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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LEVY MONNELLE RUIZ,

Plaintiff,

v.

AUTO STAR MOTORS, INC.,

Defendant.

No. 2:16-cv-00800-TLN-CKD

ORDER

This matter is before the Court on Defendant Auto Star Motors, Inc.'s ("Defendant") Motion to Dismiss. (ECF No. 9.) Plaintiff Levy Monnelle Ruiz ("Plaintiff") opposes the motion. (ECF No. 10.) The Court has carefully considered the arguments raised by the parties. For the reasons set forth below, the Defendant's motion is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND¹

On or about November 15, 2015, Plaintiff visited Defendant's car dealership and agreed to purchase a particular 2012 Honda Civic ("Vehicle"). (ECF No. 1 at ¶¶ 5–7.) Plaintiff paid \$1,035.00 as a down payment and financed the remainder of the sale price through Defendant. (ECF No. 1 at ¶ 8.) The agreed-upon purchase price of the Vehicle was \$13,200.00, with a total sale price of \$23,697.72, including taxes, fees, and finance charges. (ECF No. 1 at ¶ 7.)

¹ The facts are taken from Plaintiff's Complaint (ECF No. 1). See *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1142–43 (9th Cir. 2012) ("In evaluating a Rule 12(b)(6) motion, the court accepts the complaint's well-pleaded factual allegations as true and draws all reasonable inferences in the light most favorable to the plaintiff.>").

1 Defendant advised Plaintiff that she was approved for financing the same day she visited
2 Defendant's dealership. (ECF No. 1 at ¶¶ 9, 17.) In particular, Defendant obtained her credit
3 report and advised her that she had been approved for financing on the terms contained in a retail
4 installment contract (the "Contract") that she signed before leaving Defendant's dealership with
5 the Vehicle. (ECF No. 1 at ¶¶ 10, 17, 20.)

6 On or about November 20, 2015, Defendant informed Plaintiff that Defendant had been
7 unable to assign her loan to a third party bank and demanded Plaintiff return to the dealership
8 with a cosigner or surrender the Vehicle. (ECF No. 1 at ¶ 18.) Plaintiff, under protest,
9 surrendered the Vehicle to Defendant. (ECF No. 1 at ¶ 22.) Plaintiff states she never received a
10 written notice explaining why Defendant revoked its extension of credit and why Defendant
11 cancelled the Contract. (ECF No. 1 at ¶ 23.)

12 II. STANDARD OF LAW

13 A motion to dismiss for failure to state a claim upon which relief can be granted under
14 Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v.*
15 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Federal Rule of Civil Procedure 8(a) requires that a
16 pleading contain "a short and plain statement of the claim showing that the pleader is entitled to
17 relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Under notice pleading in federal
18 court, the complaint must "give the defendant fair notice of what the claim ... is and the grounds
19 upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations
20 omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary
21 judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."
22 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

23 On a motion to dismiss, the factual allegations of the complaint must be accepted as true.
24 *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give plaintiff the benefit of every
25 reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail*
26 *Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege
27 "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to
28 relief." *Twombly*, 550 U.S. at 570.

1 Nevertheless, a court “need not assume the truth of legal conclusions cast in the form of
2 factual allegations.” *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir.
3 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than an
4 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A
5 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the
6 elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678
7 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
8 statements, do not suffice.”) Moreover, it is inappropriate to assume that the plaintiff can prove
9 facts that it has not alleged or that the defendants have violated the ... laws in ways that have not
10 been alleged [.]” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*,
11 459 U.S. 519, 526 (1983).

12 Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged “enough
13 facts to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 697 (quoting
14 *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
15 content that allows the court to draw the reasonable inference that the defendant is liable for the
16 misconduct alleged.” *Id.* at 680. While the plausibility requirement is not akin to a probability
17 requirement, it demands more than “a sheer possibility that a defendant has acted unlawfully.”
18 *Id.* at 678. This plausibility inquiry is “a context-specific task that requires the reviewing court to
19 draw on its judicial experience and common sense.” *Id.* at 679.

