The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LAWRENCE HART, CLYDE STEPHEN LEWIS, JAMES PRESTI, and MICHAEL RALLS, individual and on behalf of all others similarly situated,

Plaintiffs,

v.

CF ARCIS VII LLC d/b/a THE CLUB AT SNOQUALMIE RIDGE, d/b/a TPC AT SNOQUALMIE RIDGE, and d/b/a SNOQUALMIE RIDGE GOLF CLUB, et al.,

Defendants.

No. C17-01932 RSM

ARCIS DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

Noted for Consideration:
Friday, July 13, 2018

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I. INTRODUCTION AND SUMMARY OF REPLY

In their motion to dismiss, the Arcis Defendants showed that Plaintiffs Hart, Lewis, Presti, and Ralls, who bought refundable memberships from prior Club owners: (a) cannot state a CPA claim, because the challenged conduct could affect only the specific Club members in May 2013, not the public, and because they do not allege deceptive or unfair acts by the Arcis Defendants or that they suffered CPA injury; (b) cannot state a conversion claim, because they have no property interest in money *others* paid for *non*-refundable memberships; (c) cannot state a contract claim as to the Arcis Defendants, because Plaintiffs' membership policies with Brightstar allowed it to make the amendments it made, and Plaintiffs do not allege facts plausibly showing they suffered resulting damage; and (d) cannot pierce the veil, because they allege no facts plausibly showing Mr. Walker used the corporate form to evade a legal duty (particularly given Plaintiffs admit the Arcis Defendants have adopted a voluntary refund policy that has accelerated the pace of refunds), and they admit that Defendant CF Arcis VII, the Club owner, has sufficient assets to satisfy any judgment.

Plaintiffs do not meaningfully dispute these outcome-determinative points. Instead, they ask the Court to deny the motion based on speculative theories and "consistent 'hypothetical facts.'" Opp. 21 [Dkt. 23]. But under federal law, "[f]actual allegations must be enough to raise a right to relief ***above*** the speculative level," and Plaintiffs may not rely on hypotheticals. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (emphasis added). The Court should grant the motion and dismiss all claims with prejudice.

II. ARGUMENT

A. Plaintiffs Have Not Pled the Essential Elements of Their CPA Claim.

1. Plaintiffs Cannot Allege Public Interest Impact.

Plaintiffs do not dispute that the conduct they challenge—Brightstar's May 2013 amendments to the membership policies without prior notice and a vote—could affect *only* people who were members of the Club as of May 2013 and therefore had rights under the pre-May 2013 policies, not the general public. *See* Opp. 17-18. Because Plaintiffs base their

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claims on an alleged breach of the contractual obligations that existed between the prior club owner and a finite group of people at a particular point in time, Plaintiffs cannot show public interest impact. *See* Mot. to Dismiss ("Mot.") 8-11 [Dkt. 20].

Seeking to distract from this fatal flaw, Plaintiffs criticize the Arcis Defendants for not relying solely on RCW 19.86.093(3)(a), passed in 2009. Opp. 15-16. But RCW 19.86.093(3)(a) did not "abandon[] prior tests" for public interest impact; rather, "[t]he *Hangman Ridge* factors [on which the Arcis Defendants relied] are still relevant in analyzing public interest impact and are useful in interpreting the 2009 amendments." *Stiegler v. Saldat*, 2015 WL 13686087, at *3 (W.D. Wash. 2015), *aff'd*, 707 F. App'x 478 (9th Cir. 2017).[1] As the Arcis Defendants showed, Plaintiffs cannot allege facts plausibly establishing the second and third *Hangman Ridge* factors—i.e., advertising the challenged conduct to the public and actively soliciting these Plaintiffs—and that warrants dismissing their CPA claim for lack of public interest impact. Mot. 10-11.

