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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID A SIFUENTES,
Plaintiff,
v.
GOOGLE INC.,
Defendant.

Case No. 22-cv-03102-JCS

**ORDER GRANTING MOTION TO
DISMISS AND VACATING MOTION
HEARING AND CASE MANAGEMENT
CONFERENCE SET FOR JUNE 30,
2023 AT 2:00 PM**

Re: Dkt. No. 50

I. INTRODUCTION

Plaintiff David Sifuentes initiated this action against Defendant Google, Inc. to assert claims based on alleged unauthorized charges on his bill for Google Fi cell phone service. After the deadline to amend as-of-right had passed, the Court granted Sifuentes’s request for leave to amend to add a claim for violation of 47 C.F.R. § 64.2401 (“Truth-in-Billing Rules”). Dkt. no. 42. In his Amended Complaint, dkt. no. 45, Sifuentes added not only the Truth-in-Billing Rules claim but also a series of claims based on an alleged data breach. Presently before the Court is Google’s Rule 12(b)(1) and 12(b)(6) Motion to Dismiss Amended Complaint (“Motion”). The Court finds that the Motion is suitable for determination without oral argument and therefore vacates the Motion hearing set for June 30, 2023 at 2:00 p.m. pursuant to Civil Local Rule 7-1(b). The Case Management Conference set for the same time and date is also vacated. For the reasons stated below, the Motion is GRANTED.¹

¹ The parties have consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

1 **II. BACKGROUND²**

2 On May 16, 2022, Sifuentes filed a complaint in the Eastern District of Michigan
3 (“Michigan Court”) that is almost identical to the original complaint in this action. RJN, Ex. A
4 (Complaint, Michigan Case); dkt. no. 1 (Complaint). As in this case, Sifuentes alleged in the
5 Michigan Case that he asked Google to put him on a lower-cost cell phone plan. *Id.* at 1-2;
6 Complaint at 1-2. Because the lower-cost plan allegedly increased his costs by \$90, he requested
7 to switch back to his original plan. Complaint, Michigan Case at 1; Complaint at 1. Subsequently,
8 Google allegedly charged Sifuentes for *both* plans, combining the charges from the two plans into
9 a single bill, and failed to fix the problem when Sifuentes contacted Google to request that the bill
10 be adjusted. Complaint, Michigan Case at 2; Complaint at 2. According to Sifuentes, Google
11 informed him that it was “charging him a head [sic] that is in advance for the unlimited plan and
12 his previous bill.” Complaint, Michigan Case at 2; Complaint at 2. Based on these facts,
13 Sifuentes asserted in the Michigan Case claims for “cell phone bill cramming, false advertising,
14 potential future violation of the fair credit reporting act by concrete injury of a lower credit score,
15 Michigan consumer protection act, risk of present and future retaliation by Google, and intentional
16 infliction of emotional distress.” Complaint, Michigan Case at 1. He claimed that there was
17 subject matter jurisdiction over his claims on the basis of diversity under 28 U.S.C. § 1332. *Id.* at
18 2.

19 The next day, on May 17, 2022, the Michigan Court dismissed Sifuentes’s complaint.

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21 ² Google has brought a request for judicial notice asking the Court to take judicial notice of six
22 documents filed in a case Sifuentes brought in the Eastern District of Michigan, Case No. 2:22-
23 mc-50916-SJM-KGA (“Michigan Case”) and of the terms of service applicable to Sifuentes’s
24 telephone service, Google Fi (“Terms of Service”). Dkt. no. 50-1 (“RJN”). The Court GRANTS
25 Google’s request as to all of those documents. The documents filed in the Michigan Case are
26 properly the subject of judicial notice under Rule 201 of the Federal Rules of Evidence because
27 they are publicly available court records. *Poorsina v. Xiaosong Zhang*, 2021 WL 1222520, at *5
28 (N.D. Cal. Mar. 31, 2021). The Terms of Service may be considered in evaluating the sufficient
 of the allegations in the amended complaint because Sifuentes alleges in his Amended Complaint
 that Google has breached the Terms of Service. See Amended Complaint (dkt. no. 38) at 5;
 Trudeau v. Google LLC, 349 F. Supp. 3d 869, 876 (N.D. Cal. 2018) (taking judicial notice of
 Google’s Terms of Service). The Court notes that although Sifuentes has objected to the Court
 taking judicial notice of the documents filed in the Michigan Case, he does so only because he
 does not believe the documents show that his claims are barred. Dkt. no. 58 (Opposition) at 2.
 That, however, is a separate question from whether it is proper to take judicial notice of the
 documents.

1 RJN, Ex. B (Michigan Case, May 17, 2022 Order). In its order, the Michigan Court explained that
2 Sifuentes was subject to an order “that prohibited [him] from filing any new action in the Eastern
3 District of Michigan without first obtaining leave.” *Id.* at 1. It stated that Sifuentes had not sought
4 or obtained leave before filing his complaint, and that the court would not grant leave to file the
5 complaint because the “proposed complaint [was] frivolous.” *Id.* The Michigan Court described
6 the dispute as “aris[ing] from Google’s false advertising of its cell phone plans that has caused
7 Plaintiff to pay a more expensive bill and suffer from intentional infliction of emotional distress
8 (‘IIED’).” *Id.* It went on to find that the IIED claim was “plainly frivolous” as the test for that
9 claim under Michigan law is “one in which the recitation of the facts to an average member of the
10 community would arouse his resentment against the actor, and lead him to exclaim,
11 ‘Outrageous!’” *Id.* at 1-2 (quoting *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 603 (1985)).