20 In ruling upon a motion to dismiss, the court may only consider the complaint, any
21 exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of
22 Evidence 201. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Isuzu*
23 *Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1042 (C.D. Cal.
24 1998).

25 If a complaint fails to state a plausible claim, “[a] district court should grant leave to
26 amend even if no request to amend the pleading was made, unless it determines that the pleading
27 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122,
28 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 484, 497 (9th Cir. 1995)).

1 **III. ANALYSIS**

2 Defendant moves to dismiss each of the claims in the Complaint for failure to state a
3 claim upon which relief may be granted. (ECF No. 9.) Those claims are as follows: (1) violation
4 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601, *et seq.*; (2) violation of the Equal Credit
5 Opportunity Act (“ECOA”), 15 U.S.C. § 1691, *et seq.*; (3) violation of the Fair Credit Reporting
6 Act (“FCRA”), 15 U.S.C. § 1681, *et seq.*; (4) breach of “good faith and fair dealing obligation”;
7 and (5) fraud and misrepresentation. (ECF No. 1.) In her opposition, Plaintiff consented to the
8 dismissal of her third and fifth claims. (ECF No. 10 at 2 n.1.) The Court will address the motion
9 as to the remaining claims in order.

10 **A. Claim I: Violation of TILA**

11 Plaintiff wanted to buy a car from Defendant, a car dealer, on credit. The Court will
12 assume that Defendant was a creditor within the meaning of TILA for purposes of this motion.
13 As discussed in more detail below, TILA requires creditors to make specific disclosures to
14 consumers in connection with covered consumer credit transactions. There is no dispute that
15 Defendant made those disclosures in connection with the parties entering into the Contract.

16 The question is whether Defendant, nevertheless, violated TILA by inserting into the
17 Contract the following provision (where Defendant is “Seller”):

18 **Seller’s Right to Cancel.** If Buyer and Co-Buyer sign here, the
19 provisions of the Seller’s Right to Cancel section on the back
20 giving the Seller the right to cancel if Seller is unable to assign this
contract to a financial institution will apply.

21 **Seller’s Right to Cancel.** Seller agrees to deliver the vehicle to
22 you on the date this contract is signed by Seller and you. You
23 understand that it may take a few days for Seller to verify your
24 credit and assign the contract. You agree that if Seller is unable to
assign the contract to any one of the financial institutions, with
whom Seller regularly does business under an assignment
acceptable to Seller, Seller may cancel this contract.

25 (ECF No. 10 at 8–10.)² This purely legal question is an issue of first impression in this Circuit.

26 ² The Complaint does not attach the Contract. Likewise, it does not contain the text of the so-called “Seller’s
27 Right to Cancel provision.” Nevertheless, the Court can consider the text of this provision in resolving this motion as
28 this text is undisputed, the provision is central to Plaintiff’s claim, and the Complaint refers to the document in
question. *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *Lee v. City of Los Angeles*, 250
F.3d 668, 688 (9th Cir. 2001).

1 However, to winnow the parties' submissions to this question, a brief preliminary discussion is
2 required.

3 *i. Preliminary Discussion*

4 "Congress enacted the Truth in Lending Act in 1968 to strengthen the 'informed use of
5 credit' by requiring meaningful disclosure of credit terms to consumers." *In re Ferrell*, 539 F.3d
6 1186, 1189 (9th Cir. 2008) (quoting 15 U.S.C. § 1601(a)). The purpose of TILA is to:

7 assure a meaningful disclosure of credit terms so that the consumer
8 will be able to compare more readily the various credit terms
9 available to him and avoid the uninformed use of credit, and to
protect the consumer against inaccurate and unfair credit billing and
credit card practices.

10 *Id.* (quoting 15 U.S.C. § 1601(a).)

