

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 PORTIONS OF
situated,	)	PLAINTIFFS' SECOND AMENDED
	)	<u>COMPLAINT</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.	)	
	)	

**I.    INTRODUCTION**

Plaintiffs Sandra McKinnon and Kristen 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 in their second amended complaint that Defendants defrauded

1 Plaintiffs and other customers in California and Oklahoma. ECF No.  
2 50 ("SAC"). Defendants now move to dismiss portions of Plaintiffs'  
3 SAC. ECF No. 51 ("Mot."). The Motion is fully briefed, ECF Nos.  
4 55 ("Opp'n"), 60 ("Reply"), and is suitable for determination  
5 without oral argument, Civ. L.R. 7-1(b). For the reasons explained  
6 below, Defendants' motion to dismiss portions of Plaintiff's SAC is  
7 GRANTED IN PART and DENIED IN PART.

8  
9 **II. BACKGROUND**

10 Defendants are car rental companies. SAC ¶¶ 5-7. Named  
11 Plaintiffs were customers of Defendants who rented cars in  
12 California (Ms. Tool) and Oklahoma (Ms. McKinnon). Id. ¶¶ 3-4.

13 Ms. McKinnon, a California resident, alleges that she made an  
14 online vehicle reservation with Defendants via their partner  
15 Southwest Airlines's website. Id. ¶ 13. At that time, Defendants  
16 apparently offered her a daily rental rate, including "approximate  
17 taxes and fees," and stated that additional taxes, surcharges, or  
18 fees "may apply." Id. Ms. McKinnon submitted her payment  
19 information to Defendants via their website in order to confirm her  
20 reservation, at which point she received a confirmation number from  
21 Defendants, as well as a "rate breakdown" of two weeks' rental time  
22 at \$147.56 plus one extra day at \$20.69 (totaling a "base rate" of  
23 \$315,81") and \$160.46 in taxes and fees. Id.; see also SAC Ex. 1  
24 ("Confirmation").<sup>1</sup>

25 Defendants offer their own damage waivers and insurance, but  
26 at no point during the reservation process did Defendants disclose

27  
28 <sup>1</sup> Plaintiffs refer to the Confirmation as if it generally represents the "initial reservation agreements" they claim to have entered. The Court does the same.

1 that some of the waivers or insurance they offer might be  
2 duplicative of what customers might already have through credit  
3 card companies or private insurers. See SAC ¶ 13. Plaintiffs  
4 allege that Defendants should have known such duplicative coverage  
5 would be likely. See id. Further, Plaintiffs state that none of  
6 Defendants' representations or agreements during their online  
7 reservation process provided specific information about potential  
8 add-on fees, though the Confirmation stated that additional fees,  
9 surcharges, and taxes may apply. See id.; see also Confirmation at  
10 1-2.

11 Plaintiffs aver that when Ms. McKinnon picked up her car from  
12 Defendants' facility in the Tulsa airport, Defendants' agent tried  
13 to offer her a variety of additional services, all of which she  
14 orally declined. Id. When Ms. McKinnon signed Defendants'  
15 electronic signature pad to complete her transaction, Defendants'  
16 agent told her to initial certain areas in order to decline the  
17 add-ons. Id. She did so and was handed a folded-up copy of her  
18 rental contract. Id. The agent allegedly did not discuss the  
19 total amount charged. Id. When Ms. McKinnon returned her rental  
20 car to Defendants, she was allegedly charged an additional \$359.65,  
21 almost the total cost of the rental itself. Id. Defendants'  
22 manager at the Tulsa airport would not discuss the charges with  
23 her, and Defendants' other employees allegedly said in reference to  
24 Defendants, "They never give the money back. You are not going to  
25 get your money back." Id. ¶ 14. Ms. McKinnon tried contacting  
26 Defendants after that, including by sending them a written demand  
27 for the return of her money, but she never received a refund or any  
28 form of redress. Id.