In response, Plaintiffs argue "[t]he second factor is … met because the Club advertised[] to members of the public in order to get them to join." Opp. 18. But everyone who belonged to the Club in 2013 joined *before* the Arcis Defendants had any role. For that reason, the SAC alleges advertising by *Brightstar*, not the Arcis Defendants. *See* Mot. 10; SAC ¶¶ 3.9, 4.5, 6.4.1 [Dkt. 18]. Plaintiffs cannot amend the SAC through their opposition brief. *Kuhlman v. Bank of Am., N.A.*, 2012 WL 12941700, at *2 (W.D. Wash. 2012). Nor does judicially noticing the Club's current website resolve Plaintiffs' pleading problem. Opp. 18 n.7. As Plaintiffs admit, CF Arcis VII has *always* sold both refundable and non-refundable memberships, so Plaintiffs cannot show the Arcis Defendants advertised one thing to the public but sold another. *See* SAC ¶¶ 4.10, 6.4.1, 7.4.1. This makes Plaintiffs' attempt to rely on CF Arcis VII's advertising after the July 2013 acquisition irrelevant: for the second factor, the relevant advertising is that which implicates the challenged conduct, not advertising generally. Mot. 10-11 (collecting cases). Plaintiffs do not argue otherwise, and repeatedly assert that the

[1] *See also* Mot. 8-9 (citing numerous post-2009 cases applying the *Hangman Ridge* factors).

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challenged conduct occurred in "secret," not through advertising. *See id.*; SAC ¶¶ 4.17, 6.9; Opp. 4-5. Thus, Plaintiffs have not met the second public interest impact factor.[2]

Plaintiffs claim "[t]here is nothing in the record regarding the third factor," Opp. 19, which asks "whether the defendant actively solicited this particular plaintiff," *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 605 (2009). In fact, Plaintiffs admit they joined the Club *six to 14 years before* CF Arcis VII acquired it in July 2013. SAC ¶¶ 3.1-3.4, 4.4; Mot. 10. Plaintiffs cannot allege facts showing the Arcis Defendants solicited *them* to join the Club, negating the third factor. Mot. 10.

Because Plaintiffs cannot satisfy these two public interest impact factors, the Court should dismiss their CPA claim for lack of public interest impact. *See* Mot. 10-11; *Michael*, 165 Wn.2d at 605 (no public interest impact where plaintiff failed to allege defendant advertised challenged conduct to the public or actively solicited the plaintiff in particular).

But even if the Court were to consider only RCW 19.86.093(3)(a), it should still dismiss. Plaintiffs argue they satisfy the "[i]njured other persons" language in (3)(a) because they allege the wait list includes "more than 100 persons." Opp. 15-16. But as they repeatedly admit, this group consists entirely of Club members—not the public at large. The court in *Stiegler* dismissed a CPA claim for lack of public interest impact under similar circumstances. There, a group of time-share club members brought a putative class action against the club's ownership and management for alleged CPA violations stemming from loans between club entities. 2015 WL 13686087, at *1. The court held plaintiffs did not allege public interest impact because although plaintiffs alleged there were 2,000 other time-share club members, plaintiffs "d[id] not allege that persons *other* than members of the time-shares were injured."

[2] Plaintiffs nevertheless suggest they can meet this factor by inferring that hypothetical members on the wait list joined the Club between May 2013 and August 2015. Opp. 18-19. Of course, these hypothetical members could not claim any rights under the pre-May 2013 Membership Policies and so could not assert a claim based on those policies. In any event, Plaintiffs cannot rely on the hypothetical circumstances of others to establish the elements of their own claims. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996). Further, Plaintiffs' allegations contradict the inference they now ask the Court to draw: Plaintiffs allege "the sale of Refundable Memberships has all but ceased since the Non-Refundable Memberships became available for purchase" in May 2013. SAC ¶ 4.12. Since only refundable memberships are entitled to refunds, all memberships on the wait list are refundable ones. Dkt. 11, Ex. B ¶ 3.2(c), Ex. C ¶ 3.2(c). Because Plaintiffs allege refundable membership sales "all but ceased" after May 2013, the Court could not reasonably infer that some hypothetical number of the "more than 100 persons" on the wait list joined the Club after CF Arcis VII acquired it in July 2013.

