UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW PRICE,

Plaintiff,

v.

APPLE, INC.,

Defendant.

Case No. 21-cv-02846-HSG

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 32

Plaintiff Matthew Price brings this putative class action lawsuit challenging Defendant Apple, Inc.'s alleged policy of terminating the Apple ID accounts of its users who seek credit or debit card payment returns for app purchases that do not work. Plaintiff asserts eight counts of fraud, tort, and unfair competition violations based on Apple's policy. Apple now moves to dismiss all eight counts, and the motion is fully briefed.[1] *See* Dkt. No. 32 ("Mot."), 34 ("Opp."), 43 ("Reply"). For the reasons below, the Court **GRANTS** the motion.

I. BACKGROUND

For purposes of deciding the motion, the Court accepts the following as true:

Apple is a California corporation that designs and sells smartphones, personal computers, and tablets. These devices run apps and other services for customers to use. To purchase and access the apps, Apple requires its customers to have an Apple ID account and agree to Apple's terms and conditions (the "Apple Terms"). The Apple Terms contain a termination of services section that reads:

[1] The Court finds the motion appropriate for disposition without oral argument and deems the

> TERMINATION AND SUSPENSION OF SERVICES
>
> If you fail, or Apple suspects that you have failed, to comply with any of the provisions of this Agreement, Apple may, without notice to you: (i) terminate this Agreement and/or your Apple ID, and you will remain liable for all amounts due under your Apple ID up to and including the date of termination; and/or (ii) terminate your license to the software; and/or (iii) preclude your access to the Services.
>
> Apple further reserves the right to modify, suspend, or discontinue the Services (or any part or Content thereof) at any time with or without notice to you, and Apple will not be liable to you or to any third party should it exercise such rights.

Dkt. No. 31-1 (Ex. A to First Amended Complaint) at 12.

Plaintiff has had an Apple ID since 2015. Using his Apple ID, Plaintiff has purchased over $24,000 in apps and services to use on his Apple devices. After some of the apps did not work, Plaintiff complained to Apple. In response, Apple advised him to contact the app developer. When Plaintiff contacted the app developer, the app developer told Plaintiff that it could not return his money or otherwise help him because Plaintiff's purchases were made with Apple. When Plaintiff went back to Apple with his complaints, Apple advised Plaintiff to institute "chargebacks" – requesting payment returns from the bank of the credit or debit card associated with his Apple ID – for those purchases. Following Apple's advice, Plaintiff sought chargebacks for Apple ID purchases of apps that did not work.

In October 2020, after Plaintiff processed his chargebacks, Apple terminated Plaintiff's Apple ID based on its determination that Plaintiff had breached the Apple Terms. As a result, Plaintiff was no longer able to use his Apple ID or the $24,000 of app services he had purchased using the Apple ID.

Plaintiff first filed this putative class action lawsuit against Apple in April 2021. Dkt. No. 1. Five months later, Plaintiff submitted an amended complaint, bringing the following claims: (1) impermissible liquidated damages clause in violation of California Civil Code Section 1671; (2) unconscionable contract provision in violation of the CLRA; (3) unconscionable liquidated damages clause in violation of the UCL; (4) unfair business practice under the UCL; (5) fraudulent business practice under the UCL; (6) conversion; (7) trespass to chattels; and (8) unjust enrichment. Dkt. No. 31 ("Compl."). Apple now moves to dismiss.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Rule 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless, courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). The Court also need not accept as true allegations that contradict matter properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint. *Sprewell*, 266 F.3d at 988.

III. DISCUSSION

The Court begins its analysis by noting that Apple's motion and reply brief repeatedly ask the Court to draw inferences in its favor based on allegations not in the complaint. *See* Mot. at 9 (suggesting that "[i]t is far more plausible that [Plaintiff's] Apple ID was terminated because of his fraudulent activity and breaches of the Terms"); Reply at 8 (stating that Plaintiff "admit[ed] he was terminated for misconduct"). These claims are inaccurate, and Plaintiff did not concede any misconduct. The only relevant statement in the complaint simply says that "Apple determined [Plaintiff] breached its terms and conditions." Compl. ¶ 21.

