

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. 12-4457 SC
)	
SANDRA McKINNON and KRISTEN)	ORDER GRANTING IN PART AND
TOOL, individually and on behalf)	DENYING IN PART DEFENDANTS'
of all others similarly)	MOTION TO DISMISS AND DENYING
situated,)	<u>DEFENDANTS' MOTION TO STRIKE</u>
)	
Plaintiffs,)	
)	
v.)	
)	
DOLLAR THRIFTY AUTOMOTIVE GROUP,)	
INC. d/b/a DOLLAR RENT A CAR;)	
DOLLAR RENT A CAR, INC.; DTG)	
OPERATIONS, INC. d/b/a DOLLAR)	
RENT A CAR; and DOES 1-10,)	
inclusive,)	
)	
Defendants.)	
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I. INTRODUCTION

Plaintiffs Sandra McKinnon ("Ms. McKinnon") and Kristen Tool ("Ms. Tool") (collectively "Plaintiffs") bring this putative class action against Dollar Thrifty Automotive Group, Inc., a Delaware corporation headquartered in Oklahoma, and its subsidiaries Dollar Rent A Car, Inc. and DTG Operations, Inc. (collectively "Defendants"), both Oklahoma corporations. Plaintiffs, customers of Defendants, allege that Defendants defrauded Plaintiffs and

1 other customers in California and Oklahoma, and potentially
2 elsewhere as well. ECF No. 26 ("FAC"). Defendants now move to
3 dismiss Plaintiffs' FAC and strike Plaintiffs' class allegations.
4 ECF No. 33 ("MTS"); ECF No. 34 ("MTD"). The motions are fully
5 briefed,¹ and are suitable for determination without oral argument,
6 Civ. L.R. 7-1(b). For the reasons explained below, Defendants'
7 motion to dismiss is GRANTED in part and DENIED in part, and
8 Defendants' motion to strike is DENIED.

9
10 **II. BACKGROUND**

11 Defendants are car rental companies. FAC ¶¶ 5-7. Named
12 Plaintiffs were customers of Defendants who rented cars in
13 California (Ms. Tool) and Oklahoma (Ms. McKinnon). Id. ¶¶ 3-4.
14 Plaintiffs allege that Defendants organized a scheme to defraud
15 consumers either by fraudulently signing customers up for collision
16 damage waivers, car insurance, and other added services, or by
17 misleading customers into signing up for such services. Id. ¶ 1.
18 Plaintiffs claim that Defendants' conduct amounted to a systematic,
19 nationwide program through which Defendants' employees and agents
20 would dupe customers into buying services that those customers had
21 specifically declined or attempted to decline. Id. ¶ 12.

22 Ms. McKinnon, a California resident, alleges that she made an
23 online reservation through Defendants' reservation system and
24 specifically declined all available optional add-ons at that time.
25 Id. ¶ 13. However, Plaintiffs aver that when Ms. McKinnon picked
26 up her car from Defendants' facility in the Tulsa airport,

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¹ ECF No. 40 ("Opp'n to MTD"); ECF No. 41 ("Opp'n to MTS"); ECF No. 44 ("Reply ISO MTS"); ECF No. 45 ("Reply ISO MTD").

1 Defendants' agent tried to offer her a variety of additional
2 services, all of which she orally declined. Id. When Ms. McKinnon
3 was asked to sign an electronic signature pad to complete her
4 transaction, Defendants' agent told her to initial certain areas in
5 order to decline the add-ons. Id. She did so and was handed a
6 folded-up copy of her rental contract, though the agent allegedly
7 did not discuss the total amount charged. Id. When Ms. McKinnon
8 returned the car to Defendants, she was allegedly charged an
9 additional \$359.65, almost the total cost of the rental car. Id.
10 Defendants' manager at the Tulsa airport would not discuss the
11 charges with her, and Defendants' other employees allegedly said in
12 reference to Defendants, "They never give the money back. You are
13 not going to get your money back." Id. ¶ 14. Ms. McKinnon tried
14 contacting Defendants after that, including by sending them a
15 written demand for the return of her money, but to no avail. Id.
16 Ms. Tool's experience was substantially similar, though she (unlike
17 Ms. McKinnon) allegedly disputed her charges with her credit
18 company. See id. ¶ 15. Plaintiffs' FAC includes a litany of other
19 consumers' reviews of Defendants' services, all reporting
20 experiences similar to Ms. McKinnon's and Ms. Tool's. See id. ¶¶
21 17-20.

