RICHARD R. PATCH (State Bar No. 88049)
CLIFFORD E. YIN (State Bar No. 173159)
CHRISTOPHER J. WIENER (State Bar No. 280476)
LAURA R. SEEGAL (State Bar No. 307344)
COBLENTZ PATCH DUFFY & BASS LLP
One Montgomery Street, Suite 3000
San Francisco, California 94104-5500
Telephone: 415.391.4800
Facsimile: 415.989.1663
Email: ef-rrp@cpdb.com
ef-cey@cpdb.com
ef-cjw@cpdb.com
ef-lrs@cpdb.com

Attorneys for Defendant
DRAFTKINGS INC.

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 . FAX 415.989.1663

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRANDON MOORE, ZHICHENG ZHEN, and JONATHAN SMITH, individually and on behalf of others similarly situated,

Plaintiffs,

v.

DRAFTKINGS, INC., AND DOES 1-20,

Defendants.

Case No. 3:25-cv-04618-CRB

DEFENDANT DRAFTKINGS INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Date: October 31, 2025
Time: 10:00 a.m.

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on October 31, 2025, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 6, 17th Floor, in the courtroom of the Honorable Charles R. Breyer, located in the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, Defendant DRAFTKINGS INC. ("DraftKings") will and hereby does move this Court to dismiss the Complaint ("Compl.") of Plaintiffs ZHICHENG ZHEN and JONATHAN SMITH (collectively, "Plaintiffs")[1] with prejudice under Federal Rule of Civil Procedure 12(b)(6).

DraftKings moves to dismiss on the grounds that:

(1) Plaintiffs fail to state claims under either the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §17200 *et seq.*, or the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §1750 *et seq*, because Plaintiffs do not plausibly allege that they have suffered an injury and thus do not have standing under either statute. Further, Plaintiffs do not plausibly allege that they will suffer an imminent injury and lack standing to seek injunctive relief;

(2) Plaintiffs' claims involving monetary relief are barred on public policy grounds. Plaintiffs seek to recover alleged gambling-related losses, but California has a long-standing policy against judicial resolution of such claims;

(3) This Court lacks equitable jurisdiction to hear Plaintiffs' claim for equitable monetary relief, as Plaintiffs have an adequate legal remedy, which they have chosen not to pursue;

(4) Plaintiffs fail to state claims under the CLRA and UCL because Plaintiffs do not allege a "good" or "service" within the ambit of the CLRA, and their fraud-based allegations underlying their CLRA and UCL claims fall short of the heightened pleading standard required under Federal Rule of Civil Procedure 9(b) ("Rule 9(b)");

(5) Plaintiff Smith's claims are time-barred, and he has not plausibly pled a basis for this Court to toll the statutory limitation periods; and

(6) Plaintiffs' punitive damages-related allegations should be dismissed or stricken, given punitive damages are unavailable for their claims, and Plaintiffs do not seek to recover such

[1] Plaintiff Moore voluntarily dismissed his individual claims on August 1, 2025. ECF No. 32.

damages in any event.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, and the Request for Judicial Notice filed concurrently herewith, all of the pleadings, files, and records in this proceeding, all other matters of which the Court may take judicial notice, and any argument or evidence that may be presented to or considered by the Court prior to its ruling.

STATEMENT OF ISSUES TO BE DECIDED PURSUANT TO CIVIL LOCAL RULE 7-4(a)(3)

Whether Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(6), because:

1. Plaintiffs fail to state a claim under either the UCL or CLRA, as they lack standing, fail to allege a "good or service" within the meaning of the CLRA, and do not plead fraud-based allegations with the requisite particularity;
2. Plaintiffs' claims are barred by California's public policy against judicial enforcement of alleged gambling-related claims;
3. The Court lacks equitable jurisdiction to consider Plaintiffs' requests for equitable relief;
4. Plaintiff Smith's claims are time-barred; and
5. Plaintiffs do not and cannot state a claim for punitive damages.

DATED: August 11, 2025

COBLENTZ PATCH DUFFY & BASS LLP

By: */s/ Richard R. Patch*
RICHARD R. PATCH
Attorneys for Defendant
DRAFTKINGS INC.

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

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415.391.4800 · FAX 415.989.1663

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ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

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415.391.4800 · FAX 415.989.1663

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ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

INTRODUCTION AND SUMMARY OF ARGUMENT

Two DraftKings customers—one of whom opened his account over six years ago—have sued DraftKings to recover, among other things, entry fees for Daily Fantasy Sports ("DFS") contests *that they admit they lost*. They do not allege they should have won those DFS contests, nor do they claim there was anything improper about how the DFS contests were conducted. Instead, they base their two claims—one under the "unlawful" and "unfair" prongs of California's Unfair Competition Law ("UCL") and one under the Consumer Legal Remedies Act ("CLRA")—on the fundamentally flawed proposition that DraftKings' DFS contests constitute unlawful gambling under California law, even though DraftKings has operated DFS contests openly, honestly, and permissibly in California since 2012.

While DraftKings flatly denies that assertion, that issue need not be resolved here. Plaintiffs' own allegations reveal five independent and dispositive grounds for dismissal.

