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EQUINOX HOLDINGS, INC.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JASON ROTHMAN, Plaintiff, vs. EQUINOX HOLDINGS, INC., and DOES 1 through 100, inclusive. Defendants.	CASE NO. 2:20-cv-9760-CAS-MRW **DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: Apr. 12, 2021 Time: 10:00 a.m. Judge: Hon. Christina A. Snyder

NOTICE OF MOTION

PLEASE TAKE NOTICE that defendant EQUINOX HOLDINGS, INC., moves to dismiss the complaint of plaintiff Jason Rothman ("Plaintiff") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The motion will be heard on April 12, 2021, at 10:00 a.m., before the Hon. Christina A. Snyder, U.S. District Court Judge.

Equinox seeks an order dismissing the action with prejudice. The motion is based on this notice, the following memorandum of points and authorities, the accompanying declaration, the pleadings on file in this matter, and such other

matters as may be presented before or at the hearing of the motion, if any.

This motion is made following the telephonic conference of counsel which took place on February 5.

Dated: February 12, 2021

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The consumer plaintiff here asserts a COVID-related class action that requires dismissal due to his lack of Article III standing. Aside from that, his theory that a fitness club's closure in mid-March entitled members to an *automatic* refund for pro-rated March dues *without asking* for one holds no plausible footing in any such representation or the law.

Upon virtually every enterprise that lives by welcoming the public through its doors, the COVID-19 pandemic has inflicted an upheaval of a severity and duration previously unknown in modern life. So many such businesses are foundering, and more continue to sink under, an incalculable economic toll on top of the weight of the disease itself.

Those still afloat face the exacting imperative of reinventing their operations to suit the new pandemic reality, but with nothing approaching a normal cash flow to accomplish that feat. Few if any hope for a profit. Their goal is to outlive each new crest of the pandemic, preserving the livelihoods of as many employees as they can, while continuing to treat their customers with the gratitude and generosity they deserve.

The defendant here owns a collection of beautiful fitness clubs called Equinox Fitness. Fortunately, Equinox has avoided the fate of other fitness enterprises, such as California's largest chain of gyms, now bankrupt.[1] But it is facing the same challenges that are roiling the fitness industry with special ferocity among the service sector writ large.

In observance of California's emergency public health orders, Equinox closed its doors in mid-March 2020. Due to that closure, it immediately stopped

[1] "24 Hour Fitness Files For Bankruptcy, Closing 130 Gyms," LOS ANGELES TIMES (June 15, 2020), *available at* https://www.latimes.com/business/story/2020-06-15/24-hour-fitness-bankruptcy-coronavirus-gyms-closed (last accessed Feb. 5, 2021).

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charging monthly membership dues. However, many members had already paid dues for all of March. Equinox therefore issued pro-rated refunds or credits good for dues to any member who requested as much. And it went further: without awaiting a member's request for compensation, Equinox automatically issued to every California member a pro-rated credit redeemable for fitness products or services.

Equinox has taken care of its members in good faith at each turn in this pandemic, even as other fitness clubs continued to charge dues during closure, went bankrupt, or permanently closed. But that hasn't satisfied the plaintiff here, himself an enterprising, young class action attorney. Amid the historic misfortunes of 2020, he saw a litigation opportunity. He filed suit, alleging statutory consumer fraud, even though Equinox credited his own March dues to his account exactly the way he specifically requested in his individualized dealings with staff at the Equinox club in Glendale. He made no other request for refund or other handling of his post-closure dues. Uninjured, he lacks Article III standing, requiring dismissal at the threshold for want of a justiciably ripe case or controversy.

Beyond that, Plaintiff's claims invoke the faulty premise that the pandemic closures somehow obligated Equinox to automatically issue pro-rata refunds for the post-closure dues even before members requested them. Upon a member's request, Equinox has indeed issued refunds or credits good for dues, just as it did for Plaintiff himself. Nothing in Plaintiff's membership agreement or California's consumer statutes barred Equinox from initially offering credits for goods and services. Least of all did they require Equinox to instead automatically issue refunds to every member who did not ask for one.

Because all of Plaintiff's claims lack that basic foundation, the Court should dismiss them now. Yet, the claims suffer from other serious shortcomings. The sole purported representation in dispute, that Equinox would become "legally liable" for a refund, is a non-actionable legal opinion and prediction. It could not

possibly have been knowingly false or deceptive at the time it was made, back in 2017 when Plaintiff enrolled, years before the virus emerged. Instead, the complaint is stalwartly dedicated to the refund language's *truth*.

