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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ANDREW ROLEY,
Plaintiff,

v.

GOOGLE LLC,
Defendant.

Case No. 18-cv-07537-BLF

**ORDER DENYING MOTION TO
DISMISS; LIFTING DISCOVERY
STAY**

[Re: ECF 24]

Before the Court is Defendant Google LLC’s (“Google”) motion to dismiss Plaintiff Andrew Roley’s (“Roley”) First Amended Complaint in this consumer class action case. Mot., ECF 24. The Court held a hearing on the motion on April 17, 2019. For the reasons stated on the record and as discussed below, Google’s motion is DENIED.

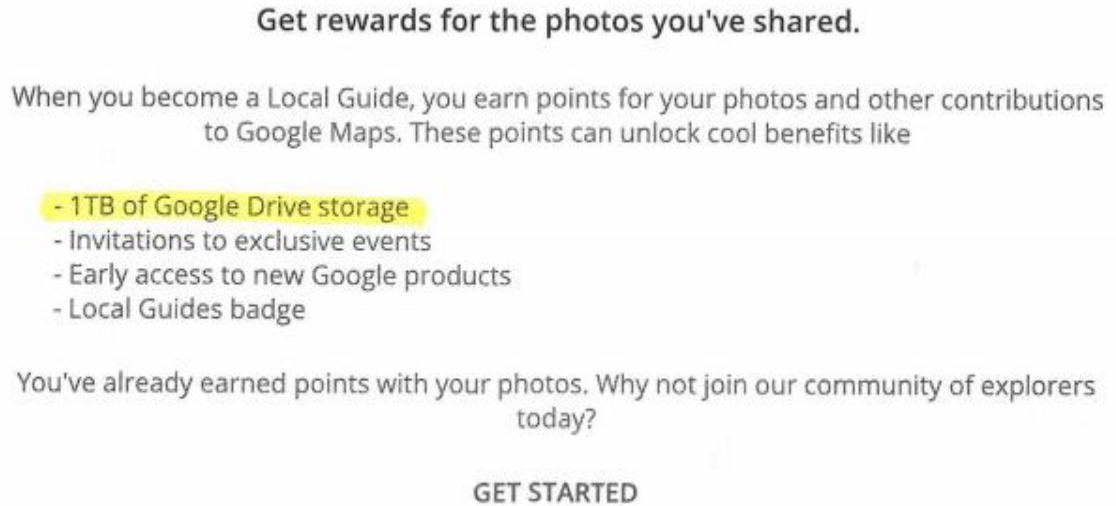
I. BACKGROUND¹

In early 2015, Google created its “Local Guides” program to improve its Google Maps and Google Earth products. First Am. Compl. (“FAC”) ¶¶ 1–3, ECF 18. Individuals who sign up to be local guides share photographs, comments, reviews, and the like about various establishments and locations in their communities, which benefits Google through increased page views and advertising revenue. FAC ¶ 3. In return for these benefits and to encourage enrollment in and participation in the program, Google offers local guides various benefits for their participation. FAC ¶ 4. One such benefit Google offered was a free terabyte of data storage for those local guides who achieved “Level 4 status” in the program. FAC ¶ 5.

On April 4, 2016, Roley, who had previously uploaded pictures to Google, received an

¹ Plaintiff’s well-pled factual allegations are accepted as true for purposes of the motion to dismiss. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).

1 email from Google inviting him to join the Local Guides program. FAC ¶ 14. Specifically, the
2 email provided, in part:



12 FAC ¶ 15. Relying on the perceived promise of a terabyte of free data storage, Roley joined the
13 Local Guides Program and thereafter received an email acknowledging his enrollment. FAC ¶ 16.