22 In both Ms. Tool and Ms. McKinnon's cases, Defendants' records
23 allegedly show that Plaintiffs' electronic signatures and checked
24 boxes from the touchpads they were offered when picking up their
25 cars indicate that Plaintiffs accepted Defendants' additional
26 services instead of declining them, as Defendants' agents allegedly
27 led Plaintiffs to believe. See id. Defendants therefore told
28 Plaintiffs that, since their records indicate that Plaintiffs opted

1 into all charges, Plaintiffs have no recourse against Defendants.
2 Id. ¶¶ 16-17. Plaintiffs aver that they never intended to accept
3 any of these charges and that Defendants' agents instructed them
4 that signing and checking the electronic forms they were offered
5 would decline the add-ons. See id. ¶¶ 15-20. Plaintiffs further
6 allege that Defendants never reviewed the final contract or final
7 charges with them, suggesting that Defendants rely on the hustle
8 and rush of airports to send their customers away without having
9 reviewed their rental charges. Id. ¶¶ 19-20. According to
10 Plaintiffs, Defendants' business model is built on incentivizing
11 this sort of fraud, because Defendants' employees are paid minimum
12 wage but make commissions of up to 12 percent on the sales of add-
13 ons, while employees who fail to obtain "an average 30 per day up-
14 sales of additional options for three months" may be terminated
15 without eligibility for unemployment. Id. ¶ 18.

16 Plaintiffs therefore brought this action on behalf of
17 themselves and other similarly situated customers of Defendants,
18 asserting the following causes of action: (1) violations of
19 California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code
20 §§ 17200 et seq., for unlawful, unfair, and fraudulent business
21 acts and practices; (2) violations of California's Consumers Legal
22 Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 et seq.; (3)
23 violation of the Oklahoma Consumer Protection Act ("OCPA"), Okla.
24 Stat. tit. 15, § 751 et seq.; (4) breach of contract; (5) breach of
25 the covenant of good faith and fair dealing; (6) unconscionability;
26 and (7) common counts, assumpsit, unjust enrichment, and
27 restitution. Id. ¶¶ 29-78. Defendants now move to dismiss
28 Plaintiffs' FAC and strike Plaintiffs' class allegations.

1 **III. LEGAL STANDARD**

2 **A. Motions to Dismiss**

3 A motion to dismiss under Federal Rule of Civil Procedure
4 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
5 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
6 on the lack of a cognizable legal theory or the absence of
7 sufficient facts alleged under a cognizable legal theory."
8 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
9 1988). "When there are well-pleaded factual allegations, a court
10 should assume their veracity and then determine whether they
11 plausibly give rise to an entitlement to relief." Ashcroft v.
12 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court
13 must accept as true all of the allegations contained in a complaint
14 is inapplicable to legal conclusions. Threadbare recitals of the
15 elements of a cause of action, supported by mere conclusory
16 statements, do not suffice." Id. at 663 (citing Bell Atl. Corp. v.
17 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
18 complaint must be both "sufficiently detailed to give fair notice
19 to the opposing party of the nature of the claim so that the party
20 may effectively defend against it" and "sufficiently plausible"
21 such that "it is not unfair to require the opposing party to be
22 subjected to the expense of discovery." Starr v. Baca, 633 F.3d
23 1191, 1204 (9th Cir. 2011). A court's review of a motion to
24 dismiss is generally "limited to the complaint, materials
25 incorporated into the complaint by reference, and matters of which
26 the court may take judicial notice." See Kourtis v. Cameron, 419
27 F.3d 989, 994 n.2 (9th Cir. 2005).

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1 **B. Motions to Strike**

2 Federal Rule of Civil Procedure 12(f) provides that a court
3 may, on its own or on a motion, "strike from a pleading an
4 insufficient defense or any redundant, immaterial, impertinent, or
5 scandalous matter." Motions to strike "are generally disfavored
6 . . . [and] are generally not granted unless it is clear that the
7 matter sought to be stricken could have no possible bearing on the
8 subject matter of the litigation." Rosales v. Citibank, 133 F.
9 Supp. 2d 1177, 1180 (N.D. Cal. 2001).