11 TILA "requires a creditor to disclose information relating to such things as finance
12 charges, annual percentage rates of interest, and borrowers' rights, and it prescribes civil liability
13 for any creditor who fails to do so." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 54
14 (2004) (internal citations omitted). "To insure that the consumer is protected . . . TILA and
15 accompanying regulations must be absolutely complied with and strictly enforced." *Jackson v.*
16 *Grant*, 890 F.2d 118, 120 (9th Cir. 1989) (original alteration marks omitted). If the required
17 disclosures are not made, a plaintiff may recover even if she has not sustained "any actual
18 damages." *Lea v. Buy Direct, L.L.C.*, 755 F.3d 250, 254 (5th Cir. 2014).

19 For purposes of this motion, the Court will assume that Plaintiff is correct that the
20 transaction arising out of the Contract is a closed-end consumer transaction governed by TILA.
21 Section 1638(a) "sets forth the disclosures that creditors must make in closed-end consumer credit
22 transactions[.]" *In re Ferrell*, 539 F.3d at 1189. "The specific content and timing of the
23 disclosures are set forth in Regulation Z, which was adopted by the Federal Reserve Board in
24 support of TILA." *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004).
25 "The disclosures required by TILA must be made 'before consummation of the transaction.'" *Lea*,
26 755 F.3d at 253 (quoting 12 C.F.R. § 226.17(b)). "Consummation means the time that a
27 consumer becomes contractually obligated on a credit transaction." *Id.* (citing 12 C.F.R.
28 226.2(a)(13)). "When a consumer 'becomes contractually obligated' is, in turn, determined by

1 looking to state law[.]” *Jackson*, 890 F.2d at 120.

2 Having carefully reviewed Plaintiff’s submissions, the Court understands her primary
3 argument to be the purely legal question identified at the outset of this Section of the Court’s
4 Order. At times, however, Plaintiff appears to elide this argument with two other arguments,
5 neither of which can withstand close scrutiny. This blurring was, at times, confusing. To avoid
6 confusion herein, the Court refers to these other arguments as Plaintiff’s “preliminary
7 arguments.” The Court will briefly examine each of them.

8 The first preliminary argument proceeds as follows: “TILA and its enabling regulations
9 require the creditor to make disclosures before consummation of the transaction.” (ECF No. 10 at
10 9.) At least for purposes of her first preliminary argument, Plaintiff contends that the inclusion of
11 the Seller’s Right to Cancel provision can only have two possible legal consequences — either it
12 “prolongs consummation of the contract to an uncertain point in the future” or it “nullifies
13 consummation altogether.” (ECF No. 10 at 8.) In her view, “either scenario” constitutes a
14 violation of the requirement to make TILA compliant disclosures “before [the] consummation of
15 transaction.” (ECF No. 10 at 8–9.)

16 There is an obvious problem with Plaintiff’s first preliminary argument. It causes the
17 argument to fail even if her legal premises are accepted. If the Seller’s Right to cancel provision
18 “*prolongs consummation of the contract to an uncertain point in the future*” or it “*nullifies*
19 *consummation altogether*,” then the disclosures contained in the Contract must have been *before*
20 the consummation of the transaction (if it ever took place). (ECF No. 10 at 8–9 (emphasis
21 added).) Thus, under her own theory, there would have been no TILA violation, as Plaintiff
22 acknowledges the disclosures themselves were TILA compliant.

23 The Court now turns to Plaintiff’s second preliminary argument, which proceeds as
24 follows: a creditor would violate TILA by inserting a provision into a contract that authorized it
25 to “subsequent[ly] change” the TILA disclosures at its “sole and arbitrary discretion,” even if the
26 contract at issue otherwise made the disclosures required by TILA. (ECF No. 10 at 8–10.) The
27 Court will assume for purposes of this motion that such a clause would violate TILA. The
28 problem with Plaintiff’s argument is the text of Seller’s Right to Cancel provision in the Contract.

1 If Defendant is “unable to assign the [C]ontract to any one of the financial institutions, with
2 whom [Defendant] regularly does business under an assignment acceptable to [Defendant],
3 [Defendant] may *cancel*” the Contract. (ECF No. 10 at 8 (emphasis added).) The Right to
4 Cancel provision simply cannot be reasonably read to authorize Defendant to *change the contents*
5 *of its TILA disclosures at all*, let alone in its discretion.

