No. _____

In The
Supreme Court of the United States

PATRICK BERRY, on behalf of
himself and all others similarly situated,

Petitioner,

v.

WEBLOYALTY.COM, INC., a Delaware corporation; and
MOVIETICKETS.COM, INC., a Delaware corporation,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents Webloyalty.com, Inc. and Movietickets.com, Inc. orchestrated a massive internet fraud on consumers, bilking them of millions of dollars by duping them to join a "rewards" program and repeatedly withdrawing funds from their bank accounts without authorization. Respondents' scam violated numerous state and federal laws, including the Electronic Fund Transfer Act ("EFTA"). The EFTA requires that electronic fund transfers from a consumer's account be authorized by the consumer in writing, and a copy of such authorization must be provided to the consumer. 15 U.S.C. § 1693e. Section 15 U.S.C. § 1693m provides for an award of actual damages or statutory damages. Respondents ultimately returned the principal amount they stole from Petitioner, but did not pay him any interest for the months they wrongfully held Petitioner's money. The questions presented are:

1. Did the Ninth Circuit err in holding that a victim of an internet scam has no standing to bring a claim for damages based on the loss of use of the money stolen from him?

2. Did the Ninth Circuit err in holding that a victim of an internet scam has no standing, even though he alleges all the facts necessary to bring a claim for statutory damages under 15 U.S.C. §§ 1693e and 1693m?

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PETITION FOR A WRIT OF CERTIORARI

Patrick Berry, on behalf of himself and all others similarly situated, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit in *Berry v. Webloyalty.com, Inc., et al.*, No. 11-55764 (O'Scannlain, W. Fletcher, and Korman, JJ.).

OPINIONS BELOW

The memorandum opinion of the court of appeals vacating Petitioner's appeal for lack of standing is not reported (but is available at 2013 U.S. App. LEXIS 8433). The memorandum opinion of the court of appeals denying Petitioner's petition for rehearing is not reported.

JURISDICTION

The court of appeals vacated Petitioner's appeal and remanded to the district court to dismiss the case without prejudice on April 25, 2013. (App. at 3.) The court of appeals denied a petition for rehearing on May 20, 2013. (App. at 27.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1693e(a)

(a) A preauthorized electronic fund transfer from a consumer's account may be authorized by the consumer only in writing, and a copy of such authorization shall be provided to the consumer when made. A consumer may stop payment of a preauthorized electronic fund transfer by notifying the financial institution orally or in writing at any time up to three business days preceding the scheduled date of such transfer. The financial institution may require written confirmation to be provided to it within fourteen days of an oral notification if, when the oral notification is made, the consumer is advised of such requirement and the address to which such confirmation should be sent.

15 U.S.C. § 1693m(a)

(a) Individual or class action for damages; amount of award

Except as otherwise provided by this section and section 1693h of this title, any person who fails to comply with any provision of this subchapter with respect to any consumer, except for an error resolved in accordance with section 1693f of this title, is liable to such consumer in an amount equal to the sum of –

(1) any actual damage sustained by such consumer as a result of such failure;

(2)(A) in the case of an individual action, an amount not less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that

(i) as to each member of the class no minimum recovery shall be applicable, and

(ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

STATEMENT OF THE CASE

This case seeks relief for thousands of consumers who were defrauded of millions of dollars by Respondents' sham "data pass" scheme. During a consumer's purchase transaction on Movietickets.com's website, a banner offer would pop up on the consumer's screen offering a coupon. To get the coupon, a consumer had to click on the banner offer and then enter his email twice on a second page. Unbeknownst to the consumer, when he entered his email address, he was

"authorizing" Movietickets to transfer his financial information to Webloyalty.com, which then used that information to take money from the consumer's bank account on a monthly basis for a "rewards program" that was nothing more than a scam.

Respondents made millions of dollars off of this scheme. Consumers did not fare nearly as well. Webloyalty's internal documents show that it knows that 90% of its "rewards program" customers do not even know they are enrolled or being charged.

Like thousands of other consumers, Petitioner was a victim of this scam. Petitioner bought movie tickets from Movietickets.com's website with his debit card. On the confirmation page for his transaction, Petitioner clicked a banner offer for a coupon to save $10.00. Petitioner reasonably believed that this offer was from Movietickets because it was presented on the Movietickets confirmation page, appeared to be a "thank you" for using Movietickets, and offered a discount for Movietickets.

When Petitioner clicked the offer, a new window appeared on his computer screen. This window directed him to enter his email address twice and click on a green button. Petitioner believed that he needed to provide this information to Movietickets in order to receive the coupon electronically via his email account. Petitioner entered his email address and clicked on the green button. Based solely on the entry of his email address, Movietickets passed his

billing data on to Webloyalty.com, a stranger to the transaction.

Several months later, Petitioner discovered that Webloyalty had made unauthorized charges totaling $36.00 to his debit card over three months. These charges were purportedly for a "rewards program" that Petitioner knew nothing about. Petitioner cancelled his "membership" and demanded a refund in August 2009. Petitioner's bank charged back $36.00 to Webloyalty on September 4, 2009. This chargeback only returned the principal amount that Respondents misappropriated. Respondents have never paid Petitioner any amount to compensate for the fact that he lost the use of his money during the months before the chargeback.

