IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DAWN COOKS, EMMA BRADLEY, GAYLA FENNOY, and CHRISTOPHER MARCH, On Behalf of Themselves and All Others Similarly Situated,	)	
Plaintiffs,	)	
vs.	)	**Case No. 3:15-CV-0652-NJR-PMF**
THE HERTZ CORPORATION,	)	
Defendant.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

Currently before the Court is Defendant's motion to compel arbitration of Plaintiff Dawn Cooks's claims and to dismiss or stay proceedings related to those claims (Doc. 24), Defendant's motion to dismiss the claims of Plaintiffs Emma Bradley, Gayla Fennoy, and Christopher March pursuant to Federal Rule of Civil Procedure 9(b) and 12(b)(6) (Doc. 25), Plaintiffs' motion to strike Defendant's reply brief (Doc. 33), and Plaintiffs' motion to strike Defendant's response to Plaintiffs' motion to strike (Doc. 35). For the following reasons, the Court grants Defendant's motion to compel arbitration and dismiss or stay proceedings, denies Defendant's motion to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), denies Plaintiffs' motion to strike Defendant's reply brief, and denies Plaintiffs' motion to strike Defendant's response to Plaintiffs' motion to strike.

INTRODUCTION

This case is a purported consumer class action regarding automobile rental transactions. Defendant Hertz is in the business of renting cars to customers for a predetermined cost, a portion of which Plaintiffs allege is fraudulent. On June 10, 2015, Defendant, the Hertz Corporation, removed this action from state court pursuant to 28 U.S.C. §§ 1332, 1441, 1453, and 1446 asserting that this Court has jurisdiction under the Class Action Fairness Act ("CAFA").[1] *See* 28 U.S.C. § 1332(d) (Doc. 1). On August 6, 2015, Plaintiffs filed an amended complaint, the operative complaint in this matter, which added two more named Plaintiffs, Gayla Fennoy and Christopher March (Doc. 23). Plaintiffs bring the following nine claims against Hertz:

> **Count One**: Hertz violated the Illinois Consumer Fraud Act ("ICFA") by means of deceptive acts or practices;
>
> **Count Two:** Hertz violated the ICFA by means of unfair/unethical practices;
>
> **Count Three:** Hertz violated the ICFA by means of unfair practices in imposing an excessive fee related to the recovery of vehicle licensing costs in violation of the Illinois Vehicle Code;
>
> **Count Four:** Hertz violated the ICFA by means of unfair practices in imposing an "Energy Surcharge" on nonbusiness renters in violation of the Illinois Vehicle Code;
>
> **Count Five:** Defendant received or obtained possession of Plaintiffs' money for unjust reasons in Illinois, thereby achieving a benefit;

[1] The Court ordered Defendant to file an amended notice of removal on or before April 29, 2016 (Doc. 52). Defendant responded to this Order and filed an amended notice of removal on April 29, 2016 (Doc. 54). The Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because the amount in controversy exceeds $5,000,000, the proposed class includes at least 100 members, and at least one Plaintiff is a citizen of a state different from Defendant.

Count Six: Hertz violated the Missouri Merchandising Practices Act ("MMPA") by means of deceptive practices;

Count Seven: Hertz violated the MMPA by means of unfair practices in Missouri;

Count Eight: Defendant received or obtained possession of Plaintiffs' money for unjust reasons in Missouri, thereby achieving a benefit;

Count Nine: Declaratory relief regarding Defendant's arbitration provision.

On August 19, 2015, Defendant filed a motion to compel arbitration as to Plaintiff Dawn Cooks and to dismiss or stay proceedings related to those claims (Doc. 24). On the same day, Defendant filed a motion to dismiss the claims of the remaining Plaintiffs pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) (Doc. 25). Plaintiffs timely responded to both motions (Docs. 28, 29). Defendant filed reply briefs as to both motions on October 15, 2015 (Docs. 31, 32). Plaintiffs subsequently filed a motion to strike Defendant's reply briefs (Doc. 33)[2], to which Defendant responded (Doc. 34), and Plaintiff then filed a motion to strike Defendant's response to Plaintiffs' motion to strike.[3] On January 27, 2016, the Court stayed discovery pending a ruling on Defendant's motions (Docs. 45, 47).

