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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CAREN EHRET,

No. C-14-0113 EMC

Plaintiff,

v.

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT’S  
MOTION TO DISMISS**

UBER TECHNOLOGIES, INC.,

**(Docket No. 44)**

Defendant.

**I. INTRODUCTION**

Plaintiff Caren Ehret seeks to represent a nationwide class of customers who have hired passenger car service drivers through Defendant Uber Technologies, Inc.’s (“Uber”) mobile phone application. She alleges that Uber charges a 20% fee above the metered fare for each ride that it misrepresents as a “gratuity” that is automatically added “for the driver.” In reality, Plaintiff alleges that a substantial portion of this “gratuity” is retained by Uber as an additional revenue source. Plaintiff asserts claims under the California Unfair Competition Law, Consumer Legal Remedies Act, and for breach of contract. Pending before the Court is Uber’s motion to dismiss all of Plaintiff’s claims. For the following reasons, the Court **GRANTS** in part and **DENIES** in part Uber’s motion.

**II. FACTUAL BACKGROUND**

Uber provides a mobile phone application that permits consumers to “summon, arrange and pay for taxi cab rides and other transportation services electronically via their mobile phone.” First Amended Complaint (“FAC”) ¶ 10 (Docket No. 40). Consumers provide payment through the Uber app through credit card information provided by the consumers. *Id.* Plaintiff alleges that on its

1 website and in its application, Uber represents ‘Hassle-free Payments’ by stating: “We automatically  
2 charge your credit card the metered fare + 20% *gratuity*.” *Id.* ¶ 11. Uber allegedly further  
3 represents that the “20 % gratuity is automatically added for the driver.” *Id.* Finally, when rides are  
4 arranged through the Uber app, “the text of the app represents to those consumers that a 20%  
5 *gratuity* will be automatically added to the metered fare.” *Id.*

6 Contrary to its representations, Uber allegedly fails to remit the full amount of the “gratuity”  
7 charge to its drivers. *Id.* ¶ 13. Rather, it “keeps a substantial portion of this additional charge for  
8 itself as its own additional revenue and profit on each ride arranged and paid for by consumers.” *Id.*  
9 Plaintiff contends that Uber’s “gratuity” representations are false, misleading, and likely to deceive  
10 members of the public insofar as the term “gratuity” suggests a sum paid to the driver that “is  
11 distinct and different from the actual fair.” *Id.* ¶ 14. Plaintiff further alleges that by continually  
12 misrepresenting the “gratuity” in its advertisements and then keeping a substantial portion of the  
13 gratuity, Uber “effectively increases the ‘metered fare’ and/or is charging an undisclosed fee. This  
14 is false advertising.” *Id.*

15 On September 9, 2012, Plaintiff utilized Uber’s app to arrange for a taxi cab ride in Chicago,  
16 Illinois. *Id.* ¶ 15. Plaintiff alleges that she was misled into “paying sums greater than the ‘metered  
17 fare’ for taxi cab rides based upon Uber’s misrepresentations that all of the additional 20% charge  
18 over and above the ‘metered fare’ was a ‘gratuity.’” *Id.* ¶ 16. Accordingly, “but for” Uber’s  
19 misrepresentations, Plaintiff alleges she “would not have agreed to or paid Uber the full amount that  
20 Uber charged her and that she paid to Uber.” *Id.*

21 Plaintiff asserts five causes of action on behalf of a class. First, she alleges that the conduct  
22 alleged constitutes an unfair business practice in violation of California’s Unfair Competition Law  
23 (“UCL”), Cal. Bus. & Prof. Code § 17200. *Id.* ¶¶ 25-30. Second, she alleges that the conduct  
24 constitutes an unlawful business practice in violation of the UCL insofar as the conduct in question  
25 violates California Civil Code §§ 1572, 1709, 1710, and 1750 and California Business and  
26 Professions Code § 17500. *Id.* ¶¶ 31-36. Third, Plaintiff contends that Uber’s actions constitute a  
27 fraudulent business practice in violation of the UCL. *Id.* ¶¶ 37-41. Fourth, Plaintiff alleges a  
28 violation of the Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.* *Id.*

1 ¶¶ 42-59. Finally, Plaintiff contends that Uber breached its contract with her and the class by failing  
2 to remit the full amount of the collected gratuity to the drivers. *Id.* ¶¶ 60-65. Uber has moved to  
3 dismiss all of Plaintiffs asserted claims.

### 4 III. DISCUSSION

5 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss based on the  
6 failure to state a claim upon which relief may be granted. *See* Fed .R. Civ. P. 12(b)(6). A motion to  
7 dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See Parks*  
8 *Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering such a motion, a court  
9 must take all allegations of material fact as true and construe them in the light most favorable to the  
10 nonmoving party, although “conclusory allegations of law and unwarranted inferences are  
11 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.  
12 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough  
13 facts to state a claim to relief that is plausible on its face.’ “ *Id.* “A claim has facial plausibility  
14 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that  
15 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also*  
16 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “The plausibility standard is not akin to a  
17 ‘probability requirement,’ but it asks for more than sheer possibility that a defendant acted  
18 unlawfully.” *Iqbal*, 129 S.Ct. at 1949.

19 Insofar as Plaintiff’s claims sound in fraud, her complaint must meet the heightened pleading  
20 standard of Federal Rule of Civil Procedure 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120,  
21 1125 (9th Cir. 2009). Rule 9(b) provides: “In alleging fraud or mistake, a party must state with  
22 particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other  
23 conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). To satisfy Rule 9(b),  
24 the “complaint must ‘identify the who, what, when, where, and how of the misconduct charged, as  
25 well as what is false or misleading about the purportedly fraudulent statement, and why it is false.’”  
26 *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (quoting *Cafasso, U.S. ex rel. v.*  
27 *Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011)). This encompasses the  
28 circumstances surrounding reliance. *See Kearns*, 567 F.3d at 1125 (holding that the complaint did

1 not meet the standard of Rule 9(b) partly because the plaintiff failed to specify when he was exposed  
2 to the allegedly fraudulent advertisements, which ones he found material, and on which ones he  
3 relied).

4 A. Plaintiff Has Pled Sufficient Detail Under Rule 9(b)

5 To begin, the Court finds that Plaintiff has pleaded her UCL cause of action with sufficient  
6 particularity to satisfy Fed. R. Civ. P. 9(b). In her FAC, Plaintiff alleges that on September 9, 2012,  
7 she used Uber's App to arrange and pay for taxi cab rides in Chicago, IL, and paid 20% over the  
8 metered fare "in reliance upon Uber's representation that the 20% charge was a 'gratuity.'" FAC ¶  
9 15. She further alleged that on its website and in its application, Uber advertises a "Hassle-free  
10 Payment" which automatically charges the consumer the metered fair and 20% gratuity." *Id.* ¶ 11.  
11 She further alleges that "[b]ut for Uber's misrepresentations Plaintiff would not have agreed to or  
12 paid Uber the full amount Uber charged her." FAC ¶ 16. Despite these allegations, Uber contends  
13 that Plaintiff has failed to allege when Uber made the alleged representations, when Plaintiff  
14 allegedly saw or heard the statement in question, whether she saw it on the website or in the  
15 application, and whether she "specifically relied on it." Docket No. 44, at 6.