14 In order to enroll, Roley had to agree to the program’s rules—the Local Guides Program
15 Terms and Conditions (“Terms”).² See Slabin Decl. ISO Mot. ¶¶ 2–4, ECF 24-1; Slabin Decl., Ex.
16 A, ECF 24-2. The Terms state that “[b]y signing up to be a member of the Local Guides
17 Program . . . you agree to be bound” by the Terms. *Id.*, Ex. B, ECF 24-3. As is relevant here, the
18 Terms purport to give Google wide discretion with respect to providing benefits to local guides.
19 Specifically, the Terms state the following: (1) “Level requirements and descriptions are subject to
20 change, at Google’s sole discretion;” (2) “Benefits are offered at the discretion of Google and its
21 affiliates;” and (3) “Benefits are subject to change.” *Id.*

22
23 ² Google requests the Court take judicial notice of the Local Guides sign-up page and the Terms.
24 See Mot. at 13–16. Plaintiff opposes this request. Opp. at 21–22, ECF 32. The request is
25 GRANTED. As to the Terms, Plaintiff specifically incorporates them by reference into the FAC.
26 See FAC ¶ 89; *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by*
27 *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (“[D]ocuments whose contents are
28 alleged in a complaint and whose authenticity no party questions, but which are not physically
attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.”). As
to the sign-up page, the Court takes notice of the appearance of the sign-up page, which “can be
accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”
Fed. R. Evid. 201(b); see *Craigslis, Inc. v. DealerCMO, Inc.*, No. 16-CV-01451-VC, 2017 WL
6334142, at *3 n.3 (N.D. Cal. Apr. 11, 2017).

1 Throughout the next several months, Roley uploaded photos, business information, and
2 other content to Google as part of the Local Guides program. FAC ¶ 17. During this time, Google
3 sent several emails to Roley, who started as a Level 3 local guide, encouraging him to continue to
4 post photos and reviews through Local Guides and, at least on one occasion, to “[l]evel up now
5 and get more exclusive benefits.” FAC ¶¶ 18–24. On July 7, 2016, Google emailed Roley stating
6 that it would be “adjust[ing] [its] Level 4 benefit to 100 GB of free Google Drive storage,” but that
7 “Local Guides who reach Level 4 in the next 2 weeks can still unlock the original offer of 1TB of
8 free Drive storage.” FAC ¶ 23. On July 14, 2016, within the two-week time frame Google
9 provided, Roley achieved Level 4 status, and Google notified him that he could redeem his Google
10 Drive storage. FAC ¶ 26. Roley alleges that Google believes that at the time Roley claimed his
11 free storage, Google informed him that his free storage would last only two years, but Roley
12 alleges this is not true. FAC ¶¶ 27–28.

13 Two years later, in April 2018, Google notified Roley that his free Drive storage was
14 expiring and that he would have to begin paying monthly for his terabyte of storage. FAC ¶ 30.
15 Roley was surprised to learn that his free storage was ending because none of the offers or
16 information he had received relating to the terabyte of storage ever included a time limitation.
17 FAC ¶¶ 32–34. Roley alleges that through these actions Google “convert[ed] the offer of a ‘free
18 terabyte’ of data to a service that cost \$10/month.” FAC ¶ 50. Roley was then forced to either
19 delete some of his data or pay \$10/month to continue using the terabyte of storage. FAC ¶¶ 35–
20 37. He ultimately was shut out of some Google services until he deleted some of his data. FAC ¶
21 37.

22 Roley alleges that no reasonable consumer would have understood that the offer of free
23 storage was time-limited to two years. FAC ¶¶ 7, 50. And he alleges that Google intentionally
24 failed to disclose this time limit (and thus misrepresented the benefit) in an effort to induce Roley
25 and members of the putative class to sign up for Local Guides to the benefit of Google. FAC ¶¶
26 7–8. Based on these alleged actions, Roley brings the following claims against Google: (1) unfair
27 business practices, in violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. &
28 Prof. Code § 17200, *et seq.*; (2) breach of contract; (3) fraud; (4) conversion; and (5) violations of

1 the California Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.* FAC ¶¶
2 45–99.