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Id. at *3 (emphasis added). The court thus interpreted "the 2009 amendments' language of 'injuring other persons' to relate to persons *not already members* of the two time-share entities." *Id*. (emphasis added). *See also Bolling v. Dendreon Corp.*, 2014 WL 12042559, at *15 (W.D. Wash. 2014) (no public interest impact even though plaintiffs alleged the challenged conduct injured "other ... shareholders"; dismissal granted).

The same rationale applies here. As in *Stiegler*, Plaintiffs admit the "more than 100 persons" they claim were injured were all members of the Club, "and no *other* persons were injured." 2015 WL 13686087, at *3 (emphasis in original); Opp. 17-18. "Because Plaintiffs do not allege anyone outside the [Club was] injured, the Court [should] conclude[] that Defendants' alleged conduct has not 'injured other persons' within the meaning of RCW 19.86.093." *Stiegler*, 2015 WL 13686087, at *3.

As *Stiegler* also shows, Plaintiffs misstate the law in suggesting the mere existence of class allegations satisfies the public interest impact. Opp. 17. *Stiegler* also involved class allegations, yet the court still dismissed for lack of public interest impact because the challenged conduct affected only club members. 2015 WL 13686087, at *3. Any contrary outcome would allow Plaintiffs to use Rule 23 to enlarge a substantive right—i.e., to allege a CPA claim they could not assert absent class allegations. The Rules Enabling Act, however, squarely forbids such an outcome; the application of Rule 23, governing class actions, cannot expand substantive rights. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).[3]

Because Plaintiffs do "not plead sufficient facts to meet the public interest prong, the court need not address the remaining four elements." *Bly v. Field Asset Servs.*, 2014 WL 2452755, at *6 (W.D. Wash. 2014). But Plaintiffs' CPA claim falls short in other ways as well.

[3] In *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 841 (2007) (*cited in* Opp. 17), the Court held a forum selection clause may be unenforceable if it "precluded class actions … where it is otherwise economically unfeasible for individual consumers to bring their small-value claims," but not where "the value of an individual claim is significant." The Court did not rule on public interest impact, and Plaintiffs admit their individual claims are "significant," as they seek refunds of the "tens of thousands of dollars" each paid for private country club memberships. Opp. 1.

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2. Plaintiffs Cannot Allege a Deceptive or an Unfair Act.

No Deceptive or Unfair Act. Plaintiffs do not allege deceptive or unfair acts on the part of the Arcis Defendants because Plaintiffs rely on Brightstar's conduct *before* the Arcis Defendants acquired the Club and *before* the Arcis Defendants had any obligations toward Plaintiffs. SAC ¶¶ 3.9, 4.8-4.10, 6.4.1-6.4.3, 7.4.1-7.4.3; Mot. 12-13. For the same reason, Plaintiffs cannot invoke the duty of good faith and fair dealing to establish a deceptive act by the Arcis Defendants. *See* Opp. 13-14; *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 197 (2002) (duty of good faith and fair dealing does not exist absent a contractual duty between the parties). Similarly, while Plaintiffs repeatedly assert the Arcis Defendants "colluded" with Brightstar before May 2013, they allege no facts plausibly supporting this assertion. The Court should reject it as pure speculation. Opp. 12-13, 20; *Aziz v. Knight Transp.*, 2012 WL 3596370, at *3 (W.D. Wash. 2012) (refusing to assume facts based on vague and speculative assertions; dismissing CPA claim).