16 The Court finds that Plaintiff's allegations are sufficiently specific as to when and where  
17 Uber made the alleged misrepresentations. While the FAC does not expressly allege when and  
18 where Plaintiff saw the statements, it does allege that on September 9, 2012 she used the App and  
19 paid the 20% additional charge in reliance on Uber's representation that it was a "gratuity." FAC ¶  
20 15. The inference is that she knew there was a "20% gratuity" charge and that the source of her  
21 knowledge was the App and/or website, if not precisely on September 9, 2012, sometime before  
22 then. Plaintiff has specified the statements on which she allegedly relied. The Court declines to  
23 require Plaintiff to allege the precise web pages viewed and the precise date she viewed the  
24 representation. *See Bronson v. Johnson & Johnson, Inc.*, C 12-04184 CRB, 2013 WL 5731817  
25 (N.D. Cal. Oct. 22, 2013) ("Defendants contend[] that Plaintiffs fail to allege 'which pages of the  
26 website' were reviewed, 'when' they were viewed, . . . . But *Kearns* [*v. Ford Moto Co.*, 567 F.3d  
27 1120 (9th Cir. 2009)] did not require such specific allegations."). To so require would be unrealistic  
28 and needlessly impede access to an important remedial statute. *See In re Tobacco II Cases*, 46 Cal.

1 4th 298, 328 (2009) (“[W]here, as here, a plaintiff alleges exposure to a long-term advertising  
2 campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the  
3 plaintiff relied on particular advertisements or statements.”).

4 Similarly, the Court finds that Plaintiff has sufficiently alleged that Uber’s  
5 misrepresentations were false and misleading and why they were false and misleading. Specifically,  
6 it is alleged that Uber has represented that a 20% gratuity charge is added to each metered fair but  
7 that Uber keeps a “substantial” sum for itself. FAC ¶ 13, 14. Uber contends that Plaintiff has failed  
8 to allege how much is “substantial” and that this allegation is factually incorrect. Nonetheless, the  
9 Court concludes that Plaintiff’s allegation is sufficient for purposes of Rule 9(b) and the motion to  
10 dismiss stage. The ultimate question under Rule 9(b) is not whether the allegation has been or likely  
11 will be proven, but whether the allegations are “specific enough to give defendants notice of the  
12 particular misconduct which is alleged to constitute the fraud charged so that they can defend against  
13 the charge and not just deny that they have done anything wrong.” *Bly-Magee v. California*, 236  
14 F.3d 1014, 1019 (9th Cir. 2001) (citation omitted)). The Court concludes that Plaintiff’s allegations  
15 have provided Uber with sufficient detail to defend against Plaintiff’s allegations.

16 B. Plaintiff Has Stated a Claim under the UCL and CLRA

17 Uber has moved to dismiss the UCL and CLRA claims on a number of bases. Uber contends  
18 that Plaintiffs UCL and CLRA claims fail (1) because the UCL does not apply to non-California  
19 residents alleging non-California conduct; and (2) because she has failed to allege standing under  
20 either statute. The Court first addresses Uber’s extraterritoriality arguments, then its standing  
21 arguments, before addressing the sufficiency of Plaintiff’s allegations.

22 1. Plaintiff’s Claims Do Not Require Extra-Territorial Application of Either the UCL or  
23 the CLRA

24 California’s Supreme Court has made clear that there is a strong presumption against the  
25 extra-territorial application of California law. In *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011),  
26 the court reiterated this long-held rule:

27 However far the Legislature’s power may theoretically extend, we  
28 presume the Legislature did not intend a statute to be “operative, with  
respect to occurrences outside the state, . . . unless such intention is

1 clearly expressed or reasonably to be inferred from the language of the  
2 act or from its purpose, subject matter or history.”

3 *Id.* at 1207 (quoting *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal. 4th 1036, 1059  
4 (1999)) (internal citation and quotation marks omitted). This presumption against the extra-  
5 territorial application has been established in California for almost a century. *See N. Alaska Salmon*  
6 *Co. v. Pillsbury*, 162 P. 93, 94 (Cal. 1916). In *Sullivan*, the California Supreme Court made explicit  
7 that this presumption applies to the UCL, noting that “[n]either the language of the UCL nor its  
8 legislative history provides any basis for concluding the Legislature intended the UCL to operate  
9 extraterritorially,” and, therefore, the presumption against extraterritoriality “applies to the UCL in  
10 full force.” *Id.* Simply put, “the UCL does not apply to actions occurring outside of California that  
11 injure non-residents.” *Ice Cream Distributors of Evansville, LLC v. Dreyer’s Grand Ice Cream,*  
12 *Inc.*, C-09-5815 CW, 2010 WL 3619884 (N.D. Cal. Sept. 10, 2010), *aff’d*, 487 F. App’x 362 (9th  
13 Cir. 2012) (internal citation and quotation marks omitted). Courts have assumed the presumption  
14 against extraterritoriality applies equally to the CLRA and, based on the reasoning in *Sullivan*, the  
15 Court finds no basis to hold otherwise. *See McKinnon v. Dollar Thrifty Auto. Grp., Inc.*, No. C-  
16 12-4457-SC, 2013 WL 791457 (N.D. Cal. Mar. 4, 2013); *In re iPhone 4S Consumer Litig.*, No. C-  
17 12-1127-CW, 2013 WL 3829653 (N.D. Cal. July 23, 2013).

18 However, the critical question presented by Plaintiff’s complaint is whether application of  
19 the UCL and CLRA in the circumstances alleged actually entails an extraterritorial application of  
20 those statutes. Multiple courts – including the California Supreme Court in *Sullivan* – have  
21 permitted the application of California law where the plaintiffs’ claims were based on alleged  
22 misrepresentations that were disseminated from California. In *Sullivan*, the court distinguished the  
23 cases of *Weshba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001) and *Clothsrigger, Inc. v. GTA*  
24 *Corp.*, 191 Cal. App. 3d 605 (1997), by noting that, in those cases, “the unlawful conduct that  
25 formed the basis of the out-of-state plaintiffs’ claims (i.e., fraudulent misrepresentations made to  
26 induce consumer transactions), and that justified the application of California law to resolve those  
27 claims, occurred in California.” *Sullivan*, 51 Cal. 4th at 1208 n.10. In *Weshba*, the California Court  
28 of Appeals, in the context of Cal. Bus. & Prof. Code § 17500, rejected the argument that

1 California’s unfair business law “cannot support nationwide class certification.” *Id.* at 241. First,  
2 the court noted that the defendant (Apple) was a “California corporation” and that the brochures  
3 containing the purported misrepresentations “were prepared in and distributed from California.” *Id.*  
4 at 242. A rule permitting application of the UCL or CLRA where the alleged fraudulent activity  
5 emanated from California is consistent with the California Supreme Court’s statement in *In Re*  
6 *Tobacco II Cases*, 46 Cal. 4th 298 (2009) that the UCL’s focus is “on the defendant’s conduct,  
7 rather than the plaintiff’s damages, in service of the statute’s larger purpose of protecting the general  
8 public against unscrupulous business practices.” *Id.* at 312.

