United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LISA BODENBURG,

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. 23-cv-04409-TLT

**ORDER GRANTING REQUEST FOR JUDICIAL NOTICE AND INCORPORATION BY REFERENCE AND GRANTING MOTION TO DISMISS**

Re: ECF Nos. 36, 36-1

Plaintiff Lisa Bodenburg ("Plaintiff" or "Bodenburg") alleges a breach of contract claim and three consumer protection claims against Defendant Apple Inc. ("Defendant" or "Apple"). ECF No. 34 (First Amended Complaint ("FAC")) ¶ 1.

Before the Court is Defendant's Motion to Dismiss the First Amended Complaint and Defendant's Request for Judicial Notice and Incorporation by Reference. ECF Nos. 36 and 36-1. Plaintiff filed an opposition to the Motion and Request for Judicial Notice and Incorporation by Reference. ECF Nos. 38, 39.

Having considered all the papers submitted by the parties, the arguments of counsel and for the reasons set forth below, the Court **GRANTS** the Request for Judicial Notice and Incorporation by Reference. The Court further **GRANTS** the Motion with prejudice.

## I. BACKGROUND

Defendant Apple, a California Corporation, provides customers with a base level of storage in the cloud (aka "cloud storage").[1] ECF No. 34-1 (Exh. 1 to FAC), at 2 (Section I.C.).

[1] Apple produces and sells devices called the iPhone and iPad, along with personalized services such as iCloud+, a premium subscription service that customers can choose to upgrade to from the base level storage if they want more iCloud storage to keep their photos, videos, and

This base level of cloud storage is provided to consumers free of charge by Apple. *Id.* Cloud storage means electronic storage in a system located in a facility with servers, or computers, that may be accessed remotely, including accessed remotely by cell phones. *See Riley v. California*, 573 U.S. 373, 397 (2014). Consumers have multiple options for plans offered by Apple, starting from 5GB for free cloud storage or upgrading and starting from 50GB for paid cloud storage. *See* ECF No. 34-2 (Exh. 2 to FAC). Apple refers to the plans with 5GB of free cloud storage per month as "iCloud" plans and now refers to the upgraded (paid) plans with more storage and premium features as "iCloud+" plans. ECF No. 34 (FAC) ¶ 14.

The Terms of Service are in the Written Agreement and Disclosure (collectively referred to as "Written Agreement"). The Written Agreement includes the terms of Plaintiff's cloud storage plan, including the plans and pricing information. ECF No. 34-1 (Exh. 1 to FAC), at 7; ECF No. 34-2 (Exh. 2 to FAC), at 2. The plans and pricing information shows the amount of cloud storage in GB and the monthly price for the different amounts of cloud storage. ECF No. 34-2 (Exh. 2 to FAC), at 2. The plans and pricing information are accessible through a link provided in the Terms of Service. *See* ECF No. 34-1 (Exh. 1 to FAC). The Written Agreement states in pertinent part[2]:

> III.SUBSCRIPTION UPGRADES
>
> The iCloud+ Subscription plans are available for purchase on a subscription basis.
>
> A. Payment
> By you upgrading to the iCloud+ Subscription service for more storage and additional features, Apple will automatically charge on a recurring basis the fee for the plan you choose, including any applicable taxes, to the payment method associated with your Apple ID (e.g., the payment method you use to shop on the iTunes Store, App Store, or Apple Books, if available) or the payment method associated with your Family account. For details about plans and pricing, please visit https://support.apple.com/en-us/HT201238. If you are a Family organizer, you agree to have Apple charge your payment method on a recurring basis for members of your Family who upgrade their plan. Apple may also obtain preapproval for an amount up to the amount of the transaction and contact you periodically by email to the email address associated with your Apple ID for billing reminders and other subscription account-related communications.

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files, and have access to additional product features. ECF No. 27, at 8-9 (statement of facts in Apple's first motion to dismiss the original complaint).

[2] Section III is shown in different font types and sizes in the Written Agreement. *See* ECF 34-1 (Exh. 1 to FAC), at 7.