Moreover, it exceeds the limit of plausibility to pretend that 2017's reasonable consumer ever imagined 2020's novel circumstances, let alone that he or she would perceive a material injury in the act of asking for a refund instead of a credit in the same amount.

In addition, if the contract obligated Equinox to issue a refund, whether automatically or upon request, then by necessity Plaintiff holds an adequate legal remedy in contract that bars all his claims for equitable relief. Controlling case law teaches that all of the complaint's equitable claims warrant dismissal because Plaintiff does not plead the inadequacy of legal remedies, and cannot plausibly do so, stalwartly asserting as he does that he is owed legal damages as matter of contract or under the CLRA.

The amended complaint also fails to assert any basis for an award of punitive damages, requiring the dismissal or striking of that demand.

In the end, though his complaint reads like a contract dispute, this uninjured Plaintiff cannot plead a contract theory because his agreement simply contains no promise of an automatic refund. He therefore tries to plead consumer fraud instead, but that mismatched theory fails on the same bases and several more. Indeed, no theory fits, because Equinox remained fair and square with members even as a black swan event eliminated its revenue. The Court should grant the motion to dismiss, as more fully detailed below.

II. FACTS

Equinox Fitness is a collection of fitness clubs with a number of locations in California. Dkt. 15, ¶ 1. Like all gyms and fitness clubs, and many other places of congregate public accommodation, Equinox closed the doors of its California locations in mid-March 2020 to help slow the spread of COVID-19, in keeping

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with the state's emergency public health directives. *Id*. at ¶¶ 5, 28-29.

Upon closure, Equinox stopped charging monthly dues, which are usually pre-paid for the following month. Dkt. 15, ¶ 5 ("'freeze' meant that no additional payments would be required"); *id*. at ¶ 4. Because the closures occurred mid-month, many members had already pre-paid for the remaining portion of their March dues. *Id*.

To compensate members for those pre-paid residues, Equinox issued refunds or credits good for dues to members who requested them. Sheikh decl., ¶¶ 2-4. Also, without waiting for a member request, Equinox issued credits to every affected member redeemable for goods or fitness services. Dkt. 15, ¶ 6.

Plaintiff Jason Rothman joined Equinox at the Pasadena club in 2017. Dkt. 15, ¶ 15. He now belongs to the Equinox location in Glendale. *Id*. When that club closed in March, Plaintiff received an automatic credit, in the amount of $84.19, redeemable for goods and services. *Id*. at ¶¶ 16-17.

Upon Plaintiff's request in his individualized dealings with the Glendale staff in summer 2020 (dkt. 15, ¶ 17), Equinox applied the full amount of his post-closure March dues as a non-expiring credit to his dues account in just the way he asked. Sheikh decl., ¶¶ 7-8, 10-13, 16-18.

Plaintiff did not otherwise ask for a refund or other handling of his post-closure dues before filing suit. Sheikh decl., ¶¶ 18, 20-21. If he had asked for a refund, Equinox would have granted it without question (*id*. at ¶¶ 19, 23), just as it has done upon the request of other members. *Id*. at ¶¶ 2-4. In fact, Plaintiff himself asked for and was granted a full refund of summer dues before he changed his mind in early July. *Id*. at ¶¶ 7-11, 14-15. He filed suit a month later, on August 7. Dkt. 1-1 at 2.

III. DISMISSAL IS REQUIRED.

Equinox respectfully submits that Plaintiff, lacking an injury caused by Equinox, cannot establish a ripe, justiciable case or controversy under Article III.

He also cannot plead a plausible theory of liability or viable claims under the controlling Rule 9(b) or even Rule 8(a).

A. There Is No Ripe Case or Controversy Involving An Actual Injury-In-Fact Caused By Equinox.

The complaint requires dismissal in whole because Plaintiff lacks Article III standing. He does not plausibly plead and cannot establish that Equinox has caused him any injury-in-fact in what amounts to an unripe suit he ensured would be the first-filed at the expense of its justiciability. Plaintiff's ability to obtain a full refund, versus a credit or purported statutory "gift certificate," was not impaired by any act of Equinox, but by his own calculated failure to simply ask.