[2] Because the Court finds that Defendant has demonstrated exceptional circumstances for filing its reply briefs in accordance with Local Rule 7.1, Plaintiffs' motion to strike Defendant's reply briefs are denied.

[3] Because Defendant filed a response to Plaintiff's motion to strike within the appropriate time frame set forth in Local Rule 7.1, Plaintiffs' motion to strike Defendant's response to Plaintiffs' motion to strike Defendant's reply brief is denied.

FACTUAL BACKGROUND

This case concerns two fees that Hertz charges its customers, the "Energy Surcharge" and the "Vehicle License Fee Recovery" ("VLCRF") in Illinois, and "Vehicle Licensing Cost Recovery" ("VLCR") in Missouri. Plaintiff Cooks rented cars from Hertz on or about November 17, 2014, and on or about April 20, 2015, from its O'Fallon, Illinois location. (Doc. 23, p. 4 ¶¶ 18-19). Plaintiff Bradley claims to have rented cars from Hertz at Lambert International Airport in St. Louis, Missouri, "at various times in 2010 through Christmas of that year" (*Id.*, p. 2 ¶ 7). Plaintiff Fennoy asserts that she also rented cars from Hertz "[d]uring the three years preceding the filing of this Amended Complaint," in addition to having rented cars from Hertz in Missouri "[d]uring the five years preceding the filing of the amended complaint." (*Id.*, p. 2 ¶ 8, p. 5 ¶¶ 24-25). Plaintiff March claims to have rented a car from Hertz "[d]uring the three years preceding the filing of the Amended Complaint." (*Id.*, p. 2 ¶ 9). Each time Plaintiffs rented a car from Hertz, they were charged various amounts, which were labeled as an Energy Surcharge and VLCRF or VLCR.

Defendant first began to charge customers an Energy Surcharge in 2008. The Energy Surcharge was displayed on Hertz's website when a customer would reserve a vehicle and included the following explanation: "[t]he costs of energy needed to support our business operations have escalated considerably. To offset the increasing costs of utilities, bus fuel, oil and grease, etc., Hertz is separately imposing an Energy Surcharge." (*Id.*, p. 10 ¶ 12). Because the charge was originated at a date when energy prices were falling, Plaintiffs claim that the charge was originated to garner more profit

and not the stated purpose. Plaintiffs include several graphs and charts to demonstrate that energy prices were falling as the Energy Surcharge was rising.

The other charge Plaintiffs complain about is the VLCR or the VLCRF, which Hertz describes as a fee for "Hertz's recovery of the proportionate amount of the vehicle registration, licensing and related fees applicable to a rental." (Doc. 28, p. 3). Plaintiffs allege that the VLCR and the VLCRF are also designed for profit and not for the stated reason. Plaintiffs allege that the VLCR and VLCRF greatly surpass any costs that Hertz incurs to license its vehicles. Plaintiffs cite examples such as there is a greater charge depending on where you rent the vehicle from, the brand of vehicle rented, and if you rent from Hertz or one of its sister companies.

Plaintiffs allege that both of these charges violate the ICFA and the MMPA "as both [are] deceptive and unfair." (*Id.*, p. 5). Plaintiffs further claim that these charges are unethical and unfair because they violate the American Marketing Association and Direct Marketing Association's ethical standards, in addition to violating public policy. (*Id.*)

DISCUSSION

I. MOTION TO COMPEL ARBITRATION OF CLAIMS OF PLAINTIFF DAWN COOKS AND TO DISMISS OR STAY PROCEEDINGS RELATED TO THOSE CLAIMS (DOC. 24).