The district court denied Respondents' Rule 12(b)(1) motion to dismiss for lack of standing on November 16, 2010. The district court granted Respondents' subsequent Rule 12(b)(6) motion to dismiss on February 17, 2011. Petitioner appealed from this dismissal. Respondents did not challenge Petitioner's standing on appeal.

The court of appeal raised the issue of standing *sua sponte* at oral argument, vacated the appeal for lack of standing, and denied Petitioner's petition for rehearing.

REASONS FOR GRANTING THE PETITION

I. THERE ARE CONFLICTS IN THE COURTS OF APPEALS ON THE QUESTIONS PRESENTED

A. The Courts of Appeals Have Reached Conflicting Decisions Regarding Whether Article III Permits Standing for the Loss of Use of Money.

Petitioner suffered injury-in-fact under Article III based on the loss of use of his money during the several months that Respondents wrongfully obtained and possessed it. The court below disagreed, holding that Petitioner had no cognizable injury because Respondents ultimately returned the principal amount they stole from Petitioner. Essentially, this holding permits a wrongdoer to steal a person's money for an indefinite amount of time with no legal recourse for the damage he has caused. This holding conflicts with the decisions of other circuit courts that allow Article III standing based on the loss of use of money.

In *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453 (7th Cir. 2010), a nonprofit organization sued to obtain judicial review of the defendant's decision to authorize a permit for a logging project. *Id.* at 455. The district court granted the plaintiff's request for a preliminary injunction and required the plaintiff to post an injunction bond. *Id.* The plaintiff asked the court to reconsider the bond requirement because of the plaintiff's nonprofit status. *Id.* The district court denied the plaintiff's request. *Id.*

Ultimately, the district court dissolved the preliminary injunction and granted summary judgment in favor of the defendant. *Id.* at 456.

Plaintiff appealed, challenging the district court's order denying the plaintiff's motion for reconsideration of the bond requirement. *Id.* at 457. The plaintiff had deposited the $10,000 bond amount with the court. *Id.* The defendant challenged the plaintiff's standing on appeal, arguing that the plaintiff had not incurred any injury-in-fact to support standing. *Id.* The Seventh Circuit rejected this argument, holding that the plaintiff "***has*** incurred a loss – a loss of the use of $10,000. Every day that a sum of money is wrongfully withheld, its rightful owner loses the time value of the money." *Id.* (emphasis in original).

Similarly here, Petitioner has suffered an injury-in-fact because he lost the time value of the money that Respondents wrongfully obtained from his bank account. The Ninth Circuit's refusal to recognize Petitioner's standing on that basis conflicts with the Seventh Circuit's holding in *Habitat Educ. Ctr*.

B. The Courts of Appeals Have Reached Conflicting Decisions Regarding Whether Article III Permits Standing to Sue for a Statutory Violation That Causes No Injury to the Plaintiff.

The courts of appeals also are divided – and there is significant confusion – on the question of whether an allegation of a statutory violation, in the absence

of any actual injury, creates standing under Article III.

The Ninth Circuit here held that the existence of the EFTA right of action alone does not supply the necessary Article III injury-in-fact. (App. at 2.) This holding is in conflict with decisions from the Second and Third Circuits. It also conflicts with the Ninth Circuit's decision in *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010).

In *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170 (2d Cir. 2012), the plaintiff brought a claim under Section 16(b) of the Securities Exchange Act of 1934 for disgorgement of the profits made by the defendant in short-swing trading in violation of § 16(b). *Id.* at 171. The court held that the plaintiff had standing, even though it had not suffered any injury apart from a violation of the rights granted under § 16(b). *Id.* at 175. The court held that "it has long been recognized that a legally protected interest may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Id.* (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (internal punctuation omitted)).

Similarly, in *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009), the Third Circuit held that the plaintiff, who had not suffered a monetary injury, had Article III standing solely by virtue of the defendant's alleged violation of statutory rights conferred upon the plaintiff by the Real Estate

Settlement Procedures Act of 1974 ("RESPA"). *Id.* at 762. The Ninth Circuit reached the same conclusion in *Edwards*, holding that the plaintiff there stated a cause of action under RESPA even though she did not suffer any monetary injury. *Edwards*, 610 F.3d at 518 ("Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants."). This Court should provide direction to resolve these conflicts among the courts of appeals.

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS

The jurisdiction of federal courts is limited to "cases" or "controversies." U.S. Const., Art. III, § 2. The doctrine of standing identifies whether a particular lawsuit satisfies this constitutional limitation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). There are three elements of standing: (1) "the plaintiff must have suffered an injury in fact"; (2) a "causal connection between the injury and the conduct complained of", and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (internal citations omitted).

This Court has held that "the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. . . ." *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*,

410 U.S. at 617 n.3). In such a case, a court looks to the statute at issue "to determine whether it prohibited Defendants' conduct." *Edwards*, 610 F.3d at 517. If so, the plaintiff "has demonstrated an injury sufficient to satisfy Article III." *Id.*

The decision below is based on a mistaken belief that Petitioner cannot allege an injury in fact because he was "fully compensated" by the chargeback prior to filing this action. (App. at 2.) This is not true. Even though Petitioner received the principal amount that Respondents wrongfully took from him, he still has an injury in fact to support standing because he has not been compensated for the loss of use of his money during the time it was misappropriated.