First, Plaintiffs lack standing under both the UCL and the CLRA because they fail to allege a cognizable injury. They admit to receiving the benefit of their bargain—entry into DFS contests—and thus cannot establish economic harm. *See Hall v Time Inc.,* 158 Cal. App. 4th 847, 856 (2008); *Johnson v. Mitsubishi Digit. Elecs. Am. Inc.,* 365 F. App'x 830, 832 (9th Cir. 2010); *Mai v. Supercell Oy*, 648 F. Supp. 3d 1130 (N.D. Cal. 2023), *vacated on other grounds,* No. 23-15144, 2024 WL 2077500 (9th Cir. May 9, 2024). Nor can they seek injunctive relief, having conceded that they no longer participate in such DFS contests and do not intend to do so in the future, based on their alleged belief that DFS supposedly constitutes illegal gambling. *Davidson v. Kimberly-Clark Corp*., 889 F.3d 956, 970 (9th Cir. 2018). Their allegation that DraftKings could somehow "trick" them into changing their belief is unfounded and does not warrant injunctive relief.

Second, if Plaintiffs' *own* allegations that DFS contests are unlawful are accepted as true, then Plaintiffs' claims are barred by California's longstanding public policy against judicial enforcement of alleged gambling-related claims. Courts routinely dismiss requests to recover gambling losses at the pleading stage, even where, as here, they are styled as requests for equitable monetary relief. *Kelly v. First Astri Corp.*, 72 Cal. App. 4th 462, 471 (1999); *Ochoa v. Zeroo Gravity Games LLC*, No. 22-5896, 2023 WL 4291650, at *4 (C.D. Cal. May 24, 2023).

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Third, even assuming public policy concerns do not bar Plaintiffs' requests for equitable monetary relief, the Court lacks equitable jurisdiction to grant the relief sought. Plaintiffs concede they have an adequate legal remedy, which they have affirmatively chosen not to pursue. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020) (*Sonner I*).

Fourth, Plaintiffs fail to state a claim under both the CLRA and UCL for additional independent reasons: they do not allege a transaction involving "goods" or the type of "services" defined by the CLRA, and their fraud-based allegations under the CLRA and UCL fall short of the heightened Rule 9(b) pleading standard. *Fairbanks v. Super. Ct.*, 46 Cal. 4th 56, 60–61 (2009); *Wehlage v. EmpRes Healthcare, Inc.*, 791 F. Supp. 2d 774, 789 (N.D. Cal. 2011); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009).

Fifth, Smith's claims are time-barred. He alleges injuries that accrued six years ago—well beyond the applicable three-year and four-year statutes of limitations under the CLRA and UCL, respectively. Cal. Civ. Code § 1783; Cal. Bus. & Prof. Code § 17208. He does not plead the elements necessary to invoke the discovery rule or equitable tolling, nor could he. *Vanella v. Ford Motor Co.*, No. 3:19-CV-07956, 2020 WL 887975, at *4 (N.D. Cal. Feb. 24, 2020); *see also Johnson v. Glock, Inc.*, No. 3:20-CV-08807, 2021 WL 1966692, at *4 (N.D. Cal. May 17, 2021). He had publicly available information at his fingertips at all times and could have discovered the basis for his claims through a simple Internet search.

Finally, Plaintiffs' punitive damages-related allegations should be dismissed or stricken.

Underlying each of Plaintiffs' claims is a circular and wholly implausible theory of liability: that this Court should be the first in California to hold DFS contests unlawful and simultaneously infer that DraftKings knew that these DFS contests were unlawful over a decade ago. The DFS contests are lawful, but even if they were not, Plaintiffs' theory cannot support their claims.[2]

[2] DraftKings anticipates that Plaintiffs will rely heavily on Opinion No. 23-1001 issued by the California Attorney General on July 3, 2025. (ECF No. 19). This Opinion "does not affect any change in the law." Minute Order, *Underdog Sports, LLC v. Rob Bonta, In His Official Capacity as Attorney General of California, et al.*, 25WM000120 (Cal. Super. Ct., Sacramento Cnty., July 2, 2025). Moreover, the Opinion does not alter or establish binding law in California. "[T]he opinions of the California Attorney General are advisory only and do not carry the weight of law." *People v. Vallerga*, 67 Cal. App. 3d 847, 870 (1977). Therefore, as the Ninth Circuit has held, federal courts

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FACTUAL BACKGROUND

A. DraftKings' Daily Fantasy Sports Contests in California

DraftKings offers DFS contests in California, including (i) original DFS[3], which has been offered since 2012; and (ii) more recently, Pick6. Compl. ¶ 40. All DFS contests operated by DraftKings are peer-to-peer: participants compete against one another for prizes. *Id.* ¶ 46 (original DFS); ¶ 69 (Pick6). DraftKings itself is not a participant in these DFS contests. *Id.* ¶¶ 50, 69. DFS contests may be free or require an entry fee. *See, e.g., Id.* ¶¶ 48, 76 (screenshot shows an entry fee for each contest). Where entry fees apply, the prizes are known in advance and guaranteed. *Id.*