Hertz claims that this Court is not the proper venue for Plaintiff Cooks's claims because Plaintiff Cooks signed a binding arbitration agreement. Hertz asks the Court to enforce this agreement and to dismiss Plaintiff Cooks's claims pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2.

The FAA governs the validity of agreements to arbitrate. *See Jain v. de Mere,* 51 F.3d 686, 688 (7th Cir. 1995). The FAA states that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The initial issue before the Court is whether it is for the Court or an arbitrator to decide the threshold and gateway issue of arbitrability.

Cooks rented a car from Hertz on or about November 17, 2014, and on or about April 20, 2015 (Doc. 23, p. 4 ¶¶ 18-19). On each of these instances, Cooks signed an agreement with Hertz, which contained an arbitration provision. The delegation clause, which was set forth in the arbitration provision, contracted for an arbitrator to have the ability to decide whether or not Cooks would have the ability to challenge the enforceability of the arbitration provision. The delegation clause at issue states "all issues are for the arbitrator to decide, including his or her own jurisdiction, and any objections with respect to the existence, scope or validity of this Arbitration Provision." (Doc. 23-3). The parties also agreed that "[t]he American Arbitration Association ("AAA") would administer any arbitration pursuant to its Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes." *Id*.

Hertz argues that the language of the delegation clause indicates that an arbitrator, not the Court, should decide the threshold issue of arbitrability. Hertz further argues that, because the parties agreed to be bound by the AAA's rules, the issue of

arbitrability must be decided by an arbitrator.

Cooks sets forth two arguments supporting her assertion that the Court, not an arbitrator, should decide the threshold issue of arbitrability. First, Cooks argues that the arbitration provision and the delegation clause are unconscionable because they were "buried on page four of a five-page contract in tiny print." (Doc. 29, p. 16). Secondly, Cooks argues that the delegation clause is unconscionable because the parties did not clearly and unmistakably agree to the delegation clause.

Cooks first argues that the placement of the arbitration provision and the delegation clause in the contract makes them unconscionable. Hertz's arbitration provision is located on the fourth page of a five-page contract, and it is typed in the same font and size as the rest of the agreement. The arbitration provision begins with the heading "**ARBITRATION PROVISION**" typed in bolded and capitalized letters (Doc. 23-3). The delegation clause is located in the fourth short paragraph following this heading. The wording of the delegation clause can be understood by the average layperson. Thus, the Court does not find the arbitration provision or the delegation clause to be unconscionable because of its location in the contract.

Cooks's second argument also fails because the arbitration clause clearly sets forth that an arbitrator has the ability to decide the "validity of this Arbitration Provision." (Doc. 24-1). There is nothing vague or ambiguous about this statement or the arbitration clause as a whole. Individuals of common intelligence would not have to guess at the meaning of this language. *See Baggett v. Bullitt,* 377 U.S. 360, 367 (1964) (holding a provision of a contract unenforceable because "men of common intelligence

must necessarily guess at its meaning."); *See also Quinlan v. Stouffe*, 823 N.E.2d 597, 603 (Ill. App. Ct. 2005) ("However, a contract 'is sufficiently definite and certain to be enforceable if the court is enabled from the terms and provisions thereof, under proper rules of construction and applicable principles of equity, to ascertain what the parties have agreed to do.'") (*citing Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 515 N.E.2d 61, 65 (Ill. Sup. Ct. 1987)). Further, when parties clearly and unmistakably contract for a gateway issue, such as the issue of arbitrability, the Court is bound by this agreement and must defer the decision of this threshold matter to an arbitrator. *See Rent-A-Center West, Inc., v. Jackson*, 561 U.S. 63, 79 (2010); *See also Grasty v. Colorado Technical Univ.*, 599 F. App'x 596, 598 (7th Cir. 2015).