6 The Court will make one more point before proceeding. Taking Plaintiff’s allegations as
7 true, the Court agrees with Plaintiff’s position that, under California law, the Contract was a
8 “valid and completed contract” once she signed it. (ECF No. 10 at 5.) That is, Plaintiff was
9 “contractually obligated” within the meaning of TILA at that point. The Seller’s Right to Cancel
10 provision *does not undo this*. *Buie v. Palm Springs Motors, Inc.*, No. EDCV 00-00168 VAP,
11 2001 WL 34570064, at *4 (C.D. Cal. May 14, 2001). *Buie* involved a similar provision.³ *Id.*
12 The district court there concluded that the contract was “consummated upon signing” for
13 purposes of TILA (looking to California law), even though it could be “rescinded by the dealer.”
14 *Id.* (emphasis added). The Court agrees with that conclusion. Plaintiff is no less contractually
15 obligated because *Defendant* has the right to cancel the Contract in a specified circumstance.
16 Accordingly, the Court finds the transaction arising from the Contract consummated upon the
17 signing of the Contract by Plaintiff.

18 *ii. Whether TILA is violated by the Seller’s Right to Cancel provision?*

19 Defendant argues it cannot be held liable for a TILA violation for entering into a Contract
20 that “on its face clearly set forth all of the requirements under . . . TILA.” (ECF No. 9-1 at 5.)
21 Plaintiff argues the Seller’s Right to Cancel provision renders the otherwise properly disclosed
22 “credit terms . . . meaningless” or “illusory” because Defendant “reserve[s to itself] a unilateral
23 and arbitrary ability to rescind the contract.” (ECF No. 10 at 8–10.)

24 As an initial matter, Plaintiff has cited no authority for the proposition that an otherwise
25 TILA compliant contract may not simultaneously contain a provision authorizing the creditor to
26 cancel the contract if that creditor is “unable to assign the contract to any one of the financial

27 ³ The text of the *Buie* provision is as follows: “In consideration of seller agreeing to deliver the vehicle, buyer
28 agrees that if seller is unable to assign the contract to any one of the financial institutions with whom seller regularly
does business . . . seller may elect to rescind the contract.” *Buie*, 2001 WL 34570064, at *4.

1 institutions, with whom [the creditor] regularly does business under an assignment acceptable to
2 [creditor].” The Court’s research has revealed none.

3 “TILA and Reg[ulation] Z contain detailed disclosure requirements for consumer loans”
4 *Semar v. Platte Valley Fed. Sav. & Loan Ass’n*, 791 F.2d 699, 703–04 (9th Cir. 1986). “To insure
5 that the consumer is protected TILA and Reg[ulation] Z must be absolutely complied with and
6 strictly enforced.” *Id.* (original alterations omitted). *This is how TILA’s purpose* of “avoiding the
7 uninformed use of credit” *is accomplished.* *Jackson*, 890 F.2d at 120.

8 Simply put, “there is nothing in TILA or Regulation Z which prohibits financing
9 contingencies in consumer contracts as violative of the TILA[.]” *Chastain v. N.S.S. Acquisition*
10 *Corp.*, No. 08-81260-CIV, 2009 WL 1971621, at *4 (S.D. Fla. July 8, 2009), *aff’d*, 378 F. App’x
11 983 (11th Cir. 2010). Moreover, a provision in a TILA covered loan transaction that
12 automatically cancels or gives the creditor the option to cancel the transaction if the creditor is
13 unable to assign the contract on terms acceptable to the creditor simply does not make the already
14 made TILA disclosures violate TILA. *See, e.g., Leguillou v. Lynch Ford, Inc.*, No. 99 C 3449,
15 2000 WL 198796, at *3 (N.D. Ill. Feb. 14, 2000) (“Plaintiff entered into a fully binding contract
16 with Lynch Ford. A condition subsequent was used to cancel the contract. This set of facts does
17 not undermine the validity of the original TILA disclosures.”); *Tripp v. Charlie Falk Auto*, No.
18 CIV. 3:00CV512, 2001 WL 1105132, at *6 (E.D. Va. Aug. 22, 2001) (“If the financing condition
19 had been satisfied, then Plaintiffs and Defendants would have been obligated under the terms of
20 the contract. The fact that the financing condition never came about does not make the credit
21 terms estimates.”), *aff’d sub nom. Tripp v. Charlie Falk’s Auto Wholesale Inc.*, 290 F. App’x 622
22 (4th Cir. 2008); *Baez v. Potamkin Hyundai, Inc.*, No. 09-21910-CIV, 2011 WL 13174894, at *5
23 (S.D. Fla. June 14, 2011) (rejecting the plaintiff’s argument that the defendant’s “option to cancel
24 the contract if it cannot secure financing or assign the contract (i.e. predicating the [the contract]
25 on a condition subsequent) renders the [contract] illusory and violates TILA”), *report and*
26 *recommendation adopted*, No. 09-21910-CIV, 2011 WL 13174896 (S.D. Fla. July 11, 2011),
27 *aff’d*, 458 F. App’x 827 (11th Cir. 2012).

