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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ILANA IMBER-GLUCK, on Behalf of Herself
and All Others Similarly Situated,

Plaintiff,

v.

GOOGLE, INC., a Delaware Corporation.

Defendant.

Case No. 5:14-CV-01070-RMW

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
GOOGLE, INC.’S MOTION TO
DISMISS**

[Re: Docket No. 20]

Google, Inc. (“Google”), a Delaware corporation with its headquarters and principal place of business in California, is a leading seller of software applications (“Apps”) users can download onto their mobile computing devices. *See* Plaintiff’s Class Action Complaint (“Compl.”), Dkt. No. 1, ¶¶ 2-3. Plaintiff Ilana Imber-Gluck brings the instant class action complaint “on behalf of herself and other parents and guardians whose minor children: (a) downloaded from [Google] a free or modestly priced [App]; and (b) then incurred charges for in-game-related voidable purchases that the minor was induced by Google to make, without the parents’ and guardians’ knowledge or authorization.” *Id.* at ¶ 1.

Case No. 5:14-CV-01070-RMW

- 1 -

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT GOOGLE, INC.’S MOTION TO DISMISS

1 Pursuant to Federal Rule of Civil Procedure 12(b)(6), Google moves to dismiss plaintiff's
2 class action complaint. Motion to Dismiss ("MTD"), Dkt. No. 20. The court GRANTS in part and
3 DENIES in part Google's motion to dismiss.

4 I. FACTUAL AND PROCEDURAL BACKGROUND

5 Plaintiff alleges the following:

6 Google operates a digital distribution platform known as "Google Play" that permits users to
7 browse and download applications developed for the Android operating system. Compl. ¶¶ 2-3.
8 Apps, which are often games, are available through Google Play either free-of-charge or for a fee.
9 *Id.* Many of these gaming Apps are designed to allow purchases of what Google refers to as "In-
10 App Purchases" or "In-App Content," i.e., virtual supplies, cash, and content, which are designed to
11 be used within the game itself ("Game Currency"). *Id.* at ¶ 3.

12 Prior to the purchase of content from Google Play, a user must establish a Google Play
13 account. Compl. ¶ 18. Opening an account requires, among other things, creating a username and
14 password, providing certain contact and personal information, and agreeing to Google's Terms of
15 Service ("Terms of Service").¹ *Id.* In order to purchase content from Google Play, one typically
16 supplies Google with a credit or debit card number or PayPal account through Google's "Google
17 Wallet" function. *Id.* For each digital purchase, users who specify a credit, debit, or PayPal payment
18 will have Google automatically draw funds from the account holder's specified credit or debit card
19 or PayPal account. *Id.*

20 The purchase of an App or any Game Currency is a transaction completed directly between
21 Google and the consumer. Compl. ¶ 17. Immediately prior to the purchase of content from Google
22 Play, Google requires the account holder to enter her password. *Id.* at ¶ 19. Once the password is
23 entered, the user is permitted to make subsequent purchases through her Google Play account for up
24 to 30 minutes without reentering the password. *Id.*

25 In or around February 2012, plaintiff established a Google Play account utilizing her debit
26 card and placed it on file to make future purchases of Google Play downloads and applications.

27
28 ¹ The complaint refers to the Terms of Service as "Terms and Conditions." *See, e.g.*, Compl. ¶¶ 18,
38.

1 Compl. ¶10. In February 2014, plaintiff downloaded the App Marvel Run Jump Smash (“Run Jump
2 Smash”) onto her Samsung Galaxy Tab 2 10.1. *Id.* Within 30 minutes of permitting the download,
3 one of plaintiff’s minor sons made subsequent In-App Purchases of virtual content without
4 plaintiff’s authorization. *Id.* Plaintiff received an email notification that her Google Play account
5 had been charged \$65.95 for the purchased virtual content. *Id.*

6 On March 6, 2014, plaintiff filed a class action complaint, individually and on behalf of all
7 others similarly situated, seeking monetary, declaratory, and equitable relief under California’s
8 contract laws, Consumers Legal Remedies Act, Business and Professions Code § 17200, et seq.,
9 and/or for unjust enrichment. Compl. ¶ 5. The complaint asserts claims for: (1) declaratory
10 judgment pursuant to 28 U.S.C. § 2201, *et seq.*; (2) violation of the California Consumers Legal
11 Remedies Act; (3) violation of California’s Unfair Competition Law; (4) unjust
12 enrichment/restitution; and (5) breach of the duty of good faith and fair dealing. *See* Compl. In
13 response, Google filed the instant motion to dismiss. *See* MTD.

