UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PELANATITA OLOSONI, et al.,

Plaintiffs,

v.

HRB TAX GROUP, INC., et al.,

Defendants.

Case No. 19-cv-03610-SK

ORDER DENYING MOTION FOR STAY AND DENYING MOTION TO DISMISS

Regarding Docket Nos. 60, 68, 62, 69

On November 5, 2019, the Court issued an Order denying Defendants' motion to compel arbitration and their motion to stay the case pending arbitration. (Dkt. 51.) Defendants filed a notice of appeal of that Order to the Ninth Circuit on December 4, 2019. (Dkt. 58.) On December 5, 2019, Defendants moved to stay this case while the appeal is pending. (Dkt. 60.) Defendants subsequently filed a separate motion to dismiss Plaintiffs' First Amended Complaint. (Dkt. 62.) Plaintiffs oppose both motions. (Dkts. 68, 69.) The Court heard oral argument on both motions on February 10, 2020. (Dkt. 78.) Having considered the submissions of the parties, the record in the case, and the relevant legal authority, and having had the benefit of oral argument, the Court HEREBY DENIES Defendants' motion to stay and DENIES Defendants motion to dismiss, for the reasons set forth below.

BACKGROUND

In their First Amended Complaint ("FAC"), Plaintiffs allege that Defendants violated several California statutes by creating a "bait and switch" program to lure customers into paying for Defendants' services to file tax returns. (Dkt. 19.) This case arises out of an attempt by the Internal Revenue Service ("IRS") to encourage taxpayers to file their tax returns electronically. Rather than developing its own system, the IRS engaged with private, for-profit companies to

develop online tax services and make them available for free to certain classes of taxpayers.[1] (Dkt. 19 at ¶ 3.) The resulting program is commonly referred to as the "Free File" program. (*Id.* at ¶ 4.) Several companies formed the Free File Alliance, LLC and later Free File, Inc. ("FFI") to offer those online tax services, and Defendants are currently part of FFI. (*Id.* at ¶¶ 31, 32.) The IRS and FFI entered into agreements regarding the services, and the most recent version is the Eighth Memorandum of Understanding on Service Standards and Disputes Between the Internal Revenue Service and Free File, Incorporated ("MOU"). (Dkt. 19 at Ex. 2.) That MOU became effective October 31, 2018, and terminates on October 31, 2021. (*Id.*) The MOU provides specific guidelines for FFI members' processing services, including requirements related to number of taxpayers, security measures, continuity of service, and dispute resolution. (*Id.*) The MOU provides that FFI's members "must clearly list their free customer service options" on the "Free File Landing Page (or such page must have a clear and prominent link to such disclosures directly from this page)." (Dkt. 19 at Ex. 2, § 4.15.4.) However, other than that provision in Section 4.15.5, the MOU is largely silent on the specific manner in which FFI's members are required to present the Free File program on their websites. Section 4.4 of the MOU simply requires that the websites "be functionally adequate in permitting a taxpayer to complete taxpayer's return if the return is consistent with the Member's free offer" and states that the IRS will review member websites for "usability." (*Id.* § 4.4.) The MOU also contains a provision that calls for an annual review of the Free File program and provides the IRS with the unilateral ability to propose additional standards. (*Id.*)

Plaintiffs allege that Defendants widely advertised the availability of the Free File program but then used a variety of methods to divert potential customers into Defendants' own programs, which charged a fee. (Dkt. 19 at ¶¶ 41-81.) The manner by which Defendants allegedly diverted taxpayers into Defendants' system, which required payment, is based on the way in which a taxpayer viewed Defendants' website and then interacted with the website. (*Id.* at ¶¶ 53-57.) For example, Plaintiffs allege that "Defendants purposely made it difficult to find" the free part of the

[1] Generally speaking, the Free File program is for taxpayers with adjusted gross income of $66,000 or less. (Dkt. 19 ¶ 3.)

system "by placing a 'noindex' tag on the webpage for the free part of the system, with the result that the search engines did not go to that page but instead to Defendants' system which required payment of fees." (*Id.* at ¶ 46.) Defendants also allegedly created a webpage that "is designed to capture taxpayers seeking free e-filing services" and then essentially hid the free part of the system. (*Id.* at ¶¶ 53-59.) Plaintiffs refer to Defendants' actions as a classic "bait and switch" maneuver. (*Id.* at ¶ 5.) Plaintiffs specifically allege that individuals were lured by an offer falsely labeled "free" into entering their information into Defendants' website, only to be informed at the end of the laborious information-entry process that they "needed" to pay for Defendants' services to complete their taxes, without ever being informed of the availability of the actual free filing program that they may have qualified for. (*Id.* at ¶¶ 73-78.)

