UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KAITLYN LAWRENCE, individually and on behalf of all others similarly situated, Plaintiff, v. FINICITY CORPORATION, Defendant.	No. 2:23-cv-01005-DJC-AC ORDER DENYING MOTION TO COMPEL ARBITRATION (ECF NO. 17) AND GRANTING IN PART AND DENYING IN PART MOTION TO TRANSFER VENUE, OR, IN THE ALTERNATIVE, DISMISS COMPLAINT (ECF NO. 19)

Plaintiff Kaitlyn Lawrence brings an action on behalf of herself and putative sub-classes of national and California consumers that used an application, website, or online or Internet service provided by Defendant Finicity Corporation ("Finicity"). According to the Complaint, Finicity allegedly used counterfeit trademarks to: (1) impersonate financial institutions, (2) acquire login credentials from consumers who thought that they were interacting with their financial institution, and (3) collect and curate consumer data related to their financial institution's account to then re-package and sell to other businesses in the "financial technology" or "FinTech" industry. As a result, Plaintiff alleges that Finicity has violated the federal Racketeering Influenced and Corrupt Organizations Act ("RICO"), Utah's Consumer Sales Practices

Act ("UCSPA"), unjust enrichment principles under Utah common law and equity, and California's Anti-Phishing Act ("CAPA"). Finicity now seeks to compel arbitration of Plaintiff's claims based on its Terms and Conditions, which contains a delegation clause. In the alternative, Finicity seeks transfer of the case to the federal district court in the District of Utah under 28 U.S.C. § 1404(a), or dismissal of Plaintiff's claims for various reasons, including for failing to establish Article III and statutory standing.

For the reasons set forth below, because the Court concludes that Finicity did not provide reasonably conspicuous notice of the arbitration provision, such that Plaintiff did not consent to it, the Court denies Finicity's Motion to Compel Arbitration (ECF No. 17). Further, while the Court rejects Finicity's challenges to the state law claims on the basis of Article III standing, the Court concludes that Plaintiff has not established Article III or statutory standing under RICO, and, accordingly, dismisses the first cause of action of the Class Action Complaint (ECF No. 1) with leave to amend. However, the Court concludes that Plaintiff has sufficiently pled causes of action under California's Anti-Phishing Act, California Business & Professions Code section 22948, *et seq.*, and the Targeted Solicitations Ban under Utah's Consumer Sales Practices Act, Utah Code Annotated § 13-11-19. As for venue, Finicity fails to show that transfer would amount to more than a shift in burden, which is not enough to override Plaintiff's preferred choice of forum in her home venue of the Eastern District of California. Therefore, the Court denies the remainder of Finicity's requests in its Motion to Transfer Venue or, in the Alternative, Dismiss Complaint (ECF No. 19).

BACKGROUND

I. Factual Allegations

A. The Parties

Plaintiff lives in Sacramento County, where she "downloaded the Every Dollar app on her smartphone and linked her PNC bank account to the app." (Class Action Compl. (ECF No. 1) ¶ 15 ("Complaint" or "Compl.").) Plaintiff alleges that while on the Every Dollar app, "she was presented with a fake login screen designed by" Finicity,

"which featured the PNC trademark and URL." (*Id.*) "On this fake login page, she input her PNC bank account username and password, believing [that] she was interacting with PNC." (*Id.*) Plaintiff "did not realize [that] she was giving away her sensitive financial information to Finicity." (*Id.*)

Finicity is a "software-as-a-service company that is hired by FinTech companies to link users' bank accounts to their proprietary apps and websites." (Compl. ¶ 16.) Finicity is domiciled in Utah (principal place of business) and in Delaware (state of incorporation). (*See id.*) "Finicity's clients are primarily FinTech companies that provide credit monitoring, financial wellness, and payment processing [services] to consumers through smartphone applications and websites." (*Id.* ¶ 17 (citing Every Dollar's website as an example of one client).) "Finicity designs and provides the software used to link FinTech applications [and services] to those consumers' bank accounts." (*Id.*)

B. Finicity's Alleged Practices

According to the Complaint, "Finicity collects users' login credentials for purposes that far exceed the disclosed scope [of the Terms and Conditions and Privacy Policy] in at least three ways." (Compl. ¶ 18.) Finicity allegedly: (1) uses the credentials for consumers "without any regard for what is needed to help the user connect their financial accounts to apps[,]" and instead "acquires massive quantities of data for its own purposes[;]" (2) "then uses the usernames and passwords to refresh individuals' account information on an ongoing basis, whether or not the individual uses the FinTech app on a given day[,]" and "even if the user never uses the app again[;]" and (3) finally "sells this data as part of large compilations of individual transactions that remain traceable to particular individuals." (*Id.*) "Nowhere does the user give either the [financial technology] company or Finicity permission to do any of this." (*Id.*)

Finicity calls the above-described practice, "Financial data aggregation." (Compl. ¶ 19.) According to Finicity: "Financial data aggregation is a lot less

confusing than it sounds. The process involves compiling information from different accounts—including bank accounts, credit card accounts, investment accounts, loans and other financial accounts—into a single place." (*Id.* ¶ 19 and n.23 (quoting Finicity's website).) Crucially, Finicity sells the insights it gathers from consumers based on its financial data aggregation to rival banks to attract new customers and "provide[ ] data that can help . . . target new customers with specific offers that will be attractive to them . . . [and] expand service offerings." (*Id.* ¶ 19 and n.25 (quoting Finicity's website) (first omission added).) Apparently, Finicity's financial data aggregation "provides lenders with 'the best data for credit decision making[,]'" and "can '[a]ugment credit reports with real-time data for better credit decisioning of customers considered to be subprime,' such as 'cash flow analytics' and 'income verification.'" (*Id.* ¶ 20.) Finicity "delivers the most current and accurate view of a borrower's finances." (*Id.* ¶ 20 and nn. 28–29 (citations to Finicity's website omitted).)

In the course of this financial data aggregation, Finicity allegedly engages in certain deceptive practices. (*See* Compl. ¶ 23; *also id.* ¶¶ 35–36 (providing copies of some trademarks Finicity has allegedly counterfeited).) Plaintiff complains that Finicity uses counterfeit marks and URLs that are cyberpirated[1] or deceptively use common names for legitimate businesses without permission on the login screen themselves, such that "[m]ost app users will simply turn over their usernames and passwords falsely believing [that] they are directly interfacing with the bank itself." (*Id.* ¶ 24.) Plaintiff also complains that Finicity does not disclose that it collects user's financial institution credentials. (*See id.*) According to the Complaint, nowhere across three separate sign-in windows "does Finicity disclose [that] it is a financial data analysis broker. In fact, [the last two sign-in windows] suggest the opposite." (*Id.* ¶ 25; *see id.* ¶ 24 (providing Figures 7, 8, and 9 depicting the three separate sign-in windows).)

[1] *See Cyberpiracy*, *Black's Law Dictionary* (11th ed. 2019) ("The act of registering a well-known name or mark (or one that is confusingly similar) as a website's domain name, usu[ally] for the purpose of deriving revenue."); 15 U.S.C. § 1125(d) (codifying amendments to the Lanham Act that added the Anticybersquatting Consumer Protection Act of 1999).

This case ultimately revolves around the disclosure contained in the second window and the visual presentation of it, as depicted in Figure 8, which is provided in Appendix A.

II. Procedural Background

Plaintiff filed the Complaint in federal court, based on federal question jurisdiction and jurisdiction under the Class Action Fairness Act, on May 26, 2023. (*See* Compl. at 35.) On August 21, 2023, Finicity filed its present Motion to Compel Arbitration (ECF No. 17) and Motion to Change Venue or Dismiss (ECF No. 19). (*See* Finicity's Mem. of P. and A. in Supp. of Mot. to Compel Arbitration (ECF No. 18) ("Arbitration Motion" or "Arb. Mot."); Finicity's Mem. of P. and A. in Supp. of Mot. to Transfer Venue Or, in the Alternative, Dismiss Compl. (ECF No. 20) ("Motion" or "MTD").) Finicity also filed an unopposed Request for Judicial Notice (ECF No. 23), which the Court GRANTS.[2] Plaintiff filed an Omnibus Opposition, and Finicity filed separate Replies. (*See* Omnibus Opp'n to Finicity's Arb. Mot. and MTD (ECF No. 29) ("Opposition" or "Opp'n"); Finicity's Reply Mem. of P. and A. in Further Supp. of Arb. Mot. (ECF No. 30) ("Arbitration Reply" or "Arb. Reply"); Finicity's Reply Mem. of P. and A. in Further Supp. of MTD (ECF No. 31) ("Reply" or "MTD Reply").) The Court heard oral arguments on November 9, 2023, where Attorneys Stefan Bogdanovich and

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[2] The Court grants Finicity's Request for Judicial Notice in Support of Finicity's Motion (ECF No. 23) and takes judicial notice of Exhibits A, B, C, D, and E (*see* ECF Nos. 21-1, 21-2, 21-3, 21-4, and 21-5), which contain Finicity's End User License Agreement (its Terms and Conditions) revised as of November 18, 2019 (ECF No. 21-1), and Finicity's Privacy Notices (its Privacy Policy) from February 19, 2020 (ECF No. 21-5) through August 16, 2023 (ECF No. 21-2). The Court grants Finicity's Request for Judicial Notice because: (1) these agreements are not subject to reasonable dispute, as both parties rely on them, and the contents of the notices are capable of being accurately and readily determined from online sources whose accuracy cannot reasonably be questioned, *see* Fed. R. Evid. 201(b)(2); and (2) the agreements are like an agreement that governs the private relations of the parties, *see*, *e.g.*, *Correa v. A2 Railla Dev., Inc.*, No. 2:22-cv-071280-DWP-DX, 2023 WL 6783987, at *2 (C.D. Cal. Apr. 7, 2023) (taking judicial notice of a collective bargaining agreement and collecting cases); *Trudeau v. Google LLC*, 349 F. Supp. 3d 869, 876 (N.D. Cal. 2018) (taking judicial notice of the Terms of Service and other online contractual agreements), *aff'd*, 816 F. App'x 68 (9th Cir. 2020). However, so as to not create an unassailable fact for the future, the Court will incorporate these documents by reference and will presume their veracity at this stage. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998–99 (9th Cir. 2018). (*See, e.g.*, Compl. ¶ 8 ("A link to Finicity's privacy policy or terms of use does not appear anywhere on the fake login screen it designs."); *id.* ¶ 30 and nn.34–35 (citing and quoting Finicity's Privacy Policy); *id.* ¶ 34.)

Brittany S. Scott appeared for Plaintiff, and Attorneys Christopher G. Karagheuzoff, Maral Shoaei, and Rachel P. Stoian appeared for Finicity. (*See* ECF No. 35.) Both parties filed supplemental authorities regarding the Arbitration Motion. (*See* ECF Nos. 34, 36.) The matter is now fully briefed.

DISCUSSION

I. Article III Standing and the Rule 12(b)(1) Motion

A. The Court Construes the Motion as Raising a Facial Attack

A Rule 12(b)(1) jurisdictional attack may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) ("*SAFE*") (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). In a facial attack, the challenger takes the allegations in the complaint as true but challenges whether those allegations are sufficient to invoke jurisdiction. *See id.* at 1039. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. *Id.* The difference is crucial because a court errs when it considers evidence outside of the pleadings in a facial attack. *See, e.g.*, *Salter v. Quality Carriers, Inc.*, 974 F.3d 959, 964–65 (9th Cir. 2020) (vacating and remanding the district court's order that construed an attack as factual rather than facial, thus applying the wrong standard). "For a facial attack, the court, accepting the allegations as true and drawing all reasonable inferences in the [opponent's] favor, 'determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction.'" *Salter*, 974 F.3d at 964 (citation omitted). However, "[w]hen a factual attack is mounted, the responding party 'must support her jurisdictional allegations with "competent proof" . . . under the same evidentiary standard that governs in the summary judgment context.'" *Id.* (citations omitted).

Finicity argues that "Plaintiff has not pled sufficient facts to satisfy [her] burden, so all of her claims must be dismissed." (Mot. at 12.) Thus, the Court concludes that Finicity brings a facial attack because Finicity does not challenge the truthfulness of Plaintiff's allegations, instead challenging their sufficiency. *See Salter*, 974 F.3d at 964.

B. Plaintiff Adequately Pleads an Injury-in-Fact under CAPA and the UCSPA's Targeted Solicitations Ban

1. Legal Standard

The "irreducible constitutional minimum of standing" contains three elements: (1) injury-in-fact; (2) causation; and (3) redressability. *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). First, the plaintiff must have suffered an injury-in-fact: an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" *Lujan*, 504 U.S. at 560 (citations omitted). Second, there must be a causal connection between the injury and the conduct complained of: the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* at 560–61 (citation omitted). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* at 561 (citation omitted). Because Plaintiff seeks injunctive, that is, prospective, relief (*see* Compl. ¶¶ 10, 72, 113), Plaintiff must also show more than a past exposure to illegal conduct, and must show that she suffers from the "continuing, present adverse effects[,]" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("*Lyons*") (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974)), or that future harm is "certainly impending" or that there is a "substantial risk" that such harm will occur. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 and n.5 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010)). Where, as here, a case is at the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) ("*Spokeo II*").

At base, Article III standing requires the plaintiff "[t]o demonstrate their personal stake [in the case and] be able to sufficiently answer the question: What's it to you?" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17

Suffolk U. L. Rev. 881, 882 (1983)) (internal quotation marks omitted). Typically, plaintiffs demonstrate their personal stake through a "concrete" injury that "actually exist[s]." *Phillips v. U.S. Customs & Border Prot.*, 74 F.4th 986, 991 (9th Cir. 2023) (quoting *Spokeo II*, 578 U.S. at 340). Tangible injuries, like physical harms or monetary losses, are concrete. *Id*. But "[a] concrete injury need not be tangible." *Id.* (quoting *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019)). Moreover, a legislature may enact laws that protect substantive interests, a violation of which may constitute an injury-in-fact. Both the Supreme Court and the Ninth Circuit have recognized that legislatures are "well positioned to identify [tangible and] intangible harms that meet minimum Article III requirements." *Spokeo II*, 578 U.S. at 341; *see TransUnion LLC*, 594 U.S. at 462 (Kagan, J., dissenting). In cases involving a legislatively identified harm, both courts counsel that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts[,]" such as common law torts or certain constitutional violations. *Spokeo II*, 578 U.S. at 341 (citing *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775–77 (2000)); *Phillips*, 74 F.4th at 991.

2. Analysis

a. The Loss of Indemnification Rights and to the Value of Plaintiff's Data Are Too Speculative to Confer Standing

Plaintiff's first alleged harm – the loss of indemnification rights (*see* Compl. ¶¶ 49–52) – is insufficient to confer standing. The identified harm is contingent upon "a rogue actor at the Defendant us[ing] a consumers' credentials to access and improperly transfer funds from their accounts . . . ." (*Id.* ¶ 50; *see id.* ¶ 51). But Plaintiff has failed to identify any "rogue actor," and the Supreme Court has never held "that the mere risk of future harm, without more, suffices to demonstrate Article III standing in a suit for damages." *TransUnion LLC*, 594 U.S. at 437. So too with Plaintiff's third alleged harm, the increased risk of identity theft. (*See* Compl. ¶¶ 58–60). Plaintiff fails

to allege that there ever *was* a breach or that she *was* ever targeted by a third party because of Finicity's scheme. (*Compare with* MTD at 14–15 (collecting cases).) Thus, even though Plaintiff has spent time and money to monitor her credit and identity, she "cannot manufacture standing by incurring costs in anticipation of non-imminent harm." *Clapper*, 568 U.S. at 422.

Plaintiff's second alleged harm revolves around the notion that Finicity's financial data aggregation crowds out Plaintiff's ability to market and sell her information and data. (*See* Compl. ¶¶ 53–57.) Plaintiff claims that "there is an economic value to the financial data that Finicity collects, analyzes, and sells about Plaintiff and Class members." (*Id.* ¶ 53.) True enough, but Plaintiff again fails to specifically allege a pocketbook or economic injury *to herself* in the form of lost money or property. Plaintiff complains that "Finicity's unlawful conduct is a substantial factor preventing the developing a market for Plaintiff and class members to sell access to their data on their terms." (*Id.* ¶ 55.) A market requires demand, however, which assumes that there is at least someone able and willing to pay. Yet Plaintiff fails to allege that she or any other putative class members *did* try to sell their individual data and were unable to complete a sale. (*Compare with* MTD at 14 (collecting cases).) If the presence of "'some day' intentions—without any description of concrete plans, or indeed any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require[,]" then the absence of any stated "some day" intentions to sell one's information and data is also fatal to Plaintiff's argument here. *See Lujan*, 504 U.S. at 564.

b. The Statutes Protect Concrete Interests

Perhaps recognizing the Complaint's deficiencies, Plaintiff raises a new theory of standing in her Opposition based on privacy interests purportedly protected by the statutory claims she brings. (*See* Opp'n at 20–21 (citing Compl. ¶¶ 3–5, 9, 15, 19–21, 41, 46).) Finicity objects to this argument, pointing out that privacy is not mentioned in the Complaint and that there is no claim for an invasion of privacy. (*See* MTD Reply

at 4.) Even if this case is ultimately about a direct injury to Plaintiff's privacy rights and right to control her personal information, *see, e.g.*, *Patel*, 932 F.3d at 1273 (quoting *U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 763 (1989) (recognizing the common law's protection of a privacy right)), the question for this Court is whether the statutes that provide a cause of action either (1) protect a substantive right, the invasion of which is an injury that confers standing, or (2) establish a procedural right, the violation of which creates a material risk of harm sufficient to confer standing. *See Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 782 (9th Cir. 2018) (first quoting *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 982–84 (9th Cir. 2017); and then citing *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114–17 (9th Cir. 2017) ("*Spokeo III*")).

i. The Statutes Do Not Codify Privacy Rights

The Ninth Circuit has recognized that "the distinction between a 'substantive' statutory violation that alone creates standing, and a 'procedural' statutory violation that may cause harm or a material risk of harm sufficient for standing[ ] can be a murky one." *Bassett*, 883 F.3d at 782 n.2. Nonetheless, the Ninth Circuit has explained that a court "must always analyze whether the alleged harm is concrete, with an eye toward history and congressional judgment . . . ." *Id.*

Here, Plaintiff tries to tie her Article III standing to her privacy rights in the personal information Finicity obtains and to a somewhat similar case from the Northern District of California, *Cottle v. Plaid Inc.*, 536 F. Supp. 3d 461 (N.D. Cal. 2021). (*See* Opp'n at 21–22.) In *Cottle*, the plaintiffs alleged a cause of action under several privacy-related statutes and CAPA, and the court held that the plaintiffs established Article III standing "because each of their claims relate[d] to [the defendant's] alleged invasion of their privacy rights." *Cottle*, 536 F. Supp. 3d at 480. However, as Finicity points out, *Cottle* involved statutory causes of action that courts had already found to protect substantive privacy rights (*see* MTD Reply at 6 and n.5 (collecting cases)), and the court in *Cottle* did not specifically analyze whether CAPA

protected a substantive privacy right or created a procedural right that protects against a material risk of harm (*see id.* at 6–7 and n.7). Therefore, *Cottle* is of little help.