"As a general rule, 'a district court may not consider any material beyond the pleadings in

ruling on a Rule 12(b)(6) motion.' *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (quoting *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)). There are two exceptions: "material which is properly submitted as part of the complaint" and judicial notice of "matters of public record." *Id.* at 688-89 (citations omitted). The suggestion that Plaintiff's Apple ID was terminated based on admitted misconduct appears nowhere in the complaint, any exhibits, or any judicially-noticeable material. The Court thus declines to consider Apple's improper characterizations at this stage and warns Apple not to overreach in this manner again in any renewed motion to dismiss.

A. Liquidated Damages (Claim 1)

Plaintiff's first claim asserts that the Apple Terms' termination clause is an unlawful liquidated damages clause under California Civil Code Section 1671. Plaintiff contends that the provision "provides a formula by which the amount is certain or readily ascertainable" – namely the amount an Apple user spent using his Apple ID before termination. Compl. ¶¶ 55-56.

Section 1671 of the California Civil Code sets out that:

> [a liquidated damages clause] is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

Cal. Civ. Code § 1671(c)-(d). In other words, "liquidated damages" is "an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement[.]" *See Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1002 (9th Cir. 2002) (holding entitlement to 15% revenue not "liquidated debt" because "revenues to which that percentage figure is to be applied cannot be calculated with reasonable certainty"); *see also Bayol v. Zipcar, Inc.*, 78 F. Supp. 3d 1252, 1256 (N.D. Cal. 2015) ("To be sufficiently fixed and certain to qualify as 'liquidated damages,' a provision must either set the exact amount (i.e., a single number), or provide some formula by which the amount is 'certain or readily ascertainable.'" (quoting *Chodos*, 292 F.3d at 1002)).

Here, the formula Plaintiff asserts based on the challenged termination provision leads to an amount that is neither certain nor "readily discernible at the time of breach." *Id.* When Apple

terminates a user's Apple ID under the termination provision, Plaintiff's claimed formula leads to damages equal to the value of the apps and services the user purchased and can no longer access – in Plaintiff's case, over $24,000. The exact amount thus necessarily varies from user to user: it depends on when the Apple ID account was terminated, what the user purchased through his Apple ID account, and what balance he had in his Apple ID account.[2] Plaintiff's "liquidated damages" theory fails because the termination provision does not contain a fixed or readily ascertainable sum as defined in Section 1671, meaning that it is not a liquidated damages provision at all.

Accordingly, the Court grants Apple's motion to dismiss as to Plaintiff's first claim.

B. Unconscionability (Claims 2 and 3)

Apple moves to dismiss Plaintiff's second and third claims on the grounds that the complaint fails to adequately plead unconscionability.

"Unconscionability is a question of law for the court." *Williams v. Tesla, Inc.*, No. 20-CV-08208-HSG, 2021 WL 2531177, at *5 (N.D. Cal. June 21, 2021) (quoting *Seifi v. Mercedes-Benz USA, LLC*, No. 12-CV-5493 TEH, 2013 WL 2285339, at *4 (N.D. Cal. May 23, 2013)). "Under California law, an agreement is enforceable unless it is both procedurally and substantively unconscionable. Procedural and substantive unconscionability need not be present in equal amounts. The two are evaluated on a 'sliding scale,' which means that the more evidence of procedural unconscionability there is, the less evidence of substantive unconscionability is needed to render the agreement unenforceable, and vice versa." *Id.* (citing *Armendariz v. Foundation Health Psychcare Svcs. Inc.*, 24 Cal. 4th 83, 114 (Cal. 2000)). "However, both forms of unconscionability must be present in some amount 'for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.'" *Id.* (quoting *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1521 (Ct. App. 1997), *as modified* (Feb. 10, 1997)).

[2] Plaintiff's opposition brief offers two entirely different formulas for the purported "liquidated damages," underscoring Apple's contention that the claimed damages are not readily discernible. Opp. at 14-15 (suggesting damages amount is: (1) forfeiting the entire value of apps and services purchased with Apple ID and additional money remaining in Apple ID account; and (2) "all

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.