1 Ms. Tool's experience renting a car from Defendants was  
2 substantially similar, though she (unlike Ms. McKinnon) allegedly  
3 disputed her charges with her credit card company, and Plaintiffs  
4 allege that she (also unlike Ms. McKinnon) prepaid her reservation.  
5 See id. ¶ 15.<sup>2</sup>

6 In both Ms. Tool and Ms. McKinnon's cases, Defendants' records  
7 allegedly show that Plaintiffs' electronic signatures and checked  
8 boxes from the touchpads they were offered when picking up their  
9 cars indicate that Plaintiffs accepted Defendants' additional  
10 services instead of declining them, as Defendants' agents allegedly  
11 led Plaintiffs to believe. See id. ¶¶ 15-17. Defendants therefore  
12 told Plaintiffs that they had no recourse against Defendants, since  
13 Defendants' records indicated that Plaintiffs opted into all  
14 charges. Id. ¶¶ 16-17.

15 Plaintiffs aver that they never intended to accept any of  
16 these charges and that Defendants' agents instructed them that  
17 signing and checking the electronic forms they were offered would  
18 decline the add-ons. See id. ¶¶ 15-20. Plaintiffs further suggest  
19 that Defendants rely on the hustle and rush of airports to send  
20 their customers away without having reviewed their rental charges,  
21 thereby giving Defendants a basis for claiming that their customers  
22 routinely agree to the add-on charges. Id. ¶¶ 19-20. According to  
23 Plaintiffs, Defendants' business model is built on incentivizing  
24 this sort of fraud, because Defendants' employees are paid minimum  
25 wage but make commissions of up to twelve percent on the sales of  
26 add-ons, while employees who fail to obtain "an average 30 per day

---

27  
28 <sup>2</sup> Plaintiffs' FAC includes a long list of other consumers' reviews  
of Defendants' services, all reporting experiences similar to Ms.  
McKinnon's and Ms. Tool's. See id. ¶¶ 17-20.

1 up-sales of additional options for three months" may be terminated  
2 without eligibility for unemployment. Id. ¶ 18.

3 Based on the facts described above, Plaintiffs' SAC asserts  
4 eight causes of action against Defendants: (1-3) violations of  
5 California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code  
6 §§ 17200 et seq., for unlawful, unfair, and fraudulent business  
7 acts and practices; (4) violation of California's Consumers Legal  
8 Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 et seq.; (5)  
9 violation of the Oklahoma Consumer Protection Act ("OCPA"), Okla.  
10 Stat. tit. 15, § 751 et seq.; (6) breach of contract and breach of  
11 the covenant of good faith and fair dealing; (7) declaratory  
12 relief; and (8) unjust enrichment. SAC ¶¶ 32-85.

13 Now Defendants move to dismiss Plaintiffs' UCL and CLRA claims  
14 as to Ms. McKinnon, and their breach of contract and breach of the  
15 implied covenant claims as to all Plaintiffs. See MTD at 1-2.

16  
17 **III. LEGAL STANDARD**

18 A motion to dismiss under Federal Rule of Civil Procedure  
19 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
20 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
21 on the lack of a cognizable legal theory or the absence of  
22 sufficient facts alleged under a cognizable legal theory."  
23 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
24 1988). "When there are well-pleaded factual allegations, a court  
25 should assume their veracity and then determine whether they  
26 plausibly give rise to an entitlement to relief." Ashcroft v.  
27 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court  
28 must accept as true all of the allegations contained in a complaint

1 is inapplicable to legal conclusions. Threadbare recitals of the  
2 elements of a cause of action, supported by mere conclusory  
3 statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v.  
4 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a  
5 complaint must be both "sufficiently detailed to give fair notice  
6 to the opposing party of the nature of the claim so that the party  
7 may effectively defend against it" and "sufficiently plausible"  
8 such that "it is not unfair to require the opposing party to be  
9 subjected to the expense of discovery." Starr v. Baca, 652 F.3d  
10 1202, 1216 (9th Cir. 2011).