28 Consequently, having carefully considered the matter, the Court holds “[a] seller’s

1 unilateral right to cancel a sales contract or a contract conditioned upon seller-located financing,
2 does not, by itself, violate TILA.” *Clarke v. W. Palm Nissan, LLC*, No. 9:17-CV-81032, 2018
3 WL 521031, at *2 (S.D. Fla. Jan. 23, 2018) (citing *Bragg*, 374 F.3d at 1068).

4 The authorities cited by Plaintiff simply are not to the contrary. Only one warrants brief
5 mention, *Patton v. Jeff Wyler Eastgate, Inc.*, 608 F. Supp. 2d 907 (S.D. Ohio 2007).⁴ That case
6 involved an indisputably TILA compliant installment contract that contained a “merger clause”
7 providing that it “contain[ed] the entire agreement between [the parties] relating to the contract”
8 and did not “reference or incorporate” any of the other documents signed by the plaintiffs.
9 *Patton*, 608 F. Supp. 2d at 915. The TILA compliant installment contract “d[id] not make the
10 validity of [that contract] contingent upon assignment.” *Id.* The district court found a TILA
11 violation in that case because “[t]he purpose of TILA would be frustrated if automobile
12 dealerships are permitted to rescind the terms of integrated automobile retail installment sales
13 contracts by *use of a second, contradictory form.*” *Id.* at 915–16 (emphasis added).

14 In reaching this conclusion, the district court found “[s]pecial considerations militate[d]
15 against the application of the general rule” that “a court may construe multiple documents
16 together if they concern the same transaction.” *Id.* at 915. The district court explained “[t]he
17 language in the [second agreement] that ‘financing for your purchase has not been finalized’
18 *directly contradict[ed]* the terms of the [first agreement] wherein the TILA financing terms
19 [we]re disclosed and [the defendant was] identified as the Creditor-Seller to whom payments
20 [we]re due.” *Id.* True, the TILA compliant agreement in *Patton* did “not make [its] . . . validity
21 contingent upon assignment,” while the second form purportedly authorized the defendant to
22 “reclaim the purchased vehicle if the [first agreement] is not assigned to or the financing
23 approved by a third party.” *Id.* This supported finding a TILA violation because it was one of the
24 identified inconsistencies that made the two contracts “impossible to reconcile” into “a coherent

25 ⁴ The string-citation in question cites to four cases, including *Patton*, with little in the way of discussion.
26 (ECF No. 10 at 9–10.) *Salvagne v. Fairfield Ford, Inc.*, 794 F. Supp. 2d 826 (S.D. Ohio 2010), does not warrant
27 separate discussion as it confronts much the same issue and relies heavily on *Patton* to resolve it. This is even more
28 true for the third case, *Jefferson v. United Car Co., Inc.*, No. 14-13749, 2016 WL 3876607 (E.D. Mich. July 18,
2016), which applies *Patton* and *Salvagne* in the context of a motion for entry of default judgment. The fourth, *Lea*,
is cited for the non-controversial proposition the Court has cited it for above — a plaintiff may recover under TILA
even if she has not sustained “any actual damages.” *Lea*, 755 F.3d at 254.

