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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11

12
13 ANDREW ROLEY, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 GOOGLE LLC and DOES 1-50,

18 Defendants.
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Case No. 5:18-cv-7537-BLF

**DEFENDANT GOOGLE LLC'S NOTICE OF
MOTION AND MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

Date: May 9, 2019
Time: 9:00 a.m.
Courtroom: Courtroom 3, 5th Floor
Judge: Hon. Beth L. Freeman

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on May 9, 2019, in Courtroom 3, 5th floor of the above-entitled
3 court, located at 280 South 1st Street, San Jose, California, pursuant to Federal Rule of Civil Procedure
4 12(b)(6), defendant Google LLC (“Google”) will and hereby does move to dismiss the First Amended
5 Complaint (“FAC”) (ECF No. 18) filed by plaintiff Andrew Roley (“Plaintiff”). This motion is based
6 on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the
7 pleadings and evidence on file in this matter, oral argument of counsel, and such other materials and
8 arguments as may be presented in connection with the hearing of the motion. Google also requests
9 that the Court take judicial notice of the documents attached as Exhibit A and Exhibit B to the
10 Declaration of Laura Slabin, respectively, in support of Google’s Motion to Dismiss.

11 **STATEMENT OF RELIEF SOUGHT**

12 Google seeks an order dismissing with prejudice all causes of action in the FAC for failure to
13 state a claim upon which relief can be granted.

14 **ISSUES TO BE DECIDED**

15 1. Whether Plaintiff’s breach of contract claim should be dismissed, where Plaintiff
16 alleges that statements in Google’s marketing emails constitute a unilateral contract requiring Google
17 to provide Plaintiff with a benefit for an indefinite period, but Plaintiff expressly agreed to terms
18 providing that “Benefits are subject to change.”

19 2. Whether Plaintiff’s common-law fraud claim should be dismissed, where Plaintiff can
20 point to no affirmative statement in which Google promised to provide benefits for an indefinite period
21 and Google disclosed in the applicable terms that “Benefits are subject to change.”

22 3. Whether Plaintiff’s conversion claim should be dismissed, where Plaintiff cannot
23 allege that he had a permanent ownership interest in the benefits granted by Google given express
24 terms clarifying that any benefits were provided in Google’s sole discretion.

25 4. Whether Plaintiff’s claims under the Consumers Legal Remedies Act, Cal. Civ. Code
26 Section 1750 *et seq.* (“CLRA”) and Unfair Competition Law, California Business & Professions Code
27 Section 17200, *et seq.* (“UCL”), should be dismissed, where Google’s alleged conduct was expressly
28 authorized by its agreement with Plaintiff.

1 Google “discretion” to “change” benefits as it deems appropriate. (*Id.*) All of Plaintiff’s claims fail
2 as a matter of law because Plaintiff cannot impose legal liability for alleged conduct that he specifically
3 authorized Google to take. While Plaintiff carefully omits mention of the Local Guides Terms in the
4 FAC, the Court is entitled to consider the Terms, which indisputably governed Plaintiff’s participation
5 in the Local Guides program and are an appropriate subject of judicial notice. For all these reasons,
6 Google requests that the Court dismiss the FAC in its entirety, with prejudice.

7 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

8 **A. Background**

9 Google’s Local Guides program allows individuals to sign up to be a Local Guide and to post
10 user-generated content, including reviews, comments, and photographs, regarding locations on Google
11 Maps. Google provides benefits to Local Guides who post certain amounts of user-generated content,
12 subject to the Terms as further discussed below.

13 Plaintiff alleges that in April 4, 2016, he received an email from Google that “invited [him to]
14 ‘join Local Guides!’” and offered him ““rewards”” for participating in the program. (FAC ¶ 15.) The
15 email indicated that individuals who “become a Local Guide,” can “earn points” which “can unlock
16 cool benefits like:” “invitations to exclusive events,” “early access to new Google products,” “1TB of
17 Google Drive storage,” or a “Local Guides badge.” (*Id.*) The email, as described in the FAC, contains
18 no other explanations about the “points” program or the “cool benefits” available. It does not, for
19 example, explain how many points are needed to earn particular benefits, or specify what “exclusive
20 events” or “new Google products” might be made available as benefits to Local Guides, or what terms
21 might apply to the “1TB of Google Drive storage.” As shown in the FAC, the email includes a button
22 with the text “GET STARTED” at the bottom of the email (discussed further below).

23 Plaintiff alleges that this April 4, 2016 email was “a promise of a free terabyte of storage” that
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25 to two years. (FAC ¶ 27.) Moreover, in April 2016, Google also disclosed on the Local Guides
26 website that Level 4 Guides could “receive free Google Drive storage for two years.” For purposes of
27 this Motion, however, the Court need not resolve that issue, because Plaintiff’s claims fail even
28 assuming the truth of all allegations.

1 “induced Plaintiff to become a Local Guide.” (*Id.* ¶ 16.) Plaintiff alleges that he believed the benefit
2 of free storage would be for “an indefinite amount of time” and “without limitation.” (*Id.* ¶¶ 65, 88.).
3 Plaintiff alleges that over the next few months, he continued to upload photos and other content to
4 Google Maps, until Google notified him that he had attained “Level 4” status and would receive the
5 benefit of free Google Drive storage on July 14, 2016. (*Id.* ¶¶ 22, 26.) Plaintiff alleges that when he
6 received this notification, Google placed a time limit on the free storage benefit, which Plaintiff claims
7 was inconsistent with Google’s prior statements. (*Id.* ¶ 26.) Plaintiff alleges that Google then
8 informed Plaintiff in April 2018 (nearly two years later) that his free Google Drive storage would soon
9 end, and he would need to start paying a \$10/month fee after the benefit ended. (*Id.* ¶ 30.) In response,
10 Plaintiff allegedly removed data from his Google Drive account so that his amount of data storage
11 would qualify for a free account, so that Plaintiff does not appear to have suffered any out-of-pocket
12 loss from the alleged facts. (*Id.* ¶ 37.)

13 **B. Judicially Noticeable Facts Omitted from the Complaint.**

14 Plaintiff alleges that after receiving the April 4, 2016 email discussed above, “he joined
15 Google’s Local Guides program” by completing an “enrollment” process. (FAC ¶ 16.) What Plaintiff
16 neglects to explain in the FAC, however, is that this enrollment process required Plaintiff to click to
17 agree to the Local Guides Terms, which governs his participation in the Local Guides program.

