

1 **I. BACKGROUND**

2 The factual background of this case is well known to the parties and has been
3 discussed extensively in this Court's prior orders. It need not be repeated in full here.

4 According to the complaint, in February 2004, Plaintiff Alicia Hoffman entered
5 into a Wireless Service Agreement (the "Agreement") with Cingular for cellular
6 telephone service. (*Compl.*, ¶10.) Hoffman's service plan provided 850 "anytime
7 minutes" and included Cingular's "rollover" feature that allowed unused anytime
8 minutes to roll over to the next month. (*Id.*, ¶¶2, 10.) The monthly service fee was
9 \$59.99. (*Id.*, ¶10.) Hoffman alleges that under the Agreement, rollover minutes would
10 only expire under three well-defined circumstances: (1) after twelve months; (2) upon
11 default; or (3) if she switched to a non-rollover plan. (*Id.*, ¶11.)

12 Plaintiff alleges that on October 7, 2004, she added Plaintiff Market Trading, Inc.
13 to the account. (*Id.*, ¶12.) By October 2005, Plaintiffs had accumulated more than
14 10,000 rollover minutes. (*Id.*)

15 Sometime in October 2005, Hoffman contacted Cingular to switch to a service
16 plan with fewer anytime minutes so she could begin to use her accumulated rollover
17 minutes. (*Id.*, ¶13.) According to Hoffman, Cingular's customer service representative
18 stated that Hoffman would not be allowed to keep all of the unused minutes if she
19 switched to a service plan with fewer anytime minutes. (*Id.*) Instead, Hoffman would
20 be allowed to transfer only the number of rollover minutes equal to her new service
21 plan's monthly anytime-minute allowance. (*Id.*) In other words, if Hoffman's new plan
22 provided only 500 monthly anytime minutes, she would only be allowed to transfer 500
23 of her 10,000 unused rollover minutes.

24 On April 6, 2006, Plaintiffs filed this class-action lawsuit in the San Diego
25 Superior Court. The complaint includes three causes of action for (1) breach of
26 contract, (2) violation of California Civil Code §§ 1750, *et. seq.* (the Consumers Legal
27 Remedies Act or "CLRA"), and (3) violation of California Business and Professions
28 Code §§ 17200, *et. seq.* (the "UCL"). Defendant's motion seeks to dismiss all causes of

1 action for failure to state a claim. Additionally, Defendant's seeks to strike certain
2 factual and damage allegations.

3
4 **II. LEGAL STANDARD**

5 **A. Motions to Dismiss Under Rule 12(b)(6).**

6 The court must dismiss a cause of action for failure to state a claim upon which
7 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
8 tests the complaint's sufficiency. See North Star Int'l. v. Arizona Corp. Comm'n., 720
9 F.2d 578, 581 (9th Cir. 1983). All material allegations in the complaint, "even if
10 doubtful in fact," are assumed to be true. Id. The court must assume the truth of all
11 factual allegations and must "construe them in the light most favorable to the
12 nonmoving party." Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also
13 Walleri v. Fed. Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).

14 As the Supreme Court recently explained, "[w]hile a complaint attacked by a
15 Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's
16 obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels
17 and conclusions, and a formulaic recitation of the elements of a cause of action will not
18 do." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007). Instead, the
19 allegations in the complaint "must be enough to raise a right to relief above the
20 speculative level." Id. at 1964-65. A complaint may be dismissed as a matter of law
21 either for lack of a cognizable legal theory or for insufficient facts under a cognizable
22 theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

23 Generally, the court may not consider material outside the complaint when ruling
24 on a motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d
25 1542, 1555 n.19 (9th Cir. 1990). However, the court may consider any documents
26 specifically identified in the complaint whose authenticity is not questioned by the
27 parties. Fecht v. Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995). Moreover, the
28 court may consider the full text of those documents, even when the complaint quotes

1 only selected portions. Id. The court may also consider material properly subject to
2 judicial notice without converting the motion into a motion for summary judgment.
3 Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994) (citing Mack v. South Bay Beer
4 Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986) *abrogated on other grounds by* Astoria
5 Federal Savings and Loan Ass’n v. Solimino, 501 U.S. 104 (1991)).

6
7 **III. CINGULAR’S MOTION TO DISMISS**

8 **A. The Complaint Adequately Alleges a Right to Change Rate Plans.**

9 Cingular contends that the complaint’s allegations establish that Plaintiffs
10 attempted to change rate plans before the Agreement expired. Cingular argues,
11 however, that the complaint fails to explicitly allege a “contractual right to subsequently
12 switch rate plans in the midst of their contract...” Because Plaintiffs fail to allege a
13 contractual right to change plans before the Agreement expired, Cingular contends that
14 the UCL and breach of contract claims fail. (*Mot. to Dismiss*, 4:16–18.)