3 The breach of contract claim is premised on the allegation that Google “promised Plaintiff
4 and Class members a free terabyte of data storage if they achieved ‘Level 4’ status as a Local
5 Guide” in exchange for Roley’s and the class’s performance of certain services for Google, like
6 uploading photos and reviews. FAC ¶ 61. Roley alleges that he “accepted the terms of the
7 contract through performance.” FAC ¶ 62. The fraud claim is based on Google’s
8 “misrepresentation of a material fact and/or a material and misleading omission to Plaintiff” by
9 which Google intended to deceive average consumers into believing that the storage would last
10 indefinitely, all the while knowing that the free storage would end after two years. FAC ¶¶ 68–74.
11 Plaintiff brings his claims on behalf of a putative class of individuals “residing in the United States
12 who attained ‘Level 4’ as a Google Local Guide after having been offered one free terabyte of
13 Google Drive storage space without a time limitation in the offer, and who claimed their terabyte
14 of data storage space, but whose free use of the terabyte was terminated after two years of having
15 been given the terabyte.” FAC ¶¶ 38–43.

16 **II. LEGAL STANDARD**

17 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
18 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*
19 *Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d
20 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts
21 as true all well-pled factual allegations and construes them in the light most favorable to the
22 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the
23 Court need not “accept as true allegations that contradict matters properly subject to judicial
24 notice” or “allegations that are merely conclusory, unwarranted deductions of fact, or
25 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)
26 (internal quotation marks and citations omitted). While a complaint need not contain detailed
27 factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to
28 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*

1 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the
2 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*
3 On a motion to dismiss, the Court’s review is limited to the face of the complaint and matters
4 judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star*
5 *Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983).

6 In deciding whether to grant leave to amend, the Court must consider the factors set forth
7 by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the
8 Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2009). A district
9 court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1)
10 undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by
11 amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment. *Eminence*
12 *Capital*, 316 F.3d at 1052. “[I]t is the consideration of prejudice to the opposing party that carries
13 the greatest weight.” *Id.* However, a strong showing with respect to one of the other factors may
14 warrant denial of leave to amend. *Id.*

15 **III. DISCUSSION**

16 Google moves to dismiss all of Roley’s claims. The Court discusses each claim in turn by
17 category, first discussing the breach of contract claim and then the remaining four claims.

18 **A. Breach of Contract**

19 Roley alleges that he entered into a unilateral contract with Google. Read in the light most
20 favorable to Roley, Roley alleges that Google’s emails to Roley beginning in April 2016 and
21 continuing through July 7, 2016 constituted a binding offer for a free terabyte of storage if Roley
22 reached Level 4 status. FAC ¶¶ 23, 61. Roley alleges he accepted this offer by fully
23 performing—that is, by reaching Level 4 status. FAC ¶ 62; *see also* Opp. at 4–8 & n.2.

24 Recognizing that Roley’s allegations are somewhat imprecise with respect to whether the
25 April 2016 email alone or in tandem with the subsequent emails through July 7, 2016 constitutes
26 the alleged binding offer, *see* Mot. at 7–8 n.3, Google argues that the April email was not a
27 binding offer because (1) it did not include essential terms necessary to tell the recipients how they
28 could accept the offer through performance, including how many points were needed to earn the

1 terabyte benefit; (2) recipients were required to take additional steps before they could start
2 performing as local guides, including clicking “Get Started” and enrolling in the program; and (3)
3 the Terms, to which Roley agreed, expressly allowed Google to change the free storage benefit.
4 *See Mot.* at 7–10. Indeed, Google argues that the Terms, not the “advertising” email, constitutes
5 the relevant contract here. *See id.* at 9–10.

6 The Court agrees with Roley that on the facts alleged, he states a valid claim for breach of
7 contract.

8 The Ninth Circuit decision in *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777 (9th
9 Cir. 2012), relied on by both parties, is instructive. In *Sateriale*, the Ninth Circuit held that the
10 cigarette company R.J. Reynolds Tobacco Company (“RJR”) made an offer for customers to enter
11 into a unilateral contract through its Camel Cash customer loyalty program. *See id.* at 785–89.
12 RJR represented to consumers on product packaging, in the media, and on the certificates
13 themselves, that consumers could collect Camel Cash certificates and exchange them for
14 merchandise according to the terms provided in a separate catalog. *Id.* at 783. To participate,
15 consumers had to fill out and submit separate registration forms to RJR, after which RJR sent
16 them an enrollment number and a catalog containing the redeemable merchandise. Some of the
17 catalogs stated that RJR could terminate the program at any time without notice. *Id.* In October
18 2006, RJR announced the program would end in March 2007. Despite this representation, RJR
19 ceased accepting certificates immediately, and consumers were left with unredeemable certificates
20 before March 2007. The plaintiffs sued for breach of contract, promissory estoppel, and UCL and
21 CLRA violations.