14 II. ANALYSIS

15 A. Motions to Dismiss and Leave to Amend

16 To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must make “factual
17 allegations [that are sufficient] to raise a right to relief above a speculative level.” *Bell Atlantic*
18 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). On a motion to dismiss, a court must take all of the
19 factual allegations in a complaint as true, but the court need not accept as true “[t]hreadbare recitals
20 of the elements of a cause of action,” or legal conclusions presented as facts. *Ashcroft v. Iqbal*, 556
21 U.S. 662, 678 (2009). A trial court may also dismiss a claim *sua sponte* under Rule 12(b)(6) if it
22 determines a claimant clearly cannot win relief. *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991
23 (9th Cir. 1987).

24 When an allegation involves fraud pursuant to Rule 9(b), a heightened pleading standard
25 applies and a party must state with particularity the circumstances constituting fraud or mistake.
26 Fed. R. Civ. P. 9(b). A motion to dismiss a complaint or claim grounded in fraud under Rule 9(b)
27 for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule
28 12(b)(6) for failure to state a claim. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir.

1 2003). “If dismissal is granted under either Rule 12(b)(6) or 9(b), leave to amend should be allowed
2 unless the pleading could not possibly be cured by the allegation of other facts.” *In re Apple In-App*
3 *Purchase Litig.*, 855 F. Supp. 2d 1030, 1040 (N.D. Cal. 2012) (citing *Lopez v. Smith*, 203 F.3d
4 1122, 1130 (9th Cir. 2000) and *Vess*, 317 F.3d at 1108).

5 **B. Declaratory Judgment**

6 Plaintiff seeks a declaratory judgment by this court pursuant to 28 U.S.C. § 2201, *et seq.*
7 that:

8 (a) this action may proceed and be maintained as a class action; (b) the
9 contracts between [d]efendant and the [c]lass members relating to the
10 purchase of Game Currency are voidable at the option of the respective
11 [c]lass members on behalf of their minor children; (c) if the [c]lass
12 members elect to void the contracts, they will be entitled to restitution; (d)
an award of reasonable attorneys’ fees and costs of suit to [p]laintiff and
the [c]lass is appropriate; and (e) such other and further relief as is
necessary and just may be appropriate as well.

13 Compl. ¶ 50. Plaintiff’s declaratory judgment claim rests on plaintiff’s allegations that each
14 purchase of Game Currency is a contract between Google and minor children, which parents can
15 disaffirm. Google moves to dismiss plaintiff’s declaratory judgment claim on two alternative
16 grounds: (1) if the contracts are with plaintiff’s minor child, plaintiff does not have standing to
17 disaffirm the contracts; and (2) that the contracts in question are with plaintiff and not plaintiff’s
18 minor child.

19 **1. Standing of Plaintiff to Disaffirm the Contracts of a Minor Child**

20 Plaintiff alleges California Family Code § 6710 provides that the contract of a minor is
21 voidable by disaffirmance by the minor or a parent or guardian on behalf of a minor. Compl. ¶¶ 46-
22 49. Google argues that if any contracts were made with plaintiff’s minor child, as plaintiff alleges,
23 this claim should be dismissed as a matter of law because plaintiff does not have standing to
24 disaffirm the contracts of her minor child as she did not sue on behalf of her minor child. MTD 3-5.

25 Plaintiff acknowledges that under California Family Code § 6710, the contract of a minor
26 may only be disaffirmed by the minor, but argues that § 6710 only refers to which party in the
27 transaction can disaffirm, averring “it would be untenable to require the minors (some younger than
28

1 four years old) to knowingly express disaffirmance.” MTD 6-7 (citing *Apple In-App Purchase*
2 *Litig.*, 855 F. Supp. 2d at 1036 n.4). However, plaintiff is incorrect in both her assumption that
3 § 6710 requires the minor to “knowingly express disaffirmance” and that such a requirement would
4 undermine the utility of § 6710. *Id.* at 7. As Google points out, express disaffirmance by the minor
5 himself or herself is not required because a legal representative of the minor may bring the case on
6 the minor’s behalf. Google, Inc.’s Reply in Support of MTD (“Reply”), Dkt. No. 24, at 1.