11  
12 **IV. DISCUSSION**

13 **A. Plaintiffs' UCL and CLRA Claims**

14 Plaintiffs make UCL and CLRA claims as to both named  
15 Plaintiffs, but Defendants only challenge these claims as they  
16 concern Ms. McKinnon, who picked up her rental car in Oklahoma.  
17 Defendants argue that California's presumption against  
18 extraterritoriality precludes Plaintiffs' claims as to Ms.  
19 McKinnon, and also that Plaintiffs' allegations about Defendants'  
20 violations of California laws are insufficiently pled.

21 California law presumes that the legislature did not intend a  
22 statute to be "operative, with respect to occurrences outside the  
23 state, . . . unless such intention is clearly expressed or  
24 reasonably to be inferred from the language of the act or from its  
25 purpose, subject matter or history." Sullivan v. Oracle Corp., 51  
26 Cal. 4th 1191, 1207 (Cal. 2011) (citations and quotations omitted).  
27 With regard to the UCL specifically, and presumably the CLRA since  
28 the presumption against extraterritoriality is broad, non-

1 California residents' claims are not supported "where none of the  
2 alleged misconduct or injuries occurred in California." Churchill  
3 Village, LLC v. General Elec. Co., 169 F. Supp. 2d 1119, 1126  
4 (citing Norwest Mortg. Inc. v. Super. Ct., 72 Cal. App. 4th 214,  
5 222 (Cal. Ct. App. 1999)). In Order I, the special concern for the  
6 UCL and CLRA's application to non-residents was heightened because  
7 Ms. Tool is not a resident of California. In Defendants' present  
8 motion, that concern is somewhat dampened because Ms. McKinnon is a  
9 California resident, and Defendants' motion only disputes  
10 Plaintiffs' claims about her.

11 In Order I, the Court dismissed Plaintiffs' UCL and CLRA  
12 claims as to Ms. McKinnon because the harm -- being forced to pay  
13 fraudulent charges -- actually occurred in Oklahoma, not  
14 California, and Plaintiffs pled no other facts strongly linking  
15 Defendants' behavior to California or justifying the application of  
16 California law to Ms. McKinnon's situation. Order I at 9-12. The  
17 Court gave Plaintiffs leave to amend their complaint to explain how  
18 Ms. McKinnon's alleged harms fall within the territorial scope of  
19 the UCL and CLRA. See id. at 12.

20 Now Plaintiffs plead that Defendants' statements during the  
21 reservation process in California were harmful misrepresentations  
22 or omissions giving rise to UCL and CLRA claims, and that Ms.  
23 McKinnon was also harmed by ultimately paying the fraudulent  
24 charges from a California bank account. See, e.g., SAC ¶¶ 13-15,  
25 37, 54. Plaintiffs no longer plead that Ms. McKinnon declined any  
26 add-ons from California.

27 ///

28 ///

1                   a. The UCL

2           The UCL makes actionable any "unlawful, unfair or fraudulent  
3 business act or practice." Cal. Bus. & Prof. Code § 17200. These  
4 three prongs are distinct, and Plaintiffs have accordingly asserted  
5 claims against Defendants for unlawful, unfair, and fraudulent  
6 business practices. The Court first discusses the unlawful prong,  
7 which would tie Plaintiffs' claims as to Ms. McKinnon firmly to  
8 California because Plaintiffs base this claim on Defendants'  
9 alleged violations of California laws within the state of  
10 California. The Court then discusses the unfair or fraudulent  
11 claims, which depend on facts inside and outside the state.

12                   i. Unlawful Prong

13           Plaintiffs can plead a UCL violation under the "unlawfulness"  
14 prong by pleading that one of Defendants' business practices  
15 violated a predicate federal, state, or local law. See Cel-Tech  
16 Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163,  
17 180 (Cal. 1999) (citing State Farm Fire & Cas. Co. v. Superior  
18 Court, 45 Cal. App. 4th 1093, 1103 (Cal. Ct. App. 1996)).