Plaintiffs, however, suggest assignee liability principles allow them to burden the Arcis Defendants with Brightstar's pre-acquisition conduct. *See* Opp. 7 n.2, 12, 20. Not so. Even if assignee liability applied, *see* Mot. 17 n.8, it exists only when, in the assignment contract, the assignee expressly assumes the obligation. *See Lewis v. Boehm*, 89 Wn. App. 103, 107 (1997). It does not impose contractual obligations on the assignee until after the assignment—here, after the acquisition in July 2013. The Arcis Defendants assumed Brightstar's liability to issue refunds as they came due under the Membership Policies in place when it acquired the Club. SAC ¶¶ 8.6, 8.10; Opp. 1. But in May 2013, before the acquisition, the Arcis Defendants were not parties to the Membership Policies between Brightstar and Plaintiffs and, therefore, were not then bound by those Policies.[4]

Plaintiffs also cannot establish a deceptive or unfair act based on the theory the May 2013 amendments changed the refund ratio. SAC ¶¶ 6.4.4., 7.4.4; *see* Mot. 12-13. Plaintiffs appear to concede as much for deception, now arguing this theory only as an unfair act.

[4] In contrast, in *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 206 (1998), on which Plaintiffs rely, Opp. 11, the defendant built, marketed, and sold the homes to the plaintiffs.

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Compare Opp. 15, *with* Opp. 11; SAC ¶¶ 6.4.4, 7.4.4. But Plaintiffs do not dispute that the May 2013 Membership Policies continues to specify "the 3-1 ratio." Dkt. 11, Ex. C ¶ 3.2(c); Mot. 12-13; Opp. 10 n.4. Instead, Plaintiffs assert a *new* theory of deception, claiming the Arcis Defendants "failed to disclose that they would not refund Refundable Memberships with the sale of Non-Refundable Memberships." Opp. 15, 13 (citing SAC ¶ 4.12; McEntee Decl., Ex. 1). Plaintiffs do not plead facts plausibly supporting this theory, *see* SAC ¶ 4.12, and documents on which they rely belie their assertion, *see Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) (court properly rejects allegations "contradicted by documents referred to in the complaint"). For example, the May 2013 Membership Policies did not "stop[]" Plaintiffs from being able to obtain refunds; rather, on its face, it left their refund rights unchanged. Opp. 13, 15; Mot. 12, 20. And the TPC SR 20/20 Plan shows the Arcis Defendants ultimately disclosed they would (and did) apply sales of non-refundable memberships to refunds in an "attempt to move the list faster," issuing a refund within months of adopting the policy. McEntee Decl., Ex. 1 [Dkt. 24]; *see also* Dkt. 11, Ex. D.[5]

No Capacity to Deceive. Plaintiffs also do not allege a "capacity to deceive substantial portions of the public," as required to establish a deceptive act, *see* Opp. 13, because they do not dispute that the alleged deceptive acts were directed only at members of the Club who joined before May 2013, i.e., those with rights under the pre-May 2013 Membership Policies. Mot. 12 (collecting cases). Plaintiffs' cases do not save them, as both involved conduct that affected new customers (as well as old) on an ongoing basis. *See* Opp. 14 (citing *Skansgaard v. Bank of Am., N.A.*, 896 F. Supp. 2d 944, 949 (W.D. Wash. 2011) (ongoing practice of requiring customers to obtain forced insurance and receiving kickbacks); *Riensche v. Cingular Wireless, LLC*, 496 F. App'x 760 (9th Cir. 2012) (ongoing practice of including surcharge on bills)). And an alleged lack of equal bargaining power has no bearing on the capacity to deceive

[5] Plaintiffs cite the 20/20 Plan to argue the Arcis Defendants issued only one refund from July 2013 to October 2016. Opp. 14. While not relevant to this motion, in fact the 20/20 Plan states "[s]ince the Plan was initiated on May 1, 2016, one refund has been issued and the second is fast approaching." McEntee Decl., Ex. 1. Further, the 20/20 Plan and First Amended Voluntary Refund Policy together show the Arcis Defendants have followed the policy since April 2016. *Id.*; Dkt. 11, Ex. D. Plaintiffs' insinuation that CF Arcis VII will stop following the policy is pure speculation, contradicted by the documents on which Plaintiffs rely. *See* Opp. 15.

