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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

10 MOISES ZEPEDA

11 Plaintiff,

12 v.

13 PAYPAL, INC.

14 Defendant.
15

Case Number 5:10-CV-02500 JF (PSG)

**ORDER¹ GRANTING MOTIONS
TO DISMISS AND TO APPOINT
INTERIM LEAD, LIAISON, AND
CLASS COUNSEL**

Re: Docket Nos. 26, 28

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18 On June 7, 2010, Plaintiff Moises Zepeda filed a putative class action against defendant
19 PayPal, Inc. (“PayPal”) alleging breach of contract, breach of the implied covenant of good faith
20 and fair dealing, breach of fiduciary duty, unjust enrichment, and violations of California’s
21 Consumer Legal Remedies Act and Unfair Competition Law. Zepeda subsequently filed a first
22 amended complaint, in which he joined additional named plaintiffs (collectively “Plaintiffs”).
23 PayPal moves to dismiss that pleading for failure to state a claim upon which relief may be
24 granted, and Plaintiffs move to appoint interim lead, liaison, and class counsel. For the reasons
25 set forth below, both motions will be granted, and Plaintiffs will be given leave to amend their
26 pleading.

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28 ¹ This disposition is not designated for publication in the official reports.

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I. BACKGROUND

PayPal is a Delaware corporation whose principal place of business is located in Santa Clara County, California. Am. Compl. ¶ 17. PayPal’s payment processing service allows users to accept payment for goods and services they sell online. *Id.* ¶ 1. After users complete their transactions, PayPal puts the money it collects from buyers into the sellers’ PayPal accounts; sellers then have the option to withdraw their funds or to keep them in their PayPal accounts. *Id.* ¶ 28.

Plaintiffs are residents of various states who use PayPal to accept payments for items they sell online. *Id.* ¶¶ 8-15. Each of the eight named plaintiffs uses PayPal “as a seller.” *Id.* Plaintiffs allege that PayPal placed holds on their accounts without providing them “any real explanation.” *Id.* ¶¶ 49, 8-15. They claim that as a result of the holds they have been unable to access the money in their PayPal accounts. *Id.* Plaintiffs received notice of the holds in “form emails” and “prepared phone scripts,” in which PayPal explained that the holds were placed because of “excessive risk involved,” “security issues,” or “suspicious activity.” *Id.* ¶ 42. Seven of the eight named plaintiffs were told through such notices that their funds would be held for 180 days, and one of them was told that his funds would be held for twenty to thirty days. *Id.* ¶¶ 8-15. When Plaintiffs inquired about the reasons for the holds, PayPal’s customer service representatives told them that they would “need to obtain a court order or subpoena” to “obtain copies of the information [PayPal] reviewed in deciding to place a limitation on [their] accounts.” *Id.* ¶ 45.

All users must agree to PayPal’s user agreement before using PayPal’s services. *Id.* ¶ 33. The agreement states that “PayPal is an independent contractor for all purposes, except that PayPal acts as your agent with respect to the custody of your funds only.” *Id.* Pursuant to the user agreement, PayPal users must transfer to PayPal “any ownership right . . . to any interest that may accrue” from the money deposited in their accounts. *Id.* ¶ 32. PayPal users also must refrain from engaging in any “Restricted Activities” under the user agreement, and PayPal is authorized to “take various actions” to protect itself and others from liability, including limiting

1 access to users' accounts for "up to 180 days." *Id.* ¶¶ 34-36. Plaintiffs allege that they performed
2 their obligations under the user agreement. *Id.* ¶ 69.

3 Plaintiffs claim to act on behalf of a putative nationwide class consisting of all PayPal
4 users "whose funds have been held by PayPal, or whose accounts were closed, suspended, or
5 limited by PayPal."² *Id.* ¶ 57. They allege that PayPal's holds constitute a breach of the user
6 agreement, as well as "fraudulent act[s]" that "unjustly enrich[] PayPal since it fails to refund
7 interest earned while the users are denied access to their accounts." *Id.* ¶ 3.

8 II. STANDARD OF REVIEW

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10 Fed. R. Civ. P. Rule 8(a) requires a plaintiff to plead his claim with sufficient specificity
11 to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell*
12 *Atl. Corp. v. Twombly*, 550 U.S. 545, 544 (2007). "To survive a motion to dismiss, a complaint
13 must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible
14 on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows
15 the court to draw the reasonable inference that the defendant is liable for the misconduct
16 alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550
17 U.S. 544, 556, 570 (2007)). A court is not required to accept as true conclusory allegations,
18 unreasonable inferences, or unwarranted deductions of fact. *Manzarek v. St. Paul Fire & Marine*
19 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). If a complaint lacks facial plausibility, a court
20 must grant leave to amend unless it is clear that the complaint's deficiencies cannot be cured by
21 amendment. *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002).