19           Plaintiffs cite three California laws as predicates for  
20 Defendants' alleged violation of the UCL's unlawful prong:  
21 subsections (g) (1), (j), and (t) (2) (B) of California's car rental  
22 statute, California Civil Code section 1936 ("Section 1936");  
23 California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code  
24 § 17500 et seq.; and California Civil Code sections 1670.5 and  
25 1671, which set out rules for, respectively, unconscionable  
26 contracts and liquidated damages provisions in contracts.

27 ///

28 ///





1 any pleading of a statement to the public that could be actionable  
2 under the statute. The Court finds that the FAL is not a predicate  
3 for Plaintiffs' claim under the unlawful prong of the UCL.

4 **3. Section 1936**

5 Plaintiffs allege that Defendants violated three subsections  
6 of Section 1936: subsections (g)(1), (j), and (t)(2)(B). The Court  
7 finds that Plaintiffs have failed to plead that Defendants violated  
8 Section 1936.

9 Section 1936(g) states that rental companies offering damage  
10 waivers in addition to the rental rate must disclose certain  
11 coverage-related information in their rental contracts (or the  
12 holders in which the contracts are placed), in signs posted in the  
13 company's office, and in locations visible to renters who are  
14 enrolled in the rental company's membership program. Section  
15 1936(g) also requires that rental companies make oral disclosures  
16 of possible duplication of waiver coverage at the time of rental,  
17 and that the companies' contracts must also include specific  
18 language about that issue.

19 Plaintiffs have failed to plead that Defendants violated  
20 Section 1936(g). None of the Plaintiffs' facts as to Ms. McKinnon  
21 that would be relevant to Section 1936(g) occurred in California.  
22 Ms. McKinnon rented her vehicle and received her rental contract in  
23 Oklahoma, and nothing in Section 1936(g) purports to cover online  
24 reservations, even if they are made from California. Plaintiffs'  
25 strongest argument on this point is that Section 1936(g)'s  
26 requirements about "oral disclosures" of potentially duplicative  
27 coverage should be read to apply to online communications as well -  
28 - an interpretation that would put Defendants on the hook for

1 Section 1936(g) disclosures in California, even if the actual  
2 rental transaction and its attendant contracts, signs, and  
3 disclosures occur elsewhere. See Opp'n at 7-8. The Court finds  
4 Plaintiffs' proposed interpretation of Section 1936(g)  
5 unconvincing. That subsection anticipates that rental companies  
6 are to make the requisite oral disclosure at the time the customer  
7 is presented with the rental agreement itself, at which point the  
8 customer should initial an acceptance or declination of the damage  
9 waiver. The Court finds that because Ms. McKinnon received her  
10 rental agreement in Oklahoma, not California, Defendants could not  
11 have breached Section 1936(g), because it applies only in  
12 California. See, e.g., Speyer v. Avis Rent a Car System, Inc., 415  
13 F. Supp. 2d 1090, 1098-99, 1100 (S.D. Cal. 2005) (reading a  
14 different subsection of Section 1936 to apply only to California).

15 Section 1936(j) concerns advertisements in California, and  
16 Plaintiffs have not pointed to any advertisements. The  
17 Confirmation is not an advertisement. It is a reservation, and  
18 those are governed by separate parts of Section 1936 that  
19 Plaintiffs do not cite in support of their UCL claim. The Court  
20 finds that Section 1936(j) cannot be a predicate to Plaintiffs'  
21 claim under the UCL's unlawful prong.

22 Section 1936(t)(2)(B) only applies to renters enrolled in the  
23 rental company's membership program, which Plaintiffs do not claim  
24 to have been. The Court finds that this subsection cannot support  
25 Ms. McKinnon's claim under the UCL's unlawful prong.

