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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIANNA RIVERA, individually and on)	CASE NO. CV 19-1217-R
behalf of all others similarly situated,)	
)	ORDER GRANTING DEFENDANT’S
Plaintiff,)	MOTION TO DISMISS
)	
v.)	
)	
BRAINFM, INC.; et al.,)	
)	
Defendants.)	
)	

19 Before the Court is Defendant BrainFM, Inc.’s (“Defendant”) Motion to Dismiss, filed on
20 March 14, 2019. (Dkt. No. 9). This Court took the matter under submission on April 26, 2019.

21 Central District Local Rule 7-9 imposes a filing deadline for opposing papers of “not later
22 than twenty-one (21) days before the date designated for the hearing of the motion.” C.D. Cal.
23 L.R. 7-9. Here, the Motion was set for hearing on May 6, 2019; therefore, the deadline to file an
24 opposition was April 15, 2019. Plaintiff filed an untimely Opposition on April 16, 2019. Plaintiff
25 requests that the Court overlook the untimely filing of her Opposition due to the Court’s striking
26 of her First Amended Complaint, which she improperly filed on April 15, 2019, nearly two weeks
27 after the expiration of her deadline to amend the Complaint as a matter of course following the
28 filing of Defendant’s Motion to Dismiss. Plaintiff did not seek Defendant’s written consent or

1 leave of court to file the amendment as required by Federal Rule of Civil Procedure 15(a)(2).
2 Plaintiff's ignorance, disregard, or misunderstanding of the Federal Rules of Civil Procedure does
3 not give the Court good cause to overlook the untimeliness of her Opposition.

4 Pursuant to Local Rule 7-12, "[t]he Court may decline to consider any memorandum or
5 other document not filed within the deadline set by order or local rule. The failure to file any
6 required document, or the failure to file it within the deadline, may be deemed consent to the
7 granting or denial of the motion" C.D. Cal. L.R. 7-12. Thus, Plaintiff's failure to timely file
8 her Opposition may be deemed consent to the granting of Defendant's Motion to Dismiss.

9 Even considering Plaintiff's untimely Opposition, the Complaint fails to state a claim upon
10 which relief can be granted on any of Plaintiff's four causes of action. Dismissal under Federal
11 Rule of Civil Procedure 12(b)(6) is proper when a complaint exhibits either "the lack of a
12 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."
13 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). Under the heightened
14 pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*,
15 556 U.S. 662 (2009), a plaintiff must allege "enough facts to state a claim to relief that is plausible
16 on its face," so that the defendant receives "fair notice of what the . . . claim is and the grounds
17 upon which it rests." *Twombly*, 550 U.S. at 547; *Iqbal*, 556 U.S. at 698. "All allegations of
18 material fact are taken as true and construed in the light most favorable to the nonmoving party."
19 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

20 Dismissal of Plaintiff's fourth cause of action is also appropriate under Federal Rule of
21 Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, because the Complaint fails to
22 plead facts necessary for standing.

23 Plaintiff brings four causes of action—three for violations of the California Automatic
24 Renewal Law ("ARL"), Business and Professions Code §§ 17600-17604; and one for violations of
25 the California Unfair Competition Law ("UCL"), Business and Professions Code §§ 17200-17204.
26 With respect to the first three causes of action, the ARL does not create a private cause of action,
27 and the Complaint fails to allege facts stating a claim for violations of the ARL. Such violations
28 may provide the basis for a cause of action under the UCL; however, Plaintiff fails to allege facts

1 stating a claim or establishing standing under the UCL.

2 First, whether a statute creates a private cause of action depends on whether the Legislature
3 manifested an intent to do so. *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 596 (2010).
4 “Such legislative intent, if any, is revealed through the language of the statute and its legislative
5 history.” *Id.* (citation omitted). In a case analogous to this one, the District Court for the Southern
6 District of California determined that the “ARL does not contain ‘clear, understandable,
7 unmistakable terms’ strongly and directly indicating that the California Legislature intended to
8 create a private cause of action under the ARL.” *Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d
9 1058, 1067 (S.D. Cal. 2018) (citing *Lu*, 50 Cal. 4th at 596). Likewise, the legislative history of the
10 ARL indicates that the California legislature “specifically contemplate[d] that consumers who
11 suffered an injury by violations of the ARL can seek relief under other statutory provisions,
12 including the UCL,” but not under the ARL itself. *Id.* at 1068-69 (discussing California Senate
13 Judiciary Committee bill analysis of SB340, which became the ARL, and dismissing plaintiff’s
14 three causes of action brought under the ARL). The circumstances in this case are analogous, and
15 the language and history of the statute are the same; therefore, Plaintiff’s first three cause of
16 actions must be dismissed.


17 Regarding Plaintiff’s UCL cause of action, which incorporates her ARL allegations,
18 Plaintiff lacks standing to bring the claim and fails to state a claim upon which relief can be
19 granted. In order to have standing to pursue either an individual or a representative claim under
20 the UCL, a plaintiff must allege both an economic injury-in-fact and that such injury was caused
21 by the unfair business practices alleged in the complaint. *See Hall v. Time Inc.*, 158 Cal. App. 4th
22 847, 849 (2008) (citing Cal. Bus. & Prof. Code § 17204).

23 The Complaint as a whole contains little more than a recitation of law. Plaintiff alleges
24 broadly that “Defendant offers, at its website, found at brain.fm, various subscriptions for music
25 streaming and related products;” that “Defendant’s product and services plan constitutes an
26 automatic renewal and/or continuous service plan or arrangement for the purposes of Cal. Bus. &
27 Prof. Code § 17601;” that “Plaintiff and Class Members purchased Defendant’s online music
28 streaming and related products for personal, family or household purposes;” that Defendant failed

1 to present the automatic renewal offer terms, or continuous service offer terms, in a clear and
2 conspicuous manner and in visual proximity the request for consent to the offer before the
3 subscription or purchasing agreement was fulfilled;” that “Defendant charged, and continues to
4 charge Plaintiff’s and Class Members’ Payment Method for an automatic renewal or continuous
5 service without first obtaining Plaintiff’s and Class Members affirmative consent to the Terms of
6 Use containing the automatic renewal offer terms or continuous service offer terms;” that
7 Defendant failed to provide an acknowledgement that includes the automatic renewal or
8 continuous service offer terms, cancellation policy, and information on how to cancel in a manner
9 that is capable of being retained by Plaintiff and Class Members;” and that Plaintiff “suffered
10 injury in fact and has lost money or property as a result of Defendant’s actions.” However,
11 Plaintiff does not state in the Complaint crucial facts such as when she subscribed to Defendant’s
12 service, what type of subscription she purchased (i.e. monthly, yearly, or unlimited), how much
13 she paid for the service, or even whether her subscription was in fact automatically renewed
14 without her consent. The Complaint contains two screenshots of Defendant’s website purporting
15 to provide a factual basis for Plaintiff’s claims; however, the screenshots are of such poor quality
16 that the majority of them cannot be read. In sum, the Complaint lacks factual allegations sufficient
17 to support the necessary elements of injury or causation; therefore, Plaintiff’s fourth cause of
18 action must be dismissed.

19 **IT IS HEREBY ORDERED** that Defendant’s Motion to Dismiss is GRANTED. (Dkt.
20 No. 9).

21 Dated: May 10, 2019.

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25 MANUEL L. REAL
26 UNITED STATES DISTRICT JUDGE
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