15 Plaintiffs counter by arguing that the complaint sufficiently alleges that “Plaintiff
16 had the contractual right to change rate plans during the term of the contract with
17 Defendant.” (*Opp.’n to Mot. to Dismiss*, 10:10–11.) Based on the standard applicable
18 to this motion, the Court agrees with Plaintiffs.

19 The complaint alleges that “On February 18, 2004, [Hoffman] entered a contract
20 with Cingular, under which she purchased a cellular phone and subscribed to Cingular’s
21 monthly plan that provided 850 ‘anytime minutes’ with the advertised ‘rollover’ feature,
22 for a fee of \$59.99 per month.” (*Compl.*, ¶10.) Plaintiffs also allege that before entering
23 into the Agreement, “Hoffman reviewed the terms of Cingular’s monthly plan which
24 represented that unused ‘anytime minutes’ would expire only under three well-defined
25 circumstances: (1) after twelve months; (2) upon default; or (3) if she changed to a non-
26 rollover plan.” (*Id.*, ¶11, emphasis added.)

27 The Agreement is not attached to the complaint, and the parties did not attach
28 a copy of the document to any of the papers filed in connection with the motion. It is,

1 therefore, impossible for the Court to determine whether Plaintiffs had a contractual
2 right to change rate plans before the Agreement expired.

3 Additionally, on a motion to dismiss, all reasonable inferences must be decided
4 in Plaintiffs' favors. Thus, although the complaint does not expressly allege that
5 Plaintiffs could change rate plans before the Agreement expired, the allegations suggest
6 that Hoffman had such a right.

7
8 **B. Plaintiffs Lack Standing Under the CLRA.**

9 Cingular argues that Plaintiffs lack standing to pursue the CLRA because the
10 Agreement was not entered in Hoffman's name. The Court agrees.

11 The CLRA makes unlawful certain acts "undertaken by any person in a
12 transaction intended to result or which results in the sale or lease of goods or services
13 to any consumer." Cal. Civ.Code § 1770(a). A "consumer" is defined as "an individual
14 who seeks or acquires, by purchase or lease, any goods or services for personal, family,
15 or household purposes." *Id.* § 1761(d). Accordingly, only a consumer may pursue a
16 violation of the CLRA. *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003).

17 Cingular argues that, contrary to the complaint's allegations, Hoffman did not
18 open the service plan in her name, but instead opened the account in the name of
19 Plaintiff Market Trading, Inc. (*Mot. to Dismiss*, 10:21–24.) Cingular's argument is based
20 on the account's initial billing record that is attached to the Declaration of Timothy A.
21 Horton, and which Cingular argues the Court may consider under the "incorporation
22 by reference" doctrine. (*Id.*)

23 Plaintiffs argue that the Court should not consider the billing statement because
24 the incorporation by reference doctrine does not apply. Plaintiffs acknowledge that the
25 doctrine applies where a document's "contents are alleged in the complaint and whose
26 authenticity no party questions, but which are not physically attached to the plaintiff's
27 pleading." (*Opp.'n to Mot. to Dismiss*, 16:7–9, citing *Knieval v. ESPN*, 393 F.3d 1069,
28 1076 (9th Cir. 2005). Plaintiffs then state that "Plaintiff vigorously challenges

1 Defendant's characterization and factual assumption raised by Defendant's argument
2 that Plaintiff Alicia Hoffman did not open a personal account in February 2004." (*Id.*,
3 16:9–11.)

4 Although Cingular's motion cites Rule 12(b)(6), because standing involves the
5 Court's subject-matter jurisdiction, the motion must be evaluated under Federal Rule
6 of Civil Procedure 12(b)(1). See St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir.
7 1989) (Applying the Rule 12(b)(1) standard to a motion challenging subject-matter
8 jurisdiction on ripeness ground, even though moving party incorrectly identified Rule
9 12(b)(6).). Unlike a 12(b)(6) motion, in deciding a motion to dismiss for lack of subject
10 matter jurisdiction, the Court may review matters outside the complaint in order to
11 resolve jurisdictional fact issues: a "Rule 12(b)(1) motion can attack the substance of
12 a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing
13 rely on affidavits or any other evidence properly before the court." *Id.* (citing Thornhill
14 Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979)).

15 Here, the parties have provided the Court with two documents, both of which
16 establish that Plaintiff Hoffman was not the account holder. The first document is
17 Cingular's billing record, which identifies Market Trading as the account holder. The
18 second document, provided by Plaintiffs, is a "true and correct copy" of the sales receipt
19 from the purchase of the telephone and service plan. (*Hoffman Decl.*, ¶13, Ex. 3.¹) The
20 receipt identifies the buyer as another business, the Law Offices of Alicia Hoffman. (*Id.*,
21 Ex. 1 at 1.) Because the documents contradict Hoffman's contention that she
22 purchased the telephone and service plan for her personal use, Plaintiffs lack standing
23 to pursue the CLRA claims.²

26 ¹The Court further notes that Plaintiffs' opposition includes five exhibits, all attached
27 to Hoffman's declaration. None of the exhibits identify Hoffman as the account holder.