26 Plaintiffs' arguments about the policy rationale behind  
27 Section 1936 do not override the statute's plain text. Plaintiffs  
28 describe a situation in which Section 1936 arguably does not match

1 the expectations of the modern customer who probably begins the  
2 car-rental process online. But only the California legislature,  
3 not the Court, may properly address this issue.

4 **4. Conclusion on the Unlawful Prong**

5 As explained above, Plaintiff has failed to state a claim  
6 under the unlawful prong of the UCL. Defendants' motion to dismiss  
7 that claim is GRANTED, and the claim is DISMISSED WITH LEAVE TO  
8 AMEND.

9 **ii. Unfair and Fraudulent Prongs**

10 Though the parties effectively briefed only the issue of  
11 whether any California statutes are predicates for the UCL's  
12 unlawfulness prong, the question remains whether Plaintiffs' have  
13 pled valid claims for violations of the UCL's unfairness or  
14 fraudulent prongs. See SAC ¶¶ 41-49 (unfairness prong), 50-56  
15 (fraudulent prong). These two claims are based on Plaintiffs'  
16 theory that Defendants' reservation system, coupled with its  
17 alleged practice of tricking customers into paying add-on fees once  
18 they rent their cars, amounts to a "bait and switch" scheme that  
19 renders Defendants' quoted reservation prices unfair or fraudulent.  
20 See id. ¶¶ 41-56. The Court must first consider whether  
21 Plaintiffs' pleadings as to these two prongs can overcome  
22 California's presumption against extraterritorial application of  
23 its laws.

24 In support of their argument that the UCL applies even though  
25 the allegedly fraudulent transaction itself occurred in Oklahoma,  
26 Plaintiffs cite a recently decided Ninth Circuit case, AT&T  
27 Mobility LLC v. AU Optronics Corp., 707 F.3d 1106 (9th Cir. 2013).  
28 In that case, the district court had dismissed a group of telecom

1 corporation plaintiffs' state law antitrust claim under the  
2 Cartwright Act against several international electronics  
3 corporations. See id. at 1108-09. The plaintiffs appealed. Id.  
4 The Cartwright Act provides a private cause of action for indirect  
5 purchasers of price-fixed goods, though other states' laws do not.  
6 Id. at 1108. The district court held that since the plaintiffs had  
7 purchased the allegedly price-fixed goods outside California, the  
8 Due Process Clause of the Fourteenth Amendment forbade applying  
9 California antitrust law to those claims, since the Due Process  
10 Clause requires plaintiffs asserting state law causes of action to  
11 allege that the "occurrence or transaction giving rise to the  
12 litigation" occurred in that state. See id. at 1109.

13         The Ninth Circuit reversed and remanded, holding that the  
14 antitrust law in question could lawfully be applied without  
15 violating Due Process when "more than a de minimis amount" of the  
16 allegedly actionable activity took place in California. Id. at  
17 1113. This required the district court to consider, for each  
18 individual defendant, whether the plaintiffs had alleged sufficient  
19 conspiratorial conduct within California that is not "slight and  
20 casual," such that the application of California law to that  
21 defendant is "neither arbitrary nor fundamentally unfair." Id. at  
22 1107; see also In re TFT-LCD, No. C 10-4945 SI, 2013 WL 1891367, at  
23 \*1-4 (N.D. Cal. May 6, 2013) (applying AT&T on remand).  
24 Significantly, the Ninth Circuit stated that its analysis was  
25 equally applicable to the UCL, even though its holdings  
26 specifically discussed the Cartwright Act, since the UCL borrows  
27 violations from other laws and makes them independently actionable.  
28 AT&T, 707 F.3d at 1107 n.1.