> You can change your subscription by upgrading or downgrading your plan under the iCloud section of Settings on your device, or under the iCloud pane of System Preferences on your Mac or iCloud for Windows on your PC.

*Id.* at 7-8.

The second exhibit to the FAC are the plans and pricing information Plaintiff alleges she accessed along with the price for each monthly subscription plan. ECF No. 34-2 (Exh. 2 to FAC), at 2:

> **iCloud+ plans and pricing**
> When you sign up for iCloud, you automatically get 5GB of free storage. If you need more iCloud storage or want access to premium features, you can upgrade to iCloud+.
>
> **About iCloud+**
> iCloud+ is Apple's premium cloud subscription. It gives you more storage for your photos, files, and backups, and additional features available only to subscribers:
>
> **iCloud+ with 50GB storage** **iCloud+ with 200GB storage** **iCloud+ with 2TB storage**
>
> **…**
>
> You can upgrade to iCloud+ from your iPhone, iPad, iPod touch, Mac, or PC. After you upgrade, you'll be billed monthly. See the monthly pricing and plans per country or region below.

ECF No. 34 (FAC), at 9 (bold in original; footnotes omitted).

Below that plan information, is a price list showing the amount of cloud storage offered in exchange for specific monthly payments to be made by subscribers in various location around the world. ECF No. 34 (FAC) ¶ 25. The applicable upgraded cloud storage pricing for the United States is as follows[3]:

> United States (USD)
> **50GB**: $0.99
> **200GB**: $2.99

[3] This information is also shown in different font types and sizes in the Written Agreement.

> ECF No. 34-1 (Exh. 1 to FAC), at 7 (bold emphasis in original; footnote in original omitted).

Plans and pricing information accessible on Apple's public website, over a period of three or four years, reflects the consumers' options to choose from (1) a free cloud storage plan (iCloud) providing 5GB of free storage per month, (2) paid cloud storage plans (iCloud+) providing 50GB for $0.99 per month, (3) 200GB for $2.00 per month, and (4) other paid plans with higher GB. *See* ECF No. 36-5 (Exh. C to the Declaration of Matthew Powers ("Powers Decl.")) (plans and pricing advertised on Apple's website, dated November 24, 2021); ECF No. 36-4 (Exh. B to Powers Decl.) (plans and pricing advertised on Apple's website, dated November 24, 2022); and ECF No. 36-3 (Exh. A to Powers Decl.) (plans and pricing advertised on Apple's website, dated November 24, 2023).

Plaintiff Lisa Bodenburg resides in California. ECF No. 34 (FAC) ¶ 19. During the Class Period, she upgraded to the paid cloud storage plan and began paying money for cloud storage. *Id.* At no point, during the relevant time, did Plaintiff receive less than the 200GB of cloud storage in exchange for her monthly payment. *Id.* ¶¶ 19, 20, 27. Plaintiff alleges that she had been receiving 5GB of free cloud storage per month before she upgraded to the paid cloud storage plan. She further alleges that Apple wrongfully stopped providing her the 5GB of free cloud storage after she upgraded to a paid plan for 200GB of cloud storage at a rate of $2.99 per month. *Id.* ¶¶ 7-10, 19-20, 27. Plaintiff interpreted the plans and pricing information as showing 200GB of paid cloud storage plus the 5GB of cloud storage. In short, she would have 205GB of storage. Conversely, her interpretation is that she was only provided 195GB of paid cloud storage at the rate of $2.99 after Plaintiff deducted the free 5GB of free cloud storage that she should have still received at no cost. *Id.* ¶¶ 10-12.

She claims this is the proper interpretation because there is a section in the Terms of Service that states: "Your Account is allocated 5GB of storage capacity as described in the iCloud

feature pages. ***Additional storage*** is available for purchase, as described below." ECF No. 34 (FAC) ¶ 5 (quoting ECF No. 34-1 (Exh. 1 to FAC), at 2). Because of that language in the Terms of Service, Plaintiff alleges that she would, or should, have still received the free 5GB even after an upgrade. *See id.* ¶¶ 10-12.

