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

THE ARCIS DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

Noted for Consideration:
Friday, June 8, 2018

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I. INTRODUCTION

Between 1999 and 2007, plaintiffs Lawrence Hart, Clyde Stephen Lewis, James Presti, and Michael Ralls paid substantial membership fees to join a private country club now known as The Club at Snoqualmie Ridge ("Club"). Second Amend. Compl. ("SAC") ¶¶ 3.1-3.4, 4.1 [Dkt. 18]. When they joined, the Club sold only refundable golf memberships. Under the Membership and Operating Policies Plaintiffs accepted ("Membership Policies"), if a member resigned, he went on a waiting list; for every third golf membership sold in the same class, the member at the top of the list would receive a refund of 70% of the then-published fee for refundable golf memberships. In 2007, 2008, and 2010—the height of the economic crisis, in which the private golf club industry suffered[1]—three plaintiffs (Lewis, Presti, and Hart) put their golf memberships on the resigned list, joining more than 100 other Club members waiting for refunds. *See id.* ¶ 5.3 (alleging over 100 persons on waiting list).

In May 2013, defendant Brightstar Golf Snoqualmie LLC, which then owned the Club, invoked a provision in the Policies allowing it to create new membership categories, and created a ***non***-refundable membership category with a lower membership fee. Two months later, in July 2013, Brightstar sold the Club to defendant CF Arcis VII LLC. In August 2013, plaintiff Ralls resigned his membership and joined the other three plaintiffs on the growing waiting list.

In late 2017, Plaintiffs filed this lawsuit, claiming the 2013 creation of a non-refundable category of memberships violated the pre-May 2013 Membership Policies. They allege Defendants breached their contracts by "amending the Rules without providing notice, amending the Rules without the requisite approval of two-thirds of members, and materially adversely affecting Plaintiffs' ... rights to receive a refund." *Id.* ¶ 8.7. After CF Arcis VII, CF Arcis IV Holdings, LLC, Arcis Equity Partners, LLC, and Blake Walker (collectively, the "Arcis Defendants") moved to dismiss, Plaintiffs filed a Second Amended Complaint, which revised their Consumer Protection Act and breach of contract claims, and replaced their unjust

[1] *See* Bill Pennington, *Golf Clubs Feel Pinch of Economy*, N.Y. Times, Mar. 17, 2009, http://www.nytimes.com/2009/03/18/sports/golf/18golf.html (last visited May 4, 2018).

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enrichment claim with one for conversion. But Plaintiffs' amendments do not save their claims, and the Court should dismiss with prejudice, for these reasons:

First, Plaintiffs have no CPA claim because this is fundamentally a private contract dispute between Plaintiffs and their country club. The allegedly unfair and deceptive conduct at issue was directed not at the public, but at a limited group: members of the Club as of May 2013. As a result, Plaintiffs cannot allege any public interest impact. Plaintiffs also do not allege deceptive or unfair acts or practices, or any resulting injury to business or property.

Second, Plaintiffs cannot state a conversion claim because they cannot plead facts showing the Arcis Defendants wrongfully received membership fees from them. And Plaintiffs do not have a cognizable property interest in the non-refundable membership fees others paid.

Third, Plaintiffs cannot state a breach of contract claim because they have not properly alleged a breach or any facts plausibly showing they suffered injury by any hypothetical breach. Plaintiffs agreed to Membership Policies that gave the Club's owner the unqualified right to add new membership categories, which is what Brightstar did. In addition, Plaintiffs' allegations show the market for refundable memberships (on which their refunds depended) dried up long before the May 2013 Membership Policies. They allege no facts plausibly suggesting they will receive refunds any later as a result of the 2013 changes, which allowed the Club to attract new members and stay open. And Plaintiffs have acknowledged that the current owner of the Club has adopted new "refund policies" that benefit them by no longer tying refunds to refundable membership sales. *Id.* ¶¶ 4.19, 4.21; *see also* Dkt. 11, Ex. D.[2]

[2] On a motion under Fed. R. Civ. P. 12(b)(6), the Court may consider documents on which the Complaint relies but does not attach. *Lake v. Premier Fin. Servs., Inc.*, 2017 WL 2538007, at *2 (W.D. Wash. June 12, 2017) (citation omitted). Here, the Court may consider include the membership agreement, the pre-May 2013 and May 2013 Membership Policies, and the "refund policies." *See* SAC ¶¶ 4.3, 8.3 (membership agreements), ¶¶ 4.7-4.15 (relying on pre-May 2013 rules and changes in May 2013 amendments), ¶¶ 4.19, 4.21 (referring to "refund policies," as opposed to "Rules"). The Arcis Defendants attached these documents to the Francis Declaration in Support of the first Motion to Dismiss, cited through this Motion by reference to the docket number. [Dkt. 11.] With their Second Amended Complaint (but not their two prior ones), Plaintiffs attach a version of the same May 2013 Membership Policies, except theirs says "CF ARCIS VII LLC … owns" the Club, not Brightstar. *Compare* Francis Decl., Ex. C, *with* SAC ¶ 4.8, Ex. A. As Plaintiffs admit, however, the Arcis Defendants did not own the Club until late July 2013. SAC ¶¶ 3.9, 4.4, 4.8. Plaintiffs submit their Exhibit A solely to suggest the Arcis Defendants "colluded with Brightstar" in amending the Policies in May 2013. SAC ¶ 4.8. While the Arcis Defendants dispute that assertion, the Court need not resolve any disputes over authenticity here because the parties do not dispute the substance of the May 2013 Membership Policies, which is all that matters on this Motion, and both versions of the May 2013 Policies are substantively the same. As a result, throughout this Motion the Arcis Defendants cite Exhibit C to the Francis Declaration when referring to the May 2013 Policies.

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Fourth, the Court should dismiss all claims against Blake Walker. Plaintiffs base their claims on membership contracts to which he was never a party in his personal capacity. Plaintiffs cannot allege facts plausibly supporting piercing the corporate veil.

II. STATEMENT OF RELEVANT FACTS

A. The Club and the Pre-May 2013 Membership and Operating Policies.

The Club at Snoqualmie Ridge "is a membership-only," non-equity golf and country club in Snoqualmie, Washington, which is "[h]ome to the only Jack Nicklaus Signature Course in Washington." SAC ¶ 4.1; *see also* Dkt. 11, Ex. B (2008 Membership Policies ¶ 6.4) & Ex. C (May 2013 Membership Policies ¶ 6.4).[3] "From 2008 through approximately July 2013, Defendant Brightstar owned and operated the Club." SAC ¶ 3.9.

Before May 2013, the Club offered only refundable memberships, which conferred a license to use the Club's facilities and golf course. *Id.* ¶ 4.2; Dkt. 11, Ex. B ¶¶ 1.1, 3.2, 6.4. To buy a golf membership, applicants executed a membership agreement and "agree[d] to abide by … the Club's Membership and Operating Policies," which were incorporated into the agreement. SAC ¶ 4.3; *see also id.* ¶ 8.3; Dkt. 11, Ex. A (Recitals). In addition, new members paid a "large, one-time membership fee in the tens of thousands of dollars," and agreed to pay monthly dues and any other fees or charges incurred. SAC ¶ 4.2; Dkt. 11, Ex. B ¶ 2.2.