9 Multiple federal district courts have denied motions to dismiss similar claims to those raised  
10 in this action on the basis of alleged extraterritorial application of California law. For example, in *In*  
11 *re iPhone 4S Consumer Litigation*, No. C12-1127 CW, 2013 WL 3829653 (N.D. Cal. July 23,  
12 2013), plaintiffs asserted, *inter alia*, UCL and CLRA claims against Apple based on alleged  
13 misrepresentations regarding the functionality of the iPhone 4’s “Siri” feature. *Id.* at \*4. Judge  
14 Wilken noted that “California courts have concluded that ‘state statutory remedies may be invoked  
15 by out-of-state parties when they are harmed by wrongful conduct occurring in California.’” *Id.* at  
16 \*7 (quoting *Norwest Mortg., Inc. v. Superior Ct.*, 72 Cal. App. 4th 214, 224-25 (1999)). She noted  
17 that the Plaintiffs had alleged that that

18 their injuries were caused by Apple’s wrongful conduct in false  
19 advertising that originated in California. Here, Plaintiffs have alleged  
20 that Apple’s purportedly misleading marketing, promotional activities  
21 and literature were coordinated at, emanate from and are developed at  
its California headquarters, and that all “critical decisions” regarding  
the marketing and advertising were made within the state.

22 On this basis, Judge Wilken held that “California’s presumption against the extraterritorial  
23 application of its statutes therefore does not bar the claims of the out-of-state Plaintiffs, because this  
24 principle is ‘one against an intent to encompass conduct occurring in a foreign jurisdiction in the  
25 prohibitions and remedies of a domestic statute.’” *Id.* (quoting *Diamond Multimedia Sys.*, 19 Cal.  
26 4th at 1060 n.20). Numerous cases are in accord. *See TRC & Assocs. v. NuScience Corp.*, No. 2:13-  
27 cv-6903-ODW(CWx), 2013 WL 6073004, at \*5 (C.D. Cal. Nov. 18, 2013) (“[T]he alleged  
28 fraudulent conduct occurred in California. The Complaint is not based solely on a commercial



1 transaction outside of California, but is instead based on material misrepresentations originating in  
2 California with NuScience, traveling through Florida, and ending up in Ohio with TRC.”); *Wang v.*  
3 *OCZ Tech. Group, Inc.*, 276 F.R.D. 618, 630 (N.D. Cal. 2011) (“Though Wang’s allegations of  
4 OCZ’s California-based conduct are general, they provide a sufficient basis at the pleading stage for  
5 the invocation of California law. . . . [T]he facts alleged are that the misleading marketing,  
6 advertising, and product information are ‘conceived, reviewed, approved, or otherwise controlled  
7 from [OCZ’s] headquarters in California.’”); *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1119 (C.D.  
8 Cal. 2008) (“Plaintiffs have adequately alleged that Mattel and Fisher-Price’s conduct occurred, if at  
9 all, in – or had strong connections to – California. Plaintiffs complain of misrepresentations made in  
10 reports, company statements, and advertising that are reasonably likely to have come from or been  
11 approved by Mattel corporate headquarters in California.” (citation omitted)).

12 In the FAC, Plaintiff alleges that Uber is a “Delaware corporation with its headquarters in  
13 San Francisco, California.” FAC ¶ 9. It further alleges that:

14 The deceptive practices alleged herein were conceived, reviewed,  
15 approved and otherwise controlled from Defendant’s headquarters in  
16 San Francisco, California. Furthermore, the misrepresentations and  
17 omissions alleged herein were contained on Defendant’s website and  
18 mobile phone application, which are maintained in California. When  
19 Plaintiff and class members used Defendant’s services those [sic]  
20 transactions, including the billing and payment for those services,  
21 were processed on Defendant’s servers in San Francisco, California.

19 *Id.* ¶ 6. On the basis of these allegations, the Court finds that Plaintiff has alleged a sufficient nexus  
20 between California and the misrepresentations which form the basis of Plaintiff’s claims.  
21 Specifically, allegations that the misrepresentations were developed in California, contained on  
22 websites and an application that are maintained in California, and that billing and payment of  
23 services went through servers located in California distinguish this case from those relied upon by  
24 Uber in its reply brief. *Compare Cannon v. Wells Fargo N.A.*, 917 F. Supp. 2d 1025, 1055-56 (N.D.  
25 Cal. 2013) (allegations that the defendant was headquartered in California were insufficient to  
26 plausibly allege that the advertising in question originated from California); *Gustafson v. BAC Home*  
27 *Loans Servicing, LP*, No. SACV 11-915-JST (ANx), 2012 WL 4761733, at \*6 (C.D. Cal. Apr. 12,  
28 2012) (finding the single allegation that “Defendants’ scheme was devised, implemented and



1 directed from BAC Home Loans Servicing’s and Balboa’s offices in California” was “too vague to  
2 ‘plausibly suggest an entitlement to relief’”); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 917 &  
3 n.26 (C.D. Cal. 2011) (noting that “Plaintiffs have not alleged that marketing decisions about the  
4 representations each Plaintiff saw in his or her home country were made in California”).

5 Plaintiff has provided sufficient factual allegations from which the Court can plausibly infer  
6 that Uber’s alleged gratuity misrepresentations emanated from California. Accordingly, the Court  
7 concludes that, for purposes of the motion to dismiss, application of the UCL and CLRA in these  
8 circumstances would not constitute extra-territorial application of these statutes and therefore  
9 **DENIES** Uber’s motion on this ground.