18 As shown in the FAC, the April 4, 2016 email from Google included a “GET STARTED”
19 button at the bottom of the email. When recipients clicked on this button, they were directed to the
20 Local Guides Program website (located at: <https://maps.google.com/localguides>). On this page,
21 individuals could access a sign-up page (“Sign-Up Page”) as a pop-up window, which is depicted
22 below and attached as Exhibit A to the Declaration of Laura Slabin:

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Select your city MY_

I am 18 years or older and I agree to the [program rules](#).

I agree to receive emails from the Local Guides program.

SIGN UP

As shown, a user signing up to be a Local Guide had to (1) click the two boxes above, including the box with the text “I am 18 years old and I agree to the program rules,” and (2) click the “SIGN UP” bar at the bottom of the Sign-Up Page. (Slabin Decl.; Ex. A.) The blue text “program rules,” shown above, was a hyperlink that directed users to the “Local Guides Program Terms and Conditions” (“Local Guides Terms”) located at <https://maps.google.com/localguides/rules/> and attached as Exhibit B to the Declaration of Laura Slabin. These Local Guide Terms stated that Local Guides “agree to be bound” by both the “Google Terms of Service” and the “additional terms and conditions set forth below.” (Slabin Decl.; Ex. B.) This process was in place at the time Plaintiff joined the Local Guides program in April 2016 as alleged in the FAC.² (Slabin Decl. ¶ 4.) As noted, the Terms provide that:

² This common form of online agreement constitutes binding acceptance, as courts have consistently held. *See, e.g., Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 911 (N.D. Cal. 2011) (finding that a plaintiff consented to defendant’s terms of service by clicking a button with text indicating that clicking would constitute acceptance); *Crawford v. Beachbody, LLC*, No. 14-cv-1583, 2014 WL 6606563, at *3 (S.D. Cal. Nov. 5, 2014) (holding that online terms are enforceable “where the user is provided with an opportunity to review the terms of service in the form of a hyperlink immediately under the ‘I Accept’ button and clicks that button”) (citations omitted).

1 (1) “Level requirements and descriptions are subject to change, *at Google’s sole discretion*;” (2)
 2 “Benefits are offered at *the discretion of Google* and its affiliates;” and (3) “*Benefits are subject to*
 3 *change*.” (Slabin Decl.; Ex. B) (emphasis added.)

4 The Sign-Up Page and Local Guide Terms are properly subject to judicial notice, for all the
 5 reasons discussed below in Google’s Request for Judicial Notice.

6 C. Claims and Procedural History

7 Plaintiff filed his original Complaint in Santa Clara County Superior Court on October 25,
 8 2018. (ECF Dkt. 1.) Google removed the action on December 14, 2018 to this Court because the
 9 Complaint alleged a nationwide class and is therefore subject to federal jurisdiction under CAFA. (*Id.*)
 10 On January 11, 2019, Plaintiff filed an Amended Complaint, where he removed two causes of action
 11 (unjust enrichment and negligent misrepresentation). (ECF No. 18.) In the FAC, Plaintiff seeks
 12 various remedies, including “specific performance by Google,” by which Plaintiff presumably means
 13 requiring Google to provide Local Guides with free storage for an “indefinite period” and “without
 14 limitation,” as alleged in the FAC.

15 III. ARGUMENT

16 A. Plaintiff’s Breach of Contract Claim Fails Because He Relies on Non-Binding 17 Promotional Materials While Failing to Acknowledge the Actual Contract that 18 Governs the Local Guides Program.

19 Plaintiff claims that the April 4, 2016 email inviting recipients to join the Local Guides
 20 program was a binding offer to provide free data storage for life, which Plaintiff could “accept[] . . .
 21 through performance” without having to assume any contractual obligations of his own. (Compl.
 22 ¶¶ 15, 16, 64). This type of unilateral contract is an exception to the rule that contracts require a mutual
 23 exchange of promises. *See Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 785 (9th Cir. 2012)
 24 (explaining distinction between bilateral contracts and unilateral contracts, which can be “accepted by
 25 rendering a performance rather than providing a promise.”). As a general matter, “advertisements and
 26 solicitations” are *not* unilateral contracts because it is “unreasonable for a person to believe that [such
 27 marketing materials] are offers that bind the advertiser.” *Mesaros v. United States*, 845 F.2d 1576,
 28 1581 (Fed. Cir. 1988). Rather, these sorts of materials “are . . . mere notices and solicitations for offers
 which create no power of acceptance in the recipient.” *Id.* at 1580; *accord Foremost Pro Color, Inc.*

1 v. *Eastman Kodak Co.*, 703 F.2d 534, 539 (9th Cir. 1983) (“Trade circulars, catalogs and
 2 advertisements are uniformly regarded as mere preliminary invitations which create no power of
 3 acceptance in the recipient.”) *overruling recognized on other grounds by Aerotec Int’l, Inc. v.*
 4 *Honeywell Int’l, Inc.*, 836 F.3d 1171, 1179 (9th Cir. 2016). Under California law, marketing materials
 5 can potentially give rise to a unilateral contract only if “the advertiser, *in clear and positive terms*,
 6 promised to render performance in exchange for something requested by the advertiser” and causes
 7 the recipients to “reasonably . . . conclude[] that by acting in accordance with the request a contract
 8 would be formed.” *Sateriale*, 697 F.3d at 787 (internal quotation and citation omitted) (emphasis
 9 added).

10 In *Frezza v. Google Inc.*, No. 12-cv-0237, 2013 WL 1736788 (N.D. Cal. Apr. 22, 2013)
 11 (Whyte, J.), the court applied these principles to reject a unilateral contract theory in closely analogous
 12 circumstances to those presented here. In *Frezza*, the plaintiff alleged that Google’s blog posts and
 13 other marketing materials for its “Tags” program constituted a binding offer for an unlimited number
 14 of free “Tags” within a 30-day period. *Id.* at *1. The Court held that Google’s marketing materials
 15 fell within the “well-established rule that an advertisement generally does not constitute an offer” for
 16 multiple reasons: (1) the materials did not contain material terms of the alleged contract, (“That the
 17 promotional materials were not contemplated to constitute an offer is clear from the undisputed fact
 18 that they made no mention of the requirement to provide credit card information.”); (2) the materials
 19 directed users to an additional sign-up page and did not stand on their own as a purported offer, and
 20 (3) users were required to agree to additional “terms and conditions” that placed limits on the
 21 promotion and were “presented at the time of enrollment, and not through the promotional materials .
 22 . . .” *Id.* at *3.