B. Plaintiffs' Participation in DraftKings' DFS Contests

Each Plaintiff created a DraftKings account and used DraftKings' app or website to enter DFS contests. Plaintiffs seek the entry fees they paid to DraftKings to enter DFS contests "and/or the total of [their] net losses" in connection with those DFS contests. *Id.* ¶¶ 113, 117, 126, 130, 167. Plaintiff Smith alleges he began using DraftKings in 2019 and has since incurred a total of approximately $1,700 in losses. *Id.* ¶¶ 126, 130. Smith played original DFS but has since discontinued his use and does not intend to return if the DFS contests are unlawful. *Id.* ¶¶ 132, 134. Plaintiff Zhen opened an account in 2024 and alleges he has since incurred about $1,000 in losses. *Id.* ¶¶ 113, 117. He last played Pick6 on February 12, 2025 and does not intend to use DraftKings again if the DFS contests remain, in his view, unlawful. *Id.* ¶¶ 120–121.

Plaintiffs concede that they "purportedly consented" to the Terms of Use ("Terms") when creating their accounts. *Id.* ¶ 122 (Zhen); ¶ 135 (Smith). They do not allege that the Terms were hidden or misleading, only that they chose not to read them. *Id.*

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are not bound by the opinions of the California Attorney General. *See Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 625 (9th Cir. 1993) (holding that where both a party and the Attorney General offered reasonable but conflicting interpretations of a statute, the Attorney General's opinion was not dispositive). In any event, the legality of the DFS contests in California is not relevant to the resolution of this Motion.

[3] As plaintiffs allege, original DFS "mirrors season-long fantasy sports but condenses it into a shorter, more sweat-inducing format" with "[c]ompetitors draft[ing] a player roster and those athletes earn points based on their in-game performance." *Id.* ¶ 44.

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415.391.4800 · FAX 415.989.1663

C. Plaintiffs' UCL and CLRA Claims

Plaintiffs allege that DraftKings' DFS contests are unlawful in California and that DraftKings has misrepresented their legal status. Plaintiffs assert claims under the unlawful and unfair (but not fraudulent) prongs of the UCL (Compl. ¶¶ 159–169) and under the CLRA. *Id.* ¶¶ 170–178. Plaintiffs' UCL claim contends that DFS is "unlawful" because the DFS contests purportedly constitute illegal gambling in violation of the California Penal Code or Business and Professions Code (*Id.* ¶¶ 162, 164) or, in the alternative, violate the CLRA. *Id.* ¶ 163. Plaintiffs allege that DraftKings' practices are "unfair" because they purportedly mislead consumers into believing that DFS contests are lawful in California. *Id.* ¶ 167. Plaintiffs' CLRA claim is similarly based on alleged misrepresentations regarding the legality of DFS. *Id.* ¶ 168. Plaintiffs seek to represent a putative class – with no time restriction – of California residents who "placed a bet or wager on the Gambling Websites while in California." *Id*. ¶ 148. They request declaratory relief, injunctive relief, and equitable monetary relief (restitution). *Id.* ¶ 179.

LEGAL STANDARD

To withstand a motion to dismiss under Rule 12(b)(6), "a complaint must 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) (cleaned up). The Court need not accept allegations that are "merely conclusory," nor should it make unwarranted factual deductions or unreasonable inferences. *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055–1056 (9th Cir. 2008).

Claims sounding in fraud are subject to the heightened pleading requirements of Rule 9(b). *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). A plaintiff alleging fraud "must state with particularity the circumstances constituting fraud[.]" Fed. R. Civ. P. 9(b). To satisfy this standard, the allegations must be "specific enough to give defendants notice of the particular misconduct . . . ." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Accordingly, Plaintiffs must plead "the who, what, when, where and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quotation marks and citation omitted).

In considering a motion to dismiss, the Court "may . . . consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or

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415.391.4800 · FAX 415.989.1663

matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *Dichter-Mad Family Partners, LLP v. United States*, 707 F. Supp. 2d 1016, 1026 (C.D. Cal. 2010) (quoting *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)). The Court may also take judicial notice of matters of public record, provided the facts are not subject to reasonable dispute. *Timmons v. Linvatec Corp.*, 263 F.R.D. 582, 584 (C.D. Cal. 2010).

ARGUMENT

I. Plaintiffs Lack Standing under the UCL and CLRA, Including to Seek Injunctive Relief.

A. Plaintiffs Lack Statutory Standing Under the UCL Because They Have Suffered No Economic Injury.

Plaintiffs lack standing to assert UCL claims because they received precisely what they bargained for – entry into DFS contests – and thus cannot plausibly allege that they suffered cognizable economic injury.[4] To establish standing, Plaintiffs must allege that they have "suffered injury in fact and . . . lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. This requires a showing of "some form of economic injury as a result of [the plaintiff's] transactions with the defendant." *Hawkins v. Kroger Company Co.*, 906 F.3d 763, 768 (9th Cir. 2018) (citations omitted). However, "[i]f one gets the benefit of his bargain, he has no standing under the UCL." *Mitsubishi Digit.*, 365 F. App'x at 832; *see also Hall*, 158 Cal. App. 4th at 854–855 (plaintiff did not have standing to pursue a UCL claim where he received what he paid for); *Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th Cir. 2009) (plaintiffs were not deprived of an agreed-upon benefit).