22 III. DISCUSSION

23 24 **A. Plaintiffs Fail to State a Claim for Breach of Contract and Breach of the Implied** 25 **Covenant of Good Faith and Fair Dealing**

26 Plaintiffs claim that PayPal breached "the express terms" of its user agreement by placing

27 ² Alternatively, Plaintiffs define the class as "[a]ll natural persons whose funds have been
28 held by PayPal or whose accounts were closed, suspended, or limited by PayPal." Am. Compl. ¶
57.

1 holds on their accounts “without reason to believe” that they had engaged in restricted activities
2 and by failing to provide them with notice of the reasons for the holds. Am. Compl. ¶ 70. For
3 the same reasons, Plaintiffs contend that PayPal also breached the implied covenant of good faith
4 and fair dealing contained in the user agreement. *Id.* ¶¶ 73-75.

5 California contracts in a diversity case “will be interpreted so as to reach the same results
6 as would be reached in a California court.” *Republic Pictures Corp. v. Rogers*, 213 F.2d 662,
7 664 (9th Cir. 1954). Under California law, contract interpretation is a matter of law and solely a
8 judicial function. *Superior Dispatch, Inc. v. Insurance Corp. of New York*, 97 Cal.Rptr.3d 533,
9 548 (Cal. Ct. App. 2009). The goal of contract interpretation is to give effect to the mutual
10 intention of the parties, which “is to be inferred, if possible, solely from the written provisions of
11 the contract.” *County of San Diego v. Ace Prop. & Cas. Ins. Co.*, 118 P.3d 607, 612 (Cal. 2005).
12 “If contractual language is clear and explicit, it governs.” *Id.*

13 1. The User Agreement Gives Broad Discretion to PayPal to Place Users’
14 Accounts on Hold

15 Plaintiffs allege that PayPal breached the express terms of the user agreement by placing
16 their accounts on hold “without reason to believe that Plaintiffs were engaged in restricted
17 activities.” Am. Compl. ¶¶ 70-72. To support their claims, Plaintiffs cite a provision of the user
18 agreement that lists a number of “Restricted Activities” that could lead PayPal to suspend a
19 user’s account.³ Section 10.4 of the user agreement provides:

20 “If [PayPal] ha[s] reason to believe that [a user] ha[s] engaged in any
21 Restricted Activities,” [PayPal] may take various actions to protect PayPal, eBay,
22 other Users, other third parties, or [the user] from Reversals, Chargebacks,
23 Claims, fees, fines, penalties, and any other liability,” including closing,
24 suspending or limiting access to the user’s account and holding the user’s funds
25 “for up to 180 days if reasonably needed to protect against the risk of liability.”
26 *Id.* ¶¶ 34-36, Ex. 1 at 14.

27 Plaintiffs’ claim for breach of contract is unpersuasive. Even assuming that Plaintiffs did
28 not engage in any restricted activities and that PayPal thus lacked authority to place their

³ Section 9 of the user agreement contains a list of twenty-five restricted activities, which includes breach of the user agreement, violation of any law, providing false information, refusing to cooperate with a PayPal investigation, and conducting business in a manner that results or may result in complaints or other liability to PayPal. Am. Compl. ¶ 36, Ex. 1 at 13.

1 accounts on hold pursuant to section 10.4, this Court cannot infer that the holds amount to breach
2 of the user agreement. This is because the user agreement contains at least two other provisions
3 that give PayPal broad discretion to place holds on its users' accounts, neither of which requires
4 that the users have engaged in restricted activities.

5 Section 10.6 provides:

6 "PayPal, in its sole discretion, may place a hold on a payment [the seller]
7 receive[s] for an eBay transaction when PayPal believes there may be a high level
8 of risk associated with the transaction." *Id.* Ex. 1 at 14.