23 The marketing materials at issue here fall within the same “well-established rule” for the same
 24 reasons. First, the April 4, 2016 email that Plaintiff claims induced him to become a Local Guide
 25 contains virtually none of the basic terms that would be needed if it were intended to be an enforceable
 26 offer that recipients could accept through performance.³ For example, the email tells recipients they
 27 _____

28 ³ Plaintiff does not identify which specific offer formed his alleged unilateral contract with Google.

1 can “earn points” towards various benefits but says nothing about how many points Local Guides will
2 earn from specific tasks or how many points are needed to be eligible for specific benefits. The email
3 also makes no guarantee that recipients will necessarily receive specific benefits by earning points
4 alone. Rather, Google tells recipients that points “*can* unlock cool benefits,” plainly indicating that
5 benefits are subject to additional terms. (FAC ¶ 15) (emphasis added). Moreover, the potential benefits
6 listed in the email are described in broad marketing terms (“invitations to exclusive events,” “early
7 access to new Google products”), without any of the details that would be needed to support
8 enforceable obligations on Google’s part.⁴ (*Id.*) In short, Google’s April 4, 2016 email contains none
9 of the indicia of a binding offer, and certainly does not state in “clear and positive terms” that it was
10 intended to support a unilateral contract acceptable through performance. *Sateriale*, 697 F.3d at 787
11 (internal quotation and citation omitted).

12 Second, the April 4, 2016 email on its face rebuts any notion that it could be accepted by
13 performance alone because it expressly contemplates that recipients must take additional steps beyond
14 merely performing tasks to earn points. As described and depicted in the Complaint, the email
15 “invited” recipients to “join Local Guides!” and included a “Get Started” button that recipients had
16 to click, which directed them to the additional steps needed to sign up as a Local Guide. As in *Frezza*,

17 _____
18 However, Plaintiff claims that the April 4, 2016 “promise of a free terabyte of storage induced Plaintiff
19 to become a Local Guide” and that Plaintiff’s injury allegedly accrued “after Plaintiff had done the
20 work that Google encouraged him to do with a promise of ‘1TB of free Drive storage.’” (FAC ¶¶ 16,
21 32.) Plaintiff also points to a “Benefits Update” that he received on July 7, 2016, which states “Local
22 Guides who reach Level 4 in the next 2 weeks can still unlock the original offer of 1TB of free Drive
23 storage,” two weeks prior to his allegedly attaining Level 4 status. (FAC ¶¶ 23, 26.)

24 ⁴ Google’s marketing emails are phrased in general terms because the “benefits” for Local Guides are
25 expected to evolve over time. As such, there is no way to apply these statements as if they were
26 contract terms. For example, the statement that Local Guides could receive “invitations to exclusive
27 events” could not be enforced as a binding contract term because there would be no way for a court to
28 know what “exclusive events” might be covered.

1 the fact that the emails at issue “directed [recipients] to a signup page” confirms that they are
 2 “promotional materials” and not “a binding offer” that could be accepted by mere performance.
 3 *Frezza*, 2013 WL 1736788, at *3; *see also Donovan v. RRL Corp.*, 26 Cal. 4th 261, 272 (2001) (a
 4 unilateral contract must “invite the performance of a specific act *without further communication and*
 5 *leave nothing for negotiation.*”) (emphasis added).

6 Third, and most importantly, the additional steps for becoming a Local Guide require that
 7 individuals expressly agree to the Local Guides Terms, which constitute the *actual* contract between
 8 Local Guides and Google and *not* the various marketing emails referenced in the FAC. Plaintiff
 9 strategically omits to mention the Terms in the Complaint⁵ but the Court can and should consider them
 10 nonetheless for all the reasons explained in the Request for Judicial Notice below. Plaintiff’s breach
 11 of contract claim fails as a matter of law in light of the Terms, because he expressly agreed that:

- 12 • “Level requirements and descriptions are subject to change, *at Google’s sole discretion.*”
- 13 • “Benefits are offered *at the discretion of Google* and its affiliates.”
- 14 • “*Benefits are subject to change.*”

15 (Slabin Decl.; Ex. B) (emphasis added.)

16 Any one of these provisions alone would be sufficient to sink Plaintiff’s FAC, but taken
 17 together they make unmistakably clear that Plaintiff was never entitled to a benefit of free storage that
 18 would last for an indefinite period and would never be subject to change. To the contrary, Google was
 19 entirely within its contractual rights under the Terms to change the duration of the free storage benefit,

20 _____
 21 ⁵ Indeed, Plaintiff’s failure to include or even mention the Terms is in itself grounds to dismiss the
 22 claim. *See Frezza*, 2013 WL 1736788, at *2 (dismissing breach of contract claim where the complaint
 23 referred only to marketing materials and omitted the actual contract terms, explaining that “[b]ecause
 24 such terms are missing, plaintiffs have neither provided the entire contract verbatim nor adequately
 25 stated its complete legal effect, and thus, plaintiffs again fail to plead the existence of a contract”)
 26 (citation omitted); *Kilaita v. Wells Fargo Home Mortg.*, No. 11-cv-0079, 2011 WL 6153148, at *4
 27 (N.D. Cal. Dec. 12, 2011) (“[A] plaintiff must either set forth in *haec verba* all the terms of the contract
 28 or state the legal effect of those terms.”) (internal quotation and citation omitted).

1 regardless of what Plaintiff might have expected from reviewing Google’s marketing emails alone.
2 Plaintiff’s breach of contract claim thus fails as a matter of law. *Cox v. McLaughlin*, 63 Cal. 196, 206
3 (1883) (“[A] party cannot commit a breach of contract by exercising a right secured to him by the
4 contract.”); *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 374 (1992)
5 (“[I]f defendants were given the right to do what they did by the express provisions of the contract
6 there can be no breach.”) (internal quotation and citation omitted); *Gabana Gulf Distribution, Ltd. v.*
7 *GAP Int’l Sales, Inc.*, No. 06-cv-2584, 2008 WL 111223, at *6 (N.D. Cal. Jan. 9, 2008) (dismissing
8 breach of contract claim as a matter of law where contract gave defendant specific authority to perform
9 actions alleged to be breach).