10
11 **IV. DISCUSSION**

12 **A. Defendants' Motion to Dismiss**

13 Defendants argue that all of Plaintiffs' claims, except Ms.
14 Tool's UCL claims, should be dismissed because (1) the presumption
15 against extraterritorial application of statutes means that
16 Plaintiffs' UCL, CLRA, and OCPA claims all fail where Plaintiffs'
17 allegations would cause these statutes to operate
18 extraterritorially; (2) Plaintiffs' OCPA claims are barred by the
19 voluntary payment doctrine, a defense that a payment knowingly made
20 may not be recovered; and (3) Plaintiffs' common law claims fail
21 because Plaintiffs fail to plead essential elements of those
22 claims. Plaintiffs' opposition brief includes extensive argument
23 about whether Plaintiffs have sufficiently pled elements of the
24 UCL, CLRA, and OCPA, but since Defendants' arguments concern
25 whether Plaintiffs' claims are barred for threshold reasons, the
26 Court does not address the substance of Plaintiffs' claims at this
27 point.

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1 **a. OCPA and the Voluntary Payment Doctrine**

2 OCPA prohibits, among other things, knowingly making false or
3 misleading statements or trade practices concerning consumer
4 transactions. Okla. Stat. tit. 15, §§ 751, 753, 753(13).
5 Plaintiffs claim that Defendants' acts in the Tulsa airport violate
6 OCPA because Defendants' agents allegedly "knowingly made false and
7 misleading statements, and engaged in deceptive trade practices"
8 when they misled Ms. McKinnon into paying for services she did not
9 want. FAC ¶ 58. Defendants argue that Ms. McKinnon's claim under
10 OCPA is foreclosed by the "voluntary payment doctrine, under which
11 money voluntarily paid with full knowledge of the facts under which
12 it was demanded cannot be recovered." MTD at 7 (internal citations
13 and quotations omitted).

14 California law treats the voluntary payment doctrine as an
15 affirmative defense. See, e.g., Ellsworth v. U.S. Bank, N.A., --
16 F. Supp. 2d. --, No. C 12-02506 LB, 2012 WL 6176905, *14 (N.D. Cal.
17 Dec. 11, 2012). Motions to dismiss based on affirmative defenses
18 can be granted if the complaint's allegations, with all inferences
19 drawn in the plaintiff's favor, nonetheless show that the
20 affirmative defense is obvious on the face of the complaint. See
21 Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954,
22 969 (9th Cir. 2010). The Court does not find that the affirmative
23 defense of the voluntary payment doctrine was obvious on the face
24 of the FAC. The parties dispute whether Ms. McKinnon's payment was
25 made "with full knowledge of the facts," and the cases Defendants
26 cite to resolve this issue, C9 Ventures v. SVC-West, L.P., 202 Cal.
27 App. 4th 1483, 1501 (Cal. Ct. App. 2012), and Marin Storage &
28 Trucking, Inc. v. Benco Contracting & Eng'g, Inc., 89 Cal. App. 4th

1 1042, 1049 (Cal. Ct. App. 2001), are inapposite because they state
2 the rule that parties to a valid contract must be held to the
3 provisions of that contract regardless of whether they were aware
4 of those provisions. That is a different question from whether a
5 party actually had knowledge of those provisions for purposes other
6 than contract enforcement.

7 Plaintiffs' OCPA claims as to Ms. McKinnon are therefore
8 undisturbed. Plaintiffs' OCPA claims as to Ms. Tool are discussed
9 below.

10 **b. Extraterritorial Application of the UCL, CLRA, and**
11 **OCPA**

12 The UCL makes actionable any "unlawful, unfair or fraudulent
13 business act or practice." Cal. Bus. & Prof. Code § 17200.
14 Similarly, the CLRA prohibits "unfair methods of competition and
15 unfair or deceptive acts or practices." Cal. Civ. Code § 1770.
16 OCPA prohibits, among other things, knowingly making false or
17 misleading statements or trade practices concerning consumer
18 transactions. Okla. Stat. tit. 15, §§ 751, 753, 753(13).

19 California law presumes that the Legislature did not intend a
20 statute to be "operative, with respect to occurrences outside the
21 state, . . . unless such intention is clearly expressed or
22 reasonably to be inferred from the language of the act or from its
23 purpose, subject matter or history." Sullivan v. Oracle Corp., 51
24 Cal. 4th 1191, 1207 (Cal. 2011) (citations and quotations omitted).
25 With regard to the UCL and CLRA, non-California residents' claims
26 are not supported "where none of the alleged misconduct or injuries
27 occurred in California." Clothesrigger, Inc. v. GTE Corp., 191
28 Cal. App. 3d 605, 612-13 (1987) (citing Norwest Mortg. Inc. v.