Finally, the Court agrees with Hertz's argument that it must send the threshold matter of arbitrability to an arbitrator because the arbitration provision is bound by the Rules of the AAA. The Arbitration Provision states that "[t]he American Arbitration Association ("AAA") will administer any arbitration pursuant to its Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes." (Doc. 23-3). By agreeing to have the AAA's rules govern the parties' arbitration, they also agreed to leave the issue of whether Cooks's claims belong in arbitration to an arbitrator. *See Corrigan v. Domestic Linen Supply Co., Inc.*, No. 12-cv-0575, 2012 WL 2977262, at *2 (N.D. Ill. July 20, 2012) ("Further, when parties agree in a valid arbitration agreement that the AAA's rules apply, an arbitrator should decide the scope of the arbitrability.") *citing Bayer CropScience, Inc. v. Limagrain Genetics Corp., Inc.*, No. 04-cv-5829, 2004 WL 2931284, at *4 (N.D. Ill. Dec. 9, 2004) ("The inclusion of the

phrase '[t]he arbitration shall be conducted . . . in accordance with the prevailing commercial arbitration rules of the American Arbitration Association' in the arbitration provision of the Agreement is clear and unmistakable evidence that the issue of arbitrability is to be submitted to the arbitrator.").

For these reasons, the Court finds that the issue of arbitrability is to be decided by an arbitrator, and the claims brought by Plaintiff Cooks are dismissed without prejudice. *See Innova Hospital San Antonio, L.P. v. Blue Cross and Blue Shield of Georgia, Inc.,* 995 F. Supp. 2d 587, 613 (N.D. Tex. 2014) (holding that 9 U.S.C. § 3 "is not intended to limit the dismissal of a case in the proper circumstances. [internal citation omitted] Courts may dismiss a case 'if retaining jurisdiction and staying the action will serve no purpose'") (quoting *Jureczki v. Banc One Texas, N.A.,* 252 F. Supp. 2d 368, 380 (S.D. Tex. 2003), *aff'd.,* 75 F. App'x 272 (5th Cir. 2003)).

II. MOTION TO DISMISS FOR FAILURE TO MEET THE HEIGHTENED PLEADING STANDARD OF RULE 9(B) AND FOR FAILURE TO STATE A CLAIM UNDER RULE 12(B)(6) (DOC. 25)

Hertz moves to dismiss Plaintiffs Bradley, Fennoy, and March's claims pursuant to Federal Rule of Civil Procedure 9(b) (Doc. 25). Hertz argues that Plaintiffs' amended complaint lacks the details required under Rule 9(b) regarding the time, place, and contents of the alleged misrepresentations or deceptive conduct (Doc. 25, p. 1). Hertz further argues that Plaintiffs were never exposed to deceptive conduct as alleged in the amended complaint. *Id*.

Hertz asserts that if Plaintiffs' claims are not dismissed pursuant to Rule 9(b), they should be dismissed for failure to state a claim upon which relief can be granted under

Federal Rule of Civil Procedure 12(b)(6) (Doc. 25, p. 2). Specifically, Hertz argues that its Energy Surcharge and VLCR/VLCRF fees are not unfair as matter of law because they were fully disclosed. According to Hertz, its fees are not unfair, and Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) (*Id).*

A. DEFENDANT'S REQUEST FOR DISMISSAL UNDER RULE 9(B)

It is uncontested that Plaintiffs' deceptive acts claims contained within Counts One and Six should be analyzed under the heightened pleading standard of Rule 9(b). *See Budach v. NIBCO, Inc.,* No. 2:14-cv-04324, 2015 WL 3853298, at *6 (W.D. Mo. June 22, 2015); *see O'Brien v. Landers,* No. 1:10-cv-02765, 2011 WL 221865, at *4 (N.D. Ill. Jan. 24, 2011). Specifically Counts One and Six allege that Hertz violated the ICFA and the MMPA by deceptive acts through the misrepresentation of fees on Hertz's website.