7 The power to disaffirm a minor’s contract does not extend to the minor’s parents. *See I.B. ex*
8 *rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989, 1004-05 (N.D. Cal. 2012) (dismissing the claims of
9 plaintiffs who did not bring their claims on behalf of their minor children). Because plaintiff did not
10 bring suit on behalf of her minor child, she does not have standing to disaffirm any contracts made
11 by her minor child.

12 **2. Contracts between Google and Minor Child**

13 Plaintiff has sufficiently alleged that each In-App Purchase constituted a contract with her
14 minor son. Plaintiff’s theory is that Google made an offer, in the form of all Game Currency Google
15 presented for sale. Compl. ¶ 42. Plaintiff’s minor son accepted that offer through his purchase of
16 Game Currency from Google. *Id.* at ¶ 43.

17 Google argues that plaintiff’s declaratory judgment claim should be dismissed as a matter of
18 law because all purchases made on the plaintiff’s account are governed by the Terms of Service, a
19 contract between Google and Plaintiff. MTD 5-6. If, as Google argues, the contract is not with a
20 minor, then the contract is not voidable under California Family Code § 6710. Google further
21 contends that, as all purchases were “made through [p]laintiff’s device, using [p]laintiff’s Google
22 Play account, and were billed to [p]laintiff,” the Terms of Service control, which make plaintiff
23 responsible for all transactions on her account. *Id.* at 5; *see also* Schmidlein Decl. Ex. B (Dkt. No.
24 20-1), at 2.

25 Plaintiff responds that the Terms of Service do not control because the contracts at issue are
26 the individual purchases of Game Currency by the minor, not the creation of plaintiff’s Google Play
27 account. Plaintiff’s Opposition to MTD (“Opp.”), Dkt. No. 23, at 4. Plaintiff argues that even if the
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1 Terms of Service do control the contracts, the terms are ambiguous and thus subject to
2 interpretation. *Id.* at 5.

3 Under California law, “courts may not dismiss on the pleadings when one party claims that
4 extrinsic evidence renders the contract ambiguous. The case must proceed beyond the pleadings so
5 that the court may consider the evidence.” *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d
6 493, 497 n.2 (9th Cir. 1988). However, if “the court decides that the contract is not reasonably
7 susceptible to more than one interpretation, the court can reject the assertion of ambiguity.” *Skilstaf,*
8 *Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1115 (9th Cir. 2012).

9 Plaintiff alleges that the term “authorized” is ambiguous and seeks to introduce extrinsic
10 evidence as to whether the Terms of Service apply to contracts generated from unauthorized use of
11 accounts. *Id.* Google counters that no extrinsic evidence is required to determine that the Terms of
12 Service define the contract as between the plaintiff and Google. *See* Reply 4. Moreover, the term
13 “authorized” does not appear in the relevant sections of the Terms of Service, and plaintiff does not
14 allege that any other terms in the Terms of Service are ambiguous.

15 In sum, plaintiff’s pleading is deficient in two regards. If the alleged contracts at issue are
16 between plaintiff’s minor child and Google, then plaintiff does not have standing to void the
17 contracts on behalf of her child. She would have to sue in a representative capacity. If the contracts
18 are instead between plaintiff and Google, plaintiff has not alleged any terms actually present in the
19 Terms of Service which might render the Terms of Service ambiguous or suggest that plaintiff is not
20 liable for the allegedly unauthorized purchases by her minor sons. Therefore, the court GRANTS
21 Google’s motion to dismiss plaintiff’s declaratory judgment claim, with leave to amend.