10 **B. Plaintiff’s Additional Causes of Action also Fail Because Google’s Alleged**
11 **Conduct Fully Complied with the Local Guides Terms.**

12 Plaintiff’s remaining causes of action—fraud, conversion, and violations of the UCL and
13 CLRA—are all premised on Google’s alleged obligation to provide Plaintiff with free data storage
14 “indefinitely” and “without limitation.” (FAC ¶ 88.) Because the Terms demonstrate as a matter of
15 law that Google had no such obligation, Plaintiff’s additional claims predicated on the purported right
16 to receive free storage “without limitation” also fail. Google takes each in turn.

17 **1. Plaintiff Cannot Pursue a Fraud Claim When Google Disclosed that All**
18 **Benefits Were Subject to Change at Google’s Discretion.**

19 Under established law, Plaintiff cannot claim that Google defrauded him into believing that he
20 would receive free storage for life when Google expressly advised in the Terms that all benefits for
21 Local Guides are provided at “Google’s discretion” and “subject to change.” (Slabin Decl.; Ex.
22 B.) For example, in *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1164 (9th Cir. 2012), the
23 plaintiff brought a fraudulent concealment claim alleging that an annual fee was not disclosed in
24 defendants’ advertising and marketing materials. The Court of Appeals, however, found that the fee
25 in dispute was disclosed in terms and conditions that Plaintiff had agreed to online (which the district
26 court below had considered on judicial notice). The Court of Appeals accordingly affirmed dismissal
27 of the fraud claim, explaining that “reliance on the purported misrepresentation was manifestly
28 unreasonable” under the circumstances. *Id.*

1 Likewise, even if Plaintiff assumed based on the marketing emails he received that he would
2 receive free data storage for an “indefinite period” and “without limitation,” any such belief was
3 unreasonable. (FAC ¶ 88.) None of the emails quoted in the FAC state, or even imply, that the free
4 storage benefit would be for an “indefinite period” or any words to similar effect. To the contrary, the
5 statements at issue do not address the duration of the benefit at all. To the extent Plaintiff assumed
6 from the marketing emails that the free storage benefit would last for a lifetime “without limitation,”
7 a cursory review of the Terms would have disabused him of that notion. As in *Davis*, Plaintiff’s
8 apparent confusion from failing to review the Terms cannot support a fraud claim because “where . .
9 . the parties to an agreement deal at arm’s length, it is not reasonable to fail to read a contract before
10 signing it.” *Davis*, 691 F.3d at 1163; *see also Circle Click Media LLC v. Regus Mgmt. Grp. LLC*, No.
11 12-cv-4000, 2013 WL 57861, at *10-12 (N.D. Cal. Jan. 3, 2013) (dismissing fraud by omission claims
12 because terms and conditions incorporated into the underlying agreement disclosed the allegedly
13 undisclosed fees); *Guerard v. CNA Fin. Corp.*, No. 09-cv-1801, 2009 WL 3152055, at *5 (N.D. Cal.
14 Sept. 23, 2009) (dismissing fraud claims where the contract terms at issue were “unambiguous” and,
15 thus, could not be fraudulent).

16 2. Plaintiff Has Failed to Allege the Elements of a Conversion Claim.

17 As with Plaintiff’s fraud claim, Plaintiff’s conversion claim also cannot stand because
18 Google’s alleged conduct was permitted by the Terms. To state a claim for conversion, Plaintiff must
19 show (1) his ownership or right to possess the subject property; (2) the defendant’s conversion of that
20 ownership right by a wrongful act; and (3) damages. Where, as here, the alleged wrongful acts that
21 constitute the conversion “are contradicted by the terms of [an] Agreement,” the conversion claim
22 necessarily fails. *Appling v. Wachovia Mortg., FSB*, 745 F. Supp. 2d 961, 974 (N.D. Cal. 2010); *see*
23 *also McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1491 (2006) (reasoning that a conversion
24 claim could not proceed when plaintiffs’ alleged entitlement to funds was contradicted by the terms
25 of an agreement). Here, because Plaintiff agreed in the Terms that any Local Guides benefits were
26 subject to Google’s discretion, Plaintiff cannot establish the ownership interest needed to support a
27 conversion claim. *Bank of N.Y. v. Fremont Gen. Corp.*, 523 F.3d 902, 914 (9th Cir. 2008) (affirming
28 dismissal of conversion claim because plaintiff was required to show he “did not consent to the

1 defendant’s exercise of dominion,” but could not do so).

2 **3. Plaintiff Fails to Allege a Claim under the UCL.**

3 **a. Plaintiff fails to allege a fraudulent or unfair business practice**
4 **within the meaning of the UCL.**

5 Plaintiff also fails to allege a claim under the “unfair” and “fraudulent” prongs of the UCL
6 because Google’s alleged conduct was authorized by the Terms. *See* Cal. Bus. & Prof. Code § 17200.
7 The court’s reasoning in *Davis v. HSBC Bank Nevada*, is again instructive. In *Davis*, plaintiff claimed
8 that he accepted an offer that he believed came with no annual fee, but he also agreed to terms and
9 conditions that expressly disclosed the fee. 691 F.3d at 1158. When defendant imposed the fee,
10 plaintiff claimed he was misled and sued for “unfair”⁶ and “fraudulent” conduct under the UCL. *Id.*
11 at 1159. The Court of Appeals affirmed dismissal, reasoning that defendant had acted in accordance
12 with the express terms of its agreement and could not be held liable under the UCL just “[b]ecause
13 [plaintiff] failed to read the terms and conditions before agreeing to them” *Id.* at 1170. Similarly
14 here, Plaintiff cannot pursue a UCL claim based on conduct—Google’s alleged decision to modify the
15 duration of the free storage benefit—that was expressly authorized by the Terms to which Plaintiff
16 agreed. As in *Davis*, Plaintiff’s alleged misunderstanding about the free storage benefit—based on his
17 apparent failure to read the Local Guides Terms when he enrolled in the program—cannot support a
18 claim under either the “unfair” or “fraudulent” prong of the UCL. *See also Spiegler v. Home Depot*
19 *U.S.A., Inc.*, 552 F. Supp. 2d 1036, 1045-46 (C.D. Cal. 2008) (dismissing claim under the unfairness
20 and fraudulent prong of the UCL, where “[d]efendants complied with the express terms of the

21 _____
22 ⁶ While California law is unsettled as to whether this Court should apply a “public policy” test or the
23 “balancing test” to determine if Google’s conduct is allegedly unfair, Plaintiff’s allegations are
24 insufficient regardless. *See, e.g., Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1027 (N.D. Cal. 2016)
25 (reasoning that disclosures on defendant’s website barred a UCL claim under the “balancing test”).
26 Equally, Plaintiff has not “tethered” his claim to “specific constitutional, statutory or regulatory
27 provisions,” as required by some courts in this District and his claim should be dismissed. *Scripps*
28 *Clinic v. Super. Ct.*, 108 Cal. App. 4th 917, 940 (2003) (internal quotation and citations omitted).