As a result, Plaintiff filed a class action lawsuit in this Court on August 25, 2023. ECF No. 1 (Complaint). She filed this initial complaint under the Class Action Fairness Act ("CAFA"), 28 U.S.C § 1332, which gives federal courts original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, if there is minimal diversity. *Id.* ¶ 15.

In her initial complaint, Plaintiff seeks damages, equitable relief, and restitution for Apple's alleged Breach of Contract (seeking damages), Violation of California's Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750 et seq) (seeking damages), California's False Advertising Law ("FAL") (Cal. Bus. and Prof. Code, §§ 17500 et seq) (seeking restitution), and California's Unfair Competition Law ("UCL") (Cal. Bus. and Prof. Code, §§ 17200 et seq.) (seeking restitution). ECF No. 34 (FAC) ¶ 1.

Apple moved to dismiss the initial complaint. In response, Plaintiff filed her FAC seeking the same relief for the same claims, mooting Apple's Motion to Dismiss as to that initial complaint. According to Plaintiff, the Class Period for the Breach of Contract Claim and Violation of the UCL is from September 1, 2019 until April 30, 2024. ECF No. 53 (Plaintiff's Responses to the Court's Notice of Questions), at 2:15-27. The Class period appliable to CLRA and FAL is September 1, 2020 until the date of the filing of Plaintiff's motion for class certification. *Id*

Currently before the Court is Apple's motion to dismiss the FAC. ECF No. 36 (Motion). Apple argues that Plaintiff has failed to state a claim under 12(b)(6) and failed to state and apply the appropriate legal standard under 8(a) for all claims alleged. *Id.*; ECF No. 38 (Reply iso

Motion ("Reply")). Defendant further claims Plaintiff has failed to meet the heightened pleading standard under 9(b) for the consumer protection claims. And finally, that Plaintiff has failed to make a sufficient showing that the reasonable consumer test has been met for the consumer protection claims. ECF No. 38 (Reply).

## II. STANDARD

### A. Judicial Notice & Incorporation by Reference

Under Fed. R. Evid. 201, "the court may take judicial notice on its own" and may do so "at any stage of the proceeding." The Court "need not accept as true allegations contradicted by judicially noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and, and it 'may look beyond the plaintiff's complaint to matters of public record' without converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995)." *Sciacca v. Apple, Inc.*, 362 F.Supp.3d 787, 794 (N.D. Cal. 2019); *Fayer*, 649 F.3d at 1064 (per curiam); *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (a court may take notice of an adjudicative fact not subject to reasonable dispute). When a court deems a document incorporated by reference, it may assume its contents are true for the purposes of a motion to dismiss under Rule 12(b)(6). *Khoja*, 899 F.3d at 1003 (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)).[4]

Apple requests the Court take judicial notice of and incorporate by reference the information published on its public website in November 2021, November 2022, and November 2023. ECF No. 36-1 (Request for Judicial Notice and Incorporation by Reference). Apple makes

[4] In addition, under California law, when fraud or illegality is alleged "the parol evidence rule does not apply, and evidence of precontract representations which vary or contradict the terms of an integrated contract are admissible." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1291 (9th Cir. 2006) (citing Cal. Civ. Proc. Code § 1856).

this request in response to Plaintiff's allegations in her complaint that Apple's advertisements are misleading with respect to the amount of cloud storage it will provide consumers for the prices listed for each of its cloud storage plans. *See generally* ECF No. 34 (FAC). For the reasons stated below, the Court grants the request.

**B. Motion to Dismiss Under Federal Rule of Procedure 12(b)(6)**

A complaint may be dismissed under Federal Rule of Civil Procedure 12(b)(6) if it fails to include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Sciacca*, 362 F.Supp.3d at 793 (quoting Rule 8(a)(2)). To survive a motion to dismiss under 12(b)(6) a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Sciacca*, 362 F.Supp.3d at 794 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Sciacca*, 362 F.Supp.3d at 794 (quoting *Ashcroft v. Iqbal*, 556 U.S. 622, 678 (2009)). "Labels and conclusions" or "formulaic recitation of the elements of a cause of action" do not suffice. *Twombly*, 550 U.S. at 555. " '[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.' *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004)." *Sciacca*, 362 F.Supp.3d at 794.

