UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MATTHEW AJZENMAN, et al., Plaintiffs, v. OFFICE OF THE COMMISSIONER OF BASEBALL d/b/a MAJOR LEAGUE BASEBALL, et al., Defendants.	CV 20-3643 DSF (JEMx) Order GRANTING Ticket Merchant Defendants' Motions to Dismiss (Dkts. 65, 70)

Ticketmaster L.L.C., Live Nation Entertainment, Inc., and Live Nation Worldwide, Inc. (collectively, LN/TM) and Last Minute Transactions, Inc. and StubHub, Inc. (collectively, StubHub) (together, Ticket Merchant Defendants) separately move to dismiss Plaintiffs' Corrected Amended Complaint. Dkts. 65-1 (LN/TM Mot.), 70-1 (StubHub Mot.). Plaintiffs oppose. Dkts. 84 (Opp'n to LN/TM Mot.), 87 (Opp'n to StubHub Mot.). Because the separate motions rest on similar arguments and factual backgrounds, the Court addresses them together. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons stated below, the motions are GRANTED.

I. BACKGROUND

The 2020 Major League Baseball (MLB) season was scheduled to begin on March 26, 2020 and run through the first week of October. Dkt. 42 (Corr. Am. Compl.) ¶ 74. Due to COVID-19, on March 12, 2020, MLB Commissioner Robert D. Manfred Jr. postponed the start of the

season by two weeks. Id. ¶¶ 33, 75. Four days later, the MLB posted an online announcement that the season would be further postponed to at least mid-May 2020. Id. ¶ 76. At this point, millions of fans had already purchased tickets to 2020 MLB games. Id. ¶ 75. Following this announcement, MLB teams posted various updates on ticketing policies online. Id ¶¶ 77-78. As of the filing of the Corrected Amended Class Action Complaint, no ticket refunds had been issued to ticketholders because the MLB had yet to formally cancel any games. Id. ¶ 79. The MLB had "not issued any refunds during this crisis despite the fact it is virtually impossible that a season can be played because (i) certain dates for games ha[d] already passed; (ii) government and health officials ha[d] indicated that games are not going to be played, and if so, likely without spectators; and (iii) MLB itself has given indications that games will not be rescheduled as usual." Id. ¶ 80.

On April 20, 2020, Plaintiffs – individuals who purchased tickets for MLB 2020 regular season games – brought this action against the MLB, Manfred, 30 baseball teams, LN/TM, and StubHub. Id. ¶¶ 9-72; Dkt. 1.

Ticketmaster is an authorized reseller of MLB tickets. Compl. ¶ 67. On April 17, 2020, Live Nation Entertainment, Ticketmaster's parent company, issued a statement that it would offer refunds and coupons for canceled and postponed shows. Id. ¶ 95. However, Live Nation did not address refunds for ticketholders who purchased 2020 MLB regular season tickets through Ticketmaster. Id. On April 19, 2020, Ticketmaster's website stated that it would refuse to refund MLB games even if they were canceled. Id. ¶ 93 & n.72.

StubHub is the "Official Fan-to-Fan Ticket Marketplace of MLB.com and the 30 Teams." Id. ¶ 71. LMT is a subsidiary of StubHub. Id. ¶ 72. In mid-March 2020, StubHub changed its policy to offer a 120% site credit – rather than a full refund – to ticketholders once an event was officially canceled. Id. ¶ 91.

Plaintiffs bring this action on behalf of themselves and two putative classes – a class of persons and entities who bought tickets

directly from MLB teams and a class of those who purchased tickets from the Ticket Merchant Defendants. Id. ¶ 99. Plaintiffs bring claims for violations of California's Consumer Legal Remedies Act (CLRA) and California's Unfair Competition Law (UCL), civil conspiracy, and unjust enrichment. Id. ¶¶ 110-137.

Of the eight current named plaintiffs, one, Plaintiff Susan Terry-Bazer, alleges that she purchased tickets through LN/TM, id. ¶ 11, and two, Plaintiffs Alex Canela and Amanda Woolley, allege that they purchased tickets through StubHub, id. ¶¶ 16, 18. In its separately issued Orders, the Court has compelled those three plaintiffs to arbitrate their claims against the Ticket Merchant Defendant from which they purchased their tickets. The Ticket Merchant Defendants move to dismiss all claims asserted against them by the remaining Plaintiffs (the Non-Purchasing Plaintiffs).

II. LEGAL STANDARD

"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93 (2007) (ellipsis in original; internal quotation marks omitted). But Rule 8 "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for failure to state a claim upon which relief can be granted. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." Erickson, 551 U.S. at 94. However, allegations contradicted by matters properly subject to judicial notice or by exhibit need not be accepted as true, Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001), and a court is "not bound to accept as true a legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678

(2009) (internal quotation marks omitted). "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." Id. (alteration in original; citation and internal quotation marks omitted). A complaint must "state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. This means that the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

Ruling on a motion to dismiss will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief." Id. at 679 (alteration in original; internal quotation marks and citation omitted).