22 In their breach of contract claim, the plaintiffs did not dispute that RJR had the right to
23 terminate the program in March 2007, but they claimed that RJR had breached its contract by
24 failing to perform between October 2006 and March 2007. *Id.* at 784. The Ninth Circuit agreed.
25 The court first held RJR’s representations on the certificates represented a binding offer to enter
26 into a unilateral contract. *Id.* at 785–88. The court noted that the common law rule that
27 advertisements generally do not constitute offers to sell “includes an exception for offers of a
28 reward, including offers of a reward for the redemption of coupons.” *Id.* at 786. The key question

1 was simply “whether the advertiser, in clear and positive terms, promised to render performance in
2 exchange for something requested by the advertiser, and whether the recipient of the
3 advertisement reasonably might have concluded that by acting in accordance with the request a
4 contract would be formed.” *Id.* at 787.

5 Looking to the “totality of the circumstances,” the Ninth Circuit concluded the offer was
6 binding because of “the repeated use of the word ‘offer’ in the [certificates]; the absence of any
7 language disclaiming the intent to be bound; the inclusion of specific restrictions in the
8 [certificates] . . . the formal enrollment process, through which consumers submitted registration
9 forms and RJR issued enrollment numbers; and the substantial reliance expected from
10 consumers,” *id.* at 787–88, including that “consumers were expected to purchase Camel cigarettes
11 and accumulate Camel Cash certificates for a period of weeks, months or even years” before
12 redeeming merchandise, *id.* at 788 n.3. Based on these facts, the Ninth Circuit held that the
13 “alleged offer invited the performance of specific acts (saving [certificates] and redeeming them
14 for rewards in accordance with the catalog) without further communication, and leaving nothing
15 for negotiation.” *Id.* at 788. Importantly, the court rejected RJR’s argument that “the offer left
16 aspects of RJR’s performance to RJR’s discretion,” such as how many certificates would be
17 required to purchased merchandise and what items could be purchased, because the plaintiffs had
18 not alleged that “these were essential terms.” *Id.* Similarly, the court rejected RJR’s argument
19 that the offer was too indefinite to enforce as a contract. *Id.* at 789–90.

20 Finally, the court rejected RJR’s argument that the contract lacked mutuality of obligation
21 because RJR had “an unrestricted right to terminate the Camel Cash program at will, and without
22 notice.” *Id.* at 790. The court first held that mutuality of obligation does not apply to unilateral
23 contracts. *Id.* at 791. But it also recognized that a “reservation of an unrestricted right to
24 terminate could have precluded RJR’s communications from constituting an offer” and that “an
25 enforceable termination clause that gives a promisor an unrestricted power to terminate a contract
26 at any time, without notice, renders the promise illusory and unenforceable, at least so long as the
27 purported contract remains wholly executory.” *Id.* But because plaintiff had alleged that only
28 some of the catalogs reserved the right to terminate at will and because RJR “waived the right to

1 terminate without notice” when it announced it would maintain the program until March 2007, the
2 court held that dismissal was not warranted. *Id.* at 791–92.

3 Comparing the facts of *Sateriale* to this case, the Court concludes that, at the motion to
4 dismiss stage, the offer here was a binding offer that Roley accepted through full performance. As
5 an initial matter, the Court takes as true Roley’s allegation that Google’s offer was for storage for
6 an indefinite period of time and that Google changed the benefit to a two-year time-limited benefit
7 after Roley fully performed (*i.e.*, reached Level 4). On the facts alleged, the question of whether
8 the offer was for storage that would last forever or that was implicitly time-limited is a question of
9 fact not appropriate for resolution on a motion to dismiss.