1 Superior Court, 72 Cal. App. 4th 214, 222 (Cal. Ct. App. 1999));
2 Banks v. Nissan N. Am., Inc., 2012 U.S. Dist. LEXIS 37754, *3 (N.D.
3 Cal. Mar. 20, 2012). Oklahoma law is in accord with the
4 presumption against extraterritoriality. Harvell v. Goodyear Tire
5 & Rubber Co., 164 P.3d 1028, 1037 (Okla. 2007) ("Courts have
6 generally determined that the focus of the inquiry concerning
7 application of [consumer protection statutes] to out-of-state
8 consumers is whether the offending consumer transaction occurred
9 with[in] the state.")

10 Defendants argue that Ms. McKinnon's UCL and CLRA claims are
11 barred by the presumption against extraterritoriality since they
12 "depend on actions and alleged injuries occurring in Oklahoma,"
13 because Plaintiffs allege that Defendants' agents "tried to up-
14 sell" Ms. McKinnon in the Tulsa airport, that she was fraudulently
15 charged by Defendants in Tulsa, and that she paid Defendants in
16 Tulsa.² See MTD at 7. Defendants conclude that if Ms. McKinnon's
17 injuries took place in Oklahoma, then no California statute can
18 encompass those injuries. Defendants make the same territorial
19 argument as to Ms. Tool's OCPA claim, since the core of Ms. Tool's
20 allegations about Defendants' behavior is located in California,
21 not Oklahoma. Id. at 7-8.

22 Plaintiffs allege that Defendants do business in California
23 through their website and at California airports, thereby linking
24 Defendants to this jurisdiction. FAC ¶¶ 5-7. Further, as to Ms.

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26 ² Defendants' footnotes also raise the argument, which Plaintiffs
27 join, that applying California statutes to an Oklahoma transaction
28 would violate the Dormant Commerce Clause. See MTD at 7 n.7; Opp'n
to MTD at 8 n.2; Reply ISO MTD at 4 n.3. The Court declines to
address this argument at this point, because the Court finds that
the presumption against extraterritoriality bars Plaintiffs' claims
as to Ms. McKinnon as pled in Plaintiffs' FAC.

1 McKinnon's injuries, Plaintiffs argue that "even though [Ms.
2 McKinnon] picked up the vehicle in Oklahoma, she made the
3 reservation for the rental, where she specifically placed
4 [Defendants] on notice that she specifically declined all available
5 additional optional add-ons, in California. As such her injury
6 also occurred in the State of California." Opp'n to MTD at 8.

7 With regard to Ms. McKinnon, Plaintiffs also argue that
8 "California residents . . . may bring claims under the UCL and CLRA
9 regardless of where the 'injury' took place." Opp'n to MTD at 7.
10 In support of this, Plaintiffs cite Allstate Ins. Co. v. Hague, 449
11 U.S. 302, 315 (1981), for the principle that "[n]umerous cases have
12 applied the law of a jurisdiction other than the alleged situs of
13 the injury where there existed some other link between that
14 jurisdiction and the occurrence." Id. Plaintiffs cite Allstate's
15 holding correctly, but the issue in Allstate involved choice of
16 law, not the reach of one particular state's statute. Allstate
17 does not support Plaintiffs' broad claim that California residents
18 can bring UCL and CLRA claims regardless of where their injuries
19 take place.

20 Plaintiffs further cite Stop Youth Addiction v. Lucky Stores,
21 Inc., 17 Cal. 4th 553, 570 (Cal. Ct. App. 1998), to argue that
22 because the California Legislature deleted the language "in this
23 state" from the UCL in 1992, they meant for the UCL to encompass
24 past activity and out-of-state activity. Id. However, California
25 courts have already rejected this argument. Norwest, 72 Cal. App.
26 4th at 223-24 ("The 1992 amendment did not expand the conduct
27 regulated by the UCL. It clarified the scope of injunctive relief
28 available to a plaintiff who was already entitled to pursue a claim

1 under the UCL.").

2 None of Plaintiffs' other cases are apposite. Both Yu v.
3 Signet Bank/Virginia, 69 Cal. App. 4th 1377, 1381-82 (Cal. Ct. App.
4 1999), and Speyer v. Avis Rent A Car System, Inc., 415 F. Supp. 2d
5 1090, 1099 (S.D. Cal. 2005), affirm the rule that California
6 residents can bring claims against out-of-state defendants if their
7 injuries occurred in California. Moreover, Speyer noted that
8 similarly situated plaintiffs could state a UCL claim if they were
9 harmed at the moment they received unlawful online rental quotes
10 from the out-of-state car rental defendants, but that is not what
11 Plaintiffs pled here. In any event, Speyer partly concerned an
12 underlying California statute that specifically prohibited car
13 rental companies from offering misleading quotes to customers. 415
14 F. Supp. 2d at 1095.