As a factual matter, he indisputably has no injury-in-fact corresponding to his March dues. Rather, Equinox applied the full amount of his pro-rated March dues as a non-expiring credit to his dues balance in exactly the way Plaintiff requested in his individualized dealings with the management of the Equinox club in Glendale. Sheikh decl., ¶¶ 7-13. The manager of his club went further, personally making sure that Plaintiff was indeed satisfied with the money's application to his dues account. *Id*. at ¶¶ 16-21. He invited Plaintiff to let him know if there was anything more he could do to keep Plaintiff happy. *Id*. at ¶¶ 18, 23. Plaintiff filed suit instead.

Plaintiff's amended complaint now admits he approached Equinox last summer to request that his credit be made good for dues (dkt. 15, ¶ 17), but persists in omitting anew the undeniable fact that Equinox granted his request before he rushed to the courthouse. Nowhere does Plaintiff allege that he requested or Equinox denied him a refund of March dues. On its own, that silence is conspicuous and telling.

This lack of standing requires dismissal in whole because Plaintiff has directed all of his claims to the March dues. Both complaints have been effectively silent about Equinox's handling of Plaintiff's post-closure July dues. As a facial

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matter, the complaint does not even squarely allege that Plaintiff's club closed in July. Dkt. 15, ¶ 33 (alleging that "several" clubs closed); *id*. at ¶ 8. Nor does his case rest on any allegation that Equinox actually issued Plaintiff an expiring July credit instead of a refund, let alone one already expired or set to expire anytime soon. And nothing in the amended complaint alleges that he ever asked for a refund of post-closure July dues. Much less does the complaint allege that Equinox ever denied Plaintiff a refund or other request related to July.

The reason is straightforward. As a factual matter, Plaintiff did not ask for refund, dues credit, or any other handling of post-closure July dues. Sheikh decl., ¶¶ 20-21. This is because Equinox had already made clear by then it would do whatever Plaintiff asked, spoiling the lawsuit he planned.

More specifically, in the same dealings in which he requested and received dues credit for the March closure, Plaintiff also requested a refund of all of his summer 2020 dues because he did not then plan to use the reopened club. Sheikh decl., ¶¶ 7-11. He made that summer refund request on June 25, well before the governor's July 13 public health order. *Id*. Equinox immediately granted his request for a refund of all June and July dues. *Id*. Plaintiff then wrote on July 4 to say he changed his mind and wanted to keep using the reopened club after all. *Id*. at ¶ 14. Shortly later, on July 10, he asked for his membership agreement. *Id*. at ¶ 22. He filed this suit some three weeks later on August 7. Dkt. 1-1 at 2.

Based on (1) Equinox's ready accession to his request to turn to his March credit to dues money and (2) its immediate offer to refund the full amount of his summer dues, Equinox had already shown Plaintiff it would handle his July dues however he asked, whether as a dues credit like requested for March, or as a refund like he was initially granted for all his June and July dues before changing his mind.

Thus, neither of Plaintiff's complaints have yet alleged that Equinox denied him a refund of his post-closure July dues or otherwise wrongfully handled them.

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Even if Plaintiff had by now asserted claims concerning July, they too would fail on standing and ripeness grounds, given that Plaintiff filed suit without having requested a refund or other any handling of his post-closure July dues.

Courts have not hesitated to dismiss suits involving similar failures to ask for a refund. In such disputes, as here, the purported injury is self-inflicted, precluding the claimant's ability to assert an injury-in-fact caused by the defendant's conduct. *E.g.*, *Taylor v. FAA*, No. 18-cv-00035 (APM), 2019 WL 3767512, at *4 (D.D.C. Aug. 9, 2019) (plaintiff lacked injury caused by defendant "with respect to return of the $5.00 registration fee" because he never requested its refund); *In Re McNeil Consumer Healthcare*, 877 F.Supp.2d 254, 275-276 (E.D. Pa. 2012) (dismissal with prejudice where consumers who were eligible for refund but did not seek them could not "establish[] that they suffered an injury that is fairly traceable to the conduct of the defendants"); *Bandler v. Town of Woodstock*, No. 2:18-cv-001278, 2019 WL 5616956, at *6 (D. Vt. Oct. 31, 2019) (plaintiff's failure to seek reimbursement of $120 fee to which he was entitled "negates his standing because a self-inflicted harm is not a *de facto* injury").