On a motion to dismiss, "the court accepts the material facts alleged in the complaint, together with all reasonable inferences to be drawn from those facts, as true." *Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018, 1034-35 (N.D. Cal. 2014). All reasonable inferences are drawn in favor of the non-moving party. *Retail Prop. Trust v. United Bd. Of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). "The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it 'may look beyond the plaintiff's complaint to matters of public record' without converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995)." *Sciacca*, 362 F.Supp.3d at 794; *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (The Court does not have to "assume the truth of legal

conclusions merely because they are cast in the form of factual allegations") (internal quotation marks omitted).

"[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The Court may consider declarations as well, since "the district court is not restricted to the face of the pleadings, but may review evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

**C. Rule 15 Leave to Amend**

"[D]ismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Lund v. Cowan*, 5 F.4th 964, 973 (9th Cir. 2021) (citing *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008)). However, leave to amend "shall be freely given when justice so requires." Fed. R. Civ. Proc. 15(a)(2). Courts have discretion to deny leave to amend because of "undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed undue prejudice to the opposing party by virtue of allowance of the amendment and futility of amendment." *Forman v. Davis*, 371 U.S. 178, 182 (1962) (cited in *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008)).

**III. DISCUSSION**

**A. Request for Judicial Notice and Incorporation by Reference**

The Court may take judicial notice of documents readily accessible to the public and not subject to reasonable dispute. *E.g. Hammerling v. Google LLC*, No. 21-cv-09004-CRB, 2022 WL 17365255, at *4 (N.D. Cal. Dec. 1, 2022) (granting request for judicial notice of information from defendant's website and observing that "[p]ublicly accessible websites…are proper subjects of judicial notice") (citation and internal quotation marks omitted); *Kang v. PayPal Holdings, Inc.*,

620 F.Supp.3d 884, 895-96 (N.D. Cal. 2022) (granting request for judicial notice of information on websites); *Diep v. Apple, Inc.*, No. 21-cv-10063-PJH, 2022 WL 4021776, at *2-3 (N.D. Cal. Sep. 2, 2022) (granting request for judicial notice of publicly available documents).

Plaintiff claims that Apple misled consumers regarding the storage they would receive if they upgraded to a paid cloud storage plan. This claim is predicated on Apple's plan and pricing information on its website. Therefore, a key issue is what Plaintiff and putative class members were told and agreed to regarding the upgraded plans. Incorporation by reference is also appropriate because it fulfills the purpose of the doctrine, namely, to prevent a plaintiff from highlighting only the portion of the publicly available documents that support her claims while omitting the portions of those same documents and other publicly available documents that weaken her claims. *Khoja*, 899 F.3d at 1102 (a party should not be permitted to 'select[] only portions of documents that support their claims, while omitting portions of those very documents that weaken, or doom, their claims.") (citations omitted).

The exhibits attached to the FAC, and the Powers' Declaration, are accessible on Apple's public website. The cloud storage plans, pricing, free cloud storage plan and additional features available for Apple customers and other consumers, including those receiving the free cloud storage plan, are prominently displayed on the website. ECF Nos. 36-3, 36-4, and 36-5. Together these exhibits, along with the FAC, show that Apple provides 5GB of free cloud storage in the free plan and that the paid plans start at 50GB per month. *Id.* More importantly, since this information is included in Plaintiff's allegations and incorporated by reference to support her claims that Apple violated the FAL, CLRA, and UCL, the Court may take both judicial notice and incorporate by reference of the exhibits. *See Khoja*, 899 F.3d at 1002; *See In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d at 813-14 (incorporating by reference Google's Terms of Service and Privacy

policy where these documents "form[ed] the basis" for Plaintiff's claims.[5]

Given the above, the Court GRANTS Apple's Request for Judicial Notice and Incorporation by Reference.