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analysis. *See* Opp. 14-15; *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 744 (1997) (capacity to deceive turns on whether conduct was "directed at the public").[6]

No Substantial Injury That Was Not Reasonably Avoidable. Plaintiffs do not dispute that to satisfy the unfairness test under the CPA, they must allege facts plausibly showing actual monetary loss, not a hypothetical risk of injury. Opp. 12; Mot. 12-13. Plaintiffs allege no such facts. *See* Mot. 12-13; SAC ¶¶ 6.4.2-6.4.3, 7.8. In their opposition, they rely on the 20/20 Plan to argue the Arcis Defendants spent $3 million on the Club that "could have, and should have, been used to pay refunds." Opp. 12. Plaintiffs' assertion is purely speculative; they allege no facts plausibly suggesting the $3 million "in capital improvements" referenced in the 20/20 Plan came from the sale of refundable memberships, as required to trigger a refund, rather than from the Arcis Defendants' own investment capital. *See id.* 6, 12; McEntee Decl., Ex. 1; Dkt. 11, Ex. B ¶ 3.2(b)-(c) & Ex. C ¶ 3.2(b)-(c). Nor do Plaintiffs allege any facts plausibly showing any one of *them* was entitled to a refund by May 2013, or would have received a refund by now but-for the May 2013 amendments. And given Plaintiffs agree the Arcis Defendants are issuing refunds under a policy intended "to move the list faster," McEntee Decl., Ex. 1, Plaintiffs cannot allege facts plausibly showing their own personal refunds will be delayed beyond what would have occurred under the pre-May 2013 Membership Policies.

Plaintiffs also do not dispute they agreed to membership policies that allowed Brightstar to create new classes and categories of membership. Mot. 14. Contrary to Plaintiffs' spin, the Arcis Defendants do not argue "Plaintiffs should have known that the Arcis Defendants would someday breach the parties' contract," Opp. 12; rather, they argue Plaintiffs should have known Brightstar might exercise its contractual right to create a new class or category of membership under its agreement with Plaintiffs—as it did. Mot. 14. If Plaintiffs wished to avoid that risk, Plaintiffs could have chosen not to buy memberships in the Club. *Id.*; *Davis v. HSBC Bank*

[6] *See also Eye Care Ctr. of Snohomish v. Chemat Tech., Inc.*, 2012 WL 12941686, at *2 (W.D. Wash. Dec. 14, 2012) (capacity to deceive turns on whether the conduct was directed at the public); *Segal Co. (E. States), Inc. v. Amazon.com*, 280 F. Supp. 2d 1229, 1233 (W.D. Wash. 2003) (same).

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Nev., N.A., 691 F.3d 1152, 1168 (9th Cir. 2012).[7]

Finally, Plaintiffs' allegations and the documents on which they rely confirm they have received countervailing benefits: the Club has continued to prosper despite an economic downturn, which is necessary for Plaintiffs to have any hope of refunds, and Plaintiffs agree CF Arcis VII has for over two years followed a refund policy that accelerates the pace of refunds. Mot. 14-15; McEntee Decl., Ex. 1. Indeed, Plaintiffs nowhere allege Brightstar was issuing refunds at a faster pace before May 2013, and the fact three of the Plaintiffs had been on the wait list for years by the time of May 2013 confirms Brightstar was not.