Turning to the question before the Court of whether CAPA or the UCSPA's Targeted Solicitations Ban protect concrete interests sufficient to confer Article III standing, the Ninth Circuit has established a two-part test that "asks '(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.'" *Patel*, 932 F.3d at 1270–71 (quoting *Spokeo III*, 867 F.3d at 1113). The statutes at issue here, CAPA and the UCSPA's Targeted Solicitations Ban, function similarly and the analysis substantially overlaps between the two. CAPA makes it "unlawful for any person, by means of a Web page, electronic mail message or otherwise through use of the Internet, to solicit, request, or take any action to induce another person to provide identifying information by representing itself to be a business without the authority or approval of the business." Cal. Bus. & Prof. Code § 22948.2. The UCSPA's Targeted Solicitations Ban similarly makes it unlawful for a supplier[3] "who is not the financial institution of an account holder [to] represent, directly or indirectly, that the supplier is the financial institution of the account holder[,]" Utah Code Ann. § 13-11-4.1(4), and makes it unlawful to engage in "targeted solicitation," which means:

> any written or oral advertisement or solicitation for products or services that: (i) is addressed to an account holder; (ii) contains specific account information; (iii) is offered by a supplier that is not sponsored by or affiliated with the financial institution that holds the account holder's account; and (iv) is not authorized by the financial institution that holds the account holder's account.

[3] A "supplier" under the UCSPA "means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer." Utah Code Ann. § 13-11-3(6).

Id. § 13-11-4.1(1)(d).

As for the first part of the test stated above, the two statutes do not protect privacy rights. Plaintiff's reliance on the Second Restatement of Torts, the common-law tort of intrusion upon seclusion, and Ninth Circuit cases finding Article III standing under a statute that protected a substantive privacy right are unavailing here because it is not clear that either the California or Utah Legislatures intended to protect privacy rights in the passage of CAPA and the UCSPA's Targeted Solicitations Ban. *Compare with Eichenberger*, 876 F.3d at 983 (finding standing where the statute at-issue, 18 U.S.C. § 2710(b)(1), provided that "[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person . . . ."); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (finding standing under the Telephone Consumer Protection Act of 1991, where "Congress made specific findings that 'unrestricted telemarketing can be an intrusive invasion of privacy' and are a 'nuisance.'").

CAPA protects "identifying information," which "means, with respect to an individual any of the following:"

> (1) Social security number. (2) Driver's license number. (3) Bank account number. (4) Credit card or debit card number. (5) Personal identification number (PIN). (6) Automated or electronic signature. (7) Unique biometric data. (8) Account password. (9) Any other piece of information that can be used to access an individual's financial accounts or to obtains goods or services.

Cal. Bus. & Prof. Code § 22948.1(b). The UCSPA's Targeted Solicitations Ban protects "specific account information," which "includes: (A) a loan number; (B) a loan amount; or (C) any other specific account or loan information." Utah Code Ann. § 13-11-4.1(1)(c)(ii). Aside from the exceptional reference to "unique biometric data" in CAPA, much of the information covered by the two statutes is information that is maintained by an entity providing a good or service for the individual and that is required to be disclosed in certain circumstances (like the social security number, the driver's license

number, the bank account number, the credit card or debit card number, and the loan number) and, as held by the Ninth Circuit, is not "so sensitive that another's access to that information 'would be highly offensive to a reasonable person' or otherwise gives rise to reputational harm or injury to privacy interests." *Phillips*, 74 F.4th at 996 (quoting *Restatement (Second) of Torts* § 625B (Am. L. Inst. 1977)). *Compare with id.* (discussing "names, birthdays, social security numbers, occupations, addresses, social medica profiles, and political views and associations"); *Patel*, 932 F.3d at 1268–69 (holding that a plaintiff had standing under an Illinois law "regulating the collection, use, safeguarding, and storage of biometrics[,]" including "biometric identifiers" such as a "scan of hand or face geometry."). Crucially, as stated in CAPA, the information covered includes "any other piece of information that *can be used to access an individual's financial accounts*[,]" Cal. Bus. & Prof. Code § 22948.1(b)(9) (emphasis added), so the violation is for the unauthorized access to and acquiring of this information, *not* the unauthorized *investigation or intrusion* upon an individual's financial accounts. A potential injury to privacy under these statutes is therefore dependent upon additional consequences to be actionable, unlike common-law privacy torts, as the mere acquisition of this information does not necessarily violate a person's privacy or intrude upon their seclusion. *Compare with Patel*, 932 F.3d at 1274 (noting that, "[u]nder the common law, an intrusion into privacy rights by itself makes a defendant subject to liability[,]" citing *Restatement (Second) of Torts* § 625(B), and that "privacy torts do not always require additional consequences to be actionable[,]"quoting *Eichenberger*, 876 F.3d at 983).

Looking to the records available for the enacting State Legislatures confirms the conclusion that CAPA and the UCSPA's Targeted Solicitations Ban do not "codif[y] a context-specific extension of the *substantive* right to privacy[.]" *Eichenberger*, 876 F.3d at 983. For instance, CAPA grounded itself in the common law action of *fraud*, not invasion of privacy. *See Bill Analysis: Senate Floor Analyses on S.B. 355 Before the S. R. Comm.*, 2005–06 Reg. Sess., at 2 (Cal. 2005) ("CAPA's Second Senate Floor

Analyses"), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060SB355 [Perma.cc record: https://perma.cc/FF3M-79BR]. Similarly, the UCSPA's Targeted Solicitations Ban is also focused on preventing fraud with the enrolled copy of the bill providing that it "enacts provisions in the Utah Consumer Sales Practices Act and the Financial Transaction Card Protection Act[ ]" that, in relevant part, "prohibits a supplier who is not the financial institution of an account holder from representing that the supplier is the financial institution of the account holder[.]" Consumer Sales Practices Amendments, H.B. 113, at 1, 63d Leg., Gen. Sess., 2020 Utah Laws Ch. 173 (enacted), https://le.utah.gov/~2020/bills/static/HB0113.html [Perma.cc record: https://perma.cc/PM2L-NXQGT]. Further revealing that these statutes are not about privacy is that other laws contemplated by the same State Legislatures were *explicitly* about privacy.[4] Thus, the statutes do not protect substantive privacy rights. *See Spokeo III*, 867 F.3d at 1113 (citation omitted).

[4] *See* Internet – Anti-Phishing Act, 2005 Cal. Legis. Serv. Ch. 437 (S.B. 355) (West) (noting that "the Consumer Protection Against Computer Spyware Act[ ] provides specified protections for the computers of consumers in this state against certain types of computer software."), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200520060SB355 [Perma.cc Record: https://perma.cc/QM34-5M4T]; *Bill Analysis: Hearing on S.B. 1436 Before the Sen. Jud. Comm.*, 2003–04 Reg. Sess., at 1–2 (Cal. 2004) (noting that existing law, including the California Constitution and common law, recognize the right to privacy, and that the common law tort of trespass to chattels has been applied to computer systems), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040SB1436 [Perma.cc Record: https://perma.cc/95ZA-385U]; Electronic Information and Data Privacy Amendments, H.B. 383, at 1, 63d Leg., Gen. Sess. (Utah 2020) (proposing amendments that were filed in the Utah House but not passed in the Utah Senate that "related to the privacy of electronic data and information."), https://le.utah.gov/~2020/bills/static/HB0383.html [Perma.cc Record: https://perma.cc/6ZKS-BJXK]; Electronic Information and Data Privacy Amendments, H.B. 87, at 1, 64th Leg., Gen. Sess., 2021 Utah Laws Ch. 42 (enacting amendments similar to those proposed in H.B. 383 "related to the privacy of electronic data and information."), https://le.utah.gov/~2021/bills/static/HB0087.html [Perma.cc Record: https://perma.cc/7WWE-VDDT]; Utah Consumer Privacy Act, S.B. 249, at 1, 63d Leg., Gen. Sess. (Utah 2020) (proposing amendments that were filed in the Utah Senate but did not pass in the Utah Senate that would "create[ ] a cause of action for . . . the consumer to recover damages . . . from a business if the business fails to disclose personal information collected or sold, to delete personal information upon the consumer's request, or to stop selling a consumer's personal information upon request[ ]"), https://le.utah.gov/~2020/bills/static/SB0249.html [Perma.cc Record: https://perma.cc/ZV8T-RHSZ].

ii. The Statutes' Procedural Rights Prevent Fraud

While CAPA and the UCSPA's Targeted Solicitations Ban do not protect privacy interests, they do protect another interest that has a common-law analogue and that is raised by Plaintiff in the Complaint: the prevention of fraud, thus satisfying the first part of the Ninth Circuit's test.[5] *See, e.g.*, CAPA's Second Senate Floor Analyses, at 3 ("Phishing is a widespread technique for obtaining personal information and is used to facilitate identity theft and other crimes."); Utah Code Ann. § 13-11-4.1(1)(d), (3)–(4) (making it unlawful as a deceptive act or practice for a supplier to make a targeted solicitation using specific account information without a disclosure only if the sender of the targeted solicitation is not affiliated or associated with the target's financial institution).

However, to satisfy the second part of the Ninth Circuit's test, the Court must still find that "the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests." *Spokeo III*, 867 F.3d at 1113; *see Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1066 (D.C. Cir. 2019). Like the D.C. Circuit finding a concrete injury-in-fact under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), codified at 15 U.S.C. § 1681c(g), and other courts under similar laws enacting procedural protections,[6] CAPA and the UCSPA's Targeted

[5] While Plaintiff did not explicitly argue or allege that CAPA and the UCSPA's Targeted Solicitations Ban establish a concrete injury-in-fact sounding in fraud, rather than privacy, as the Court concludes, it is appropriate for the Court to consider this basis for Article III standing because Plaintiff did allege fraud or deceit generally. (*See* Compl. ¶¶ 1–4, 8, 15, 24–34, 55, 57, 60–61, 99–100, 106, 111.) Moreover, courts have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). And when a federal court has jurisdiction, it also has a "virtually unflagging obligation . . . to exercise" that authority. *Mata v. Lynch*, 576 U.S. 143, 150 (2015) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)) (omission added in *Mata*).

[6] *See also Strubel v. Comenity Bank*, 842 F.3d 181, 190–91 (2d Cir. 2016) (holding that the plaintiff had standing under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, for procedural violations of the statute's right to the informed use of credit where "[t]hese procedures afford such protection by requiring a creditor to notify a consumer, at the time he opens a credit account, of how the consumer's own actions can affect his rights with respect to credit transactions[,]" and the defendant failed to follow certain disclosure requirements that could have led to missed payments or increased charges); *Spokeo III*, 867 F.3d at 1115–17 (holding that the plaintiff had standing under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, because the "procedures at issue in this case were crafted to protect

Solicitations Ban themselves "do[ ] not prohibit the crime of identity theft; instead, [they] establish[ ] a procedural requirement to ensure that consumers can use their credit and debit cards without incurring *an increased risk* of identity theft [and fraud]." *Jeffries*, 928 F.3d at 1066. For instance, California recognized that one argument in support of passing CAPA was to instill "[c]onfidence in the integrity of personal information transmitted via the Internet [that] remains an integral part of the medium's development." CAPA's Second Senate Floor Analyses, at 5.

Nonetheless, as the Supreme Court has now clarified: "No concrete harm, no standing." *TransUnion LLC*, 594 U.S. at 442. Here, however, Plaintiff has alleged two sufficiently concrete harms from the past to pursue monetary relief that, while insufficient to support traditional Article III standing on their own, constitute sufficient harm arising from the alleged statutory violations to provide standing.

First, Plaintiff alleged that the risk of future harm has materialized in the form of the expenses she has paid for "ongoing costly credit monitoring services." (Compl. ¶ 59.) A personal pocketbook injury has always been enough for Article III standing purposes, even if just a few pennies or a "trifle." *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth C. Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1968)); *see, e.g.*, *Van v. LLR, Inc.*, 61 F.4th 1053, 1064 (9th Cir. 2023) ("Any monetary loss, even one as small as a fraction of a cent, is sufficient to support standing.").

Second, Plaintiff alleges that Finicity has shared her personal financial information and financial data with others, alleging that, as a result, "Finicity has multiplied the number of targets for malicious actors[ ] [because] [i]t is hard to keep a password secret between just two people[,] [and] [i]t is even harder to keep it secret

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consumers' . . . concrete interest in accurate credit reporting about themselves[,]" and the defendant had disclosed such inaccurate information, thus implicating the statutory right); *Tailford v. Experian Info. Sols., Inc.*, 26 F.4th 1092, 1099–1100 (9th Cir. 2022) (holding that the plaintiff had standing under the Fair Credit Reporting Act where "alleged procedural violations protected substantive rights by requiring disclosures necessary for informed decision-making." (citing *Syed v. M-I, LLC*, 853 F.3d 492, 497–99 (9th Cir. 2017))).

with three or more people." (Compl. ¶ 58.) Finicity's own User Agreement contained in its hyperlinked Terms and Conditions confirms that users like Plaintiff:

> are authorizing Finicity to, among other things, (i) collect your Consumer Credentials and Uploaded Data, (ii) instruct Provider on your behalf to provide your Provider Account Data to Finicity in order to provide Services to you (either using your Consumer Credentials or through other means with your Provider); (iii) retain and use, at least two times for no less than a sixty (60) day period, your Consumer Credentials for the provision of the Services; (iv) access, retain, and use your Consumer Data in providing you Services, at least two times for no less than a sixty (60) day period; (v) compare Provider Account Data and Uploaded Data in providing you Services, and/or (vi) disclose and share your Consumer Data to service providers and/or resellers to use in accordance with applicable law and for research and development.

(ECF No. 21-1 at 3.)

In addition to retaining Plaintiff's financial information for itself, Finicity also discloses it to "third party affiliates." Specifically, the User Agreement states:

> You acknowledge that in accessing your data and information through the Services, your Provider account access number(s), password(s), security question(s) and answer(s), account number(s), login information, and any other security or access information, and the actual data in your account(s) with such Provider(s) such as bank and other account balances, credit card charges, debits and deposits (collectively, "Provider Account Data"), may be collected and stored in Services. You further acknowledge that in providing or uploading your financial and/or employment documents, statements, records, or other information (either directly to Finicity or through a third-party) ("Uploaded Data"), such Uploaded Data will be stored and used in the Services. Provider Account Data and Uploaded Data are referred to collectively herein as "Consumer Data". You authorize us and our third party affiliates, in conjunction with the operation and hosting of the Services, to use certain Consumer Data to (a) collect your Consumer Data, (b) reformat and manipulate such Consumer Data, (c) create and provide hypertext links to your Provider(s), (d) access Providers' websites using your Consumer Data, (e) update and maintain your account information, (f) address errors or service interruptions, (g) enhance the type of data and services we can provide to you in the future, and (h) take such other actions as are reasonably necessary to perform the actions described in (a) through (g) above. You hereby represent that you are the legal owner of your Consumer Data and that you have the authority to appoint, and hereby expressly do appoint

> us or our third-party affiliates as your attorney-in-fact and agent, to access third-party sites and/or retrieve your Consumer Data through whatever lawful means with the full power and authority to do and perform each thing necessary in connection with such activities, as you could do in person, without limitation, accepting any new and/or updated Terms and Conditions from your Provider on your behalf, in providing Services to you. You also expressly authorize Provider to share and disclose your Provider Account Data to us on your behalf to facilitate your use of your Provider Account Data for products and services agreed to by you.

(ECF No. 21-1 at 3–4.) Thus, this case involves more than the mere retention of information unlawfully obtained. *Compare with Phillips*, 74 F.4th at 996. As a result, Plaintiff has pled facts establishing a concrete harm that has materialized from these statutory violations. *See TransUnion LLC*, 594 U.S. at 425.

Furthermore, this is not a case where the risk of fraud or identity theft is minimal because of the information involved.[7] The Complaint alleges that Finicity has information from which "Finicity can '[a]ugment credit reports with real-time data for better credit decisioning of customers considered to be subprime,' such as 'cash flow analytics' and 'income verification[,]'" (Compl. ¶ 20 (quoting Finicity's website)), and its "profiling of people is so comprehensive they include attributes like [an individual's] 'TV and Streaming Services.'" (*Id.* ¶ 4.) That is, the information Finicity allegedly has access to is enough to defraud Plaintiff. *See Jeffries*, 928 F.3d at 1067 ("Because the receipt contained enough information to defraud Jeffries, she suffered an injury in fact at the point of sale."). And unlike other cases where the plaintiff could take actions to prevent the fraud, Plaintiff cannot do so here because Finicity, not Plaintiff, gave away to others the information that can be used to access Plaintiff's financial accounts.

[7] Indeed, as the Complaint alleges, and Finicity's Terms and Conditions and Privacy Policy confirm, Plaintiff's individual data is "s[old] as part of large compilations of individual transactions that remain traceable to particular individuals." (Compl. ¶ 18; *see also* ECF No. 21-1 at 4 (discussing Finicity's use of "compiled, anonymized data concerning your financial transactions, or other available data that is collected through your use of the Services[ ]"); ECF No. 21-2 at 6 ("We may use, share, or publicly disclose or otherwise process your information that has been, de-identified, anonymized and/or aggregated (so that it does not identify you personally) for any purpose permitted under applicable law, including for research and the development of new products.").)