8 Section 10.7 provides:

9 "PayPal, in its sole discretion, may place a Reserve on funds held in [the
10 user's] Premier or Business Account when PayPal believes there may be a high
11 level of risk associated with [the user's] Account . . . If [the user's] Account is
12 subject to a Reserve, PayPal will provide [the user] with notice specifying the
13 terms of the Reserve. The terms may require that a certain percentage of the
14 amounts received into [the user's] Account are held for a certain period of time, or
15 that a certain amount of money is held in reserve, or anything else that PayPal
16 determines is necessary to protect against the risk associated with [the user's]
17 Account." *Id.*

14 Both 10.6 and 10.7 apply to Plaintiffs, who were sellers on eBay.⁴ *Id.* ¶¶ 8-15.

15 Accordingly, PayPal could have placed holds on Plaintiffs' accounts in its "sole discretion" even
16 if Plaintiffs never engaged in restricted activities. Because Plaintiffs fail to address the effect of
17 sections 10.6 and 10.7, their pleading in its current form fails to give rise to the reasonable
18 inference that PayPal is liable for breach of contract.

19 2. The User Agreement Does Not Require PayPal to Disclose Reasons for Holds

20 Plaintiffs also allege that PayPal breached the express terms of the user agreement by
21 failing to provide them with an explanation of the reasons why their accounts were suspended.
22 Am. Compl. ¶¶ 70-72. This argument also is unpersuasive, as Plaintiffs do not identify a
23 provision in the user agreement that imposes an affirmative duty on PayPal to share said
24 information with its users.

25 3. Plaintiffs' Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing is
26 Superfluous

27 _____
28 ⁴ Sellers on eBay are required by the PayPal user agreement to establish Premier or
Business Accounts. Am. Compl. Ex. 1 at 5, § 4.2.

1 Plaintiffs allege that PayPal breached the implied covenant of good faith and fair dealing
2 contained in the PayPal user agreement by holding Plaintiffs' funds "for 180 days when not
3 reasonably needed to protect against the risk of liability." Am. Compl. ¶¶ 74-75.

4 "If the allegations in a breach of implied covenant claim do not go beyond the statement
5 of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or
6 other relief already claimed in a companion contract cause of action, they may be disregarded as
7 superfluous as no additional claim is actually stated." *Malcolm v. JPMorgan Chase Bank, N.A.*,
8 No. 09-4496-JF (PVT), 2010 WL 934252, at *6 (N.D. Cal. Mar. 15, 2010) (citing *Careau & Co.*
9 *v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal.App.3d 1371, 1395 (Cal. Ct. App. 1990)). Here,
10 Plaintiffs' allegations in support for their claim for breach of the implied covenant are the same
11 as those supporting their breach of contract claim. *Compare* Am. Compl. ¶¶ 70-72, *with* Am.
12 Compl. ¶¶ 74-75.

13 **B. Plaintiffs Fail to State a Claim for Breach of Fiduciary Duty**

14 Plaintiffs allege that because it acted as their agent in respect to the funds deposited in
15 their PayPal accounts, PayPal breached its fiduciary duty by placing holds on their accounts
16 "without determining whether such action was reasonably needed to protect against the risk of
17 liability." Am. Compl. ¶¶ 78-82.

18 To maintain a claim for breach of fiduciary duty, a plaintiff must show that (1) a fiduciary
19 relationship exists, (2) there was a breach of the fiduciary duty, and (3) he suffered damage
20 proximately caused by the breach. *Roberts v. Lomanto*, 5 Cal.Rptr.3d 866, 872 (Cal. Ct. App.
21 2003). Here, Plaintiffs fail to plead the second required element, as they allege that PayPal's
22 breach of its fiduciary duty arises out of its alleged breach of the user agreement based on its
23 suspension of Plaintiffs' accounts. Because they fail to state a claim for breach of contract,
24 Plaintiffs also fail to state a claim for breach of fiduciary duty.

25 **C. Plaintiffs Have No Right to an Accounting**

26 Plaintiffs allege that because PayPal acted as their agent in respect to the funds contained
27 in their PayPal accounts, PayPal owes Plaintiffs the interest accrued on their closed, suspended,
28 or limited accounts. Am. Compl. ¶¶ 85-86. Plaintiffs claim that this amount can be ascertained

1 only by an accounting. *Id.*

2 Under California law, “[t]he right to accounting is derivative and depends on the validity
3 of a plaintiff’s underlying claims.” *Wong v. First Magnus Fin. Corp.*, No. C-09-01612 RMW,
4 2009 WL 2580353, at *2 (N.D. Cal. Aug. 20, 2009) (citing *Duggal v. G.E. Capital Commc’n*
5 *Serv., Inc.*, 81 Cal.App.4th 81, 95 (Cal. Ct. App. 2000)). When a plaintiff fails to plead the
6 underlying claims sufficiently, a claim for an accounting should be dismissed. *See id.* Here,
7 ownership of the interest earned by the funds contained in Plaintiffs’ accounts is governed by the
8 user agreement, a contract to which both PayPal and Plaintiffs are parties. Because Plaintiffs fail
9 to state their underlying claim for breach of contract, their derivative claim to an accounting also
10 is subject to dismissal.

