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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAGGIE CAMPBELL, on behalf of herself and
all persons in California similarly situated,

Plaintiff,

v.

EBAY, INC., AND PAYPAL, INC.,

Defendants.

Case No.: 13-CV-2632 YGR

ORDER GRANTING MOTION OF DEFENDANTS
TO DISMISS WITH LEAVE TO AMEND

Plaintiff Maggie Campbell (“Plaintiff”) brings this putative class action against Defendants eBay, Inc. and Paypal, Inc. (“Defendants”). Plaintiff alleges claims for breach of fiduciary duty, violation of the California Unfair Competition Law, Cal. Business & Professions Code section 17200 *et seq.* (“UCL”), and violation of the California Consumer Legal Remedies Act, (“CLRA”).

Defendants have filed a Motion to Dismiss under FRCP 12(b)(1) on the grounds that Plaintiff lacks standing, and under FRCP 12(b)(6) on the grounds that Plaintiff fails to meet the minimal pleading requirements of FRCP 8 or otherwise to state facts sufficient to support her claims. Having carefully considered the papers submitted and the pleadings in this action, and for the reasons set forth below, the Court hereby **GRANTS** the Motion to Dismiss **WITH LEAVE TO AMEND**.¹

¹ Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the Court finds this motion appropriate for decision without oral argument. Accordingly, the Court **VACATES** the hearing set for **September 10, 2013**.

1 **I. BACKGROUND**

2 This action was removed from Santa Clara Superior Court by the Notice of Removal filed
3 June 7, 2013. (Dkt. No. 1 [“NOR”].) Plaintiff filed her complaint on October 9, 2012, and then
4 filed a First Amended Complaint. (NOR, Exhs. 1 and 9 [“FAC”].) In the FAC, Plaintiff alleges
5 that she operates a business in California selling bicycles and bicycle parts through eBay. (FAC ¶
6 14.) She alleges that she has an account with both Defendant PayPal, Inc. and Defendant eBay,
7 Inc. (FAC ¶ 14.) She alleges a class defined as “all sellers of goods and services emanating from
8 California who have user agreements” with Defendants and “who have utilized and are utilizing the
9 services provided by Defendant PayPal, Inc. and Defendant eBay Inc.” (FAC ¶ 19.)

10 Plaintiff’s claims are based upon several alleged policies or practices of Defendants,
11 including:

12 (1) eBay’s “Buyer Is Always Right” grievance policy concerning disputes between buyers
13 and sellers, which results in “[s]ellers such as the Plaintiff ... losing the goods... shipped to the
14 buyer, as well as the money paid by the buyer for the goods, which is refunded to the buyer by
15 either PayPal or eBay” (FAC ¶ 5);

16 (2) Defendants’ use of software to “place files in the computers of the Plaintiff and other
17 sellers . . . which allows said Defendants to spy on the activities of the Plaintiff and other sellers
18 similarly situated” and invades their privacy (FAC ¶ 6);

19 (3) eBay’s restrictions what can be sold on its website (FAC ¶7);

20 (4) eBay restrictions on sellers’ accounts when a seller is late in paying listing fees and
21 Final Value Award fees owed to the company, or if a seller is “downgraded” based on buyer
22 complaints (FAC ¶ 8);

23 (5) PayPal’s failure to deliver payments immediately from an eBay buyer to a seller, instead
24 making use of the funds during the delay period while the funds are in the possession and control of
25 PayPal (FAC ¶ 9);

26 (6) eBay’s encroachment on sellers’ ownership rights by “placing ‘fast and easy
27 advertisements’ all over the listings pages . . . which detract from the effectiveness of the listing
28 pages,” and thereby cause sellers “damage as a result of lost sales” (FAC ¶ 10);

1 (7) eBay’s actions as an “agent for the Plaintiff and other sellers similarly situated” by
2 which eBay precludes sellers “from communicating with their prospective buyers, and also
3 precludes the prospective buyers from communicating directly with the sellers,” including that
4 eBay “delete[s] language from a communication that it does not want the buyer or the seller to read,
5 or [] will add language that it does want the buyer or seller to read.” (FAC ¶ 11.)