22 **C. CLRA Claim**

23 Plaintiff alleges Google violated the Consumers Legal Remedies Act (“CLRA”) by
24 concealing the ability to use real-world currency to purchase Game Currency in gaming Apps
25 labelled as “free,” with the intent of inducing minors to purchase said Game Currency. Compl. ¶ 54.
26 In so doing, plaintiff alleges Google has violated: (1) Cal. Civ. Code § 1770(a)(5), by “representing
27 that goods or services have sponsorship, approval, *characteristics*, ingredients, *uses*, benefits, or
28 qualities that they do not have”; (2) Cal. Civ. Code § 1770(a)(7), by “representing that goods or

1 services are of a particular *standard, quality, or grade . . . if they are of another*”; and (3) Cal. Civ.
2 Code § 1770(a)(14), by “representing that a transaction confers or involves rights, remedies, or
3 obligations which it does not have or involve, or which are prohibited by law.” Cal. Civ. Code
4 § 1770 (emphasis added); *see also* Compl. ¶ 54. Plaintiff further alleges Google had a duty to
5 disclose material facts about the Game Currency offered in Apps it “marketed, advertised, and
6 promoted to children as ‘free.’” *Id.* at ¶ 56.

7 Google argues plaintiff’s CLRA claim is procedurally defective due to a failure to fulfill the
8 heightened pleading requirements of Rule 9(b), which require that “in allegations of fraud or
9 mistake, a party must state with particularity the circumstances constituting fraud or mistake” and
10 that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged
11 generally.” MTD 11; *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)
12 (stating that Rule 9(b) always applies to claims of violation of the CLRA). Plaintiff argues that she
13 has sufficiently alleged CLRA claims under Rule 9(b). Opp. 11.

14 A duty to disclose arises under the CLRA in four cases: “(1) when the defendant is in a
15 fiduciary relationship with the plaintiff; (2) when the defendant has the exclusive knowledge of
16 material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact
17 from the plaintiff; and (4) when the defendant makes partial representations but also suppresses
18 some material fact.” *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1142 (9th Cir. 2012) (quoting
19 *Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007)). A non-disclosed fact
20 is material when the plaintiff can show that, had the fact been disclosed, the plaintiff would have
21 been “aware of it and behaved differently.” *Id.* (quoting *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093
22 (1997)).

23 Plaintiff has sufficiently alleged that Google had a duty to disclose material facts about the
24 Game Currency in the “games it marketed, advertised, and promoted to children as ‘free.’” Compl.
25 ¶ 56. Plaintiff has further specifically alleged the misrepresentations she was exposed to and the
26 resulting harm. Plaintiff pled specific facts that Google “actively advertis[ed], market[ed], and
27 promot[ed] certain gaming Apps as ‘free.’” *Id.* at ¶ 69. Plaintiff has also alleged she was charged
28 money after Game Currency was purchased without her authorization. *Id.* at ¶ 10.

1 Google argues plaintiff has not sufficiently alleged a claim for relief because “she fails to
2 identify a single game that she downloaded that was ‘free.’” MTD 12. In support, Google argues
3 Run Jump Smash costs \$0.99, attaching a printout of the Google Play page for the App. *See*
4 Schmidlein Decl. Ex. A (Dkt. No. 20-1). However, as plaintiff correctly points out, a district court
5 generally “may not consider any material beyond the pleadings in ruling on a 12(b)(6) motion to
6 dismiss for failure to state a claim.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

7 Nonetheless, plaintiff alleges she downloaded Run Jump Smash and “[i]n the 30 minutes
8 after [she] permitted the download, a subsequent purchase was made in the Run Jump Smash game
9 without her authorization.” Compl. ¶ 10. Plaintiff further alleges she “was given no indication by
10 Google that [she was] approving anything more than a single ninety-nine-cent (\$0.99) transaction.”
11 *Id.* at ¶ 26. Because plaintiff did not authorize a purchase after the download, but did authorize a
12 \$0.99 purchase as part of the transaction, her allegation only makes sense if the purchase of the App
13 was for \$0.99. Additionally, plaintiff argues her usage of the term “free” was merely for brevity, and
14 that a nominal cost, in all cases \$0.99, was included in the term. Opp. 12.