The loss of use of money is an injury that is compensable by interest or other value. *See Ministry of Defense v. Cubic Defense Sys., Inc.*, 665 F.3d 1091, 1102 (9th Cir. 2011) (in the absence of a statutory directive, district courts have discretion to award prejudgment interest "to compensate the injured party for the loss of the use of money he would otherwise have had."); *Donell v. Kowell*, 533 F.3d 762, 772 (9th Cir. 2008) (prejudgment interest is "an ingredient of full compensation that corrects judgments for the time value of money."). Otherwise, a party who unlawfully obtains the property of another could hold that money for an indefinite length of time, but avoid any recourse by simply returning the principal amount taken before an action is brought.

The small amount of interest due to Petitioner does not impact his standing. The existence of an injury, not its extent, is all Petitioner must prove. *See U.S. v. SCRAP*, 412 U.S. 669, 689 n.24 (1973) ("[A]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."); *Preminger v. Peake*, 536 F.3d 1000, 1005 (9th Cir. 2008) (only minimal injury required for standing).

Petitioner also has standing under the EFTA. The EFTA requires preauthorization for an electronic fund transfer from a consumer's account to be "in writing, and a copy of such authorization shall be provided to the consumer when made." 15 U.S.C. § 1693e(a). Under 15 U.S.C. § 1693m(a), a violation of the EFTA entitles a plaintiff to an award of either actual ***or*** statutory damages. 15 U.S.C. § 1693m(a)(2).

Petitioner alleges that Webloyalty violated the EFTA by initiating electronic fund transfers from his bank account without written authorization and by failing to provide him with a copy of any authorization. Petitioner seeks statutory damages based on Webloyalty's violations. These allegations are sufficient to confer standing. *Edwards*, 610 F.3d at 417. ("The injury required by Article III can exist solely by virtue of statutes creating legal rights, the invasion of which requires standing."). The decision below was in error.

III. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S IMMEDIATE RESOLUTION

The Ninth Circuit's holding in this case raises issues of great practical importance and constitutional significance meriting this Court's intervention. The issue of whether a party has Article III standing based solely on a statutory injury has arisen, and is likely to recur, with frequency. This Court has acknowledged the importance of this issue in considering a prior petition for review of the *Edwards* decision. *Edwards v. First Am. Corp.*, 131 S. Ct. 3022 (2011). Although this Court ultimately dismissed the writ of certiorari in the *Edwards* matter, *see* 132 S. Ct. 2536 (2012), substantial discord remains in the circuit courts on the issue of statutory standing.

Resolving this issue is even more critical in the face of an internet scam like the one perpetrated by Respondents here. When Congress passes a law like the EFTA to protect consumers in the face of technological advances, consumers should be able to rely on and enforce the law. There can be no doubt that consumers are harmed significantly by fraudulent business practices such as those perpetrated by Respondents. Even if an individual consumer's harm is slight, Respondents' illicit gain is enormous. Consumers must be able to challenge these practices, and statutory damages such as those allowed under the EFTA are critical to ensuring consumer protection.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK BERRY, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. WEBLOYALTY.COM, INC., a Delaware corporation; MOVIETICKETS.COM, INC., a Delaware corporation, Defendants-Appellees.	No. 11-55764 D.C. No. 3:10-cv-01358-H-CAB MEMORANDUM* (Filed Apr. 25, 2013)

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted January 11, 2013
Pasadena, California

Before: O'SCANNLAIN and W. FLETCHER, Circuit Judges, and KORMAN, Senior District Judge.**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

Plaintiff Patrick Berry appeals the district court's dismissal of his suit for failure to state a claim against Webloyalty.com and Movietickets.com. We vacate and remand because Berry lacks Article III standing.

"To invoke the jurisdiction of the federal courts," Berry "must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101 (1983). To have constitutional standing under Article III, a party must demonstrate an injury in fact that is traceable to the challenged action and that is likely to be redreessed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). At the motion to dismiss stage, we accept as true all factual allegations in the complaint and draw all reasonable inferences therefrom in the nonmoving party's favor. *Assn for L.A. Deputy Sheriffs v. Cnty. of L.A.,* 648 F.3d 986, 991 (9th Cir. 2011). "[B]ecause issues of constitutional standing are jurisdictional, they must be addressed whenever raised." *Pershing Park Villas Homeowners Assn v. United Pacific Ins. Co.,* 219 F.3d 895, 899 (9th Cir. 2000).

Berry has alleged no injury in fact sufficient to support Article III standing. The record reveals Berry was fully compensated by Webloyalty.com for the $36.00 charged against his debit card. The $1.00 charge appearing in his account history is clearly marked as a debit card authorization rather than as an actual charge. Berry has not shown that he

incurred any other injury as a result of defendants' actions.

Because we hold that Berry lacks standing, we do not reach his other contentions. We "vacate the district court's order and remand with instructions to dismiss without prejudice." *Fleck & Assocs. v. City of Phoenix,* 471 F.3d 1110, 1106 (9th Cir. 2006).