Thus, Finicity, not Plaintiff, is the best-situated person to regain control of that information. *Compare with Bassett*, 883 F.3d at 783 (finding no injury-in-fact where the plaintiff failed to allege "any risk of harm is real, 'not conjectural or hypothetical,' given that he could shred the offending receipt along with any remaining risk of disclosure."); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 931 (11th Cir. 2020) (finding no injury-in-fact for a Fair and Accurate Credit Transactions Act violation because "[i]f his receipt would not offer any advantage to identity thieves, we could hardly say that he was injured because of the efforts he took to keep it out of their hands.").

Finicity finally argues that Plaintiff has a redressability problem, that is, Finicity argues that Plaintiff cannot show how the relief she seeks will remedy her alleged injuries. (*See* MTD Reply at 7.) Plaintiff seeks monetary relief, and a decision in her favor would compensate her lost money paying for credit monitoring services. These costs may fairly be attributed to Finicity because "in procedural-standing cases, we tolerate uncertainty over whether observing certain procedures would have led to (caused) a different substantive outcome[.]" *Dep't of Educ. v. Brown*, 600 U.S. 551, 565–66 (2023) (citing *Lujan*, 504 U.S. at 572 n.7)

Moreover, Legislatures are "well positioned to identify intangible harms that meet Article III requirements . . . ." *Spokeo II*, 578 U.S. at 341. Legislatures "ha[ve] the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," so long as the Legislature "at the very least identif[ies] the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment).

Here, for example, California found when passing CAPA that the fraudulent practice it targeted, called "phishing," had 78% of its perpetrators located in the United States, with 15% of the scams originating in California, the most in the nation. *See* CAPA's Second Senate Floor Analyses, at 4. California also found that these

scams cost 76,000 consumers to lose money based on more than 100,000 reports of fraud, totaling over $193 million in losses in 2003 and 2004 alone, the year before CAPA was passed. *See id*. These findings are entitled to deference from courts, which should only override the Legislature's decision to provide a cause of action if the Legislature "could not reasonably have thought a suit will contribute to compensating or preventing the harm at issue." *TransUnion LLC*, 594 U.S. at 463 (Kagan, J., dissenting); *see, e.g.*, *Spokeo III*, 867 F.3d at 1115 (recognizing standing despite some differences between the statutory cause of action and the comparable common-law cause of action because courts "respect Congress's judgment that a similar harm would result from [the prohibited conduct]."). Here, Plaintiff's complaints plainly fall within the scope of both statutes.

As for the "continuing, adverse effects" required to seek prospective relief, *Lyons*, 461 U.S. at 102 (quoting *O'Shea*, 414 U.S. at 493), the Court finds that there are two. First, as explained above, there is a "substantial risk" that fraud or identity theft will occur based on violations of CAPA and the UCSPA's Targeted Solicitations Ban. *Clapper*, 568 U.S. at 414 n.5 (citations omitted). Second, Plaintiff suffers the "continuing, present adverse effects[ ]" of losing control over her information after giving it to Finicity as a result of Finicity's allegedly fraudulent conduct. *See Eichenberger*, 876 F.3d at 983. These harms are traceable to Finicity because of its alleged violations of CAPA and the UCSPA's Targeted Solicitations Ban. Finally, a decision in Plaintiff's favor would be likely to remedy Plaintiff's loss because an injunction could compel Finicity to regain control of Plaintiff's information. As stated before, Finicity – not Plaintiff – is the best-situated problem-solver, as Finicity could go up and down its supply and service chain to ask for Plaintiff's information to be returned and deleted from its "third part affiliates." Thus, Plaintiff has established Article III standing to pursue monetary and injunctive relief under CAPA and the UCSPA's Targeted Solicitations Ban.

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c. Plaintiff's RICO Claim Is Too Speculative

i. Plaintiff Lacks Article III Standing to Pursue Her RICO Claim

The Court concludes that Plaintiff has adequately pled an injury-in-fact because of the alleged violations of CAPA and the UCSPA's Targeted Solicitations Ban. But standing is not dispensed in gross. *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Plaintiff's alleged pocketbook or market injury theory of standing is not sufficient to establish Article III standing to pursue her RICO claim without any allegations that she lost sales or suffered damage to her reputation or that she had preexisting potential purchasers. *Compare with Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014); *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970). Accordingly, the Court dismisses the first cause of action concerning RICO.

While Plaintiff may be able to amend her complaint to allege a chain of inferences to establish her Article III standing to pursue her claim of lost sales or lost profits without direct proof of diverted sales or business, *see, e.g.*, *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825 (9th Cir. 2011), RICO standing is a more rigorous matter than standing under Article III. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 266 (2d Cir. 2006); *see also TrafficSchool.com, Inc.*, 653 F.3d at 826 ("Evidence of direct competition is strong proof that plaintiffs have a stake in the outcome of the suit, so their injury isn't 'conjectural' or 'hypothetical.'" (quoting *Lujan*, 504 U.S. at 560)). To provide guidance to Plaintiff in amending her claims and for purposes of judicial economy, the Court proceedings to the question of whether Plaintiff has statutory standing under RICO, which the Court answers in the negative. Nonetheless, the Court concludes that amendment would not be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

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ii. Plaintiff Lacks Statutory Standing to Pursue Her RICO Claim

RICO provides a private cause of action for "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962(c)]." *United Bhd. of Carpenters & Joiners of Am. v. Bldg. and Constr. Trades Dep't, AFL-CIO*, 770 F.3d 834, 837 (9th Cir. 2014) (quoting 18 U.S.C. § 1964(c)). Subsections 1962(a) through (c) prohibit certain "pattern[s] of racketeering activity" in relation to an "enterprise." *Id.* Subsection 1964(d) makes it illegal to conspire to violate subsections (a), (b), and (c) of section 1962. *Id.*

A *prima facie* RICO claim requires the plaintiff to assert: (1) conduct (2) of an "enterprise" (3) through a "pattern" (4) of "racketeering activity" (known as "predicate acts") that (5) cause injury to plaintiff's business or property. *See, e.g.*, *id.* (quoting *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (citations omitted)). Plaintiff alleges that Finicity, as the RICO enterprise,[8] engaged in a pattern of racketeering activity consisting of "intentionally traffick[ing] in . . . services and knowingly us[ing] a counterfeit mark . . . in connection with such . . services" in violation of 18 U.S.C. § 2320, which is identified as a predicate act under Section 1961(1), the section providing definitions under RICO. (Compl. ¶ 81.) Plaintiff alleges that "Finicity has repeatedly violated 18 U.S.C. § 2320(a) by trafficking counterfeit marks of financial institutions in connection with its bank account linking services by using such counterfeit marks on fake login screens on various FinTech apps, including, but not limited to, Every Dollar." (*Id.* ¶ 82.) Plaintiff provides nine separate figures (Figures 10 through 18 of the Complaint) depicting what Plaintiff alleges are counterfeit marks of several financial institutions that Finicity has used without a license. (*See id.* ¶¶ 35–36, 83–84, 86.) Given the nature of the allegations,

[8] For a claim under 18 U.S.C. § 1962(a), it is permissible to name the same party as the RICO "person" and RICO "enterprise." *See, e.g.*, *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 574 (9th Cir. 2004) (citing *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992)).

Plaintiff has alleged a pattern of two or more distinct instances of counterfeiting trademarks by Finicity, thus establishing a pattern of racketeering activity. (*See id.* ¶ 87.) As for the injury to business or property, California law recognizes protections for prospective business relations, a well-recognized injury to business or property for RICO purposes. *See Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (*en banc*) (*per curiam*) (applying California law); *Global Master Int'l Grp., Inc. v. Esmond Nat., Inc.*, 76 F.4th 1266, 1274 (9th Cir. 2023) (citing *Diaz*, 420 F.3d at 900). Therefore, Plaintiff has established the *prima facie* elements to her RICO claim. *See United Bhd. of Carpenters & Joiners of Am.*, 770 F.3d at 837.

In addition to the *prima facie* elements identified above, however, Plaintiff must also establish statutory standing to bring a § 1962(a) RICO claim, which requires that a plaintiff "allege facts tending to show that he or she was injured by the use or investment of racketeering income." *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992). The so-called "investment injury" requirement arises from the Ninth Circuit's reading of the "plain language" of § 1962(a) and § 1964(c) to not "allow an individual to recover for injuries caused by an action that does not constitute a violation of section 1962(a) [because] section 1964(c) speaks not of an 'element of a violation' but rather only of a 'violation.'" *Id.*

For investment injury, Plaintiff essentially argues that Finicity acquired "racketeering income" from trafficking in counterfeit trademarks for financial institutions in the form of "data" and other investment insights that Finicity then sold to create the "financial data aggregation" function of the RICO "enterprise" as an "undisclosed second line of business[.]" (Compl. ¶¶ 3, 18–19; *see* Opp'n at 24–26.) But Plaintiff's investment injury fails for two reasons: first, as a matter of law, and second, as a matter of fact or proximate cause.

First, the Court is unconvinced that RICO – broad as it may be – is broad enough to stretch the word "income" to mean "data." (*See* Opp'n at 24.) While the RICO statute is often interpreted broadly to "effectuate its remedial purposes," Title IX

of the Organized Crime Control Act of 1970 § 904(a), Pub. L. No. 91-452, 84 Stat. 947; *see also, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497–98 (1985), neither the common understanding of income nor the dictionary definition of the word suggests that it would encompass data. *Black's Law Dictionary* (11th ed. 2019), for example, defines income as "money or other form of payment that one receives," typically from employment, business, or the like. While it may be, as Plaintiff argues, that income could include something like Bitcoin or stocks that are easily liquidated, raw data is not so easily liquidated or transferred into cash to be understood as income.[9]

Second, Plaintiff does not allege how the RICO violation is a proximate cause of any injury to her. A civil RICO "plaintiff only has standing if, and can only recover to the extent that, [s]he has been injured in h[er] business or property by the conduct constituting the violation." *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008) (first quoting *Sedima, S.P.R.L.*, 473 U.S. at 496; and then citing 18 U.S.C. § 1964(c)). Federal courts interpret RICO's "by reason of" language and similar language in other statutes to require proximate causation and "some degree of directness." *See, e.g.*, *Fields v. Twitter, Inc.*, 881 F.3d 739, 745 (9th Cir. 2018) (citing *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258 (1992), a RICO case, when interpreting the Anti-Terrorism Act).

To have RICO standing, a plaintiff must therefore allege a "concrete financial loss[,]" *Diaz*, 420 F.3d at 898 (quoting *Oscar v. Univ. Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (*en banc*)), not a loss of personal rights or discomfort and annoyance, *see id.* (quoting *Oscar*, 965 F.2d at 785). The Ninth Circuit instructs courts

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[9] The Court also notes that a United States House of Representatives Report on the Organized Crime Act, which contained the RICO act, defined a "substantial source of income" for a related section on Dangerous Special Offenders, 18 U.S.C. §§ 3575–78, by reference to what a "workingman receives under the Fair Labor Standards Act." H.R. Rep. No. 91-1549, at 61–62, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4039. Despite the ubiquity of data in the modern economy, data, by itself, is still not "income" that can supply a "workingman's" wages, and, therefore, cannot be said to fall within the scope of RICO with sufficient "clarity and predictability" to support a criminal or civil violation. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J. concurring in the judgment) (citing *Fed. Commc'ns Comm'n v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954)).

to "typically look to state law to determine 'whether a particular interest amounts to property[.]'" *Id.* at 899 (quoting *Doe v. Roe*, 958 F.2d 763, 768 (7th Cir. 1992)).

For her RICO cause of action, Plaintiff essentially alleges a competitive injury, that is, a harm to Plaintiff's ability to compete in the marketplace, arguing that Finicity has caused Plaintiff to lose control over her financial data and information (*see* Opp'n at 25; Compl. ¶ 90), and that "[b]y stealing Plaintiff and Class members' data without their informed consent, Finicity impedes the possibility of a robust and equitable market for consumer data where Plaintiff and Class members could be compensated." (Compl. ¶ 57.)[10] Plaintiff also alleges that Finicity's RICO activity injured her through the increased risk of identity theft and ongoing costly credit monitoring services, but these are more like the discomforts and annoyance found insufficient in *Diaz*. *See* 420 F.3d at 898 (quoting *Oscar*, 965 F.2d at 785).

As for the competitive injury, Plaintiff fails to allege a "concrete financial loss." *Diaz*, 420 F.3d at 898 (quoting *Oscar*, 965 F.2d at 785). Critically, Plaintiff does not allege that she tried to sell her data to a willing and able buyer but was boxed-out because of Finicity's deal. *Compare with, e.g.*, *World Wrestling Ent., Inc. v. Jakks Pac., Inc.*, 530 F. Supp. 2d 486, 520–24 (S.D.N.Y. 2007), *aff'd*, 328 F. App'x 695 (2d Cir. 2009); *Kelco Constr., Inc. v. Spray in Place Sols., LLC*, No. 18-cv-5925-SJF-SIL, 2019 WL 4467916, at *2–3 (E.D.N.Y. Sept. 18, 2019); *Tatung Co. v. Shu Tze Hsu*, 43 F. Supp. 3d 1036, 1043–45, 1058–59 (C.D. Cal. 2014). While Plaintiff alleges that Finicity has inhibited an allegedly nascent market in individually commodified consumer financial data, "[Plaintiff] never alleged that she had wanted or tried to [sell her

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[10] In this regard, Plaintiff's complaints are not too different from the artists complaining about computer models with artificial intelligence capabilities trained on their work, alleging that these companies are stealing their work by reproducing it and creating similar works of a kind the artist would make, thereby "represent[ing] 'unfair competition against'" the artists. *Andersen v. Stability AI Ltd.*, --- F. Supp. 3d. ----, No. 23-cv-00201-WHO, 2023 WL 7132064, at *2 (N.D. Cal. Oct. 30, 2023) (granting motion to dismiss with leave to amend). In that case, however, there is a much more readily identifiable market, as that case involved plaintiffs who were established artists (of varying degrees of success) and who had established property rights via their alleged copyrights in several images that were scraped and copied. *See id.* at ----, *2.

data,] . . . rendering '[a]ny supported loss . . . purely speculative.'" *Diaz*, 420 F.3d at 898 (citation omitted). This is especially so because Plaintiff's data, on its own, might not be valued by others. This is particularly fatal to any RICO cause of action Plaintiff intends to bring because the phrase "business or property" in 18 U.S.C. § 1964(c) has "restrictive significance[,]" *Oscar*, 965 F.2d at 786 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)), which the Ninth Circuit has repeatedly interpreted to "require[ ] proof of concrete financial loss, and not mere 'injury to a valuable intangible property interest.'" *Id.* at 785 (quoting *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990)).[11]

C. Conclusion

Although the three harms Plaintiff identifies in the Complaint are too speculative to support Article III standing on their own, the Court finds that Plaintiff suffered a concrete injury-in-fact when Finicity allegedly violated CAPA and the UCSPA's Targeted Solicitations Ban, which require some sort of affiliation or association with a financial institution before seeking information related to an account holder, thereby creating a material risk of increased identity theft and fraud, the very harm the statutes sought to ameliorate. *See Patel*, 932 F.3d at 1275 (citing *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1174 (9th Cir. 2018)). Therefore, the Court DENIES Finicity's Motion to Dismiss Plaintiff's Complaint for lack of Article III standing as to Counts 2, 3 and 4. (*See* MTD at 12–16.) However, the Court GRANTS the Motion to Dismiss Count 1 in the Complaint, the RICO cause of action, with leave to amend.

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[11] A comparison to other cases in which a plaintiff had RICO standing are instructive. Unlike in *Ideal Steel V*, Plaintiff does not allege that she is an established competitor in the relevant market and that Finicity has invested new funds to become a direct competitor where it was not before, thereby more clearly alleging how Finicity's RICO activity is taking business from Plaintiff. *Compare with Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 324 (2d Cir. 2011). And unlike in *Mendoza*, Plaintiff has not alleged that Finicity can essentially dictate the prices. *Compare with Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1171 (9th Cir. 2002). Without such allegations, Plaintiff will have a difficult time proving that Plaintiff lost any sales, as the Ninth Circuit has recognized the practical differences and accompanying difficulties in proving future losses as opposed to current losses. *See Diaz*, 420 F.3d at 900–01.

II. Motion to Compel Arbitration

A. Legal Standard

The Federal Arbitration Act ("FAA") governs arbitration agreements. 9 U.S.C. § 2. The FAA affords parties the right to obtain an order directing that arbitration proceed in the manner provided for in the agreement. 9 U.S.C. § 4. To decide on a motion to compel arbitration, a court must determine: (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1017 (9th Cir. 2016). Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67–69 (2010)). However, parties may use general contract defenses to invalidate an agreement to arbitrate. *See id.* at 339. Thus, a court should order arbitration of a dispute only where satisfied that neither the agreement's formation nor its enforceability or applicability to the dispute is at issue. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299–300 (2010). "Where a party contests either or both matters, 'the court' must resolve the disagreement," *Granite Rock Co.*, 561 U.S. at 299, because "a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) (alteration omitted)). If a valid arbitration agreement encompassing the dispute exists, arbitration is mandatory. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Under § 3 of the FAA, a court, "upon being satisfied that the issue involved . . . is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U.S.C. § 3.

The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence the existence of a valid agreement to arbitrate. *See*

Ashbey v. Archstone Prop. Mgmt., Inc., 785 F.3d 1320, 1323 (9th Cir. 2015). In resolving a motion to compel arbitration, "[t]he summary judgment standard [of Federal Rule of Civil Procedure 56] is appropriate because the district court's order compelling arbitration 'is in effect a summary disposition of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate.'" *Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667, 670 (9th Cir. 2021) (quoting *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 n.9 (3d Cir. 1980)). Under this standard of review, "[t]he party opposing arbitration receives the benefit of any reasonable doubts and the court draws reasonable inferences in that party's favor, and only when no genuine disputes of material fact surround the arbitration agreement's existence and applicability may the court compel arbitration." *Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293-KJM-KJN, 2016 WL 881134, at *4 (E.D. Cal. Mar. 8, 2016). A material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 500 (9th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Conversely, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

B. Analysis

1. Legal Standards Governing Consent in the Context of Internet-Based Agreements

Plaintiff opposes arbitration, mostly relying on the argument that she did not assent. (*See* Opp'n at 4–19.) Plaintiff also argues that the arbitration clause is unconscionable. (*See id.* at 19–20.) However, as the Court concludes that there is not a valid arbitration agreement in the first place, the Court need not reach the issue of unconscionability. *See, e.g.*, *Knutson*, 771 F.3d at 569.