Allegations of fraud are excepted from the "notice pleading" standard of Rule 8(a)(2). Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 513 (2002).

> Rule 9(b) requires that, when fraud is alleged, a party must state with particularity the circumstances constituting fraud. Where fraud is not an essential element of a claim, only those allegations of a complaint which aver fraud are subject to Rule 9(b)'s heightened pleading standard. Any averments which do not meet that standard should be disregarded, or stripped from the claim for failure to satisfy Rule 9(b). . . . Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word fraud is not used).
>
> Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct so that they can defend against

> the charge and not just deny that they have done anything wrong. Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged. A party alleging fraud must set forth more than the neutral facts necessary to identify the transaction.

Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009) (alterations, citations, and internal quotation marks omitted). In addition, claims that fall under Rule 9(b) must meet Iqbal's plausibility standard. Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1055 (9th Cir. 2011). "Rule 9(b)'s particularity requirement applies to state-law causes of action." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003).

As a general rule, leave to amend a complaint that has been dismissed should be freely granted. Fed. R. Civ. P. 15(a).

III. DISCUSSION

Because the Court has ordered to arbitration the claims of Plaintiffs Canela, Terry-Bazer, and Woolley, at issue here are the claims of the Non-Purchasing Plaintiffs – the individuals who purchased their tickets directly from MLB or MLB teams rather than from LN/TM or StubHub.

A. Standing

As a preliminary matter, the Court must decide whether the Non-Purchasing Plaintiffs have standing to assert claims against the Ticket Merchant Defendants. See LN/TM Mot. at 7-8 & n.3; StubHub Mot. at 7-8. Article III requires that a plaintiff demonstrate she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. Spokeo, Inc. v. Robins, 136 S. Ct 1540, 1547 (2016). Additionally, to establish standing to sue on a UCL or CLRA claim, a plaintiff must show that she suffered an injury-in-fact and has

lost money or property as a result of the defendant's alleged conduct. See Cal. Bus. & Prof. Code § 17204; Cal. Civ. Code § 1780.

"[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). In the context of a motion to dismiss, the Court is required to construe the complaint in the light most favorable to the non-moving party and all material allegations in the complaint are taken as true. Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986).

At the heart of LN/TM and StubHub's assertions is that because the Non-Purchasing Plaintiffs did not buy tickets from LN/TM or StubHub, their injury is not fairly traceable to the conduct of the Ticket Merchant Defendants. See LN/TM Mot. at 7 n.3; SH/LMT Mot. at 7-8. In support of this position, StubHub cites Shahar v. Hotwire, Inc., No. C 12-06027, 2013 WL 12176843 (N.D. Cal. Apr. 15, 2013). In Shahar, the Court held that the plaintiff lacked standing to pursue claims against Hotwire related to air travel and hotel rooms because he only alleged injuries related to car rentals. Id. at *4. StubHub argues that, as in Shahar, the Non-Purchasing Plaintiffs "do not have standing to sue because they never allege that they used the StubHub services, made purchases through StubHub, or saw or relied on any allegedly false representations from StubHub." StubHub Mot. at 8. The same is true of LN/TM. But the Non-Purchasing Plaintiffs are proceeding on a conspiracy theory of liability in which they claim they were damaged because of a conspiracy among all Defendants – not that they were damaged directly by the Ticket Merchant Defendants. Standing, then, stands or falls with the civil conspiracy allegations.

B. Pleading Standard

The parties disagree over whether the Non-Purchasing Plaintiffs' claims are subject to the heightened pleading standards of Rule 9(b). The Ninth Circuit has recognized that when a complaint is "grounded in fraud" – even if no fraud causes of action are explicitly stated – all

claims "must satisfy the particularity requirement of Rule 9(b). Kearns, 567 F.3d at 1127 (quoting Vess, 317 F.3d at 1103-04). The Non-Purchasing Plaintiffs argue that their claim does not sound in fraud because "fraud is not an essential element of any of the claims alleged in the Complaint" and "the Complaint does not contain the word fraud (or any derivative thereof)." Opp'n to LN/TM Mot. at 11. That is not the inquiry, though. Instead, courts look to whether the *substance* of the plaintiff's allegations contend a defendant made a knowingly false representation that injured the plaintiff. See Vess, 317 F.3d at 1105-06; Kearns, 567 F.3d at 1126. In Kearns, the plaintiff brought UCL and CLRA claims against Ford for "conspir[ing] with its dealerships to misrepresent the benefits of its CPO program to sell more cars and increase revenues." 567 F.3d at 1125. The court found that Kearn's nondisclosure claims were claims of fraud even though "fraud is not a necessary element of a claim under the CLRA and UCL." Id. at 1125-27.

