

United States District Court
Northern District of California

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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. 56

Pending before the Court is Defendant Apple, Inc.’s motion to dismiss Plaintiff Matthew Price’s second amended complaint. *See* Dkt. No. 65. The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b). For the reasons below, the Court **GRANTS** the motion.

I. BACKGROUND

A. Allegations

Plaintiff alleges that since approximately January 2015 he has had an Apple ID to purchase apps and other content from Apple. *See* Dkt. No. 53 (“SAC”) at ¶¶ 2, 8–10, 23. Plaintiff further asserts that during this time he made several in-app game purchases that “did not work as advertised or at all.” *See id.* at ¶ 24. He alleges that he contacted Apple, and was advised to contact the game/app developer. *Id.* When this was unsuccessful, he contacted Apple again, and the company suggested that he “talk to his bank/credit card company to have them chargeback the money he spent on said purchases.” *Id.* Plaintiff contends that “chargebacks” are not “refunds,” and defines them as “a consumer protection tool that allow consumers to get their money back for fraudulent charges or purchases that don’t live up to standards” *See id.* at ¶ 4, n.4. Plaintiff acknowledges that he requested “multiple chargebacks” for purchases he made using his Apple

1 ID. *See id.* at ¶¶ 24, 26. In October 2020, after Plaintiff processed another chargeback, Apple
2 terminated Plaintiff’s Apple ID. *Id.* at ¶¶ 26–28. He no longer has access to the content that he
3 purchased or the \$7.63 in unspent money that he had in his Apple account at the time of his
4 termination. *See id.* at ¶¶ 29–30. According to Plaintiff, an Apple representative told him that
5 Apple terminated his Apple ID because he initiated these chargebacks. *See id.* at ¶ 27. Plaintiff
6 contends that he did not violate Apple’s Terms and Conditions, and says the company had no basis
7 to terminate his account. *See id.* at ¶¶ 3, 22, 28, 33, 36, 40, 42. He urges that by terminating his
8 Apple ID, Apple violated its own Terms and Conditions. *See id.* at ¶¶ 6, 58–72.

9 As relevant to this case, the Terms and Conditions state that users may not “plan or engage
10 in any illegal, fraudulent, or manipulative activity.” *See* SAC, Ex. A at 5–6. The Terms also state
11 that Apple “may monitor [users’] use of the Services and Content” for compliance with the Terms,
12 *id.* at 3, and that it may “refuse a refund request if we find evidence of fraud, refund abuse, or
13 other manipulative behavior that entitles Apple to a corresponding counterclaim,” *id.* at 2. The
14 Terms also include the following termination provision:

15
16 **TERMINATION AND SUSPENSION OF SERVICES**

17 If you fail, or Apple suspects that you have failed, to comply with any
18 of the provisions of this Agreement, Apple may, without notice to
19 you: (i) terminate this Agreement and/or your Apple ID, and you will
20 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.

21 Apple further reserves the right to modify, suspend, or discontinue the
22 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.

23
24 *See id.* at 12.

25 **B. Procedural History**

26 Plaintiff initially filed this putative class action in April 2021. *See* Dkt. No. 1. Apple
27 moved to dismiss the complaint, Dkt. No. 20, but rather than oppose the motion, Plaintiff filed an
28 amended complaint, Dkt. No. 31. At the time, Plaintiff asserted various claims, including for

1 violations of California’s Unfair Competition Law (“UCL”) and Consumers Legal Remedies Act
2 (“CLRA”), and for conversion, trespass to chattels, and unjust enrichment. *See* Dkt. No. 31.
3 Apple again moved to dismiss the complaint. Dkt. No. 32. The Court granted the motion to
4 dismiss in its entirety, but granted Plaintiff leave to amend the UCL and CLRA claims only. Dkt.
5 No. 52 at 13–14. Rather than amend his existing claims, however, Plaintiff’s SAC asserts a new
6 breach of contract claim. *See* SAC at ¶¶ 58–72. Apple again moves to dismiss. Dkt. No. 56.