The *Taylor*, *McNeil*, and *Bandler* refund cases concord with decisions reaching similar results in a broad variety of circumstances where plaintiffs file suit before simply asking for what they want. The law of this circuit has developed several examples. *E.g.*, *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220 (9th Cir. 1992) (no standing to assert wrongful failure to provide free parking permit for persons with disabilities where plaintiff "never actually applied" for such a permit); *McQuiston v. Los Angeles*, 560 Fed. Appx. 684, 685 (9th Cir. 2014) (no standing to challenge zoning restriction because plaintiff "never applied for a variance and, thus, has never been denied a variance," meaning "[h]is alleged injury is therefore hypothetical, because he simply assumes he would not be granted a variance if he applied"); *Vitolo v. Bloomingdale's, Inc.*, No. CV 09-07728 DSF (PJWx), 2010 WL 11463631, at *4 (C.D. Cal. Dec. 7, 2010) (no injury

concerning final wages of quitting employee where employee "neither returned to the store to claim her final payment nor requested an alternative means of payment"); *Burdick v. Union Sec. Ins. Co.*, No. CV 07-4028 ABC (JCx), 2009 WL 4798873, at *5 (C.D. Cal. Dec. 9, 2009) (FAL and UCL claims were non-justiciable on ripeness and standing grounds where insureds neither sought nor were denied disability benefits under policy); *Maldonado v. Yellow Freight System, Inc.*, No. CV-74-2617 JWC, 1975 WL 11889, at *5 (C.D. Cal. Apr. 9, 1975) (no standing to assert wrongful failure to provide training because plaintiff "never requested training and was never refused training").

Such authorities are by no means limited to this circuit. *E.g.*, *Natl. Family Planning & Reproductive Health Assn., Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (where plaintiff "has within its grasp an easy means for alleviating the alleged" injury, such "self-inflicted harm doesn't satisfy the basic requirements for standing"); *Freedom from Religion Foundation, Inc. v. Lew*, 773 F.3d 815, 821 (7th Cir. 2014) (no standing to challenge tax exemption without having first requested and been denied the exemption); *Swann v. Secretary*, 668 F.3d 1285, 1288 (11th Cir. 2012) (no standing for theory that ballot clerk should have sent inmate's absentee ballot to jail when inmate never requested it); *Oil, Chemical and Atomic Workers Int'l Union AFL-CIO v. Gillette Co.*, 905 F.32d 1176, 1177 (8th Cir. 1990) (claim for denial of retirement benefits "not ripe for adjudication" where plaintiff "had not filed a claim" and "was not denied benefits").

In sum, Equinox handled Plaintiff's post-closure March dues as he requested, parking them as a non-expiring credit on his dues account. He does not plead and cannot establish that he ever made, or that Equinox rejected, any other request for refund or other handling of his post-closure dues. Plaintiff lacks an injury-in-fact caused by Equinox amid the unripe circumstances he froze in his hurry to file suit.

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B. The Case Depends On An Implausible, Non-Existent Obligation To Issue Automatic Refunds Unprompted By Any Request.

The complaint's refund theory relies wholly on the false assumption that Equinox was somehow required to issue refunds on an automatic basis to members who made no such request. Dismissal is required because nothing in the complaint articulates a plausible basis for such an expectation on Plaintiff's part, least of all any representation that refunds would be automatic. There was none. Because "plaintiff must allege a plausible interpretation of a representation that defendant actually made to state a claim," the refund theory underlying all of Plaintiff's claims is therefore missing its foundation. *Rice v. Sunbeam Prods., Inc*., No. CV 12-7923-CAS-(AJWx), 2013 U.S. Dist. LEXIS 7467, at *17, *20 (C.D. Cal. Jan. 7. 2013) (dismissing CLRA, UCL, and FAL claims where "safe for household use" statement did not represent anything about Crock-Pot exterior's capacity to burn users' skin); *see Spiegler v. Home Depot U.S.A., Inc*., No. CV 07-4428 CAS (AJW), 2008 U.S. Dist. LEXIS 120397, at *32 (C.D. Cal. June 30, 2008) (dismissing CLRA and UCL claims where plaintiff "failed to identify a single representation indicating that defendants would recalculate their Contract Selling Price if the Sales Professional's [home remodeling] measurements turned out to be inaccurate").

It is telling that Plaintiff failed to append his membership agreement to the complaint. Given that he poses a purported breach of contract as statutory consumer fraud, the complaint incorporates Plaintiff's agreement through and through, making it fit material for the Court's consideration in deciding this motion. Ex. 2.