**B. Breach of Contract**

To state a claim for breach of contract under California law, a plaintiff must sufficiently state facts showing "the contract, plaintiff['s] performance (or excuse from nonperformance), defendant's breach, and damage to plaintiff therefrom." *Gautier v. Gen. Tel. Co.*, 234 Cal.App.2d 302, 305, 44 Cal.Rptr.404 (Cal.Ct.App.1965)." *In re Facebook Privacy Litig.*, 791 F.Supp.2d 705, 717 (N.D. Cal. 2011). To prove damage caused by a breach of contract claim, plaintiff must show "appreciable and actual damage." *Id.* (quoting *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir. 2000). "Nominal damages and speculative harm do not suffice to show legally cognizable damage under California contract law." *Id.* (citing *Ruiz v. Gap, Inc.*, 622 F.Supp.2d 908, 917 (N.D. Cal. 2009)).

In its Motion, Apple claims it did not breach the Agreement because its contractual statements show "that a consumer will receive the listed amount of storage with each specific subscription plan" that is in the plans and pricing information accessible via the URL provided in the Written Agreement. *See* ECF No. 36 (Motion), at 11; ECF No. 40 (Reply), at 7. Plaintiff argues in response that "additional" or "in addition to" in Section I.C. in the Written Agreement means an amount on top of the 5GB of free cloud storage she received by default from the free iCloud plan. ECF No. 38 (Opposition), at 7-8. Succinctly, Plaintiff argues that, under the terms of the Written Agreement, she should still receive the free 5GB of cloud storage even though she

[5] These exhibits are also relevant to the Court's jurisdictional analysis since they could go to the amount in controversy, which if not met the Court may be compelled or have the discretion to abstain under 28 U.S.C. § 1332. *McCarthy*, 850 F.2d at 560; *United States v. Corinthian Coll.*, 655 F.3d 984, 999 (9th Cir. 2011).

upgraded to a cloud storage plan with more storage. The Court disagrees.

Contract interpretation requires that "[p]reference must be given to reasonable interpretations as opposed to those that are unreasonable." *JPaulJones L.P. v. Zurich Ins. Co., (China) Ltd.*, No. 21-cv-35365, 2022 WL 1135424, at *1 (9th Cir. Apr. 18, 2022) (internal quotation marks omitted) (quoting *Shakey's v. Cobalt*, 704 F.2d 426, 434 (9th Cir. 1983); Cal. Civ. Code § 1644 ("The words of a contract are to be understood in their ordinary and popular sense."). "A written contract must be read as a whole, and every part interpreted with reference to the whole." *Shakey's*, 704 F. 2d at 434. The Written Agreement read together with the terms of service show that in exchange for Plaintiff's monthly payment of $2.99, Plaintiff receives 200GB of cloud storage. ECF No. 34 (FAC) ¶¶ 20, 46, 47, 48; ECF No. 34-1 (Exh. 1 to FAC); ECF No. 34-2 (Exh. 2 to FAC). For instance, under Section III of the Written Agreement, it states: "Subscription Upgrades" and that "[t]he iCloud+ Subscription plans are available for purchase on a subscription basis." ECF No. 34-1 (Exh. 1 to FAC), at 7. Then under Subsection A of Section III of the Terms of Service (ECF No. 34-1 (Exh. 1 to FAC)), it states "[b]y upgrading to the iCloud+ Subscription service for *more storage* and *additional features*, Apple will automatically charge on a recurring basis the fee for the plan you choose…For details about plans and pricing, please visit https://support.apple.com/en-us/HT201238...". *Id.* (emphasis added).