10 Here, Google offered Roley a free terabyte of storage in exchange for his earning points
11 through the Local Guides program. FAC ¶¶ 15, 61–62. Once Roley enrolled in the program,
12 Google continued to encourage his performance, specifically encouraging him toward the benefit
13 of one terabyte of storage. FAC ¶¶ 18–24. Indeed, on July 7, 2016, Google promised Roley that
14 if he reached Level 4 status within two weeks, he would receive one terabyte of free storage. FAC
15 ¶ 23. Roley fully performed in accordance with Google’s terms. As such, the “totality of the
16 circumstances” demonstrate that Google “in clear and positive terms, promised to render
17 performance”—provision of a terabyte of storage—“in exchange for something requested by the
18 advertiser”—achievement of Level 4 status—and that Roley “reasonably might have concluded
19 that by acting in accordance with the request a contract would be formed.” *Sateriale*, 697 F.3d at
20 787. As in *Sateriale*, that Roley had to enroll in the program does not render the offer non-
21 binding. And contrary to Google’s argument, at least as of the July 7 email, the essential terms of
22 the agreement were set—Google promised the terabyte of data in exchange for Level 4 status if
23 reached within two weeks. *See Donovan v. RRL Corp.*, 26 Cal. 4th 261, 272 (2001), *as modified*
24 (Sept. 12, 2001) (“[C]ertain advertisements have been held to constitute offers where they invite
25 the performance of a specific act without further communication and leave nothing for
26 negotiation.”).

27 For these reasons, Google’s reliance on *Frezza v. Google Inc.*, No. 12-CV-0237, 2013 WL
28 1736788 (N.D. Cal. Apr. 22, 2013), is misplaced. There, the court rejected the plaintiffs’

1 argument that Google had made a binding offer of a free 30-day trial period for a new program
2 because (1) the alleged offer directed the consumer to a signup page “for more details,” (2) the
3 sign-up page required the consumer to provide credit card information, which was not made clear
4 in the advertisement, (3) and the plaintiffs alleged the contract was formed at the time of
5 enrollment, but they had not included the terms and conditions presented during the enrollment
6 process. *Id.* at *3–*4. Moreover, the terms and conditions expressly provided for the fee that the
7 plaintiffs were challenging. *Id.* at *1. None of these facts is present here. The April 4 email
8 directed Roley to “start now” but did not indicate that Roley would be required to take additional
9 steps (such as providing credit card information) beyond mere enrollment in the program (as in
10 *Sateriale*). Likewise, the Terms here do not expressly provide for a time-limited storage benefit,
11 whereas the *Frezza* terms expressly provided for the fee that the plaintiffs believed the contract did
12 not contemplate. Moreover, though the FAC is not entirely clear as to when the binding offer was
13 made (be it April or July 7, 2016, or otherwise), Roley clearly does not allege that the contract was
14 formed at the time of enrollment.

15 Roley’s agreement to the Terms does not change this conclusion. Google is correct that
16 just like RJR’s termination rights included in the catalogs in *Sateriale*, the Terms can be
17 considered part of the offer and contract here. But these provisions do not help Google because
18 Roley alleges that Google promised as late as July 7, 2016 to provide the terabyte of storage for
19 the next two weeks. As in *Sateriale*, where RJR promised to keep the rewards program open until
20 March 2007 but ended it early, Google did not live up to this promise. Moreover, by this point
21 Roley had fully performed—he had reached Level 4 status. Though the court in *Sateriale*
22 recognized that a clause giving the “promisor an unrestricted power to terminate a contract at any
23 time, without notice, renders the promise illusory and unenforceable,” it noted that this applies
24 where “the contract remains wholly executory.” Here, because Roley had fully performed, the
25 contract was no longer wholly executory. *See Contract*, Black’s Law Dictionary (10th ed. 2014)
26 (defining executory contract as “contract that remains wholly unperformed or for which there
27 remains something still to be done on both sides”).

