UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID ANDINO, individually and on behalf of all others similarly situated, Plaintiff, v. APPLE, INC., a California Company, Defendant.	No. 2:20-cv-01628-JAM-AC **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS**

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND[1]

Apple Inc. ("Defendant") is one of the world's largest computer and phone manufacturers and retailers. First Am. Compl. ("FAC") ¶ 1, ECF No. 11. Apple's iTunes application allows consumers to "Rent" or "Buy" movies, television shows, music and other content. Id. ¶¶ 1, 2. If the consumer desires to "Rent" a movie, Apple advertises that for a fee of around $5.99, the consumer will have access to the movie for 30 days and then for

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for February 23, 2021.

48 hours after the consumer first starts to watch it. Id. ¶ 3. For a higher fee of around $19.99, Apple offers consumers the option to "Buy" the content. Id. ¶ 4. When a consumer opts to "Buy" the content, it then appears in their "Purchased" folder. Id. ¶ 13.

David Andino ("Plaintiff") argues this labeling is deceptive as the use of a "Buy" button and representation that content has been "Purchased" leads consumers to believe their access cannot be revoked. Id. ¶ 15. Plaintiff alleges this is untrue as Apple reserves the right to terminate the consumers' access and use of content at any time, and in fact, has done so on numerous occasions. Id. ¶ 16. Plaintiff claims he would not have purchased the content or would not have paid as much, if he had known that his access and use could be terminated at any time. Id. ¶ 25. Accordingly, Plaintiff filed a class action complaint on behalf of himself and those similarly situated, for violations of (1) California's Consumers Legal Remedies Act ("CLRA"); (2) California's False Advertising Law ("FAL"); and (3) California's Unfair Competition Law ("UCL"). ECF No. 1. After the complaint was amended to add a fourth claim for Unjust Enrichment, ECF No. 11 ("FAC"), Apple brought this Motion to Dismiss. Def.'s Mot. to Dismiss ("Mot."), ECF No. 16. Plaintiff opposed the Motion. Opp'n, ECF No. 19. Apple replied. Reply, ECF No. 20. For the reasons set forth below, the Court GRANTS in part and DENIES in part Apple's Motion to Dismiss.

II. OPINION

A. Legal Standard

A defendant may move to dismiss for lack of subject matter

jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(1). If the plaintiff lacks standing under Article III of the United States Constitution then the court lacks subject-matter jurisdiction, and the case must be dismissed. See Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011). Once a party has moved to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), the opposing party bears the burden of establishing the court's jurisdiction. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

A Rule 12(b)(6) motion challenges the complaint as not alleging sufficient facts to state a claim for relief. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss [under 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). While "detailed factual allegations" are unnecessary, the complaint must allege more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Id. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

B. Article III Standing

Article III of the Constitution limits the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S.

Const. art. III, § 2. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) (internal quotation marks and citation omitted). To establish standing "a plaintiff must show (1) [they have] suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. Inc., 528 U.S. 167, 180-81 (2000).

The parties dispute whether Plaintiff has alleged an injury in fact. Apple argues that Plaintiff's alleged injury — which it describes as the possibility that the purchased content may one day disappear — is not concrete but rather speculative. Mot. at 6-9. This, however, as Plaintiff points out, misconstrues the injury. Plaintiff responds that his injury is not that he may one day lose access to his content. Opp'n at 7. Rather the injury Plaintiff asserts, is that he spent money purchasing the content that he wouldn't have otherwise as a result of Apple's misrepresentation. Id. This occurred at the time of purchase.

To establish standing, Plaintiff need only allege an economic injury in fact. See Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015)(explaining that California's standing requirements for the UCL, FAL, and CLRA only require "an economic injury-in-fact, which demands no more than the

corresponding requirement under Article III of the Constitution.") "In a false advertising case, plaintiffs meet this requirement if they show that, by relying on a misrepresentation on a product label, they 'paid more for a product than they otherwise would have paid, or bought it when they otherwise would not have done so.'" Id. (quoting Hinojos v. Kohl's Corp., 718 F.3d 1098, 1104 n. 3, 1108 (9th Cir. 2013)) (also citing POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 108 (2014) for the proposition that "[a] consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III").