Plaintiffs allege injury-in-fact "in the form of all amounts paid to DraftKings and/or the total of net losses on the Gambling Websites run by DraftKings." Compl. ¶ 167. This does not constitute "lost money or property" under the UCL because Plaintiffs' own allegations confirm that they

[4] While DraftKings must accept the allegations in Plaintiffs' Complaint as true for the purposes of this motion, DraftKings does not concede that Plaintiffs entered any DFS contests or created DraftKings accounts. Plaintiffs' Complaint does not contain their DraftKings usernames, nor does it contain information sufficient to allow DraftKings to identify them as customers. DraftKings has specifically requested this information, but Plaintiffs have thus far refused to provide it. As a result, DraftKings reserves the right to challenge Plaintiffs' standing should it learn in discovery that Plaintiffs' allegations that they created accounts and entered DFS contests are false.

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ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

received exactly what they bargained for: they entered into DFS contests and presumably won some and lost others. There is no allegation that the DFS contests did not operate as Plaintiffs expected. They allege circumstances similar to those in *Mai. See* 648 F. Supp. 3d at 1134. There, this Court held that plaintiffs had not suffered an economic injury under the UCL because they received what they paid for: in-game "loot boxes" that awarded "exactly what they expected: at least one mystery virtual item" to use in the game. *Mai*, 2024 WL 2077500, at *1. The Ninth Circuit vacated that decision (for lack of Article III standing) but affirmed this Court's conclusion that the plaintiffs had "not shown a sufficient economic injury-in-fact," depriving them of UCL statutory standing as well. *Id.*; *see also Coffee v. Google, LLC*, No. 20-cv-03901, 2022 WL 94986, at *8 (N.D. Cal. Jan. 10, 2022) (reaching same conclusion in connection with purchase of virtual currency for use in game); *Taylor v. Apple, Inc.,* No. 20-cv-03906, 2022 WL 35601, at *2 (N.D. Cal Jan 4. 2022) (same).

The same reasoning applies here. Plaintiffs' core theory is that DraftKings misrepresented DFS as legal in California, when Plaintiffs allege it was not. But, even if Plaintiffs' allegations are accepted as true, that does not mean Plaintiffs suffered an injury or failed to receive the full benefit of their bargain. "[I]njury-in-fact requires more than a mere statutory violation." *Mai*, 2024 WL 2077500, at *1 (Plaintiffs' allegation that 'loot boxes' were illegal under California law did not give rise to standing); *Mason v. Mach. Zone, Inc.,* 140 F. Supp. 3d 457, 465 (D. Md. 2015), *aff'd on other grounds,* 851 F.3d 315 (4th Cir. 2017) (applying California law and holding that plaintiff had not satisfied the UCL's economic injury requirement merely because plaintiff alleged that the game she played was an "illegal game of chance" in circumstances where plaintiff received the full benefit of her bargain).

In short, Plaintiffs' alleged economic injury is merely the ordinary and expected outcome of the DFS contests they voluntarily entered into. Plaintiffs do not allege otherwise, and they therefore lack standing to assert a claim under the UCL.[5]

[5] Furthermore, Zhen and Smith lack standing to assert claims related to both DFS contests named in the Complaint (original DFS and Pick6). Zhen alleges only that he participated in Pick6, while Smith alleges only that he participated in original DFS. Compl. ¶¶ 120, 132. Zhen lacks standing to assert original DFS-based claims, and Smith lacks standing to assert Pick6-based claims.

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ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

B. For Similar Reasons, Plaintiffs Fail to Establish Standing Under the CLRA.

Plaintiffs also lack standing under the CLRA for similar reasons. The CLRA grants standing to "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770[.]" Cal. Civ. Code § 1780(a). "[I]n order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result." *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641 (2000).

Plaintiffs do not plausibly allege damage. The Complaint contains a bare assertion that they "suffered injury" (Compl. ¶ 175), which is inadequate. Plaintiffs' conclusory allegations of injury appear to be no different from the injury asserted under their UCL claim – namely, that they "los[t] money." *Id*. ¶ 174. As explained above, Plaintiffs do not have standing under the UCL because they did not lose money but rather received exactly what they bargained for. This failure is equally fatal to their CLRA claim. *See Coffee,* 2022 WL 94986, at *10 (dismissing CLRA claim where plaintiffs failed to allege facts establishing standing, including failure to show "any damage" as they received exactly what they paid for).

C. Plaintiffs Lack Standing to Seek Injunctive Relief.

Plaintiffs also lack standing to seek injunctive relief because they do not allege an imminent or actual threat of future harm sufficient to satisfy the requirements of Article III. Compl. ¶¶ 167, 178, 179; *Davidson*, 889 F.3d at 967. The "threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398 (2013) (cleaned up). It cannot be "conjectural" or "hypothetical." *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983). If, as here, standing for injunctive relief is based on the future threat of the same or similar injury, a plaintiff must establish "a sufficient likelihood that [they] will again be wronged in a similar way." *Id.* at 111; *Davidson*, 889 F.3d at 967 (citations omitted).