3. Plaintiffs Do Not Plausibly Allege a Cognizable CPA Injury.

Plaintiffs do not allege a single fact plausibly suggesting any one of *them* suffered injury to business or property as a result of the May 2013 amendments. Mot. 15-17; SAC ¶¶ 6.7-6.9; Opp. 19-20. Plaintiffs' argument that the Arcis Defendants should have issued $1 million in refunds rests on pure speculation. Opp. 19-20. Plaintiffs do not allege facts plausibly suggesting the $3 million "in capital improvements to the club facilities" stemmed from sales of refundable memberships, as required to trigger any refunds; indeed, their allegations suggest otherwise. *See* SAC ¶ 4.12 (alleging sales of refundable memberships "all but ceased"). Nor does the theoretical figure of $1 million in refunds establish anything as to these four Plaintiffs, none of whom alleges any fact plausibly suggesting he would have received a refund by now under the pre-May 2013 Membership Policies. Courts in Washington routinely reject similar efforts to rely on speculation to allege CPA injury. *See Alvarez v. Target Corp.*, 2013 WL 4734123, at *7 (E.D. Wash. 2013); *Del Vecchio v. Amazon.com, Inc.*, 2011 WL 6325910, at *5 (W.D. Wash. 2011); *Gragg v. Orange Cab Co.*, 942 F. Supp. 2d 1111, 1119 (W.D. Wash. 2013).

Further, Plaintiffs admit that Lewis, Hart, and Presti cannot establish CPA injury based on paragraph 3.2(b)(iii) of the pre-May 2013 Membership Policies, because all three resigned

[7] *Veridian Credit Union v. Eddie Bauer, LLC*, 295 F. Supp. 3d 1140 (W.D. Wash. 2017) (*cited in* Opp. 12) bears no likeness to this case, as the alleged unfair act there turned on Eddie Bauer's internal cyber-security measures, not on any contract between Eddie Bauer and the plaintiffs (issuers of credit cards compromised in a data breach).

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before Brightstar sold the Club to CF Arcis VII. Opp. 20. Nor did Ralls suffer CPA injury: Plaintiffs admit paragraph 3.2(b)(iii) does *not* apply if the "new owner agrees to take title subject to the rights of a Member under the Member's existing Membership agreement," Dkt. 11, Ex. B ¶ 3.2(b)(iii), and they repeatedly admit CF Arcis VII assumed Brightstar's obligations to them, *see* SAC ¶¶ 8.6, 8.10; Opp. 1 & 7 n.2. Plaintiffs' attempt to manufacture a fact issue contradicts their own allegations and assertions, and the Court should disregard it. *See* Opp. 20 n.8; *cf. Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13 (1986) (parties may not rely on "argumentative assertions that unresolved factual issues remain").

B. Plaintiffs Cannot Plead a Claim for Conversion.

Plaintiffs agree that a party claiming conversion must allege the defendant "wrongfully received the money or was under an obligation to return the specific money to the party claiming it." Opp. 21; *see also* Mot. 17-18. Plaintiffs' brief reveals they do not assert a conversion claim on the former theory, leaving only the latter. *See* Opp. 22. But Plaintiffs do not plead facts plausibly showing they have a "property interest" in the $3 million "in capital improvements to the club facilities" so as to give rise to a claim of conversion. *See id.*; SAC ¶ 9.3. Nor could they claim any such interest in that money, having alleged sales of refundable memberships (the type of membership they bought) "all but ceased" after May 2013. SAC ¶ 4.12; Mot. 18-19. Even if the $3 million came from the sales of non-refundable memberships—another piece of pure speculation, *see* McEntee Decl., Ex. 1—Plaintiffs still cannot allege facts plausibly showing that money "once belonged to them," as required to establish a "property interest" in it, because Plaintiffs did not buy non-refundable memberships. *See* Mot. 18-19 (citing *Gremp v. Ramsey*, 2009 WL 112674, at *8 (W.D. Wash. 2009)).

C. Plaintiffs Do Not Allege a Breach of Contract.

The Arcis Defendants showed Brightstar's May 2013 amendments did not change Plaintiffs' refund rights under Sections 3.2(b) and (c) of the pre-May 2013 Membership Policies. *See* Mot. 19-20. Plaintiffs do not argue otherwise, instead asserting the May 2013 amendments "materially and adversely affected Plaintiffs' interests" because "[by] marketing

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Non-Refundable Memberships at half the price of Refundable Memberships, Defendants diverted all sales to Non-Refundable Memberships." Opp. 8. But Plaintiffs do not identify a single provision in the pre-May 2013 Membership Policies prohibiting Brightstar from creating and offering non-refundable memberships. *Id.* at 7-9. Nor could they, since the pre-May 2013 Membership Policies specifically allowed Brightstar "to create additional categories of membership with such eligibility requirements, privileges, and obligations as it deems appropriate." Dkt. 11, Ex. B ¶ 1.1.