6 (8) “eBay sanctions and approves” third party vendors and “recommends that sellers
7 utilize the services of an approved third party vendor,” including Teaplix and Inkfrog insurance,
8 such that even when a seller tries to terminate service with the third party vendor, “PayPal, upon the
9 direction of Defendant eBay,” continues to pay third party vendors with a seller’s money (FAC ¶¶
10 12, 13); and

11 (9) sellers subject to account holds by Defendants cannot obtain shipping insurance
12 because a recommended third party insurance provider only accepts payment through PayPal (FAC
13 ¶ 13).

14 **II. STANDARDS APPLICABLE TO THE MOTION**

15 Defendants move under FRCP 12(b)(6) for failure to allege facts sufficient to establish
16 Plaintiff’s claims. “Federal Rule of Civil Procedure 8(a)(2) requires only a ‘short and plain
17 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
18 defendant fair notice of what the claim is and the grounds upon which it rests.’” *Bell Atlantic*
19 *Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). The pleading is
20 construed in the light most favorable to the non-moving party and all material allegations in it are
21 taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986).

22 Even under the liberal pleading standard of Rule 8(a)(2), “a plaintiff’s obligation to
23 provide the grounds of his entitlement to relief requires more than labels and conclusions, and a
24 formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555
25 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (internal brackets and quotation marks
26 omitted)). Hence, the Court need not assume unstated facts, nor will it draw unwarranted
27 inferences. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“Determining whether a complaint states
28 a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw

1 on its judicial experience and common sense.”). A plaintiff must not merely allege conduct that is
2 conceivable but must instead allege “enough facts to state a claim to relief that is plausible on its
3 face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads
4 factual content that allows the court to draw the reasonable inference that the defendant is liable
5 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). In sum, if
6 the facts alleged foster a reasonable inference of liability—stronger than a mere possibility—the
7 claim survives; if they do not, the claim must be dismissed. *See Iqbal*, 556 U.S. at 678–79.

8 Defendants’ motion also challenges the complaint under FRCP 12(b)(1) for lack of subject
9 matter jurisdiction based upon Plaintiff’s lack of standing. *See In re Ditropan XL Antitrust Litig.*,
10 M:06-CV-01761-JSW, 2007 WL 2978329, at *1 (N.D. Cal. Oct. 11, 2007) (“Standing pertains to
11 a federal court’s subject matter jurisdiction under Article III, and thus, is properly raised in a
12 motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).”) (citing *White v. Lee*, 227 F.3d
13 1214, 1242 (9th Cir. 2000)); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 942-44 (S.D.
14 Cal. 2007) (addressing standing under Rule 12(b)(1)). The Court is presumed to lack subject
15 matter jurisdiction until plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes*, 873
16 F.2d 1221, 1225 (9th Cir. 1989). Plaintiff must present admissible evidence to satisfy this burden.
17 *Ass’n of Am. Medical Colleges, v. United States*, 217 F.3d 770, 778 (9th Cir. 2000).

18 Defendants request judicial notice as to two items: eBay’s User Agreement in effect at the
19 time of the filing of the original complaint, and eBay’s Prohibited and Restricted Items Policy in
20 effect at that time, which was expressly incorporated into the User Agreement. (*See Request for*
21 *Judicial Notice [Dkt No. 17] and Declaration of Elizabeth Hartrich, Exh. A and B [Dkt. No. 18].*)
22 Plaintiff objects on grounds of relevance, lack of foundation and failure to comply with the Best
23 Evidence Rule. However, Plaintiff has alleged that she and members of the putative class have
24 “user agreements” with eBay. (FAC ¶19.) On a motion to dismiss, a court may consider
25 documents referenced in the complaint, “central” to the claims, and as to which no party questions
26 the authenticity of the copies provided. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.
27 2005). The agreements are referenced by the FAC, central to the allegations, and, even if not the
28 agreement Plaintiff herself signed, are undisputedly the version in effect at the time of the filing of

1 the FAC. Plaintiff’s objections are overruled and the Court considers them for the limited
2 purpose of considering whether they affect Plaintiff’s pleading burden.