1 single contract.” *Id.* Nothing in *Patton* suggests that a provision like the Seller’s Right to Cancel
2 provision in the instant action could not be included in an otherwise TILA compliant contract.
3 *See id.* at 916 (“*Accordingly*, the Court holds that [the defendant] violated TILA by use of the
4 Purchase Spot Delivery Agreement *to vitiate the terms* of the Installment Contract.”) (emphasis
5 added).

6 For the foregoing reasons, the first claim fails as a matter of law. As Plaintiff’s legal
7 theory is fatally flawed, the Court dismisses this claim with prejudice.

8 B. Claim II: Violation of ECOA

9 Remarkably, the premise of Defendant’s argument with respect to Plaintiff’s second claim
10 is that the factual allegations made against it in the Complaint are “misleading,” “not true,” and
11 “false[.]” (ECF No 9-1 at 5–6.) At this stage in the proceedings, it is *Plaintiff’s* factual
12 allegations that are taken as true and it is *she* who is to be given the benefit of every reasonable
13 inference from her well-pleaded factual allegations. Consequently, Defendant’s motion with
14 respect to the second claim must be denied.

15 C. Claim IV: Breach of the Implied of Covenant of Good Faith and Fair Dealing

16 The Complaint sets out the fourth claim in three sentences. The first incorporates by
17 reference the preceding paragraphs in the Complaint. (ECF No.1 at ¶ 53.) The second sentence
18 states that breach of the implied covenant resulted from Defendant’s “misrepresenting material
19 facts and omitting material facts” which constituted Defendant “not perform[ing] its obligations
20 to Plaintiff in good faith[.]” (ECF No. 1 at ¶ 54.) The third sentence provides that “[t]he actions
21 of Defendant as described in this Complaint constitute a breach of the good faith requirement[.]”
22 (ECF No. 1 at ¶ 55.) Frankly, it is not entirely clear what Plaintiff intends her fourth claim to
23 encapsulate.

24 Defendant’s opening brief argues as follows: Plaintiff is complaining about Defendant
25 exercising its rights under the express terms of the Seller’s Right to Cancel provision, which
26 Defendant contends cannot be a violation of the implied covenant. (ECF No. 9-1 at 6.) Although
27 not clearly stated, the inescapable take away from the opposition is that the intended gravamen of
28 Plaintiff’s fourth claim is precisely that: Defendant breached the implied covenant of good faith

1 and fair dealing by doing what the Seller's Right to Cancel provision allows by its express terms.
2 (See ECF No. 10 at 14–15.)

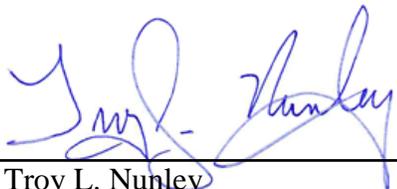
3 That is simply not how the implied covenant functions. When it comes to the implied
4 covenant, “as a general matter, implied terms should never be read to vary express terms.”
5 *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342, 374 (1992).
6 More particularly, the implied covenant of good faith and fair dealing is “plainly subject to the
7 exception that the parties may, by express provisions of the contract, grant the right to engage in
8 the very acts and conduct which would otherwise have been forbidden by an implied covenant of
9 good faith and fair dealing.” *Steiner v. Thexton*, 48 Cal. 4th 411, 419–20 (2010). Consequently,
10 the fourth claim fails as a matter of law and is dismissed with prejudice.

11 **IV. CONCLUSION**

12 For the foregoing reasons, Defendant's motion to dismiss (ECF No. 9) is GRANTED in
13 part and DENIED in part. Accordingly, IT IS HEREBY ORDERED that the first, third, fourth,
14 and fifth claims in the Complaint are dismissed with prejudice.

15 IT IS SO ORDERED.

16 Dated: 2/12/2018

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21 Troy L. Nunley
22 United States District Judge
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