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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JACOB FIGUEROA and MARY
JACKSON,

Plaintiffs,

v.

CAPITAL ONE, N.A.,

Defendant.

CASE NO. 18cv0692 JM(BGS)

ORDER DENYING MOTION TO
DISMISS

Pursuant to Fed.R.Civ.P. 12(b)(6), Defendant Capital One, N.A. (“Capital One”) moves to dismiss all claims alleged in the First Amended Complaint (“FAC”). Plaintiffs Jacob Figueroa and Mary Jackson (collectively “Plaintiffs”) oppose the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the court denies the motion to dismiss the breach of contract claim and defers ruling on the remainder of Plaintiffs’ claims until a later date.

BACKGROUND

Filed on May 30, 2018, the FAC alleges eight causes of action: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) conversion, (4) unjust enrichment, (5) violation of the unfair prong of California’s Unfair Competition Law, Cal. Bus. And Prof. Code § 17200, et seq. (“UCL”), (6) violation of the fraudulent prong of the UCL, (7) violation of the California Consumer Legal Remedies Act, Cal. Civ. Code § 1770 et seq. (“CLRA”), and (8) violation of the New York

1 Consumer Protection Act, N.Y. Gen. Bus Law §§ 349-350. Plaintiffs bring this action
2 on behalf of themselves and six purported classes— two national classes and two
3 state-specific sub-classes within each national class based upon the imposition of two
4 out-of-network Automatic Teller Machine (“ATM”) fees by Capital One: one for a
5 balance inquiry and another in conjunction with a cash withdrawal. (FAC ¶¶53-56).

6 In broad brush, Plaintiffs challenge Capital One’s fee structure as applied to out-
7 of-network ATMs. Plaintiffs used their Capital One ATM card at out-of-network
8 ATMs in California and New York. Plaintiffs allege that they were wrongfully charged
9 a fee by Capital One when performing an account balance inquiry and then, in
10 conjunction with the balance inquiry, charged another fee for the cash withdrawal. For
11 a \$20 cash withdrawal, Plaintiffs paid \$4 in fees to Capital One (\$2 for the balance
12 inquiry and \$2 for the cash withdrawal). Plaintiffs do not challenge the fee charged by
13 the out-of-network ATM nor the fee charged by Capital One for a cash withdrawal,
14 unless the consumer also makes a balance inquiry. As explained by Plaintiffs,
15 “Plaintiffs’ claims concern the fact that Capital One charges two of these [out-of-
16 network] Fees for simple, 30-second ATM interactions when a ‘balance inquiry’ is
17 performed in conjunction with a cash withdrawal.” (Oppo. at p.1:10-13). Plaintiffs
18 seek a declaration that Capital One’s fee policies and practices are wrongful, unfair,
19 and unconscionable; restitution of all ATM fees; disgorgement of alleged ill-gotten
20 gains; actual damages; punitive damages; prejudgment interest; and attorneys’ fees.

21 DISCUSSION

22 Legal Standards

23 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in
24 "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.
25 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a
26 "cognizable legal theory" or sufficient facts to support a cognizable legal theory.
27 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should
28 dismiss a complaint for failure to state a claim when the factual allegations are

1 insufficient “to raise a right to relief above the speculative level.” Bell Atlantic Corp.
2 v. Twombly, 550 U.S. 544, 555 (2007) (the complaint’s allegations must “plausibly
3 suggest[.]” that the pleader is entitled to relief); Ashcroft v. Iqbal, 556 U.S. 662 (2009)
4 (under Rule 8(a), well-pleaded facts must do more than permit the court to infer the
5 mere possibility of misconduct). “The plausibility standard is not akin to a ‘probability
6 requirement,’ but it asks for more than a sheer possibility that a defendant has acted
7 unlawfully.” Id. at 678. Thus, “threadbare recitals of the elements of a cause of action,
8 supported by mere conclusory statements, do not suffice.” Id. The defect must appear
9 on the face of the complaint itself. Thus, courts may not consider extraneous material
10 in testing its legal adequacy. Levine v. Diamantheset, Inc., 950 F.2d 1478, 1482 (9th
11 Cir. 1991). The courts may, however, consider material properly submitted as part of
12 the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555
13 n.19 (9th Cir. 1989).