Accordingly, the terms, including the plans and pricing information, do not state that Plaintiff would still get the free 5GB she received from her free cloud storage plan after an upgrade. Section III.A. addressing "Subscription Upgrades" states "[t]he iCloud+ Subscription plans are available for purchase on a subscription basis" show that through an upgraded plan Plaintiff can get "***more storage and additional features***", which is also repeated in the plans and pricing information. ECF No. 34-1 (Exh. 1 to FAC); ECF No. 34-2 (Exh. 2 to FAC). The plans and pricing information available through the link lists the amount of storage (including 200GB) and the price for the different upgraded plans (including $2.99 for 200GB). *Id.*

The Written Agreement states that upon upgrading, Plaintiff will get "more storage and additional features". When Plaintiff upgraded, she did receive more storage. All the terms of service in ECF No. 34-1 (Exh. 1 to FAC) when reasonably interpreted and read together with the plans and pricing in ECF No. 34-2 (Exh. 2 to FAC), mean that Plaintiff would receive the amount of GB stated in the plans and pricing for the amount she paid. Interpretation of the Written Agreement "with reference to the whole" requires consideration of the other provisions in the Terms of Service along with the plans and pricing information. *See Shakey's*, 2022 WL 1135424 *1. Under these circumstances, the Court cannot reasonably infer that Apple breached the contract and is therefore "liable for the misconduct alleged." *See Sciacca*, 362 F.Supp.3d at 794 (quoting *Ashcroft*, 556 U.S. at 678).

In another case, regarding a plaintiff's claim that they received less GB than what they expected, the Northern District found no breach of contract when there was a signal to look elsewhere to understand the GB being offered for the price paid. In an unreported decision, *Dinan v. Sandisk LLC*, No. 18-cv-05420-BLF, 2019 WL 2327923 (N.D. Cal. May 31, 2019), *aff'd* 844 Fed. Appx. 978 (9th Cir. 2021), the court explained:

> Plaintiff's breach of contract claim is easier to resolve than his consumer-protection claims. Plaintiff's theory of liability under his breach of contract claim is that "Defendant promised to provide a USB Flash Drive to Plaintiff with a storage capacity of 64GBs in exchange for the purchase price," but did not live up to that promise…By this, Plaintiff means that Defendant promised to provide 64 binary GBs. But what Defendant actually promised, as expressly noted on the packaging, was 64 decimal GBs, wherein "1 GB = 1,000,000,000 bytes." Thus, Defendant provided exactly what it promised by the express terms of the agreement. ***Plaintiff's failure to read those terms does not provide him grounds for a breach of contract claim.*** *See Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014) ("[F]ailure to read a contract before agreeing to its terms does not relieve a party of a party of its obligations under the contract."); *see also Vernon v. Drexel Burnham & Co.*, 52 Cal.App.3d 706, 714 (1975).
>
> Unlike his consumer-protection claims, plaintiff cannot possibly cure this fatal defect with amendment. As such, the claim is DISMISSED WITH PREJUDICE.

*Id.* at *8 (bolded, italicized emphasis added).[6]

In *Dinan* the amount of storage plaintiff thought was provided was stated on thumb drive packaging. *Dinan*, 2019 WL 2327923, at *8. Here, the amount of storage Plaintiff thought she would get was indicated in Terms of Service portion of the Written Agreement (ECF No. 34-1 (Exh. 1 to FAC)). In *Dinan*, the question is whether the GB being provided was decimal or binary since that would determine whether the thumb drive had the amount of GB that the *Dinan* plaintiff was expecting. *See id.* at *8. For *Dinan*, that answer was in another location on the USB flash drive packaging, as shown by the asterisk next to "64GB". *Id.* In this case, the question for Plaintiff is whether the plans and pricing information included the free 5GB of cloud storage after an upgrade to a paid plan. That is answered in the plans and pricing information, as shown through the link in the Written Agreement.