1 contracts”); *Samura v. Kaiser Found. Health Plan, Inc.*, 17 Cal. App. 4th 1284, 1299 n.6 (1993) (The
 2 “unfairness” prong of the UCL “does not give the courts a general license to review the fairness of
 3 contracts . . .”).

4 **b. Plaintiff fails to allege an unlawful business practice within the**
 5 **meaning of the UCL.**

6 Plaintiff’s claim of “unlawful” conduct under the UCL should also be dismissed because it
 7 relies on the same defective allegations of fraud discussed above. To support this aspect of his UCL
 8 claim, Plaintiff alleges violations of California Civil Code Sections 1709, 1710, and 1752, which
 9 codify various aspects of common law fraud. No other statutory violations or other independent
 10 “unlawful” conduct are alleged. Where, as here, the predicate “unlawful” conduct claim cannot stand,
 11 the UCL “unlawful” claim must be dismissed as well. *Ingels v. Westwood One Broad. Servs., Inc.*,
 12 129 Cal. App. 4th 1050, 1060 (2005) (“A defendant cannot be liable under [Section] 17200 for
 13 committing unlawful business practices without having violated another law.”) (internal quotation and
 14 citations omitted).

15 **4. Plaintiff Has Failed to State a Claim under the CLRA.**

16 Plaintiff’s CLRA claim fails for the same reasons as his other fraud-based claims. Again,
 17 Plaintiff cannot allege that he reasonably relied on Google’s marketing emails in light of the provisions
 18 of the Terms discussed above, and this fatal defect applies equally to the CLRA claim. *See Spiegler*,
 19 552 F. Supp. 2d at 1045 (dismissing CLRA claim because defendant “complied with the express terms
 20 of the contracts, and charged plaintiffs in accordance with their terms”); *Woods v. Google, Inc.*, 889
 21 F. Supp. 2d 1182, 1196 (N.D. Cal. 2012) (same).

22 **IV. REQUEST FOR JUDICIAL NOTICE**

23 Pursuant to Federal Rule of Evidence 201, Google requests that the Court take judicial notice
 24 of the Sign-Up Page (Slabin Decl.; Ex. A) and the Local Guides Terms (Slabin Decl.; Ex. B.). Judicial
 25 notice is appropriate for facts “not subject to reasonable dispute” that are either generally known
 26 within the jurisdiction of the trial court or “can be accurately and readily determined from sources
 27 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

28 The Ninth Circuit has recognized that “in order to ‘[p]revent [] plaintiffs from surviving a Rule

1 12(b)(6) motion by deliberately omitting . . . documents upon which their claims are based,’ a court
 2 may consider a writing referenced in a complaint but not explicitly incorporated therein if the
 3 complaint relies on the document and its authenticity is unquestioned.” *Swartz v. KPMG LLP*, 476
 4 F.3d 756, 763 (9th Cir. 2007) (citations omitted).⁷ This rule allows courts to avoid the basic unfairness
 5 that would result from allowing a plaintiff to avoid dismissal by strategically alleging only those
 6 aspects of a document that support its claims while avoiding others.

7 Courts in this Circuit have applied this rule to consider a variety of documents on a motion to
 8 dismiss, including online terms, which are not attached to a complaint but are referenced in the
 9 pleadings or on which the claims depend. *See, e.g., Coto Settlement v. Eisenberg*, 593 F.3d 1031,
 10 1038 (9th Cir. 2010) (taking judicial notice of documents not referenced in the complaint and
 11 explaining that the Ninth Circuit has “extended the doctrine of incorporation by reference to consider
 12 documents in situations where the complaint necessarily relies upon a document . . .”).

13 Additionally, publicly available websites are proper subjects for judicial notice, when the
 14 “website’s authenticity is not in dispute, and the exhibits ‘[are] capable of accurate and ready
 15 determination.’ . . .” *Opperman v. Kong Techs., Inc.*, No. 13-cv-0453, 2017 WL 3149295, at *4 (N.D.
 16 Cal. Jul. 25, 2017); *see also Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015)
 17 (judicially noticing various online agreements “as they are publicly available, standard documents that
 18 are capable of ready and accurate determination, and they are relevant to Plaintiffs’ . . . claims”)
 19 (citations omitted). Courts also take judicial notice of archived websites, *i.e.*, websites that are no
 20 longer hosted on the original website, but are publicly available, catalogued, and accessible on
 21 websites like “archive.org” (the “Wayback Machine”). *Erickson v. Neb. Mach. Co.*, No. 15-cv-1147,
 22 2015 WL 4089849, at *1 n.1 (N.D. Cal. Jul. 6, 2015) (“Courts have taken judicial notice of the contents
 23 of web pages available through the Wayback Machine as facts that can be accurately and readily
 24 _____
 25 ⁷ *See also, e.g., Branch v. Tunnell*, 14 F. 3d 449, 454 (9th Cir. 1994) (“[D]ocuments whose contents
 26 are alleged in a complaint and whose authenticity no party questions, but which are not physically
 27 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.”) *overruled*
 28 *on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F. 3d 1119 (9th Cir. 2002).

1 determined from sources whose accuracy cannot be reasonably questioned.”) (citations omitted);
2 *Tompkins v. 23andMe, Inc.*, Nos. 13-cv-5682, 14-cv-0294, et al., 2014 WL 2903752, at *1 n.1 (N.D.
3 Cal. Jun. 25, 2014) (“[T]he Court takes judicial notice of the Internet Archive (<http://archive.org>)
4 version of 23andMe’s website as of November 20, 2013.”).