While Plaintiffs allege that they face a "substantial risk of continuing to lose money and be[ing] injured" if DraftKings is not enjoined (Compl. ¶ 167), that assertion is contradicted by their own allegations that each has "discontinued the use of DraftKings." *Id*. ¶¶ 121, 134. Plaintiffs allege one wholly implausible scenario in which they speculate that they might be harmed in the

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future: they allege they may be misled later into engaging in "unlawful gaming" if they change their current (mistaken) understanding that DFS is unlawful in the future based on DraftKings continuing to represent that DFS is legal. *Id*. ¶¶ 121, 134. But Plaintiffs (represented by sophisticated counsel) also allege that they are monitoring the legal landscape and remain "interested in online gambling in California" if it becomes legal. *Id*. While DraftKings disputes that Plaintiffs have ever been misled, they clearly will not be misled going forward by any hypothetical representation DraftKings could make.

In any event, this theory does not support standing. Plaintiffs can simply close their DraftKings accounts (or not enter into any future DFS contests), and they can test any future representations made by DraftKings without needing to enter into DFS contests. *Kenney v. Fruit of the Earth, Inc.*, No. 23-55583, 2024 WL 4578981, at *1 (9th Cir. Oct. 25, 2024); *Cimoli v. Alacer Corp*., 546 F. Supp. 3d 897, 906 (N.D. Cal. July 1, 2021) ("several district courts relying on *Davidson* have found a plaintiff lacks standing where the plaintiff could 'easily discover whether a previous misrepresentation had been cured without first buying the product at issue'") (citation omitted).

Even if there were any plausibility to Plaintiffs' allegations (and there is not), they are far too speculative to establish an injury that is "*certainly impending*." *Davidson*, 889 F.3d at 966 (cleaned up). Plaintiffs allege no concrete intention to use DraftKings again. *Lanovaz v. Twinings N. Am., Inc.*, 726 F. App'x 590, 591 (9th Cir. 2018) ("A someday intention—without any description of concrete plans . . . does not support a finding of the actual or imminent injury that Article III requires.") (cleaned up). Because none of the Plaintiffs face a real and immediate threat of future harm, they lack standing to seek injunctive relief.

II. Plaintiffs' Monetary Claims Are Barred by California's Public Policy Against Judicial Resolution of Gambling Claims.

Plaintiffs' claims against DraftKings are wholly dependent on their theory that DFS is a form of unlawful gambling under California law. In other words, if DFS is legal, then Plaintiffs have no basis – and have alleged no basis – for recovery. While DraftKings denies that DFS is any form of gambling, even assuming that assertion is true as required at this stage, Plaintiffs' *own* theory means

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that their claims *must* be barred by California's "strong, broad and long-standing" public policy against "judicial resolution of civil claims arising out of lawful or unlawful gambling contracts or transactions[.]" *Kelly*, 72 Cal. App. 4th at 466, 471. "[T]his judicially-recognized public policy can be traced back virtually to the inception of statehood." *Id*. at 477. (citing cases from 1851, 1853, 1907, 1946, 1947, 1948, 1956, 1968, 1993). The public policy doctrine bars plaintiffs from pursuing "actions for recovery of gambling losses and actions to enforce gambling debts." *Id*.

Courts have frequently dismissed claims at the motion to dismiss stage based on this doctrine. *Jamgotchian v. Sci. Games Corp.*, 371 F. App'x 812, 813 (9th Cir. 2010) (affirming district court's dismissal on public policy grounds of claims seeking to unwind betting transactions and recover related losses); *Ochoa,* 2023 WL 4291650, at *4 (granting motion to dismiss illegal gambling claims under California law to the extent they seek monetary damages or restitution); *Hang Ngoc Lam v. Hawaiian Gardens Casino*, CV 19-3989, 2020 WL 806655, at *2 (C.D. Cal. Jan. 8, 2020) (granting motion to dismiss claims under public policy doctrine where plaintiffs alleged they were fraudulently induced to play baccarat). The doctrine "applies to all forms of gambling, whether legal or illegal." *Kelly*, 72 Cal. App. 4th at 490.

Plaintiffs' *own* theory of liability squarely implicates the public policy doctrine. Plaintiffs allege that DFS contests constitute illegal gambling under California law. Compl. ¶¶ 40, 110, 172. Plaintiffs seek as monetary relief, and as their injury-in-fact, the type of recovery precluded by the public policy doctrine: (i) "total of net losses on the Gambling Websites;" and (ii) "all amounts paid to DraftKings." *Id.* ¶ 167. Both categories are barred by the public policy doctrine. *Kelly*, 72 Cal. App. 4th at 466 (public policy doctrine applies to "actions for recovery of gambling losses"); *Ochoa,* 2023 WL 4291650, at *4 ("The Court agrees with Defendants that Plaintiffs' claims for monetary relief are barred" because "claims for monetary relief are in essence a claim to recover for gambling losses").