The Supreme Court has repeatedly proclaimed that "the first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly a matter of

consent." *Lamps Plus, Inc. v. Varela*, 587 U.S. ----, ----, 139 S. Ct. 1407, 1415 (2019) (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010)) (first alteration omitted). Consent is required for every contract, but the "'principle of knowing consent applies with particular force to provisions for arbitration,' including arbitration provisions contained in contracts purportedly formed over the internet[.]" *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 460 (2021) (quoting *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993 (1972)). To determine whether knowing consent has been established when forming a contract over the Internet, courts have created a constructive or inquiry notice framework, which requires Finicity to show that: "(1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms." *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022). Finicity and Plaintiff mostly agree on the two-step standard the Court is to apply, which largely derives from interpretation of the *Sellers* case.

In the seminal case of *Sellers,* the California appellate court categorized contracts formed over the Internet, distinguishing between: (1) browsewraps, (2) sign-in or sign-up wraps, (3) scrollwraps, and (4) clickwraps. *See Sellers*, 73 Cal. App. 5th at 463 (citing *Selden v. Airbnb, Inc.*, No. 16-cv-00933-CRC, 2016 WL 6476934, at *4 (D.D.C. Nov. 1, 2016), *aff'd*, 4 F.4th 148 (D.C. Cir. 2021)). As recognized in *Sellers*, California "court[s] and federal courts have reached consistent conclusions when evaluating the enforceability of agreements at either end of the spectrum, generally finding scrollwrap and clickwrap agreements to be enforceable and browsewrap agreements to be unenforceable." *Id.* at 466. Although categorization is important, it is not dispositive. *See id.* at 466 (quoting *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76 (2d Cir. 2017)). Ultimately, the question is whether the disclosure provides reasonably conspicuous notice, which, though a question of law, is a fact-intensive inquiry. *See id.* at 473 (quoting *Meyer*, 868 F.3d at 76).

In rejecting the call to adopt any bright-line rules, *see Sellers*, 73 Cal. App. 5th at 474, the *Sellers* court provided criteria that federal courts "have generally considered . . . when determining whether a textual notice is sufficiently conspicuous under California law." *Id.* at 473 (first citing *Long v. Provide Com., Inc.*, 245 Cal. App. 4th 855, 866 (2016); and then citing *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177–78 (9th Cir. 2014)). To examine whether a textual notice is sufficiently conspicuous to put an individual on notice under California law, courts evaluate factors including: (1) the size of the text; (2) the color of the text compared to the background; (3) the location of the text and its proximity to where the user clicks to consent; (4) the obviousness of an associated hyperlink; and (5) other elements on the screen which clutter or obscure the textual notice. *In re Stubhub Refund Litig.*, No. 22-15879, 2023 WL 5092759, at *2 (9th Cir. Aug. 9, 2023) (mem.) (non-precedential) (citing *Sellers*, 73 Cal. App. 5th at 473).

The *Sellers* court rejected prior decisions that focused on a hypothetical Internet consumer of varying degrees of "reasonableness" and savvy. *See Sellers*, 73 Cal. App. 5th at 475. Instead, "the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers[ ]" because they have "complete control over the design of their websites and can choose from myriad ways of presenting contractual terms to consumers online." *Id.* at 475–76 (quoting *Long*, 245 Cal. App. 4th at 867). Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound. *Id.* at 476 (quoting *Long*, 245 Cal. App. 4th at 867 (quotation marks omitted)).

2. The Form of the Notice

Here, the Court finds that Finicity's Disclosure Page provides a sign-in or sign-up wrap agreement because: (1) the website does take some steps to draw attention to the Terms and Conditions, but (2) the website does not require a user to acknowledge or view the Terms and Conditions before proceeding. *See Sellers*, 73

Cal. App. 5th at 463–64. And though categorization is not dispositive, *see id.* at 466, some judges have cautioned that, "[g]iven the present state of California law, website designers who knowingly choose sign-in wrap . . . over clickwrap and scrollwrap designs practically invite litigation over the enforceability of their sites' terms and conditions . . . ." *Berman*, 30 F.4th at 868 n.4 (Baker, J., concurring).

Finicity argues that its disclosure satisfies the five criteria identified in *Sellers*, stating that the Disclosure Page:

> takes up one full screen; the notice is the same legible size as the other text on the screen (other than the title and the "Next" button); the notice informs users that by clicking the "Next" button, they are agreeing to the "Terms and Conditions" and "Privacy Policy," and uses bold black font for the word "Next"; the words "Terms and Conditions" and "Privacy policy" are in red text, clearly indicating they are hyperlinks to those terms; there is a square icon with an arrow pointing to the upper-right corner ([ ]) following the red hyper-linked text, which icon is commonly recognized as evidence of an external link; and the notice is immediately above the "Next" button.

(Arb. Mot. at 8 (citing Compl. at 12 and Figure 8.)

Viewed in isolation, the visual elements of Finicity's Disclosure Page are similar to those found to be sufficiently conspicuous in other cases, and that have been reproduced in Appendix B[12] of this Order. The overall design of the Disclosure Page is relatively clean and free of clutter, the text of the hyperlink is in a separate color

[12] For examples of disclosures that did provide reasonably conspicuous notice, *see* Decl. of Jeremy Davie in Supp. of Defendant Payward, Inc.'s Mot. to Compel Arbitration (ECF No. 12-2) at 5, *Singh v. Payward, Inc.*, No. 3:23-cv-01435-CRB, 2023 WL 5420943 (N.D. Cal. Aug. 22, 2023); *Hooper v. Jerry Ins. Agency, LLC*, --- F. Supp. 3d ----, No. 22-cv-04232-JST, 2023 WL 3992130, at *1 (N.D. Cal. June 1, 2023); *Houtchens v. Google LLC*, 649 F. Supp. 3d 933, 940–41 (N.D. Cal. 2023); *Oberstein v. Live Nation Ent., Inc.*, No. CV 20-3888-GW-GJSx, 2021 WL 4772885, at *1 (C.D. Cal. Sept. 20, 2021), *aff'd*, 60 F.4th 505 (9th Cir. 2023); *Capps v. JPMorgan Chase Bank, N.A.*, No. 2:22-cv-00806-DAD-JDP, 2023 WL 3030990 (E.D. Cal. Apr. 21, 2023); *Saucedo v. Experian Info. Sols., Inc.*, No. 1:22-cv-01584-ADA-HBK, 2023 WL 4708015 (E.D. Cal. July 24, 2023); *Pizarro v. QuinStreet, Inc.*, No. 22-cv-02803-MMC, 2022 WL 3357838, at *1 (N.D. Cal. Aug. 15, 2022); *In re Stubhub Refund Litig.*, No. 22-15879, 2023 WL 5092759, at *2 (9th Cir. Aug. 9, 2023) (mem.) (non-precedential). For examples of disclosures that did *not* provide reasonably conspicuous notice, *see* Appendix C, citing to the following cases: *Sellers*, 73 Cal. App. 5th at 454; *Berman*, 30 F.4th at 859–61; *Serrano v. Open Rd. Delivery Holdings, Inc.*, 666 F. Supp. 3d 1089, 1093 (C.D. Cal. 2023); Decl. of Nina Bayatti in Supp. of Def.'s Mot. to Compel Arbitration and Dismiss and/or Stay Case Ex. 1 (ECF No. 18-1), at 8, *Chabolla v. ClassPass Inc.*, No. 4:23-CV-00429-YGR, 2023 WL 4544598 (N.D. Cal. June 22, 2023).

from the black-colored text, and there is a pop-out window icon at the end of the written disclosure by the hyperlink to the Privacy Policy.

On the other hand, certain elements of the Disclosure Page undermine the conspicuousness of the notice. The color of the hyperlinks is not blue, a color that is normally used for hyperlinks, but rather is the same color as the Next button, thus reducing the visibility of the hyperlinked text. *Compare with Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 517 (9th Cir. 2023) ("In contrast with the agreements invalidated in *Berman* and *Sellers*, the Terms here were marked in bright blue font and distinguished from the rest of the text."); *Berman*, 30 F.4th at 857 ("Customary design elements denoting the existence of a hyperlink include the use of a contrasting font color (typically blue) and the use of all capital letters, both of which can alert a user that the particular text differs from other plain text in that it provides a clickable pathway to another page."). Moreover, even though there is a pop-out window icon at the end of the disclosure by the hyperlink to the Privacy Policy, there is not a similar icon for the other hyperlink to the Terms and Conditions containing the arbitration provision, which might suggest that the Privacy Policy is the only hyperlink. Together, these defects distract a user from the disclosure and the hyperlink to the arbitration provision, which are deemphasized by comparison. *See Berman*, 30 F.4th at 857.

3. The Context of the Transaction

While looking at the Disclosure Page in isolation might lead to a conclusion that Finicity provided reasonably conspicuous notice, the Court concludes that in the specific context of this case – where Plaintiff had already entered into a transaction with an entity and was not expecting to agree to yet another set of Terms and Conditions with a heretofore unknown entity – the disclosure is insufficient. *See Sellers*, 73 Cal. App. 5th at 481 ("As the courts in *Long* and *Specht* acknowledged, the transactional context is an important factor to consider and is key to determining the expectations of a typical consumer.") Though Defendant disputes the relevance of that context, under both California and Ninth Circuit caselaw, context is critical.

In *Sellers*, the California Court of Appeal emphasized that "the full context of the transaction is critical to determining whether a given textual notice is sufficient to put an internet consumer on inquiry notice of contractual terms." *Id.* at 477. Specifically, in determining that the arbitration notice was not sufficiently conspicuous to bind the parties, the *Sellers* court *first* considered the fact that "the transaction [wa]s one in which the typical consumer would not expect to enter into an ongoing contractual relationship, regardless of whether the transaction occurs online or in person." *Id.* at 476. There, the court noted that it was "questionable whether a consumer buying a single pair of socks, or signing up for a free trial, would expect to be bound by contractual terms, and a consumer that does not expect to be bound by contractual terms is less likely to be looking for them." *Id; see also Berman*, 30 F.4th at 868 (Baker, J., concurring) ("That in turn means that the conspicuousness of these sites' textual notices must undergo the most rigorous scrutiny, because a reasonably prudent user would not have been on the lookout for fine print.").

Plaintiff argues that, similar to *Sellers*, the Disclosure Page and the context in which a user encounters and interacts with the Disclosure Page provide "no reason to be *on the lookout* for contractual terms when she clicks Next on the EveryDollar app." (Opp'n at 10 (emphasis added in original).) Plaintiff points to the fact that she already entered into a separate transaction with Every Dollar before proceeding to Finicity's Disclosure Page where she encountered Finicity for the first time. (*See* Opp'n at 11; Compl. ¶¶ 24–27, 31–34.) She then cites to cases finding more distinctive features in a notice insufficient in situations where a third-party business tried to bind a consumer who was already in a contractual relation with another business. (*See* Opp'n at 10–16 (citing *Doe v. Massage Envy Franchising, LLC*, 87 Cal. App. 5th 23 (2022) ("*Massage Envy Franchising, LLC*")).)

Finicity counters, arguing that the Court should not consider the context of the transaction in the inquiry notice analysis because "the nonbinding concurrence in *Berman* relies upon *Sellers* as a basis for suggesting that the conspicuousness analysis

expressly incorporate consideration of the context of the transaction." (Arb. Reply at 3 n.4.) More specifically, Finicity argues that, though context may be relevant, "[t]he primary, salient inquiry, focuses on the visual elements of the notice[ ]" (*id.* at 4) because "the Ninth Circuit has not explicitly incorporated an analysis of the circumstances surrounding the internet transaction when analyzing conspicuousness in step one . . . ." (*Id.* at 7–8 (citing *Oberstein*, 60 F.4th at 516).)

However, this Court, like the Ninth Circuit, is bound by the decisions of the California Courts of Appeal absent convincing evidence that the California Supreme Court would decide differently. *See, e.g.*, *Cmty. Nat'l Bank v. Fid. & Deposit Co. of Maryland*, 563 F.2d 1319, 1321 n.1 (9th Cir. 1977) (collecting cases). Because whether a valid arbitration agreement was formed is a question of state law, the Court applies *Sellers*. *See, e.g.*, *Nguyen*, 763 F.3d at 1175 (citing *Hoffman v. Citibank (S. Dakota), N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008) (*per curiam*)). Moreover, the Ninth Circuit has in fact recognized that the analysis considers the totality of the circumstances which necessarily means that the transaction's context matters for the analysis at step one. *See Oberstein*, 60 F.4th at 514 (describing the approach in *Berman* as adopting an "objective, totality-of-the-circumstances standard."). And as conceded by Finicity at oral argument, there are no prior cases that involved the constructive or inquiry notice framework for contracts between a consumer and what amounts to be a subcontractor or intermediary along the production or service chain. That is, all of the prior cases upon which Finicity relies involve *direct* transactions between a consumer and an ultimate or retail business that the consumer specifically sought.[13]

[13] *See, e.g.*, *Oberstein*, 60 F.4th at 512 (rejecting the putative class members' argument that they did not know that they were contracting with Live Nation Entertainment, the parent company of Ticketmaster, when visiting a website to purchase a ticket through Ticketmaster and Live Nation Entertainment); *Berman*, 30 F.4th at 853 (involving plaintiffs, one of whom had previously visited the defendant's website, but both of whom had accessed the websites ran by the defendant to purchase items); *Capps v. JPMorgan Chase Bank, N.A.*, No. 2:22-cv-00806-DAD-JDP, 2023 WL 3030990, at *1 (E.D. Cal. Apr. 21, 2023) (involving a plaintiff that "sign[ed] up for 'CreditWorks,' a credit monitoring service with defendant Experian's corporate affiliate, ConsumerInfo.com, Inc.[,]" which are all parent-subsidiaries of each other). *Cf. Knutson*, 771 F.3d at 569 ("[The plaintiff] could not assent to [the defendant's] arbitration provision because he did not know that he was entering into a contract with [the defendant]."); *In re Stubhub Refund Litig.*, 2023 WL 5092759, at *2 and n.3 (citing *Knutson*, 771 F.3d at

The Ninth Circuit's decision in *Oberstein* is particularly instructive. *See* 60 F.4th at 514–17. There, the court considered a case brought by individuals who had purchased tickets from Ticketmaster. *See id.* at 509. In defending against a motion to compel arbitration, the ticket purchasers, like Plaintiff here, argued that they had not agreed to the arbitration provision. *See id.* at 512. In concluding that there had been sufficient notice of the Terms and Conditions that contained the arbitration clause, the Ninth Circuit relied on the fact that the notice was "conspicuously displayed directly above or below the action button at each of three independent stages – when creating an account, signing into an account, and completing a purchase[,]" that the notice clearly indicated continued use would bind the user to the Terms and Conditions, and that the hyperlink to the Terms and Conditions was "conspicuously distinguished from the surrounding text in bright blue font, making its presence readily apparent." *Oberstein*, 60 F.4th at 515–16. Importantly, the Ninth Circuit distinguished *Berman* and *Sellers*, not by discounting or ignoring the circumstances surrounding the transaction, but *because of them*. *See id.* The court stated: "in contrast with the noncommittal free trial offered in *Sellers*, the context of this transaction, requiring a full registration process, reflected the contemplation of 'some sort of continuing relationship' that would have put users on notice for a link to the terms of that continuing relationship." *Id.* at 517.[14] Far from disavowing reliance on the circumstances and context of a transaction, *Oberstein* compels it.

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565–66; and holding that the "district court did not err in denying StubHub's motion to compel arbitration as to [one plaintiff] who signed into the website *after* his ticket purchase.").

[14] A review of the district court's decision in *Oberstein* reflects how different that case is from the transaction at issue here. *See* No. 20-cv-3888-GW-GJSx, 2021 WL 4772885 (C.D. Cal. Sept. 20, 2021), *aff'd* 60 F.4th 505 (9th Cir. 2023). In *Oberstein*, the plaintiffs, aggrieved purchasers complaining about paying prices that are higher than would exist in a competitive market, had to specifically search for the defendant's website to complete the purchase. *See id.* at *2. In fact, each plaintiff had made multiple purchases with the defendant on its website or online platform before with each making at least two and one making over 40 prior purchases, *see id.* Moreover, Live Nation Entertainment and Ticketmaster are not unknown businesses.

In the unique context of this transaction, it is not the case that Finicity engaged Plaintiff on the Every Dollar app at a time where Plaintiff "signed up for an account[ ] and entered h[er] [ ] [financial] information with the intention of entering into a *forward-looking relationship* with [the defendant]." *Sellers*, 73 Cal. App. 5th at 477 (quoting *Meyer*, 868 F.3d at 80). Plaintiff, to even access Finicity's Disclosure Page, had to first pay for a service through a premium subscription with Every Dollar that purportedly gave her access to the bank-linking service provided by the third-party Finicity. (*See* Compl. ¶¶ 24–27; Opp'n at 6–10 (citations omitted).) An Internet user would not have expected to encounter yet another, heretofore unknown third-party in this situation, making it even more important that the Terms and Conditions were displayed in a prominent fashion.

Plaintiff's situation is like Jane Doe in *Massage Envy Franchising, LLC*, in which the court likewise refused to enforce an arbitration agreement. There, Jane Doe had a monthly membership with an independently owned Massage Envy franchise, which, in exchange for a monthly fee, provided Jane Doe with one massage per month and others at a reduced rate. At one massage, Jane Doe was handed an electronic tablet as part of a check-in process which involved two electronic forms, one of which involved an agreement with Massage Envy Franchising ("MEF"), a separate corporation with which Jane Doe had no prior relationship. *See Massage Envy Franchising, LLC*, 87 Cal. App. 5th at 26–27. On the "In-Store Application," MEF provided a clickwrap agreement that first presented a window that contained all of the Terms and Conditions with the franchise location for Jane Doe to scroll through and read, and then presented towards the bottom of that same window a separate hyperlink to the Terms and Conditions with MEF near a disclosure stating "I agree and assent to the Terms of Use Agreement" next to a box that Jane Doe had to check. *See id.* at 27–29.