The reason Plaintiff left out the contract is simple. Even though the contract's refund language is the basis of his case, there is in fact nothing in Plaintiff's agreement that promises, states, or even implies that a closure will result in the issuance of refunds on an automatic basis without a request by a member.

Ex. 2 (no such language).

Courts have reached similar conclusions even in cases presenting language that *was* arguably suggestive of automatic refunds, unlike here. *See Chattler v. U.S.*, 632 F.3d 1324, 1328-1329 (Fed. Cir. 2011) (affirming judgment in state department's favor because the phrase "[t]he passport expedite fee will be refunded" does not mean or imply that fee "will automatically" be refunded without request, as such an interpretation would be "contrary to the plain meaning"); *Hoban v. USLIFE Credit Life Ins. Co.*, 163 F.R.D. 509, 515-516 (N.D. Ill. 1995) (dismissal of automatic refund theory under pre-*Twombly*, permissive "no set of facts" standard, despite insurance certificates' representations that refunds of unearned premiums "will be 'determined' and 'computed'" when insurance "'automatically end[s]'") (alteration in original). In other words, Plaintiff's complaint imagines a representation that the membership agreement does not contain.

Further, the complaint pleads no other basis outside the contract, plausible or otherwise, for Plaintiff's expectation that he should have automatically received a refund before asking for one. Indeed, it would be nearly impossible to find a modern consumer who has not repeatedly practiced the reality of registering his or her request for a refund versus credit in a variety of consumer transactions across the service and retail sectors.

Or, to approach the matter from a different angle, how many class action settlements requiring a consumer to request money to which she became legally entitled under a settlement agreement have California's state and federal courts approved as reasonable, fair, and just in the modern era? *E.g., Stern v. New Cingular Wireless Servs., Inc.*, No. SACV 09-1112-CAS (AGRx), 2010 U.S. Dist. LEXIS 151439, at *8-*10 (final approval of claim form procedure for cellular telephone subscribers to gain refund of disputed fees) (affirmed at 480 Fed. App'x 867).

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Again, upon careful reading, the Court will note that never, not once, does the artful complaint allege that Plaintiff himself asked for but was denied a refund. It merely alleges that Equinox "did not refund" the residual March dues before issuing Plaintiff's corresponding $84.19 credit for goods and services. Dkt. 15, ¶ 16. Put another way, it simply alleges that Plaintiff did not receive a refund automatically. Importantly, nowhere does Plaintiff assert that he ever requested a refund that Equinox turned down.

That pleading failure alone requires dismissal. Because Plaintiff fails to plead that Equinox ever denied him a requested refund, all that's left is his implausible expectation, based on no such representation, that he was assured an automatic refund without asking for one.[2]

C. The Case Rests On Non-Actionable Prediction And Opinion.

Dismissal is also required because each claim depends on a representation of law that constitutes non-actionable prediction and opinion, rather than a statement of past or existing fact.

More specifically, all five claims rest on the agreement's prediction "that if the Club closes…the Club will remain legally liable to Buyer for a refund." That is an opinion about a matter of law that is not actionable. *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004); *Sevigny v. DG Fastchannel, Inc.*, No. CV 11-9197 CAS (JEMx), 2011 U.S. Dist. LEXIS 142461, at *9 (C.D. Cal. Dec. 12, 2011) ("representation that the non-compete agreement would be unenforceable is, at most, a legal opinion, and not a statement of a past or existing fact"); *Ellis v. J.P. Morgan Chase & Co.*, No. 12-cv-03897-YGR, 2016 U.S. Dist. LEXIS 138689, at *22-26 (N.D. Cal. Oct. 5, 2016).

[2] Worse, his pleading omits what actually happened. Though the missing fact is not necessary to grant the motion to dismiss on the grounds asserted in this part B, Equinox did indeed receive and grant Plaintiff's request to convert his $84.19 goods-and-services credit into money good for dues, as outlined in part A and the Sheikh declaration.

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The complaint does not plead any circumstance that could render such an opinion actionable. First, rather than constituting an expression of any past or then-existing fact, the challenged "legally liable…for a refund" language refers exclusively to a legal opinion and a then-speculative future point in time only to arrive "if the Club closes."

Next, the complaint does not plead any type of special, confidential, or fiduciary relationship, but instead confirms that Plaintiff's dealings with Equinox were simply those of a consumer at arm's length. Dkt. 15, ¶ 2 ("consumer[]" relationship); *id*. at ¶¶ 15-16.