Plaintiffs characterize their net losses as gambling losses throughout their Complaint. Zhen allegedly lost "approximately $1,000" since May 2024, and Smith allegedly lost $1,700 since May 2019. Compl. ¶¶ 117, 130. They also seek recovery of all amounts paid to DraftKings to allegedly restore them to the position they would have been in had they never placed any "bets." *Id.* ¶ 118 ("If

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DraftKings had not solicited bets and wagers from Plaintiff Zhen while representing that such activities were legal in California . . . he would not have made any of those bets or wagers and would not have paid any money to DraftKings"), ¶ 129 (same for Smith). But "a suit to be placed in the *ex ante* position after losing a bet is" just that, and is barred by *Kelly*. *Jamgotchian*, 371 F. App'x at 813 (citation omitted). In sum, if DFS contests are gambling (and they are not), then these alleged injuries fall directly within the scope of the public policy doctrine, which prohibits recovery of gambling losses. If the DFS contests are not gambling, then the premise of their entire Complaint is fatally flawed, and they can recover nothing. Either way, their claims must fail.

That Plaintiffs claim to be unknowing participants in illegal gambling (Compl. ¶¶ 118, 131) does not save their claims for monetary relief. *Ochoa*, 2023 WL 4291650, at *4. Even in that scenario, plaintiffs knowingly participated in the DFS contests, and "in the absence of a statute authorizing recovery of gambling losses, and as a matter of strong public policy," this Court should refuse to lend its 'process to adjudicate actions arising out of gambling transactions.'" *Id.* (quoting *Kelly*, 72 Cal. App. 4th at 483). Accordingly, in *Ochoa*, the Court dismissed plaintiffs' claims for monetary relief, whether labeled as damages or restitution. The same result is warranted here. Plaintiffs identify no statutory right to recover gambling losses, and neither the UCL nor the CLRA provides one. *See* 2023 WL 4291650, at *4. Because Plaintiffs' monetary relief claims, however styled, seek recovery of alleged gambling losses, they are barred by California's well-established public policy and must be dismissed.

III. This Court Lacks Equitable Jurisdiction To Hear Plaintiffs' Prayers For Equitable Monetary Relief.

California's public policy against resorting to the courts to recover gambling losses bars this action. But even if this bar did not exist, Plaintiffs would run headlong into another clear obstacle: Plaintiffs' requests for equitable monetary relief also fail for lack of equitable jurisdiction.[6] Plaintiffs only seek equitable restitution and disgorgement. Compl. ¶¶ 168, 178, 179. But a district court may adjudicate claims for equitable relief only if the plaintiff lacks an adequate remedy at

[6] A Rule 12(b)(6) motion is the appropriate vehicle for a motion to dismiss for lack of equitable jurisdiction. *Sonner v. Premier Nutrition Corp.*, 49 F.4th 1300, 1305 (9th Cir. 2022) (*Sonner II*).

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law. *Guzman v. Polaris Indus. Inc*., 49 F.4th 1308, 1314 (9th Cir. 2022) (affirming district court's finding that plaintiff could not bring a UCL claim in federal court because he had an adequate legal remedy under the CLRA); *Sonner I* (holding that equitable relief under the UCL and CLRA is only available in federal court if legal remedies are inadequate). Specifically, a plaintiff "must establish that [they] lack[] an adequate remedy at law before securing equitable restitution for past harm under the UCL and CLRA." *Sonner I*, 971 F.3d at 844. To establish the court's equitable jurisdiction, courts have held that a plaintiff is required to allege at the pleading stage "that her legal remedies are inadequate or plead equitable claims in the alternative because her legal remedies are inadequate." *Pitkin v. State Farm Gen. Ins. Co.*, No. 23-cv-00924, 2023 WL 11990316, at *5 (N.D. Cal. July 25, 2023) (citation omitted).

Plaintiffs have done neither. They do not allege that they lack an adequate remedy at law. To the contrary, they acknowledge that legal remedies are available and affirmatively *elected* not to pursue them. Compl. ¶ 178, n.26 (Plaintiffs expressly reserve their "right to amend their CLRA cause of action to add claims for monetary relief."). Nor do they allege that legal remedies would be inadequate. Such an allegation would be implausible given they assert a right to add claims for monetary relief. *Id*. The existence of an adequate remedy at law is sufficient to bar this Court's equitable jurisdiction. *See, e.g.*, *Sonner I*, 971 F.3d at 844 (refusing equitable relief where plaintiff strategically dismissed her damages claim to avoid a jury trial); *Guzman*, 49 F.4th at 1312 ("[E]quitable relief must be withheld when an equivalent legal claim would have been available but for a time bar."). Here, where Plaintiffs have failed even *to plead* an inadequate remedy at law (and, indeed, have implied the opposite), dismissal of their equitable claims is required. *Freund v. HP, Inc.*, No. 22-CV-03794, 2023 WL 187506, at *6 (N.D. Cal. Jan. 13, 2023).

IV. Plaintiffs Fail to State a CLRA or UCL Claim.

Plaintiffs' claims are independently deficient for two reasons: (i) Plaintiffs have failed to allege a transaction involving the sale of goods or type of services required under the CLRA; and (ii) Plaintiffs' fraud-based allegations under both the CLRA and UCL do not satisfy Rule 9(b).