12 The Michigan Court continued, “As for the other claims that sound in false advertising,
13 Plaintiff cannot in good faith claim that his damages exceed \$75,000 and thus fall within the
14 Court’s diversity jurisdiction.” *Id.* at 2. Instead, the Michigan Court found, Plaintiff’s damages
15 “are a few hundred dollars from paying more for his cell phone plan” and thus, “[b]ased on [its]
16 review of the complaint, the preponderance of the evidence show[ed] that the amount in
17 controversy [was] far less than \$75,000.” *Id.* For these reasons, the Michigan Court dismissed
18 the complaint and stated that it would “deny Plaintiff leave to appeal in forma pauperis because he
19 cannot take an appeal in good faith.” *Id.* (citing 28 U.S.C. § 1915(a)(3)).

20 Sifuentes subsequently filed a motion for leave to amend his complaint in the Michigan
21 Court, stating that he sought to assert “additional claims and relief such as a \$200 refund and
22 request for punitive damages of \$76,000” and add “claims of fraudulent misrepresentation, breach
23 of contract, and ‘negligent’ intentional infliction of emotion distress claims.” RJN, Ex. C. He also
24 brought a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil
25 Procedure. RJN, Ex. D. The Michigan Court denied both motions. RJN, Ex. E. The Michigan
26 Court stated:

27 The Court denied Plaintiff leave to file a complaint and dismissed the
28 complaint because he is enjoined and his proposed complaint is
frivolous. ECF 2. The Court will deny the motions that Plaintiff filed
after the Court’s screening order. ECF 5; 6. Because Plaintiff is

1 enjoined, he cannot file more motions unless his complaint passes the
2 Court’s screening. In short, Plaintiff cannot pursue a civil matter in
the above case; he thus cannot file new motions related to that matter.

3 *Id.*

4 Six days after the Michigan Court denied Sifuentes’s motions, he filed the instant action
5 against Google, Inc. – the same defendant he named in the Michigan Case.³ As noted above, the
6 facts upon which Sifuentes based his claims in the original complaint were the same as the ones
7 alleged in the Michigan Case. He again invoked diversity jurisdiction, but he expanded the list of
8 claims he sought to assert, asserting claims for:

9 cell phone bill cramming, false advertising, potential future violation
10 of the fair credit reporting act by concrete injury of a lower credit
11 score, Michigan consumer protection act, risk of present and future
12 retaliation by Google, doctrine of unclean hands, fraudulent
misrepresentation, breach of contract, negligent and or intentional
infliction of emotional distress.

13 Complaint at 1-2.

14 Google brought a motion to dismiss the case under Rule 12(b)(1) and 12(b)(6) of the
15 Federal Rules of Civil Procedure, but before that motion was briefed, Sifuentes moved to compel
16 arbitration of his own claims and stay the case pursuant to an arbitration agreement purportedly
17 included in Google’s terms of use, dkt. no. 23. As Google did not oppose arbitration, on August
18 31, 2022, the Court granted Sifuentes’s motion, denied without prejudice Google’s motion to
19 dismiss, stayed the case, and ordered Sifuentes “to file an arbitration demand in accordance with
20 the terms of the parties’ arbitration agreement no later than September 28, 2022.” Dkt. no. 30.
21 Sifuentes filed an arbitration demand but the American Arbitration Association (“AAA”)
22 concluded that it did not have authority to adjudicate the case. Dkt. no. 35-1 at ECF pp. 4, 10.
23 Sifuentes asked to proceed with the case in federal court, dkt. no. 33, and also sought leave to
24 amend his complaint to add an assertion that Google’s billing violated “Federal Communication
25 Committee [sic] rules” and increase the relief requested. Dkt. no. 34. In his reply brief, Sifuentes

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28 ³ According to Defendant, although Sifuentes named Google, Inc. as the defendant, “[i]t is now understood that Plaintiff’s dispute is with Google North America, Inc., which provides Google Fi services and is a wholly-owned subsidiary of Google LLC.” Motion at 12 n. 3 (citing RJN, Ex. G).

1 clarified that he sought to assert a claim under 47 C.F.R. § 64.2401’s truth-in-billing requirements
2 for telephone bills. Dkt. no. 41 at 2-3. Google opposed both requests. Dkt. nos. 36, 37.

3 The Court granted Sifuentes’s requests. Dkt. no. 42. As to the request to proceed in
4 federal court, the Court found that the “record suggest[ed] that Sifuentes’s failure to follow
5 through on his choice to arbitrate stemmed from his good faith mistake as to which of Google’s
6 terms of service governed his claim and the AAA’s refusal to take the case when the applicable
7 terms did not provide for arbitration.” Dkt. no. 42 at 3. As to the motion for leave to amend, the
8 Court cited the liberal standard that governs motions brought under Rule 15(a) of the Federal
9 Rules of Civil Procedure and concluded that although the deadline for amending the complaint
10 had passed, Sifuentes should be given an opportunity to amend because it was not “‘absolutely
11 clear’ that Sifuentes could not state a claim for violation of § 64.2401.” Dkt. no. 42 at 3.