5 **A. The Court Should Take Judicial Notice of the Sign-Up Page and the Local**
6 **Guides Terms Because Plaintiff Necessarily Relies on Them in His Allegations and**
7 **They Are Publicly Available.**

8 As discussed above, Plaintiff alleges that he was induced to join the Local Guides program by
9 an email that prompted him to “become a Local Guide.” (FAC ¶ 15.) Plaintiff alleges that he then
10 “joined Google’s Local Guides program and received a ‘welcome’ email from Google acknowledging
11 his enrollment.” (FAC. ¶ 16.) Because Plaintiff alludes to but does not explain the “enrollment” steps
12 he went through to become a Local Guide, it is necessary to take judicial notice of the Sign-Up Page
13 (Slabin Decl.; Ex. A), which Plaintiff necessarily accessed in order to sign up as a Local Guide, and
14 the Local Guides Terms (Slabin Decl.; Ex. B), which Plaintiff necessarily clicked to agree to as part
15 of this sign up process.

16 These materials are essential to evaluating the FAC and putting Plaintiff’s allegations in proper
17 context. Because Plaintiff’s claims are predicated on the alleged contractual obligations that Google
18 owed, it is critical to consider the actual sign up process that Plaintiff went through and the actual
19 terms to which he agreed, rather than the partial and misleading descriptions in the FAC. The Sign-
20 Up process and Local Guides Terms are not “subject to reasonable dispute” and “can be accurately
21 and readily determined,” Fed. R. Evid. 201(b), because they are a publicly available document that
22 can be accessed by anyone joining the Local Guides program. Further, the version of the Local Guides
23 Terms in place at the time Plaintiff joined Local Guides remains publicly accessible on the Wayback
24 Machine, as discussed in the Declaration of Laura Slabin.

25 Indeed, the instant case is analogous to *Craigslist, Inc. v. DealerCMO, Inc.*, No. 16-cv-1451,
26 2017 WL 6334142 (N.D. Cal. Apr. 11, 2017), where the court took judicial notice of Terms of Use in
27 order to assess the legal sufficiency of a breach of contract claim where the pleading incorporated
28 those terms. Those terms were available both on contemporary websites and exclusively via the

1 “Wayback Machine.” *Id.* at *3 n.3. Like the documents in *Craigslist, Inc.*, Google’s Local Guides
2 Terms are available either directly from the Google website or have been archived on the Wayback
3 Machine website. *See id.*; *see also Prime Healthcare Servs., Inc. v. Harris*, No. 16-cv-0778, 2017 WL
4 3525169, at *10 (S.D. Cal. Aug. 16, 2017) (taking judicial notice of Wayback Machine websites that
5 bear the watermark of the Wayback Machine to support their authenticity); *Erickson*, 2015 WL
6 4089849, at *1 n.1 (taking judicial notice of websites available via the “Wayback Machine” to assess
7 sufficiency of Complaint’s allegations); *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1067 (2017)
8 (taking judicial notice of various terms from websites sources, as they are “publicly available on the
9 Investopedia website and the Stable Value Investment Association website”).

10 In addition, judicial notice is appropriate because Plaintiff expressly references and relies on
11 the Local Guides Terms in the FAC. (*See* FAC ¶ 89.) While Plaintiff selectively quotes the Terms to
12 support his CLRA claim, he omits to mention the other terms discussed above that directly rebut his
13 claims. Given this express incorporation by reference, the Court should take judicial notice of Exhibit
14 B in order to fairly assess the Local Guides Terms in their entirety. *See, e.g., Kaufman & Broad-S.*
15 *Bay v. Unisys Corp.*, 822 F. Supp. 1468, 1472 (N.D. Cal. 1993) (“A document incorporated by
16 reference is not external to the complaint” and may be considered “even if it is actually introduced by
17 the defendant.”) (citations omitted), *overruled on other grounds by KFC W., Inc. v. Meghrig*, 49 F.3d
18 518 (9th Cir. 1995), *rev’d on other grounds by Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996).

19 V. CONCLUSION

20 For the above reasons, the FAC should be dismissed in its entirety with prejudice because the
21 alleged wrongful conduct—Google’s alleged modification to the free storage benefit for Local
22 Guides—was expressly authorized by Plaintiff when he agreed to the Local Guides Terms.

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Dated: February 11, 2019

COOLEY LLP
MICHAEL G. RHODES (116127)
WHITTY SOMVICHIAN (194463)
MAXWELL E. ALDERMAN (318548)

/s/ Whitty Somvichian
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7 Attorneys for Defendant
8 GOOGLE LLC

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11

12
13 ANDREW ROLEY, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 GOOGLE LLC and DOES 1-50,

18 Defendants.
19

Case No. 5:18-cv-7537-BLF

**DECLARATION OF LAURA SLABIN IN
SUPPORT OF GOOGLE LLC'S MOTION
TO DISMISS THE AMENDED COMPLAINT**

Date: May 9, 2019
Time: 9:00 a.m.
Courtroom: Courtroom 3, 5th Floor
Judge: Hon. Beth L. Freeman

20 I, Laura Slabin, hereby declare as follows:

21 1. I am a Director of Content and Community at Google LLC ("Google"). I have been
22 working at Google since February 20, 2007. I am a member of a team whose responsibilities include
23 coordinating the display and development of the sign-up flow process for a variety of Google
24 programs, including the Google Local Guides program. My team also coordinates the development
25 and display of the Local Guides Program Terms and Conditions, which governs the Local Guides
26 Program. If called to testify regarding the facts set forth in this declaration I could and would testify
27 competently thereto.

28 2. Attached hereto as **Exhibit A** and depicted below is a true and correct copy of a

1 screen capture showing the Sign-up Page, which is available at <https://maps.google.com/localguides>,
 2 and appears as a pop-up window when a prospective Local Guide selects “join” on the web page.

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14 3. Google requires a user to affirmatively check a box confirming that she is “18 years
 15 or older” and she will “agree to the program rules.” The “program rules” are a hyperlink that, when
 16 selected, take a prospective Local Guide to the operative Local Guides Program Terms and
 17 Conditions, available at: <https://maps.google.com/localguides/rules/>. Individuals signing up to be a
 18 Local Guide are required to click to agree to the Local Guides Program Terms and Conditions.

19 4. This Sign-Up page and the associated process described above have been in place
 20 since at least January 2015, which I have verified by reviewing records kept in the ordinary course of
 21 Google’s business.

22 5. Attached as **Exhibit B** is a true and correct copy of the Local Guides Program Terms
 23 and Conditions, accessed on February 11, 2019, and publicly available via the Internet Archive
 24 (Wayback Machine) at:

25 <https://web.archive.org/web/20160411071003/https://www.google.com/intl/en/local/guides/rules/>.