A. DFS is not a covered good or service under the CLRA.

The CLRA applies only to transactions involving the sale or lease to consumers of "goods"

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or "services," as those terms are specifically defined under the CLRA. Cal. Civ. Code § 1770(a). "Goods" are defined as tangible chattels, and "services" are limited to work or labor for non-commercial use, including those related to the sale or repair of goods. *Id*. § 1761(a)-(b).

Plaintiffs' conclusory assertion that DFS involves "unlawful gambling goods and services" (Compl. ¶ 172) fails to explain how DFS fits within these narrow definitions. DFS contests, offered online or via mobile app (*Id*. ¶ 40), are intangible and therefore not "goods" under the statute. Nor are they "services" within the CLRA's narrow definition of that term, as they do not involve work, labor, or relate to the sale or repair of any tangible good. California courts have endorsed a strict interpretation, consistent with the "unambiguous" statutory language. *Fairbanks*, 46 Cal. 4th at 60–61 (declining to find life insurance was a service within the scope of the CLRA because an insurer's contractual obligation to pay money under a life insurance policy is not work or labor, nor is it related to the sale or repair of any tangible chattel). *See also e.g*., *Simon v. SeaWorld Parks & Ent., Inc.*, No. 3:21-CV-1488, 2022 WL 1594338, at *8 (S.D. Cal. May 19, 2022) (rejecting an argument that a ticket to a theme park was a CLRA service); *Reeves v. Niantic, Inc.*, No. 21-CV-05883, 2022 WL 1769119, at *2 (N.D. Cal. May 31, 2022) (cautioning against "shoehorn[ing] transactions involving the purchase of intangible goods into the definition of 'services'"). Having failed to allege "goods" or "services" under the CLRA, Plaintiffs' CLRA claim fails.

B. <u>Plaintiffs Fail to Plead Their CLRA and UCL Claims With Particularity.</u>

In their CLRA claim, Plaintiffs characterize DraftKings' conduct as "fraudulent" and allege misrepresentations about the "goods or services" offered by DraftKings. Compl. ¶¶ 173, 176. Similarly, Plaintiffs allege that DraftKings engaged in fraudulent conduct under their UCL claim. *Id*. ¶ 166 (DraftKings has "trick[ed] consumers into believing operations of the Gambling Websites is lawful in California…"). While Plaintiffs characterize this as an "unfair practice," the 'unfairness' is premised on an alleged deceptive course of conduct.

Accordingly, these allegations sound in fraud and are subject to Rule 9(b). *Wehlage*, 791 F. Supp. 2d at 789; *Kearns*, 567 F.3d at 1127 (concluding that if a claim is grounded in fraud, even where pled under the unfair prong of the UCL, the pleading of that claim as a whole must satisfy the particularity requirements of Rule 9(b)). Plaintiffs must allege the "who, what, when, where, and

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how" of the alleged misconduct. *Gudgel v. Clorox Co.*, 514 F. Supp. 3d 1177, 1184 (N.D. Cal. 2021). They do not.

Plaintiffs allege they created their accounts in response to online or television advertisements (Compl. ¶¶ 113, 126) but do not allege when they saw those advertisements, or what they said, let alone that they included any representations by DraftKings that the DFS contests it offered in California were legal.[7] They certainly do "not allege the circumstances in which [they] viewed these materials," as required under Rule 9(b). *Wehlage*, 791 F. Supp. 2d at 789 (dismissing CLRA claim on this basis); *Kearns*, 567 F.3d at 1126 (dismissing UCL and CLRA claims grounded in fraud for failing to allege "the particular circumstances surrounding such representations").

Plaintiffs also fail to allege that DraftKings *knew* its DFS contests were illegal, nor can they, given that no California court has decided the issue. Compl. ¶ 144 (alleging that "DraftKings knew *(or should have known)* that its gambling operations in California were illegal") (emphasis added); *Kirkpatrick v. Home Depot U.S.A., Inc.*, No. 2:24-cv-01927, 2025 WL 2029714, at *7 (E.D. Cal. July 21, 2025) (allegation that defendant "knows, or at least it should know," did not satisfy Rule 9(b)) (citation omitted).

V. Smith's Claims Are Time-Barred.

Smith's CLRA and UCL claims are untimely. These claims are governed by three and four year statutes of limitations, respectively. *See* Cal. Civ. Code § 1783; Cal. Bus. & Prof. Code § 17208; *Johnson v. Glock, Inc.*, No. 20-CV-08807, 2021 WL 428635, at *3 (N.D. Cal. Feb. 8, 2021). A claim accrues when the alleged conduct occurs, unless tolled by the discovery rule. *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1191 (2013). To invoke that rule, a plaintiff must plead "(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Schwartz v. Finn,* No. 21-15841, 2022 WL 636641, at *1 (9th Cir. Mar. 4,

[7] Elsewhere in the Complaint, Plaintiffs allege statements made "on the main DraftKings landing page" or on the app related to original DFS (¶¶ 63–67) or statements on its website or mobile app related to Pick6 (¶¶ 89–91). But plaintiffs do not allege that they saw or relied on those statements *before* creating their DraftKings accounts. *Key v. Qualcomm Inc.*, 129 F.4th 1129, 1141 (9th Cir. 2025) ("[T]he California Supreme Court has repeatedly reaffirmed that reliance is the causal mechanism of fraud . . . [t]hus any plaintiff relying on a UCL fraud theory must demonstrate actual reliance on the allegedly deceptive or misleading statements") (cleaned up).