Plaintiffs bring statutory claims for violation of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* ("CLRA"); violation of the False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.* ("FAL"); and violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"). (Dkt. 19.) Plaintiffs propose to represent the following class of plaintiffs:

> All persons who, between May 17, 2015 and the present, paid to file one or more federal tax returns through Defendants' internet-based filing system even though they were eligible to file those tax returns for free through Defendants' True Free File Service,[2] and who resided in and were citizens of California at the time of the payments[.]

(Dkt. 19 at ¶ 110.) Plaintiffs seek a public injunction to prevent Defendants from engaging in fraudulent business practices and false advertising, compensatory damages and/or restitution for taxpayers who paid Defendants, and attorneys' fees. (*Id.* at pages 43-46.) As to each claim, "Plaintiffs, on behalf of themselves, the Classes, and the general public" request the entry of "a public injunction temporarily and permanently enjoining Defendants from continuing the unlawful, deceptive, fraudulent, and unfair business practices alleged in this Complaint" related to

[2] Plaintiffs refer to the actual system for filing tax returns without a fee as the "True Free File" system and Defendants' system with a fee as the "Fake Free File" system. (Dkt. 19, ¶¶ 53-59.)

their marketing and offering of allegedly "free" tax preparation services. (*Id.* at page 43.)

In its Order denying Defendants' motion to compel arbitration and stay the case, the Court applied well-settled precedent from the Ninth Circuit and California Supreme Court to conclude that Plaintiffs' claims for public injunctive relief cannot be compelled to arbitration under the CLRA, FAL, and UCL. *See, e.g., Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 822 (9th Cir. 2019); *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 956 (2017).

ANALYSIS

The Court turns first to Defendants' motion to stay pending appeal and second to Defendants' motion to dismiss.

A. Motion to Stay Pending Appeal.

In asking that the Court stay these proceedings pending their appeal, Defendants argue that their appeal presents serious legal questions, that they will suffer irreparable harm absent a stay in comparison to Plaintiffs, who would not be injured by a stay, and that imposing a stay would conserve judicial resources. (Dkt. 60.) Plaintiffs counter that Defendants have not set out a strong case on the merits of their appeal, that Plaintiffs would be irreparably harmed by a stay, in comparison to Defendants would not be harmed by a denial of a stay, and that a stay works against the public interest. (Dkt. 68.)

1. Legal Standards.

Whether to issue a stay pending appeal is "an exercise of judicial discretion . . . to be guided by sound legal principles." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Courts consider the following four factors in determining whether to issue a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (2011) (quoting *Nken*, 556 U.S. at 434).

The first two factors are the most important. *Id.* at 964 (citing *Nken*, 556 U.S. at 434). The party seeking the stay "must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips

sharply in [the party's] favor." *Id.* at 964. As the Ninth Circuit explained, "[t]hese standards represent the outer extremes of a continuum." *Id.* Under this approach, "the elements . . . are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id.* However, if the movant fails to demonstrate the substantial merit of its appeal, a stay may be rejected without addressing the other factors. *See, e.g.*, *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 558 (9th Cir. 1996). "Serious questions are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1952). Additionally, although "[s]erious questions need not promise a certainty of success, nor even present a probability of success, [they] must involve a 'fair chance of success on the merits.'" *Id.* (quoting *National Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)).

2. Discussion.

Defendants have not shown that their appeal is likely to succeed on the merits or that their appeal raises serious legal questions. Essentially, Defendants' argument is that the Ninth Circuit wrongly decided the governing precedent on point, *Blair*, 928 F.3d 819. Defendants make several tortured arguments as to why their reading of *Blair* raises "serious legal questions" for appeal, essentially rehashing the arguments they made in bringing their original motion to compel. (Dkt. 60.) The Court has already explained why those arguments are incorrect. (Dkt. 51.) "Defendants' rehash of arguments the Court previously considered and rejected at length fails to raise a serious legal question; otherwise, every time a party disagreed with a court's ruling, a serious question would exist." *In re Pac. Fertility Ctr. Litig.*, 2019 WL 2635539, at *3 (N.D. Cal. Jun. 27, 2019).