Nor does the complaint allege Equinox's superior knowledge or assert any facts to match. *Yokohama*, 358 F.3d at 621 (employer's representation of law to employees was not actionable based on superior knowledge or any other circumstance). Between the parties on either side of the disputed transaction, the only attorney was Plaintiff himself.[3]

Thus, to the full extent they rest on a non-actionable prediction and legal opinion, each of Plaintiff's claims require dismissal with prejudice now. *See Cruz v. Dollar Tree Stores, Inc*., No. 07-2050 SC, 2007 U.S. Dist. LEXIS 71117, at *14-15 (N.D. Cal. Sep. 18, 2007) (fraud theory predicated on a misrepresentation of law could not be saved by amendment).

[3] Equinox requests that the Court take judicial notice of the following entry in the public directory of the State Bar of California: "Attorney Licensee Profile: Jason W. Rothman," The State Bar of California, *available at* http://members.calbar.ca.gov/fal/Licensee/Detail/304961 (last accessed Jan. 24, 2021). FED. R. EVID. 201(b)(2); *see White v. Martel*, 601 F.3d 882, 885 (9th Cir.), cert. denied, 562 U.S. 896 (2010) (taking judicial notice of state bar records); *Monclova-Chavez v. McEachern*, No. 1:08-cv-00076-AWI-BAM, 2018 WL 2106481, at *3 n.1 (E.D. Cal. May 7, 2018) ("The Court may take judicial notice of the State Bar of California's website regarding attorneys' admission status. These facts can be accurately and readily determined from the website, and the site's accuracy regarding this information cannot reasonably be questioned.") (citation and internal quotations omitted).

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D. The Complaint Does Not Target Any Statement That Was Supposedly False Or Misleading At The Time Made.

In addition, each of Plaintiff's claims fails at the threshold because the complaint also does not allege a false or misleading representation. The basis of the complaint is the language in Plaintiff's membership agreement stating that "if the Club closes…the Club will remain legally liable to Buyer for a refund." Rather than alleging that statement's falsity, the complaint and its liability theory are entirely committed to its truth. Each claim asserts that Equinox truly is "liable."

Nor does the complaint plead any plausible angle by which the statement is misleading. Equinox's issuance of credit for goods and services does not render it so. As detailed more fully above in part B, neither the refund statement, nor anything else in Plaintiff's membership agreement or complaint, implies or suggests the automatic issuance of refunds, rather than a good-and-services credit, in the absence of a member's request for a refund.

E. The Complaint Lacks A Plausible Theory Of Materiality.

All of Plaintiff's claims fail because the complaint does not and cannot articulate a plausible theory of materiality to the reasonable consumer. Rather, the complaint dangles by a string of implausible retrospective premises too weak to carry the liability theory, which amounts to a charge of consumer fraud by hindsight.

A representation is not material unless a "reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (Cal. 2009). That means materiality is judged at the time of the disputed transaction, not by retrospection. *Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1164, n. 13 (Cal. Ct. App. 2005) (California law requires materiality "to be determined at the time of the transaction, not in hindsight"); *see also In re Cypress Semiconductor Sec. Litig.*, 891 F. Supp. 1369, 1381 (N.D. Cal. 1995) ("Plaintiffs'

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entire case is based on hindsight, forgetting that the securities laws do not adopt this perspective.").

First, the complaint imagines that the typical reasonable consumer had in mind the vanishingly low probability that his or her term of gym membership would ever see the globe swept by the emergence of a new virulent airborne pandemic. It further imagines that the reasonable consumer regarded as a realistic possibility that such a new disease might be dangerous enough to shutter indoor public accommodations of nearly every variety, roil the economy, put the president on oxygen, and upend our very way of life. If the membership advisor who signed up Plaintiff in 2017 had mentioned these scant, fearful possibilities during that transaction, Plaintiff or any reasonable consumer, at a loss, would have called it crazy talk.

Just as implausibly, the complaint then posits that, with the remote chance of such a pandemic in mind, the reasonable consumer would have seen the possibility that a question might arise about the pro-rata share of pre-paid monthly membership dues corresponding to periods during which public health orders mandated the gym's closure for part of the month.[4]

To date, the value of Plaintiff's contractual relationship has reached or exceeded $4,394.[5] The complaint ends its series of implausible assumptions by imagining that, within this context of a then-speculated future pandemic and dealings totaling thousands of dollars, the reasonable consumer in November 2017 would have somehow seen a material difference if required to ask for direct refund of $84 in pro-rated dues for this-or-that month of gym closure, after receiving an

[4] To be clear, the question only concerns the pro-rata remainder of monthly dues pre-paid prior to mid-month closure because Equinox stopped collecting additional monthly dues upon closure. Dkt. 15, ¶ 5.