11 **D. Plaintiffs Fail to State a Claim for Violation of the California Consumer Legal
12 Remedies Act, CAL. CIV. CODE §§ 1750-1784**

13 Plaintiffs allege that PayPal violated the California Consumer Legal Remedies Act
14 (“CRLA”), CAL. CIV. CODE §§ 1750-1784, by omitting information on its website about the
15 “high likelihood of a hold being placed on a user’s account” and by making statements on its
16 website that “were intended to deceive Plaintiffs.”⁵ Am. Compl. ¶¶ 91, 93. Plaintiffs also allege
17 that they are “consumers within the meaning of the CLRA” and that they have used PayPal “for
18 personal, family and/or household purposes.” *Id.* ¶ 88.

19 To bring a claim under the CRLA, a plaintiff must be a “consumer.” CAL. CIV. CODE §
20 1780(a); *see also Shin v. BMW of N. Am.*, No. CV 09-00398 AHM, 2009 WL 2163509, at *3
21 (C.D. Cal. Jul. 19, 2009) (dismissing a CRLA claim because the plaintiffs did not allege they are
22 consumers within the meaning of the statute). A “consumer” under the CLRA is “an individual
23 who seeks or acquires, by purchase or lease, any goods or services for personal, family, or
24 household purposes.” CAL. CIV. CODE § 1761(d).

25 Although Plaintiffs claim that they are consumers within the meaning of the CLRA, their
26 complaint alleges facts that contradict this conclusory assertion. First, Plaintiffs allege that they

27 ⁵ These include “promises that the service allows sellers to get paid instantly and
28 securely,” “PayPal enables any individual or business to pay and get paid online safely and
easily,” and “Get Fast Access to Your Money.” Am. Compl. ¶¶ 89-90.

1 used PayPal as “sellers.” Am. Compl. ¶¶ 8-15. Sellers typically do not seek, acquire, purchase
2 or lease goods and services; instead, they provide them to others. Second, sellers on eBay are
3 required by the user agreement to establish Premier or Business Accounts. *Id.* Ex. 1 at 5, § 4.2.
4 Holders of Premier or Business Accounts are required by the user agreement to “attest that [they]
5 are *not* establishing [those accounts] primarily for personal, family, or household purposes.” *Id.*
6 Ex. 1 at 2, § 2.2 (emphasis added). Third, the alleged conduct that Plaintiffs claim violates the
7 CRLA was related to Plaintiffs’ activities as sellers and not as consumers. Indeed, Plaintiffs
8 allege that PayPal violated the CLRA by making deceitful statements in the promotion of its
9 “business *merchant* services,” such as “promises that [PayPal] allows *sellers* to get paid
10 instantly.” *Id.* ¶ 90 (emphasis added).

11 **E. Plaintiffs Fail to State a Claim for Violation of California’s Unfair Competition**
12 **Law, CAL. BUS. & PROF. CODE § 17200**

13 Plaintiffs claim that PayPal’s intentional omissions and misrepresentations in the
14 marketing of its services constitute “consumer fraud” and “unfair business practice[s]” in
15 violation of the California Unfair Competition Law (“UCL”), CAL. BUS. & PROF. CODE § 17200.
16 Am. Compl. ¶ 109. They allege that PayPal’s holds on their accounts caused them financial
17 injury because they “delayed the transfer of funds to Plaintiffs.” *Id.* ¶ 101.

18 The UCL prohibits any “unlawful, unfair or fraudulent business practices.” CAL. BUS. &
19 PROF. CODE § 17200. When a plaintiff “alleges a unified course of fraudulent conduct and relies
20 entirely on that course of conduct as the basis of that claim,” the claim is said to be grounded in
21 fraud and the pleading must satisfy the particularity requirements of Federal Rule of Civil
22 Procedure 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). In *Kearns*, the
23 plaintiff’s claims for violations of the UCL were dismissed because they did not meet the
24 heightened pleading standards of Rule 9(b). *Id.* Even though not all of the plaintiff’s allegations
25 were grounded in fraud, the court determined that his claims were subject to the pleading
26 requirements of Rule 9(b) because he alleged that he relied on the defendant’s deceitful
27 marketing materials and representations in purchasing a vehicle that did not meet his
28 expectations. *Id.* at 1126. Here, Plaintiffs’ UCL claims also are subject to the heightened
pleading standards of Rule 9(b) even though Plaintiffs allege that PayPal engaged in unfair

1 business practices in addition to consumer fraud. Like the plaintiff in *Kearns*, Plaintiffs claim to
2 have relied on deceitful marketing materials and representations in deciding to use and pay for
3 PayPal’s services.