In particular, Defendants again attempt to distinguish the public injunction at issue here as one that does not "benefit the general public" as required in *McGill*, because the injunction applies only to those consumers who actually engage with Defendants' website. 393 P.3d at 94. As the Court previously discussed, this case involves Defendants' offering of a potentially misleading advertisement on the internet, to the general public, available for anyone to review. As the Court previously concluded, this allegation of fraud in a broad, publicly accessible offering is exactly the

type of conduct that California law is designed to prevent and that arbitration cannot shield from review. As was true before Defendants filed this motion to stay, this case is almost identical to *Blair*, where the plaintiffs were a set of consumers affected by rent-to-own contracts allegedly structured in violation of state law. 928 F.3d at 822-23. As here, not every member of the public in *Blair* had actually availed herself of the contract at issue. *Id.* Applying *McGill*, the *Blair* court held that plaintiffs, as a subset of the consuming public affected by the allegedly illegal conduct, were entitled to seek public injunctive relief under California law, including the CLRA and UCL. *Id.* at 824. As was true before Defendants filed this motion to stay, the Court remains bound to follow governing Ninth Circuit precedent.

Defendants similarly reiterate their argument that the FAA preempts *McGill*. Again, the Ninth Circuit in *Blair* explicitly rejected that argument and held, after a lengthy and thorough discussion, that "the FAA does not preempt the *McGill* rule." 928 F.3d at 831. Defendants have not presented any novel theory that indicates the existence of a substantial legal question in this area of law that would merit a stay pending appeal.

Defendants argue that the Ninth Circuit is wrong about whether California law can prevent cases involving public injunctive relief from being compelled to arbitration. (Dkt. 60.) Defendants hope that either the Ninth Circuit will grant rehearing in one of two cases related to *Blair* or that the Supreme Court will take up the issues raised here in the very near future. (*Id.*) Either of those things may or may not happen. Meanwhile, the Court's Order on the motion to compel arbitration applied the law as it is, not as Defendants wish it to be. Defendants have not shown that they have a substantial likelihood of success on the merits or that their appeal of that Order raises a serious legal question, and thus the Court need not address the remaining *Nken* factors. *Mount Graham Coalition*, 89 F.3d at 558.

Defendants' motion for a stay pending appeal is DENIED.

B. Motion to Dismiss.

Defendants next move to dismiss Plaintiffs' FAC pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. 62.) Defendants argue that Plaintiffs lack standing to sue under California's consumer protection laws because they have not sufficiently alleged reliance or injury

in fact. Defendants also claim that Plaintiffs lack standing to pursue injunctive relief because they are now aware of any alleged trickery by Defendants and are therefore unlikely to be tricked in the future. (*Id.*) Defendants further contend that Plaintiffs have failed to plead their causes of action with sufficient specificity under Federal Rule of Civil Procedure 9(b), and that they have insufficiently stated their claims under California law. (*Id.*) Plaintiffs counter that their allegations in the FAC clearly demonstrate standing and are pled with the required specificity. (Dkt. 69.)

1. Legal Standards.

i. Federal Rule of Civil Procedure 12(b)(6).

Defendants bring their motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Rule 12(b)(6) authorizes a motion to dismiss where the pleadings fail to state a claim upon which relief can be granted. When considering a motion to dismiss under Rule 12(b)(6), the Court construes the allegations in the complaint in the light most favorable to the non-moving party and takes as true all material allegations in the complaint. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). Even under the liberal pleading standard of Rule 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Rather, a plaintiff must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

"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. . . . When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g.*, *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Lieche, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

ii. Constitutional and Statutory Standing.

The California electorate "has materially curtailed the universe of those who may enforce" the provisions of the UCL and the FAL. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320-21 (2011). Both the UCL and the FAL require plaintiffs to demonstrate injury in fact and show that they have suffered economic harm as the result of the unfair business practices they allege. *Id.*; Cal. Bus. & Prof. Code § 17204 (action may be brought "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition); Cal. Bus. & Prof. Code § 17536 (penalty provision of FAL); *Koh v. S.C. Johnson & Son, Inc.*, 2010 WL 94265, at *2 (N.D. Cal. Jan. 6, 2010). The standing requirements of the CLRA are "essentially identical to those of the UCL and the FAL" and standing may be considered under all three statutes together. *See Veera v. Banana Republic, LLC*, 6 Cal. App. 5th 907, 916 (2016). "Standing under the UCL requires proof of reliance even if reliance is not an express substantive element of the underlying statute when the claim essentially sounds in misrepresentation." *Swearingen v. Late July Snacks LLC*, 2017 WL 4641896, at *2 (N.D. Cal. Oct. 16, 2017). "Under California law, the economic injury of paying a premium for a falsely advertised product is sufficient harm to maintain a cause of action." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 966 (9th Cir. 2018).