[5] Rothman alleges a $169 monthly payment after joining in late 2017, throughout 2018 and 2019, and including January and February 2020, resulting in a total of at least 26 months. Dkt. 15, ¶¶ 15-16. Multiplying 26 months by $169 yields a figure of $4,394.

automatic credit for goods or services in same amount. The complaint conceives of consumers to whom the difference between a refund and credit is supposedly material, but who are inexplicably unwilling to simply ask for a refund.

To credit the implausible chain of assumptions in Plaintiff's theory of 2017 materiality would turn the reasonable consumer into an irrational but minutely attentive clairvoyant.

F. Plaintiff Cannot Possibly Plead Knowledge of Falsity or Then-Present Intent Not To Perform.

Even if the refund language were otherwise actionable, the theory would amount to a purported species of promissory fraud, charging that Equinox supposedly made a false promise of an automatic refund.

As such, each of the complaint's causes of action, whether framed as false promise or statutory consumer fraud, required Plaintiff to plead that Equinox knew at the time of the 2017 transaction that the refund language was untrue or misleading. CAL. CIV. CODE § 1710(4) ("A promise, made without any intention of performing it"); *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1060 (Cal. Ct. App. 2012) (plaintiff must plead and prove that "defendant did not really have that intent at the time that the promise was made, i.e., the promise was false"); CAL. BUS. & PROF. CODE § 17500 (FAL contains explicit knowledge requirement); *Sunbeam*, 2013 U.S. Dist. LEXIS 7467, at *31 (this Court's dismissal of consumer fraud claims due to complaint's "fail[ure] to adequately allege defendant's knowledge"); *Neu v. Terminix Int'l, Inc*., No. C 07-6472 CW, 2008 U.S. Dist. LEXIS 60505, at *8, *11 (N.D. Cal. Jul. 24, 2008) (dismissing CLRA, FAL, and UCL claims where plaintiff "has not alleged facts to support a finding that Defendants knew that those [disputed] statements were false when made").

Despite that plain requirement, the complaint does not plausibly allege that Equinox knowingly made an automatic refund promise with no intent to perform it. Dkt. 15, ¶¶ 49, 84 (conclusory recitations of the element). In fact, it strains the

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imagination to conceive how Plaintiff could even attempt pleading that Equinox somehow knew in 2017 the ways it would respond to the coronavirus pandemic of 2020, such that it could have possibly known the refund language to be false or misleading at the time of Plaintiff's membership agreement. That amounts to another incurable defect that requires dismissal.

G. All Claims For Equitable Relief Require Dismissal.

The UCL and FAL claims in total, along with all of the other demands for restitution, injunction, or other equitable relief, require dismissal because Plaintiff does not allege, much less plausibly, an indispensable prerequisite: the inadequacy of legal remedies. It is not a matter of pleading in the alternative, but a failure to plead *at all*, alongside the *inability* to do so plausibly.

Instead, his complaint is wholly suffused with proclamations that Equinox breached a contract, the quintessential antipode of equity. Dkt. 15, ¶¶ 2, 3, 7, 8, 15, 17, 21, 23, 24, 25, 26, 29, 30, 40(c)(iv), 40(f)(i), 40(f)(iii), 40(f)(iv), 40(f)(v), 44, 47, 48, 49, 50, 51, 55, 59, 60, 65, 67, 73, 76, 78, 79, 83, 84, 85. And the injury he claims, the dollar value of a dues refund, is purely monetary. He therefore cannot help but concede it is redressable by the legal remedy of the money damages he seeks in connection with his CLRA claim. *Id*. at ¶¶ 9, 19, 60, 63; *id*. at 21, ¶ C (damages prayer). In other words, aside from simply failing to allege that his purported monetary injury would somehow elude legal recompense, his allegations leave no room to plausibly assert as much under Rule 8(a).