Federal Rule of Civil Procedure 9(b) states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). The purpose of the elevated pleading standard is so Plaintiffs "conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." *Camasta v. Jos. A. Bank Clothiers, Inc.,* 761 F.3d 732, 738 (7th Cir. 2014). When claiming fraud or deception, a plaintiff is required to allege the "who, what, when, where, and how" of a case. *DiLeo v. Ernst & Young,* 901 F.2d 624, 627 (7th Cir. 1990). More specifically, a plaintiff is required to plead "the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Windy City Metal*

Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc., 536 F.3d 663, 668 (7th Cir. 2008); *H.C. Duke & Son, LLC v. Prism Mktg. Corp.*, No. 4:11-cv-04006, 2013 WL 5460209, at *3 (C.D. Ill. Sept. 30, 2013).

Hertz argues that Plaintiffs Bradley, March, and Fennoy's claims must be dismissed because they cannot pinpoint exact dates in which they rented cars from Hertz. But Plaintiffs are not required to plead with specificity the exact dates that they rented their cars. *Camasta*, 761 F.3d at 737 ("We do not require that Camasta provide the precise date, time, and location that he saw the advertisement or every word that was included on it, but something more than Camasta's assertion that 'merchandise was offered at "sale prices" is needed.'").

Plaintiff Bradley claims that she rented cars from Hertz "at various times in 2010 through Christmas of that year" (Doc. 23, p. 4). Plaintiffs Fennoy and March allege that they have rented cars from one of Hertz's locations in Illinois in the three years prior to the filing of the amended complaint (Doc. 23, p. 5). Plaintiff Fennoy also alleges that she rented cars from Hertz in the five years preceding the filing of the amended complaint from a Missouri location (*Id).* At this stage of the case, Plaintiffs' generalized allegations regarding when they rented cars from Hertz are sufficient to satisfy Rule 9(b).

Hertz next argues that Plaintiffs failed to plead in detail the specifics of the alleged deceptive misrepresentations (Doc. 25, p. 9). Plaintiffs allege that Hertz misrepresented its Energy Surcharge and VLCRF/VLCR on its website because the fees were not used for the stated purpose, but instead were used to gain additional profit. As stated above, Plaintiffs pleaded with enough specificity the dates on which they rented

cars from Hertz. Plaintiffs state that "[a]t the time Hertz first imposed the 'Energy Surcharge' in October 2008, energy costs throughout the American Economy . . . were 'not escalat[ing] considerably.' . . . They were declining." (Doc. 23, p. 14). Plaintiffs go on to state that '[t]he 'Energy Surcharge' not only does not reflect a 'precise' measure of Hertz' [sic] actual energy costs, it does not reflect any measure of Hertz' [sic] actual energy costs." (Doc. 23, p. 23). Additionally, Plaintiffs claim that the VLCRF and the VLCR "are far more than the proportionate amount of vehicle registration, licensing and related fees applicable to a rental; these fees mainly provide increased profit for the company." (*Id.*, p. 24). Plaintiffs cite to the fact that the charge is different for a car rented from O'Hare International Airport as opposed to a car rented elsewhere in the state of Illinois and that the amount charged at Lambert International Airport differed from the amount charged at a downtown St. Louis location (*Id.*, pp. 27, 30). Plaintiffs assert that these misrepresentations were made on Hertz's website, and Plaintiffs were exposed to all of these misrepresentations while visiting Hertz's website to reserve a rental car (*Id.*, p. 5). Because these allegations sufficiently state the "who, what, where, when, and how" of Hertz's allegedly deceptive conduct, Counts One and Six will not be dismissed.