3 **III. ANALYSIS**

4 **A. Failure to Allege Damage and Standing**

5 First, Plaintiff does not plead that she was damaged as a result of any of the nine policies
6 she alleges. While she details policies and practices that apply to “sellers such as Plaintiff,” she
7 never alleges that any of these policies or practices affected her. For example, in her “Buyer Is
8 Always Right” policy allegations, Plaintiff fails to allege that she had a dispute with a buyer or that
9 eBay resolved such a dispute in the buyer’s favor. (*See* FAC ¶ 5.) In her listing restriction
10 allegations, she complains that eBay restricts sellers from listing some types of items for sale on its
11 website, but she does not allege that she was ever restricted from selling any item at any time.
12 (FAC ¶ 7.) In the allegations concerning account restrictions or account downgrading, she fails to
13 allege her accounts were restricted, that any such restriction was improper, or that she suffered any
14 damage as a result. (FAC ¶¶ 7, 8.) With respect to the allegations that PayPal holds funds for an
15 unreasonable period and makes use of the money, Plaintiff does not allege any sale in which this
16 alleged practice affected her. (FAC ¶ 9.) The allegations as to each of the policies and practices
17 suffer from the same lack of any factual allegation that Plaintiff was affected by any of them. As a
18 result, Plaintiff fails to allege a claim and, more significantly, fails to allege a basis for standing.
19 *See Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 643 (2009) (standing for purposes of CLRA
20 claim not established in “situations in which an allegedly unlawful practice under the CLRA has
21 not resulted in some kind of tangible increased cost or burden to the consumer”); *Kwikset Corp. v.*
22 *Superior Court*, 51 Cal. 4th 310 (2011) (establishing standing, *i.e.* injury in fact, for purposes of
23 UCL claim requires factual allegations establishing “lost money or property” personal to the
24 plaintiff). Thus, the motion to dismiss on standing grounds is **GRANTED**.

25 Defendants also argue that certain of the alleged bases for the claims are foreclosed by the
26 terms of the standard user agreements Plaintiff and other sellers have with eBay and PayPal.
27 Plaintiff acknowledges that she has signed a user agreement with eBay. (FAC ¶ 19). The eBay
28 User Agreement in effect at the time of the filing of the original complaint specifically incorporated

1 eBay’s “Prohibited and Restricted Items Policy,” which restricts sellers from listing certain items
2 for sale such as “ethnically or racially offensive material and Nazi memorabilia.” (*See* RJN,
3 Hartrich Dec., Exh. A, “Additional Terms” at p. 7; Exh. B, “Prohibited and Restricted Items” at p.
4 2.) In her opposition, Plaintiff seems to acknowledge that this Prohibited and Restricted Items
5 Policy applied to her user agreement, but contends that she can amend the complaint to make clear
6 that she is challenging a different set of restrictions. (Opp’n at 10:20 – 11:5.) In amending her
7 complaint, Plaintiff should address the nature of the restrictions that are the basis for her complaint
8 and why those restrictions are not part of the agreement she acceded to as part of her user
9 agreement with eBay.²

10 **B. Breach of Fiduciary Duty**

11 To state a claim for breach of fiduciary duty, Plaintiff must allege: (1) the existence of a
12 fiduciary relationship, (2) breach of fiduciary duty, and (3) damages. *Oasis W. Realty, LLC v*
13 *Goldman*, 51 Cal. 4th 811, 820 (Cal. 2011). Certain relationships give rise to fiduciary duties “as a
14 matter of law,” such as relationships between “principal and agent,” “real estate broker/agent and
15 client” and “joint venturers.” *Oakland Raiders v. Nat’l Football League*, 131 Cal. App. 4th 621,
16 632 (2005). Otherwise, “before a person can be charged with a fiduciary obligation, he must ...
17 knowingly undertake to act on behalf and for the benefit of another.” *Id.* “California courts have
18 rejected attempts to extend fiduciary obligations to relationships where the imposition of such an
19 affirmative duty is unwarranted.” *Id.* at 633.

20 Plaintiff alleges that PayPal and eBay both “serve as the agent” for Plaintiff and other
21 sellers (*id.*, ¶ 9). Plaintiff alleges that PayPal acts as the agent for Plaintiff by “obtaining payment
22 for goods and services sold by the sellers to their buyers.” (*Id.*) Plaintiff similarly alleges that eBay
23 serves as her agent because it has the power to “preclude[] Plaintiff and other sellers . . . from
24 communicating with their prospective buyers” and to “delete language from a communication it
25 does not want the buyer or seller to read.” (*Id.* ¶ 11.)

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² Plaintiff does not allege a violation of the user agreement.