1            AT&T concerned whether application of the California statutes  
2 to that case's defenses violated the United States Constitution's  
3 Due Process Clause. 707 F.3d at 1107. That constitutional  
4 question is different from California's presumption against  
5 extraterritorial application in that it places additional  
6 limitations on the extraterritorial application of state law. See  
7 Sullivan, 51 Cal. 4th at 1207 n.9. As to extraterritoriality  
8 specifically, California courts and federal courts applying  
9 California law have held consistently that while out-of-state  
10 conduct can be actionable when it results in injury to an out-of-  
11 state plaintiff in California, courts must draw a territorial line  
12 between actionable and non-actionable conduct under the UCL based  
13 on the plaintiff's citizenship and the actionable conduct's  
14 connection to California. See Speyer, 415 F. Supp. 2d at 1099-  
15 1100; Norwest, 72 Cal. App. 4th at 222-24; Yu v. Signet  
16 Bank/Virginia, 69 Cal. App. 4th 1377, 1381-82 (Cal. Ct. App. 1999).

17            Plaintiffs' pleadings have raised new facts suggesting that  
18 the Court's analysis should change -- specifically, Plaintiffs  
19 explain how Ms. McKinnon was harmed by reserving a car in  
20 California, being promised a certain price, and then being  
21 defrauded by a widespread scheme that Defendants have engineered to  
22 produce exactly the outcome she suffered. In this case, regardless  
23 of whether the Court applies the Ninth Circuit's holding from AT&T  
24 analogically, or considers the precedent and policy articulated in  
25 cases like Norwest, Yu, and Speyer, the Court finds that  
26 Defendants' conduct within California, as pled, plausibly suggests  
27 that the UCL should apply to Ms. McKinnon.

28            Defendants' conduct in California does not only amount to the

1 provision of a price quote and the completion of an automated  
2 reservation process. Based on Plaintiff's reasonably specific  
3 pleadings, Defendants have a national scheme involving providing  
4 low reservation rates and then tricking customers into paying more  
5 once they pick up their cars. Plaintiffs' second amended complaint  
6 sufficiently makes clear that the presumption against  
7 extraterritoriality does not apply to limit Plaintiffs' action in  
8 this case, and that Defendants' conduct is more than mere endemic  
9 dishonesty -- it is actionable under the UCL as an unfair and  
10 fraudulent business practice. Moreover, under AT&T, Defendants'  
11 conduct is not "slight and casual," such that the application of  
12 California law to that defendant would be "neither arbitrary nor  
13 fundamentally unfair." 707 F.3d at 1107.

14 Plaintiffs' UCL claims for unfair and fraudulent business  
15 practices therefore survive as to Ms. McKinnon. Defendants' motion  
16 is therefore DENIED as to these claims.

#### 17 **5. The CLRA**

18 Like the UCL, the CLRA prohibits "unfair methods of  
19 competition and unfair or deceptive acts or practices." Cal. Civ.  
20 Code § 1770. And like the UCL, the CLRA is not meant to apply  
21 extraterritorially. See, e.g., Murphy v. DirecTV, Inc., No. 2:07-  
22 cv-06465-JHN-VBKx, 2011 WL 3325891, at \*3 (C.D. Cal. Feb. 11, 2011)  
23 (since wrongful conduct did not occur in California, plaintiff  
24 could not plead CLRA claim). Since Plaintiffs' CLRA pleadings as  
25 to Ms. McKinnon are virtually identical to their UCL pleadings,  
26 Plaintiffs' CLRA claim survives per the Court's discussion above,  
27 and Defendants' motion is DENIED as to this claim. The Court's  
28 holding on this issue does not address Plaintiffs' standing to

1 pursue damages or other remedies under the CLRA.