14 Finally, courts must construe the complaint in the light most favorable to the
15 plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116
16 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in
17 the complaint, as well as reasonable inferences to be drawn from them. Holden v.
18 Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of
19 law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In
20 Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

21 **The Choice-of-Law Provision**

22 Before addressing the merits of the motion, Capital One asserts that the
23 contractual choice-of-law provision, choosing New Jersey state law, applies to the
24 parties’ contractual relationship. Plaintiffs argue that either California or New York
25 state law should apply to the parties’ relationship because those were the states of their
26 residence at the time of the ATM withdrawals.

27 Federal courts look to the law of the forum state in resolving choice-of-law
28 issues. See Ticknor v. Choice Hotels Intern., Inc., 265 F.3d 931, 937 (9th Cir. 2001);

1 Sparling v. Hoffman Constr. Co., Inc., 864 F.2d 635, 641 (9th Cir. 1988). “In
2 determining the enforceability of . . . contractual choice-of-law provisions, California
3 courts shall apply the principles set forth in the Restatement (Second of Conflict of
4 Laws) section 187 which reflects a strong policy favoring enforcement of such
5 provisions.” Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459, 464 (1992).

6 Section 187 provides, in pertinent part, that:

7 The law of the state chosen by the parties to govern their contractual
8 rights and duties will be applied . . . unless . . .

9 (b) application of the law of the chosen state would be contrary to a
10 fundamental policy of a state which has a materially greater interest than
11 the chosen state in the determination of the particular issue and which,
12 under the role of section 188, would be the state of the applicable law in
13 the absence of an effective choice of law by the parties.

14 Restatement (2d) of Conflict of Laws §187(2) (1988). In determining the
15 enforceability of a contractual choice-of-law provision, the court must first determine
16 (1) whether the chosen state has a substantial relationship to the parties or transaction
17 or (2) whether there is any other reasonable basis for the parties’ choice of law. If
18 either test is met, then the court must next determine whether the chosen state’s law is
19 contrary to a fundamental policy of California. If there is no conflict, the court must
20 enforce the parties’ choice of law provision. If there is a fundamental conflict with
21 California law, the court must then determine whether California has a materially
22 greater interest than the chosen state in the determination of the particular issue. If
23 California has a materially greater interest, then the choice-of-law provision will not
24 be enforced. See Nedlloyd, 3 Cal.4th at 464-466.

25 The applicable Rules Governing Deposit Accounts (“Rules”), effective August
26 22, 2014, provides the following choice-of-law provision: “Applicable federal law will
27 decide any questions under these Rules, or if no federal law exists, applicable state law
28 (the state where your account was established).” (Stainback Decl. Exh. A, p.2).
Accordingly, there is a reasonable basis for the parties’ choice of law provision because
Plaintiffs resided in New Jersey at the time the accounts were opened with Capital One.

1 Here, there does not appear to be any conflict between California or New Jersey
2 state law, as least with respect to the common law claims. As no conflict is apparent,
3 and the parties fail to identify one, the court applies New Jersey state law, unless
4 otherwise noted.

5 **The Breach of Contract Claim**

6 The court concludes that an informed ruling on Plaintiffs’ breach of contract
7 claim requires further development of the record and legal analysis. As this case is in
8 its infancy, a limited amount of discovery regarding the breach of contract claim will
9 assist the parties and the court in reaching an informed analysis on this claim, as well
10 as its impact, if any, on the remainder of Plaintiffs’ claim.

11 In large part, Capital One argues that the parties’ contract permits it to charge an
12 out-of-network fee for a balance inquiry and another separate fee for the cash
13 withdrawal. Plaintiffs take the opposite position and allege that Capital One breached
14 its contractual obligations.