28 ²Because the documents establish that Hoffman is not the account holder, Hoffman also
lacks standing to pursue the breach of contract claim.

1 **C. Plaintiffs Fail to Allege the Requisite Harm.**

2 Citing Plaintiffs’ pattern of cellular telephone usage, Cingular next argues that
3 Plaintiffs have failed to adequately allege the requisite harm for each of their claims.
4 According to Cingular, in order for Plaintiffs to have accrued 10,000 rollover minutes
5 (as alleged in the complaint), Plaintiffs would have only been using, on average, 17
6 anytime minutes per month. (*Reply to Mt. to Dismiss*, 2:15–17.) Cingular thus argues
7 that it is implausible that Plaintiffs would have ever used any of their 10,000
8 accumulated rollover minutes, and accordingly Plaintiffs could not have been harmed
9 by Cingular’s alleged threat to confiscate the accumulated minutes. (*Id.*)

10 As an initial matter, the Court notes that Plaintiffs do not dispute that each of
11 the three claims requires Plaintiffs to allege harm. Plaintiffs argue, however, that it is
12 “not unreasonable to believe that Plaintiffs could have used more than 850 Anytime
13 minutes per month....” (*Opp.’n to Mt. to Dismiss*, 12:22–24.³) But the complaint’s
14 factual allegations simply do not support Plaintiffs’ argument.

15 The complaint’s allegations confirm that in the 12-month period before Plaintiffs
16 contacted Cingular to change rate plans, Plaintiffs used an average of approximately 17
17 anytime minutes per month, or 200 minutes for the entire period.⁴ Based on this usage
18 pattern, Plaintiffs would not have used any accumulated minutes unless Cingular offered
19 a rate plan with 16 anytime minutes per month. The complaint acknowledges, however,
20 that Cingular’s smallest rate plan provided 450 anytime minutes per month. (*Compl.*,
21 ¶19.) Thus, even under Cingular’s smallest plan, Plaintiffs would have accrued, on

23 ³ Plaintiffs also allege that they “need not prove that they would have used the entire
24 balance of their accrued Rollover minutes.” (*Opp.’n to Mt. to Dismiss*, 12:22–24.) The Court
25 agrees. But as Plaintiffs concede later in their brief, they must be able to prove that “Plaintiffs
would have used at least 1 of the” accrued minutes. (*Id.*, 12:24–25.)

26 ⁴ These figures are taken from complaint’s allegations that Plaintiffs’ service plan
27 provided 850 anytime minutes (*Compl.*, ¶10), and that by “October 2005 [Plaintiffs] had
28 accumulated approximately 10,000 unused ‘rollover minutes’” (*Id.*, ¶12). At 850 minutes per
month, Plaintiffs had 10,200 anytime minutes per year (850 x 12). Thus, if Plaintiffs accrued
10,000 rollover minutes in 12 months, Plaintiffs could only have used 200 anytime minutes for
the year or approximately 17 per month (200/12=17). (*See also Mot. to Dismiss*, 8:1 f.n.9.)

1 average, 433 minutes per month, and would have never used a single accrued rollover
2 minute.

3 Nor does the complaint as currently drafted include any facts that would allow
4 the Court to reasonably infer that after changing rate plans, Plaintiffs were going to
5 significantly increase the number of anytime minutes used. In short, the complaint's
6 allegations are not "enough to raise [Plaintiffs'] right to relief above the speculative
7 level." Twombly, 127 S.Ct. at 1964–1965.

8 Because Plaintiffs have failed to plead facts supporting the contention that they
9 were harmed by Cingular's conduct, Plaintiffs have failed to state a claim.

10

11 **IV. CONCLUSION AND ORDER**

12 For the foregoing reasons, the **GRANTS** Cingular's motion to dismiss (Doc. No.
13 58) and **DISMISSES** Plaintiffs' claims **WITHOUT PREJUDICE**. Any amended
14 complaint that addresses the defects discussed above must be filed on or before **October**
15 **3, 2008**.

16 In light of the foregoing, Cingular's motion to strike is **DENIED** as moot.

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18 **IT IS SO ORDERED.**

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20 DATED: September 4, 2008

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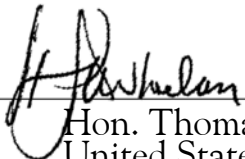
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Hon. Thomas J. Whelan
United States District Judge