This outcome does not render the notice and voting language in Section 6.2 "entirely superfluous," as Plaintiffs argue. Opp. 8. If, for instance, Brightstar had amended Section 3.2(b) of the pre-May 2013 Membership Policies to lower the percentage of the refund from 70% to 40%, Brightstar would have had to provide notice and an opportunity to vote under Section 6.2. In that circumstance, the amendment would "materially adversely affect the rights of any existing Member under Section 3.2(b)" by lowering the amount of the refund to be issued under Section 3.2(b). Dkt. 11, Ex. B ¶ 6.2. But Brightstar made no such amendments to Section 3.2(b), and it retained "the 3-1 ratio" in Section 3.2(c). Dkt. 11, Ex. C ¶ 3.2(c). Plaintiffs' refund rights remained unchanged, so Plaintiffs cannot claim Brightstar (much less the Arcis Defendants, who had no contractual duty to the Plaintiffs in May 2013), breached the pre-May 2013 Membership Policies through the May 2013 amendment process.[8]

Finally, Plaintiffs' brief makes clear Plaintiffs cannot allege facts plausibly showing any of them suffered damages as a result of Brightstar's alleged breaches of the pre-May 2013 Membership Policies. Mot. 20-22 (no plaintiff alleges he was or would have been entitled to a refund but-for the May 2013 amendments); SAC ¶ 8.8; Opp. at 9-10. Plaintiffs' opposition relies solely on the alleged "inference" "that the $3 million stemmed from revenue earned from

[8] Plaintiffs argue the Arcis Defendants breached the pre-May 2013 Membership Policies by not providing notice under the "any amendment" language in Section 6.2. Opp. 7 n.3. But the Arcis Defendants could not breach contractual obligations to which they were not a party. *See* Mot. 20. And Plaintiffs allege no facts plausibly suggesting they suffered damage as a result of a lack of notice of an amendment on which they had no right to vote in any event. *See* Dkt. 11, Ex. B ¶ 6.2 (right to vote exists only where an amendment "materially adversely" affects an "existing" member's rights under Section 3.2(b)); Mot. 20-22.

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the sale of memberships," and an article addressing revenue growth across the entire Arcis portfolio, not just The Club at Snoqualmie. Opp. 9-10. Nothing but speculation supports the notion that the "$3M in capital improvements" mentioned in the 20/20 Plan came from the "sale of memberships," much less the sale of refundable ones. *See Wilkerson v. Wegner*, 58 Wn. App. 404, 409-10 (1990) (no contract claim where damages purely speculative). And revenue generated across the Arcis portfolio is irrelevant; Plaintiffs must show "actual loss sustained by reason of the breach," i.e., by Brightstar's 2013 amendments to this Club's membership policies. *Rathke v. Roberts*, 33 Wn.2d 858, 865 (1949); *see Olander v. Recontrust Corp.*, 2011 WL 841313, at *5 (W.D. Wash. Mar. 7, 2011) (dismissing breach of contract claim because, among other things, plaintiffs failed to "connect the breach to his damages"). Plaintiffs allege no facts plausibly showing *they* suffered damages as a result of the May 2013 amendments, and the Court should dismiss their contract claim. Mot. 20-22.[9]