15 The parties’ dispute over the price of the App notwithstanding, it is clear from the complaint
16 as a whole that “free” includes both free and nominally valued App purchases, such as those that
17 cost \$0.99. *See, e.g.*, Compl. ¶ 1 (“free or moderately priced application”); *Id.* at ¶ 22 (“free or cost
18 a nominal charge”); *Id.* at ¶ 28 (“free or inexpensive (e.g. \$0.99)”). Plaintiff sufficiently alleges that
19 she purchased a free or nominally priced App. *See id.* at ¶ 10 (alleging plaintiff downloaded Run
20 Jump Smash); *id.* at ¶ 26 (alleging plaintiff was given no indication she was approving more than
21 \$0.99).

22 However, plaintiff has failed to sufficiently allege that she relied upon Google’s
23 misrepresentation or that she would have behaved differently had she been aware of it. While
24 plaintiff alleges she was charged \$65.95 without her authorization and that Google gave her no
25 indication that she was approving anything more than a \$0.99 purchase, she fails to explicitly allege
26 that she was unaware of either the 30-minute password duration or the ability to make In-App
27 Purchases. Compl. ¶¶ 10, 26.

1 Plaintiff has also not sufficiently alleged materiality because she has not alleged that she
2 would have acted differently, had she been aware of the ability to make purchases without
3 reentering her password. It seems clear from plaintiff's complaint and opposition to the motion to
4 dismiss that plaintiff could allege facts sufficient to show reliance and materiality. Therefore, the
5 court GRANTS Google's motion to dismiss plaintiff's CLRA claim, with leave to amend.

6 **D. Unfair Competition Law Claim**

7 Plaintiff alleges Google violated California's Unfair Competition Law, Business &
8 Professions Code § 17200, *et seq.* ("UCL"), through "unlawful," "unfair," and "fraudulent" business
9 acts or practices and "unfair, deceptive or misleading" advertising. Compl. ¶¶ 62-74. The UCL
10 "prohibits acts of 'unfair competition' defined as: (1) unlawful business acts or practices; (2) unfair
11 business acts or practices; (3) fraudulent business acts or practices; and (4) unfair, deceptive or
12 misleading advertising." *Apple In-App Purchase Litig.*, 855 F. Supp. 2d at 1040. Rule 9(b)'s
13 heightened pleading requirements apply to UCL "unfair" and "unlawful" business act or practice
14 claims which are dependent upon allegations of fraudulent omissions and misrepresentations. *Id.* at
15 1039; *see also Kearns.*, 567 F.3d at 1126-27; *In re Facebook PPC Adver. Litig.*, 2010 WL 3341062,
16 at *9 (N.D. Cal. Aug. 25, 2010).

17 Here, plaintiff's "unfair" and "unlawful" business practice claims are dependent upon
18 allegations that Google made fraudulent misrepresentations and omissions regarding Google's free
19 and nominally priced Apps, and therefore Rule 9(b)'s pleading requirements apply.

20 **1. Unlawful Business Acts or Practices**

21 A business's violations of law are actionable "unlawful" business acts or practices under the
22 UCL. *Apple In-App Purchase Litig.*, 855 F. Supp. 2d at 1040 n. 7 (citing *In re Actimmune*
23 *Marketing Litig.*, 2009 WL 3740648, at *15 (N.D. Cal. Nov. 6, 2009)). To state a claim for unlawful
24 business acts or practices under the UCL, "it is not necessary that plaintiffs allege violation of the
25 predicate laws with particularity; they must at a minimum, however, identify the statutory or
26 regulatory provisions that defendants allegedly violated." *Id.* (quoting *Actimmune*, 2009 WL
27 3740648, at *15).

1 Plaintiff alleges Google committed an unlawful business act or practice in violation of the
2 UCL when Google violated the CLRA. Compl. ¶ 68. Plaintiff does not allege any other statutory
3 violation by Google as predicate to a claim for unlawful business acts or practices under the UCL.
4 As previously discussed in the analysis of plaintiff’s CLRA claim, plaintiff has not sufficiently
5 alleged that Google has committed a CLRA violation. Because plaintiff has not sufficiently
6 identified a statutory or regulatory provision that Google allegedly violated, plaintiff has failed to
7 state a claim for “unlawful” business acts or practices under the UCL.