When they accepted the Membership Policies, Plaintiffs agreed those Policies were "subject to change from time to time in [Brightstar's] sole discretion." Dkt. 11, Ex. B (Intro.). Plaintiffs ***specifically*** acknowledged Brightstar's right to add other membership categories:

> [Brightstar] reserves the right from time to time to change the classes and categories of membership offered, to discontinue offering any class or category of membership, and to ***create additional categories of membership*** with such eligibility requirements, privileges, and obligations as it deems appropriate.

Id. ¶ 1.1 (emphasis added). Members also agreed their membership fees bought them only a "license to use ... the Club Facilities," and "[n]o Member shall have any ownership or proprietary interest, beneficial interest, or any other vested interest whatsoever in the Club,

[3] Plaintiffs refer to the Membership and Operating Policies as the "Membership Rules." SAC ¶ 4.3. Because the Club has separate Club Rules governing issues such as tee times, *see* Dkt. 11, Ex. B at 1, this Motion refers to the "Membership Policies," not the Membership Rules.

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[Brightstar], or any of the assets of [Brightstar]." *Id.* ¶ 6.4; *see also* Dkt. 11, Ex. A ¶ 5 & p. 3 (acknowledgment). Thus, "[n]o Member shall have any right to vote on or approve any matter relating to management or operation of the Club except as specifically provided in these" Policies. Dkt. 11, Ex. B ¶ 6.4.

The pre-May 2013 Membership Policies established the process for membership fee refunds. Upon written notice of resignation, the resigned member went on a waiting list. Dkt. 11, Ex. B ¶ 3.2(a) & (c); *see also* SAC ¶ 4.9. A three-to-one ratio applied to the waiting list: for every three memberships sold in a membership category, one resigned member on the waiting list "in such category" would receive a refund. *Id.* The refund amount would be 70% of the published fee for that membership category at the time of the refund. Dkt. 11, Ex. B ¶ 3.2(b)(i); SAC ¶ 4.7. Thus, if the published refundable membership fee was $39,000, a resigned member would be entitled to a refund of $27,300 (i.e., 0.7 x $39,000) once the Club sold refundable memberships totaling $117,000 (i.e., $39,000 x 3). Members also could receive refunds without going on the waiting list if Brightstar sold the Club without the new owner assuming obligations to the members:

> [I]n the event of a sale or other transfer of the Club Facilities, unless the new owner agrees to take title subject to the rights of a Member under the Member's existing Membership Agreement, the Member may voluntarily resign his or her membership by written notice to the owner within 60 days after such transfer of title and, upon such resignation, the Member shall be entitled to receive … a refund of 100% of the Membership Fee actually paid by the Member….

Dkt. 11, Ex. B ¶ 3.2(b)(iii); *see also* SAC ¶ 4.17.[4]

B. The May 2013 Amendments to the Membership Policies.

In May 2013, while Brightstar still owned the Club, it amended the Membership Policies. Dkt. 11, Ex. C (May 2013 Membership Policies); *see also* SAC ¶¶ 3.9, 4.4 (alleging Brightstar "owned and operated the Club through July 2013").

The Complaint shows that by May 2013, refundable memberships were no longer marketable. *See* SAC ¶¶ 3.1-3.4 (admitting by May 2013, the three plaintiffs who had resigned

[4] The Policies provided that once the Club reached 420 members, it would refund one resigned member in a category for every new refundable membership sold in that category. *See* Dkt. 11, Ex. B ¶ 1.2. As the SAC makes clear, the Club has never reached that threshold, making that right hypothetical as of this writing.

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in 2007, 2008, and 2010 still had not received refunds, despite being on the waiting list for years). Rather than allow the Club to stagnate, Brightstar exercised its express right to amend the Policies "to create additional categories of membership with such eligibility requirements, privileges, and obligations as it deems appropriate." Dkt. 11, Ex. B ¶ 1.1. In particular, it amended the Policies to allow a new non-refundable membership category, with a lower but non-refundable membership fee. *See id.*, Ex. C ¶ 1.1(a)[(v)] ("Non-Refundable and Non-Transferable Membership"); *see also* SAC ¶ 4.10. Brightstar also continued to offer refundable memberships, as the Club does today. *See* Dkt. 11, Ex. C ¶ 3.2(b); *see also* SAC ¶ 4.10 (admitting the Club has marketed both types of memberships since May 2013).

The May 2013 Membership Policies, like the earlier ones, allowed members to "voluntarily resign" by written notice, required Brightstar (still the owner and Club operator, SAC ¶ 4.4) to place resigned members on waiting lists "by category of membership," and maintained the "3-1 ratio" for refunds. Dkt. 11, Ex. C ¶ 3.1(a) & 3.2(c); *compare* SAC ¶ 4.9. As before, the May 2013 Membership Policies established the refund amount as 70% of the then-published fee for a membership category, and allowed for 100% refunds upon resignation after the sale of the Club to a new owner who did not take title "subject to the rights of a Member" under the Membership Agreement. Dkt. 11, Ex. C ¶ 3.2(b).

C. CF Arcis VII's Acquisition of the Club and Voluntary Refund Policy.

Brightstar sold the Club to CF Arcis VII in July 2013. SAC ¶ 4.4. Plaintiffs allege CF Arcis VII "assumed the obligations of Defendant Brightstar to comply with the Rules with respect to the resigned members on the Waiting List who purchased Refundable Memberships." SAC ¶ 8.6 ("Arcis Golf has acknowledged this duty in written communications.") & ¶ 8.10 (Arcis Defendants "assumed the obligations of Brightstar with respect to Club members"). Since the sale, the Club has remained open, has offered refundable and non-refundable memberships, and has sold memberships. *See id.* ¶¶ 4.2, 4.10, 4.12.

Plaintiffs admit CF Arcis VII has "negotiated and explained [refund policies] to members." *Id.* ¶ 4.19. In October 2016, CF Arcis VII adopted the First Amended and Restated

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Voluntary Refund Policy. Under it, the resigned member at the top of the list will receive a refund when "the total Membership Fees received" from the sales of refundable ***and*** non-refundable memberships in the resigned member's class (i.e., individual/family golf memberships) after April 1, 2016, equals "300% of the refund amount due to the resigned Member at the top of the applicable List." Dkt. 11, Ex. D. Put another way, if refundable golf memberships are offered for $39,000, a resigned member would be entitled to a refund of $27,300 (i.e., 0.7 x $39,000), payable once the Club receives $81,900 (i.e., $27,300 x 3) from refundable and non-refundable membership sales—rather than the $117,000 in refundable membership sales required for a refund under the pre-May 2013 Membership Policies.[5]

D. Plaintiffs' Memberships, Claims, and Second Amended Complaint.

Despite CF Arcis VII's efforts to accelerate refunds through the Voluntary Refund Policy, Plaintiffs filed this lawsuit, seeking to force immediate refunds of the fees they paid the former Club owners years ago. *See, e.g.*, SAC ¶¶ 4.17, 6.9, 9.4. All four allege they "paid substantial consideration" to join the Club, resigned, and remain on the Club's waiting list, despite having resigned as much as a decade ago:

- Mr. Lewis alleges he joined the Club "[b]efore the golf course opened in 1999," and resigned his membership in 2007. *Id.* ¶ 3.1.
- Mr. Presti alleges he joined the Club "[o]n or about June 30, 2000," and resigned his membership in 2008. *Id.* ¶ 3.2.
- Mr. Hart alleges he joined the Club "[o]n or about July 31, 2007," and resigned his membership in 2010. *Id.* ¶ 3.3.
- Mr. Ralls alleges he joined the Club "[o]n or about July 15, 2003," and resigned his

[5] The Court may consider these Voluntary Refund Policies on this Motion. Plaintiffs allege that CF Arcis VII "negotiated and explained to members" its new "refund policies." SAC ¶¶ 4.19, 4.20. Plaintiffs' SAC therefore refers to the new Voluntary Refund Policy. *See id.* ¶¶ 4.4, 4.8. In any event, the Court may consider the Voluntary Refund Policy based on the allegations in the First Amended Complaint, which admitted that CF Arcis VII has adopted "new refund policies." First Amend. Compl. ("FAC") ¶ 6.8; *McKenna v. WhisperText*, 2015 WL 5264750, at *3 (N.D. Cal. Sept. 9, 2015). The Court should disregard Plaintiffs' efforts to use artful pleading to avoid the Voluntary Refund Policy. *See McKenna*, 2015 WL 5264750, at *3 (relying on "previous allegations" where plaintiff amended but "neither deni[ed] nor contradict[ed] [his] earlier allegations"); *Rodriguez v. Sony Computer Entm't Am., LLC*, 801 F.3d 1045, 1054 (9th Cir. 2015) (disregarding artful amendments").

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membership "[i]n August 2013," after Brightstar sold the Club. *Id.* ¶¶ 3.4, 3.9. Plaintiffs' claims revolve around Brightstar's May 2013 amendments to the Membership Policies creating a new category of non-refundable memberships. *Id.* ¶¶ 4.8-4.10. Plaintiffs allege these amendments made "the refundability of their memberships illusory, unreasonably delaying the time it would otherwise take to receive a refund." *Id.* ¶ 6.7. According to them, Brightstar had no right to amend the Policies in a way they claim "materially adversely affect[s] the rights of any existing Member under Section 3.2(b) unless approved by at least two-thirds of the affected Members." Dkt. 11, Ex. B ¶ 6.2; *see also* SAC ¶¶ 4.13-4.15.

In their First Amended Complaint, Plaintiffs relied on these allegations to assert against all defendants (not just Brightstar) claims for CPA violations, breach of contract, and unjust enrichment, both individually and on behalf of a proposed class of "[a]ll persons who are on the Waiting List to receive refunds for their Refundable Golf Memberships with the Club[.]" FAC ¶¶ 5.1, 6.1-8.3. After the Arcis Defendants moved to dismiss, Plaintiffs filed the SAC, attempting to plead around the motion to dismiss and replacing their unjust enrichment claim with one for conversion. Plaintiffs' amendments do not save their claims.

III. ARGUMENT

Rule 12 exists to weed out undeserving complaints ***before*** parties engage in expensive discovery, particularly in class actions likely to generate significant discovery costs. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to a presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court need not accept conclusory legal allegations, *Twombly*, 550 U.S. at 570, or allegations "contradicted by documents referred to in the complaint," *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

A. Plaintiffs Cannot Plead a CPA Claim.

To state a CPA claim, Plaintiffs must sufficiently allege five elements: (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) impact to the public interest, (4) injury

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to Plaintiffs' business or property, and (5) the unfair or deceptive act or practice caused the injury to business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Failure to establish any one element is fatal. *Id.* at 793.

1. Plaintiffs Cannot Allege Public Interest Impact.

"[T]o fulfill the purpose of the CPA to 'protect the public and foster fair and honest competition,' even a private plaintiff must show that his lawsuit would serve the public interest by addressing acts or practices that are injurious to the public." *Shugart v. GYPSY Official No. 251715*, 2015 WL 1965375, at *3 (W.D. Wash. May 1, 2015) (quoting RCW 19.86.920) (citing *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 605 (2009)). Plaintiffs assert a CPA claim based solely on an alleged breach of the Club's Membership Policies. But "[t]he relationship between a social club and its members is one of contract." *Garvey v. Seattle Tennis Club*, 60 Wn. App. 930, 933 (1991); *see also Spokoiny v. Wash. State Youth Soccer Ass'n*, 128 Wn. App. 794, 801 (2005) (same). Courts do not intervene in a club's relationship with its members, except "to determine whether the club has violated it[s] own rules"—i.e., whether it breached the contract. *Garvey*, 60 Wn. App. at 933-34.

"Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest." *Hangman Ridge*, 105 Wn.2d at 790. This is so because "[o]ften a breach of private contract affects only the parties to the contract and therefore does not qualify as an act or practice that affects the public interest." *Kazia Digo, Inc. v. Smart Circle Int'l, LLC*, 2012 WL 836233, at *3 (W.D. Wash. Mar. 12, 2012). As a result, in these circumstances, "it may be difficult to show a public interest in the subject matter." *Shugart*, 2015 WL 1965375, at *3 (citing *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 744 (1997)).

Thus, when (as here) "a case involves primarily a private dispute, the court evaluates four factors to determine whether the claim has a public interest impact:

> (1) whether the alleged acts were committed in the course of defendant's business; (2) whether the defendant advertised to the public in general; (3) whether the defendant actively solicited this particular plaintiff, indicating

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> potential solicitation of others; (4) whether the plaintiff and defendant have unequal bargaining positions.

Eye Care Ctr. of Snohomish v. Chemat Tech., Inc., 2012 WL 12941686, at *3 (W.D. Wash. Dec. 14, 2012) (quoting *Michael*, 165 Wn.2d at 605). "None of these elements alone are dispositive; rather, they help indicate the extent to which a private transaction may [or may not] affect the public interest." *Segal Co. v. Amazon.com*, 280 F. Supp. 2d 1229, 1234 (W.D. Wash. 2003). "[C]onduct that is not directed at the public … lacks the capacity to impact the public in general." *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 261 (2012) (no CPA claim because plaintiff failed to show public interest impact).

Plaintiffs allege no facts establishing public interest impact. Rather, they simply declare that "Defendants' deceptive acts or practices have impacted the public interest because they have injured Plaintiffs and dozens of other persons," i.e., other Club members. SAC ¶ 6.6; *see also id.* ¶ 7.7 (same). Such "[t]hreadbare recitals of the elements of [the] cause of action" do not suffice. *Iqbal*, 556 U.S. at 678; *see also Accretive Tech. Grp., Inc. v. Adobe Sys., Inc.*, 2015 WL 4920079, at *11 (W.D. Wash. Aug. 17, 2015) (dismissing CPA claim for lack of public interest impact where plaintiff's allegations amounted to "mere labels and conclusions").