A party must demonstrate constitutional standing to pursue each form of relief requested. *Davidson*, 889 F.3d at 967. For the prospective remedy of injunctive relief, a plaintiff must show the threat of "certainly impending," "not conjectural" injury. *Id.* Named plaintiffs in class action suits must themselves be entitled to seek injunctive relief in order to represent a class seeking that relief. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). A named plaintiff's inability to rely on a company's product representations in the future based on past misrepresentations has been held "sufficient to confer standing to seek injunctive relief." *Davidson*, 889 F.3d at 967.

iii. Federal Rule of Civil Procedure 9(b).

"Rule 9(b)'s heightened pleading standards apply to all UCL, FAL, and CLRA claims that are grounded in fraud." *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1025 (N.D. Cal. 2012). Where a plaintiff alleges claims grounded in fraud, Federal Rule of Civil Procedure 9(b) requires

the plaintiff to state with particularity the circumstances constituting fraud, including the "who, what, when, where, and how" of the charged misconduct. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-49 (9th Cir. 1994). However, Rule 9(b) particularity requirements must be read in harmony with Federal Rule of Civil Procedure 8's requirement of a "short and plain" statement of the claim. Thus, the particularity requirement is satisfied if the complaint "identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *see also Vess*, 317 F.3d at 1106 ("Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge and not just deny that they have done anything wrong.") (internal quotation marks and citations omitted). The plaintiff must include statements regarding the time, place, and nature of the alleged fraudulent activities – "mere conclusory allegations of fraud are insufficient." *Moore*, 885 F.2d at 540; *see also*, *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (*per curiam*). Rule 9(b) does not extend to knowledge and intent. Assertions of "intent, knowledge, and other conditions of a person's mind" need not be stated with particularity, and "may be alleged generally." Fed. R. Civ. P. 9(b).

2. Discussion.

i. Statutory Standing.

In support of their motion to dismiss, Defendants first argue that Plaintiffs lack standing under California's consumer protection laws because Plaintiffs have not sufficiently alleged reliance on Defendants' purported misrepresentations and because they have not suffered a cognizable injury based on Defendants' practices. (Dkt. 62.) The Court finds that Plaintiffs have demonstrated standing to sue under the UCL, FAL, and CLRA.

As outlined above, a party must show injury in fact in the form of economic injury as a result of the unfair business practices alleged to have standing to sue under the UCL, FAL, and CLRA. *Kwikset*, 51 Cal. 4th at 320-21; Cal. Bus. & Prof. Code §§ 17204, 17536. The Court considers standing together under all three consumer protection statutes. *Veera*, 6 Cal. App. 5th at

916. Because the claims at issue essentially sound in misrepresentation, Plaintiffs must demonstrate their reliance on Defendants' misrepresentations to have standing. *Swearingen*, 2017 WL 4641896, at *2.

Plaintiffs have adequately alleged that they relied on Defendants' alleged misrepresentations. The FAC states that Defendants misleadingly advertised their services on search engines and landing pages, making it simultaneously likely that consumers would be drawn in by the word "free" but then would be unlikely to find Defendants' actual free filing offer and instead lured into purchasing their services for fee. (Dkt. 19 at ¶¶ 67-81.) Plaintiff Olosoni alleges that she was lured into paying for Defendant's services through her reliance on Defendants' advertising of free filing, coupled with the structure of their website. (*Id.* at ¶¶ 82-90) ("Plaintiff Olosoni spent approximately 45 minutes entering her sensitive personal and financial information, in reliance" on belief her filing would be free, only to be told erroneously at the end of the process that she did not qualify for free filing would be charged fees, which she paid in reliance on Defendants' misrepresentations). Similarly, Plaintiff Snarr alleges that he was lured by "free" language describing Defendants' services that he accessed based on a Google search. (*Id.* at ¶¶ 92-93.) Once Plaintiff Snarr arrived at Defendants' website, he "spent multiple hours entering his tax information" only to be told at the end of the process that he did not qualify for Defendants' "free" offer, without simultaneously being told that he would separately be eligible for filing for free using Defendants' true free filing program. (*Id.* at ¶¶ 91-94.) Plaintiff Snarr paid the fee based on Defendants' alleged misrepresentations. (*Id.* at ¶¶ 95-97.)