10 2. Plaintiff Has Sufficiently Alleged Standing Under the UCL and CLRA

11 Uber contends that Plaintiff’s CLRA and UCL claims fail because Plaintiff has failed to  
12 allege economic harm. Proposition 64 amended the UCL to require a Plaintiff to demonstrate that  
13 she had “lost money or property as a result of [the] unfair competition.” Cal. Bus. & Prof. Code  
14 § 17204. Accordingly, standing under the UCL is far narrower than traditional federal standing  
15 requirements: “We note UCL’s standing requirements appear to be more stringent than the federal  
16 standing requirements. Whereas a federal plaintiff’s ‘injury in fact’ may be intangible and need not  
17 involve lost money or property, Proposition 64, in effect, added a requirement that a UCL plaintiff’s  
18 ‘injury in fact’ specifically involve ‘lost money or property.’” *Troyk v. Farmers Group, Inc.*, 171  
19 Cal. App. 4th 1305, 1348 n.31 (2009). Similarly, a plaintiff will have standing under the CLRA if  
20 she “suffers *any damage* as a result of the use or employment any person of a method, act, or  
21 practice declared to be unlawful by Section 1770.” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1107  
22 (9th Cir. 2013) (emphasis in original) (quoting Cal. Civ. Code § 1780(a)). “[A]ny plaintiff who has  
23 standing under the UCL’s and FAL’s ‘lost money or property’ requirement will, *a fortiori*, have  
24 suffered ‘any damage’ for purposes of establishing CLRA standing.” *Id.* at 1108.

25 In *Kwikset v. Superior Court*, 51 Cal. 4th 310 (2011), the California Supreme Court  
26 addressed the UCL’s standing requirement in the context of allegedly misleading advertising.  
27 There, plaintiff alleged that Kwikset Corporation produced locksets which were falsely represented  
28

1 in advertising to have been “Made in U.S.A.” *Id.* at 316. The Court held that there “are  
2 innumerable ways in which economic injury from unfair competition may be shown” such as:

3 A plaintiff may (1) surrender in a transaction more, or acquire in a  
4 transaction less, than he or she otherwise would have; (2) have a  
5 present or future property interest diminished; (3) be deprived of  
6 money or property to which he or she has a cognizable claim; or (4) be  
7 required to enter into a transaction, costing money or property, that  
8 would otherwise have been unnecessary.

9 *Id.* at 323. Further, the Court found that “[n]either the text of Proposition 64 nor the ballot arguments  
10 in support of it purport to define or limit the concept of ‘lost money or property’” and that it did not  
11 “supply an exhaustive list of the ways in which unfair competition may cause economic harm.” *Id.*  
12 Ultimately, on the facts of *Kwikset*, the Court found the following allegations sufficient to establish  
13 standing under the UCL:

14 (1) *Kwikset* labeled certain locksets with “Made in U.S.A.” or a  
15 similar designation, (2) these representations were false, (3) plaintiffs  
16 saw and relied on the labels for their truth in purchasing *Kwikset*’s  
17 locksets, and (4) plaintiffs would not have bought the locksets  
18 otherwise.

19 *Id.* at 328. The Ninth Circuit has noted that “*Kwikset* emphasized that Proposition 64 was enacted  
20 *not* to eliminate individual consumer suits when the consumer was actually deceived by a  
21 misleading advertisement, but rather to stop ‘fishing expeditions’ by consumers and attorneys who  
22 may have never even intended to purchase a product that was being falsely advertised.” *Hinojos v.*  
23 *Kohl’s Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013).

24 Plaintiff alleges that, but for Uber’s “gratuity” misrepresentations, “Plaintiff would not have  
25 agreed to or paid Uber the full amount that Uber charged her and that she paid to Uber.” FAC ¶ 16.  
26 Uber argues this allegation is insufficient to allege that Plaintiff lost money or property for purposes  
27 of the UCL. Rather, it argues that Plaintiff received precisely what she bargained for – a “taxi ride  
28 at a stated price. Docket No. 44, at 13. Therefore, it contends that “Plaintiff would be in exactly the  
29 same position regardless of whether the full 20% charge went to the taxi driver.” *Id.* at 14.  
30 Relatedly, at the hearing, Uber argued that because the 20% fee allegedly misrepresented as a  
31 “gratuity” was a mandatory fee that Plaintiff could not have avoided, how Uber chose to distribute  
32 the collected fee was a “mere curiosity” to Plaintiff and, therefore, not an economic injury.

1 The Court finds that Plaintiff has adequately alleged an economic injury. First, in discussing  
2 the “benefit of the bargain” defense upon which Uber relies, the Ninth Circuit has noted that, under  
3 *Kwikset*, the defense is “permissible only if the misrepresentation that the consumer alleges was not  
4 ‘material.’” *Hinojos*, 718 F.3d at 1107. “A misrepresentation is judged to be ‘material’ if a  
5 reasonable man would attach importance” or “if the maker of the representation knows or has reason  
6 to know that its recipient regards or is likely to regard the matter as important in determining his  
7 choice of action, although a reasonable man would not so regard it.” *Kwikset*, 51 Cal. 4th at 333  
8 (internal citations and quotation marks omitted). “[T]he materiality of a misrepresentation is  
9 typically an issue of fact, and therefore should not be decided at the motion to dismiss stage.”  
10 *Hinojos*, 718 F.3d at 1107 n.7 (citing *In re Steroid Hormone Product Cases*, 181 Cal.App.4th 145  
11 (2010)). That is the case here. *Cf. Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 969 (2002) (“For a  
12 significant segment of the buying public, labor practices do matter in making consumer choices.”)

13 Second, by alleging that she would not have agreed to the full amount that Uber charged her  
14 but for Uber’s purported misrepresentation, Plaintiff has alleged a sufficiently material  
15 misrepresentation. Contrary to Uber’s argument, to obtain standing under the UCL, it is not  
16 necessary to allege and prove the plaintiff would not have entered the transaction but for the  
17 misrepresentation. Such but-for causation is only one of the “innumerable” ways of establishing  
18 standing identified in *Kwikset*, 51 Cal. 4th at 323. Economic injury sufficient to support UCL  
19 standing exists where the plaintiff “surrender[ed] in a transaction more, or acquire[d] less than he or  
20 she otherwise would have.” *Id.* As Uber acknowledged, a UCL claim is stated when the plaintiff,  
21 as a result of a defendant’s misrepresentation, did not receive what he or she had bargained for.  
22 Reply Br., p. 5. This makes sense; materiality for purposes of the UCL is defined not in terms of a  
23 “but for” cause, but whether a reasonable person “would attach importance” to it. *Kwikset*, 51 Cal.  
24 4th at 333. Here it is enough that Plaintiff has alleged that but for Uber’s misrepresentations, she  
25 would not “have agreed to or paid Uber the full amount that Uber charged her and that she paid to  
26 Uber.” FAC ¶ 16.