12 Although Sifuentes had filed a proposed First Amended Complaint in conjunction with his motion
13 for leave to amend, the Court ordered that he file a new amended complaint that “more clearly
14 identif[ied] all claims he wishe[d] to assert and relevant factual allegations to support those
15 claims.” *Id.* at 4. The Court further instructed:

16 Sifuentes’s second amended complaint must comply with Rule 10 of
17 the Federal Rules of Civil Procedure, which—among other
18 requirements—calls for the use of separately numbered paragraphs.
19 Sifuentes should state all relevant factual allegations in short,
20 numbered paragraphs, followed by discrete statements of each legal
claim he intends to pursue. Sifuentes should also take into account
the arguments Google has raised thus far and only assert claims that
he has a good faith basis to believe would survive a motion to dismiss.

21 *Id.* at 5.

22 In the Court’s order permitting Sifuentes to amend his complaint, it addressed but did not
23 rule on Google’s argument in its prior motion to dismiss that Sifuentes’s claims were barred by the
24 dismissal of the Michigan Court. *Id.* at 4. The Court observed:

25 It is not obvious that the dismissal of Sifuentes’s previous case in the
26 Eastern District of Michigan bars the regulatory claim he now intends
27 to pursue. While decisions by federal courts dismissing in forma
28 pauperis claims as frivolous under 28 U.S.C. § 1915 are preclusive
under the doctrine of res judicata with respect to future in forma
pauperis claims, *Kolocotronis v. Benefis Healthcare*, 360 F. App’x
860, 861 (9th Cir. 2009), and a decision finding a lack of subject

1 matter jurisdiction can be preclusive as to that issue in a future case,
2 *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999), the
3 Michigan court dismissed Sifuentes’s case under a pre-filing review
4 order specific to that court with no explicit reference to § 1915, and
5 Google has not addressed whether a decision finding no subject
6 matter jurisdiction where the court only acknowledged state law
7 claims is preclusive as to a future complaint asserting violations of
8 federal regulations. Moreover, it is not clear that Sifuentes had a fair
9 opportunity to litigate claims not squarely presented by his original
10 complaint in the Michigan case when that court dismissed his case
11 pursuant to a pre-filing review order and later held that, due to that
12 procedural posture, Sifuentes could not file a motion for leave to
13 amend—without considering the merits of that motion. Def.’s
14 Request for Judicial Notice (dkt. 16 1) Ex. E (order denying leave to
15 amend in the Eastern District of Michigan); see *United States v.*
16 *Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1151 (9th Cir.
17 2011) (“ [A] critical predicate for applying claim preclusion is that
18 the claimant shall have had a fair opportunity to advance all its ‘same
19 transaction’ claims in a single unitary proceeding[.]’ ” (quoting
20 *Dionne v. Mayor of Baltimore*, 40 F.3d 677, 683 (4th Cir. 1994))).
21 This is not to say that Google could not prevail on that argument, only
22 that it is not clear at this time that the new claim Sifuentes wishes to
23 bring is barred, and Google should be prepared to address these issues
24 if it brings another motion to dismiss after Sifuentes amends his
25 complaint.

26 *Id.* at 5.

27 On January 9, 2023, Sifuentes filed his Amended Complaint, dkt. no. 45. Contrary to the
28 Court’s instructions, Sifuentes did not adhere to Rule 10 of the Federal Rules of Civil Procedure
and he did not “state all relevant factual allegations in short, numbered paragraphs, followed by
discrete statements of each legal claim he intends to pursue.” Dkt. no. 42 at 5. Moreover,
although he had requested leave only to add a claim for violation of 47 C.F.R. § 64.2401 in
connection with the dispute relating to Sifuentes’s telephone bill, the Amended Complaint not
only adds other claims in connection with that dispute but also adds claims based on an entirely
different set of factual allegations relating to a data breach.

Sifuentes’s Amended Complaint, like his previous complaints, is confusing and
convoluted. The claims he asserts in the Amended Complaint in connection with the telephone
bill dispute are described as follows:

violation of the Federal Communication Committee rules for cell
phone bill cramming, FCC truth in billing, false advertising, potential
future violation of the fair credit reporting act by concrete injury of a
lower credit score, Michigan consumer protection act, risk of present
and future retaliation by Google, doctrine of unclean hands,

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fraudulent misrepresentation, breach of contract, negligent and or intentional infliction of emotional distress.

Amended Complaint at 1. He describes his claims in connection with an alleged data breach as follows:

invasion of privacy by public disclosure of private facts, negligence, negligent and or intentional infliction of emotional distress, conversion (use of information without permission) breach of bailment, failure to provide safeguard security measures and protection to Sifuentes for the breach, and risk of future injury, and violation of the Gramm-Leach-Bliley Act, Fair Credit Reporting Act (hereinafter (FCRA)) and Fair and Accurate Credit Transactions Act of 2003 (FACTA), also the Michigan Consumers Protection Act, violation of the Michigan Constitution Art 10, § 2 of Michigan’s 1963 Constitution where [p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law, The federal Trade Commission’s Identity Theft Red Flag Rules, violation of the USA Patriot Act, The health Insurance Portability and Accountability ACT (HIPPA), . . .