7 **II. LEGAL STANDARD**

8 Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain
9 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A
10 defendant may move to dismiss a complaint for failing to state a claim upon which relief can be
11 granted under Rule 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the
12 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”
13 *Mendondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule
14 12(b)(6) motion, a plaintiff need only plead “enough facts to state a claim to relief that is plausible
15 on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible
16 when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that
17 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

18 In reviewing the plausibility of a complaint, courts “accept factual allegations in the
19 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”
20 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless,
21 courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of
22 fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
23 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

24 **III. DISCUSSION**

25 Over a year after Plaintiff initially filed this case, he attempts to recast it as a breach of
26 contract action. Plaintiff contends that Apple breached the termination provision of the Terms and
27 Conditions by (1) terminating his Apple ID and (2) retaining his unused funds because his
28 chargebacks were not prohibited by the Terms. *See* SAC at ¶¶ 58–72. But even as amended, the

1 Court finds that the latest complaint fails to state a claim for relief.

2 **A. Breach of Contract Claims**

3 To state a breach of contract claim under California law, a plaintiff must allege “(1) the
4 existence of the contract, (2) plaintiff’s performance or excuse for nonperformance,
5 (3) defendant’s breach, and (4) the resulting damages to the plaintiff.” *Oasis W. Realty, LLC v.*
6 *Goldman*, 51 Cal. 4th 811, 821 (Cal. 2011). Additionally, “[i]n an action for breach of a written
7 contract, a plaintiff must allege the specific provisions in the contract creating the obligation the
8 defendant is said to have breached.” *See, e.g., Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110,
9 1117 (N.D. Cal. 2011); *see also Miron v. Herbalife Int’l, Inc.*, 11 Fed. App’x 927, 929 (9th Cir.
10 2001) (“The district court’s dismissal of the [plaintiffs’] breach of contract claims was proper
11 because the [plaintiffs] failed to allege any provision of the contract which supports their claim.”).¹
12 Critically, Plaintiff here has not identified any provision of the Terms that Apple allegedly
13 breached.

14 **1. Termination of Apple ID**

15 *First*, Plaintiff asserts that Apple breached the “Termination and Suspension of Services”
16 provision quoted in Section I above by terminating his Apple ID account. *See* SAC at ¶¶ 60–65.
17 Plaintiff repeatedly asserts that chargebacks are lawful and not prohibited by the Terms. *See, e.g.,*
18 *id.* at ¶¶ 3, 22, 28, 33, 36, 40, 42. Thus, according to Plaintiff, “Apple materially breached its
19 Terms with Plaintiff and the members of the Class by erroneously finding, or suspecting, that they
20 violated its Terms because they engaged in chargebacks.” *Id.* at ¶ 64.

21 However, Plaintiff’s breach of contract claim is belied by his own allegations. The Terms
22 state that users may not “plan or engage in any illegal, fraudulent, *or manipulative activity.*” *See*
23 SAC, Ex. A at 5–6 (emphasis added). And under the termination provision, Apple may terminate
24 a user’s Apple ID if the user “fail[s], or *Apple suspects that [he] ha[s] failed, to comply with any*
25 *of the provisions of [the Terms]*” *See* SAC, Ex. A at 12 (emphasis added). Although in his
26 opposition Plaintiff suggests that Apple terminated his account “without any rational basis or
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28 ¹ As an unpublished Ninth Circuit decision, *Miron* is not precedent, but may be considered for its persuasive value. *See* Fed. R. App. P. 32.1; CTA9 Rule 36-3.

1 suspicion,” Dkt. No. 57 at 7, this is inconsistent with the allegations in the complaint. Plaintiff
2 acknowledges that he requested “multiple chargebacks” for purchases he made using his Apple
3 ID, and that Apple terminated his Apple ID because of this conduct. *See* SAC at ¶¶ 24, 26–27. It
4 is simply immaterial whether Plaintiff’s multiple chargebacks were actually fraudulent or
5 manipulative because even as alleged, Apple suspected that they were. As the Court previously
6 explained, because Plaintiff accepted the Terms, he “knew that he would lose access to his
7 purchased apps and services if Apple determined (or even suspected) that he failed to comply with
8 the Apple Terms.” *See* Dkt. No. 52 at 11. Because Apple was ““given the right to do what [it] did
9 by the express provisions of the contract there can be no breach.”” *Mishiyev v. Alphabet, Inc.*, 444
10 F. Supp. 3d 1154, 1159 (N.D. Cal. 2020) (quoting *Carma Dev. (Cal.) Inc. v. Marathon Dev. Cal.,*
11 *Inc.*, 2 Cal. 4th 342, 374 (Cal. 1992)). The Court therefore **GRANTS** Apple’s motion to dismiss
12 as to this claim.