27 Whether Plaintiff had the option of not paying the additional fee (the 20% gratuity) because  
28 it was integral to Uber’s charge is immaterial to standing under the UCL. A number of cases are

1 instructive on this point. In *Blessing v. Sirius XM Radio Inc.*, 756 F. Supp. 2d 445 (S.D.N.Y. 2010),  
2 the court interpreted the CLRA’s standing requirements. There, plaintiffs who purchased  
3 defendant’s satellite digital radio services alleged that the defendant had misrepresented in its  
4 customer agreements that a “royalty fee” would be included in the subscription cost and that this  
5 charge would be “limited to the amount necessary to ‘pass through’ its own increased costs.” *Id.* at  
6 450. Instead, Plaintiffs alleged that the royalty fee charged “exceeded the amount of Defendant’s  
7 increase in royalty obligations.” *Id.* Plaintiffs asserted a claim under the CLRA, and the Southern  
8 District of New York found that plaintiffs could proceed with this claim. It held that the “California  
9 plaintiffs suffered injury by paying a Royalty Fee that was greater than what it would have been had  
10 it been calculated as an actual ‘pass through’ of the fee paid by Defendant. This states a claim under  
11 § 1770(a)(5) [of the CLRA].” *Id.* at 455. Importantly, the court did not suggest the payment of the  
12 included “royalty fee” was avoidable by the consumer.

13 Similarly, in *Johnson v. Wal-Mart Stores, Inc.*, 544 F. App’x 697 (9th Cir. 2013), plaintiff  
14 alleged that Wal-Mart included a \$9 fee every time a customer purchased a car battery and  
15 misrepresented the fee was required by California law. In fact, California law did not require the  
16 imposition of the fee and Wal-Mart kept the nine dollars for itself. *Id.* at 697 Plaintiff alleged that  
17 “she would not have paid the additional nine dollar fee if she had known that California law did not  
18 require her to pay it and that Wal-Mart intended to keep the nine dollars for itself.” *Id.* The Ninth  
19 Circuit found that these factual allegations “permit a reasonable inference that Johnson paid more  
20 ‘than she otherwise would have’ if Wal-Mart had not engaged in the alleged misrepresentation.” *Id.*

21 Uber contends that this case is distinguishable on this basis since the fee was not  
22 “mandatory” because the customers could opt to not give Wal-Mart the old battery and avoid the  
23 fee. Uber mis-reads *Johnson*. First, the complaint in that action did not allege that plaintiffs could  
24 have avoided the recycling fee by *not* bringing in an old car battery; rather, it alleged that the fee  
25 could only be avoided *by bringing in* an old car battery. Second, and more significantly, the Ninth  
26 Circuit in *Johnson* did not find significant (or even mention) the fact that recycling fee was  
27 somehow avoidable. Rather, it simply stated that it was “reasonable to infer that [plaintiff], if  
28

1 correctly informed, would not have given Wal-Mart the nine dollar fee in addition to paying  
2 seventy-seven dollars for the battery.” *Id.*

3         These cases are consistent with longstanding rule that under the UCL even a mandatory  
4 charge can be deceptive if it is labeled as something it is not. For example, in *McKell v. Washington*  
5 *Mutual, Inc., supra*, 142 Cal. App. 4th 1457, plaintiff alleged that Washington Mutual had  
6 represented in its statements that certain costs of underwriting and wire transfers were included.  
7 These fees were “mandatory” insofar as Washington Mutual required home buyers to pay them.  
8 Nonetheless, the court found that plaintiff had stated a claim under the UCL’s fraudulent prong:

9                 Looking at these documents, plaintiffs reasonably would conclude that  
10                 the fees charged were the costs Washington Mutual incurred in  
11                 providing these services. The fees charged were substantially above  
12                 Washington Mutual’s costs, however. . . . Washington Mutual’s  
13                 practice of charging its customers more for services than the actual  
14                 cost of those services, with no indication to the customers that they  
15                 were doing so, may constitute a deceptive business practice within the  
16                 meaning of the UCL, as a reasonable consumer likely would believe  
17                 that fees charged in connection with a home mortgage loan bore some  
18                 correlation to services rendered.

15 *Id.* at 1472; *see also People v. Dollar Rent-A-Car Sys., Inc.*, 211 Cal. App. 3d 119, 129 (1989)  
16 (holding that the defendant violated the UCL by charging for the “retail cost” of car repairs in excess  
17 of actual repair costs).

18         To hold otherwise would result in perverse outcomes. Were the UCL to recognize economic  
19 injury only where a consumer proves he or she would not have entered the transaction at all would  
20 mean that someone who, for example: (1) bought a computer advertised at a processor speed of  
21 2ghz but which actually ran at 1.8ghz; (2) purchased a car advertised as having an engine that ran at  
22 250 horsepower when, in fact, it only had 225 horsepower; (3) paid for service in which the seller  
23 that falsely represented it included necessary transaction fees; or (4) donated to a charity which  
24 falsely representing that a certain percentage of the funds would go to beneficiaries as opposed to  
25 overhead, would be left with no remedy under the UCL despite being defrauded by the defendant if  
26 she cannot prove she would not have entered the transaction at all. The economic injury  
27 requirement of Proposition 64 was not intended to gut the UCL; it was intended to stop drive-by  
28 lawsuits and “fishing expeditions” by attorneys representing clients who never intended to purchase

1 the product. *See Hinojos*, 718 F.3d at 1107; *see also Kwikset*, 51 Cal. 4th at 321 (“While the voters  
2 clearly intended to restrict UCL standing, they just as plainly preserved standing for those who *had*  
3 had business dealings with a defendant and had lost money or property as a result of the defendant’s  
4 unfair business practices.”). Allowing standing in the case at bar – where a false representation is  
5 made to raise the price of a service which the plaintiff would not have agreed to pay had the truth  
6 been told, does not frustrate the purpose of Proposition 64; rather, it furthers it.<sup>1</sup>

7 At the hearing, Uber relied extensively on the California Court of Appeal decision in *Searle*  
8 *v. Wyndham International, Inc.*, 102 Cal. App. 4th 1327 (2002). There, plaintiff alleged that after  
9 ordering room service at one of defendant’s hotels, she was assessed a 17% service charge which  
10 was, in fact, a gratuity paid to the server. At the same time, the room service bill allegedly contained  
11 a blank line for the customer to add a tip or gratuity. *Id.* at 1330. Plaintiff alleged that the service  
12 charge was deceptive under the UCL as customers were “not advised the service charge is in fact a  
13 gratuity paid to the server.” *Id.* The California Court of Appeal found that plaintiff had failed to  
14 state a claim, finding that “[w]hat a hotel does with the revenue it earns – either from the mini-bar,  
15 in home movies or its room service charges – is of no direct concern to hotel guests.” *Id.* at 1334.  
16 Rather, the “room service patron[] is given both clear notice the service being offered comes at a  
17 hefty premium and the freedom to decline the service. . . . [T]he patron has no legitimate interest in  
18 what the hotel does with the service charge.” *Id.*

19 *Searle* is readily distinguishable. There, the defendant made no representation about the  
20 nature of the service charge or where the collected funds would be distributed. There was no  
21 representation made one way or the other regarding whether the “service charge” was actually a  
22 gratuity payable to the server. Rather, it was – as Uber repeatedly argued at the hearing – a  
23 mandatory charge that was presented to the plaintiff as a charge attendant to ordering room service.  
24 In the case at bar, in contrast, it is alleged that Uber expressly represented a 20% charge was added

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26  
27 <sup>1</sup> Indeed, it is also plausible that had Uber not made the alleged misrepresentation, the total  
28 fee it charged would have been less than what it charged with the misrepresentation. In this regard,  
there is an arguable cause-in-fact in that consumers paid more than they would have but for Uber’s  
alleged misrepresentation.