VACATED, and REMANDED with instructions.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PATRICK BERRY, on behalf of himself and all others similarly situated, Plaintiff, vs. WEBLOYALTY.COM, INC., a Delaware corporation; MOVIETICKETS.COM, INC., a Delaware corporation, DOES 1 through 50 inclusive Defendants.	CASE NO. 10-CV-1358-H-CAB **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS** (Filed Nov. 16, 2010)

On June 25, 2010, Plaintiff Patrick Berry ("Berry") brought this action against Defendants Webloyalty.com, Inc. ("Webloyalty"), MovieTickets.com, Inc. ("MovieTickets.com"), and Does 1-50. (Doc. No. 1.) On September 27, 2010, Defendants Webloyalty and MovieTickets.com both filed their motion to dismiss. (Doc. Nos. 17, 19.) On November 1, 2010, Plaintiff filed its opposition to the motion to dismiss. (Doc. Nos. 27, 30.) Plaintiff filed a request to strike exhibits attached to Defendant Webloyalty's motion to dismiss as part of their opposition. (Doc. No. 27.) Plaintiff also filed a request for judicial notice. (*Id.*) On November 8, 2010, Defendants filed their replies to the opposition. (Doc. Nos. 33, 34.) On the same day, Defendants filed their responses to the request to strike exhibits. (Doc. No. 35.) Defendants also filed their opposition to

Plaintiff's request for judicial notice. (Doc. No. 36.) On November 15, 2010, the Court held a hearing on this matter. James Patterson appeared on behalf of Plaintiff. James Prendergast and John Regan appeared on behalf of Defendant Webloyalty. Carrie Anderson and Bruce Colbath appeared on behalf of Defendant MovieTickets.com. After due consideration, the Court GRANTS IN PART AND DENIES IN PART Defendants' motion to dismiss.

BACKGROUND

This action centers around Webloyalty's club membership program. Plaintiff alleges that Defendant Webloyalty and Defendant MovieTickets.com together run a scheme to subscribe consumers into the club without their consent and thereafter, charges them monthly membership fees. (Compl. ¶ 1.)

On May 26, 2009, Plaintiff Berry purchased tickets from MovieTickets.com using his debit card. (Compl. ¶ 22.) Berry alleges he saw an advertisement on the website to save $10.00 on his next purchase. (*Id.*) Berry clicked "ok" and provided his email and street address. (*Id.*) Berry alleges that he believed the information he entered was necessary to complete his transaction with MovieTickets.com and did not realize he was being directed away to Webloyalty's website. (*Id.*) Berry started getting monthly charges of $12.00 per month as a member of this club. (*Id.* at 23.)

Defendants request judicial notice of a screenshot of the club enrollment webpage as part of their motion to dismiss to support their contention that Plaintiff Berry consented to the enrollment. (*See* Doc. No. 19, Declaration of Richard Winiarski, Exhs. A-E.)

DISCUSSION

I. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)

A. Legal Standard

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Black,* 250 F.3d 729, 732 (9th Cir. 2001). Federal Rule of Civil Procedure 8(a)(2) requires that a pleading stating a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The function of this pleading requirement is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiffs obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949

(2009) (*quoting Twombly,* 550 U.S. at 557). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555 (citing 5 *C. Wright & A. Miller, Federal Practice and Procedure* § 1216, pp. 235-36 (3d ed. 2004)). "All allegations of material fact are taken as true and construed in the light most favorable to plaintiff However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.,* 83 F.3d 1136, 1140 (9th Cir. 1996); *see also Twombly,* 550 U.S. at 555. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith,* 203 F.3d 1122, 1130 (9th Cir.2000).

B. Judicial Notice

I. Legal Standard

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). The court may, however, consider the contents of documents specifically referred to and incorporated into the complaint. *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara,* 307 F.3d 1119,

1127 (9th Cir. 2002). This rule is limited to a document "whose authenticity no party questions." *Id.* 14 F.3d at 453. Additionally, the court may take judicial notice of facts that are "beyond reasonable controversy." *Rivera v. Phillip Morris, Inc.,* 395 F.3d 1142, 1151 (9th Cir. 2005). A court cannot take judicial notice of a fact that is subject to reasonable dispute even if it is in the public record. *Lee v. City of Los Angeles,* 250 F.3d 668, 689 (9th Cir. 2001).

ii. Exhibits to the Affidavit of Richard Winiarski

Defendants included a screenshot of the enrollment webpage for the savings club as parts of various exhibits to the affidavit of Richard Winiarski in support of their motion to dismiss to support their contention that Plaintiff Berry consented to the enrollment. (*See* Doc. No. 19, Aff. of Richard Winiarski, Exhs. A-E.) Plaintiff moved to strike these exhibits as improper documents for the Court to consider in a motion to dismiss. (Doc. No. 27., Objection to and Request to Strike the Exhibits Attached to the Affidavit of Richard Winiarski.) Plaintiff raises questions on the accuracy, authenticity, and completeness of the screenshot. (*Id.* at 3.) Plaintiff also argues that Webloyalty constantly revises its webpages so neither Berry or the Court is in a position to determine if the webpage is what was displayed to the consumers. (*Id.*) Plaintiffs argue that this makes the webpage screenshot improper for judicial notice. (*Id.* at 5 (*citing In Re Easysaver Rewards,* Case. No. 09-CV-2094-MMA,