In sum, Plaintiffs specifically allege that they were lured into Defendants' website under the pretense of a fake free filing offer. They relied on the representation that services were free in filling out the online form with their tax information. Then, at the end of the transaction, Plaintiffs allege that Defendants suddenly required a fee for service, without explaining whether or not Plaintiffs were in fact eligible for free filing through another part of Defendants' website. Plaintiffs then paid the fee for service in reliance on Defendants' statements, despite the fact that they were actually eligible to file for free through another part of Defendants' website.

The Court considers this almost exactly analogous to the facts in *Veera*, where a set of

consumers alleged that advertisements of a 40 percent discount posted in Banana Republic store windows were misleading because they did not disclose that the advertised discount applied only to certain items. 6 Cal. App. 5th at 910. The *Veera* plaintiffs entered the store (just as Plaintiffs here clicked on the free file offer on Defendants' website), they selected the items they wished to purchase assuming that the advertised 40 percent discount applied (just as Plaintiffs here filled in their tax information assuming filing would be free), and then at the point of sale the consumers were informed that the 40 percent discount would not apply to their items, but they purchased them anyway for a variety of reasons, including time already invested in the transaction, confusion, and embarrassment (just as the Plaintiffs here were surprised to discover a fee for their filings at the conclusion of the process of filing out their information). *See Veera*, 6 Cal. App. 5th at 919-22.

The court in *Veera* concluded that "the question of reliance and causation does not rest as a matter of law on whether plaintiffs knew the actual price of the items they purchased at the moment money was exchanged." 6 Cal. App. 5th at 920. Rather, as long as "reliance on the misleading advertising was a substantial factor in causing plaintiff's decision to buy, the requirements of reliance and causation are met." *Id.* Here, Plaintiffs have shown that they relied on Defendants' advertisement of free filing in deciding to fill out their online tax form. Though they knew they would be paying for services at the point of sale, Plaintiffs have adequately shown that their decision to purchase was influenced by Defendants' advertising of free filing, which they allege was misleading. Plaintiff have therefore shown the reliance necessary for standing under California's consumer protection statutes.

Plaintiffs have similarly demonstrated that they were injured as a result of their reliance. For example, the FAC notes that both Plaintiffs Olosoni and Snarr paid to file their taxes using Defendants' website when they were in fact both eligible for free filing. (Dkt. 19 at ¶¶ 88, 95.) Both Plaintiffs Olosoni and Snarr allege that, but for Defendants' misrepresentations, they would not have paid for services, but rather would have taken advantage of the free filing for which they were eligible. (*Id.* at ¶¶ 89, 96.) The Ninth Circuit has clearly held that "[u]nder California law, the economic injury of paying a premium for a falsely advertised product is sufficient harm to

maintain a cause of action." *Davidson*, 889 F.3d at 966. In *Davidson*, the plaintiff purchased bathroom wipes that she alleged were falsely labeled "flushable." *Id.* at 961. She paid more for the product than similar products cost that were not labeled "flushable," only to discover later that the wipes were not in fact suitable for disposal down a toilet, as the word "flushable" commonly implies. *Id.* at 961-62. The *Davidson* court concluded that the plaintiff had standing to maintain a cause of action under California consumer laws because she had paid a premium for a product based on allegedly false advertising. *Id.* at 965. She was economically harmed because she paid money she would not otherwise have paid in direct reliance on the misrepresentation. *Id.* at 965-66.

Here, Plaintiffs clearly allege that they paid a premium for Defendants' product based on misrepresentations by Defendants about their eligibility to file for free and the deceptive nature of Defendants' fake "free" offer. After paying for Defendants' products, Plaintiffs later learned that they could have filed for free had they not relied on Defendants' representations. They were economically harmed in the amount that they paid for Defendants' fee services. In attempt to refute Plaintiffs' assertion that they were economically harmed, Defendants cite a line of cases finding no economic injury under the California consumer statutes where Plaintiffs received the "benefit of the bargain" in the transactions at issue. *Koh v. S.C. Johnson & Son, Inc.*, 2010 WL 94265, at *2 (N.D. Cal. Jan. 6, 2010); *Warner v. Tinder Inc.*, 105 F. Supp. 3d 1083, 1094-95 (C.D. Cal. 2015); *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 854-55 (2008); *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1592 (2008). These cases represent merely persuasive authority, and all predate the Ninth Circuit's opinion in *Davidson* and the California Court of Appeals' decision in *Veera*, discussed above, both of which the Court finds more analogous to the case at bar. Further, the Ninth Circuit has made quite clear that "the 'benefit of the bargain' rationale was explicitly rejected in *Kwikset*." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013) (citing Kwikset, 120 Cal. 3d at 741). As the *Hinojos* court summarized, "when a consumer purchases merchandise on the basis of false price information, and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL and FAL because he has suffered an economic injury." 718 F.3d at 1107.