1 to every metered fare specifically for purposes of paying the driver a gratuity. In short, in *Searle*,  
 2 there was no misrepresentation; here, allegedly, there was.<sup>2</sup>

3 The Court cannot conclude at the motion to dismiss stage that Uber's representations  
 4 regarding gratuities is immaterial as a matter of law. Accordingly, Uber's motion to dismiss  
 5 Plaintiff's UCL and CLRA claims for lack of standing is **DENIED**.

6 3. Plaintiff Has Stated a Claim Under the UCL's Fraudulent and Unfairness Prongs

7 To state a claim under the UCL's fraudulent prong based on false advertising or promotional  
 8 practices "it is necessary only to show that members of the public are likely to be deceived." *In re*  
 9 *Tobacco II*, 46 Cal. 4th at 312. The standard for finding a likelihood of deception is that of a  
 10 "reasonable consumer who is neither the most vigilant and suspicious of advertising claims nor the  
 11 most unwary and unsophisticated, but instead is 'the ordinary consumer within the target  
 12 population.'" *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 226 (2013) (quoting *Lavie v. Procter*  
 13 *& Gamble Co.*, 105 Cal. App. 4th 496, 509-10 (2003)). As this Court recognized in *O'Connor v.*  
 14 *Uber Technologies, Inc.*, No. C-13-3826 EMC, 2013 WL 6354534 (N.D Cal. Dec. 5, 2013), three  
 15 separate tests have developed to determine if conduct is "unfair" for purposes of the UCL. *Id.* at  
 16 \*16-17. In this case, both parties apply the test which holds that conduct is "unfair" if it is  
 17 "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *See*  
 18 *Plumlee v. Pfizer, Inc.*, No. 13-cv-0414-LHK, 2014 WL 4275519, at \*5 (N.D. Cal. Aug. 29, 2014)  
 19 ("A business practice violates the unfair prong of the UCL if it is contrary to 'established public  
 20 policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers  
 21 which outweighs its benefits.'").

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22  
 23  
 24 <sup>2</sup> Uber's reliance on *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796 (2006) for the same  
 25 proposition is misplaced. In that case, the court found that the challenged refueling fee was as a  
 26 practical matter unavoidable and unfair. The court did not hold that a UCL claim cannot lie where a  
 27 challenge fee is avoidable. Other cases cited by Uber in its briefs involve situations in which no  
 28 misrepresentation affecting the efficacy of the product was found. *See, e.g., Tae Hee Lee v. Toyota*  
*Motor Sales, U.S.A., Inc.*, 13-cv-7331, 2014 WL 211462, at \*5 (C.D. Cal. Jan. 9, 2014) ("In this  
 case, Plaintiffs have not alleged an actual economic injury because they have not had any negative  
 experiences with the PCS and have not identified any false representations about the automatic pre-  
 collision braking feature made by Toyota.").



1 In addressing similar allegations regarding Uber’s alleged “gratuity” misrepresentations, this  
2 Court has previously held:

3 The Complaint alleges the following: Uber advertises “on its website  
4 and in marketing materials, that gratuity is included and there is no  
5 need to tip the driver,” reasonable customers would expect that drivers  
6 would receive that gratuity, Uber does not remit the entirety of the  
7 gratuity to drivers, and as such, Uber’s statements are “deceptive and  
8 misleading.” These allegations make it plausible that a reasonable  
9 consumer would likely be deceived to the detriment of drivers.

10 *O’Connor*, 2013 WL 6354534, at \*17. Similarly, here, Plaintiff has alleged that Uber represents that  
11 it automatically charges consumer credit card “the metered fare + 20% *gratuity*” and that this “20%  
12 gratuity is automatically added for the driver” while, at the same time, it “keeps a substantial portion  
13 of this additional charge for itself as its own additional revenue and profit.” FAC ¶ 13. These  
14 allegations are sufficient to plausibly allege that a reasonable consumer would be deceived and, as a  
15 result of this deception, they expended more money than they otherwise would have but for the  
16 misrepresentation (as discussed above).

17 Similarly, in determining whether a business practice is unfair under the approach adopted  
18 by the parties, “California courts balance the ‘impact on the its alleged victim’ against ‘the reasons,  
19 justifications, and motives of the alleged wrongdoer.’” *Plumlee*, 2014 WL 4275519, at \*5 (quoting  
20 *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (2006)). As discussed above, Plaintiff has  
21 alleged that Uber adds a fee above its metered fair, misrepresents this fee as a gratuity that is given  
22 to the consumers, and keeps a substantial portion of this fee to boost its revenue. The Court cannot  
23 conclude at this early stage that the alleged cost of this misrepresentation to Uber’s consumers is  
24 justified by Uber’s reasons and motives. *See Pirozzi v. Apple, Inc.*, 966 F. Supp. 2d 909 (N.D. Cal.  
25 2013) (“Apple offers nothing in the way of ‘reasons, justifications, or motives,’ or ‘utility of [its]  
26 conduct,’ to weigh against the alleged harm. Thus, ‘the Court cannot say that Apple’s practices are  
27 not injurious to consumers, or that any benefit to consumers outweighs the harm.’” (citation  
28 omitted)).

29 In arguing that Plaintiff has failed to state a claim under either the fraudulent or unfairness  
30 prongs of the UCL, Uber relies almost exclusively on the California Court of Appeal’s decision in  
31 *Searle*, discussed above. Uber appears to contend that *Searle* stands for the proposition that where a

1 charge is mandatory, the consumer has no legitimate interest in what is ultimately done with the  
2 funds recouped as a result of that charge. Similarly, it contends that, under *Searle*, so long as a  
3 consumer is not deceived about the *total cost* of the services it receives from the defendant, the UCL  
4 is not offended. Docket No. 44, at 8-9.

5 For the reasons stated above in connection with standing, Uber reads *Searle* too broadly.

6 The Court finds that Plaintiff has stated a claim under the UCL's fraudulent and unfairness  
7 prongs, and Uber's motion to dismiss on this ground is **DENIED**.

8 4. Plaintiff Has Stated a Claim Under the CLRA.

9 The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices  
10 undertaken by any person in a transaction intended to result or which results in the sale or lease of  
11 goods or services to any consumer." Cal. Civ. Code § 1770. Plaintiff alleges that Uber violated a  
12 number of the CLRA's provisions.