2010 U.S. Dist. LEXIS 84043, *14-21) (S.D. Cal. Aug. 13, 2010), *Ferrington v. McAfee, Inc.,* Case. No. 10-CV- 1455-LHK, *4-5 (N.D. Cal. Oct. 5, 2010)).) Defendants argue in response that judicial notice is proper because the enrollment page forms the bases of the allegations in the complaint. (Doc. No. 35 at 3 (*citing Baxter v. Intelius, Inc.,* No. SACV 09-1031 AG, 2010 WL 3791487 (C.D. Cal. Sept. 16, 2010)).) Further, they argue that the screenshot is not subject to any question on authenticity because Mr. Winiarski testified in his affidavit that Berry's account has a unique identifying number (a campaign ID) which matches the screenshot. (*Id.* at 6.) This issue presents a very close call. On one hand, Defendants have put forth what looks to be a accurate screenshot of the enrollment page that is linked to Plaintiff Berry's account through the unique campaign identifier. Plaintiff however challenges the authenticity and accuracy of the screenshot and has not yet had the opportunity to verify the screenshot. After due consideration of the parties' arguments, the Court concludes that there is sufficient dispute such that judicial notice of the webpage screenshot is inappropriate at this time in the context of a motion to dismiss. *See Branch,* 14 F.3d at 453. Accordingly, the Court declines to take judicial notice of the exhibits to the affidavit of Richard Winiarski in support of Defendants' motion to dismiss.[1]

[1] The Court grants Defendants' motion to dismiss on the fraud-based claims below with leave to amend. *See* Section E. If

(Continued on following page)

iii. Committee Reports

Plaintiff requested the Court take judicial notice of two reports: (1) United States Committee on Commerce, Science and Transportation's Report on Aggressive Sales Tactics on the Internet and Their Impact on American Consumers, dated November 17, 2009, and (2) United States Committee on Commerce, Science, and Transportation's Supplemental Report on Aggressive Sales Tactics on the Internet, dated May 19, 2010. (Doc. No. 27, Request for Judicial Notice.) Defendants objected, arguing that the documents are irrelevant and the documents contain statements that are not adjudicative facts under Federal Rule of Evidence 201. (Doc. No. 36 at 1-2.) The Court takes judicial notice of the fact that the Committee has issued reports on aggressive sales tactics. Defendants do not dispute that the existence of these reports is subject to reasonable dispute. However, the Court declines to take judicial notice of the statements within the document as there is sufficient dispute about the content of the information even if it is in the public record. *See Lee*, 250 F.3d at 689.

Plaintiff wishes to file an amended complaint to cure those deficiencies, the Court reminds him that the new complaint will be subject to Rule 11 obligations with respect to his allegations for lack of consent and lack of disclosures about the terms and conditions of the coupon offer. The Court is also granting limited discovery with respect to the issue of the enrollment page screenshot.

C. Communications Decency Act ("CDA")

Defendant MovieTickets.com argues Plaintiff is barred from imposing liability on MovieTickets.com for the content of Webloyalty's advertisements by § 230 of the Communication Decency Act ("CDA"). (Doc. No. 17 at 3.) The CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). In order to be protected under the CDA, MovieTickets.com must be classified as a "interactive computer service." The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). Defendant cites cases which include internet search engines, online dating websites, book-selling websites such as Amazon.com for their book reviews, and auction websites. (*See* Doc. No. 17 at 4-5.) Plaintiff argues that these websites that were held immune were different in nature from MovieTickets.com because individual users created the content at issue there. (Doc. No. 30 at 5.) Instead, here, Plaintiff alleges that MovieTickets.com and Webloyalty together created the coupon advertisement. The Court agrees. Defendant MovieTickets.com also agreed that protection under the CDA would not, in any case, cover

Plaintiff's claims related to the data pass process. Accordingly, the Court concludes that MovieTickets.com is not immune from liability under the CDA.

D. Claims against only Webloyalty

I. Electronic Funds Transfer Act ("EFTA")

Plaintiffs first claim is for violation of the Electronic Funds Transfer Act ("EFTA") pursuant to 15 U.S.C. § 1693 against Webloyalty. (Compl. ¶¶ 71-78.) Under the EFTA, a "preauthorized electronic fund transfer from a consumer's account may be authorized by the consumer only in writing, and copy of such authorization shall be provided to the consumer when made." 15 U.S.C. § 1693e(a). Defendant Webloyalty argues that there was no unauthorized electronic transfer because the membership club enrollment process that Plaintiff followed satisfies the requirements. (Doc. No. 19 at 12.) Furthermore, Defendant Webloyalty argues that the EFTA does not cover fund transfers where the transfer is initiated by a person other than the consumer who was furnished with the card, code, or other means of access to such consumer's account by such consumer, unless the consumer has notified the financial institution involved that transfers by such person are not longer authorized. (*Id.* (citing 15 U.S.C. § 1693(a)(11)(A))). Plaintiff argues that financial institutions are the only entities that can escape liability under this exclusion under 15 U.S.C. 1693a(11) and exclusion does

not extend to merchants. (Doc. No. 27 at 11-12.) Further, Plaintiff contends that he has alleged that he did not give consent. The Court agrees that the allegations, accepted as true, state a claim for unauthorized transfer under the EFTA.[2] *See In re Easysaver Rewards,* No. 09-CV2094-MMA, 2010 U.S. Dist. LEXIS 84043, *62-63 (S.D. Cal. Aug. 13, 2010) (citing *Nordberg v. Trilegiant Corp.,* 445 F. Supp. 2d 1082 (N.D. Cal. 2006)). Accordingly, the Court denies the motion to dismiss this cause of action as to Webloyalty.

ii. Electronic Communications Privacy Act ("EPCA") [sic]