26 According to the Wayback Machine, Exhibit B was “captured” on April 11, 2016. By reviewing
 27 Google’s records, kept in the ordinary course of business, I have verified that Exhibit B accurately
 28 sets forth the content of the Local Guides Program Terms and Conditions that were in place on April

1 4, 2016 and April 5, 2016 (when, according to the first amended complaint, plaintiff Andrew Roley
2 states he received an email inviting him to join the Local Guides program and when he avers to
3 joining the Local Guides program, respectively).

4 I declare under penalty of perjury that the foregoing is true and correct. This declaration was
5 executed on February 11, 2019 in New York, NY.

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/s/ Laura Slabin

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Laura Slabin

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

I, Whitty Somvichian, attest that concurrence in the filing of this document has been obtained from the other signatory. Executed on February 11, 2019, in San Francisco, California.

/s/ Whitty Somvichian
Whitty Somvichian (194463)
Attorney for Defendant
Google LLC

EXHIBIT A

Share your world on Google Maps

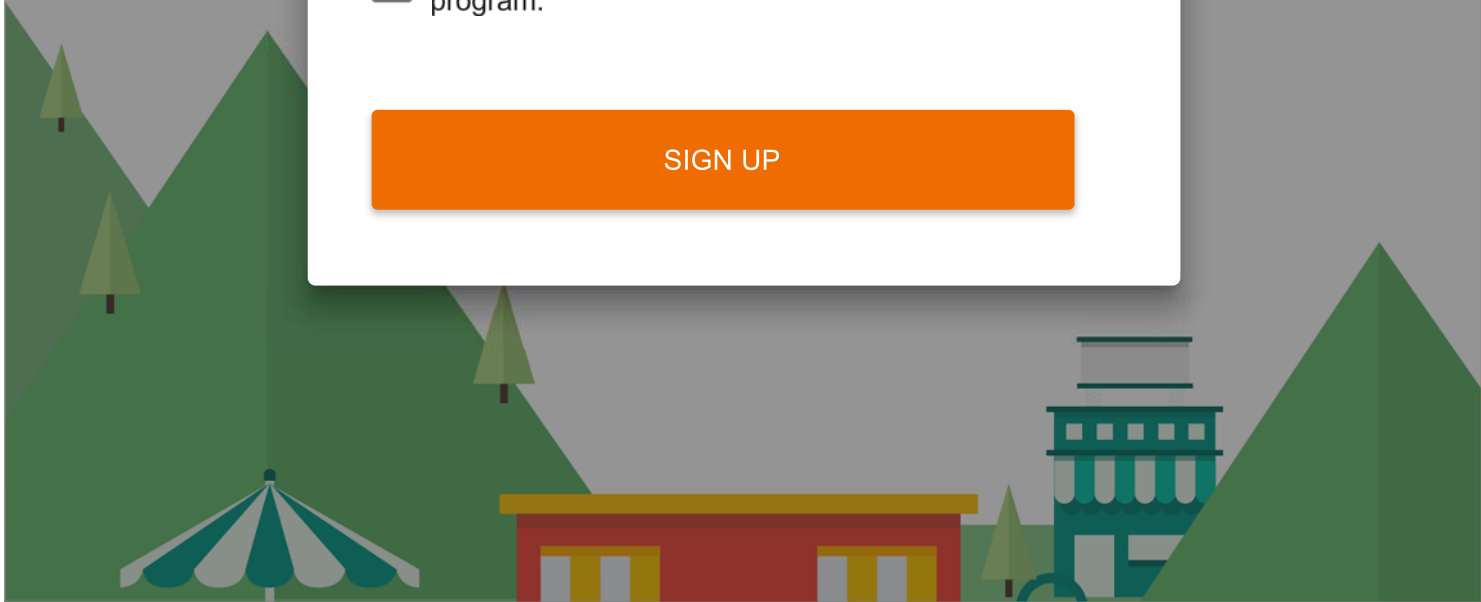
People like you make it easier to discover local places.



Select your city MY_I

- I am 18 years or older and I agree to the [program rules](#).
- I agree to receive emails from the Local Guides program.

SIGN UP



Make an impact

By sharing reviews, photos, and knowledge about the places around you, you can help inform millions of people.

[Learn about how to contribute](#)

EXHIBIT B

Local Guides

Local Guides Program Terms and Conditions

By signing up to be a member of the Local Guides program as a Local Guide (the "Program"), you agree to be bound by the following: (1) the [Google Terms of Service](#) (the "Universal Terms"); and; (2) the additional terms and conditions set forth below (the "Additional Terms"). You should read each of these two documents, as together they form a binding agreement between you and Google Inc. regarding your participation as a Local Guide in the Local Guides program (the "Program") and your use of Google's products and services. Collectively, the Universal Terms, the Code of Conduct, and the Additional Terms are referred to as the "Terms."

Who is qualified to be a Local Guide?

In order to participate in the Program as a Local Guide, you must:

- have a valid Google account;
- be at least 18 years of age; and
- have signed up to participate in the Program [here](#).

Business owners who meet the criteria may participate as individual members of the reviewing community using their personal Google account.

Local Guide Levels Benefits.

As a Local Guide, you will be placed into a level based on your participation. Each level may give access to different benefits. You will be placed in a level based on

how much local content you contribute to Google, including how many High Quality reviews you've written on Google since creating your Google account, as described in our [benefits page](#). Level requirements and descriptions are subject to change, at Google's sole discretion.

A review is considered "High Quality" when it adheres to the guidelines described in our [help center](#) or as otherwise provided by Google. Local Guides may be eligible for various benefits and rewards as part of the Program, depending on their level and location.

Local Guides in a Local Guide City may be eligible for additional benefits. Google may update the Local Guide Cities at any time.

From time to time, Google may elect, at its sole discretion, promote your membership in the Program, for example, by including a Local Guide badge or icon on your profile or reviews. Benefits are offered at the discretion of Google and its affiliates. Individuals who do not meet any eligibility requirements specified by Google or its partners (for example, age requirements) will not have access to or be given certain benefits granted to their level or within their Local Guide City.

Some Local Guides may receive invitations to attend special events held by Google in your Local Guide's City ("Events"). At some Events, you may be permitted to bring a guest (as indicated by Google). Event invitations are limited to only Local Guides (and, if applicable, their guests) who meet the legal drinking age in their Local Guide City. You must share these terms with your guest prior to bringing your guest to an Event.

Benefits are subject to change. Learn more about current benefits [here](#).