Nor could Plaintiffs allege facts establishing public interest impact. They base their CPA claim on a single alleged breach of the contracts between Brightstar (which has not owned the Club since 2013) and a limited group of members who joined the Club before May 2013. Indeed, the only "facts" Plaintiffs plead to support the public interest impact element of their CPA claims are alleged breaches of procedural rules. *See* SAC ¶¶ 6.6 & 7.7 (alleging "Defendants deceived Plaintiffs and the Class [resigned members of the Club] into believing they would abide by the Rules requiring them to give members notice and an opportunity to veto" a decision to create a class of non-refundable memberships). Washington courts consistently find public interest impact lacking where, as here, the underlying conduct giving rise to the claims arose from the parties' contractual relationship, not from conduct directed to the public generally. *See, e.g., Jet Parts Eng'g, Inc. v. Quest Aviation Supply, Inc.*, 2015 WL 4523497, at *4 (W.D. Wash. July 27, 2015) (no public interest impact where "[t]he

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circumstances alleged [in the complaint] fail to indicate that Defendants' conduct extended in any way beyond the two parties to the Distribution Agreements"); *Segal*, 280 F. Supp. 2d at 1233 (dismissing CPA claim under Rule 12(b)(6) for lack of public interest impact because plaintiff's allegations arose from the parties' contractual relationship).

Hoping to manufacture public interest impact, Plaintiffs allege "Brightstar advertised Refundable Memberships on its public website and included the Refundable Memberships in its form contracts." SAC ¶ 4.5; *see also id.* ¶ 3.9 (substantially same). But Plaintiffs plead no similar facts as to the Arcis Defendants, rendering these allegations irrelevant for the claims against them. *See id.* ¶¶ 3.9, 4.5, 6.4.1. Indeed, Plaintiffs admit they joined the Club ***years*** before CF Arcis VII acquired it (more than 14 years for Mr. Lewis, 13 years for Mr. Presti, 10 years for Mr. Ralls, and 6 years for Mr. Hart, *see id.* ¶¶ 3.1-3.4, 4.4), defeating any notion the Arcis Defendants "solicited [these] particular [plaintiffs]." *Michael*, 165 Wn.2d at 605 (no public interest impact where, *inter alia*, plaintiff failed to show defendant "actively solicited [him] in particular"); *Eye Care Ctr.*, 2012 WL 12941686, at *3 (same).

Plaintiffs' allegations also miss the point. The issue is not whether Brightstar (much less the Arcis Defendants) advertised refundable memberships or used form contracts to sell them, but whether the allegedly deceptive conduct itself implicated any "advertise[ment] to the public in general." *Eye Care Ctr.*, 2012 WL 12941686, at *3. The allegations of deception and unfairness relate entirely to the May 2013 amendments to the Policies, *see* SAC ¶¶ 6.4.1-6.4.4, 7.4.1-7.4.4; Plaintiffs assert those allegedly deceptive and unfair amendments occurred in "secret," *id.* ¶¶ 4.17, 6.9, not through public advertising. *See Eye Care Ctr.*, 2012 WL 12941686, at *3 (relevant advertising was advertising regarding same machinery at issue in case, not unrelated advertising); *Segal*, 280 F. Supp. 2d at 1233 (no public interest impact where "Plaintiffs never assert that defendant contacted members of the general public"; mere fact "defendant may have engaged in additional commercial dealings" insufficient). Plaintiffs' inability to allege facts satisfying two of the public interest factors (advertising the challenged conduct to the public in general and actively soliciting these Plaintiffs) warrants dismissing

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their CPA claim. *See Michael*, 165 Wn.2d at 605 (plaintiff who could not satisfy two of the four public interest impact factors "failed to show her lawsuit would serve the public interest").

"The purpose of the CPA is not to create an 'additional remedy' for 'private wrongs' that have no impact on the general public." *Eye Care Ctr.*, 2012 WL 12941686 at *3 (quoting *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333 (1976)). CPA claims typically involve a business repeatedly using an unfair or deceptive practice in its business with the public, such as a cable company charging hidden fees to customers. *See, e.g., Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 75-76 (2007). By contrast, the challenged conduct here was a discrete event affecting only those who already were Club members at a fixed point in time; it "was not directed at the public" and could not affect, much less injure, anyone not already a Club member. *See Goodyear*, 86 Wn. App. at 744 (no public interest impact where conduct directed at tire company's dealers, not "the public" at large); *Segal*, 280 F. Supp. 2d at 1234 (refusing "to infer an entire pattern of deceptive solicitation affecting the public interest from [an] isolated incident"; dismissing CPA claim under Rule 12(b)(6)). At bottom, this case is about the process Brightstar followed when it amended Plaintiffs' Membership Policies in May 2013, and whether that process breached those rules as to a fixed, identifiable group of Club members. That alleges a breach of a private contract, not a CPA claim.

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

Plaintiffs assert one claim for deceptive acts and practices, SAC ¶ 6.4, and another for unfairness without deception, *id.* ¶ 7.5. The Court may decide whether an act or practice is unfair or deceptive as a matter of law. *Indoor Billboard*, 162 Wn.2d at 74. Both Plaintiffs' claims fail on their face.

a. Plaintiffs Cannot Allege a Deceptive Act.

To assert a claim for deceptive acts or practices under the CPA, Plaintiffs must allege a deceptive act or practice that "has the capacity to deceive substantial portions of the public." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013). Plaintiffs identify four alleged deceptive acts or practices, none of which meets this test. SAC ¶¶ 6.4.1.-6.4.4.

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Plaintiffs' first alleged deceptive act (¶ 6.4.1) revolves around alleged deception in advertising and form contracts at the time they joined. But Plaintiffs joined the Club between 2000 and 2010, years ***before*** the Arcis Defendants acquired the Club in the last half of 2013. The Arcis Defendants could not be liable for advertising years before they were on the scene.

Plaintiffs' second and third deceptive acts (¶¶ 6.4.2, 6.4.3) center on the allegedly improper amendment of the pre-May 2013 Membership policies. But Plaintiffs cannot allege facts plausibly showing those amendments—or the process by which they came about—had the capacity to deceive substantial portions of the public. Instead, those amendments could affect ***only*** those who were members of the Club in May 2013. *See* SAC ¶ 4.10 (admitting Club has marketed both refundable and non-refundable memberships since May 2013). Conduct directed only to a limited group lacks the capacity to deceive a substantial portion of the public. *See, e.g.*, *Goodyear*, 86 Wn. App. at 744 (misrepresentations to tire company's dealers about market and profits lacked capacity to deceive substantial portion of the public; statements not "directed at the public"); *Eye Care Ctr.*, 2012 WL 12941686, at *2 (no deceptive conduct because "[d]efendant's alleged false statements are targeted at and have the capacity to deceive small optical labs, not the public"); *Segal*, 280 F. Supp. 2d at 1233 (no deceptive conduct where complaint suggested defendant's conduct limited to "parties to the alleged contract").

Plaintiffs' fourth deceptive act (¶ 6.4.4) suggests the May 2013 amendments changed the refund ratio from three-to-one to four-to-one. But the document itself refutes the allegation: far from changing the refund ratio, the May 2013 Membership Policies repeatedly refer to "the 3-1 ratio" for refunds. Dkt. 11, Ex. C ¶ 3.2(c). *See Steckman*, 143 F.3d at 1295-96 (court properly rejects allegations "contradicted by documents referred to in the complaint").

b. Plaintiffs Cannot Allege an Unfair Act.