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On the basis of the clickwrap agreement,[15] MEF tried to enforce an arbitration clause. The trial court held that there was no mutual assent, and the appellate court affirmed, relying in substantial part on the fact that Jane Doe had no prior relationship with MEF and "had no reason to believe that the check-in process or the massage involved MEF[ ]" because she "had a pre-existing contractual relationship . . . with the San Rafael location, to which MEF was not a party" *Id.* at 31; *see id.* at32, 34–35.

The same is true in this case, as Plaintiff had just entered into an agreement with Every Dollar immediately prior to interacting with Finicity for the first and only time via the Disclosure Page. *Compare with Massage Envy Franchising, LLC*, 87 Cal. App. 5th at 34 ("Plaintiff here had no reason to expect that checking in for her massage at the San Rafael Massage Envy would involve her entering into any ongoing contractual relationship of any sort with MEF, an entity that was a stranger to her."). Thus, Plaintiff could have viewed the steps taken to proceed past the Disclosure Page as "part of the process of reviewing, signing, and agreeing to the [Terms and Conditions] between her and the [Every Dollar app], rather than as an indication of assent to an entirely different contract with an entirely different entity." *Id.* at 32.

The Ninth Circuit has similarly held in another case that the plaintiff could not assent to the defendant's arbitration provision because the plaintiff did not know that she was entering into a contract with the defendant. *See Knutson*, 771 F.3d at 569. There, the Ninth Circuit considered the "economic and practical considerations involved in selling services to mass consumers," *id.* at 568 (citation omitted), but nevertheless found that the defendant could have required that its affiliates disclose the nature of the defendant's and affiliate's relationship or to at least explain the agreement between the defendant and the affiliate to the consumer before then asking for the consumer's consent. *See id.* at 567. Finicity could likewise remedy this

[15] *See Massage Envy Franchising, LLC*, 87 Cal. App. 5th at 32–34 (describing why this clickwrap agreement was deficient "in its context[.]"); *also Sellers*, 73 Cal. App. 5th at 463 ("A 'clickwrap' agreement is one in which an internet user accepts a website's terms of use by clicking an 'I agree' or 'I accept' button, with a link to the agreement readily available." (citations omitted)).

problem by requiring the FinTech apps like Every Dollar to disclose this relationship, as Finicity would have a pre-existing relationship with these entities. Alternatively, Finicity could have used a more robust form of disclosure, such as a clickwrap agreement that required the user to review the Terms and Conditions before proceeding. *See Oberstein*, 60 F.4th at 517 (noting that, while the defendants' notice provided reasonably conspicuous notice, "this hybrid form of agreement is not without its risks and invites second-guessing[,]" and that "clickwrap is the safest choice." (citing *Berman*, 30 F.4th at 868 n.4 (Baker, J., concurring))). Given this transaction's context, if the disclosure in *Massage Envy Franchising, LLC* was not sufficient, which included some functions that made it more akin to a clickwrap agreement by including an "I agree" checkbox, *Massage Envy Franchising, LLC*, 87 Cal. App. 5th at 32, then Finicity's Disclosure Page cannot be sufficient. *See Sellers*, 73 Cal. App. 5th at 476–77.

C. Conclusion

For the above reasons, the Court concludes that Finicity has not established by a preponderance of the evidence that Plaintiff had constructive notice of the linked Terms and Conditions that contained an arbitration clause, and, therefore, that Finicity has failed to prove the existence of an agreement to arbitrate. *See Berman*, 30 F.4th at 858. The Court accordingly DENIES Finicity's Motion to Compel Arbitration (ECF No. 17). As a result, the Court need not consider Finicity's arguments on waiver or striking the class allegations.

III. Motion to Dismiss Under Rule 12(b)(6)

A. Legal Standard

A party may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The motion may be granted if the complaint lacks a "cognizable legal theory" or if its factual allegations do not support a cognizable legal theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)).

The court assumes all factual allegations are true and construes "them in the light most favorable to the nonmoving party." *Steinle v. City & Cnty. of San Francisco*, 919 F.3d 1154, 1160 (9th Cir. 2019) (quoting *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). If the complaint's allegations do not "plausibly give rise to an entitlement to relief[,]" the motion must be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

A complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), not "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule demands more than unadorned accusations; "sufficient factual matter" must make the claim at least plausible. *Iqbal*, 556 U.S. at 678. In the same vein, conclusory or formulaic recitations of elements do not alone suffice. *See id.* This evaluation of plausibility is a context-specific task drawing on "judicial experience and common sense." *Id.* at 679.

B. Analysis

1. The UCSPA's Targeted Solicitations Ban Claim

Finicity has two challenges to Plaintiff's class action claim under the UCSPA's Targeted Solicitations Ban. First, Finicity argues that the UCSPA "bars class actions for money damages unless the defendant's actions violate an existing order, administrative rule or consent decree, none of which Plaintiff has pleaded here." (MTD Reply at 11 (citing *Johnson v. Blendtec, Inc.*, 500 F. Supp. 3d 1271, 1281 (D. Utah 2020)).) Second, Finicity argues that Plaintiff failed to plead her claim with particularity to satisfy Federal Rule of Civil Procedure 9(b). (*See id.* at 12.)

Taking Finicity's second argument first, Plaintiff satisfies Rule 9(b) and provides "'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) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). The "who" is Finicity. The "what" is the deceptively displayed Disclosure Page. (*See* Compl. ¶¶ 1, 15, 24, 35–36.) The "where" is every

location at which a user of a FinTech app connected to their financial institution using Finicity, which, in Plaintiff's case, was in California. The "when," as defined by the proposed classes (*see id.* ¶ 67), is every transaction like Plaintiff's since 2014. The "how" is the alleged trafficking in counterfeit marks and configuring the Disclosure Page in a way that does not provide constructive notice. Here, the allegations are specific enough to give Finicity notice of the particular misconduct so that Finicity can defend itself, thus satisfying the purposes of Rule 9(b). *See Vess*, 317 F.3d at 1106 (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).

As for Finicity's first argument, the Court finds that it is premature at this stage because Plaintiff has not brought forth a motion to certify the classes, and so the question of whether any particular class should be certified and brought is not before the Court. *See, e.g.*, *Sergeants Benevolent Ass'n Health & Welfare Fund v. Actavis, plc*, No. 15-cv-6549-CM, 2018 WL 7197233, at *51 (S.D.N.Y. Dec. 26, 2018) ("Courts that have examined the class action damages bar under the UCSPA have tended to defer the question of whether an action meets the statutory prerequisites until later stages of the case."). In particular, the UCSPA generally prohibits class actions seeking recovery of actual damages, *see* Utah Code Ann. § 13-11-19(2), but § 13-11-19(4)(a) allows a consumer to bring a class action for actual damages if the plaintiff can show that the act or practice was previously announced as prohibited before the consumer transaction on which the action is based was completed. As a result, some courts find it proper to defer consideration of these issues "because [Finicity's] 'arguments focus on whether Plaintiff[ ] can pursue *class* claims under [Utah] state consumer law[ ], not on whether the claims themselves are well pled[,]' which is the only 'question [that] is at issue in a Rule 12(b)(6) motion to dismiss.'" *Parrish v. Volkswagen Grp. of Am., Inc.*, 463 F. Supp. 3d 1043, 1062 n.17 (C.D. Cal. 2020) (quoting *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 349 F. Supp. 3d 881, 920 (N.D. Cal. 2018)). As a result, because the Court has found that Plaintiff's allegations are

pleaded with sufficient particularity, the Court reserves the question of whether a class action for actual damages may proceed until Plaintiff moves to certify such a class.

Because Plaintiff sufficiently pleads "'the who, what, when, where, and how' of the misconduct charged[,]" *Vess*, 317 F.3d at 1106 (quoting *Cooper*, 137 F.3d at 627), Plaintiff has a plausible claim. As a result, the Court DENIES Finicity's Motion to Dismiss Count Two. (*See* MTD at 19–21.)

2. Utah Unjust Enrichment Claim

Under Utah principles of equity, a cause of action for unjust enrichment requires the plaintiff to show that: (1) a benefit was conferred; (2) that the defendant appreciated or had knowledge of the benefit; and (3) that the defendant accepted or retained the benefit under circumstances making it inequitable to retain the benefit without making payment of its value. *See Thorpe v. Washington City*, 2010 UT App 297, ¶ 27, 243 P.3d 500 (2010). Finicity argues that Plaintiff cannot state a cause of action for unjust enrichment, because Plaintiff has failed to "'affirmatively show a lack of an adequate remedy at law on the face of the pleading.'" (MTD Reply at 14 (quoting *Arnson v. My Investing Place L.L.C.*, No. 2:12-CV-865, 2013 WL 5724048, at *6 (D. Utah Oct. 21, 2013)).) Finicity's argument fails for two reasons.

First, unlike the plaintiff in *Arnson*, Plaintiff pleads all of the required elements. *Compare with Arnson*, 2013 WL 5724048, at *6. The court in *Arson* dismissed the plaintiff's claim for failing to (1) affirmatively plead the lack of an adequate remedy at law in the complaint, and (2) allege that the defendant received a benefit. *See Arnson*, 2013 WL 5724048, at *6. Here, Plaintiff alleges that she and the putative class members conferred a benefit on Finicity in the form of the information Finicity obtained through its financial data aggregation (*see* Compl. ¶ 104), that Finicity appreciated and knew it received this benefit, as shown by Finicity's monetization of its financial data aggregation (*see id.* ¶ 105), and that Finicity should not receive this benefit because that would be "unjust because Defendant Finicity was only able to

obtain the benefit under false pretenses and through deception" (*id.* ¶ 106). This is enough to allege the three required elements. *See Arnson*, 2013 WL 5724048, at *6.

Second, Plaintiff does allege that there is an inadequate remedy at law (*see* Compl. ¶ 107), and Plaintiff may plead in the alternative by alleging that there is no injury under the unjust enrichment claim while also seeking damages or injunctive relief under the other claims. Under Utah law, it is true that "if a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment." *Johnson*, 500 F. Supp. 3d at 1291–92 (quoting *Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1193, 306 Utah Adv. Rep. 3 (Utah 1996), *abrogated on other grounds by Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, 221 P.3d 234 (Utah 2009)). However, Plaintiff alleges that there is not an adequate remedy, and, at this stage, Plaintiff need not prove that there will not be an adequate remedy because "proof of 'the absence of an adequate remedy at law is *not* an element of the *prima facie* case for unjust enrichment . . . '" *Johnson*, 500 F. Supp. 3d at 1292 (quoting *In re Processed Egg Prod. Antitrust Litig.*, 851 F. Supp. 2d 867, 917 (E.D. Pa. 2012) (citation omitted)).

Moreover, dismissal would only be appropriate "'if it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim . . . .'" *Johnson*, 500 F. Supp. 3d at 1293 (quoting *AGTC Inc. v. CoBon Energy LLC*, 2019 UT App 124, ¶ 22, 447 P.3d 123 (2019)). That is not the case here as Plaintiff's other claims could fail, thereby leaving her with no remedy at law, which is the point of equitable remedies such as unjust enrichment that are intended to provide a remedy where no legal remedy remains. *See, e.g.*, *Rawlings v. Rawlings*, 2010 UT 52, ¶ 29, 240 P.3d 754, 763 (Utah 2010) ("We have also noted that unjust enrichment [under Utah state law] plays an important role as a tool of equity: '[u]njust enrichment law developed to remedy injustice where other areas of the law

could not,' and therefore 'must remain a flexible and workable doctrine.'" (quoting *Jeffs v. Stubbs*, 970 P.2d 1234, 1245, 351 Utah Adv. Rep. 3 (Utah 1998))).

Accordingly, the Court DENIES Finicity's Motion to Dismiss Count Three. (*See* MTD at 23–24.)

3. CAPA Claim

Finicity has two arguments challenging Count Four concerning Plaintiff's CAPA claim. Finicity's first argument rests on Finicity establishing mutual assent, which would preclude finding that Plaintiff was deceived or that Finicity misrepresented itself to Plaintiff as a financial institution. (*See* MTD Reply at 12–14.) Having found that the Disclosure Page does *not* provide reasonably conspicuous notice, *see supra* Part II.B, Finicity's first argument fails. Finicity's second argument is that Plaintiff fails to state a claim. (*See* MTD at 21–22.) Finicity seems to argue that Plaintiff must establish that the conduct alleged falls within the scope of "'phishing,' the very activity the Act protects against." (MTD at 21.) But the California Legislature has already provided a definition of "phishing" for this Court, which is an "unlawful request[ ] by misrepresentation[,]" and, more specifically, is when "any person, by means of a *Web page*, *electronic mail message*, or otherwise through the use of the *Internet*, [ ] solicit[s], request[s], or take[s] any action to induce another person to provide *identifying information* by representing itself to be a business without the authority or approval of the business." Cal. Bus. & Prof. Code § 22948.2 (emphasis added); *see also id.* § 22948.1 (defining the italicized terms in § 22948.2). According to the California Legislature's definition of "phishing," Finicity's alleged conduct falls within the scope of CAPA because: (1) Finicity mispresented itself to be the financial institution for consumers by using counterfeit marks (*see* Compl. ¶¶ 2, 35–36 and Figures 3–4, 10–18) when (2) "taking action" by deceptively displaying the Disclosure Page that does not provide reasonably conspicuous notice (*see* Compl. ¶¶ 24–36 and Figures 7–18) to (3) obtain "identifying information" in the form of the account password and unique username that can be used to access an individual's financial

accounts. *See* Cal. Bus. & Prof. Code §§ 22948.1–2. That is enough to state a claim under CAPA. *See Gonzalez v. Bryant*, No. 2:19-cv-02155-MCE-CKD, 2021 WL 3662944, at *2 (E.D. Cal. Aug. 18, 2021) ("Cases discussing [CAPA] are limited, but claims defeating motions to dismiss appear to follow the plain language of the statute, and involve such circumstances, by way of example, as when a defendant induces the provision of account credentials by falsely representing itself as a representative of a plaintiff's financial institution.").

As for a remedy, CAPA authorizes relief for a person that was "adversely affected by a violation of Section 22948.2 . . . [and] only against a person who has directly violated Section 22948.2." *Id*. § 22948.3(a)(2). Here, Finicity directly "violated" CAPA to the extent that it did not have a license to use the allegedly counterfeit marks. Plaintiff was "adversely affected by [Finicity's] violation of Section 22948.2," *id*. § 22948.3(a)(2), by losing control over her personal information, *see* (Compl. ¶¶ 15, 18, 53, 85;) *Eichenberger*, 876 F.3d at 983, and having to monitor her credit (*see* Compl. ¶ 59). These allegations are sufficient at this stage, as these were the sorts of harms envisioned by the California Legislature. *See* CAPA's Second Senate Floor Analyses, at 2. *Compare with Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1053 (9th Cir. 2009) (defining "adversely affected by" in the Controlling the Assault of Non-Solicited Pornography and Marketing or "CAN-SPAM" Act of 2003, 15 U.S.C. § 7701, *et seq.*, by reference to the harms identified in the Committee Report).

Therefore, the Court DENIES Finicity's Motion to Dismiss Count Four of the Complaint. (*See* MTD at 21–22.)

4. Tolling and Statutes of Limitations

Finally, Finicity argues that any statute of limitations period has passed and that equitable tolling would not apply to save Plaintiff's claims. (*See* MTD Reply at 15.) However, as the parties concede, equitable tolling is generally determined by matters outside of the pleadings (*see* Opp'n at 34–35; MTD Reply at 15). Moreover, it is not

clear from the face of the Complaint that the claim is time-barred. Finicity may renew its statute of limitations argument at the appropriate time.

C. Conclusion

For the reasons set forth above, the Court DENIES Finicity's Motion to Dismiss Counts 2, 3, and 4 of the Complaint (ECF No. 19).

IV. Motion to Transfer Venue

A. Legal Standard

A transfer motion made under 28 U.S.C. § 1404(a) requires two findings: (1) that the proposed court is one where the action might have been brought, and (2) that the convenience of the parties and witnesses in the interest of justice favor transfer. *See Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). For the first part of the test, courts look to whether an action "might have been brought" in that district by reference to whether that court would have original jurisdiction over the matter and venue would be proper. *See id.* (citing *Hoffman v. Blaski*, 363 U.S. 335, 343–44 (1960) and *Van Dusen v. Barrack*, 376 U.S. 612, 620 (1964)). For the second part of the test, courts look to the factors used at common law for establishing *forum non conveniens*, but require a lesser showing of inconvenience than that required for dismissal. *See Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an "individualized, case-by-base consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen*, 376 U.S. at 622).

Where no forum selection clause is involved, a district court considering a transfer motion under 28 U.S.C. § 1404(a) must evaluate both the convenience of the parties and various public-interest considerations. *See Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 62 and n.6 (2013). The relevant private interests to consider are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses, and the costs

of obtaining attendance of willing witnesses; (3) the possibility to view the premises, if view would be appropriate to the action; and all other practical considerations that make conducting a trial easy, expeditious, and inexpensive. *See id.* (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)). Relevant public-interest factors include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; and (3) the interest in having the trial of a diversity case in a forum that is at home with the law. *See id.* The Ninth Circuit has identified the following factors as also being relevant: (1) the location of where the relevant agreements were negotiated and executed; (2) the respective parties' contacts with the forum; (3) the contacts relating to the plaintiff's cause of action in the chosen forum; and (4) the difference in the costs of litigation in the two forums. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000).

Finally, the plaintiff's choice is owed deference because the plaintiff is presumed to have picked her convenient home forum. *See, e.g.*, *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076 (9th Cir. 2015) (quoting *Piper Aircraft Co.*, 454 U.S. at 255). This deference is "far from absolute," *id.* (quoting *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 767 (9th Cir. 1991)), particularly where the plaintiff brings a class or derivative action claim, *see, e.g.*, *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). But "less deference is not the same thing as no deference." *Ayco Farms, Inc. v. Ochoa*, 862 F.3d 945, 950 (9th Cir. 2017) (quoting *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000)). The plaintiff's choice is only "entitled to minimal consideration" where "the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter[.]" *Lou*, 834 F.2d at 739.