The Court therefore concludes that Plaintiffs have demonstrated the economic injury required for California statutory standing.

ii. Standing to Seek Injunctive Relief.

Defendants next argue that Plaintiffs' claim for injunctive relief should be dismissed because Plaintiffs have not shown that they are likely to be deceived again in the future. (Dkt. 62.) Plaintiffs have established standing to seek injunctive relief. As set out above, a plaintiff must demonstrate constitutional standing to pursue each form of relief requested. *Davidson*, 889 F.3d at 967. For the prospective remedy of injunctive relief, a plaintiff must show the threat of "certainly impending," "not conjectural" injury. *Id.* Named plaintiffs in class action suits must themselves be entitled to seek injunctive relief in order to represent a class seeking that relief. *Hodgers-Durgin*, 199 F.3d at 1045. A named plaintiff's inability to rely on a company's product representations in the future based on past misrepresentations has been held "sufficient to confer standing to seek injunctive relief." *Davidson*, 889 F.3d at 967.

Here, Plaintiffs clearly allege that they intend to seek out free filing services in the future and that they will likely continue to be eligible for those services, as required by the IRS. (Dkt. 19 90, 97.) In *Davidson*, the Ninth Circuit "resolved [the] district court split" on whether plaintiffs have standing to seek injunctive relief based on a past misleading representation "in favor of plaintiffs seeking injunctive relief." 889 F.3d at 969. The Court found that there was an imminent, non-hypothetical risk of future harm to "a previously deceived consumer […] even though the consumer now knows or suspects that the advertising was false at the time of the original purchase." *Id.* The court reasoned that "[k]knowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." *Id.* Such consumers have suffered the informational injury of no longer being able to trust whether a company's representations are true in the future. *Id.* at 970-72. Like the plaintiff in *Davidson*, Plaintiffs here allege that they have been deceived by Defendants' misrepresentations about their products. Plaintiffs also allege that they will continue to seek out similar products in the future; however, in making their decisions, they will be unable to discern whether Defendants' future representations about their products are true, based on Defendants' past conduct. Plaintiffs

therefore have standing to seek prospective injunctive relief based on their allegations of past misrepresentation by Defendants.

iii. Particularity.

Plaintiffs have pled their California statutory claims with the particularity required by Federal Rule of Civil Procedure 9(b). As outlined above, "Rule 9(b)'s heightened pleading standards apply to all UCL, FAL, and CLRA claims that are grounded in fraud." *Cullen*, 880 F. Supp. 2d at 1025. Rule 9(b) requires the Plaintiff to state specifically the "who, what, when, where, and how" of the charged misconduct. *Vess*, 317 F.3d at 1106. In harmony with Federal Rule of Civil Procedure 8's requirement of a "short and plain" statement of the claim, the goal of the particularity requirement is to provide sufficient information surrounding "the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore*, 885 F.2d at 540 (9th Cir. 1989).

In ensuring that Rule 9(b) is satisfied in California consumer protection statute cases, "[t]he focus is on whether enough facts support a reasonable consumer's reaction to an allegedly deceptive advertisement – not whether enough facts can definitively prove fraud at the pleading stage. […] Such an absurd requirement would leave every litigant outside the courthouse gate and the UCL, FAL, and CLRA unused and useless." *Chester v. TJX Cos., Inc.*, 2016 WL 4414768, at *12-13 (C.D. Cal. Aug. 18, 2016). Where a defendant's representations on its website are at issue in a California consumer protection statute case, particularity does not require exact replication of the webpages at issue or precise evidence of the date of access. *Ehret v. Uber Techs.*, 68 F. Supp. 3d 1121, 1129 (N.D. Cal. 2014).