To assert a claim for unfairness without deception, Plaintiffs must allege a practice that "'causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits." *Klem*, 176 Wn.2d

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at 787; *see also Geier v. M-Qube, Inc.*, 2016 WL 3458345, at *3 (W.D. Wash. June 24, 2016).[6] Plaintiffs base this claim on the exact same four alleged practices as their deception claim. *See* SAC ¶¶ 7.4.1-7.4.4. Plaintiffs' first and fourth alleged unfair practices fail for the reasons discussed above: the first ("[s]elling Refundable Memberships and then amending the rules for obtaining refunds in 2013 without notice") fails to identify an unfair act by the Arcis Defendants, who have ***always*** offered both refundable and non-refundable memberships, *see id.* ¶¶ 7.4.1, 4.10; and the fourth rests on a faulty reading of the May 2013 Membership Policies, which retained the pre-May 2013 "3-1 ratio," *see id.* ¶ 7.4.4; Dkt. 11, Ex. C ¶ 3.2(c). Plaintiffs' remaining two alleged unfair practices, both of which arise out of the process Brightstar followed in amending the Membership Policies, also fail:

First, the Arcis Defendants cannot be liable for an unfair act as a result of the process followed to amend the Policies in May 2013. Brightstar, not the Arcis Defendants, owned the Club in May 2013; only Brightstar was bound by policies prescribing the amendment process.

Second, Plaintiffs have not alleged facts plausibly showing they suffered "substantial injury" from the procedure Brightstar followed in amending the policies. An allegedly unfair act that raises only a speculative, hypothetical risk of loss does not inflict "substantial injury," especially where, as here, the plaintiff fails to allege facts showing actual monetary loss. *See, e.g.*, *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 839 (2006) (applying FTC test; affirming dismissal of claim for lack of substantial injury where alleged unfair act or practice "might, or might not" cause injury); *FTC v. D-Link Sys., Inc.*, 2017 WL 4150873, at *5 (N.D. Cal. Sept. 19, 2017) (granting motion to dismiss unfair practices claim in data security case for lack of substantial injury because "[t]he FTC does not allege any actual consumer injury in the form of a monetary loss or an actual" compromised data). Here, Plaintiffs simply recite this element of their claim, asserting they "suffered injury in fact and lost money," SAC

[6] A plaintiff may plead an unfair practice claim under the CPA by alleging a per se unfair act or practice or an act or practice that violates the public interest. *Klem*, 176 Wn.2d at 787. Plaintiffs do not allege a per se unfair act or practice, because they do not allege a violation of any statute containing a legislative declaration of public interest impact, as required to establish a per se unfair act. *Hangman Ridge*, 105 Wn.2d at 786. Plaintiffs also cannot satisfy the public interest test, as explained above. *See Klem*, 176 Wn.2d at 804 (Madsen, J., concurring).

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¶ 7.8, which is not enough, *Iqbal*, 556 U.S. at 678. No Plaintiff has alleged facts showing monetary loss or a significant risk of loss as a result of conduct alleged in ¶¶ 6.4.2 and 6.4.3.

Third, even if Plaintiffs allege a cognizable substantial injury (and they do not), they must also allege facts showing their injury was "not reasonably avoidable." "An injury is reasonably avoidable if [among other things] consumers 'have reason to anticipate the impending harm and the means to avoid it.'" *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012). In *Davis*, the Ninth Circuit held a plaintiff's claimed injury of being charged an annual fee for a credit card was "certainly avoidable" because the plaintiff had notice that other terms applied and an opportunity to review those terms before assenting to them. *Id.* at 1169 (plaintiff's "injury was certainly avoidable before he completed the application for the [rewards card]"; affirming dismissal under Rule 12(b)(6)).

Here, as in *Davis*, Plaintiffs agreed to Membership Policies before paying membership fees, and those Policies told them that: (a) the Club could "create additional categories of memberships with such eligibility requirements, privileges, and obligations as it deems appropriate," Dkt. 11, Ex. B, ¶ 1.1; (b) the Club controlled the amount of any member's refund, since refunds would be based on the price at which the Club chose to offer memberships in the same category as theirs, *id.* ¶ 3.2(b); and (c) their membership fees bought them only a "license to use … the Club Facilities," not a guaranteed return, *id.*, Exs. A & B ¶ 6.4. If Plaintiffs wanted a guaranteed refund of a given amount, as they now claim, they had the "means to avoid" the alleged harm by not signing the membership agreement, not accepting the Membership Policies, not paying the membership fees to join the Club, and going elsewhere.

Fourth, the May 2013 amended Policies provided countervailing benefits to Plaintiffs. The Complaint shows that by May 2013, Brightstar had not sold enough refundable memberships to refund the three Plaintiffs who had been on the waiting list for years, or the 100+ people whom Plaintiffs allege were also on the list. In short, according to Plaintiffs, the Club had stagnated. Plaintiffs admit that since the 2013 amendments, the Club has sold memberships and prospered. The SAC itself therefore shows Plaintiffs benefitted from the

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May 2013 amendments, because those amendments allowed the Club to attract new members and remain viable, keeping alive the Plaintiffs' ability to obtain a refund—especially now that CF Arcis VII has adopted a process for accelerated refunds. SAC ¶¶ 4.19, 4.21; Dkt. 11, Ex. D. *See Gertz v. Toyota Motor Corp.*, 2011 WL 13142144, at *7 (C.D. Cal. Apr. 28, 2011) (inferring from plaintiffs' allegations that the alleged unfair practice "benefitted" plaintiffs).

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

"Only a person 'injured in his business or property *by*" the unfair or deceptive act or practice "may bring a private action" under the CPA. *Hangman Ridge*, 105 Wn.2d at 792-93 (emphasis in original). "A causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff." *Id.* at 793. This means Plaintiffs must allege facts showing that "but for the defendant's unfair or deceptive practice, [they] would not have suffered an injury." *Indoor/Billboard*, 162 Wn.2d at 84. Here, Plaintiffs allege four CPA "injuries" but cannot allege facts showing those purported injuries resulted from the procedure followed to adopt the May 2013 Membership Policies—the only deceptive or unfair act or practice alleged.

Plaintiffs vaguely allege "Defendants' conduct rendered the refundability of the memberships illusory, unreasonably delaying the time it would otherwise take to receive a refund." SAC ¶ 6.7. But Plaintiffs also allege no facts giving rise to a plausible claim that their eventual refunds—whenever they come—will have been delayed as a result of the allegedly improper procedure used to adopt the May 2013 Membership Policies. As Plaintiffs make clear, the Club by May 2013 had a backlog of over 100 members awaiting refunds—indicating sufficient memberships could not be sold to give rise to refunds. *See* SAC ¶¶ 3.1-3.3, 4.10. And no Plaintiff alleges facts suggesting that he ***ever*** would receive a refund absent amendments to the Membership Policies allowing for the sale of non-refundable memberships. In these circumstances, Plaintiffs cannot allege facts giving rise to a plausible inference that the allegedly flawed process Brightstar used to adopt the May 2013 Membership Policies will make Plaintiffs receive a refund one day later than they otherwise would, i.e., they cannot allege injury to their business or property. *See, e.g., Tashiro-Townley v. Bank of N.Y. Mellon*,

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2016 WL 3551810, at *3 (W.D. Wash. June 30, 2016) (dismissing CPA claim where "Plaintiffs *do not* plead sufficient facts to establish causation between Defendants' unfair and deceptive acts and their injury").[7]

Unable to allege facts showing injury based on the speculative timing of their future refund, Plaintiffs imply (but do not directly allege) they were deceived when they bought their memberships in 1999, 2000, 2003, and 2007: they allege they "would not have purchased Refundable Memberships had they known Defendants would render their memberships valueless, e.g. refundable in name only." SAC ¶ 6.8. But any deception in the sale of their memberships had to occur, if at all, many years before the Arcis Defendants bought the Club. Further, "one who becomes a member of an association is deemed to have known and assented to its" governing documents. *Spokoiny*, 128 Wn. App. at 801. Again, Plaintiffs agreed the Club owner had discretion to create new membership categories and set the price of refundable memberships (and thus determine the refund amount), and that their membership fees were not investments. Dkt. 11, Ex. B ¶¶ 1.1, 3.2, 6.4; *see also id.*, Ex. A (same). Simply put, Plaintiffs were not deceived as to the Club's ability to control refund amounts and timing.