13 2. Withholding Funds

14 *Second*, and relatedly, Plaintiff asserts that Apple breached the “Termination and
15 Suspension of Services” provision by withholding Plaintiff’s access to his unused funds after it
16 terminated his Apple ID. *See* SAC at ¶¶ 66–72. In doing so, Plaintiff has reframed his conversion
17 claim—which the Court dismissed—as a breach of contract claim. *See* Dkt. No. 52 at 10–11. In
18 its prior order, the Court explained that Plaintiff consented to the Terms, which give “Apple the
19 right to terminate a user’s Apple ID account if it suspects a user has ‘failed . . . to comply with any
20 of the provisions of’ the Apple Terms.” *Id.* at 11 (quoting Apple Terms). In any event, to plead a
21 breach of contract claim here Plaintiff must identify “the specific provisions in the contract
22 creating the obligation the defendant is said to have breached.” *See Young*, 790 F. Supp. 2d at
23 1117. But the termination provision that Plaintiff relies on does not say anything about returning
24 unused funds to users whose accounts are terminated. Plaintiff fails to explain how Apple
25 nevertheless breached this provision. In short, Plaintiff has not identified any provision of the
26 Terms that Apple actually breached by withholding access to any unused funds. *See, e.g., In re*
27 *Bank of Am. Credit Prot. Mktg. & Sales Pracs. Litig.*, No. MD 11-2269 TEH, 2012 WL 1123863,
28 at *3 (N.D. Cal. Apr. 3, 2012) (dismissing breach of contract claim that was based on *absence* of a

1 term allowing the contested conduct). The Court therefore **GRANTS** Apple’s motion as to this
2 claim as well.²

3 **B. Limitation of Liability Provision**

4 Even if Plaintiff adequately alleged a breach of contract claim, Apple argues that his
5 claims are nevertheless barred by Apple’s limitation of liability provision. *See* Dkt. No. 56 at 13–
6 15. Under the Terms, a user “agree[s] that [he] shall not sue or recover any damages from
7 Apple . . . as a result of its decision . . . to suspend or terminate [the user’s] access to the
8 services” *See* SAC, Ex. A at 12–13. In response, Plaintiff explicitly states that he “does not
9 argue that Apple’s limitation of liability provision is unconscionable” *See* Dkt. No. 57 at 11,
10 n.5. Rather, he argues that the provision is void because (1) it is contrary to public policy under
11 California law, and (2) it would permit Apple to evade statutory liability. Dkt. No. 57 at 11–17.
12 The Court is not persuaded.

13 Under California law, “[w]ith respect to claims for breach of contract, limitation of liability
14 clauses are enforceable unless they are unconscionable, that is, the improper result of unequal
15 bargaining power or contrary to public policy.” *See Food Safety Net Servs. v. Eco Safe Sys. USA,*
16 *Inc.*, 209 Cal. App. 4th 1118, 1126 (Cal. Ct. App. 2012). Here, Plaintiff suggests that enforcing
17 this limitation of liability provision is contrary to public policy because the Apple Terms
18 “implicate [the] public interest.” *See* Dkt. No. 57 at 12–15 (citing *Tunkl v. Regents of Univ. of*
19 *Cal.*, 60 Cal. 2d 92, 98–109 (Cal. 1963) (en banc)). In determining whether the public interest
20 exception applies, courts consider such factors as whether the contract “concerns a business of a
21 type generally thought suitable for public regulation” and whether “[t]he party seeking exculpation
22 is engaged in performing a service of great importance to the public, which is often a matter of
23 practical necessity for some members of the public.” *Id.* at 98–99. The California Supreme Court
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25 ² To the extent Plaintiff attempts in his opposition brief to amend his complaint to add a cause of
26 action for breach of the implied covenant of good faith and fair dealing, Dkt. No. 57 at 8–9, this is
27 improper. The SAC does not allege a violation of the covenant of good faith and fair dealing. In
28 any event, as already discussed, the Terms expressly allowed Apple to terminate Plaintiff’s
account based on its suspicion of manipulative activity. *See Carma*, 2 Cal. 4th at 374 (rejecting
covenant of good faith and fair dealing claim based on conduct expressly permitted by terms of
agreement).

1 has explained that in such circumstances, “[s]ince the service is one which each member of the
2 public, presently or potentially, may find essential to him, he faces, despite his economic inability
3 to do so, the prospect of a compulsory assumption of the risk of another’s negligence.” *Id.* at 101.