4 Plaintiffs’ allegations as presently framed do not satisfy Rule 9(b). They fail to allege the
5 particular circumstances of PayPal’s deceitful representations or “the who, what, when, where,
6 and how of the misconduct alleged.” *Id.* Instead, they refer to phrases plucked from PayPal’s
7 website.⁶ Plaintiffs do not state when they were exposed to PayPal’s allegedly deceitful
8 advertisements and misrepresentations or which statements they consider material.

9 **F. Plaintiffs Fail to State a Claim for Unjust Enrichment**

10 Plaintiffs allege that, as a direct and proximate result of its misconduct, PayPal has been
11 unjustly enriched through its retention of the interest that accrued on Plaintiffs’ suspended
12 accounts. Referring to PayPal’s user agreement, Plaintiffs claim that “PayPal entered into a
13 written contract with Plaintiffs.” Am. Compl. ¶ 68. Section 5.1 of PayPal’s user agreement states
14 that users “agree that [they] will not receive interest” and that “in consideration for [their] use of
15 the PayPal Services, [they] irrevocably transfer and assign to PayPal any ownership right that
16 [they] may have in any interest that may accrue.” *Id.* Ex. 1 at 6.

17 “Under California law, unjust enrichment is an action in quasi-contract.” *Gerlinger v.*
18 *Amazon.com, Inc.*, 311 F.Supp.2d 838, 856 (N.D. Cal. 2004). “An action based on
19 quasi-contract cannot lie where a valid express contract covering *the same subject matter* exists
20 between the parties.” *Id.* (citing *Wal-Noon Corp. v. Hill*, 45 Cal.App.3d 605, 613 (Cal. Ct. App.
21 1975)) (emphasis added). Thus, “a plaintiff may recover for unjust enrichment only where there
22 is no contractual relationship between the parties.” *Id.* Here, as discussed above, a valid express
23 contract exists between the parties that covers the subject matter at issue.

24 **G. Motion for Appointment of Interim Lead, Liaison, and Class Counsel Is Granted**

25 Pursuant to Federal Rule of Civil Procedure 23(g), Plaintiffs move to appoint Freed &

27 ⁶ These include “PayPal is the faster, safer and easier way to pay and get paid online,”
28 “get paid instantly and securely,” and “receive money instantly and ship items quickly to buyers.”
Am. Compl. ¶ 106.

1 Weiss LLC as Interim Lead Counsel, Lexington Law Group as Interim Liaison Counsel, and
2 Lexington Law Group, Farmer Jaffe Weissing Edward Fistos & Lehrman P.L., and Seeger Weiss
3 LLP as members of the Executive Committee and as Interim Class Counsel. Pls.’ Mot. at 3.
4 Plaintiffs propose that Interim Lead Class Counsel, in consultation with the Executive
5 Committee, have responsibility for strategic decisions associated with the prosecution of the
6 putative class action and any related case subsequently filed. *Id.* at 3-4.

7 PayPal does not oppose Plaintiffs’ motion, although it reserves the right to challenge or
8 object to Plaintiffs or Plaintiffs’ counsel as putative class representatives in connection with any
9 motion to dismiss, motion for class certification, or any other motion or proceeding. Def.’s Resp.
10 at 2. PayPal also objects to Plaintiffs “characterization of the section of [Plaintiffs’] Motion
11 entitled ‘Statement of Facts,’” as such a section “summarizes certain *allegations*” in Plaintiffs’
12 amended complaint and not facts. *Id.* (emphasis added). None of these concerns affects the
13 disposition of the motion.

ORDER

Good cause therefor appearing, IT IS HEREBY ORDERED that PayPal's motion to dismiss is GRANTED, with leave to amend, and Plaintiffs' motion to appoint interim lead, liaison, and class counsel is GRANTED. Any amended complaint must be filed within thirty (30) days of the date of this order.

DATED: 02/14/11



JEREMY FOCHE
United States District Judge

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