15 The Court finds that Plaintiffs' UCL and CLRA claims are too
16 attenuated as to Ms. McKinnon. Everything Plaintiffs plead
17 regarding Ms. McKinnon suggests that any harms actually arose in
18 Oklahoma, when Defendants' agents allegedly tricked Ms. McKinnon
19 into purchasing unwanted add-ons at the point of sale. Ms.
20 McKinnon's online reservation, made from California, was not enough
21 to bring Defendants' Oklahoma activity within the scope of the UCL
22 and CLRA, since Plaintiffs did not plead, for example, that
23 Defendants engaged in any injurious or fraudulent activity at the
24 time Ms. McKinnon made her reservation.

25 Similarly, as to Ms. Tool's OCPA claims, the injuries in
26 question took place in California, and there is no indication that
27 OCPA encompasses injury to a non-Oklahoma-resident occurring
28 outside Oklahoma. Plaintiffs argue that Oklahoma courts do not

1 follow the "lex loci delicti" rule,³ but rather the "most
2 significant relationship" test, in determining which jurisdiction's
3 law should govern a dispute. Opp'n to MTD at 12-13 (citing
4 Brickner, 525 P.2d at 635-37). However, the issue here is not
5 choice of law but rather whether a state consumer protection
6 statute should apply extraterritorially -- and the answer is that
7 it cannot. See Harvell, 164 P.3d at 1037 ("[T]he focus of the
8 inquiry concerning the application of [a consumer protection
9 statute] to out-of-state consumers is whether the offending
10 consumer transaction occurred with[in] the state.").

11 Plaintiffs' CLRA and UCL claims as to Ms. McKinnon are
12 DISMISSED with leave to amend. Plaintiffs may amend if they can
13 plead that Ms. McKinnon's injuries occurred within those statutes'
14 territorial scopes. Plaintiffs' OCPA claims as to Ms. Tool are
15 DISMISSED with leave to amend for the same reasons. Plaintiffs'
16 OCPA claims as to Ms. McKinnon remain undisturbed, as do
17 Plaintiffs' UCL and CLRA claims as to Ms. Tool.

18 **c. Notice Under the CLRA**

19 Consumers bringing actions under CLRA provisions must give
20 notice to the alleged offender at least thirty days prior to the
21 commencement of an action for damages, demanding that the offender
22 "correct, repair, replace, or otherwise rectify the goods or
23 services alleged to be in violation of [the CLRA]." Cal. Civ. Code
24 § 1782. The purpose of this requirement is to give defendants the
25 opportunity to cure their alleged violations before they may be
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27 ³ The lex loci delicti rule is a choice of law rule. It states
28 that "the law of the place of the injury or where the cause of
action arose[] determines the substantive rights and liabilities of
the parties." Brickner v. Gooden, 525 P.2d 632, 634 (Okla. 1974).

1 held liable for damages. Outboard Marine Corp. v. Super. Ct., 52
2 Cal. App. 3d 30, 41 (Cal. Ct. App. 1975).

3 Plaintiffs pled, as to the notice requirement, that "[w]ritten
4 notice pursuant to the provisions of the CLRA was provided to
5 [Defendants] by Ms. McKinnon on behalf of all Class members on June
6 6, 2012." FAC ¶ 56. Defendants argue that because Ms. McKinnon
7 lacks standing to bring a CLRA claim (per the arguments addressed
8 in Section IV.A.b, supra), her notice is insufficient to allow Ms.
9 Tool or other putative class members to bring a CLRA action,
10 because no class has yet been certified, and Plaintiffs' prayer for
11 damages under the CLRA as to Ms. Tool would be impermissible
12 without her having filed a CLRA notice of her own. Reply ISO MTD
13 at 6-7 (citing Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d
14 939, 949 (S.D. Cal. 2007) (holding that CLRA claims for damages
15 must be dismissed with prejudice if a plaintiff does not comply
16 with CLRA notice procedures)).

17 Defendants' arguments are unavailing. First, the Court has
18 not determined that Ms. McKinnon definitively lacks status to bring
19 a CLRA claim. As noted in Section IV.A.b supra, Ms. McKinnon may
20 yet plead a CLRA claim that is not barred by California's
21 presumption against extraterritoriality.