Id. In the Amended Complaint, Sifuentes also has added claims for punitive damages in the amount of \$10,000,000 as to the phone bill claims and \$25,000,000 as to the data breach claims.

Id.

In the Motion, Google argues that this case should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure because the Court lacks subject matter jurisdiction over this action. Motion at 2-3. In particular, it contends: 1) the claims asserted in the Amended Complaint are barred under the doctrine of res judicata based on the dismissal of the Michigan Case; 2) there is no diversity jurisdiction under 28 U.S.C. §1332; and 3) Sifuentes lacks Article III standing to assert claims based on an alleged data breach. *Id.* Google argues in the alternative that the Amended Complaint should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure because neither his original claims nor his newly asserted claims are sufficiently pled and furthermore, the data breach claims exceed the scope of the Court’s order granting leave to amend. It also challenges Sifuentes’s claims for punitive damages on the basis that these claims are beyond the scope of the Court’s leave to amend and Sifuentes has alleged no facts to support those requests. *Id.* at 8-9.

1 In his response⁴ to the instant Motion, Sifuentes states that as to the telephone bill dispute,
2 he “would like to amend and drop the claims of:”

- 3 a. Risk of present and future retaliation.
- 4 b. Doctrine of unclean hands.
- 5 c. False advertising.
- 6 d. Fair Credit Reporting Act.
- 7 e. Michigan Consumer protection act
- 8 f. Breach of contract.
- 9 g. Negligent infliction of emotional distress.

7 Dkt. no. 58 (Opposition) at 2. In his Supplement Opposition, however, Sifuentes appears to have
8 changed his mind about dropping the claim for negligent infliction of emotional distress
9 Supplemental Opposition at 4.⁵

10 With respect to his data breach claims, he seeks to amend and drop the following claims:

- 11 1. MCL 445.72.
- 12 2. Fair Credit Reporting Act, and the Fair and Accurate Credit
Transaction Act.
- 13 3. Gramm-Leach-Bliley Act.
- 14 4. Risk of present and future retaliation.
- 15 5. Federal Trade commission's Identity Theft Red Flag Rules.
- 16 6. U.S.A. Patriot Act
- 17 7. Health Insurance Portability Accessibility Act.

15 *Id.* at 2; Supplemental Opposition at 4-5.⁶ Sifuentes argues that his remaining claims should not
16 be dismissed, however. In particular, he contends his remaining claims are adequately pled and
17 rejects Google’s assertions that his claims are barred by res judicata and that there is no diversity
18 jurisdiction. Opposition at 2-3; Supplemental Opposition at 2-3.

19 _____
20 ⁴ Sifuentes filed two briefs opposing the motion, docket nos. 58 (“Opposition”) and 59
21 (“Supplemental Opposition”). The second brief was filed a week after the first one and modified
22 some of the arguments made in the earlier brief. Neither the local rules nor this Court’s standing
order permits such sequential briefing. Nonetheless, because Google responded to both briefs in
its Reply brief, the Court will consider both briefs in ruling on the instant Motion.

23 ⁵ Sifuentes reiterates in his Supplemental Opposition that he seeks to drop the claim under
24 Michigan Consumer Protection Act but the proposed amended complaint attached to his
25 Supplemental Opposition includes that claim. Based on statements in Sifuentes’s Opposition and
26 Supplemental Opposition, the Court finds that as to the cell phone bill dispute, Sifuentes seeks to
27 proceed only with a claim under 47 C.F.R. § 64.2401 and negligent infliction of emotional
28 distress.

26 ⁶ Based on statements in Sifuentes’s Opposition and Supplemental Opposition, the Court finds that
he seeks to proceed with the following claims in connection with the data breach dispute:
“invasion of privacy by public disclosure of private facts, negligence, negligent and or intentional
infliction of emotional distress, conversion (use of information without permission) breach of
bailment, failure to provide safeguard security measures and protection to Sifuentes for the breach,
. . . [and] violation of the Michigan Constitution Art 10, §2 of Michigan’s 1963 Constitution”
Amended Complaint at 5.

1 In his Opposition, Sifuentes also includes a paragraph with the heading, “Motion to
2 Transfer.” Opposition at 5. This paragraph states, in its entirety:

3 Sifuentes III, ask this Honorable Court to transfer this case for Jury
4 Trial and any other proceedings to the Western District Court in
5 Grand Rapids, Michigan. A plaintiff may request a transfer under 28
6 U.S.C. § 1404(a). Sifuentes is a Pro Se plaintiff and does not have the
resources to travel to California to present his case to a jury. Sifuentes
has made a jury demand and should be able to present his case to a
jury.

7 *Id.* at 5.