In both *Dinan* and here, the plaintiffs had an expectation about the amount of GB they would be receiving upon purchasing storage. In *Dinan*, the storage was on a USB Flash Drive; here the storage is "in the cloud." In both cases, the plaintiffs purchased electronic storage. In both cases, there were signals alerting the plaintiffs to look elsewhere for information regarding exactly how much storage is provided to them in exchange for their payment. The *Dinan* plaintiff, in exchange for payment, received the amount of GB storage stated on the packaging for the USB flash drive even if it was not the *type* of GB expected—and therefore not the *amount* of GB expected. Since the *Dinan* plaintiff did receive the amount of GB stated on the packaging, the court found that plaintiff could not state a claim for breach of contract. Likewise, here, Plaintiff

[6] After the district court dismissed the action as to the consumer protection claims with prejudice along with the breach of contract claims, the judgment was appealed. *See Dinan v. Sandisk LLC*, 844 Fed.Appx. 978, 980 (9th Cir. 2021). In an unpublished decision regarding the breach of contract claim, the Ninth Circuit found no breach of contract when the packaging stated 64GB would be provided and 64GB was provided. *Id.*

received 200GB of paid cloud storage that was stated in the plans and pricing information accessible through the link in the Written Agreement. She thought she was receiving a different type of 200GB, composed of 5GB of free cloud storage and 195GB of paid cloud storage. In fact, she received 200GB of paid cloud storage. Clearly, she did receive the GB amount that was in the plans and pricing information, and therefore there are insufficient facts to support a breach of contract claim.

**C. CLRA, FAL, and UCL Claims**

***1. Heightened Pleading Standard***

Rule 8(a) requires the plaintiff to state "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). However, "[c]laims sounding in fraud or mistake are subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires that such claims 'state with particularity the circumstances constituting the fraud or mistake.' This includes 'the who, what, when, where, and how of the misconduct charged.' [citation]." *Beccera v. Dr. Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019). This is so the allegations are "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Sciacca*, 362 F.Supp.3d at 794 (quoting *Semegan v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)). "The plaintiff must also plead facts explaining why the statement was false when it was made. *See In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994) (en banc) *superseded by statute on other grounds as stated in Marksman Partners, L.P. v. Chantal Pharm. Corp.*, 927 F.Supp. 1297 (C.D. Cal. 1996)." *Id.*

The FAC does not state when Plaintiff upgraded to the paid cloud storage plan. *See generally* ECF No. 34 (FAC). Secondly, the FAC does not state when Plaintiff discovered she was no longer receiving the free 5GB of storage that she had been receiving from the default

iCloud free plan before she upgraded. *Id.* Moreover, the FAC does not state any facts showing that there are any false statements in the Written Agreement, the Terms of Service (Exh. 1 to FAC), or the plans and pricing information (Exh. 2 to FAC). The aforementioned terms are available through the link in the Agreement specifically stating the amount of storage and the price for that amount of storage.

There is no question the amount of storage Plaintiff paid for her upgraded plan *is more storage* than the free 5GB of storage that Plaintiff had been receiving by default through her free plan. *See* ECF No. 34 (FAC); *see also* ECF No. 34-1 (Exh. 1 to FAC), at 7. Since the GB listed in the plans and pricing is *more storage* than the free 5GB, Plaintiff cannot point to any to any false statements Apple made.

Consequently, the heightened pleading standard is not met and the FAC fails to state sufficient facts for any of the consumer protection claims. Plaintiff asserts the heightened pleading standard does not apply (ECF No. 38 (Opp.), at 23-25), and Plaintiff further argued during oral argument, that even if it did apply, the FAC, as it is now, meets that standard. The Court disagrees and as such, granting leave to amend these claims would be futile.

***2. Reasonable Consumer Test***

Finally, the test that applies to Plaintiff's claim for relief under the consumer protection statutes (CLRA, FAL, and UCL) is the reasonable consumer test, which is an objective test so subjective beliefs are irrelevant. *Fisher v. Monster Beverage Corp.*, 656 Fed. Appx. 819, 822 (9th Cir. 2016); *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *Lokey v. CVS Pharmacy, Inc.*, 2020 WL 6822890 (N.D. Cal. Nov. 20, 2020). The test requires courts to ask: "Would a reasonable consumer have been misled." *See Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 612, *reconsideration denied*, 2018 WL 5793479 (N.D. Cal. 2018); *see also Fisher v. Monster Beverage Corp.*, 125 F.Supp.3d 1007, *aff'd in part, rev'd in part*, 656 Fed. Appx. 819 (C.D. Cal 2013).

