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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM RUTTER; JACQUELINE TABAS; NATASHA GARAMANI; CONNIE TABAS; TRISTAN YOUNG; KASRA ELIASIEH; ROBERT BARKER; CINDY RUTTER, Plaintiffs - Appellants, v. APPLE INC., Defendant - Appellee.	No. 24-715 D.C. No. 4:21-cv-04077-HSG MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam Jr., District Judge, Presiding

Submitted December 2, 2024**
San Francisco, California

Before: BENNETT, BRESS, and FORREST, Circuit Judges.

Plaintiffs in this putative class action appeal the district court's dismissal

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

under Federal Rule of Civil Procedure 12(b)(6) of their third amended complaint. Plaintiffs allege that Apple deceives customers into paying for its iCloud data storage service by falsely representing that it is possible for users to reduce their storage and remain within iCloud's free 5 GB storage plan. The supposed end result of this scheme is that frustrated consumers fearing the loss of their iCloud data, and unable to reduce it, end up paying for additional storage.

Plaintiffs bring state law claims under California's Consumers Legal Remedies Act (CLRA) and Unfair Competition Law (UCL), as well as for breach of contract. "We review de novo a dismissal for failure to state a claim pursuant to Rule 12(b)(6) and for failure to allege fraud with particularity pursuant to Rule 9(b)." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1102 (9th Cir. 2008). We review the district court's denial of leave to amend for abuse of discretion. *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court correctly dismissed the CLRA claim. The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code. § 1770(a). To prevail under the CLRA, plaintiffs "must 'show that "members of the public are likely to be deceived."'" *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (quoting *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). In this case, plaintiffs have not sufficiently alleged either an

actionable omission or misrepresentation under the CLRA.

An omission is actionable under the CLRA if it is "contrary to a material representation actually made by the defendant" or "a fact the defendant was obliged to disclose." *Gutierrez v. Carmax Auto Superstores Cal.*, 19 Cal. App. 5th 1234, 1258 (2018) (brackets omitted) (quoting *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006)). Plaintiffs failed to plead an actionable omission. Plaintiffs cite no authority suggesting that Apple was obligated to disclose a free service that comes with an optional paid upgrade. Nor can plaintiffs establish that Apple customers will inevitably be forced to pay for iCloud when consumers can disable iCloud and when plaintiffs previously alleged that only 20% of Apple users end up paying extra for iCloud. Plaintiffs' omission argument also fails because Apple discloses iCloud in the Terms & Conditions presented to users before they can activate iCloud.

Plaintiffs also failed to plead an actionable misrepresentation. By the allegations of the third amended complaint, Apple made no representations that it would assist consumers in managing their data to stay under the 5 GB limit for free iCloud storage. While Apple did represent that users could reduce their iCloud storage, plaintiffs have failed to allege facts showing that it is "virtually impossible" for them to reduce their storage. This theory is also undercut by plaintiffs' own allegations that only 20% of Apple users end up paying for iCloud and that plaintiffs

Barker and Rutter have remained or were able to remain under the 5 GB limit.

2. Plaintiffs' UCL claim fails for the same reasons as their CLRA claim. The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. UCL and CLRA claims are analyzed together when they are based on "a unified fraudulent course of conduct." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). The district court correctly analyzed these claims together because both are premised on fraud. Because plaintiffs failed to state a claim under the CLRA, the district court properly dismissed their UCL claim.

3. The district court correctly dismissed the breach of contract claim. Plaintiffs argue that Apple's Terms & Conditions and an Apple email warning users that they are approaching the free 5 GB limit contain enforceable promises that users can reduce their data storage below 5 GB to avoid paying for iCloud, or to downgrade to the free plan from a paid tier. But the statements plaintiffs point to contain no enforceable promises and instead are merely informational. And even if these statements constituted enforceable promises, plaintiffs have not alleged facts showing that these promises were breached. As discussed above, plaintiffs have not adequately alleged that it is impossible to reduce data and to downgrade to the free 5 GB plan.

4. The district court did not abuse its discretion in denying leave to amend. Plaintiffs' inability to address the deficiencies in their complaints, despite being

granted three opportunities to amend, demonstrated that granting further leave to amend would have been futile. Dismissal without leave to amend was proper because it is "clear . . . that the complaint could not be saved by amendment." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam).

AFFIRMED.[1]

[1] Plaintiffs' motion for judicial notice, Dkt. 10, is denied.