8 **III. ANALYSIS**

9 **A. Whether Amended Complaint is Barred By Res Judicata**

10 “Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any
11 claims that were raised or could have been raised in the prior action . . . whenever there is (1) an
12 identity of claims, (2) a final judgment on the merits, and (3) identity or privity between
13 parties.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (citation
14 and internal quotation marks omitted); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l*
15 *Plan. Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003) (“Res judicata bars relitigation of all grounds
16 of recovery that were asserted, or could have been asserted, in a previous action between the
17 parties, where the previous action was resolved on the merits.”). “Suits involve the same claim (or
18 ‘cause of action’) when they ‘aris[e] from the same transaction,’ or involve a ‘common nucleus of
19 operative facts.’” *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589,
20 1595 (2020) (alteration in original; citations omitted); *see also United States v. Liquidators of*
21 *Eur. Fed. Credit Bank*, 630 F.3d 1139, 1151 (9th Cir. 2011) (citing with approval *Dionne v.*
22 *Mayor of Baltimore*, 40 F.3d 677, 683 (4th Cir. 1994) for the proposition that “a critical predicate
23 for applying claim preclusion is that the claimant shall have had a fair opportunity to advance all
24 its ‘same transaction’ claims in a single unitary proceeding”).

25 Here, there is identity of parties but the remaining two requirements for applying the
26 doctrine of res judicata are not met. First, despite Google’s assertion that the Michigan Court
27 dismissed Sifuentes’s claims with prejudice, the record in that case points to the contrary
28 conclusion. In particular, although the Michigan Court dismissed Sifuentes’s claims without leave

1 to amend, it did not state in either of its orders in that case that the dismissal was with prejudice.
2 See RJN, EXs. B, E. Nor did the Court enter a separate judgment dismissing Sifuentes’s claims
3 with prejudice.

4 Furthermore, although the Michigan Court found that Sifuentes failed to allege outrageous
5 conduct sufficient to support a claim for intentional infliction of emotional distress, it ultimately
6 concluded that Sifuentes’s complaint failed for lack of subject matter jurisdiction, holding:

7 Based on the Court’s review of the complaint, the preponderance of
8 the evidence shows that the amount in controversy is far less than
9 \$75,000. See *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 572
10 (6th Cir. 2001) (quotation omitted). The Court will therefore dismiss
the complaint and will deny Plaintiff leave to appeal in forma pauperis
because he cannot take an appeal in good faith. See 28 U.S.C. §
1915(a)(3).

11 RJN, Ex. B at 2. While this statement was made in a paragraph that ostensibly addressed only the
12 false advertising claims, the Michigan Court’s broad conclusion and failure to make any findings
13 suggesting that there was subject matter jurisdiction over the claim for intentional infliction of
14 emotional distress leads this Court to conclude that the Michigan Court’s dismissal was, in the
15 end, for lack of jurisdiction. It is well-established that a dismissal for lack of subject matter
16 jurisdiction is not a judgment on the merits, and therefore it has no claim preclusive effect. *Watson*
17 *v. Chessman*, 362 F. Supp. 2d 1190, 1194 (S.D. Cal. 2005); see also *Drevaleva v. Glazer*, No.
18 21-CV-00500-HSG, 2022 WL 767192, at *6 (N.D. Cal. Mar. 14, 2022), aff’d, No. 22-15731, 2023
19 WL 2584256 (9th Cir. Mar. 21, 2023) (“Rule 41 of the Federal Rules of Civil Procedure provides
20 that any dismissal – ‘except one for lack of jurisdiction, improper venue, or failure to join a party,’
21 or a dismissal order that specifically states otherwise – ‘operates as an adjudication on the
22 merits.’”).

23 Finally, the identity of claims requirement is not met. First, the data breach claims arise
24 out of a separate transaction (or series of transactions – it is not clear when the alleged data breach
25 or breaches that are the subject of Sifuentes’s claims occurred). Second, the identity of claims
26 requirement is only met where the plaintiff “had a fair opportunity to advance all its ‘same
27 transaction’ claims in a single unitary proceeding[.]” as discussed above. See *Tahoe-Sierra Pres.*
28

1 *Council, Inc. v. Tahoe Reg'l Plan. Agency*, 322 F.3d at 1078. It is apparent from the Michigan
2 Court's orders that as to the telephone bill claims, the court did not consider Sifuentes's motions
3 for leave to amend and for relief under Rule 60(b), concluding that because Sifuentes was
4 "enjoined" and his initial complaint had not survived initial screening, he "[could] not file new
5 motions related to the matter." RJN, Ex. E.

6 For these reasons, the Court concludes that Sifuentes's Amended Complaint is not barred
7 under the doctrine of res judicata.⁷

8 **B. Whether Sifuentes May Proceed With Data Breach Claims in this Action**

9 Sifuentes brought this case asserting claims related to a dispute with Google about his
10 telephone bill in early 2022 after a very similar complaint was rejected as frivolous by a Michigan
11 Court. This Court conducted an initial screening under 28 U.S.C. § 1915 and, finding that
12 Sifuentes's claims were colorable, ordered service of the complaint. After Google appeared and
13 brought a motion to dismiss, Sifuentes attempted to move the case to another venue by seeking
14 arbitration of his claims. When that did not work, he requested leave to proceed in this Court and
15 amend his complaint to assert a claim under FCC rules related to the same dispute and allege
16 additional damages. Instead, however, Sifuentes used this opportunity to not only add a claim
17 under 47 C.F.R. § 64.2401 and seek additional punitive damages but also to assert an entirely new
18 set of claims based on completely different conduct, namely, the data breach claims.