13 First, Plaintiff alleges that Uber has violated § 1770(a)(5), which makes it unlawful to  
14 represent "that goods or services have . . . characteristics . . . which they do not have." Cal. Civ.  
15 Code § 1770(a)(5). Similarly, Plaintiff alleges a violation of § 1770(a)(9) which prohibits  
16 "advertising goods or services with intent not to sell them as advertised." *Id.* § 1770(a)(9).  
17 Plaintiff's arguments under both sections are similar – that Uber representing that it would collect  
18 and automatically remit a 20% gratuity to the driver, "thus allowing the consumer to arrange for a  
19 taxi without the necessity of pulling out his or her wallet and/or exchanging cash with the driver,"  
20 Uber has misrepresented a characteristic and benefit of its service. Docket No. 46, at 12. The Court  
21 finds Plaintiff's allegations are sufficient to state a claim under § 1770(a)(5). As alleged, Uber  
22 represents that its application service remits a 20% gratuity to drivers when, in fact, it does not do  
23 so. This is sufficient to allege that Uber's service was advertised as having a characteristic it did not  
24 have. *Cf. Blessing*, 756 F. Supp. 2d, at 455 (holding that the plaintiffs had stated a claim for  
25 violation of sections 1770(a)(5) and 1770(a)(9), where the defendant represented it was charging a  
26 "pass through" royalty fee, but where the actual royalty fee was much less).

27 Second, Plaintiffs have alleged that Uber has violated § 1770(a)(14), which prohibits a  
28 defendant from "[r]epresenting that a transaction confers or involves rights, remedies, or obligations

1 which it does not have or involve, or which are prohibited by law.” Cal. Civ. Code § 1770(a)(14).  
2 The Court finds that Plaintiff has sufficiently alleged a violation of this provision. The allegation  
3 that Uber represented that the 20% gratuity fee would be remitted to drivers is sufficient to allege  
4 the existence of an obligation on the part of Uber – an obligation that Uber misrepresented by using  
5 the charged fee as a revenue source. *See Blessing*, 756 F. Supp. 2d at 455 (finding that plaintiff had  
6 stated a claim under § 1770(a)(14) because, the “royalty fee” imposed by the defendant “certainly  
7 imposes an ‘obligation’ and the alleged misrepresentation with respect to that fee . . . suggests that  
8 the obligation entails covering a ‘pass through’ of increased royalty obligations when in fact it is a  
9 source of additional and ‘substantial revenue’”).

10 However, the Court finds that Plaintiff has failed to state a claim under §§ 1770(a)(13) or  
11 1770(a)(16). Section 1770(a)(13) prohibits making “false or misleading statements of fact  
12 concerning reasons for, existence of, or amounts of price reductions.” Cal. Civ. Code §  
13 1770(a)(13). Plaintiff has failed to state a claim under this section because she has failed to allege  
14 that Uber made any representations with regards to a “fee reduction” nor, contrary to her arguments  
15 in her opposition, has she alleged that Uber ever represented that its service was a “free or no fee  
16 service.” Finally, § 1770(a)(16) makes unlawful “[r]epresenting that the subject of a transaction has  
17 been supplied in accordance with a previous representation when it has not.” *Id.* § 1770(a)(16).  
18 Plaintiff asserts that Uber violated § 1770(a)(16) by charging the consumer’s credit card after  
19 representing that it would remit the 20% gratuity to the driver. She argues that charging the card is  
20 “necessarily” “representing” that Uber would remit the amount according to its prior representation.  
21 The Court disagrees. This subsection “appears to target not the initial representation in a  
22 transaction, but a subsequent representation which is deceptive.” *Blessing*, 756 F. Supp. 2d at 455.  
23 Here, Plaintiff has not alleged the existence of a representation subsequent to the alleged initial  
24 misrepresentation, and the Court concludes that the subsequent charging of the credit card does not  
25 constitute a “representation” on the part of Uber.

26 5. Plaintiff Has Stated a Claim Under the UCL’s Unlawful Prong

27 “By proscribing ‘any unlawful’ business practice, section 17200 borrows violations of other  
28 laws and treats them as unlawful practices that the unfair competition law makes independently

1 actionable.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)  
2 (citations and quotation marks omitted). The UCL’s “coverage is sweeping, embracing anything that  
3 can properly be called a business practice and that at the same time is forbidden by law.” *Id.*  
4 Because the Court finds that Plaintiff has adequately alleged a violation of the CLRA, she has also  
5 sufficiently alleged a violation under the unlawfulness prong of the UCL.

6 6. Summary

7 For the foregoing reasons, the Court finds that Plaintiff has stated a claim under the  
8 fraudulent, unfairness, and unlawful prongs of the UCL. Further, Plaintiff has stated a claim under  
9 the CLRA to the extent she relies on § 1770(a)(5), (9), (14) but has failed to state a claim under the  
10 CLRA to the extent she relies on § 1770(a)(13), (16). Accordingly, Uber’s motion to dismiss is  
11 **GRANTED** with respect to CLRA claims under § 1770(a)(13) and (16); in all other respects the  
12 motion to dismiss is **DENIED**.

13 C. Plaintiff Has Failed to State a Claim for Breach of Contract

14 Under California law, “[a] cause of action for breach of contract requires proof of the  
15 following elements: (1) existence of the contract; (2) plaintiff’s performance or excuse for  
16 nonperformance; (3) defendant’s breach; and (4) damages to plaintiff as a result of the breach.”  
17 *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th 1226, 1239 (2008). Where a plaintiff has failed  
18 to allege that the defendant’s breach has caused her to suffer any damage, a breach of contract action  
19 for damages will not lie. *See Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012)  
20 (noting that to state a claim for breach of contract, plaintiff must plead “the contract, plaintiffs’  
21 performance . . . defendant’s breach, and damage to plaintiff therefrom”); *see also Bramalea Cal.,*  
22 *Inc. v. Reliable Interiors, Inc.*, 119 Cal. App. 4th 468 (2004) (“A breach of contract is not actionable  
23 without damage.”). Further, “[t]o establish contractual damages, a Plaintiff must establish  
24 ‘appreciable and actual damage,’” – “[n]ominal damages, speculative harm, or threat of future harm  
25 do not suffice to show legally cognizable injury.” *Id.*

26 Uber argues in its motion, even if the alleged breach in question had not occurred – that is, if  
27 Uber had remitted the 20% gratuity as it allegedly promised in its advertisements – Plaintiff (and the  
28 class of Uber customers) would be in precisely the same financial position as they are *after* the

1 breach. According to Uber, Plaintiff has not, and cannot, allege that they suffered damages for  
2 purposes of a breach of contract action.