4 Here, Plaintiff contends that “[w]hile Apple may not provide life-or-death services, there
5 can be no doubt that its Services have become ‘a practical necessity’ for a large percentage of the
6 public.” Dkt. No. 57 at 13; *see also id.* at 14 (“Apple provides products and Services of practical
7 necessity to the public . . .”). But Plaintiff offers no support for this assertion. Even if Apple
8 products are as “ubiquitous” as Plaintiff suggests, *id.* at 14, that is not the same as being essential.
9 Plaintiff’s own authority clarifies that in determining whether a service is essential, courts should
10 consider: “Is the service merely an optional item consumers can do without if they don’t want to
11 waive their rights to recover for negligence or is it something they need enough so they have little
12 choice if the provider attaches a liability disclaimer?” *See Gavin W. v. YMCA of Metro. Los*
13 *Angeles*, 106 Cal. App. 4th 662, 672 (Cal. Ct. App. 2003) (quotation omitted). In *Gavin*, for
14 example, the court found that childcare services were essential because “55 percent of children
15 ages 13 and under live in families with two employed parents or an employed single head of
16 household,” and due to cost of living, few parents can afford to stay home to care for young
17 children. *Id.* at 671–72. Plaintiff has no credible argument that use of Apple’s products in this
18 case is not optional.

19 In the absence of such an explanation, the Court agrees with Apple that the Terms are a
20 contract “governing the voluntary use and purchase of nonessential recreational activities and
21 entertainment media.” *See* Dkt. No. 58 at 10. As Plaintiff’s own complaint indicates, he used his
22 Apple ID to purchase recreational content such as “movies, music, games, media, [and] books.”
23 *See* SAC at ¶ 2; *see also id.* at ¶ 24 (alleging that Plaintiff “made numerous in app game purchases
24 through Apple”). And he seeks “to recover the money paid to Apple for Apps, music, movies, TV
25 shows, services and/or other Content [he and the putative class] purchased . . .” *Id.* at ¶ 39.
26 Plaintiff cites no authority supporting his argument that the public interest exception should apply
27 in this context. *Cf. Lhotka v. Geographic Expeditions, Inc.*, 181 Cal. App. 4th 816, 823 (Cal. Ct.
28 App. 2010) (“[O]ur courts consistently hold that recreation does not implicate the public interest,

1 and therefore approve exculpatory provisions required for participation in recreational activities.”)
2 (collecting cases).

3 Plaintiff also urges that enforcing the limitation of liability provision would allow Apple to
4 evade statutory liability. *See* Dkt. No. 57 at 16–17. This argument is similarly misplaced.
5 Because Plaintiff only brings breach of contract claims here, and his previous statutory claims
6 were dismissed, enforcing the liability limitation provision in this case would not allow Apple to
7 evade any statutory liability. Plaintiff cites Cal. Civ. Code § 1668, Dkt. No. 57 at 16, which states
8 that “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from
9 responsibility for his own fraud, or willful injury to the person or property of another, or violation
10 of law, whether willful or negligent, are against the policy of the law.” But again, this is a breach
11 of contract case, and courts routinely uphold liability limitation provisions in this context. *See*,
12 *e.g.*, *Gardiner v. Walmart Inc.*, No. 20-CV-04618-JSW, 2021 WL 2520103 at *9 (N.D. Cal. Mar.
13 5, 2021) (finding limitation of liability clause barred breach of contract claims); *Huynh v. Quora,*
14 *Inc.*, No. 18-CV-07597-BLF, 2019 WL 11502875 at 11 (N.D. Cal. 2019) (same); *Bass v.*
15 *Facebook, Inc.*, 394 F. Supp. 3d 1024, 1037–38 (N.D. Cal. 2019) (same). And to the extent
16 Plaintiff suggests that Apple may have violated various state or federal regulations, *see* Dkt. No.
17 57 at 16, he did not allege any such facts in the complaint and he may not amend the complaint to
18 add new causes of action through his opposition.

19 Accordingly, even if Plaintiff had stated a breach of contract claim, he has not adequately
20 explained why under the circumstances of this case, the limitation of liability provision would not
21 be enforceable and bar such claims.

22 **IV. CONCLUSION**


23 The Court **GRANTS** Apple’s motion to dismiss. Plaintiff has had ample opportunity to
24 state a claim for relief, but has repeatedly failed to do so. The Court finds that granting leave to
25 amend would be futile, and therefore **DISMISSES** the case without leave to amend. *See Zucco*
26 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (“[W]here the Plaintiff has
27 previously been granted leave to amend and has subsequently failed to add the requisite
28 particularity to its claims, [t]he district court’s discretion to deny leave to amend is particularly

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broad.” (quotation omitted)). The Clerk is directed to enter judgment in favor of Defendant Apple, Inc. and to close the case.

IT IS SO ORDERED.

Dated: 3/28/2023


HAYWOOD S. GILLIAM, JR.
United States District Judge