The Court agrees with LN/TM and StubHub that Plaintiffs' claims here are grounded in fraud. At its core, the Corrected Amended Complaint alleges that all Defendants conspired to conceal that MLB 2020 regular season games were canceled – even though they inevitably would be – in order to avoid providing refunds for the tickets Plaintiffs purchased. This is "misrepresentation (false representation, concealment, or nondisclosure)" sufficient to state a cause of action for fraud in California. See Engalla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 974 (1997) (quotation omitted).

Because "the object of the conspiracy is fraudulent," Plaintiffs are subject to the heightened pleading standard of Rule 9(b). Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir. 2007) (quoting Wasco Prods., Inc. v. Southwall Techs, Inc., 435 F.3d 989, 991 (9th Cir. 2006)). Though there is "no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme the complaint must identify *false statements* made by each and every defendant, . . . Rule 9(b) does not allow a complaint to merely lump multiple defendants together." Id. at 764. A "plaintiff must, at a minimum, 'identif[y] the role of [each] defendant[ ] in the alleged

fraudulent scheme.'" Id. at 765 (alterations in original) (quoting Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989)).

C. Conspiracy Liability

The Non-Purchasing Plaintiffs rely on a theory of civil conspiracy to assert claims against LN/TM and StubHub. See Corr. Am. Compl. ¶ 96. Under California law, "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11 (1994). "To prove a claim for civil conspiracy, [a plaintiff is] required to provide substantial evidence of three elements: (1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct." Kidron v. Movie Acquisition Corp, 40 Cal. App. 4th 1571, 1581 (1995). To show the first element of conspiracy – the "formation and operation of the conspiracy" – a plaintiff must show "(i) knowledge of wrongful activity, (ii) agreement to join in the wrongful activity, and (iii) intent to aid in the wrongful activity." Craigslist Inc. v. 3Taps Inc., 942 F. Supp. 2d 962, 981 (N.D. Cal. 2013) (citing Kidron, 40 Cal. App. 4th at 1583).

Conspiracy claims grounded in fraud must identify "the who, what, when, where, and how of the misconduct charged." United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011). For example, in Swartz, the plaintiff made general allegations that all defendants "engaged in fraudulent conduct but attribute[d] specific misconduct only to" two defendants. 476 F.3d at 765. The court found that plaintiff's "[c]onclusory allegations" that the other defendants knew about the false statements, were acting as agents of the other defendants, and were active participants in the conspiracy without any stated factual basis were insufficient. Id. Likewise, in Kearns, the court found that plaintiff failed to plead his averments of fraud with particularity because he did not include details such as "who made [the fraudulent] statement or when th[e] statement was made." 567 F.3d at 1126.

The Non-Purchasing Plaintiffs' theory of liability is that all Defendants conspired to postpone – rather than cancel – games so that they would not have to refund ticket prices. Corr. Am. Compl. ¶¶ 96, 131. The Corrected Amended Complaint includes the following allegations going to the alleged conspiracy:

- Bleed Cubbie Blue: For Chicago Cubs Fans published an article stating: "So. If you're looking to blame the Cubs for this, don't. This is a Major League Baseball directive to all teams." Corr. Am. Compl. ¶ 1; StubHub Mot. at 15.

- "Billboard reported that sources at Ticketmaster informed them that it cannot refund National Basketball Association or National Hockey League game tickets without a directive from those respective teams and leagues." Corr. Am. Comp. ¶ 95.

- "Plaintiffs were harmed by MLB's, MLB Ticket Merchants' and Team Defendants' coordination and cooperation as to a pretext of 'postponed' games in order to avoid refunds to Plaintiffs and Class members, and each of the Defendants are responsible for the harm to Plaintiffs and the Class because Defendants were part of a conspiracy to violate California consumer and other laws, and avoid refunding monies paid by Class Members." Id. ¶ 96.

- "Each of the Defendants is responsible, as each was aware that other Defendants have not refunded Plaintiffs and Class Members for MLB 2020 ticket purchases; and that Defendants agreed with each other (explicitly or tacitly), and intended that the monies paid (including all ancillary costs) by Class members for MLB 2020 tickets not be refunded (in part or in full) in violation of California consumer and other laws." Id. ¶ 97.

- "All of the actions of Defendants set forth above, incorporated herein, were . . . committed in furtherance of the aforementioned conspiracy and agreements. Moreover, each of the aforementioned Defendants lent aid and encouragement and knowingly ratified and adopted the acts of the other." Id. ¶ 98.