New controlling precedent compels dismissal in these circumstances. The Ninth Circuit recently affirmed the Rule 12(b)(6) dismissal of all claims for equitable restitution due to a consumer plaintiff's pursuit of damages and her failure to allege the absence of an adequate legal remedy. *Sonner v. Premier Nutrition Corp*., 971 F.3d 834, 844 (9th Cir. 2020). Rejecting the plaintiff's arguments about the broad availability of equitable relief under state law, the court rested its decision on the principle, "fundamental…for well over a century," "that

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state law cannot expand or limit a federal court's equitable authority." *Id*. at 841. Accordingly, "the traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies," applied with full force to preclude the plaintiff's UCL and CLRA demands for restitution. *Id*. at 844. Equitable remedies are simply not available in federal courts unless legal remedies are inadequate. *Id*.

Here, that principle requires dismissal with prejudice of each of Plaintiff's claims for equitable remedies, including the FAL and UCL claims in total, as well as the CLRA demands for restitution and injunctive relief. *In re Macbook Keyboard Litig*., No. 5:18-cv-02813-EJD, 2020 U.S. Dist. LEXIS 190508, at *14 (N.D. Cal. Oct. 13, 2020) (invoking *Sonner* to dismiss with prejudice all claims for "injunction, restitution, or other equitable relief"); *Williams v. Apple, Inc*., No. 19-CV-04700-LHK, 2020 WL 6743911, at *10 (N.D. Cal. Nov. 17, 2020) (similarly dismissing UCL and FAL claims with prejudice); *Alvarado v. Wal-Mart Associates, Inc*., No. CV 20-01926-AB (KKx), 2020 WL 6532868, at *3 (C.D. Cal. Oct. 22, 2020) (similarly dismissing UCL claim with prejudice due to inability to allege legal remedies' inadequacy); *see Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda Cty.*, 462 P.3d 461, 464 (Cal. 2020) ("[T]he causes of action established by the UCL and FAL…are equitable in nature").

In sum, if indeed Plaintiff's contract entitles him to a refund, whether automatically or upon request, then by necessity Plaintiff holds an adequate legal remedy in contract for money damages, barring all his claims for equitable relief.

H. The Complaint Pleads No Basis For Punitive Damages.

Finally, Plaintiff prays for punitive damages in connection with his CLRA claim. Dkt. 15, ¶¶ 34, 63; *id*. at 21, ¶ C (prayer). Punitive damages under the CLRA are limited to circumstances of "oppression, fraud, or malice." CAL. CIV. CODE § 3294(a). Yet, "a company simply cannot commit willful and malicious conduct – only an individual can." *Robinson v. J.M. Smucker Co*., No. 18-cv-

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04654-HSG, 2018 U.S. Dist. LEXIS 78069, at *17-18 (N.D. Cal. May 8, 2019) (internal quotation omitted); CAL. CIV. CODE § 3294(b) ("[w]ith respect to a corporate employer," the conduct "must be on the part of an officer, director, or managing agent of the corporation").

Plaintiff does not plead any facts to support an award of punitive damages because he does not allege that any individual committed willful and malicious conduct sinking to the standard of Civil Code section 3294(a). *See Ducre v. Veolia Transp.*, No. CV 10-02358 MMM (AJWx), 2010 U.S. Dist. LEXIS 152940, at *17-20 (C.D. Cal. June 14, 2010) (dismissing claim for punitive damages because plaintiff did not sufficiently alleged culpable conduct on the part of an officer, director, or managing agent); *N. Am. Co. for Life & Health Ins. v. Zhang*, No. CV 18-01872 AG (FFMx), 2019 U.S. Dist. LEXIS 46834, at *9-10 (C.D. Cal. Jan. 3, 2019) (similar).

In fact, the complaint includes no allegations that even mention an Equinox officer, director, or managing agent. Far less does the complaint plausibly allege that such a person perpetrated or ratified any acts of fraud, oppression, or malice that correspond to the liability theory. Plaintiff's demand for punitive damages therefore requires dismissal.

IV. CONCLUSION

The complaint presents no justiciable Article III case or controversy because Equinox handled Plaintiff's March dues as he asked. Lacking an injury-in-fact caused by Equinox, he cannot plead that he made any other request concerning his post-closure dues, let alone that Equinox denied it. Beyond that, Plaintiff's expectation of automatic refund, unprompted by any request, holds no plausible footing in any such representation. Even if Plaintiff's theory could overcome those fundamental barriers, the complaint would still require dismissal due to his inability to plead other requirements of California's consumer statutes. Equinox respectfully submits that dismissal with prejudice is warranted.

Dated: February 12, 2021

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