Plaintiff's second claim is for violation of the Electronic Communications Privacy Act (EPCA) pursuant to 18 U.S.C. § 2510 against Webloyalty. (Compl. ¶¶ 79-84.) The EPCA [sic] imposes liability on individuals who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). Defendant Webloyalty argues that there was no "interception" because they only receive the billing information from MovieTickets.com

[2] The Court grants Defendants' motion to dismiss on the fraud-based claims below with leave to amend. *See* Section E. If Plaintiff wishes to file an amended complaint to cure those deficiencies, the Court reminds him that the new complaint will be subject to Rule 11 obligations with respect to his allegations for lack of consent and lack of disclosures.

after billing information was already transferred to MovieTickets.com. (Doc. No. 19 at 13.) Defendants further argue that even if there was an interception, there is still no violation because Plaintiff gave consent for MovieTickets.com to transfer the information to Webloyalty. (*Id.*) Plaintiff alleges that he did not know, consent to, or authorize his billing information to be transferred to Webloyalty. (Compl. ¶ 82.) Plaintiff alleges that it was during the process of transmitting his billing information to MovieTickets.com that Webloyalty intercepts this information without consent. (*Id.*) The Court concludes that Plaintiff has sufficiently plead [sic] facts that support a cause of action under the EPCA [sic].[3] Accordingly, the Court denies the motion to dismiss this cause of action as to Webloyalty.

iii. Civil Theft

Plaintiff's third claim is for civil theft under Connecticut General Statute § 52-564 and § 53(a)-119(2) against Webloyalty. (Compl. ¶¶ 85-95.) "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages." Conn. Gen. Stat. § 52-564. "Any person who obtains property by false pretenses when, by any false token, pretense or device, he obtains from another any property, with intent to

[3] The Court again reminds Plaintiff that if he wishes to file an amended complaint to cure deficiencies, the new complaint will be subject to Rule 11 obligations with respect to his allegations for lack of consent and lack of disclosures.

defraud him or any other person." Conn. Gen. Stat. § 53(a)-119(2). Defendant Webloyalty argues that in order to sustain this cause of action, Plaintiff must show that Webloyalty committed larceny against him. (Doc. No. 19 at 14.) Defendant argues that because Plaintiff gave his consent to be enrolled into the membership club, there was consent and therefore, no larceny. (*Id.*) At this early stage of a motion to dismiss, the Court has declined to take judicial notice of the website screenshot because it is subject to reasonable dispute, but the Court will grant limited discovery as part of its order granting leave to amend the complaint. Plaintiff has sufficiently alleged that he enrolled into the membership club under false representations and omissions and did not give consent knowingly or willingly. (Compl. ¶¶ 88-89.) Accordingly, the Court denies the motion to dismiss these causes of action as to Webloyalty.

E. Fraud Claims

I. 9(b) Pleading Standards

Defendants argue that Plaintiff's claims "sounds in fraud" and should be subject to Federal Rule of Civil Procedure 9(b)'s heightened pleading standards. (Doc. No. 19 at 7.) Plaintiffs Berry agrees that he pled several causes of action against both Defendant Webloyalty and Movietickets.com that are grounded in fraud. (Plaintiffs Opposition, Doc. No. 27 at 14.) In particular, these claims are: (1) claims 8 and 9 for negligent misrepresentation, (2) claims 10 and 11 for

fraudulent misrepresentation, (3) claims 12 and 13 for violations under the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et seq. ("CLRA"), (4) claims 14 and 15 for false advertising in violation of Cal. Bus. & Prof. Code § 17500, et seq. ("FAL"), and (5) claims 18 and 19 for violation of Cal. Bus. & Prof. Code § 17200, et seq. ("UCL"). (*Id.*) Rule 9(b) requires that a person alleging fraud or mistake must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) requires "the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Odom v. Microsoft Corp.,* 486 F.3d 541, 553 (9th Cir. 2007) (*quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co.,* 806 F.3d 1393, 1400 (9th Cir. 1986)). In general, the complaint must state "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Id.* "[A] plaintiff must set forth more than neutral facts necessary to identify the transaction. . . . In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading." *In re Glenfeld Sec. Litig.,* 42 F.3d 1541, 1548 (9th Cir. 1994).

Plaintiff alleges that the fraud happens through an unsolicited advertisement that appears on-screen immediately after consumers attempt to complete some other online transaction. (Compl. ¶ 16.) Berry claims that his experience happened on May 26, 2009 after he purchased movie tickets from MovieTickets.com's

website. (*Id.* ¶ 22.) Plaintiff alleges that the advertisement pops up on-screen after he inputs billing information on a check-out page but before he receives the confirmation of the completed transaction. (*Id.* ¶ 16.) Plaintiff alleges that the advertisement seems to offer a complimentary coupon to save 10.00 off the next purchase. (*Id.*) Plaintiff further alleges that customers are directed to click on a button and enter their email address to claim it. (*Id*.)