8 **2. Unfair Business Acts or Practices**

9 Under the UCL, “[a business] act or practice is unfair if the consumer injury is substantial, is
10 not outweighed by any countervailing benefit to consumers or to competition, and is not an injury
11 the consumers themselves could reasonably have avoided.” *Apple In-App Purchase Litig.*, 855 F.
12 Supp. 2d at 1040 (quoting *Tietsworth v. Sears, Roebuck and Co.*, 2009 WL 3320486, at *7 (N.D.
13 Cal. Oct. 13, 2009)). For the purpose of alleging an “unfair” business act or practice, demonstrating
14 “aggregate harm on consumers is sufficient to show substantial injury.” *F.T.C. v. Inc21.com Corp.*,
15 688 F. Supp. 2d 927, 939 (N.D. Cal. 2010).

16 Plaintiff alleges she and class have suffered substantial harm in the aggregate by incurring
17 Google Play charges that they did not explicitly authorize. Compl. ¶¶ 10, 72. Plaintiff also contends
18 she could not have reasonably avoided the injury as she “was given no indication by Google that
19 [she] was approving anything more than a single ninety-nine cent (\$0.99) transaction” and that she
20 was deceived by Google’s practices. *Id.* at ¶¶ 26, 71. However, plaintiff does not allege that the
21 harm of Google’s purported unfair business act outweighs any countervailing benefit to consumers
22 or to competition. Therefore, plaintiff has failed to sufficiently allege that Google has committed an
23 “unfair” business practice or act under the UCL.

24 **3. Fraudulent Business Acts or Practices**

25 To state a claim for “fraudulent” business acts or practices under the UCL, “plaintiffs must
26 allege with specificity that defendant’s alleged misrepresentations: (1) were relied upon by the
27 named plaintiffs; (2) were material; (3) influenced the named plaintiffs’ decision to purchase the
28 product; and (4) were likely to deceive members of the public.” *Apple In-App Purchase Litig.*, 855

1 F. Supp. 2d at 1041 (citing *Tietsworth*, 2009 WL3320486, at *8). The sufficiency of a plaintiff’s
2 UCL fraud claim may be analyzed together with the plaintiff’s CLRA claim. *Id.* (citing *Kowalsky v.*
3 *Hewlett-Packard Co.*, 2011 WL 3501715 (N.D. Cal. Aug. 10, 2011)).

4 As discussed above, plaintiff has not pled specific facts to support a claim for violation of
5 the CLRA. Plaintiff has alleged that Google’s business acts or practices were likely to deceive the
6 public. Compl. ¶¶ 69, 71. However, plaintiff has failed to allege Google’s misrepresentations were
7 relied upon by plaintiff, were material, and influenced plaintiff’s decision to purchase the product.
8 Therefore, plaintiff has failed to sufficiently allege that Google has committed “fraudulent” business
9 acts or practices under the UCL.

10 **4. Unfair, Deceptive or Misleading Advertising**

11 To state a claim for “unfair, deceptive or misleading” advertising under the UCL, “a plaintiff
12 need merely allege that members of the public are likely to be deceived by defendants’ conduct.”
13 *Apple In-App Purchase Litig.*, 855 F. Supp. 2d at 1040 n. 10 (quoting *Actimmune*, 2009 WL
14 3740648, at *7).

15 Plaintiff alleges Google actively advertised, marketed and promoted certain gaming Apps as
16 “free” with the intent to lure minors to purchase Game Currency in a manner likely to deceive the
17 public. Compl. ¶ 69. Plaintiff alleges Google’s deceptive practices have deceived and/or are likely
18 to deceive members of the public. *Id.* at ¶ 71. Plaintiff has sufficiently alleged that Google has
19 committed “unfair, deceptive or misleading” advertising under the UCL.

20 In sum, taking all factual allegations in the complaint as true, plaintiff has sufficiently pled a
21 claim for “unfair competition” under the UCL through “unfair, deceptive or misleading”
22 advertising. Plaintiff has failed to plead claims for “unfair competition” under the UCL through
23 allegations of violations of “unlawful,” “unfair,” and “fraudulent” business acts or practices.