Plaintiffs also cite the provision in the pre-May 2013 Membership Policies allowing for 100% refunds upon the sale of the Club, claiming "Defendants' secret revision of the Rules foreclosed Plaintiffs' … ability" to invoke this provision. SAC ¶ 6.9. But the SAC makes clear that Plaintiffs could not have invoked this provision. The 100% refund provision applies only to a member who "voluntarily resign[s] his or her membership by written notice to the new owner within 60 days ***after*** such transfer of title." Dkt. 11, Ex. B ¶ 3.2(b)(iii) (emphasis added). Plaintiffs Lewis, Presti, and Hart all resigned years ***before*** Brightstar transferred title to CF Arcis VII, making them ineligible for this remedy. *See* SAC ¶¶ 3.1-3.3; Dkt. 11, Ex. B ¶ 3.2(b)(iii). Further, as Plaintiffs allege, CF Arcis VII "assumed the obligations of Defendant Brightstar … with respect to the resigned members on the Waiting List who purchased

[7] And again, Plaintiffs admit CF Arcis VII has adopted "refund policies," which will accelerate the timing of future refunds, including to Plaintiffs. SAC ¶¶ 4.19, 4.21; Dkt. 11, Ex. D.

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Refundable Memberships," SAC ¶ 8.6; *see also id.* ¶ 8.10, making the 100% refund provision inapplicable as to all Plaintiffs, Dkt. 11, Ex. B ¶ 3.2(b)(iii).[8]

Finally, Plaintiffs strain to allege injury by pleading that "Defendants' conduct created uncertainty and confusion, forcing [them] … to expend time and resources investigating Defendants' Revised Rules and the status of their own refunds." SAC ¶ 6.10. But Plaintiffs allege no facts plausibly suggesting they "actually suffered any investigation expenses beyond the expenses of litigating" their CPA, contract, and tort claims. *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 65 (2009). By May 2013, three Plaintiffs had been waiting years for refunds; later in 2013, the fourth joined a waiting list over 100 members long. None of this can be blamed on the Arcis Defendants, who did not own the Club until late July 2013. No fact alleged in the SAC suggests that implementing the May 2013 Membership Policies—the act alleged to violate the CPA—caused Plaintiffs to investigate their refund "status." Rather, the allegations give rise to one plausible inference: Plaintiffs investigated because their wait was long and the queue was getting longer. *Panag*, 166 Wn.2d at 64 ("If the investigative expense would have been incurred regardless of whether a violation existed, causation cannot be established.").

B. Plaintiffs Cannot Plead a Conversion Claim.

"The tort of conversion is 'the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Consulting Overseas Mgmt., Ltd. v. Shtikel*, 105 Wn. App. 80, 83 (2001). "Money may become

[8] Plaintiffs try to overcome their admissions by artfully alleging CF Arcis VII "expressly and impliedly assumed the obligations of Defendant Brightstar with respect to current and former members, except with respect to the obligations under the Rules." SAC ¶ 4.6. Plaintiffs' new allegation makes no sense. As they admit, if they have any right to a refund, that right arises only under the operative Membership Policies. *See id.* ¶ 4.7 (describing the provisions that govern right to refunds). If CF Arcis VII did not assume the obligation to provide refunds under those Policies, Plaintiffs have no claim against it; rather, their claim would lie only against Brightstar. *See id.* ¶ 8.6 (basing breach of contract claim on assumption of obligations under the Policies); *Long v. Home Health Servs. of Puget Sound, Inc.*, 43 Wn. App. 729, 732 (1986) (under successor liability doctrine, "a sale of corporate assets … does not result in a transfer of unbargained-for liabilities from the seller to the purchaser"). In any event, Plaintiffs' new allegation contradicts other allegations, rendering this contradictory allegation implausible. *Compare* FAC ¶ 7.6, *and* SAC ¶¶ 8.6, 8.10, *with* SAC ¶ 4.6; *Royal Primo Corp. v. Whitewater W. Indus., Ltd.*, 2016 WL 4080177, at *6 (N.D. Cal. July 29, 2016) ("The principle that a court may look to prior pleadings in determining the plausibility of an amended complaint is well established.") (citing *Rodriguez*, 801 F.3d at 1054 (plaintiff's "subsequent attempt to thwart the statutory language by artfully pleading … is unconvincing, especially considering that the more recent pleading completely contradicts the earlier pleading")). The Court should disregard paragraph 4.6 of the SAC.

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the subject of conversion … only if the party charged with conversion wrongfully received the money, or if that party had an obligation to return the money to the party claiming it." *Id.* To be subject to conversion, money must be "capable of being identified, as when delivered at one time, by one act and in one mass, or when the deposit is special and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained." *Hayton Farms Inc. v. Pro-Fac Corp.*, 2010 WL 5174349, at *10 (W.D. Wash. Dec. 14, 2010) (quoting *Westview Invs., Ltd. v. U.S. Bank*, 133 Wn. App. 835, 852 (1985)).

Here, Plaintiffs allege no facts plausibly suggesting the Arcis Defendants wrongfully received any money from them, much less an identifiable mass of money. *See* SAC ¶ 9.2. Rather, the allegations show Plaintiffs voluntarily chose to pay Brightstar (not the Arcis Defendants) membership fees years ago, when they accepted the Membership Policies and agreements. *See Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 722 (2008) (money not wrongfully received where authorized); *First Global Commc'ns, Inc. v. Bond*, 2006 WL 231634, at *5 (W.D. Wash. Jan. 27, 2006) (dismissing conversion counterclaim for failure to allege plaintiff wrongfully received money from defendants). Plaintiffs also allege no facts from which the Court could plausibly infer that Plaintiffs' money was somehow earmarked by Brightstar. Quite the contrary, Plaintiffs' Membership Policies and agreements made clear their membership fees were just that: fees, not deposits to be held in escrow. *See* Dkt. 11, Exs. A-B. Plaintiffs therefore cannot allege the Arcis Defendants wrongfully received money from them. *See Hayton Farms*, 2010 WL 5174349, at *10 (dismissing conversion claim where plaintiffs failed to allege defendants wrongfully received their money).