19 This Court has repeatedly given Sifuentes the benefit of the doubt because of his pro se
20 status. At some point, however, the Court must draw a line. The Court has reached that point.
21 The data breach claims are entirely unrelated to the dispute that was the subject of Sifuentes's
22 original complaint and were added to the complaint long after the deadline for amendment had
23 passed and without the Court's authorization. The Court therefore strikes Sifuentes's data breach
24 claims on the basis that they fall outside of the scope of the Court's order permitting Sifuentes to
25

26 ⁷ As the Court recognized in its December 22, 2022 Order, a decision finding a lack of subject
27 matter jurisdiction can be preclusive as to that issue in a future case. *Ruhrgas AG v. Marathon Oil*
28 *Co.*, 526 U.S. 574, 586 (1999). However, in its Motion Google did not cite the doctrine of issue
preclusion or address whether the requirements of that doctrine are met and therefore the Court
does not consider it here.

1 amend his complaint. *See* Fed. R. Civ. P. 15(a)(2) (providing that after the time for amending as-
2 of-right has passed, “a party may amend its pleading only with the opposing party’s written
3 consent or the court’s leave”); *Saloojas Inc. v. Blue Shield of California Life & Health Ins. Co.*,
4 No. 22-CV-03267-MMC, 2023 WL 122395, at *1 (N.D. Cal. Jan. 6, 2023) (“Claim II, titled
5 ‘Insurance Bad Faith and Fraud,’ is hereby stricken, for the reason that said new claim exceeds the
6 scope of the leave granted by the Court in its October 3 Order.”); *Benton v. Baker Hughes*, No. CV
7 12-07735 MMM MRWX, 2013 WL 3353636, at *3 (C.D. Cal. June 30, 2013), *aff’d sub nom.*
8 *Benton v. Hughes*, 623 F. App’x 888 (9th Cir. 2015) (holding that because the plaintiff’s new
9 claims “exceed[ed] the scope of the leave to amend granted” it was appropriate to strike the newly
10 added claims and collecting cases); *DeLeon v. Wells Fargo Bank, N.A.*, No. 10–CV–01390–LHK,
11 2010 WL 4285006, *3 (N.D.Cal. Oct.22, 2010) (“In cases like this one ... where leave to amend is
12 given to cure deficiencies in certain specified claims, courts have agreed that new claims alleged
13 for the first time in the amended pleading should be dismissed or stricken”).⁸

14 Accordingly, all of the data breach claims are dismissed without prejudice and without
15 leave to amend.⁹

18 ⁸ The Court notes that in a prior case, *McKenzie v. Wells Fargo Bank, N.A.*, 931 F. Supp. 2d 1028,
19 1042 (N.D. Cal. 2013), this Court addressed a challenge to claims that were outside the scope of
20 the Court’s order permitting amendment under Rule 12(b)(6) rather than Rule 12(f) of the Federal
21 Rules of Civil Procedure. Rule 12(b)(6) provides for dismissal of a claim for “failure to state a
22 claim upon which relief can be granted” whereas Rule 12(f) allows the Court to “strike from a
23 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”
24 The situation in that case differed from this one, however, because the Court had already found
25 that the theory upon which the new claims were based was legally insufficient. Here, on the other
26 hand, the Court has not addressed the merits of the data breach claims in any past order and does
27 not do so herein. Therefore, the Court concludes it is more appropriate to treat Google’s challenge
28 to the data breach claims on this ground as a request to strike under Rule 12(f).

⁹ Google also asks the Court to strike Sifuentes’s additional allegations seeking punitive damages,
arguing that these too exceed the scope of the Court’s order permitting Sifuentes to amend his
complaint. Motion at 8. The Court denies that request. The Court recognized in its order on
Sifuentes’s motion for leave to amend that Sifuentes was requesting leave to amend to “add[] an
assertion that Google’s billing violated ‘Federal Communication Committee [sic] rules’ and
increases the relief requested.” Dkt. no. 42 at 3 (emphasis added). While the discussion that
followed did not specifically address Sifuentes’s request to increase the requested relief, it also did
not qualify its holding permitting amendment by precluding Sifuentes from increasing the relief
requested. Rather, the Court’s ruling could easily be understood as permitting Sifuentes to
increase the requested relief.

1 **C. Whether there is Subject Matter Jurisdiction Over Remaining Telephone Bill**
2 **Claims**

3 **1. Legal Standards Under Rule 12(b)(1)**

4 Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a district court must
5 dismiss an action if it lacks jurisdiction over the subject matter of the suit. *See* Fed. R. Civ. P.
6 12(b)(1). “Subject matter jurisdiction can never be forfeited or waived and federal courts have a
7 continuing independent obligation to determine whether subject-matter jurisdiction exists.” *Leeson*
8 *v. Transamerica Disability Income Plan*, 671 F.3d 969, 975 n.12 (9th Cir. 2012) (internal
9 quotation marks and citations omitted). On a motion to dismiss for lack of subject matter
10 jurisdiction under Rule 12(b)(1), it is the plaintiff’s burden to establish the existence of subject
11 matter jurisdiction. *Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1197 (9th Cir.
12 2008).