24 The court GRANTS Google’s motion to dismiss Plaintiff’s UCL claim for violations of
25 “unlawful,” “unfair,” and “fraudulent” business acts or practices with leave to amend. The court
26 DENIES Google’s motion to dismiss plaintiff’s UCL claim for violations of “unfair, deceptive or
27 misleading” advertising.

1 **E. Unjust Enrichment and Restitution**

2 Plaintiff alleges that Google has been unjustly enriched at the expense of plaintiff and class
3 by collecting money Google is not entitled to. Compl. ¶ 79. Plaintiff further alleges that she and the
4 class are entitled to recover from Google all amounts wrongfully collected and improperly retained
5 by Google, plus interest. *Id.* at ¶ 80.

6 Google argues that the Ninth Circuit has held that “unjust enrichment ‘does not describe a
7 theory of recovery’ under California law.” MTD 7 (quoting *In re Sony PS3 “Other OS” Litigation*,
8 551 F. App’x 916, 923 (9th Cir. 2014)). Rather than a theory of recovery, Google argues that unjust
9 enrichment is a principle “underlying various legal doctrines and remedies.” *Id.* (citing *Donohue v.*
10 *Apple, Inc.*, 871 F. Supp. 2d 913, 932 (N.D. Cal. 2012)).

11 Plaintiff argues in response that recent Ninth Circuit precedent runs contrary to Google’s
12 argument. Opp. 7. The most recent Ninth Circuit decision on the subject incorporates unjust
13 enrichment as an independent claim. *See Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1070
14 (9th Cir. 2014) (providing the elements of unjust enrichment as the “receipt of a benefit and unjust
15 retention of the benefit at the expense of another”) (quoting *Lectrodryer v. SeoulBank*, 77 Cal. App.
16 4th 723, 726 (Cal. Ct. App. 2000); *see also Apple In-App Purchase Litig.*, 855 F. Supp. 2d at 1042
17 (permitting a claim for unjust enrichment under similar circumstances); *Ellsworth v. U.S. Bank*,
18 *N.A.*, 908 F. Supp. 2d 1063, 1088 (N.D. Cal. 2012) (holding plaintiff could proceed with unjust
19 enrichment claim at the motion to dismiss stage).

20 Google’s argument that the court should ignore *Berger* is unpersuasive. Reply 7. While
21 Google is correct that the issue in that case was class certification, the Ninth Circuit first discussed
22 unjust enrichment as a claim before determining that the plaintiff’s claim for unjust enrichment was
23 not susceptible to class treatment in that specific case. *Berger*, 741 F.3d at 1070. Other recent cases
24 also point to unjust enrichment as a cause of action in California. *See Gabriel v. Alaska Elec.*
25 *Pension Fund*, No. 12-35458, 2014 WL 2535469, at *8 (9th Cir. June 6, 2014) (noting that “the
26 remedy of surcharge is available against the fiduciary ‘for benefits it gained through unjust
27 enrichment’” (quoting *Skinner v. Northrop Grumman Retirement Plan B*, 673 F.3d 1162, 1167 (9th
28 Cir. 2012)) ; *E.J. Franks Construction, Inc. v. Sohota*, F066327, 2014 WL 2526978, at *1 (Cal. Ct.

1 App. June 5, 2014) (allowing plaintiff to bring unjust enrichment claims to trial); *People v. Sarpas*,
2 255 Cal. Rptr. 3d 25, 47 (2014) (holding “plaintiffs had ‘stated a valid cause of action for unjust
3 enrichment’” (quoting *Hirsch v. Bank of America*, 107 Cal. App. 4th 708, 722 (2003))).

4 Google’s suggestion that the court follow an unpublished, non-precedential report is
5 similarly unpersuasive. Even permitting that *Berger* did not expressly hold that California law
6 recognizes an unjust enrichment cause of action, the factually analogous *In re Apple In-App*
7 *Purchase Litigation* allowed the plaintiffs to proceed with an unjust enrichment claim at the motion
8 to dismiss stage. *Apple In-App Purchase Litig.*, 855 F. Supp. 2d at 1042. Therefore, the court
9 DENIES Google’s motion to dismiss plaintiff’s claim for unjust enrichment.