To satisfy the second scenario under which money might form the basis for a conversion claim, Plaintiffs must allege "a 'property interest' of the required type." *Davenport*, 147 Wn. App. at 722. This requires Plaintiffs to "show that the money once belonged to" them, because a "fundamental premise of conversion is that the property must have rightfully been in the possession of the owner." *Gremp v. Ramsey*, 2009 WL 112674, at *8 (W.D. Wash. Jan. 14, 2009). Here, Plaintiffs allege they "have a property interest in the money Defendants received

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from the sale of ***Non-Refundable*** Memberships." SAC ¶ 9.3 (emphasis added). But Plaintiffs bought refundable memberships from Brightstar, not non-refundable ones from the Arcis Defendants. Because any money received from the sale of non-refundable memberships did not come from Plaintiffs, they have no "property interest" in that money for purposes of a conversion claim. *See Gremp*, 2009 WL 112674, at *8 (dismissing conversion claim "because the money that was the subject of the promissory note … never belonged to Plaintiffs").

At bottom, Plaintiffs merely claim that some members should have received refunds by now under their membership contracts. "This allegation amounts to a breach of contract claim, not an action for conversion." *First Global*, 2006 WL 231634, at *5. "In general, a conversion action cannot be maintained where damages are merely being sought for breach of a contract." *Id.* (quoting *Geler v. Nat'l Westminster Bank USA*, 770 F. Supp. 210, 214 (S.D.N.Y. 1991)); *see also Davenport*, 147 Wn. App. at 722 (claim for payment of unsecured debt is not one for conversion); *Gremp*, 2009 WL 112674, at *9 (tort of conversion "certainly was not intended" to "fundamentally alter the structure of creditor and debtor rights").

C. Plaintiffs Do Not Allege a Breach of Contract Claim.

To state a contract claim, Plaintiffs must allege facts showing: "(1) a contract that imposed a duty, (2) breach of that duty, and (3) an economic loss as a result of the breach." *Myers v. State*, 152 Wn. App. 823, 827-28 (2009). The Court should dismiss the breach of contract claim because Plaintiffs do not allege a breach or damages resulting from the breach.[9]

Plaintiffs allege "Defendants" breached the Membership Policies when the May 2013 amendments were promulgated without membership notice and approval. *See* SAC ¶¶ 4.14-4.15. The only provision conceivably requiring approval says this:

> Club Operator reserves the right, in its sole and absolute discretion, to amend these Membership and Operating Policies at any time and in any manner which it deems appropriate, except that ***no amendment shall materially adversely affect the rights of any existing Member under Section 3.2(b)*** unless approved by at least two-thirds of the affected Members.

[9] The Arcis Defendants do not concede any of Plaintiffs' contract theories. If this case proceeds, the evidence will show the May 2013 Membership Policies and CF Arcis VII's acquisition saved the Club from failure—putting Plaintiffs in a position where they can now hope to receive refunds that otherwise would have been beyond reach.

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Dkt. 11, Ex. B ¶ 6.2 (emphasis added). Section 3.2(b), referred to in this provision, sets forth the refund to be issued when membership sales of the same class as the resigned member satisfy the refund ratio set forth in Section 3.2(c). Dkt. 11, Ex. B ¶ 3.2(b)-(c). Section 3.2(b) also allows for 100% refunds upon resignation after a "sale or other transfer" to a new owner who does not "agree[] to take title subject" to the Membership Agreement. *Id.*, Ex. B ¶ 3.2(b). Under ¶ 6.2, then, only amendments that materially adverse these rights require a prior vote.

But Plaintiffs do ***not*** allege facts showing that the May 2013 Membership Policies "adversely affected" these refund rights at all. In fact, no rights changed: both before and after May 2013, the amount of the refund would be 70% of the then-published membership fee for that membership category (or 100% upon resignation after the sale of the Club to a new owner who does not assume the liabilities under the Membership Policies). *Compare* Dkt. 11, Ex. B ¶ 3.2(b), *with id.*, Ex. C ¶ 3.2(b). And the May 2013 Membership Policies retained "the 3-1 ratio" from the pre-May 2013 Membership Policies. *Compare id.*, Ex. B ¶ 3.2(c), *with id.*, Ex. C ¶ 3.2(c). In short, the May 2013 Membership Policies did not alter Plaintiffs' "rights ... under Section 3.2(b)," much less "materially adversely affect" them. As a result, the two-thirds vote and notice provisions on which Plaintiffs rely were not triggered.

Nor was a vote required on the Club's decision to amend the Membership Policies to create and allow the sale of a new category of non-refundable memberships. The Membership Policies always gave the Club owner the unfettered "right from time to time to … create additional categories of membership with such eligibility requirements, privileges, and obligations as it deems appropriate." *Id.*, Ex. B ¶ 1.1. In creating a non-refundable membership category, Brightstar acted within the four corners of the contract—without altering refund rights under Section 3.2(b). Thus, even if the Arcis Defendants could be liable for breach of a contract to which they were not a party, Brightstar did not breach; it merely exercised its express contractual rights when it created the new membership category.

But even if Brightstar's promulgation of the May 2013 Membership Policies could be said to "materially adversely" affect Plaintiffs' refund rights under Section 3.2(b), Plaintiffs do

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not allege a personal economic loss resulting from the new Policies. To do so, Plaintiffs would have to allege facts showing an "actual loss sustained by reason of the breach." *Rathke v. Roberts*, 33 Wn.2d 858, 865 (1949). "[I]n suits for damages only, such as that here, a court may dismiss a breach of contract action if damages have not been suffered." *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754 (2007)[10]; *see Lake v. MTC Fin., Inc.*, 2017 WL 1378438, at *6 n.8 (W.D. Wash. Apr. 11, 2017) (plaintiffs' failure to allege damages provided an "independent ground[] for dismissal" under Rule 12(b)(6)); *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 do not (and cannot) allege they suffered an actual loss as a result of the May 2013 Membership Policies. Not one Plaintiff asserts he had a right to a refund but-for the process Brightstar followed in creating the new class of non-refundable memberships. Instead, Plaintiffs only tepidly assert that, "[o]n information and belief, one or more Plaintiffs"—without identification—"would have been entitled to and would have received refunds, had Defendants not breached the terms of the Rules by selling Non-Refundable memberships without membership notice and approval." SAC ¶ 8.8. But this allegation does nothing more than speculate that some unidentified Plaintiff ***might*** have received a refund between May 2013 and late 2017, were it not for the process followed in implementing the May 2013 amendment; it does not identify any Plaintiff who should have received money but did not. By May 2013, when Brightstar amended the Membership Policies, the waiting list was more than 100 members long, three of the four Plaintiffs had been on the list for years, and the fourth had not yet resigned. Given these admissions in the SAC, no Plaintiff alleges facts plausibly suggesting he would have received a refund but-for the May 2013 amendment to Membership Policies.

[10] Plaintiffs purport to seek "preliminary and permanent injunctions," but the "injunctions" they ask the Court to enter are to "requir[e] Defendants to refund the memberships of members who join the Waiting List in the future," SAC, Prayer ¶ B, confirming this case is one for "damages only."

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Cf. Lee v. Bergesen, 58 Wn.2d 462, 466 (1961) (plaintiffs failed to prove damages as a result of breach where they would have suffered loss even if defendant had fully performed).