B. Analysis

For step one, venue would be proper in Utah. Finicity is domiciled there, and there would still be minimal diversity under the Class Action Fairness Act. *See* 28 U.S.C. § 1391(b)(1). For step two, the Court concludes that, because the factors cut both ways, Plaintiff's choice of forum, even if owed less deference, is still "entitled to

[more than] minimal consideration[,]" *Lou*, 834 F.2d at 739 (citing *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968)).

The private interests, on net, favor Utah. Most of the evidence will be in Utah (or New York), where this Court will not have the ability to compel third-party testimony as those parties will be beyond the100 mile range of this Court's jurisdiction under Federal Rule of Civil Procedure 45(c), even through video testimony, *see In re Kirkland*, 75 F.4th 1030, 1051–52 (9th Cir. 2023). However, there is no need to view any premises in Utah, and most of the relevant evidence from Finicity will come in the form of documents, not testimony, thus reducing any inconvenience of having venue in California.

The public interest factors favor both venues. Even though the Eastern District has a heavy caseload, the District of Utah is not appreciably faster at taking cases to trial. (*See* MTD Reply at 3 n.2.) Similarly, even though there are two claims under Utah state law (Counts Two and Three raising the UCSPA's Targeted Solicitations Ban claim and the Utah unjust enrichment claim, respectively), Plaintiff also brings a claim under CAPA, and the Utah unjust enrichment claim is not a claim but an alternative pleading that can only arise if there is no other claim or remedy, meaning that there is only one substantive state-law claim for each State from which Plaintiff can recover. Finally, Finicity contends that a Utah court should be the first to hear a case regarding the UCSPA's Targeted Solicitations Ban. (*See* MTD at 10–11.) But unlike the cases Finicity cites, the UCSPA's Targeted Solicitations Ban is not part of "an area of [Utah] law that has been persistently problematic for [Utah] courts[,]" *Clisham Mgmt., Inc. v. Am. Steel Bldg. Co.*, 792 F. Supp. 150, 158 (D. Conn. 1992), or that "require[s] the application of a complex body of law to the vast universe of facts uncovered by" discovery. *Sheffer v. Novartis Pharms. Corp.*, 873 F. Supp. 2d 371, 380 (D.D.C. 2012).

The factors identified by the Ninth Circuit favor California, even if only slightly. Plaintiff's only contacts are in California, and, more specifically, in the Eastern District. (*See* Compl. ¶ 15.). For costs, both states are expensive, but the costs would be

greater to Plaintiff, as an individual, even if as a class representative, to litigate in Utah than it would be for Finicity, a multinational corporation, to litigate in California. *See, e.g.*, *In re Ferrero Litig.*, 768 F. Supp. 2d. 1074, 1081 (S.D. Cal. 2011) (quoting *Shultz v. Hyatt Vacation Mktg. Corp.*, No. 10-CV-04568-LHK, 2011 WL 768735, at *6 (N.D. Cal. Feb. 28, 2011)); *Sheffer*, 873 F. Supp. 2d at 376 (citing *Veney v. Starbucks Corp.*, 559 F. Supp. 2d 79, 84 (D.D.C. 2008)).

C. Conclusion

Even though there are arguments on either side, Plaintiff's choice of forum is still entitled to deference because her cause of action arose in the Eastern District and she is at home here. Where, as here, transfer would do no more than shift the burden or inconvenience, the movant has not met its burden. *See Shultz*, 2011 WL 768735, at *6 ("Transfer is not appropriate if it simply shifts the inconvenience from one party to another." (citing *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986))). As a result, the Court DENIES Finicity's Motion to Transfer Venue.

ORDER

For the reasons set forth above, the Court: (1) DENIES Finicity's Motion to Compel Arbitration (ECF No. 17) and (2) GRANTS IN PART AND DENIES IN PART Finicity's Motion to Transfer Venue or, in the Alternative, Dismiss Complaint (ECF No. 19). Specifically, the Court GRANTS Finicity's Motion to Dismiss Count One of the Complaint, the RICO claim, with leave to amend. However, the Court DENIES Finicity's Motion to Dismiss the remaining counts. Plaintiff has 30 days from this Order's docketing to file the Amended Complaint.

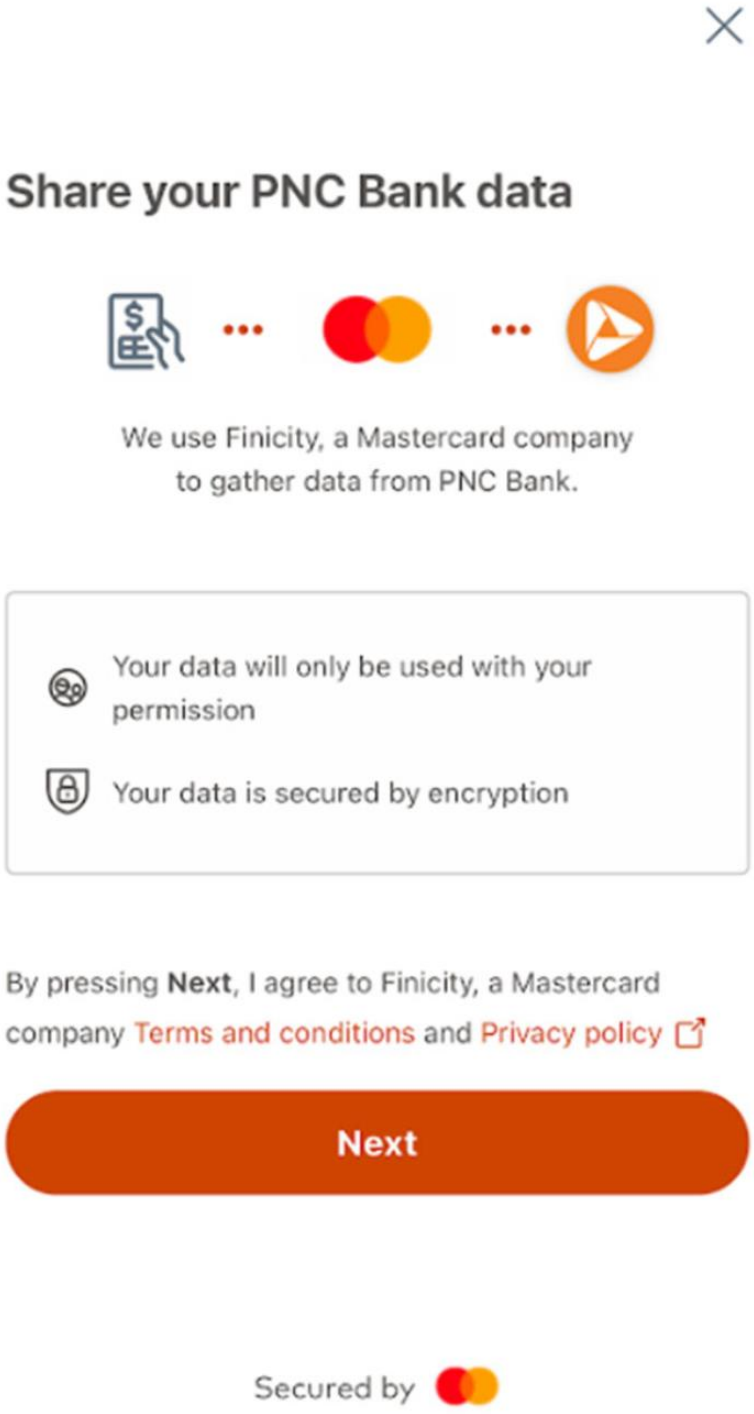
IT IS SO ORDERED.

Dated: **February 12, 2024**

Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

APPENDIX

I. Appendix A – Figure 8 of the Complaint: The Disclsoure Page[16]

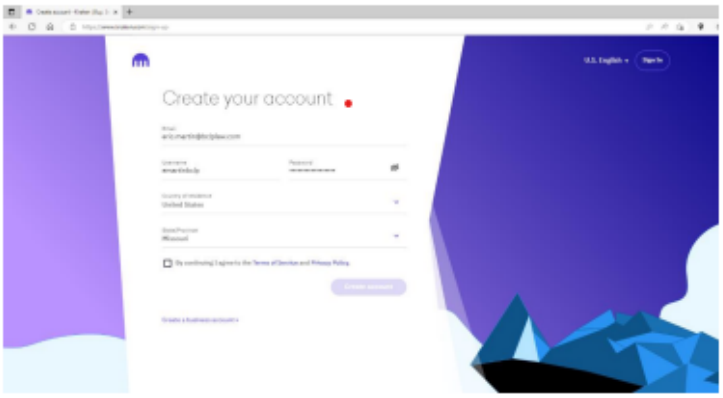


[16] (*See* Compl. at 12; ECF No. 21 ¶¶ 5–8 (declaring the veracity of Figure 8 as "The screenshot reflected in Figure 8 to Plaintiff's Complaint and reproduced below (the 'Disclosure Page') accurately depicts the format and content of the information presented to users of Finicity's services that allow users to connect their financial accounts with personal finance-related apps.").)

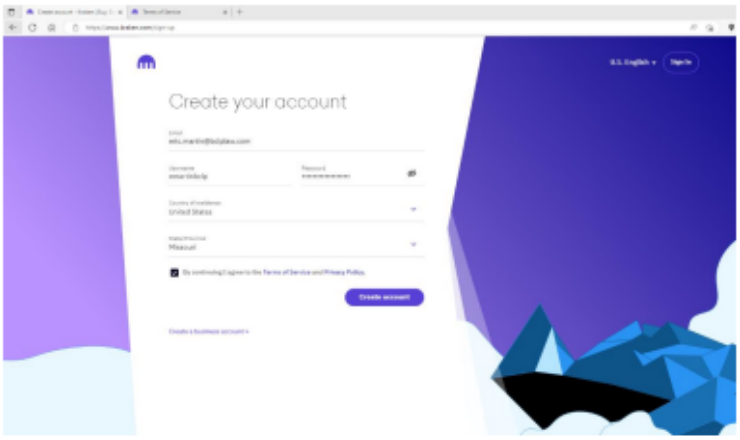
II. Appendix B – Sign-in Windows That Provided Reasonably Conspicuous Notice.

A. *Singh* Webpage Sign-in Window[17]

shown below to illustrate the color change seen by an individual signing up for a Kraken account. Without the box checked, the "Create account" icon below the user information is grey:



19. Once the box is checked, the "Create account" icon turns dark purple:



20. After the user has entered his or her login credentials and checked the box indicating agreement to Kraken's TOS and Privacy Policy, the next step is to click the (now dark purple) "Create account" button. After agreeing to Kraken's TOS and clicking "Create account," the user proceeds to further steps in account creation, *e.g.*, specifying an address, telephone number, source of funds, investment selections, etc.

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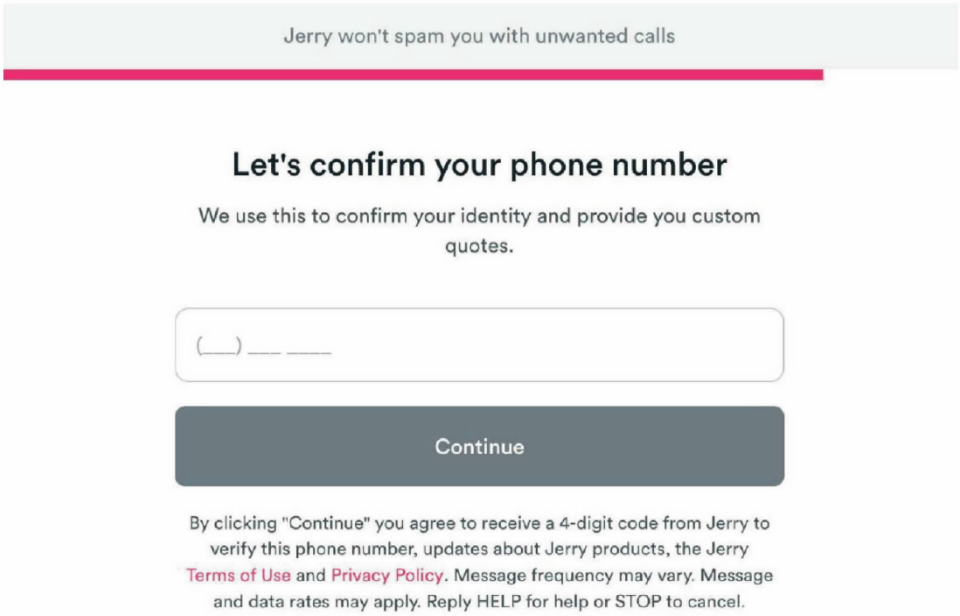
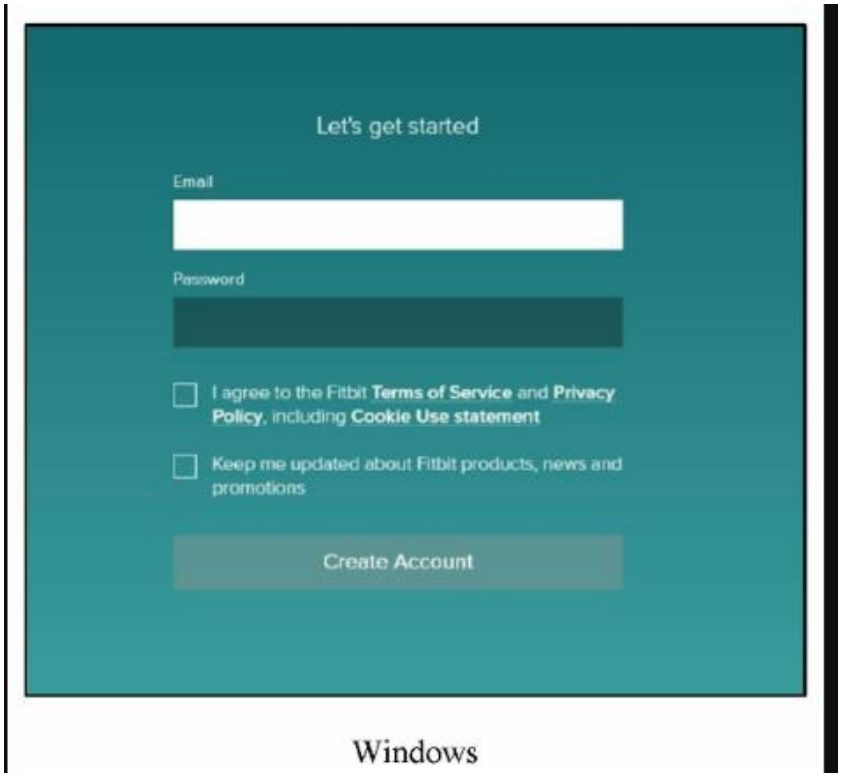
[17] *See* Decl. of Jeremy Davie in Supp. of Defendant Payward, Inc.'s Mot. to Compel Arbitration (ECF No. 12-2) at 5, *Singh v. Payward, Inc.*, No. 3:23-cv-01435-CRB, 2023 WL 5420943 (N.D. Cal. Aug. 22, 2023) (citation for decision).

B. *Hooper* Webpage Sign-in Window[18]



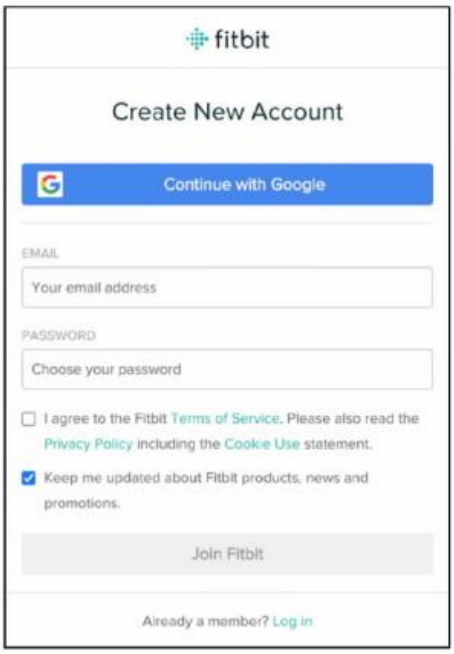
C. *Houtchens* FitBit Windows Webpage Sign-in Windows[19]



[18] *See Hooper v. Jerry Ins. Agency, LLC*, --- F. Supp. 3d ----, No. 22-cv-04232-JST, 2023 WL 3992130, at *1 (N.D. Cal. June 1, 2023).

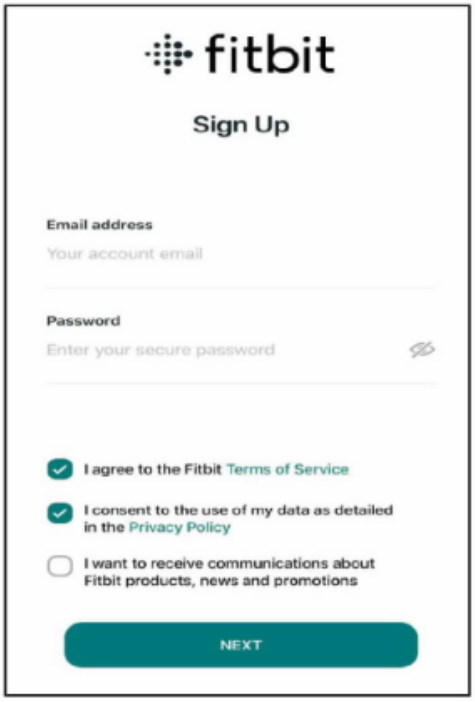
[19] *See Houtchens v. Google LLC*, 649 F. Supp. 3d 933, 940–41 (N.D. Cal. 2023).