15 The elements of a breach of contract require “a valid contract, defective
16 performance by the defendant, and resulting damages.” Coyle v. Englander's, 199 N.J.
17 Super. 212, 223 (App. Div. 1985). Contract interpretation is a matter of law for the
18 court to decide. Camden Bd. of Educ. v. Alexander, 181 N.J. 187, 194 (2004). Like
19 California state law, specific provisions of a contract control over general terms.
20 Assisted Living Assocs. of Moorestown, L.L.P. v. Moorestown Twp., 31 F. Supp. 2d
21 389, 399 (D.N.J. 1998) (“In New Jersey, it is a well-settled principle of contract
22 interpretation that, in construing the contract as a whole, specific terms or clauses
23 control general terms or clauses.”).

24 Plaintiffs argue that their contractual relationship with Capital One is based upon
25 the Rules, the Electronic Funds Transfer Agreement and Disclosure (“EFTAAD”), and

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1 a Fee Schedule.¹ The EFTAAD provides:

2 **Charges for ATM/Debit Card Transactions:** When you use your
3 ATM/Debit Card at a non-Capital One Bank branded ATM, the ATM
4 owner/operator may charge you a fee for your use of their ATM, and you
5 may be charged a fee for a balance inquiry even if you do not complete a
6 transaction. The fee charged should be disclosed to you on the ATM and
7 you should be given an opportunity to cancel the transaction before the
8 fee is imposed. You may also be charged a fee by us, as disclosed in our
9 then current Schedule of Fees and Charges, for each cash withdrawal,
10 funds transfer or balance inquiry that you may make using a non-Capital
11 One Bank branded ATM. You will not be charged this fee at most ATMs
12 owned and operated by Capital One Bank, except at certain gaming
13 establishments and other non-branch locations, where we may charge a
14 fee for each cash withdrawal. The amount of fees charged at such ATMs
15 at non-branch locations varies. Any fee charged will be displayed on the
16 ATM screen and you will be given an opportunity to cancel the
17 transaction before the fee is imposed. Please refer to our then current
18 Schedule of Fees and Charges for the amount of this fee.

11 (Stainback Decl. Exh. B, ¶7, F ¶7). This provision explains that use of an ATM at an
12 out-of-network ATM may result in a fee for the use of the ATM and may even result
13 in a charge “for a balance inquiry even if you do not complete a transaction.” Plaintiffs
14 do not dispute the fees charged by an out-of-network ATM.

15 The court now turns to the last of the three documents forming the parties’
16 contractual relationship, the Fee Schedule. While the parties are in agreement that the
17 Rules and EFTAAD documents submitted to the court govern the parties’ relationship,
18 the parties submit different versions of the governing Fee Schedule. Plaintiffs argue
19 that Exhibit A, attached to their opposition, is controlling, whereas Capital One argues
20 that Exhibit C, attached to the declaration of Thomas Stainback, is controlling.
21 Plaintiffs argue that the Fee Schedule supports their allegations that the contract
22 documents do not permit the imposition of fees on each balance inquiry and each cash
23 withdrawal when using an out-of-network ATM. The court is unable to fully address
24 the breach of contract claim without addressing the governing Fee Schedule in light of
25


26 ¹ These documents, to the extent referenced in the FAC, are appropriately
27 considered by the court. See Hal Roach Studios., 896 F.2d at 1555. The court notes
28 that the parties do not dispute that the versions of the Rules and EFTAAD documents
submitted to the court are operative documents to the parties’ contractual relationship.
However, the parties have different perspectives on the operative Fee Schedule.

1 Plaintiffs' representations that the Fee Schedule forms an integral part of the parties'
2 contractual relationship. Resolution of factual disputes concerning relevant contract
3 documentation is not appropriate on a Rule12(b)(6) motion.

4 Accepting as true Plaintiffs' allegations to the effect that the Fee Schedule does
5 not permit the imposition of out-of-network balance inquiry and cash withdrawal fees,
6 the court denies the motion to dismiss the breach of contract. The court defers ruling
7 on the remainder of Capital One's motion to dismiss until the parties have conducted
8 limited discovery to ascertain the contract documents at issue.

9 **IT IS SO ORDERED.**

10 DATED: November 13, 2018



Hon. Jeffrey T. Miller
United States District Judge

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12 cc: All parties

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