Plaintiffs have pled their claims with particularity. Defendants argue that Plaintiffs' allegations are "devoid of necessary specifics." (Dkt. 62.) The Court finds this argument disingenuous. The FAC gives Defendants ample notice of the nature of Plaintiffs' misrepresentation claims against them. Defendants do not need the Plaintiffs to be able to reconstruct the exact webpages they viewed in order to put them on notice that fraudulent misrepresentations on their website, particularly relating to the use of the word "free," representations about Plaintiffs' eligibility for free filing, and two competing systems for

funneling users toward tax filing methods, are at issue. Requiring Plaintiffs "to allege the precise web pages viewed and the precise dates" they viewed them "would be unrealistic and needlessly impede access to an important remedial statute." *Ehret*, 68 F. Supp. 3d at 1129. In *Ehret*, the Plaintiff described a deceptive advertisement scheme involving "Hassle-free Payment" on the Uber app. *Id.* The plaintiff described the structure of the app and how she relied upon a misrepresentation about price inherent in that structure to make a purchasing decision she otherwise would not have made. *Id.* (alleging payment 20 percent over the metered fair based on Uber's misrepresentation in its app that higher price was a gratuity). The *Ehret* court found the plaintiff's allegations "sufficiently specific." *Id.*

As was true in *Ehret*, the FAC does include particularized descriptions of Defendants' website and advertising practices in general, as well as Plaintiffs' specific experiences of Defendants' website and advertising, along with screenshots of sample pages from those websites. (Dkt. 19 at ¶¶ 41-97.) The Court finds that the FAC's allegations are specific enough to give notice of the particular misconduct alleged in order to allow Defendants to defend their case. As was true in *Hinojos*, the FAC "specifically and plausibly alleges" that Defendants have engaged in misrepresentation, including of "material information" necessary for consumers "when making purchasing decisions." 718 F.3d at 1107. Plaintiffs have specifically alleged that Defendants' representations were misleading, as well as when, where, and how they were misleading. Contrary to Defendants' protestations, Plaintiffs need not prove their misrepresentation or fraud by omission theories definitively to proceed. Plaintiffs have given sufficient notice of their theories and supported them with a plausible factual basis, and Defendants are sufficiently on notice based on those allegations.

Finally, Defendants argue that Plaintiffs have improperly lumped them together in making their allegations. However, a properly pled "complaint need not distinguish between defendants that had the exact same role in a fraud." *U.S. ex rel. Anita Silingo v. WellPoint, Inc.*, 904 F.3d 667, 677 (9th Cir. 2018). Here, Plaintiffs allege that Defendants are closely related corporate entities. As such, their particular division of corporate responsibilities is uniquely located within Defendants' control. It was therefore appropriate for the FAC to make collective allegations

against Defendants. *See In re Pac. Fertility Ctr. Litig.*, 2019 WL 3753456, at *6 (N.D. Cal. Aug. 8, 2019) (pleading claims "as to both defendants equally" appropriate given "parent and subsidiary relationship" of defendants and plaintiffs' "limited knowledge of the operation of this relationship.")

Plaintiffs have satisfied Federal Rule of Civil Procedure 9(b).

iv. Plausibility of Statutory Claims.

Plaintiffs have stated viable claims under the UCL, FAL, and CLRA. Defendants next argue that Plaintiffs have failed to state a claim under the UCL, FAL, and CLRA because Plaintiffs have not shown that Defendants had a duty to disclose their eligibility for free filing or that Defendants practices were unfair or unlawful within the meaning of the UCL. (Dkt. 62.)

Claims brought under the UCL, FAL, and CLRA "are governed by the 'reasonable consumer' test." *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Thus, to survive a motion to dismiss, plaintiffs must plausibly allege that members of the public are likely to be deceived by a defendant's conduct. *Id.*

As discussed above, Plaintiffs have plausibly alleged affirmative misrepresentations by Defendants. Defendants then argue that Plaintiffs have not adequately set out facts in support of their fraudulent omission theory under the standard set out in *Hall v. Seaworld Ent., Inc.*, 747 Fed. App'x 449 (9th Cir. 2018) and *Hodson v. Mars, Inc.*, 891 F.3d 857 (9th Cir. 2018). In those cases, the Ninth Circuit clarified that, in order to state a California consumer statutory claim under a fraudulent omission theory, a plaintiff must plead a "material omission" related either to safety or to the "central functionality of a product or service along with evidence that the defendant (1) is the plaintiff's fiduciary, (2) has exclusive knowledge of material facts not known or reasonably accessible to plaintiff, (3) actively conceals a material fact from plaintiff, or (4) makes partial misrepresentations that are misleading because the omitted fact has not been disclosed. 747 Fed. App'x at 451; 891 F.3d at 863. Here, Plaintiff alleges that Defendants made a material omission when they failed to inform customers who had clicked on their services labeled "free," only to be led to a fee for service page, that those same customers were also eligible for a truly free service that was also available through another section of Defendants' own website. (Dkt. 19 ¶¶ 82-97.)