The Court concludes these general allegations are insufficient under Rule 9(b)'s heightened pleading standards. Plaintiff does not identify with factual specificity the misrepresentations or specific advertisement that he relied on when he entered his email address. He only states vague allegations of the coupon offer. He does not allege what the coupon stated to mislead him to think that it was a free coupon offer. He does not allege what exactly was deceiving about the way the coupon was presented to make him think it was free. He does not allege all the steps he took to sign up for the offer and does not allege what representations or omissions were made to him at each step. Accordingly, the Court grants Defendants' motion to dismiss on these counts that are grounded in fraud.

ii. Consumer Legal Remedies Act

Plaintiff's twelfth and thirteenth claims are for violations of the Consumer Legal Remedies Act ("CLRA") under Cal. Civil Code § 1750 et seq. against

Webloyalty and MovieTickets.com, respectively. (Compl. ¶ 180-216.) The CLRA prohibits the use of certain types of "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). The CLRA has a statutory requirement that a plaintiff must notify the person alleged to have engaged in these lawful practices thirty days or more prior to the filing of the complaint. Cal. Civ. Code § 1782(a). The CLRA does have a provision that allows notice to be given within thirty days after commencement of an action for injunctive relief Cal. Civ. Code § 1782(d). Defendants argue that this cause of action should be dismissed with prejudice because Plaintiff did not provide them with this notice. (Doc. No. 34 at 7.) Defendants cite to *Laster v. T-Mobile USA, Inc.,* where the court dismissed a claim under the CLRA with prejudice even when the Plaintiffs inadvertently failed to give notice. 407 F. Supp. 2d 1181, 1195 (S. D. Cal. 2005). The court found that strict interpretation of the notice requirement is necessary to accomplish the CLRA's goals of expeditious remediation before litigation. *Id.* (citing *Outboard Marine Corp. v. Superior Court,* 52 Cal. App. 3d 30 (1975)); *see also Von Grabe v. Sprint,* 312 F. Supp. 2d 1285 (S.D. Cal. 2003). Furthermore, the Laster court held that this request is unchanged by the fact that Plaintiffs also sought injunctive relief. *Laster,* 407 F. Supp. 2d at 1195 ("While § 1782(d) authorizes the filing of an action for injunctive relief without first providing notice to the vendor, the

statute further directs that such an action may not be converted into an action for damages unless the consumer first complies with the notice provisions of § 1782(a).”). Therefore, Defendants argue that Plaintiff’s request for injunctive relief does not excuse them from the notice requirement. The Court agrees. Accordingly, the Court grants Defendants’ motion to dismiss the cause of action under the CLRA with prejudice.

F. Common Law Claims

I. Unjust Enrichment

Plaintiff’s fourth and fifth seventh [sic] claims are for unjust enrichment against Webloyalty and MovieTickets.com, respectively. (Compl. ¶ 96-117.) “Unjust enrichment is an action in quasi-contract, which does not lie when an enforceable, binding agreement exists defining the fights of the parties.” *Paracor Finance, Inc. v. General Elec. Capital Corp.,* 96 F.3d 1151, 1167 (9th Cir. 1996), *California Medical Ass’n, Inc. v. Aetna U.S. Healthcare of California, Inc.,* 94 Cal. App. 4th 151, 125 (Cal. App. 4th 2001). A claim for unjust enrichment requires pleading the “receipt of a benefit and the unjust retention of the benefit at the expense of another.” *Lectrodryer v. Seoulbank,* 77 Cal. App. 4th 723, 726 (2000). “The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.” *Dinosaur Dev., Inc. v. White,* 216 Cal. App. 3d 1310, 1315 (1989). Ordinarily, a plaintiff

must show that a benefit was conferred on the defendant through mistake, fraud, coercion, or request. *Nebbi Bros., Inc. v. Home Fed. Sav. & Loan Ass'n,* 205 Cal. App. 3d 1415, 1422 (1988).

Defendant Webloyalty argues that this cause of action cannot stand because a contract governs the relationship between Plaintiff and Webloyalty. (Doc. No. 19 at 21.) They argue that Plaintiff entered into a contract when he accepted the coupon offer. (*Id.*) Defendant MovieTickets.com additionally argues that there is not standalone action for unjust enrichment. (Doc. No. 17 at 20.) Considering Plaintiffs allegations, the Court concludes that Plaintiff has adequately pleaded a cause of action for unjust enrichment based on lack of consent in entering into the membership club. Accordingly, the Court denies the motion to dismiss this cause of action as to both Webloyalty and MovieTickets.com..

ii. Money Had and Received

Plaintiff's sixth and seventh claims are for money had and received against Webloyalty and MovieTickets.com, respectively. (Compl. ¶ 118-28.) "The count for money had and received states in substance that the defendant is indebted to the plaintiff in a certain sum for money had and received by the defendant for the use of the plaintiff.'" 4 Witkin, Cal. Proc. (5th ed. 2008) Pleading, § 561, p. 688. "The foundation of an action for conversion on a money had and received count is the unjust enrichment of the wrongdoer, and in order for plaintiff to recover in such action

she must show that a definite sum, to which she is justly entitled, has been received by defendant." *Bastanchury v. Times-Mirror Co.,* 68 Cal. App.2d 217, 236 (Ct. App. 1945). It is fatal for this cause of action if the amount is not ascertainable. *French v. Robbins,* 172 Cal. 670, 679 (1916). Defendants first argue that no action can lie because there was an express contract that covers the enrollment into the savings club. (Doc. No. 19 at 22.) Defendants further argue that Plaintiff has failed to state a definite sum that is owed to him by MovieTickets.com. (Doc. No. 17 at 21.) Plaintiff has identified that Webloyalty and MovieTickets.com owes himself and the class fees for membership programs. (Compl. ¶¶ 120. Additionally, Plaintiff alleges that MovieTickets.com earned kickbacks as a benefit for its participation in the program. (*Id.* ¶¶ 125-26). These fees are ascertainable. Further, Plaintiff has alleged that any consent that was given to enter into the membership club was unknowingly. (*Id.* ¶¶ 16-17.) Accordingly, the Court denies the motion to dismiss this cause of action as to both Webloyalty and MovieTickets.com.

iii. Conversion

Plaintiff's sixteenth and seventeenth claims are for conversion against Webloyalty and MovieTickets.com, respectively. (Compl. ¶ 229-42.) Conversion is the wrongful exercise of dominion over personal property of another. *Moore v. Regents of Univ. of Calif.,* 51 Cal. 3d 120, 136 (1990). Generally, conversion requires the wrongful interference with tangible property.