D. The Court Should Dismiss All Claims Against Mr. Walker.

Plaintiffs admit they cannot pierce the corporate veil to hold Mr. Walker personally liable unless doing so is "is necessary and required to prevent unjustified loss." Opp. 24; *see also Morgan v. Burks*, 93 Wn.2d 580, 587 (1980). Plaintiffs' allegations also admit CF Arcis VII has sufficient assets to satisfy any judgment under any theory—in other words, Plaintiffs' allegations show there are no "other remedies available" that could not be satisfied out of CF Arcis VII's assets. SAC ¶¶ 3.5, 4.12; Opp. 24; *see also* McEntee Decl., Ex. 1 (acknowledging "$3M in capital improvements" by CF Arcis VII). Thus, piercing the veil is *not* "necessary and required to prevent unjustified loss," requiring dismissing all claims against Mr. Walker. *See Morgan*, 93 Wn.2d at 587 (no individual liability because there was "no 'gutting' of corporate assets" to "justif[y] disregard of the corporate entity").

Even if all that were otherwise (and it is not), Plaintiffs still could not pierce the veil because they do not plead a single fact from which the Court could plausibly infer that Mr.

[9] Plaintiffs' allegations seeking equitable relief on behalf of absent class members does not satisfy their burden to plead facts plausibly suggesting they suffered "actual loss" as a result of the alleged breach. Opp. 10. As the Arcis Defendants pointed out, the equitable relief Plaintiffs seek is an order requiring the Arcis Defendants to issue refunds and pay other damages—i.e., they want money. *See* Opp. 10 (citing Recitals B, E); Mot. 21 n.10.

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Walker "intentionally used [the corporate form] to violate or evade a duty." *Meisel v. M&N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410 (1982). Plaintiffs conclude "Mr. Walker intentionally used [Arcis Golf and Arcis Equity[10]] to violate or evade a duty owed to the members," Opp. 23, but that amounts to nothing more than mere labels and conclusions.

Plaintiffs seek to support their bald assertions with more speculation: they ask the Court to infer that Mr. Walker "directed" "collusion" with Brightstar "*before* Arcis purchased the Club" because (a) "he has been involved in all phases of [the Arcis entities'] strategy and development" portfolio-wide, and (b) "*in September 2016*, [he] personally traveled to Washington from Texas to meet with Club members who were angry about the changes the Arcis Defendants made to the refund policy." Opp. 24 (citing SAC ¶ 3.8) (emphasis added). But one cannot plausibly infer that Mr. Walker "directed" "fraud" or "collusion" before May 2013 based on the fact that in September 2016—three years later—he met with Club members about "the refund policy," i.e., the policy that accelerates refunds. And Plaintiffs offer no basis for this Court to assume Mr. Walker "directed" "fraud" merely because he has been involved in managing the Arcis portfolio as a whole. *See* Mot. 24 n.11. The Court need not and should not "accept as true allegations [such as these] that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *opinion amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001).[11]

III. CONCLUSION

For the reasons stated here and in the Arcis Defendants' Motion to Dismiss the SAC, the Court should grant the Motion and should dismiss all claims with prejudice.

[10] Plaintiffs admit CF Arcis VII LLC owns the Club, yet do not and cannot, consistent with Rule 11, allege facts plausibly suggesting Mr. Walker is a member or manager of that LLC. *See* SAC ¶¶ 3.5, 3.8.

[11] This case is unlike *Johnson v. Marriott International, Inc.*, 2017 WL 1957071 (W.D. Wash. 2017). There, defendant Marriott International, Inc.'s wholly-owned subsidiary and insurance agents consistently identified the owner of the hotel at issue as "Marriott." *Id.* at *1. The court found such allegations sufficient to plausibly suggest Marriott International exerted control and dominance over the hotel owner for purposes of the alter ego theory. *See id.* at *4-5. Here, Plaintiffs allege no similar facts as to Mr. Walker, much less facts suggesting that applying the alter ego theory is necessary to avoid a "fraud or wrong upon others," in light of Plaintiffs' admissions as to CF Arcis VII's assets. *See* Mot. 24 n.11 (quoting *Norhawk Invs., Inc. v. Subway Sandwich Shops, Inc.*, 61 Wn. App. 395, 401 (1991)).

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DATED this 12th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 12th day of July, 2018.

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