22 Second, Defendants' allegations that the named Plaintiffs
23 cannot give notice on behalf of a class that does not exist yet
24 raises an irrelevant issue. The cases Defendants cite, Lierboe v.
25 State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1022-23 (9th Cir.
26 2003), and Boyle v. Madigan, 492 F.2d 1180, 1182 (9th Cir. 1974)),
27 rightly state that named plaintiffs in a putative class action who
28 lack standing to bring certain claims cannot litigate those claims

1 on behalf of those not present. But the Court has not held that
2 Plaintiffs lack standing to bring a CLRA claim, and moreover, those
3 cases do not state that plaintiffs cannot give notice under the
4 CLRA on a class's behalf.

5 Third, the CLRA's notice function is in place to ensure that
6 Defendants are aware of alleged wrongdoing and given an opportunity
7 to correct it before they are sued. That purpose was served when
8 Ms. McKinnon gave notice to Defendants of an impending class action
9 lawsuit concerning Defendants' add-on service sales practices.
10 Defendants were "on notice that [they were] being sued by a
11 putative class, and thus the notice was sufficient 'to facilitate
12 pre-complaint settlement,' which is the purpose of the CLRA notice
13 requirements." See In re Apple In-App Purchase Litig., 855 F.
14 Supp. 2d 1030, 1038 (N.D. Cal. 2012) (quoting Outboard Marine, 52
15 Cal. App. 3d at 41).

16 Therefore the Court declines to dismiss Plaintiffs' CLRA
17 claims for lack of notice, though as stated above, Plaintiffs' CLRA
18 claims as to Ms. McKinnon are dismissed with leave to amend for
19 other reasons.

20 **d. Plaintiffs' Common Law Claims**

21 Defendants also argue that Plaintiffs' common law claims must
22 fail primarily because Plaintiffs fail to plead requisite elements
23 of those claims.

24 **i. Breach of Contract**

25 "To state a cause of action for breach of contract, a party
26 must plead [1] the existence of a contract, [2] his or her
27 performance of the contract or excuse for nonperformance, [3] the
28 defendant's breach, and [4] resulting damage." Mora v. U.S. Bank,

1 N.A., No. 11-6598 SC, 2012 WL 2061629, *6 (N.D. Cal. June 7, 2012)
2 (citing Harris v. Rudin, Richman & Appel, 74 Cal. App. 4th 299, 307
3 (Cal. Ct. App. 1999)). Additionally, if the plaintiff alleges the
4 existence of a contract, the plaintiff may set forth the contract
5 verbatim, attach it as an exhibit, or plead it according to its
6 legal effect. See Lyons v. Bank of America, N.A., No. 11-01232 CW,
7 2011 WL 3607608, at *2 (N.D. Cal. Aug. 15, 2011).

8 Plaintiffs point to the contracts that Ms. McKinnon and Ms.
9 Tool signed when they picked up their rental cars in Oklahoma and
10 California, arguing that Defendants breached those contracts by
11 tricking Plaintiffs into checking boxes in order to claim that
12 Plaintiffs ordered unwanted products and services, or by "inputting
13 [Plaintiffs'] signature without authorization." FAC ¶ 66.
14 Plaintiffs do not cite, attach, or explain in real detail the
15 contract provisions that Defendants allegedly breached.
16 Plaintiffs' allegations appear to align more with a
17 misrepresentation claim or some other cause of action sounding in
18 fraud. Plaintiffs have failed to plead a breach of contract, so
19 this claim is DISMISSED with leave to amend so that Plaintiffs can
20 specify exactly which contract provisions Defendants breached.

21 **ii. Breach of the Implied Covenant of Good**
22 **Faith and Fair Dealing**

23 "The covenant of good faith and fair dealing, implied by law
24 in every contract, exists merely to prevent one contracting party
25 from unfairly frustrating the other party's right to receive the
26 benefits of the agreement actually made." Guz v. Bechtel Nat.
27 Inc., 24 Cal. 4th 317, 349 (Cal. 2000). The covenant thus prevents
28 a contracting party from taking an action that, although

1 technically not a breach, frustrates the other party's right to the
2 benefit of the contract. Love v. Fire Ins. Exchange, 221 Cal. App.
3 3d 1136, 1153 (Cal. Ct. App. 1990). The covenant "cannot impose
4 substantive duties or limits on the contracting parties beyond
5 those incorporated in the specific terms of their agreement." Guz,
6 24 Cal. 4th at 349-50. The elements of a claim for breach of the
7 covenant of good faith and fair dealing are:

8
9 (1) the plaintiff and the defendant entered
10 into a contract; (2) the plaintiff did all or
11 substantially all of the things that the
12 contract required him to do or that he was
13 excused from having to do; (3) all conditions
required for the defendant's performance had
occurred; (4) the defendant unfairly interfered
with the plaintiff's right to receive the
benefits of the contract; and (5) the
defendant's conduct harmed the plaintiff.