13 A party challenging the court’s subject matter jurisdiction under Rule 12(b)(1) may bring a
14 facial challenge or a factual challenge. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).
15 ““In deciding a Rule 12(b)(1) facial attack motion, a court must assume the facts alleged in the
16 complaint to be true and construe them in the light most favorable to the nonmoving party.””
17 *Torrey Pines Logic, Inc. v. Gunwerks, LLC*, No. 19-CV-02195-H-JLB, 2020 WL 6106814, at *4
18 (S.D. Cal. July 14, 2020) (quoting *Strojnik v. Kapalua Land Co. Ltd.*, 379 F. Supp. 3d 1078, 1082
19 (D. Haw. 2019) (citing *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.
20 2003))). In contrast, a factual challenge to subject matter jurisdiction “disputes the truth of the
21 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Id.* (citing *Safe Air*
22 *for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)).

23 **2. Legal Standards Governing Diversity Jurisdiction and Federal Question**
24 **Jurisdiction**

25 Federal courts have limited subject matter jurisdiction and may only hear cases falling
26 within their jurisdiction. The two most common forms of federal subject matter jurisdiction are
27 federal question jurisdiction under 28 U.S.C. § 1331 and diversity jurisdiction under 28 U.S.C. §
28 1332. Federal question jurisdiction encompasses claims “arising under the Constitution, laws, or
 treaties of the United States.” 28 U.S.C. § 1331. Diversity jurisdiction exists where all plaintiffs

1 are citizens of different states from all defendants and at least \$75,000 is in controversy.

2 **3. Discussion**

3 Two claims remain in this case: Sifuentes’s newly added claim under 47 C.F.R. § 64.2401
4 and his claim for negligent infliction of emotional distress – both based on the telephone bill
5 dispute. Sifuentes has consistently invoked diversity jurisdiction under 28 U.S.C. § 1332 to
6 support federal jurisdiction, but this Court, like the Michigan Court, concludes that it is clear from
7 the face of the Amended Complaint that the \$75,000 amount in controversy requirement is not
8 satisfied.

9 To justify dismissal for failure to adequately allege the \$75,000 amount in controversy,
10 “[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional
11 amount.” *Budget Rent–A–Car, Inc. v. Higashiguchi*, 109 F.3d 1471, 1473 (9th Cir. 1997) (quoting
12 *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)). That standard is met
13 here. First, the facts alleged in the Amended Complaint in connection with Sifuentes’s billing
14 dispute with Google indicate that his actual damages were, at most, in the hundreds of dollars. *See*
15 Amended Complaint at 2. Indeed, in his Supplemental Opposition, Sifuentes concedes that his
16 actual damages in connection with this dispute amounted to only \$250. Supplemental Opposition
17 at 3. Moreover, courts must “scrutinize [a] claim closely” where “a claim for punitive damages
18 makes up the bulk of the amount in controversy.” *Davis v. Nuci*, 2011 WL 3503175, at *4 (E.D.
19 Cal., Aug. 10, 2011) (quoting *Anthony v. Security Pac. Fin. Servs.*, 75 F.3d 311, 315 (7th Cir.
20 1996)). Here, Sifuentes seeks \$10,000,000 in punitive damages but alleges no facts to support this
21 exorbitant request, which the Court therefore finds does not satisfy the \$75,000 amount-in-
22 controversy requirement. *See Cason v. California Check Cashing Stores*, No. 13-CV-03388-JCS,
23 2013 WL 5609329, at *3 (N.D. Cal. Oct. 11, 2013).

24 Nonetheless, the Court finds that federal question jurisdiction is apparent from the face of
25 the Amended Complaint because Sifuentes asserts a colorable claim under federal law, namely,
26 47 C.F.R. § 64.2401. Furthermore, the Court may exercise supplemental jurisdiction over the
27 state law claim for negligent infliction of emotional distress under 28 U.S.C. § 1367(a).

28 Therefore, the Court concludes that dismissal of Sifuentes’s telephone bill claims for lack

1 of subject matter jurisdiction is unwarranted.

2 **D. Whether Claim Under 47 C.F.R. § 64.2401 is Subject to Dismissal Under Rule**
3 **12(b)(6)**

4 **1. Legal Standards**

5 A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure
6 for failure to state a claim on which relief can be granted. “The purpose of a motion to dismiss
7 under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp.*
8 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the pleading stage
9 is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that a “pleading which
10 sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing
11 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

12 In ruling on a motion to dismiss under Rule 12(b)(6), the court analyzes the complaint and
13 takes “all allegations of material fact as true and construe[s] them in the light most favorable to the
14 non-moving party.” *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).
15 Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that
16 would support a valid theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
17 1990). A complaint must “contain either direct or inferential allegations respecting all the material
18 elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v.*
19 *Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
20 1106 (7th Cir. 1984)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation
21 of the elements of a cause of action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
22 (quoting *Twombly*, 550 U.S. at 555). “[C]ourts ‘are not bound to accept as true a legal conclusion
23 couched as a factual allegation.’” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S.
24 265, 286 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of
25 ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557)
26 (alteration in original). Rather, the claim must be “‘plausible on its face,’” meaning that the
27 plaintiff must plead sufficient factual allegations to “allow[] the court to draw the reasonable
28 inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S.