2 **B. Breach of Contract**

3 "To state a cause of action for breach of contract, a party  
4 must plead [1] the existence of a contract, [2] his or her  
5 performance of the contract or excuse for nonperformance, [3] the  
6 defendant's breach, and [4] resulting damage." Mora v. U.S. Bank,  
7 N.A., No. 11-6598 SC, 2012 WL 2061629, \*6 (N.D. Cal. June 7, 2012)  
8 (citing Harris v. Rudin, Richman & Appel, 74 Cal. App. 4th 299, 307  
9 (Cal. Ct. App. 1999)). Additionally, if the plaintiff alleges the  
10 existence of a contract, the plaintiff may set forth the contract  
11 verbatim, attach it as an exhibit, or plead it according to its  
12 legal effect. See Lyons v. Bank of America, N.A., No. 11-01232 CW,  
13 2011 WL 3607608, at \*2 (N.D. Cal. Aug. 15, 2011).

14 In their first amended complaint, Plaintiffs cited Defendants'  
15 rental contracts as bases for their breach of contract claim,  
16 alleging that Defendants somehow breached those contracts by  
17 tricking Plaintiffs into signing them. See Order I at 15. The  
18 Court dismissed Plaintiffs' breach of contract claim because  
19 Plaintiffs did not cite, attach, or explain in real detail the  
20 contract provisions that Defendants allegedly breached, suggesting  
21 that their claim sounds more in fraud than in contract. See id.  
22 Plaintiffs allege the same facts about the rental contracts in  
23 their SAC, and to the extent those facts are bases for Plaintiffs'  
24 breach of contract claims, the claims are DISMISSED as to those  
25 contracts.

26 Plaintiffs allege new facts in their second amended complaint.  
27 They claim that the Confirmation and other online rental  
28 confirmations, provided after Plaintiffs completed the online



1 reservation process, are initial rental agreements that Defendants  
2 breached by charging at their rental desk more than Plaintiffs  
3 originally agreed to pay. See SAC ¶ 74. Plaintiffs state that (1)  
4 the online reservations are valid contracts; (2) Plaintiffs  
5 fulfilled the contracts by (among other things) picking up,  
6 returning, and refueling their rental cars; (3) Defendants breached  
7 the contracts by not providing Plaintiffs with the benefit of  
8 paying the amount they originally agreed to pay; and (4) Plaintiffs  
9 sustained damage by being overcharged. See Opp'n at 11-13.

10 The parties dispute whether Defendants breached any contract.  
11 Defendants claim that Plaintiffs do not identify any provision of  
12 any agreement that was breached, and that in any event, Defendants  
13 lawfully offered Plaintiffs add-ons after Plaintiffs received the  
14 Confirmation. MTD at 6. Plaintiffs respond that Defendants  
15 breached the Confirmation by charging more than the total charges  
16 and taxes listed on the Confirmation, for example. Opp'n at 13.  
17 (Plaintiffs do not append any of Ms. Tool's agreements, but they  
18 appear to plead that hers would have substantially resembled Ms.  
19 McKinnon's Confirmation.) Plaintiffs add that Defendants miss the  
20 point in their second argument about the add-ons having been  
21 properly confirmed at the rental desk, since any additional  
22 products offered to Plaintiffs at the rental desk were either not  
23 properly accepted or were added to Plaintiffs' bills by mistake or  
24 fraud. Id.

25 Plaintiffs offer three bases for Defendants' alleged breach:  
26 (1) Defendants charged Plaintiffs more than they claim to have  
27 agreed to pay in the Confirmation, (2) Defendants tricked  
28 Plaintiffs into signing ups for add-ons, or (3) Defendants did not

1 provide disclosures in accord with California law. See SAC ¶¶ 15,  
2 17, 74; Opp'n at 12-13.

3 The third option is not a ground for breach, as discussed in  
4 Section IV.A.a.i, supra: Section 1936 does not require the  
5 disclosures that Plaintiffs envision. Nor is the second option an  
6 appropriate ground for breach, since as the Court discussed in  
7 Order I, Plaintiffs neither pled nor referenced any contract that  
8 could be breached by Defendants' agents' conduct, which resembles  
9 the basis of a fraud claim more than a contract action.