This omission goes directly to the central function of Defendants' tax preparation products. Indeed, though not fiduciaries of Plaintiffs, Defendants hold themselves out to consumers of their products as tax preparation experts. The Court finds that a reasonable consumer, having clicked on a part of Defendants website labeled free, only to be told they "needed" to pay for services or were ineligible for the "free" service after filling in their information, would not reach the independent conclusion that they were in fact still eligible for IRS free filing and that that program could be found using a separate part of Defendants' website. Plaintiffs' allegations about this scheme plausibly allege that Defendant actively concealed material facts from Plaintiffs regarding their true eligibility for free filing and partially misrepresented the nature of the service they were truly providing because the fact of Plaintiffs' eligibility to file for free had not been disclosed. Plaintiffs have sufficiently alleged that, by not disclosing all of the tax filing options available through their website in the same location on the website, and by failing to draw a distinction between the "free" offer Plaintiffs' clicked on and the IRS free file offer, Defendants made material omission that would have deceived a reasonable member of the public. Further, the reasonable consumer inquiry is ordinarily a question of fact unsuited for resolution at the motion to dismiss stage. 552 F.3d at 938-39. The Court finds that Plaintiffs have stated a plausible claim for relief based on a fraudulent omission theory.

Finally, Defendants contend that Plaintiffs have not stated a viable claim under the "unfair" practice prong of the UCL. The test for whether a business practice is unfair differs based on whether the plaintiff alleging unfair practices is a competitor of the defendant or a consumer. *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 253 (2010). When the plaintiff is a consumer, three lines of California cases suggest differing tests for unfair conduct. *Id.* at 256-57. One line of cases has looked to whether the plaintiff has alleged that defendant's practices violate a statutory, constitutional, or regulatory provision. *Id.* at 257. A second line of cases balances considerations of whether a challenged practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, the utility of defendants' conduct, and the gravity of the harm to plaintiffs. *Id.* A third line of cases "draws on the definition of 'unfair' in section 5 of the Federal Trade Commission Act (15 U.S.C. § 45, subd. (n)), and requires that '(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.'" *Id.* (citations omitted).

Given this lack of clarity in California law, "the Ninth Circuit has instructed that the court must 'balanc[e] the harm to the consumer against the utility of the defendant's practice.'" *Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 852–53 (N.D. Cal. 2018) (citing *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735–36 (9th Cir. 2007)). Here, taking Plaintiffs' allegations as true as the Court must on a motion to dismiss, it is far from obvious as a matter of law that Defendants' practices are not unfair. Under any of the three tests articulated in *Drum*, Plaintiffs have sufficiently pled facts to survive Defendants' motion to dismiss. As discussed above, Plaintiffs have plausibly alleged violations of the FAL and CLRA alongside the UCL. In so doing, Plaintiffs have adduced substantial evidence of unscrupulous and deceptive conduct toward consumers. And Plaintiffs have demonstrated a substantial injury to themselves, not outweighed by any benefit, that they could not reasonably have avoided in trusting Defendants' representations and using their services. The Court finds that these harms to consumers outweigh any utility in Defendants' conduct. Plaintiffs have therefore successfully stated a claim under the "unfair" prong of the UCL.

As to Defendants' final argument that Plaintiffs do not satisfy the "unlawful" prong of the UCL, because Plaintiffs have adequately pled claims under the CLRA and FAL, they have concomitantly sufficiently alleged a claim under the UCL "unlawful" prong. *See Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 852 (N.D. Cal. 2018) (violations of CLRA and FAL may serve as predicate violations under UCL unlawful prong).

Plaintiffs have pleaded viable claims for relief under the California consumer protection statutes.

For the reasons set forth above, Defendants' motion to dismiss is DENIED in its entirety.

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CONCLUSION

For the reasons set forth above, the Court DENIES Defendants' motion to stay in its entirety and DENIES Defendants motion to dismiss in its entirety.

IT IS SO ORDERED.

Dated: March 24, 2020

SALLIE KIM
United States Magistrate Judge