

III. ANALYSIS

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2 T-Mobile contends that the court should dismiss the complaint because it does not
3 satisfy Fed. R. Civ. P. 9(b). Rule 9(b) requires a party “alleging fraud or mistake” to
4 “state with particularity the circumstances constituting fraud or mistake.” Although Rule
5 9(b) itself does not expressly authorize a court to dismiss a complaint, “it is established
6 law . . . that such dismissals are appropriate.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
7 1097, 1107 (9th Cir. 2003). A motion to dismiss invoking Rule 9(b) is the “functional
8 equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim.” *Id.*

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10 There is no dispute that Mr. Zaldivar asserts no claims that have fraud as an
11 element. He claims breach of contract, violations of the Washington Consumer
12 Protection Act (“CPA”), and unjust enrichment. None of these claims require a plaintiff
13 to prove fraud, and T-Mobile does not contend otherwise.

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15 Instead, T-Mobile argues that Plaintiff’s claims “sound in fraud.” It points to
16 allegations in the complaint that it is “cheating large numbers of customers out of
17 individually small sums of money” and is engaging in “deceptive conduct” or “deceptive
18 practices.” ¶ 6, 24.¹ According to T-Mobile, these allegations suggest fraud, and they are
19 not pleaded with the particularity that Rule 9(b) requires.

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21 The *Vess* court held that a plaintiff who “rel[ies] entirely” on a “unified course of
22 fraudulent conduct” to support a claim in which fraud is not a necessary element must
23 nonetheless satisfy Rule 9(b) in “pleading the claim as a whole.” 317 F.3d at 1103-04.
24 The *Vess* court contrasted a plaintiff who relies *entirely* on a unified course of fraudulent
25 conduct with one who “allege[s] some fraudulent and some non-fraudulent conduct.” *Id.*
26 at 1104. In the latter case, only the allegations of fraud need satisfy Rule 9(b), and the
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¹The court cites Mr. Zaldivar’s complaint (Dkt. # 1) using bare “¶” symbols.

1 court may “strip” the allegations of fraud from the claim to determine whether it states a
2 claim. *Id.* at 1105.

3 None of Mr. Zaldivar’s claims “rely entirely” on a uniform course of fraudulent
4 conduct. His breach of contract claim relies, among other things, on the allegation that
5 the “express and implied terms of the [T-Mobile] contract were that [T-Mobile] would
6 only charge the contractually agreed upon charges.” ¶ 43. This is not an allegation of
7 fraud. His CPA claim similarly relies on allegations of conduct that is not fraudulent.
8 ¶ 50 (alleging, *inter alia*, “[f]ail[ure] to properly notify or advise Plaintiff and the Class
9 that they were not contractually liable to pay certain fees for text messaging,” and failure
10 to notify customers of their right to terminate the contract). These allegations are neither
11 express assertions of fraud nor “facts that would necessarily constitute fraud,” as *Vess*
12 requires. 317 F.3d at 1105; *see also id.* at 1106 (reviewing allegations of the complaint
13 that did not constitute fraud). There is no basis for the court to conclude that Mr.
14 Zaldivar makes any claim that “rel[ies] entirely on a unified fraudulent course of
15 conduct,” and thus no basis to apply Rule 9(b) to any claim as a whole. *Id.* at 1106.

16 The court must therefore strip any inadequately pleaded allegations of fraud from
17 the complaint and see if the remaining allegations are sufficient to state a claim. The
18 court assumes without deciding that all allegations to which T-Mobile points are
19 grounded in fraud and inadequately pleaded.
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21 Stripping those allegations from the complaint, however, there is no question that
22 Mr. Zaldivar adequately states claims for relief. T-Mobile’s motion is so focused on its
23 contention that Mr. Zaldivar’s complaint alleges a unified course of fraudulent conduct
24 that it does not appear to even contend that his complaint, stripped of the allegations it
25 targets, fails to meet the requirements of Fed. R. Civ. P. 12(b)(6). In any event, Mr.
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1 Zaldivar's complaint, stripped in the manner that *Vess* requires, so plainly states claims
2 for relief that the court need not discuss the issue further.

3 The court's final comments address two arguments that T-Mobile raised solely in
4 its reply brief. The court has already reminded T-Mobile that this practice is
5 inappropriate (Dkt. # 47 at 5 n.5), and that the court will not consider arguments raised
6 for the first time in reply.


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8 The first of T-Mobile's belated arguments can be disposed of without Plaintiff's
9 input. In a bit of verbal sleight of hand, T-Mobile converts the *Vess* court's instruction to
10 "strip" inadequately pleaded allegations of fraud from a claim in assessing its sufficiency
11 into an instruction to "strike" such allegations from the complaint. Def.'s Reply at 2-3.
12 T-Mobile has not made a motion to strike. *See* Fed. R. Civ. P. 12(f). Even if it had, a
13 motion to strike is regarded with disfavor in federal courts, because pleading has such
14 "limited importance," and because motions to strike are "often used as a delay tactic." *In*
15 *re Wal-Mart Stores, Inc.*, 505 F. Supp. 2d 609, 614 (N.D. Cal. 2007). A court has
16 discretion to refuse to strike allegations, *Fed. Sav. & Loan Ins. Corp. v. Gemini Mgmt.*,
17 921 F.2d 241, 244 (9th Cir. 1990), and it should only strike allegations that "could have
18 no possible bearing on the subject matter of the litigation." *Wal-Mart*, 505 F. Supp. 2d at
19 614 (quoting *Rosales v. Citibank, Federal Sav. Bank*, 133 F. Supp.2d 1177, 1180 (N.D.
20 Cal. 2001)). The *Vess* court had no occasion to consider a motion to strike, and the court
21 made no suggestion that it intended to encourage litigants to invoke the disfavored
22 remedy of Rule 12(f). T-Mobile cites no authority in which a court has invoked *Vess* as a
23 basis for striking portions of a pleading, and the court is aware of none. Had the *Vess*
24 court intended to elevate the motion to strike from its disfavored status, this court is
25 convinced that it would have said so.
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1 The second of T-Mobile's belated arguments is one that the court first rejected in
2 early May 2008 because T-Mobile raised it solely in a reply brief. (Dkt. # 47 at 5 n.5).
3 T-Mobile argued then, as it does now, that if Mr. Zaldivar is not alleging fraud,
4 California law mandates that his claims are subject to the arbitration clause in his contract
5 with T-Mobile. Def.'s Reply at 2-4 (relying on *Discover Bank v. Superior Court of Los*
6 *Angeles*, 113 P.3d 1100 (Cal. 2005). T-Mobile neither raised this argument in its motion,
7 mentioned the arbitration clause, nor cited *Discover Bank*. For the second time, the court
8 declines to consider this argument because it was included solely in T-Mobile's reply.
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10 **IV. CONCLUSION**

11 For the reasons stated above, the court DENIES T-Mobile's motion to dismiss
12 (Dkt. # 38).

13 Dated this 15th day of July, 2008.

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17 The Honorable Richard A. Jones
18 United States District Judge
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