10 Only the first option -- whether Defendants breached the  
11 Confirmation by allegedly tricking Plaintiffs into paying more for  
12 add-ons at the rental counter -- could be the basis of a breach of  
13 contract claim. Based on Plaintiffs' new pleadings, the Court  
14 finds Plaintiffs' breach of contract claim sufficient as to the  
15 Confirmation. Plaintiffs agreed, through a contract of adhesion,  
16 to pay what they thought was a fair price -- after all, if they  
17 knew that Defendants would defraud them and make them pay more  
18 money, they would have rented cars from a more honest dealer.  
19 Defendants' refusal to honor the Confirmation price in any way, and  
20 in fact to convince Plaintiffs of the price's validity and then to  
21 alter it secretly, was a breach. Defendants' motion is therefore  
22 DENIED as to this claim.

23 C. Breach of the Implied Covenant of Good Faith and Fair  
24 Dealing

25 "The covenant of good faith and fair dealing, implied by law  
26 in every contract, exists merely to prevent one contracting party  
27 from unfairly frustrating the other party's right to receive the  
28 benefits of the agreement actually made." Guz v. Bechtel Nat'l

1 Inc., 24 Cal. 4th 317, 349 (Cal. 2000). The covenant thus prevents  
2 a contracting party from taking an action that, although  
3 technically not a breach, frustrates the other party's right to the  
4 benefit of the contract. Love v. Fire Ins. Exchange, 221 Cal. App.  
5 3d 1136, 1153 (Cal. Ct. App. 1990). The covenant "cannot impose  
6 substantive duties or limits on the contracting parties beyond  
7 those incorporated in the specific terms of their agreement." Guz,  
8 24 Cal. 4th at 349-50. The elements of a claim for breach of the  
9 covenant of good faith and fair dealing are:

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

22 Woods v. Google, Inc., 889 F. Supp. 2d 1182, 1194 (N.D. Cal. 2012)  
23 (citing Judicial Counsel of California Civil Jury Instructions §  
24 325 (2011)).

25 In their first complaint, Plaintiffs alleged that Defendants  
26 breached the covenant of good faith and fair dealing by  
27 implementing systemic policies and practices meant to trick or  
28 mislead customers into buying unwanted services, despite having  
been placed on notice that those practices were taking place  
nationwide. Plaintiffs did not, however, point to a specific part  
of the contract that serves as the premise for their claim. The  
Court dismissed Plaintiffs' breach of the implied covenant claim  
with leave to amend.

1 Now Plaintiffs allege, as they did in their breach of contract  
2 claim, that their initial reservation agreements were contracts  
3 that obliged Defendants to rent cars to Plaintiffs at particular  
4 prices. See SAC ¶¶ 13-17, 72-77; Confirmation at 1-2. For reasons  
5 similar to those discussed in the breach of contract section above,  
6 the Court finds Plaintiffs' new pleadings sufficient to state a  
7 claim for breach of the implied covenant. Even if the benefit  
8 under the Confirmation was the agreement to rent a car at something  
9 roughly equivalent to the price Plaintiffs expected, Defendants  
10 breached their duty of good faith and fair dealing by hiding their  
11 plan to overcharge Plaintiffs until it was too late. Defendants'  
12 motion is therefore DENIED as to this claim.

13

14 **V. CONCLUSION**

15 As explained above, the Court GRANTS Defendants' motion to  
16 dismiss Plaintiffs' UCL unlawfulness claim. However, the Court  
17 DENIES Defendants Dollar Thrifty Automotive Group, Inc., Dollar  
18 Rent A Car, Inc., and DTG Operations, Inc.'s motion to dismiss  
19 Plaintiffs' other claims.

20 Plaintiffs have thirty (30) days from the signature date of  
21 this Order to file an amended complaint addressing the deficiency  
22 described above. If they do not, that claim may be dismissed with  
23 prejudice.

24

25 IT IS SO ORDERED.

26

27 Dated: July 3, 2013

28

UNITED STATES DISTRICT JUDGE