1 In opposition to the motion, without citation to any authority, Plaintiff argues that these
2 allegations “reflect[] those fiduciary relationships traditionally acknowledged by the law such as
3 those formed by parties to a real estate transaction and the escrow agent who holds the property of
4 the parties to the transaction effectively in trust until certain instructions the parties provide the
5 agent are met; or, akin to a Trustee and Trustor or between the banker and the customer whose
6 monies it holds.” (Opp’n at 13:3-8.) Plaintiff’s argument is without substance or apparent merit
7 under applicable California law. The allegations in the FAC do not allege an agency relationship
8 with respect to any “holding of money” by PayPal (or eBay) but instead focus on eBay’s actions as
9 an “agent for the Plaintiff and other sellers similarly situated” by which eBay precludes sellers
10 “from communicating with their prospective buyers, and also precludes the prospective buyers
11 from communicating directly with the sellers,” including that eBay “delete[s] language from a
12 communication that it does not want the buyer or the seller to read, or [] will add language that it
13 does want the buyer or seller to read.” (FAC ¶ 11.) In short, the FAC does not allege facts to show
14 the nature of the fiduciary relationship or the breach of that duty, and the opposition does little to
15 explain how Plaintiff would cure this problem. Mere conclusory allegations on this point will not
16 suffice. *Gonzales v. DHI Mortgage Co., Ltd.*, C 09-1798 PJH, 2009 WL 4723362 at *4 (N.D. Cal.
17 Dec. 4, 2009) (vague allegations of fiduciary relationship are insufficient to withstand motion to
18 dismiss).³

19 As a result, Plaintiff has failed to allege a breach of fiduciary duty claim against either
20 Defendant. The motion as to this claim is **GRANTED**.

21 **C. UCL Claim**

22 California’s UCL prohibits any “unlawful, unfair or fraudulent business act or practice.”
23 Cal. Bus. & Prof. Code § 17200. “Each prong of the UCL is a separate and distinct theory of
24 liability.” *Dunkel v. eBay Inc.*, No. 5:12-CV-01452-EJD, 2013 WL 415584, at *10 (N.D. Cal. Jan.

25 _____
26 ³ eBay also argues that the standard user agreement includes a “No Agency” provision,
27 highlighted in bold font, that states: “*No agency, partnership, joint venture, employee-employer, or*
28 *franchiser-franchisee relationship is intended or created by this User Agreement.*” (RJN, Hartrich
Dec., Exh. A, “No Agency” at p. 5 (emphasis added).) Plaintiff’s amended pleading should address
the applicability of this clause to her claims.

1 31, 2013) (quoting and citing *Birdsong v. Apple, Inc.* 590 F.3d 955, 959 (9th Cir. 2009)). “[A]
2 plaintiff must have suffered an ‘injury in fact’ and ‘lost money or property as a result of the unfair
3 competition’ to have standing to pursue either an individual or a representative claim under the
4 California Unfair Competition Law.” *Jensen v. Quality Loan Serv. Corp.*, 702 F. Supp. 2d 1183,
5 1199 (E.D. Cal. 2010) (citation and quotation marks omitted).

6 Here, Plaintiff asserts that “Defendants have committed unlawful, unfair or deceptive
7 business practices in violation of California law,” without alleging which prongs are at issue or
8 what facts would establish any of those prongs. (FAC, ¶ 34; *see also*, Prayer at ¶ 3.) Assuming
9 Plaintiff intends to state a claim under the unlawful prong, she fails to identify the predicate
10 offenses that would form the basis such a claim, alleging no more than that “Defendants have
11 committed unlawful . . . business practices in violation of California law.” (FAC ¶ 34.) Plaintiff’s
12 statement in opposition to the motion, that the “unlawful” practice is the breach of fiduciary duty or
13 could be a claim (not yet pleaded) for violation of a California Civil Code provision against
14 conversion of monies, do not offer a sufficient basis for the claim either.

15 Similarly, assuming Plaintiff intends to allege a claim under the “unfair” or “fraudulent”
16 prongs, she must allege facts to support those claims. Indeed, a claim under the fraudulent prong
17 must meet the more stringent particularity standards under FRCP 9(b). *Kearns v. Ford Motor Co.*,
18 567 F.3d 1120, 1125 (9th Cir. 2009). Plaintiff’s vague argument in opposition that “Defendants
19 made representations to the public about their services and performance and what the users and
20 consumers (buyers and sellers), including Plaintiff, could expect for the fees they paid. . . [which]
21 turned out to be false and misleading half-truths,” does not get any closer to stating a plausible
22 claim. The Court therefore **GRANTS** the motion to dismiss the UCL claim.