To the extent Plaintiffs base their contract claim on the theory that their eventual refunds will be paid later, i.e., further off in the future, as a result of the May 2013 Membership Policies, that theory also fails to state a claim. *See supra* Part III.A.3. Among other things, Plaintiffs admit that in 2016, CF Arcis VII adopted a policy that allows for refunds without regard to the sale of refundable memberships, giving Plaintiffs a benefit not provided in the pre-May 2013 Membership Policies. Plaintiffs have not plausibly alleged facts showing they have suffered damage, and they can only speculate as to whether they ever will. *See Wilkerson v. Wegner*, 58 Wn. App. 404, 409-10 (1990) (no breach of contract claim because "[plaintiffs'] claim rests only on conjecture and does not support a cause of action for damages").

Under Washington law, damages in a contract action are designed to place the injured party "in the same position he would have occupied if the contract had been performed," not "in a better position than [they] would have been in if the contract had not been broken." *Rathke*, 33 Wn.2d at 865. Because Plaintiffs allege no facts showing they would have received refunds by now had Brightstar never amended the Membership Policies to create a non-refundable class of membership, or had it done so with prior notice and an opportunity to vote, they have not alleged plausible actual economic loss resulting from those amendments.

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

Plaintiffs admit Mr. Walker was not a party to the membership agreements they entered with Brightstar. Rather, Plaintiffs name Mr. Walker as a defendant based entirely on conclusory allegations that the Court should pierce the corporate veil. SAC ¶ 3.5. The allegations are insufficient, and the Court should dismiss Mr. Walker.

Plaintiffs admit they joined the Club, entered their membership agreements, and paid their membership fees long before CF Arcis VII acquired the Club in July 2013. *See* SAC ¶¶ 31.-3.4, 4.4. Plaintiffs base all claims on their allegation that Brightstar breached procedural rules in the pre-May 2013 Membership Policies when it amended those Policies in May 2013.

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And Plaintiffs allege Defendants CF Arcis VII (the current Club owner) and Arcis Golf assumed Brightstar's "obligations … to comply with the Rules with respect to the resigned members on the Waiting List." *Id.* ¶ 8.6. Plaintiffs allege no facts suggesting Mr. Walker was a party to any contract they entered, or agreed personally to assume any liability of any entity, pleading instead mere legal conclusions. *See, e.g., id.* ¶ 8.10. And nor could they so allege, given they admit CF Arcis VII, ***not*** Mr. Walker in his personal capacity, bought the Club. *Id.* ¶ 4.4; *see also Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 411 (1982) ("The purpose of a corporation is to limit liability.").

Rather than accept the consequences of an entity having purchased the Club, Plaintiffs strain to make the lawsuit personal, asking the Court to pierce the veil and hold Mr. Walker individually liable. The facts they allege, however, do not state a claim against Mr. Walker. "The doctrine of limited liability is a basic and fundamental rule of corporate law, and it has served society well by encouraging corporate enterprise without risk of personal liability for the corporation's debts." *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1227 (9th Cir. 2005) (citation omitted). As a result, courts in Washington require "exceptional situations" to pierce the corporate veil. *Morgan v. Burks*, 93 Wn.2d 580, 587 (1980). A plaintiff seeking to disregard the corporate form must establish "two essential factors." *Meisel*, 97 Wn.2d at 410. "First, the corporate form must be intentionally used to violate or evade a duty; second, disregard must be 'necessary and required to prevent unjustified loss to the injured party.'" *Id.* (quoting *Morgan*, 93 Wn.2d at 587). "[W]rongful corporate activities must actually harm the party seeking relief so that disregard is necessary." *Id.*

Plaintiffs do not allege facts establishing either factor. Plaintiffs allege no facts plausibly suggesting Mr. Walker abused or disregarded the corporate form to evade a duty. Plaintiffs now assert "Mr. Walker intentionally used Arcis Golf and Arcis Equity to strip CF Arcis VII of money received as a result of the sale of non-refundable memberships." SAC ¶ 3.8. But even if those allegations were true (which the Arcis Defendants deny), Plaintiffs do not allege Mr. Walker stripped CF Arcis VII of assets to the point that it would be unable to

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respond to a judgment or satisfy any refund obligations this Court may find. *See id.* Quite the contrary: Plaintiffs allege CF Arcis VII holds "real property and personal property, including but not limited to real property underlying The Club …, and the assets and facilities of the Club," and has "generated millions from the sale of Non-Refundable Memberships." *Id.* ¶¶ 3.5, 4.12. Thus, on the face of the SAC, CF Arcis VII retains ample assets to satisfy any judgment Plaintiffs may obtain, defeating any argument the corporate form was disregarded to avoid any duty to Plaintiffs, or that disregarding the corporate form is "necessary and required to prevent unjustified loss." *See, e.g.*, *Morgan*, 93 Wn.2d at 587 (no individual liability where there was "no 'gutting' of corporate assets" to "justif[y] disregard of the corporate entity").

Simply alleging claims for breach of contract or conversion does not justify piercing the veil. *See, e.g.*, *In re Foxmeyer Corp.*, 290 B.R. 229, 236 (Bankr. D. Del. 2003) ("The underlying cause of action[, at least by itself,] does not supply the necessary fraud or injustice. To hold otherwise would render the fraud or injustice element meaningless[.]"); *Consulting Overseas Mgmt.*, 105 Wn. App. 80 (corporate officers not liable for corporation's alleged conversion). Plaintiffs cannot, consistent with Rule 11, allege facts plausibly establishing a basis to pierce the corporate veil to assert claims against Mr. Walker.[11]

IV. CONCLUSION

For these reasons, the Court should dismiss the SAC. Because Plaintiffs re-pleaded after the Arcis Defendants' initial motion to dismiss, the dismissal should be with prejudice.

[11] Plaintiffs also assert, in conclusory fashion, that Mr. Walker is an "alter ego" of CF Arcis VII and "Arcis Golf." SAC ¶ 8.11. An alter ego theory is simply another way to seek to prove corporate disregard to pierce the veil. *See Norhawk Invs., Inc. v. Subway Sandwich Shops, Inc.*, 61 Wn. App. 395, 398-99 n.1 (1991); *W. Wash. Laborers-Emp'rs Health & Sec. Trust Fund v. Harold Jordan Co.*, 52 Wn. App. 387, 393 (1988). To satisfy this test, Plaintiffs must allege facts showing "such a commingling of property rights or interests as to render it apparent that they are intended to function as one, and, further, to regard them as separate would aid the consummation of a fraud or wrong upon others." *Norhawk*, 61 Wn. App. at 401 (quotation marks omitted). Plaintiffs plead no such facts, alleging only that Mr. Walker "is the Chairman, CEO and President of Arcis Golf, and the CEO and managing partner of Arcis Equity." *See* SAC ¶¶ 3.8, 8.11. But "[t]he fact that one person dominates both corporations is immaterial if the domination was exerted upon each as a separate concern." *Harold Jordan*, 52 Wn. App. at 393. As discussed above, Plaintiffs cannot plausibly allege facts suggesting that honoring the corporate form would result in "fraud or wrong" upon them, given their allegation that CF Arcis VII (a) has substantial assets and (b) has adopted a refund policy that accelerates refunds.

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DATED this 10th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 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 10th day of May, 2018.

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