Hertz requests that Counts Two, Three, Four, and Seven also be analyzed under Rule 9(b) because they are the root of the same supposed fraud. Plaintiffs argue that only Counts One and Six alleging deception should be reviewed under Rule 9(b), and Counts Two, Three, Four, and Seven need only meet the notice pleading standard of Rule 8(a).[4]

Hertz is incorrect in its contention that the same pleading standard should apply

[4] The remaining three claims involve money received for an unjust benefit and declaratory relief.

to all claims because all of Plaintiffs' claims arise out of the same course of conduct. The Seventh Circuit has previously analyzed under different standards a plaintiff's claims of fraud or deception and claims of unfair practices that arose from the same set of facts. *See Windy City,* 536 F.3d at 670. Thus, this Court is required to analyze Plaintiffs' claims of deception and their claims of unfair practices separately and under different standards. *See Muhammad v. Public Storage Co.*, No. 14-cv-0246, 2014 WL 3687328 (W.D. Mo. July 24, 2014); *See O'Brien v. Landers*, No. 1:10-cv-02765, 2011 WL 221865 (N.D. Ill. Jan 24, 2011).

The Seventh Circuit applied the notice pleading standard of Rule 8(a) to claims alleging unfair practices in violation of the ICFA. *Windy City,* 536 F.3d at 670 ("[A] cause of action for unfair practices under the [Illinois] Consumer Fraud Act need only meet the notice pleading standard of Rule 8(a), not the particularity requirement in Rule 9(b).").[5] Under the notice pleading standard "the complaint need only provide a short and plain statement of the claim that shows, through its allegations, that recovery is plausible rather than merely speculative." *Id*. at 670. A plaintiff is not required to plead "detailed factual allegations, but [the pleading standard of Rule 8] demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The amended complaint lays out in great detail Hertz's actions and how these actions caused Plaintiffs harm. Plaintiffs spent twenty-four pages of their amended

[5] The Court cannot see any reason why it should not apply the pleading standard of Rule 8(a) to Plaintiffs' claims alleging unfair practices in violation of the MMPA. *See Muhammad*, 2014 WL 3687328 at *4 ("In this case, the Court concludes Plaintiffs are not asserting a fraud-based claim. They contend, essentially, that Defendant committed an unfair trade practice by breaching the contract. Because this is not a fraud-based claim, Rule 9's heightened pleading requirements do not apply.").

complaint putting forth extensive detail of how the Energy Surcharge and the VLCR/VLCRF were charged in violation of the ICFA and MMPA (Doc. 23). The Court finds that Plaintiffs' pleading satisfies the requirements of Rule 8(a).

B. DEFENDANT'S REQUEST FOR DISMISSAL FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(B)(6) (DOC. 25)

Hertz alternatively argues that all of Plaintiffs' claims should be dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) because Hertz's actions regarding the two charges are not unfair as a matter of law. The purpose of a Rule 12(b)(6) motion is to decide the adequacy of the complaint, not to determine the merits of the case or decide whether a plaintiff will ultimately prevail. *Gibson v. City of Chicago,* 910 F.2d 1510, 1520 (7th Cir. 1990). In reviewing the adequacy of a complaint, courts must construe the complaint in the light most favorable to the non-moving party, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in the non-moving party's favor. *Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009) (quoting *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008)). To survive a motion to dismiss, plaintiffs need only allege enough facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While a plaintiff need not plead detailed factual allegations, he or she must provide "more than labels and conclusions, and a formulaic recitation of the elements." *Id.* at 555.

Hertz argues that Plaintiffs have failed to demonstrate unfair conduct under either the ICFA or the MMPA. In support, Hertz cites to various Illinois and Missouri cases to argue that because the fees were fully disclosed, its actions are not unfair as a

matter of law, and a customer's belief that the fee is too high or does not accurately represent the true costs to the defendant who is providing a product or service is unpersuasive in the finding of unfair practices.

i. Illinois Consumer Fraud Act

The Seventh Circuit previously analyzed what was needed to state a claim under the ICFA and what conduct the ICFA covers:

> The Illinois Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers . . . against fraud, unfair methods of competition, and other unfair and deceptive business practices. The Supreme Court of Illinois has held that recovery under the Consumer Fraud Act may be had for unfair as well as deceptive conduct. In interpreting unfair conduct under the Consumer Fraud Act, Illinois courts look to the federal interpretations of unfair conduct under section 5(a) of the Federal Trade Commission Act. Thus, three considerations guide an Illinois court's determination of whether conduct is unfair under the Consumer Fraud Act: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers.