23 **D. CLRA Claim**

24 “The [CLRA] prohibits specified unfair and deceptive acts and practices in a transaction
25 intended to result or which results in the sale or lease of goods or services to any consumer.”
26 *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 59 (2009). Under the statute, “consumer” means “an
27 individual who seeks or acquires, by purchase or lease, any goods or services for personal, family,
28 or household purposes.” Cal. Civ. Code §1761(d). To withstand a motion to dismiss, Plaintiff must

1 allege facts showing that she is a “consumer” as contemplated by the CLRA. *See Zepeda v.*
2 *PayPal, Inc.*, 777 F. Supp. 2d 1215, 1222 (N.D. Cal. 2011); *Mazur v. eBay Inc.*, 257 F.R.D. 563,
3 568 (N.D. Cal. 2009) (“[Plaintiff] uses eBay Live Auction to purchase items for her business and
4 not her own use . . . [Plaintiff] is therefore not a consumer as defined by [the CLRA].”) (internal
5 citations omitted); *Person v. Google, Inc.*, No. C 06-7297 JF (RS), 2007 WL 832941, at *7 (N.D.
6 Cal. Mar. 16, 2007) (“Since Plaintiff’s stated purpose for using [Google’s] AdWords is commercial
7 and political, he is not a consumer” under CLRA). Conclusory allegations that the plaintiff is a
8 consumer are not sufficient where the complaint alleges that the plaintiff’s claims arise out of its
9 role as a seller. *Zepeda*, 777 F. Supp. 2d at 1222.

10 Plaintiff’s allegations in the CLRA claim are, at best, unclear. As pleaded in the FAC,
11 Plaintiff “operates a business . . . by selling bicycles and bicycle parts through eBay, among other
12 goods and services.” (FAC, ¶ 14.) While Plaintiff does allege, at paragraph 1 of the FAC, that she
13 is both a seller and a buyer on eBay, the remainder of the general allegations upon which she bases
14 her claims concern her role and her treatment by Defendants as a *seller*. (FAC ¶¶ 5, 6, 7, 8, 9, 10,
15 11, 12, 13 [allegations regarding Plaintiff and “other sellers similarly situated” and “most sellers”].)
16 Her class allegations are “on behalf of herself and a class defined as all sellers of goods and
17 services emanating from California who have user agreements with Defendant PayPal, Inc. and
18 Defendant eBay Inc., and who have utilized and are utilizing the services provided by Defendant
19 PayPal, Inc. and Defendant eBay Inc.” (FAC ¶ 19.)

20 It is only in the CLRA claim itself that she adds a single line stating that she “brings this
21 claim on behalf of a class of buyers against Defendant eBay,” without further alleging a class
22 definition. (FAC ¶ 38.) She then adds new allegations that eBay manipulates sellers to get them to
23 add the cost of shipping into the selling price so that they can conceal the fact that buyers are
24 actually being charged for shipping.

25 Plaintiff’s claim fails to allege that she was subject to this practice or was injured by it.
26 Further, a CLRA claim, being “grounded in fraud,” must meet the particularity requirements of
27 FRCP 9(b), which Plaintiff’s allegations do not. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
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1097, 1106 (9th Cir. 2003). Accordingly, the motion to dismiss Plaintiff’s CLRA claim is **GRANTED.**⁴

IV. CONCLUSION

In accordance with the above, the Motion to Dismiss is **GRANTED** as to all causes of action.


The Court will allow leave to amend. Plaintiff must set forth facts sufficient to establish each claim, the defendants against whom it is stated, and the legal grounds upon which it is based. Plaintiff’s attorneys are further reminded of their obligations under FRCP 11.

Plaintiff shall file her amended complaint no later than **October 1, 2013**. Defendants shall file their response no later than **October 22, 2013**.

This Order terminates Docket No. 16.

IT IS SO ORDERED.

Date: September 5, 2013



YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

⁴ The Third Cause of Action is not labeled to specify that it is against Defendant eBay only, although it appears that was Plaintiff’s intent. (See FAC ¶ 38.) Moreover, it does not appear that the CLRA claim would apply to PayPal, as the CLRA cannot be used to regulate money or credit transactions. See *Berry v. Am. Express Publishing*, 147 Cal. App. 4th 224, 229-30 (2007); see also Cal. Civ. Code § 1770(a). In the amended complaint, Plaintiff is directed to allege with clarity which claims are stated against which Defendants.