDERS Wong to submit to arbitration pursuant to the terms of the arbitration provision, see 9 U.S.C. § 5, if he wishes to pursue his claims. Wong's claims against the Oakland Athletics are STAYED pending the resolution of the arbitration. See id. § 3. The parties are to file a joint status report every 120 days, with the first report due January 12, 2021. Each report must state on the cover page the date the next report is due. The parties must advise the Court within 30 days of issuance of the final arbitration decision.

The remaining Plaintiffs' claims against the Oakland Athletics are DISMISSED. For the same reasons stated here, the claims against all other Defendants – Remaining Defendants, as defined in the Order Granting Office of the Commissioner, *et al.*'s Motion to Dismiss, and the San Francisco Giants – are dismissed.[6] Plaintiffs' first, second, and third claims are DISMISSED with leave to amend as to all Defendants over which the Court has personal jurisdiction. Plaintiffs' fourth and fifth claims are DISMISSED without leave to amend.

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[6] "A District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related." Silverton v. Dep't of Treasury of U.S. of Am., 644 F.2d 1341, 1345 (9th Cir. 1981).

An amended complaint must be filed no later than November 2, 2020. Failure to file by that date will waive the right to do so. The Court does not grant leave to add new defendants or new claims. Leave to add new defendants or new claims must be sought by a properly noticed motion.

IT IS SO ORDERED.

Date: October 6, 2020

Dale S. Fischer
United States District Judge