28 Perhaps most importantly, unlike *Sateriale*, where some of the catalogs stated that RJR had

1 the discretion to terminate the program “without notice,” the Terms here do not give Google such
2 blanket discretion. They say only that Google has the discretion to change level requirements and
3 offer benefits; they do not say it can terminate the offer of benefits without any notice whatsoever
4 to individuals who have fully performed. Absent an express provision to the contrary, the Court
5 cannot read the contract to give Google such broad discretion. Indeed, reading such broad
6 discretion into the contract could render the contract illusory. If Google could simply choose not
7 to confer promised benefits after full performance by the consumer, it would have no duty to
8 perform under the contract. “A construction making a contract illusory is not favored and [courts]
9 will not accept it if there is a reasonable alternative.” *LaRussa v. NMTC, Inc.*, No. CV 05-751-
10 TUC-FRZ, 2007 WL 9724933, at *3 (D. Ariz. Mar. 30, 2007) (quoting *J.C. Millett Co. v.*
11 *Distillers Distributing Corp.*, 258 F.2d 139, 142 (9th Cir. 1958)); *see also Sateriale*, 697 F.3d at
12 790 (citation omitted) (“[I]f one party has greatly benefited by part performance or if one party has
13 relied extensively on the agreement, the court should go to great lengths to find a construction of
14 the agreement that will salvage it.”). At this stage, on these facts, the Court interprets Google’s
15 discretion to be limited at least by the implied duty of good faith and fair dealing. *See LaRussa*,
16 2007 WL 9724933, at *3 (listing cases in which courts applied the duty of good faith and fair
17 dealing to avoid rendering a contract illusory); *Serpa v. California Sur. Investigations, Inc.*, 215
18 Cal. App. 4th 695, 708 (2013). Especially in light of the fact that Google allegedly continued to
19 promise that Roley could earn the terabyte by performing, there is a question of fact as to how to
20 interpret the discretionary provision of the Terms.

21 Thus, on the facts as alleged in the FAC, Roley has successfully alleged the existence of a
22 binding offer from Google that Roley fully accepted through performance, such that Google
23 allegedly breached by failing to satisfy said offer.

24 **B. Fraud, Conversion, UCL, and CLRA**

25 As to the remaining claims, Google argues that because the Terms gave Google discretion
26 to change the benefits, Roley’s claims fail as a matter of law. *See Mot.* at 10–13. It does not
27 argue that the FAC fails to meet the particularity requirements of Federal Rule of Civil Procedure
28 9(b). The Court discusses each claim in turn, considering the UCL and CLRA claims together.

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1. Fraud

Google argues that Roley’s fraud claim cannot stand because Roley’s belief that he would receive free storage for life was unreasonable because the Terms allowed Google to change the benefits at its discretion and none of the marketing materials indicated that the benefit would last indefinitely. *See* Mot. at 10–11. Put another way, Google argues that Roley could not have justifiably relied on Google’s disclosures, as would be necessary to sustain a claim for fraud. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1163 (9th Cir. 2012).

The Court concludes that Google asks it to make factual determinations inappropriate at the motion to dismiss stage. *See id.* (“[W]hether reliance [on a misrepresentation] was reasonable is a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion.” (citation omitted) (second alteration in original)). To determine as a matter of law that Roley did not justifiably rely on Google’s representations, the Court would have to find that Roley’s reliance in “light of his own intelligence and information was manifestly unreasonable.” *Id.* To establish manifest unreasonableness, “[i]t must appear that [plaintiff] put faith in representations that were preposterous or shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.” *Id.* (alterations in original).

On the facts alleged, the Court cannot hold that Roley’s reliance was manifestly unreasonable. Roley alleges that Google never told him before he finished performing that the free storage would be time-limited. This fact alone distinguishes most of the cases Google cites, wherein the contracts at issue included unambiguous provisions that allowed the defendants to act in the ways the plaintiffs subsequently challenged. For example, in *Davis*, 691 F.3d at 1163, the court dismissed the plaintiff’s claim that the defendants fraudulently concealed the existence of an annual fee in its advertising and marketing because the fee was disclosed in terms to which plaintiff agreed. *See also Circle Click Media LLC v. Regus Mgmt. Grp. LLC*, No. 12-CV-4000, 2013 WL 57861, at *10–*11 (N.D. Cal. Jan. 3, 2013) (same). In *Guerard v. CNA Financial Corp.*, the plaintiffs brought multiple claims against an insurer for its failure to provide benefits to the insured for at-home health services provided to the insured by her children. No. 09-CV-1801,

1 2009 WL 3152055, at *4–*5 (N.D. Cal. Sept. 23, 2009). The court dismissed plaintiffs’ fraud
2 claim based on these allegations because the insurance policy “unambiguous[ly]” excluded
3 insurance coverage for services rendered by family members. *Id.*; *see also Hackethal v. Nat’l Cas.*
4 *Co.*, 189 Cal. App. 3d 1102, 1111 (1987) (dismissing fraud claim because insurance policy
5 unambiguously excluded coverage for the types of action at issue). In this case, Google did not
6 expressly provide that the terabyte of data would be limited to two years.