D. *Houtchens* Fitbit Website Sign-in Window



(Fitbit.com)

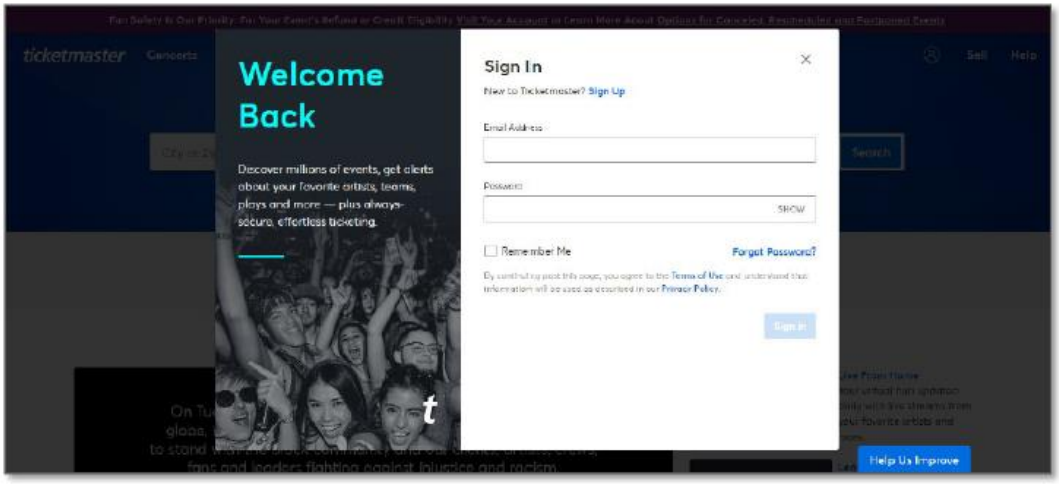
E. *Houtchens* Fitbit Mobile Webpage Sign-in Window



Fitbit Mobile Application

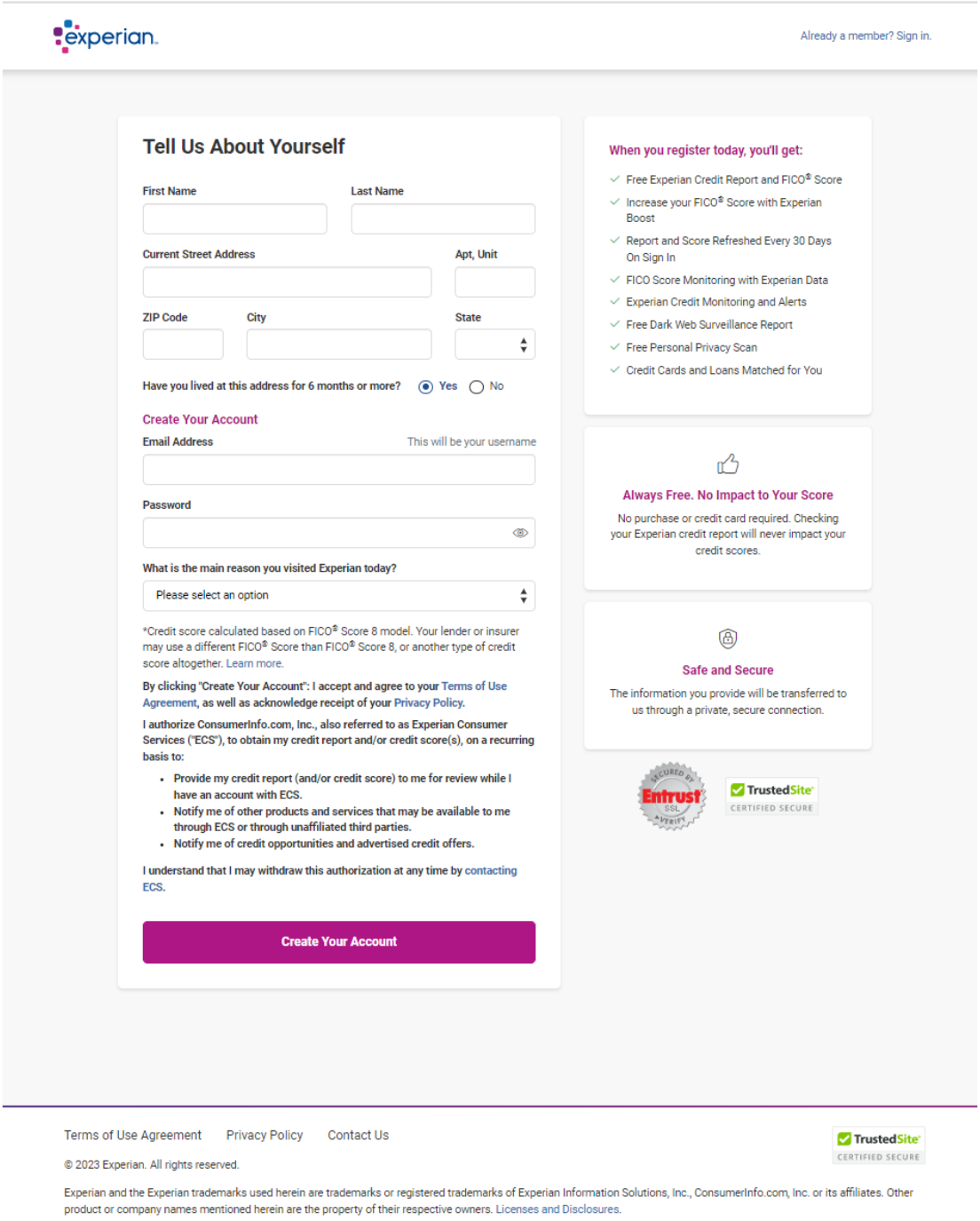
F. *Houtchens* Fitbit MacOSX Webpage Sign-in Window

G. *Oberstein* Webpage Sign-in Window[20]



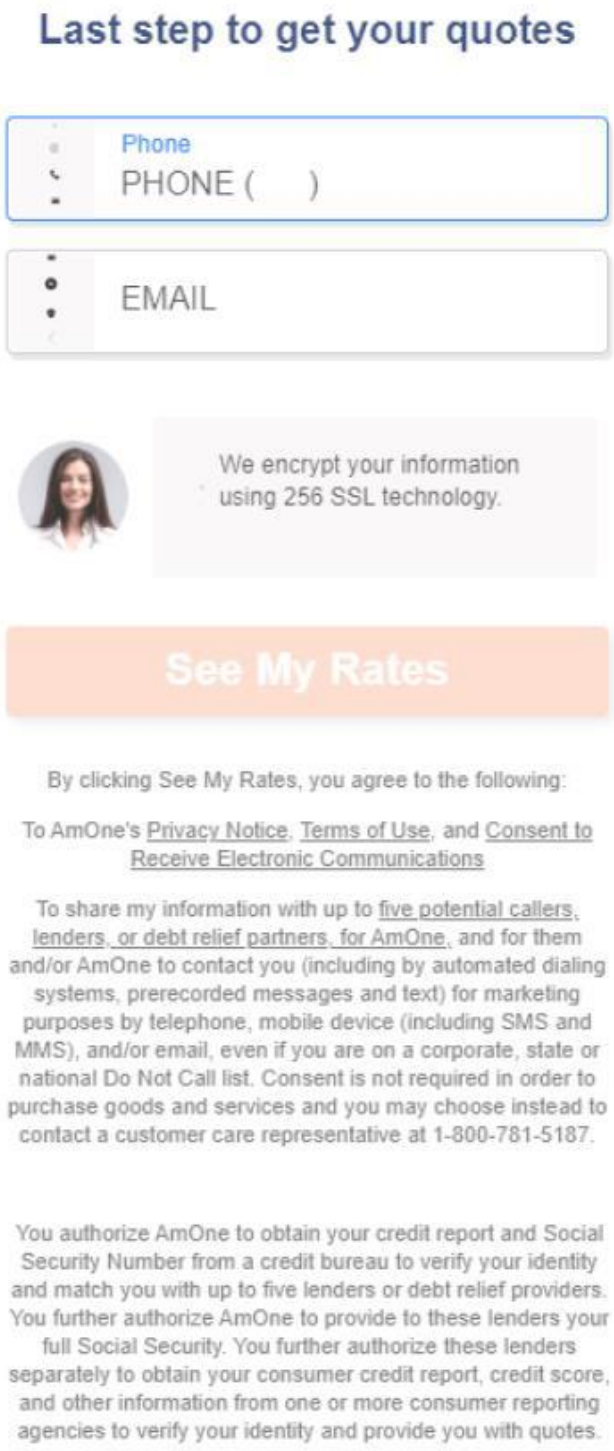
[20] (*See* ECF No. 22-1 at 2.) *See also Oberstein v. Live Nation Ent., Inc.*, No. CV 20-3888-GW-GJSx, 2021 WL 4772885, at *1 (C.D. Cal. Sept. 20, 2021), *aff'd*, 60 F.4th 505 (9th Cir. 2023).

H. *Capps* and *Saucedo* Webpage Sign-in Windows[21]



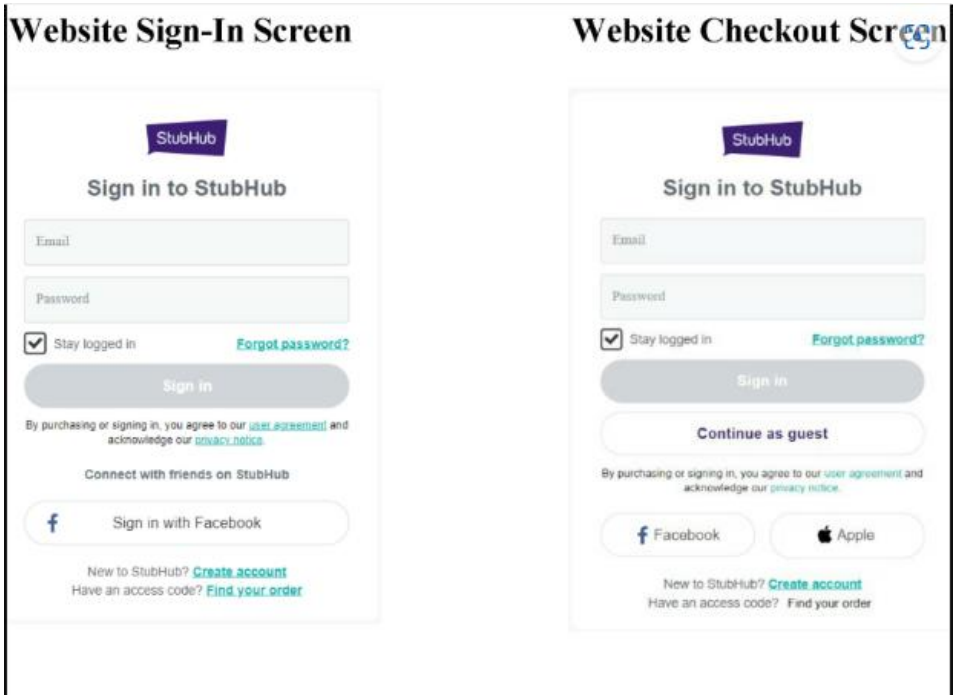
[21] (*See* ECF No. 22-2 at 2.) *See also Capps v. JPMorgan Chase Bank, N.A.*, No. 2:22-cv-00806-DAD-JDP, 2023 WL 3030990 (E.D. Cal. Apr. 21, 2023); *Saucedo v. Experian Info. Sols., Inc.*, No. 1:22-cv-01584-ADA-HBK, 2023 WL 4708015 (E.D. Cal. July 24, 2023).

I. *Pizarro* Webpage Sign-in Window[22]



[22] *See Pizarro v. QuinStreet, Inc.*, No. 22-cv-02803-MMC, 2022 WL 3357838, at *1 (N.D. Cal. Aug. 15, 2022).

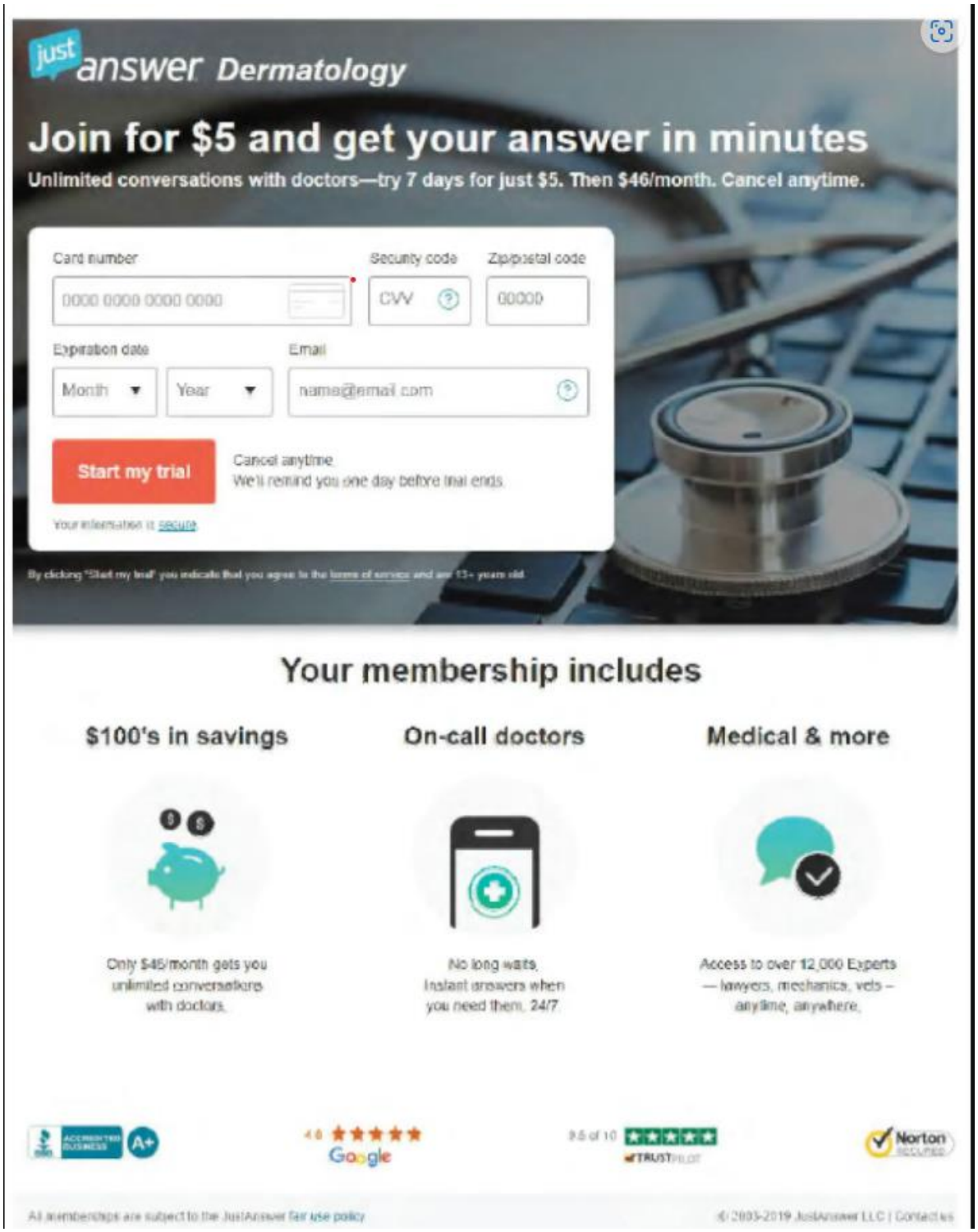
J. *In re Stubhub Refund Litig.* Webpage Sign-in Window[23]



[23] *See In re Stubhub Refund Litig.*, No. 22-15879, 2023 WL 5092759, at *2 (9th Cir. Aug. 9, 2023) (mem.) (non-precedential).

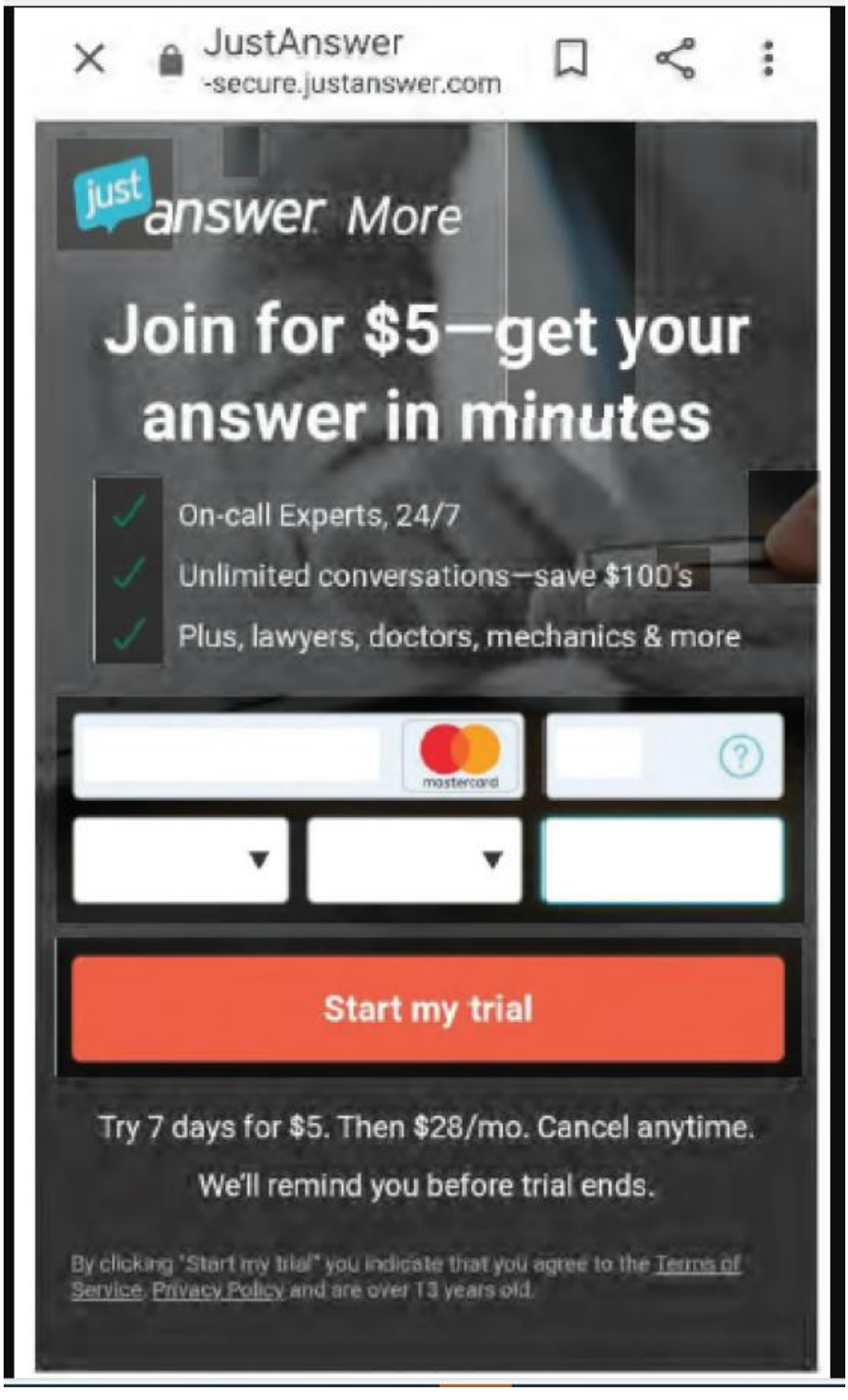
III. Appendix C – Sign-in Windows That Did Not Provide Reasonably Conspicous Notice.