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2022), citing *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 975 (9th Cir. 2013) (quoting *Camsi IV v. Hunter Tech. Corp.*, 230 Cal. App. 3d 1525, 1536 (1991).

That burden rests squarely with the plaintiff. *Invs. Equity Life Holding Co. v. Schmidt*, 195 Cal. App. 4th 1519, 1533 (2011). Smith allegedly opened and began using his DraftKings account in 2019—more than four years before this suit. *See* Compl. ¶ 130. He vaguely asserts that he "could not and did not, on [his] own, discover the true and unlawful nature of the Gambling Websites." *Id.* ¶ 141.[8] He does not plead when or how he discovered the alleged illegality, nor why earlier discovery was impossible despite diligence. *Id.*¶ 141; *see Vanella*, 2020 WL 887975, at *4; *see also Johnson*, 2021 WL 1966692, at *4. That omission is fatal. *See Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 808 (2005).

The relevant facts were publicly available long before 2019. Public lawsuits, requests for an Attorney General opinion, and widespread media coverage, some in Smith's own hometown, questioned the legality of DFS contests beginning in 2015. *See In re Daily Fantasy Sports Mktg. & Sales Pracs. Litig.*, 158 F. Supp. 3d 1375, 1377 (J.P.M.L. 2016)[9]; Request for Judicial Notice ("RJN"), Exs. 1-3.[10] Separately, a multidistrict litigation proceeding concluded in 2021 with a public, court-approved class settlement and judgment that dismissed with prejudice the claims of settlement class members based on pre-settlement conduct. *See* RJN, Ex. 4. Smith could have

[8] In alleging that he could not discover the alleged unlawful conduct "on [his] own," he suggests that he needed to consult with a third party (e.g., counsel). Any such argument is without merit. "[I]t is irrelevant that the plaintiff is ignorant of his legal remedy or of the legal theories underlying his cause of action," and "the fact that an attorney has not yet advised him does not postpone commencement of the limitations period." *Gutierrez v. Mofid*, 39 Cal. 3d 892, 898, 901 (1985).

[9] The court mentioned two lawsuits filed in California: *Spiegel, et al. v. DraftKings, Inc., et al.*, No. 2:15-08142 (C.D. Cal.); *Martin v. DraftKings, Inc., et al.*, No. 5:15-02167 (C.D. Cal.). *Id*. at 1380.

[10] The Court may take judicial notice of the fact of the letter and the news coverage. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1125–1126 (9th Cir. 2002) (at Rule 12(b)(6) stage, judicial notice was proper of publications to "indicate what was in the public realm at the time") (citation omitted); *McKelvey v. Boeing N. Am., Inc.*, 74 Cal. App. 4th 151, 162 (1999) *superseded by statute on other grounds* (newspaper articles relevant to show "that, at a time outside the statute of limitations, plaintiffs had notice of or information of circumstances sufficient to put a reasonable person on inquiry").

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discovered the basis for his claims through a simple internet search. *See Sagehorn v. Engle*, 141 Cal. App. 4th 452, 460–461 (2006); *Drake v. Toyota Motor Corp.*, No. 2:20-CV-01421, 2021 WL 2024860, at *2 (C.D. Cal. May 17, 2021).

Smith's attempt to invoke fraudulent concealment also fails. To toll on that basis, a plaintiff must plead with particularity that the defendant affirmatively misled them and that he lacked actual or constructive knowledge despite diligence. *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012); *Yetter v. Ford Motor Co.*, 428 F. Supp. 3d 210, 223 (N.D. Cal. 2019). Smith does neither. His allegations are conclusory and unsupported. See Compl. ¶¶ 138–142. Courts routinely reject tolling theories premised on such generalities. *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 638–639 (2007).

VI. Plaintiffs' Allegations That DraftKings Acted With Malice Should Be Stricken.

Alternatively, DraftKings moves to dismiss or strike Plaintiffs' allegations that it acted with "malice, oppression, and fraud." See Compl. ¶¶ 143–146, 176. These allegations are relevant only to punitive damages, which are unavailable under the UCL. *Iglesias v. Arizona Beverages USA, LLC*, No. 22-cv-09108, 2023 WL 4053803, at *7 (N.D. Cal. June 16, 2023). Nor can Plaintiffs recover punitive damages under the CLRA, as they expressly disclaim such relief. Compl. ¶ 178 n.26. In any event, Plaintiffs allege no facts supporting a finding of fraud, oppression, or malice. *See Chauhan v. Google LLC*, No. 23-cv-00702, 2023 WL 5004078, at *6 (N.D. Cal. Aug. 4, 2023).

CONCLUSION

The Court should grant Defendant's motion to dismiss and dismiss both causes of action in the Complaint without leave to amend.

DATED: August 11, 2025

COBLENTZ PATCH DUFFY & BASS LLP

By: */s/ Richard R. Patch*
RICHARD R. PATCH
Attorneys for Defendant
DRAFTKINGS INC.