Limited or No Benefits. Some participants may be ineligible for some or all of the benefits, including persons who are:

- residents of US embargoed countries;

ordinarily resident in US embargoed countries;

- otherwise prohibited by applicable export controls and sanctions programs; and
- government officials, including (1) government employees; (2) candidates for public office; and (3) employees of government-owned or government-controlled companies, public international organizations, and political parties.

Appropriate Conduct and Participation.

You must comply with the Universal Terms. By way of example, and not as a limitation, you agree that when using Google's products or services, you will not:

- defame, abuse, harass, stalk, threaten or otherwise violate the legal rights (including the rights of privacy and publicity) of others;
- upload, post, email, transmit or otherwise make available any unlawful, inappropriate, defamatory or obscene content or message;
- trespass, or in any manner attempt to gain or gain access to any property or location where you do not have a right or permission to be;
- upload, post, or otherwise make available commercial messages or advertisements, pyramid schemes, or other disruptive notices;
- impersonate another person or entity;
- promote or provide instructional information about illegal activities;
- promote physical harm or injury against any group or individual;
- transmit any viruses, worms, defects, Trojan horses, or any items of a destructive nature; or
- submit fake, falsified, misleading, or inappropriate reviews, edits or removals.

Local Guides must comply with any Event rules or regulations, as well as applicable law, while attending an Event.

Google may remove a Local Guide from the Program at any time, in its sole discretion.

Local Guides must abide by [Google's Anti-Harassment policy](#) both as part of the

Program and at Events. Local Guides will be held accountable for the actions of any guests they invite to Events and may be removed from the Program based on the actions or behavior of their guests.

Reviews must originate from a single Google account to count towards benefits and cannot be transferred between owned accounts.

You must not at any time represent yourself in any way as a Google employee or a representative of Google or its products or services.

Google does not endorse or sponsor any meetings between Local Guides. As such, if you do organize or arrange to meet independently with other Local Guides, you agree and acknowledge that Google is not responsible for organizing, financing, supporting or otherwise facilitating your meeting. Google may, at its discretion, allow you to post details of a meeting on Google products or services, but such events must be clearly marked as not sponsored by Google. Google is not, in any way, liable for any loss or damage suffered any meetings.

Photographic, Audio and Video Recording Release.

By attending any Event, you understand and agree on behalf of yourself and your guest that you consent to and authorize the use and reproduction by Google, or anyone authorized by Google, of any and all photographs, audio, or video recordings that have been taken of you during the course of an Event for any purpose, without compensation of any kind. All negatives, positives and digital copies, together with the prints, are owned by Google. Google reserves the right to use these recordings or images in any of its print or electronic publications.

Disclaimer of Warranties.

YOU AGREE THAT YOUR USE OF GOOGLE PRODUCTS AND SERVICES WILL BE AT YOUR SOLE RISK. GOOGLE MAKES NO WARRANTIES OR REPRESENTATIONS ABOUT THE ACCURACY OR COMPLETENESS OF ITS PRODUCTS OR SERVICES. TO THE FULLEST EXTENT PERMITTED BY LAW, GOOGLE, ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS AND

LICENSORS DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, IN CONNECTION WITH THE PRODUCTS, THE CONTENT AND YOUR USE THEREOF.

BY ATTENDING ANY EVENT, YOU ACKNOWLEDGE AND AGREE ON BEHALF OF YOURSELF AND YOUR GUEST THAT ATTENDANCE AT AND PARTICIPATION IN EVENT IS VOLUNTARY, POTENTIALLY DANGEROUS, AND MAY INVOLVE A RISK OF SERIOUS INJURY, DEATH, AND/OR PROPERTY DAMAGE. ON BEHALF OF YOURSELF, YOUR HEIRS, ASSIGNS, AND NEXT OF KIN, YOU WAIVE ALL CLAIMS FOR DAMAGES, INJURIES AND DEATH SUSTAINED TO YOU OR YOUR PROPERTY, THAT YOU MAY HAVE AGAINST THE GOOGLE, ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS AND LICENSORS TO SUCH ACTIVITY WHETHER CAUSED BY THE ORDINARY NEGLIGENCE OF THE SUCH PARTIES OR OTHERWISE, WITH THE EXCEPTION OF ACTS OF GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT AS INDICATED ABOVE.

Local Guides (and, if applicable, their guests) must assume full responsibility for any such risk. Each Local Guide (and any guest of a Local Guide) is solely responsible for his or her own safety and well-being while participating in or attending an Event, and is solely responsible for any costs incurred if medical treatment is necessary. At some Events, Google may require you and your guest to sign additional releases.

[JOIN NOW](#)



[Help](#) [About Google](#) [Privacy](#) [Terms](#) [Program Rules](#)



English

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10 NORTHERN DISTRICT OF CALIFORNIA
11

12
13 ANDREW ROLEY, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 GOOGLE LLC and DOES 1-50,

18 Defendants.
19
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21

Case No. 5:18-cv-7537-BLF

**[PROPOSED] ORDER GRANTING
DEFENDANT GOOGLE LLC'S MOTION
TO DISMISS FIRST AMENDED
COMPLAINT**

Date: May 9, 2019
Time: 9:00 a.m.
Courtroom: Courtroom 3, 5th Floor
Judge: Hon. Beth L. Freeman

22
23 Defendant Google LLC's ("Google") Motion to Dismiss Plaintiff's First Amended Complaint
24 ("Motion to Dismiss") was heard on May 9, 2019 at 9:00 a.m. in this Court. Having considered the
25 parties' papers filed in support of and in opposition to the motion, argument by counsel, and all other
26 matter properly considered by this Court, the Court finds there is good cause to **GRANT** the Motion to
27 Dismiss.
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1 **THEREFORE, IT IS ORDERED** that, for the reasons stated in the Memorandum of Points and
2 Authorities in Support of Google’s Motion to Dismiss, the Motion to Dismiss is **GRANTED**.

3 **IT IS FURTHER ORDERED** that this Court takes judicial notice of Exhibit A and Exhibit B
4 attached to the Declaration of Laura Slabin, submitted in support of Google’s Motion to Dismiss.

5 **IT IS FURTHER ORDERED** that Plaintiff’s First Amended Complaint and all claims for relief
6 alleged therein are hereby **DISMISSED WITH PREJUDICE**.

7 **IT IS SO ORDERED.**

8
9 Dated:

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11 _____
12 Honorable Beth L. Freeman
13 United States District Judge
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