Windy City, 536 F.3d at 669 (internal citations omitted). The Seventh Circuit has noted that not all three criteria must be met in order to establish an unfair practice. *See Batson v. Live Nation Entm't, Inc.*, 746 F.3d 827, 830 (7th Cir. 2014). "For example, 'a practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.'" *Windy City,* 536 F.3d at 669, *quoting Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 961 (Ill. 2002).

Hertz cites to *Batson* in support of its argument that Plaintiffs fail to state claims under the ICFA. *Batson*, 746 F.3d 827. In *Batson*, the plaintiff purchased a concert ticket

from the defendant, and the total price included a $9 charge for parking, regardless of whether the purchaser was going to park a car. *Id*. at 830. The plaintiff argued that the mandatory parking fee under the ICFA was an unfair practice because it forced customers to purchase parking or forgo the concert. *Id*. at 829. The defendant in *Batson* filed a motion to dismiss challenging the plaintiff's claim that the $9 charge was in violation of the ICFA as an unfair act. *Id.* at 827. The Seventh Circuit Court of Appeals found that the plaintiff failed the three factor test and affirmed the lower court's decision to dismiss the matter pursuant to Rule 12(b)(6). *Id*. at 834-35.

The Court finds *Batson* to be distinguishable from this case because, unlike *Batson*, Plaintiffs' allegations satisfy the unfair practice three factor test. Counts Two, Three, and Four allege that Hertz violated the ICFA by means of unfair practices.[6] An Illinois statute speaks directly to the issue of the VLCRF, stating "the amount of the fee must represent the motor vehicle rental company's good-faith estimate of the automobile [sic] rental company's daily charge as calculated by the motor vehicle rental company to recover its actual total annual motor vehicle titling, registration, and inspection costs." 625 ILCS § 5/6-305.3(c). The Energy Surcharge allegedly violates an Illinois statute that states that there shall be no additional charges other than "the rental rate, taxes, mileage charge, and airport concession charge." 625 ILCS § 5/6-305(f). Thus, the first element of the unfair practice three factor test is satisfied. *See Locklear Elec., Inc. v. Lay*, No. 09-cv-0531, 2009 WL 4678428, at * 4 (S.D. Ill. Dec. 7, 2009) (finding violations of state and

[6] Count One of Plaintiffs' amended complaint alleges deceptive acts in violation of the ICFA, so *Batson* does not apply.

federal statutes to be evidence that alleged practices violated public policy).

In order to satisfy the second factor of the unfair practice test, Plaintiffs must only allege conduct that ultimately could support the finding of the statutory definition of unfairness under the Consumer Fraud Act. *Windy City*, 536 F.3d at 672. Plaintiffs' claim that Hertz charged them a fee for the purpose of gaining more profit as opposed to the stated purpose is enough for this Court to find that relief is more than theoretical. *Id.* ("By claiming that CIT engaged in unfair conduct and averring facts that, if proven, make relief more than merely speculative, the plaintiffs stated adequately a claim for relief."). Finally, Plaintiffs' pleadings also meet the third factor of substantial harm because when all of Plaintiffs' harms are taken together, they sufficiently allege the possibility of substantial loss. *Locklear Elec.,* 2009 WL 4678428, at *2 (holding that when taken together, the thirty nine recipients of unsolicited faxes suffered substantial losses).

ii. Missouri Merchandising Practices Act

The MMPA was created to protect consumers and "to preserve fundamental honesty, fair play, and right dealings in public transactions." *Scott v. Blue Springs Ford Sales, Inc.,* 215 S.W.3d 145, 160 (Mo. Ct. App. 2006). It also disallows "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce" as unlawful practices. MO. REV. STAT. § 407.020.1 (2010). An individual must allege an "ascertainable loss . . . as a result of" the wrongful practice. MO. REV. STAT. § 407.025.1 (2012); *See Owen v. Gen. Motors Corp.,* 533 F.3d 913, 922 (8th Cir. 2008) (holding that causation is an essential

element of an MMPA claim).