1 at 570).

2 **2. Discussion**

3 In his Amended Complaint, Sifuentes asserts a claim for violation of 47 C.F.R. § 64.2401,
4 also known as the Truth-in-Billing Rules. Section 64.2401 was adopted by the Federal
5 Communications Commission (“FCC”) under Section 201(b) of the Communications Act of 1934.
6 *See In the Matter of Gregory Manasher et al. Petition for Declaratory Ruling*, 33 F.C.C. Rcd.
7 2737 (2018) (“*Manasher*”). The Supreme Court has held that “to violate a regulation that lawfully
8 implements § 201(b)’s requirements is to violate the statute.” *Glob. Crossing*
9 *Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 54 (2007).
10 Section 64.2401 “addresses the *organization* of bills; it does not reflect any determination as to
11 whether the charges themselves are “just and reasonable” under any particular circumstances.
12 *Rankin v. Glob. Tel*Link Corp.*, No. 13-CV-01117-JCS, 2013 WL 3456949, at *15 (N.D. Cal.
13 July 9, 2013); *see also Cavaliere v. Comcast Cable Communications, LLC*, 2022 WL 824246, at
14 *4 (M.D. Fla. Mar. 18, 2022) (“Section 64.2401 sets forth how a telephone bill must be organized
15 and what content must be contained within a telephone bill.”); *Manasher*, 33 F.C.C. Rcd. at 2743
16 (“The Truth-in-Billing rules focus on the format and clarity of a consumer bill, and do not reach
17 the actual bill charge.”)

18 In his Amended Complaint, Sifuentes’s theory in support of his claim under Section
19 64.2401 is as follows:

20 In this case it is clear that Google has violated the truth-and-billing
21 rule by imposing additional future charges on services not fully
22 rendered and paying for data twice. . . . Although Google says it is a
23 onetime charge they have done this more than once and in fact have
24 had other consumers complain about their services and charging to
25 [sic] much for services

26 Amended Complaint at 4. In other words, Sifuentes’s claim challenges the *actual charges* on his
27 bill, not the organization or content of Google’s bills. Nor does Sifuentes’s conclusory statement
28 in his Opposition brief that “Google did cram the bill unexpectedly in violation of 47 C.F.R. §
64.240 [sic]” suggest that Sifuentes can remedy this defect. Opposition at 2. “Cramming” is the
practice of “adding unauthorized charges . . . to customers’ wireline telephone bills [.]” *Moore v.*
Verizon Commc’ns Inc., No. C 09-1823 SBA, 2010 WL 3619877, at *1 (N.D. Cal. Sept. 10,

1 2010). There is no doubt that the standards for telecommunications bills set in the Truth-in-
2 Billing Rules are intended to help customers understand their bill so as to avoid unauthorized
3 charges. *See* 47 C.F.R. § 64.2400 (setting forth “Purpose and Scope” of the Truth-in-Billing
4 Rules). Nonetheless, to state a claim for violation of the Truth-in-Billing Rules, Sifuentes must
5 allege specific facts showing that Google failed to adhere to those standards. He has not done so
6 even though Google specifically highlighted this issue in the Motion.

7 Accordingly, the Court concludes that Sifuentes fails to state a claim for violation of the
8 Truth-in-Billing Rules, and therefore dismisses that claim under Rule 12(b)(6). Because the Court
9 further finds that amendment of the claim is futile, it is dismissed without leave to amend and with
10 prejudice. Because the only federal claim in the case has been dismissed and there is no diversity
11 jurisdiction, the Court declines to exercise supplemental jurisdiction over the remaining claim for
12 negligent infliction of emotional distress, which is dismissed without prejudice. *See* 28 U.S.C. §
13 1367(c)(3).¹⁰

14 **IV. CONCLUSION**

15 For the reasons set forth above, Sifuentes’s claim under 47 C.F.R. § 64.2401 is dismissed
16 with prejudice under Rule 12(b)(6). All of Sifuentes’s remaining claims are dismissed without
17 prejudice. The Clerk is instructed to close the case and enter judgment in favor of Google
18 specifying that Sifuentes’s claim under 47 C.F.R. § 64.2401 is dismissed with prejudice and that
19 all remaining claims in the case are dismissed without prejudice.

20 **IT IS SO ORDERED.**

21 Dated: June 26, 2023

22 
23 _____
24 JOSEPH C. SPERO
25 United States Magistrate Judge

26 ¹⁰ The Court does not reach Sifuentes’s request to transfer this case to the Western District of
27 Michigan pursuant to 28 U.S.C. § 1404. Even assuming that Sifuentes’s request was in
28 compliance with the Local Rules and this Court’s orders, he has made no showing that such a
transfer is warranted. Nonetheless, nothing in this Court’s Order precludes him from asserting in
that court (or any other court, including a Michigan state court) the claims that this Court has
dismissed without prejudice so long as Sifuentes has a good faith belief that jurisdiction and venue
in that court is proper. This Court expresses no opinions on those questions.