A. *Sellers* Webpage Sign-in Window[24]

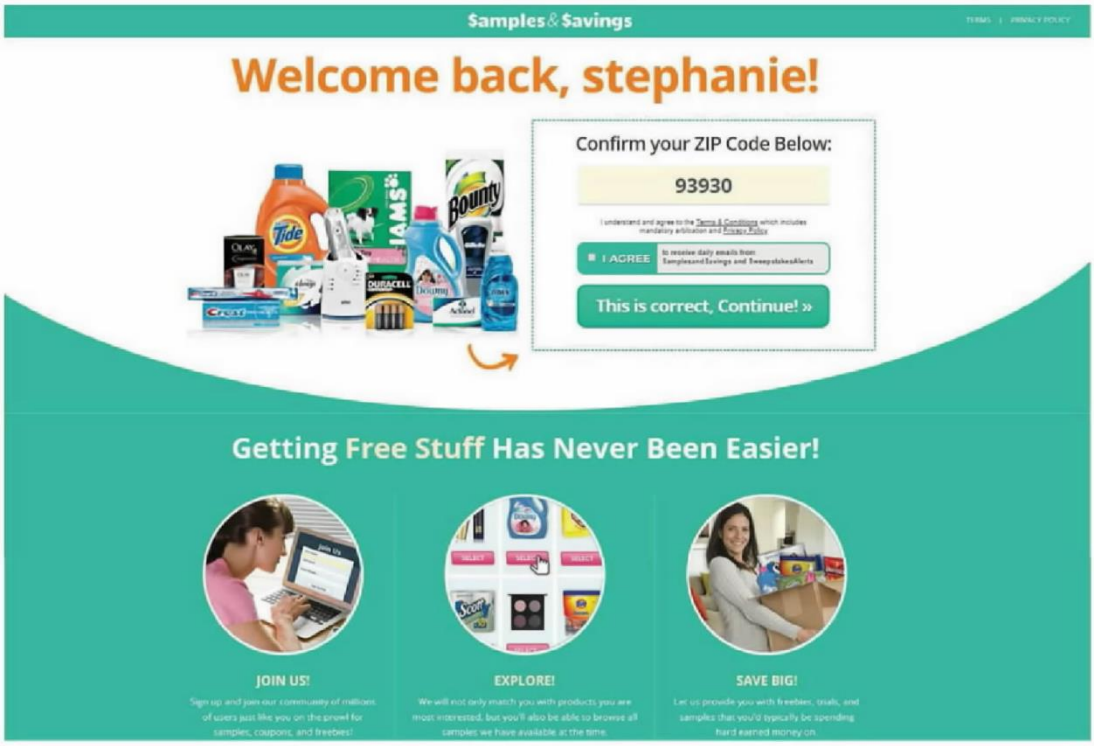


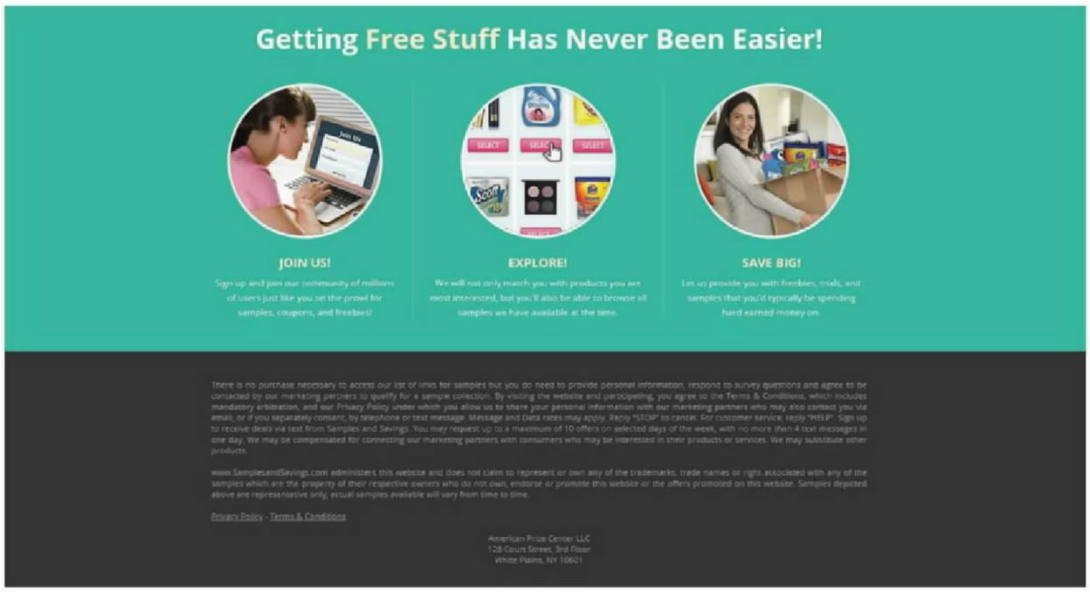
[24] *See Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 454 (2021).

B. *Sellers* Mobile Webpage Sign-in Window



C. *Berman* Webpage Sign-in Window[25]



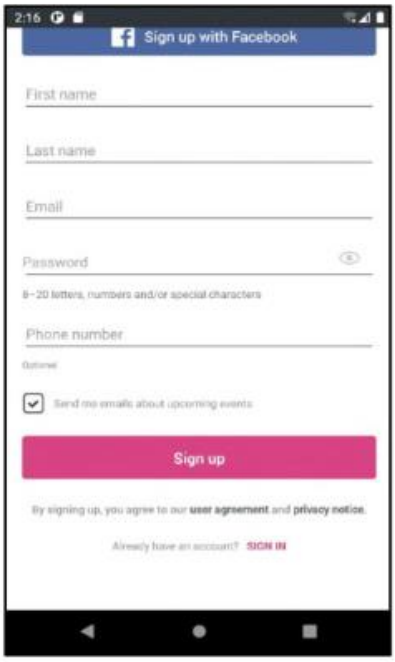


[25] *See Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 859–61 (9th Cir. 2022).

D. *Berman* Mobile Webpage Sign-in Window

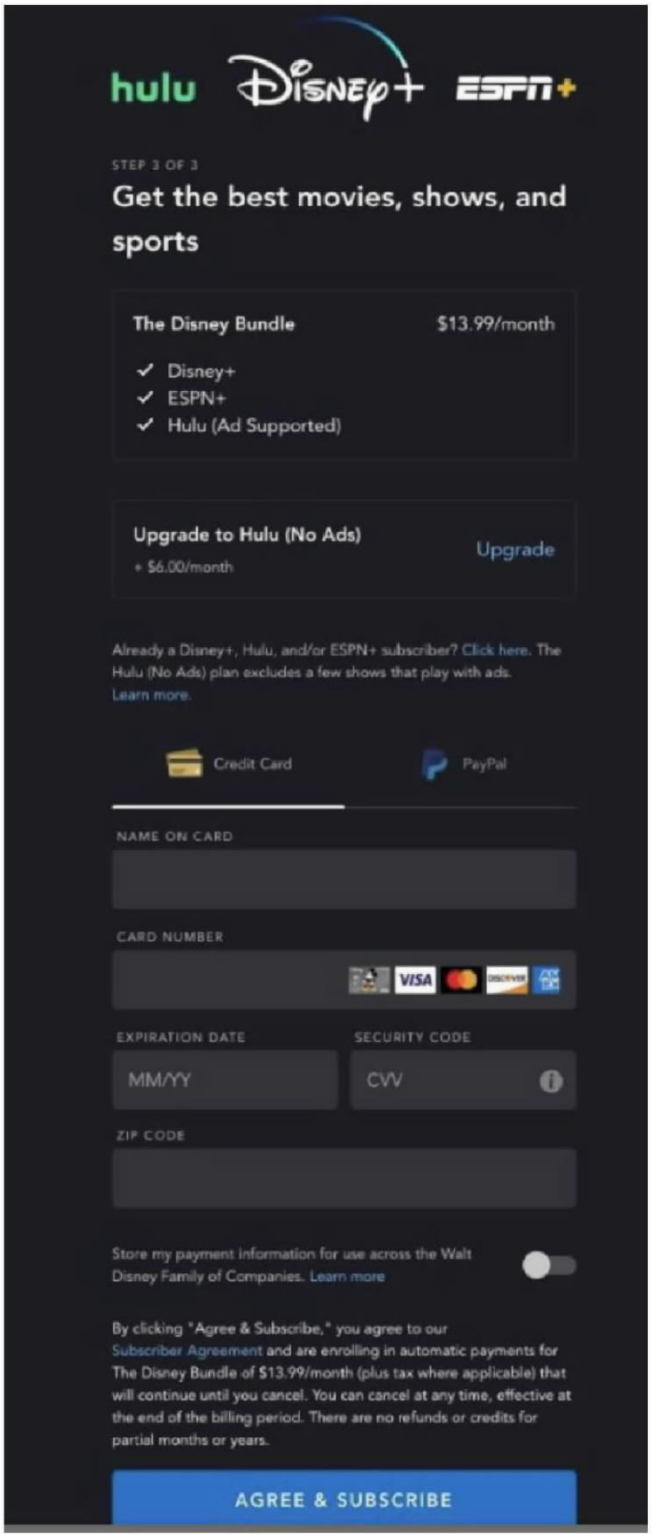
E. *In re Stubhub Refund Litig.* Mobile Webpage Sign-in Window[26]

Mobile Application Registration Screen



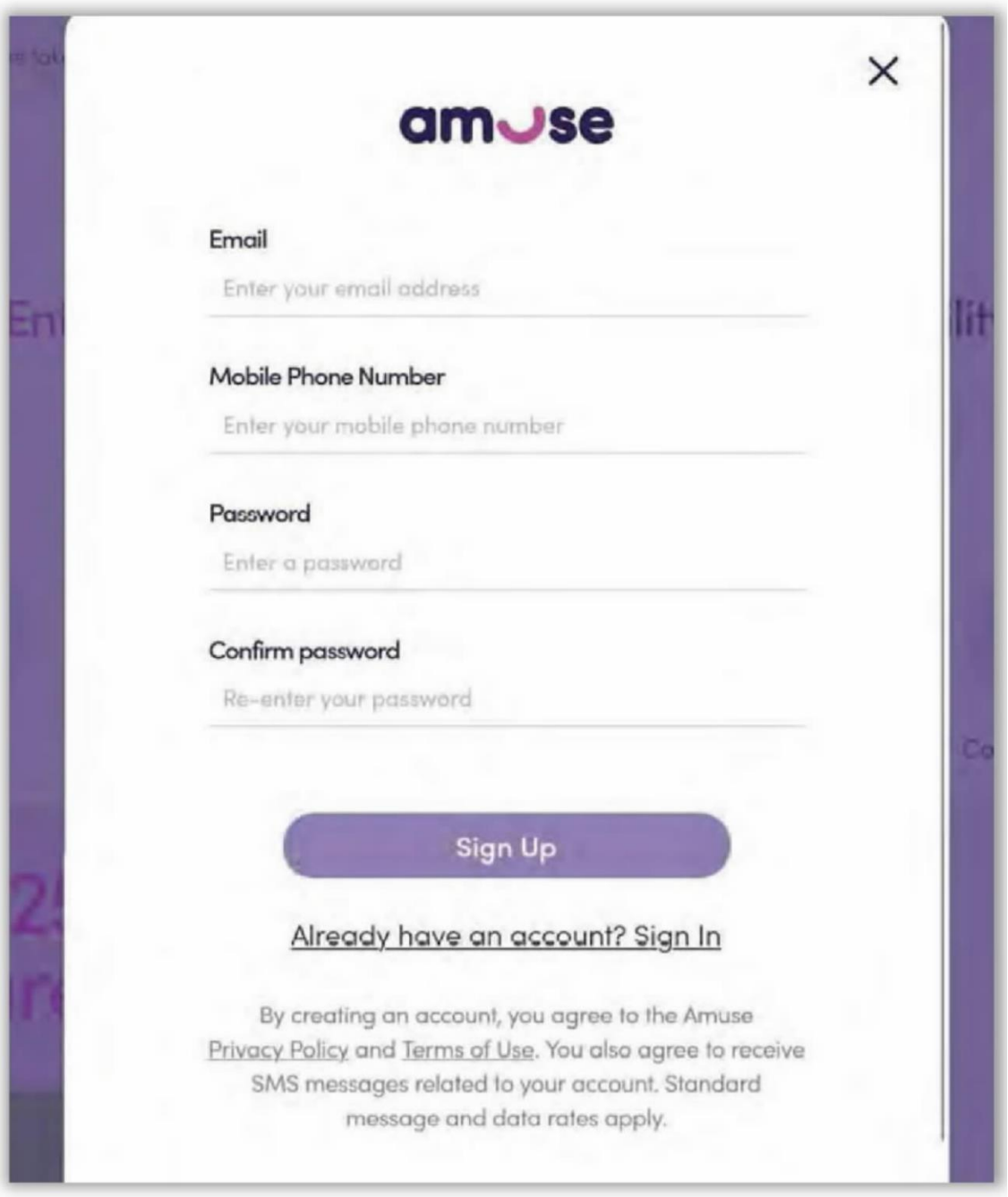
[26] *See In re Stubhub Refund Litig.*, No. 22-15879, 2023 WL 5092759, at *2 (9th Cir. Aug. 9, 2023) (mem.) (non-precedential).

F. *Sadlock* Email Sign-in Window[27]



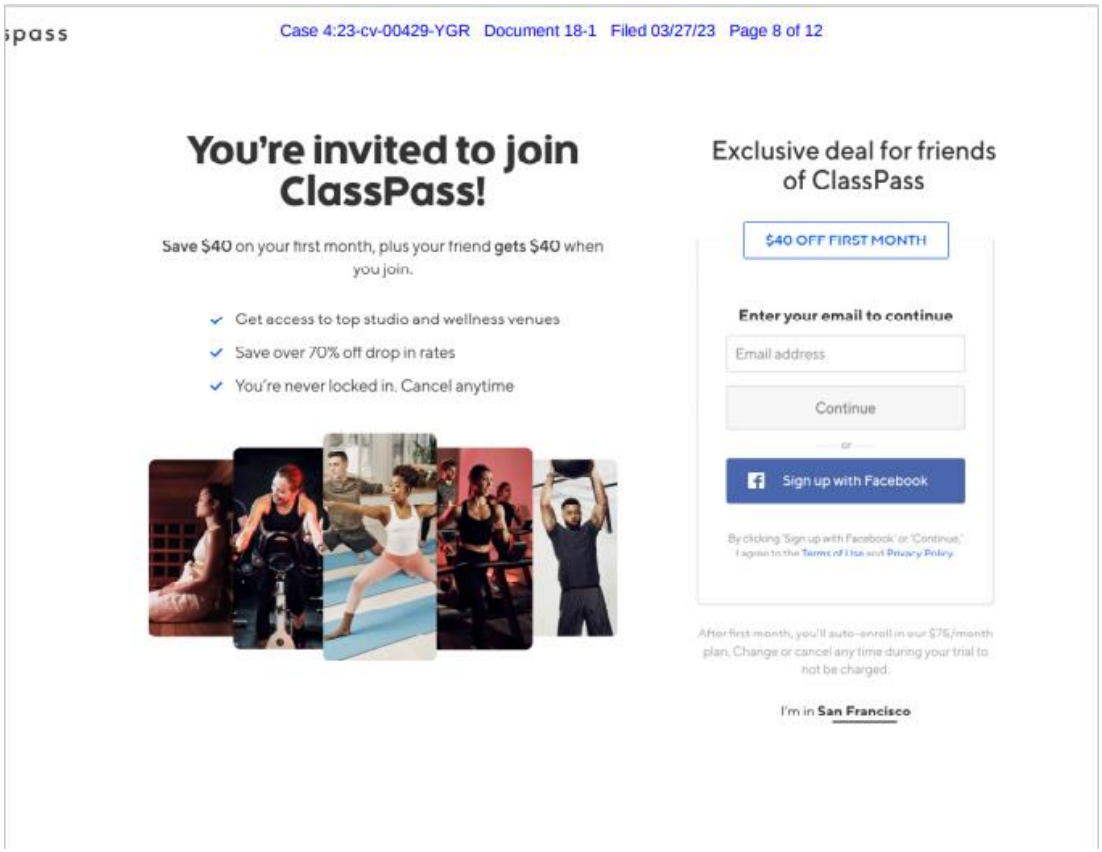
[27] *See Sadlock v. Walt Disney Co.*, No. 22-cv-09155-EMC, 2023 WL 4869245, at *4 (N.D. Cal. July 31, 2023).

G. *Serrano* Webpage Sign-in Window[28]



[28] *See Serrano v. Open Rd. Delivery Holdings, Inc.*, 666 F. Supp. 3d 1089, 1093 (C.D. Cal. 2023).

H. *Chabolla* Webpage Sign-in Window[29]



[29] *See* Decl. of Nina Bayatti in Supp. of Def.'s Mot. to Compel Arbitration and Dismiss and/or Stay Case Ex. 1 (ECF No. 18-1), at 8, *Chabolla v. ClassPass Inc.*, No. 4:23-CV-00429-YGR, 2023 WL 4544598 (N.D. Cal. June 22, 2023) (providing citation for decision).