Conversion can lie, however, when intangibles that are represented by documents, such as bonds, stock, checks. 5 Witkin, Summary of Cal. Law, Torts § 702. Money also cannot be the subject of conversion unless there is a specific, identifiable sum identified. *Vu v. California Commerce Club,* 58 Cal. App. 4th 229, 235 (Cal. App. 2d 1997). Defendants argue that Plaintiff consented to enroll in the program. (Doc. No. 19 at 23.) Further, Defendants argue that Plaintiff does not specify an amount of money that was wrongfully converted. (*Id.*, Doc. No. 17 at 21.) Plaintiff does allege that he did not consent to enrollment in the program. (*See* Compl. ¶¶ 231, 238.) Plaintiff also alleges that he was deprived of funds that were taken as part of the program and billing information which used beyond the scope of what it was authorized. (Compl. ¶¶ 230-31, 237-38.) Plaintiff's interest in their billing information may be subject to a claim of conversion similar to shares of stock or a check. *See Acme Paper Co. V. Goffstein,* 125 Cal. App. 2d 175, 179 (1954), *Mears v. Crocker First Nat. Bank,* 84 Cal. App. 2d 637 (1948). After due consideration, the Court denies the motion to dismiss this cause of action as to both Webloyalty and MovieTickets.com.

II. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) for Lack of Standing

Defendant moves to dismiss on standing grounds for lack of subject matter jurisdiction under Rule 12(b)(1). Federal courts are courts of limited jurisdiction and the Article III case or controversy clause

limits the courts' subject matter jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co.,* 598 F.3d 1115 (9th Cir. 2010). Federal Rule of Civil Procedure 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject matter jurisdiction. "When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Env't,* 236 F.3d 495, 499 (9th Cir.2001) ("A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment."). In order to have standing, a plaintiff must show: (1) he suffered an "injury in fact" – an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and (3) it must be likely that the injury will be redressed by a favorable decision. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 103-04 (1998).

Defendants argue that Plaintiff does not have standing to sue on behalf of himself and the class because he received the $36 that he paid in membership fees to the club through a chargeback request to

his credit card. (Doc. No. 19 at 6.) Plaintiff argues that he has standing because he was still injured from the loss of use of money resulting from the unauthorized charges and from the interest from his check account due to improper charges. Furthermore, Plaintiff argues that he had to request a chargeback from his credit card and Webloyalty never refunded him the money directly. After due consideration, the Court denies Defendants' motion to dismiss for lack of standing.

III. Limited Discovery

In light of the Court's grant of the motion to dismiss the fraud based claims with leave to amend, the Court also grants the parties limited right to discovery with respect to the issue of the enrollment page screenshot. Defendant may first conduct a one-hour deposition of Plaintiff Berry with respect to the screenshot. Plaintiff may then conduct an hour-long deposition of Richard Winiarski with respect to the screenshot. If parties elect to take the depositions, the Court directs them to be completed prior to the deadline for leave to amend. The Court declines to order any other discovery at this time.

Conclusion

After due consideration, the Court GRANTS Defendant Webloyalty and MovieTickets.com's motion to dismiss the CLRA claim with prejudice (claims 12 and 13). The Court also GRANTS Defendant Webloyalty

and MovieTickets.com's motion to dismiss as to the following claims with leave to amend: (1) claims 8 and 9 for negligent misrepresentation, (2) claims 10 and 11 for fraudulent misrepresentation,(3) claims 14 and 15 for false advertising in violation of Cal. Bus. & Prof. Code § 17500, et seq. ("FAL"), and (4) claims 18 and 19 for violation of Cal. Bus. & Prof Code § 17200, et seq. ("UCL"). The Court grants Plaintiff 30 days from the date of this order to amend to cure the deficiencies – if he can in the complaint for these causes of action. As to all remaining claims, the Court DENIES the motion to dismiss.

IT IS SO ORDERED.

DATED: November 16, 2010

/s/ Marilyn L. Huff
MARILYN L. HUFF,
District Judge
UNITED STATES
DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK BERRY, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. WEBLOYALTY.COM, INC., a Delaware corporation; MOVIETICKETS.COM, INC., a Delaware corporation, Defendants-Appellees.	No. 11-55764 D.C. No. 3:10-cv-01358-H-CAB Southern District of California, San Diego. ORDER (Filed May 20, 2013)

Before: O'SCANNLAIN and W. FLETCHER, Circuit Judges, and KORMAN, Senior District Judge.*

Appellant's petition for rehearing, filed May 9, 2013, is hereby DENIED.

* The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for the Eastern District of New York, sitting by designation.