The Non-Purchasing Plaintiffs fail to sufficiently allege that any conspiracy existed among the Defendants. Most of the allegations stated above are vague and follow the insufficient "everyone did everything" type allegations. Destfino v. Reiswig, 630 F.3d 952, 958 (9th Cir. 2011). And, the two allegations with more of a factual basis are irrelevant to the Ticket Merchant Defendants. The Chicago Cubs fan blog is about an MLB directive to all *teams*, and the Billboard article is about the *National Basketball Association* and *National Hockey League*. Neither alleges an MLB directive to the Ticket Merchant Defendants. Plaintiffs have failed to plead any non-conclusory facts as to the formation of a conspiracy between the Ticket Merchant Defendants and the remaining Defendants.

Further, the few specific facts the Non-Purchasing Plaintiffs allege against the Ticket Merchant Defendants appear to cut against the conspiracy allegations.[1] The Non-Purchasing Plaintiffs allege that Defendants conspired to decline refund their tickets by not officially canceling the MLB regular season games although they knew such games, if played at all, would not be played in front of a regular audience. Id. ¶¶ 96, 131, 134. But they also allege that Ticketmaster "refuses to refund MLB games *even if they are canceled*," id. ¶ 93 (emphasis added), and that in mid-March 2020, StubHub "changed its refund policy" so that even cancellation *no longer prompted a full refund*, id. ¶ 91. It is unclear then why or how LN/TM and StubHub were "cooperat[ing] as to a pretext of 'postponed' games in order to avoid refunds," id. ¶ 96, as, according to Plaintiffs' own allegations, cancellations would not have resulted in refunds from LN/TM or StubHub. Such allegations do not show formation of conspiracy (that

[1] To the extent Non-Purchasing Plaintiffs would like to rely on LN/TM's "Terms of Use" to support their claims, Opp'n to LN/TM Mot. at 4, they must include relevant allegations in their complaint. See Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." (citation omitted)).

defendants knew of the wrongful activity, agreed to join it, and intended to aid it).

Non-Purchasing Plaintiffs' theory of conspiracy also appears to rest on the theory – which does not appear in the Complaint – that the "fiction" that "MLB Games were postponed rather than cancelled . . . would not have worked absent agreement of all Defendants," and that "had LN/TM disagreed with the other Defendants and given refunds to their customers, the other Defendants would not have been able to maintain the fiction." Opp'n to LN/TM Mot. at 10. Besides the fact that this is not adequately alleged in the Complaint, it is not plausible on its face. Though in theory LN/TM and StubHub could have "disagreed with the other Defendants and given refunds to their customers," it is unclear what they could have "disagreed" about. Nowhere do Plaintiffs allege that Ticketmaster – an authorized reseller of MLB tickets – and StubHub – a fan-to-fan resale ticket merchant – had the power to affirmatively cancel baseball games. That was squarely in the hands of the MLB, Commissioner, and Team Defendants. See Corr. Am. Compl. ¶¶ 35 ("[I]n a crisis like the COVID-19 pandemic, it would require a majority vote of the Teams to make a decision about whether games would be rescheduled or canceled."), 79 ("[T]he Teams and the Ticket Merchants are not issuing refunds until MLB and Commissioner Manfred, in discussion with the Teams, formally decide to cancel the season."). The Ticket Merchant Defendants could have given refunds despite the games not being canceled – but if it is Non-Purchasing Plaintiffs' theory that all Defendants formed a conspiracy *not to give refunds* rather than *not to cancel games in order to avoid refunds*, they must allege it in their complaint.

For the stated reasons, the Non-Purchasing Plaintiffs' claims for relief as to the Ticket Merchant Defendants are DISMISSED with leave to amend.[2] [3]

IV. CONCLUSION

The Ticket Merchant Defendants' motions to dismiss are GRANTED. All causes of action stated by the Non-Purchasing Plaintiffs against the Ticket Merchant Defendants are DISMISSED with leave to amend. An amended complaint must be filed no later than October 12, 2020. Failure to file by that date will waive the right to do so. The Court does not grant leave to add new defendants or new claims. Leave to add new defendants or new claims must be sought by a properly noticed motion.

IT IS SO ORDERED.

Date: September 14, 2020

Dale S. Fischer
United States District Judge

[2] If the Non-Purchasing Plaintiffs choose to amend their complaint, civil conspiracy should not be stated as its own claim for relief. See Applied Equip., 7 Cal. 4th at 510-11 ("Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration."); Corr. Am. Compl. ¶¶ 130-134 (fourth claim for relief for civil conspiracy); Opp'n to LN/TM Mot. at 8-9 (appearing to agree that conspiracy is not a stand-alone legal claim).

[3] Because it appears doubtful that conspiracy can be adequately alleged, the Court declines to address Defendants' other grounds for dismissal. But Plaintiffs' counsel should carefully consider these other bases for dismissal if they choose to amend their complaint, because the Court will consider the amended complaint as an additional opportunity to amend all of the present claims.