10 **F. Breach of Duty of Good Faith and Fair Dealing**

11 Plaintiff alleges Google breached its contractual duty of good faith and fair dealing with
12 plaintiff and class. Compl. ¶¶ 82-89. Plaintiff specifically alleges Google engaged in conduct apart
13 from its agreement² with plaintiff and class, without good faith, “for the purpose of depriving
14 plaintiff and . . . class of rights and benefits under the contract, to wit, a sales transaction for an item
15 the consumer *intended* to purchase.” *Id.* at ¶¶ 85, 87 (emphasis in original). Google argues
16 plaintiff’s claim fails as a matter of law because under California law the implied covenant cannot
17 be used to negate an express term of the parties’ contract to which plaintiff agreed. MTD 9-10.
18 Google also argues plaintiff’s claim fails because the implied covenant cannot be used to impose
19 additional terms and duties to a contract – i.e. imposing that a consumer’s “inten[t] to purchase” is a
20 condition precedent to engaging in an enforceable sales transaction with Google. *Id.* at 10-11

21 Every contract in the state of California contains an implied covenant of good faith and fair
22 dealing that neither party will injure the right of the other party to receive the benefits of the
23 agreement. *Apple In-App Purchase Litig.*, 855 F. Supp. 2d at 1041 (citing *Wolf v. Walt Disney*
24 *Pictures & Tel.*, 162 Cal. App. 4th 1107, 1120 (2008)). The covenant is implied in every contract in
25 order to protect the express covenants or promises of the contract. *Id.* at 1041-42 (citing *Carma*
26 *Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th 342, 373 (1992)). The

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28 ² “Agreement” refers to the Terms of Service to which each member of the class agreed when they
opened a Google Play account.

1 covenant will not be implied “to prohibit a party from doing that which is expressly permitted by the
2 agreement itself.” *Id.* at 1042 (citing *Carma*, 2 Cal. 4th at 373). The implied covenant “cannot
3 impose substantive duties or limits on the contracting parties beyond those incorporated in the
4 specific terms of their agreement.” *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 779
5 (9th Cir. 2003) (quoting *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 350 (2000)). “To establish a claim
6 for breach of the implied covenant of good faith and fair dealing, [p]laintiffs must show that
7 [defendant] lacked subjective good faith in the validity of its act or the act was intended to and did
8 frustrate the common purpose of the agreement.” *Apple In-App Purchase Litig.*, 855 F. Supp. 2d at
9 1042 (citing *Carma*, 2 Cal. 4th at 373).

10 Here, Google’s Terms of Service signed by plaintiff and class expressly provides that
11 signees are “responsible for the activity that happens on or through [their] Google account[s].”
12 Schmidlein Decl. Ex. B (Dkt. No. 20-1) at 2. This express provision agreed to by plaintiff and class
13 entitles Google to bill plaintiff and class’s Google Play accounts for charges incurred through such
14 activity regardless of their intent. However, plaintiff has alleged that Google encouraged children to
15 make In-App Purchases, without providing notice to the parent or guardian of the 30-minute
16 window in which the account holder’s password is not required to make subsequent purchases.
17 Compl. ¶ 29. Such acts may frustrate the common purpose of the agreement by forcing parents to
18 pay for purchases that Google induced parents’ minor children to make.

19 Therefore, plaintiff has sufficiently pled facts which would demonstrate how Google
20 breached the duty of good faith and fair dealing. Accordingly, the court DENIES Google’s motion
21 to dismiss plaintiff’s claim for breach of the implied covenant of good faith and dealing.

22 III. ORDER

23 For the reasons explained above, the court orders as follows with respect to each of the
24 claims at issue:

- 25 • Declaratory Judgment: Dismissed with 30 days leave to amend.
 - 26 • CLRA: Dismissed with 30 days leave to amend.
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- UCL
 - Unlawful business practices or act: dismissed with 30 days leave to amend.
 - Unfair business practices or act: dismissed with 30 days leave to amend.
 - Fraudulent business acts: dismissed with 30 days leave to amend.
 - Unfair, deceptive or misleading advertising: not dismissed.
- Unjust Enrichment and Restitution: Not dismissed.
- Breach of Good Faith and Fair Dealing: Not dismissed.

Dated: July 21, 2014


Ronald M. Whyte
United States District Judge