7 Nevertheless, Google argues that the contract *did* expressly allow it to act as it did because
8 the Terms give Google wide discretion to change the benefits. However, as discussed above, the
9 contract’s discretionary provisions are ambiguous. For this reason, the decision in *Baird v.*
10 *Samsung Electronics America, Inc.*, No. 17-CV-06407-JSW, 2018 WL 4191542 (N.D. Cal. July
11 20, 2018), is distinguishable. In that case, the plaintiffs claimed in part that the defendant had
12 defrauded consumers by misrepresenting that its TVs would have unlimited access to YouTube,
13 though the TVs did not have such access. *Id.* at *5–*6. The court held that the plaintiffs could not
14 have justifiably relied on any of defendant’s representations because disclaimers in the TV
15 manuals stated that “services provided are subject to change . . . *without notice.*” *Id.* at *6
16 (emphasis added). Here, as discussed above, Google did not unambiguously reserve the right to
17 change the benefits without any notice to Roley.

18 Thus, as alleged, the FAC presents a question of fact as to whether Roley justifiably relied
19 on Google’s representations because the scope of Google’s discretion under the Terms was
20 ambiguous. As such, Google’s motion to dismiss Roley’s fraud claim on this ground is DENIED.

21 **2. Conversion**

22 As with the breach of contract claim, Google argues that Roley’s conversion claim cannot
23 stand because the Terms gave Google the right to revoke benefits at will. *See* Mot. at 11–12. This
24 amounts to an argument that the allegations do not establish that Roley “had a right to ownership
25 or possession” of the terabyte of data storage after two years. *Appling v. Wachovia Mortg.*, FSB,
26 745 F. Supp. 2d 961, 974 (N.D. Cal. 2010). Because as discussed above, the scope of Google’s
27 discretion to modify the benefits is a question of fact, the Court cannot say that Roley consented to
28 Google’s actions, and thus cannot dismiss the conversion claim on this ground. Roley alleges that

1 under the parties’ contract, read in his favor, he had a right to the terabyte of data storage
2 indefinitely and Google converted the storage by forcing Roley to pay for it.

3 For these reasons, Google’s motion to dismiss Roley’s conversion claim is DENIED.

4 **3. UCL and CLRA**

5 Finally, Google seeks to dismiss Roley’s UCL and CLRA claims in part because they rely
6 on Roley’s fraud claim and related allegations, and Google believes it has demonstrated that Roley
7 could not have justifiably relied on Google’s representations. *See* Mot. at 12–13.

8 Because the Court has held that Roley has plausibly alleged justifiable reliance and thus
9 will not dismiss the fraud claim at this stage, Roley’s UCL and CLRA claims survive as well. *See*
10 Cal. Bus. & Prof. Code § 17200 (barring unfair competition including “fraudulent business act[s]
11 or practice[s]”); *Sateriale*, 697 F.3d at 794 (allowing CLRA claims based on fraud theories if the
12 plaintiff alleges “actual reliance on the misrepresentation”); *Daniel v. Ford Motor Co.*, 806 F.3d
13 1217, 1225 (9th Cir. 2015) (discussing how UCL and CLRA claims can be supported by theories
14 of fraud).

15 Thus, Google’s motion to dismiss Roley’s UCL and CLRA claims is DENIED.

16 **IV. ORDER**

17 Based on the foregoing, Google’s motion to dismiss Roley’s FAC is DENIED. The
18 temporary stay of discovery imposed at the case management conference is hereby LIFTED.

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20 **IT IS SO ORDERED.**

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22 Dated: April 23, 2019

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BETH LABSON FREEMAN
United States District Judge

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