Count Seven of Plaintiffs' amended complaint alleges that Hertz violated the MMPA by means of unfair practices when charging Plaintiffs an Energy Surcharge and VLCR fee. An unfair practice is defined as either a practice that "[o]ffends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or is unethical, oppressive or unscrupulous; and presents a risk of, or causes, substantial injury to consumers." MO. CODE REGS. ANN. tit. 15, § 60-8.020 (1993). Plaintiffs are not required to provide "proof of deception, fraud or misrepresentation . . . to prove unfair practices." *Id.* The Missouri Supreme Court has previously stated that because section 407.020 of the MMPA is all encompassing, the meaning of an unfair practice covers "every unfairness to whatever degree." *Ports Petroleum Co., Inc. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. Sup. Ct. 2001). "The purpose of Missouri's Merchandising Practices Act is 'to preserve fundamental honesty, fair play and right dealings in public transactions.'" *Missouri ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837 (Mo. App. 2000) (quoting *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. 1973)).

Hertz cites to *Toben v. Bridgestone Retail Operations*, No. 4:11-cv-1834, 2013 WL 5406463 (E.D. Mo. Sept. 25, 2013), in support of its argument that Plaintiffs failed to state a claim under the MMPA. In *Toben*, the plaintiff alleged that the defendant violated the MMPA by charging its customers a "shop supplies fee," which the defendant claimed was for the purpose of recovering costs in connection with shop supplies consumed when working on a customer's car. *Id.* at *1. The plaintiff in *Toben*, however, claimed that

the fee was to produce additional profit. *Id*. Hertz argues that because the district court in *Toben* held that defendant did not violate the MMPA when charging a "shop supplies fee," Hertz's Energy Surplus and VLCR are also not in violation of the MMPA. *Id.* at *2. *Toben* involved a grant of summary judgment, however, not a dismissal for failure to state a claim. *Id*. at *1. The standard for summary judgment is of course different than the standard for a motion to dismiss for failure to state a claim.

A finding that Hertz's actions could violate public policy or could be considered unethical conduct which causes substantial injury is sufficient for this Court to find Hertz's actions could amount to an unfair practice. *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. App. 2006) (holding that the court could find defendant's actions to be in violation of public policy or unethical conduct that caused substantial injury so, "by definition [defendant's action] was an 'unfair practice' under section 407.020.1"). Charging customers a fee which is misrepresented could be considered unethical conduct causing substantial injury by failing to "preserve fundamental honesty [and] fair play." *Id.* at 233. Thus, the Court finds the charging of these fees could amount to an unfair practice. Accordingly, Hertz's motion to dismiss for failure to state a claim is denied.

CONCLUSION

For these reasons, the Court **GRANTS** Defendant's motion to compel arbitration and to dismiss or stay proceedings (Doc. 24). The claims brought by Plaintiff Dawn Cooks are **DISMISSED without prejudice.**

Defendant's motion to dismiss Plaintiffs' claims for failing to meet the heightened

standard under Federal Rule of Civil Procedure 9(b) and failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is **DENIED** (Doc. 25). As set forth in footnote two, Plaintiffs' motion to strike Defendant's reply briefs is **DENIED** (Doc. 33). Plaintiffs' motion to strike Defendant's response to Plaintiffs' motion to strike is also **DENIED** (Doc. 35).

The previously imposed stay of discovery is **LIFTED**. Counsel shall contact Magistrate Judge Frazier and request a discovery schedule.

IT IS SO ORDERED.

DATED: April 29, 2016

NANCY J. ROSENSTENGEL
United States District Judge