When Plaintiff upgraded to the paid plan with 200GB of cloud storage for $2.99 per month, she received 200GB per month for cloud storage. She states that she relied on the portion of the Agreement (Section I.C.) that she interpreted to mean she would still be getting the free 5GB of cloud storage along with the paid cloud storage. But neither the Written Agreement nor the plans and pricing information she accessed through the link indicated that upon upgrading she would still get the free 5GB of cloud storage. Moreover, the FAC and record is silent as to whether Plaintiff would have still purchased an iCloud+ plan if it were 195GB and not 200GB advertised in the plans and pricing information. The FAC and record is also silent as to when Plaintiff discovered that she was not receiving the free 5GB of cloud storage anymore. Plaintiff does state that the Written Agreement caused her to buy more storage than the free 5GB she was provided originally. Nor does she allege that Apple misrepresented the amount of storage available in the paid plan in violation of the consumer protection laws. She merely states that her harm is that she did not still have the free 5GB of cloud storage after she purchased the paid plan with more storage.

Plaintiff relies on these facts for her consumer protection claims "sounding in fraud or mistake" to claim she is entitled to relief under the CLRA, FAL, and UCL since she was misled to believe she would receive the free 5GB even after upgrading. However, these facts are insufficient to show the reasonable consumer test is met since they would only show Plaintiff's perspective, that is, her subjective beliefs. *See Fitzhenry-Russell*, 326 F.R.D. at 612.

To the contrary, the Exhibits show that during the relevant period, there were multiple options for consumers to choose from for their cloud storage plan, which reinforces that upon upgrading consumers do not receive 5GB of free cloud storage anymore. Consumers can choose to remain with the free plan ("iCloud"), or they can upgrade to a paid plan ("iCloud+"). A reasonable consumer would not think, from those advertisements, that there is an option to have two plans (a free one and a paid one), or that they will get 5GB of storage on top of the indicated

amount of storage in the advertisements, or that the GB advertised included the free 5GB plan from which they were upgrading. There are insufficient allegations in the FAC that Apple misrepresented the amount of cloud storage it would deliver for the prices listed, and that a reasonable consumer would think that they could have two plans, a free 5GB plan and an upgraded plan with more GB.

Plaintiff argued, during Oral Argument, that the fact that there is a "+" sign next to the word "iCloud" for the upgraded paid plans and not a "+" next to the free plan, referred to as "iCloud" shows that the upgraded paid plans must mean that Plaintiff received the free "iCloud" plan *plus* something else. The Court does not agree that is a reasonable interpretation of the Written Agreement since the cloud storage plans and pricing information accessible through the link specifically listed the amount of paid GB a consumer will receive upon upgrading and the price for that amount.

The interpretation that a free cloud storage plan providing 5GB would remain in place after upgrading to a paid plan providing more storage is insufficient to meet the reasonable consumer test, since the standard is objective. *See Fisher*, 656 Fed. Appx. at 822. As a result, the FAC does not state sufficient facts to show that a reasonable consumer would think they were getting free cloud storage even after upgrading. Once again amending the FAC would be futile because there are no facts that Plaintiff can add to show that the reasonable consumer test is met when the plans and pricing information explicitly states the amount of GB provided upon upgrading to a paid plan that provides more storage.

## IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendant's Request for Judicial Notice and Incorporation by Reference; **GRANTS** Defendant's Motion to Dismiss **with prejudice** as to the Breach of Contract Claim, the CLRA Claim, the FAL Claim, the UCL Claims based on the unlawful prong, the unfair prong, and the fraudulent prong, and as to Plaintiff's Claim for

Injunctive Relief. Given the Court's order, ECF Nos. 48, 56, 57, and 59 are moot.

This ORDER resolves ECF Nos. 36 and 36-1, 48, 56, 57, and 59.

**IT IS SO ORDERED.**

Dated: May 8, 2024

TRINA L. THOMPSON
United States District Judge