14 Woods v. Google, Inc., -- F. Supp. 2d --, 2012 WL 3673319, at *8
15 (N.D. Cal. 2012) (citing Judicial Counsel of California Civil Jury
16 Instructions § 325 (2011)).

17 Plaintiffs allege that Defendants breached the covenant of
18 good faith and fair dealing by implementing systemic policies and
19 practices meant to trick or mislead customers into buying unwanted
20 services, despite having been placed on notice that those practices
21 were taking place nationwide. Plaintiffs do not, however, point to
22 a specific part of the contract that serves as the premise for
23 their claim. The Court finds that allowing these claims to proceed
24 given their identity with Plaintiffs' breach of contract claims
25 would be superfluous. Accordingly Plaintiffs' claims here are
26 DISMISSED with leave to amend to correct these errors.

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1 **iii. Common Counts, Unjust Enrichment,**
2 **Restitution, and Assumpsit**

3 Count 8 of the FAC pleads a cause of action "[u]nder common
4 law principles of common counts, assumpsit, unjust enrichment,
5 and/or restitution," based on Defendants' alleged receipt of money
6 charged to Plaintiffs with the knowledge that those charges were
7 improper or illegal. FAC ¶¶ 75-78. Defendants argue that "there
8 is no cause of action for 'unjust enrichment' in California." MTD
9 at 13 (citing Wolph v. Acer Am. Corp., No. C 09-0314 JSW, 2009 WL
10 2969467 (N.D. Cal. Sept. 14, 2009). Defendants further argue that
11 even if there were, the Court should dismiss that claim -- as well
12 as claims for assumpsit, common counts, and common law restitution
13 -- because they would be duplicative of other theories of relief.
14 MTD at 13. Plaintiffs respond that this Court has held that unjust
15 enrichment can be an alternative claim to breach of contract when,
16 for example, "the parties have a contract that was procured by
17 fraud or is for some reason unenforceable." Opp'n to MTD at 21
18 (citing Monet v. Chase Home Fin. LLC, No. C 10-0135 RS, 2010 WL
19 2486376, at *8-9 (N.D. Cal. June 16, 2010)). Plaintiffs continue
20 that their remaining claims under Count 8 do not fail because they
21 are pled as equitable alternatives to the breach of contract claim.
22 Id.

23 Plaintiffs are correct that this Court has recognized unjust
24 enrichment as an equitable alternative to breach of contract
25 claims. See, e.g., Monet, 2010 WL 2486376, at *8-9; McBride v.
26 Boughton, 123 Cal. App. 4th 379, 388 (Cal. Ct. App. 2004)
27 (construing a claim for "unjust enrichment" as an attempt to plead
28 a cause of action giving rise to restitution). Construing the

1 pleadings liberally, Plaintiffs have pled that the contracts they
2 signed were obtained essentially through fraud, in which case
3 restitution under an unjust enrichment theory could be an
4 appropriate remedy. The Court finds that Plaintiffs have
5 sufficiently pled an equitable unjust enrichment claim insofar as
6 it is an equitable alternative to and not duplicative of
7 Plaintiffs' other claims. However, Plaintiffs' claims for
8 assumpsit, common law restitution, and common counts are DISMISSED
9 because Plaintiffs fail to state a legal basis for those claims,
10 and they would be duplicative of Plaintiffs' unjust enrichment
11 claim.

12 **iv. Unconscionability**

13 Plaintiffs plead that the contracts they have with Defendants
14 are procedurally and substantively unconscionable, because
15 Defendants did not disclose to Plaintiffs that they would be
16 charged for unwanted add-ons or obtain Plaintiffs' "free and proper
17 affirmative consent" prior to these charges, and because Defendants
18 allegedly forged Plaintiffs' signatures to the rental agreements.
19 FAC ¶¶ 70-75. Further, Plaintiffs allege that the agreements they
20 signed were contracts of adhesion, and the parties' disparate
21 bargaining positions combined with the contracts' unfair terms
22 suffice to make Plaintiffs' claims here actionable under California
23 and Oklahoma statutes allowing Courts to refuse to enforce
24 unconscionable statutes. Id. ¶ 73 (citing Cal. Civ. Code section
25 1670.5 and Okla. Stat. Tit. 12A, § 2-302.

26 Plaintiffs' claim must be dismissed because it fails to set
27 forth a cognizable legal theory. Unconscionability under both
28 statutes Plaintiffs cite, as well as under common law, is a defense

1 to the enforcement of a contract, not an independent cause of
2 action. Plaintiffs' claim for unconscionability is DISMISSED with
3 prejudice.