3 In contrast to its briefing on the UCL claim, Plaintiff does not respond to the argument that it  
4 has suffered cognizable contract damages, even if the parol evidence of the advertisement is  
5 considered in interpreting the terms and conditions of the contract. Plaintiff's failure to respond is  
6 understandable. Under common law contract principles, a promisee's right to enforce a contract  
7 term that benefits a third party depends on whether that third party is a "creditor" beneficiary or a  
8 "donee" beneficiary. If the beneficiary is a creditor, the promisee can sue for contract damages for  
9 the promisor's failure to benefit the donee. If the beneficiary is a donee, the promisee cannot sue for  
10 such damages.

11 In *In re Marriage of Smith & Maescher*, 21 Cal. App. 4th 100 (1993), the court addressed a  
12 marital separation agreement in which the husband agreed to pay for his children's undergraduate  
13 education. *Id.* at 104. Eventually, the husband stopped paying the expenses, and the wife filed an  
14 action to enforce the separation agreement. The marital separation agreement was governed by  
15 Massachusetts law and the court, applying the Restatement (Second) of Contracts held that in that  
16 case, the "promisee cannot recover damages which may be suffered by the intended third party  
17 beneficiary." *Id.* at 107. The court noted that the Restatement differentiates between "creditor"  
18 beneficiaries (that is, beneficiaries who receive payments from the promisor of a debt or obligation  
19 owed the beneficiary by the promisee) and "donee" beneficiaries who essentially receives a "gift" in  
20 the form of the promisor's obligation to it. *Id.* at 106. The court then held that if a "promisor does  
21 not pay the promisee's debt to the creditor beneficiary, then the promisee will remain liable to the  
22 beneficiary for the full amount of the debt and could directly suffer damages in this full amount. In  
23 contrast, if the promisor does not perform its obligation to the donee beneficiary, the promisee will  
24 not be liable to the beneficiary for such performance," and thus will not incur cognizable damages to  
25 support a claim for breach of contract against the promisor. *Id.* at 106. The court did note, a  
26 promisee may sue for specific performance. *Id.*

27 While tips or gratuities may be customary in the service industry, they are not binding  
28 obligations on the part of customers. Uber's failure to remit the 20% gratuity to the drivers does not

1 leave Plaintiff or the putative class members liable to the drivers for any debt or amount.

2 Accordingly, the drivers are properly considered donee beneficiaries. *See Dateline Builders, Inc. v.*  
 3 *City of Santa Rosa*, 146 Cal. App. 3d 520, 526 (1983) (“A person is a donee beneficiary only if the  
 4 promisee’s contractual intent is either to make a gift to him *or to confer on him a right against the*  
 5 *promisor.*” (emphasis added)). Hence, Plaintiff cannot seek damages for breach of contract for  
 6 Uber’s failure to benefit drivers. Plaintiff has not and, on the basis of the allegations in the FAC,  
 7 cannot allege that Uber’s alleged breach of the contract caused her to suffer any contract damages.<sup>3</sup>

8       Such a holding is not inconsistent with the Court’s holding above that Plaintiffs’ have  
 9 suffered an economic injury for purposes of the UCL. Breach of contract actions seeking recovery  
 10 of damages are focused on placing plaintiffs in the same position they would have been in had  
 11 defendants performed their contractual obligations. *See, e.g., General Employees Trust Fund v.*  
 12 *Victory Bldg. Maint., Inc.*, No. C06-6654 CW (MEJ), 2007 WL 1288393, at \*5 (N.D. Cal. Apr. 11,  
 13 2007). For the reasons stated above, Plaintiffs are not entitled to any money damages under this test.  
 14 Plaintiffs UCL claim, by contrast, is not limited to the strictures of the alleged contractual terms its  
 15 prescriptions are aimed at unlawful or unfair business practices (wherein a violation may be found  
 16 even if conduct violates no specific law). *See Cel-Tech Commc’ns*, 20 Cal. 4th at 180 (“In other  
 17 words, a practice is prohibited as ‘unfair’ or ‘deceptive’ even if not ‘unlawful’ and vice versa.”).  
 18 Nor is the UCL geared to award traditional contract damages. *See In re Tobacco II*, 46 Cal. 4th at  
 19 312 (“A UCL action is equitable in nature; damages cannot be recovered. . . . We have stated under  
 20 the UCL, [p]revailing plaintiffs are generally limited to injunctive relief and restitution.”) (quoting  
 21 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003)). Under the UCL claim,  
 22 the operative effect of the 20% gratuity statement is not a contractual promise, but rather an alleged  
 23 misrepresentation which skewed the transaction and caused Plaintiffs to expend more money than  
 24 they otherwise would have had the representation not been made. Stated another way, the breach of  
 25 contract claim looks at the 20% gratuity statement and asks how Plaintiffs can be put in the same

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26  
27  
28 <sup>3</sup> Plaintiff does not seek specific performance or assert any common law fraud claims.

1 situation they would be in had Defendants performed. The UCL claim looks at the 20% gratuity  
2 statement and asks how Plaintiffs would be positioned had the misrepresentation not been made.

3 Accordingly, Uber's motion to dismiss this claim is **GRANTED** and the claim is dismissed  
4 with prejudice.<sup>4</sup>


#### 5 **IV. CONCLUSION**

6 For the foregoing reasons, Uber's motion to dismiss Plaintiff's UCL claims is **DENIED**.  
7 Further, Uber's motion to dismiss Plaintiff's CLRA claim is **DENIED** to the extent Plaintiff's claim  
8 is predicated on Cal. Civ. Code § 1770(a)(5), (9), (14) and **GRANTED** to the extent the claim is  
9 predicated on Cal. Civ. Code § 1770(a)(13), (16). The CLRA claim under these latter provisions is  
10 dismissed with prejudice. Finally, Uber's motion to dismiss is **GRANTED** to the extent it seeks  
11 dismissal of Plaintiff's breach of contract claim. That claim is dismissed with prejudice.

12 This order disposes of Docket No. 44.

13  
14 IT IS SO ORDERED.

15  
16 Dated: September 17, 2014

17   
18 EDWARD M. CHEN  
19 United States District Judge

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21  
22  
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25 \_\_\_\_\_  
26 <sup>4</sup> The Court notes that in *O'Connor v. Uber* it dismissed a claim alleging breach of implied  
27 contract asserted under a third-party beneficiary theory brought on behalf of the drivers. *See*  
28 *O'Connor v. Uber Techs., Inc.*, No. C13-3826 EMC, 2014 WL 4382880, at \*6-8 (N.D. Cal. Sept. 4,  
2014). The class in *O'Connor* chose to rely on an implied-in-fact contract theory that the Court  
found was barred by an express provision of Uber's terms and conditions. The plaintiff in  
*O'Connor* did not allege, as Plaintiffs do here, that the gratuity-based representations were  
incorporated by reference into the Terms and Conditions.