4 **B. Defendants' Motion to Strike**

5 Plaintiffs bring this action on behalf of all of Defendants'
6 customers in California and Oklahoma who, within the last four
7 years, paid for add-ons that they either declined or did not
8 authorize with free consent. FAC ¶ 21. Defendants move to strike
9 all of Plaintiffs' class allegations pursuant to Rule 12(f),
10 arguing that "it is apparent from the face of the [FAC] that no
11 class can be certified." MTS at 4. Plaintiffs oppose this motion
12 on the grounds that it is premature. Opp'n to MTS at 1.

13 Class allegations typically are tested on a motion for class
14 certification, not at the pleading stage. See Collins v. Gamestop
15 Corp., C 10-1210-TEH, 2010 WL 3077671, at *2 (N.D. Cal. Aug. 6,
16 2010). However, "[s]ometimes the issues are plain enough from the
17 pleadings to determine whether the interests of the absent parties
18 are fairly encompassed within the named plaintiff's claim." Gen.
19 Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982). Thus, some
20 courts have struck class allegations where it is clear from the
21 pleadings that class claims cannot be maintained. E.g., Sanders v.
22 Apple Inc., 672 F. Supp. 2d 978, 990 (N.D. Cal.2009).

23 Defendants argue that Plaintiffs' class allegations should be
24 stricken because (1) the class is not ascertainable; (2) individual
25 inquiries predominate; (3) Plaintiffs' rental agreements
26 demonstrate the absence of any uniform, class-wide proof; and (4)
27 Plaintiffs cannot show class-wide injury and causation. MTS at 4-
28 11. Defendants' arguments on the first three points are

1 essentially the same: they claim that the Court would have to
2 conduct individualized inquiries or "mini-trials" to decide whether
3 Plaintiffs were really eligible for class membership. See MTS at
4 4-9. Defendants' argument on the last point is that Plaintiffs'
5 claims sound in fraud, since they involve face-to-face interactions
6 and oral representations between Defendants' employees and
7 Plaintiffs, and that fraud-based claims are generally not amenable
8 to class-wide proof of injury and causation. Id. at 9-10.

9 Whatever the merits of Defendants' claims, they are premature
10 at the pleading stage. The parties have had no time to develop a
11 factual record, and so it is unclear whether Defendants' arguments
12 on this point have any merit. Moreover, it is not clear from
13 Plaintiffs' pleadings that no class can be maintained. See Sanders
14 v. Apple, 672 F. Supp. 2d at 990. Defendants' motion to strike is
15 therefore DENIED.

16
17 **V. CONCLUSION**

18 As explained above, the Court GRANTS IN PART and DENIES IN
19 PART Defendants Dollar Thrifty Automotive Group, Inc., Dollar Rent
20 A Car, Inc., and DTG Operations, Inc.'s motion to dismiss Sandra
21 McKinnon and Kristen Tool's complaint, and DENIES their motion to
22 strike. The Court orders as follows:

- 23 • Plaintiffs' UCL claims are DISMISSED with leave to amend as to
24 Ms. McKinnon, but undisturbed as to Ms. Tool.
- 25 • Plaintiffs' CLRA claim is DISMISSED with leave to amend as to
26 Ms. McKinnon, but undisturbed as to Ms. Tool.
- 27 • Plaintiffs' OCPA claim is DISMISSED with leave to amend as to
28 Ms. Tool, but undisturbed as to Ms. McKinnon.

- 1 • Plaintiffs' breach of contract claim is DISMISSED with leave
2 to amend.
- 3 • Plaintiffs' claim for breach of the covenant of good faith and
4 fair dealing is DISMISSED with leave to amend.
- 5 • Plaintiffs' unconscionability claim is DISMISSED WITH
6 PREJUDICE.
- 7 • Plaintiffs' common counts, common law restitution, and
8 assumpsit claims are DISMISSED WITH PREJUDICE, but Plaintiffs'
9 equitable unjust enrichment claim is undisturbed.

10 Plaintiffs have thirty (30) days from the signature date of this
11 Order to file an amended complaint curing the defects described in
12 Section III.A supra, or the Court may dismiss their defective
13 claims with prejudice. The status conference now scheduled for
14 Friday, March 15, 2013, is hereby VACATED and rescheduled for
15 Friday, May 24, 2013.

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18 IT IS SO ORDERED.

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20 Dated: MARCH 4, 2013

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UNITED STATES DISTRICT JUDGE

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