In Reid, the Ninth Circuit found that plaintiff had undoubtedly satisfied this requirement "as he alleged that he would not have been willing to pay as much as he did for Benecol, if anything, if he had not been misled by McNeil's misrepresentations about Benecol's health effects." 780 F.3d at 958. Similarly, Plaintiff alleges here that he would not have been willing to pay as much for the content, if anything, if he had not been misled by Apple's misrepresentations about his ability to indefinitely access that content. See FAC ¶¶ 23-25, 55-58, 68-71. Thus, the injury Plaintiff alleges is not, as Apple contends, that he may someday lose access to his purchased content. Rather, the injury is that at the time of purchase, he paid either too much for the product or spent money he would not have but for the misrepresentation. This economic injury is concrete and actual, not speculative as Apple contends, satisfying the injury in fact requirement of Article III. See Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015).

For the same reasons, the Court finds Plaintiff has also met the statutory standing requirements for the UCL, FAL, and CLRA. Id. (explaining that California's standing requirements for the UCL, FAL, and CLRA only require "an economic injury-in-fact, which demands no more than the corresponding requirement under Article III of the Constitution.")

Further, in Davidson v. Kimberly-Clark Corporation, the Ninth Circuit held that "[a] consumer's inability to rely on a representation made on a package, even if the consumer knows or believes the same representation was false in the past, is an ongoing injury" sufficient to confer standing to seek injunctive relief. 889 F.3d 956, 961 (9th Cir. 2018). In so holding the Ninth Circuit rejected the argument that "plaintiffs who are already aware of the deceptive nature of an advertisement are not likely to be misled into buying the relevant product in the future and therefore, are not capable of being harmed again in the same way." Id. at 968 (internal quotation marks and citation omitted). The Court noted "[k]knowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." Id. at 969. "In some cases, the threat of future harm may be the consumer's plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to. In other cases, the threat of future harm may be the consumer's plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the

product was improved." Id. at 969-70.

Apple argues that Plaintiff has not alleged a valid future threatened injury under Davidson as he neither alleges "he stopped buying Digital Content, nor does he allege any changes to the iTunes Store that 'reasonably' cause him to 'assume' that the Digital Content has 'improved.'" Def.'s Mot. at 10. But the Court does not read Davidson so narrowly. Rather, it seems clear from Davidson that a plaintiff's allegation that they will not be able to rely on a product's advertising or labeling is sufficient to demonstrate a future threatened injury, conferring standing to seek injunctive relief. See Davidson, 889 F.3d at 971-72 ("Davidson faces the similar injury of being unable to rely on Kimberly-Clark's representations of its product in deciding whether or not she should purchase the product in the future.")

Here, Plaintiff has alleged just that. Plaintiff claims he will not be able to rely on Apple's purchase option to know whether the content will be available indefinitely or not. FAC ¶¶ 59, 72, 90; see also Opp'n at 8. This is a threatened injury that is certainly impending, establishing Article III standing to assert a claim for injunctive relief. See Davidson, 889 F.3d at 972.

Because Plaintiff has alleged an economic injury and a threatened future injury, the Court finds Plaintiff has demonstrated standing sufficient to overcome this motion to dismiss. Accordingly, Apple's 12(b)(1) Motion to Dismiss for lack of standing and 12(b)(6) Motion to Dismiss for lack of statutory standing are DENIED.

C. Rule 9(b)

Rule 9(b) provides that: "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Claims alleging violations of the FAL, CLRA, and UCL that are based on fraudulent conduct must satisfy Rule 9(b). See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). This requires that the plaintiff plead the "who, what, when, where, why, and how, of the conduct charged." Id. at 1126. "[I]n a deceptive advertising case, Rule 9(b) requires that the plaintiff or plaintiffs identify specific advertisements and promotional materials; allege when the plaintiff or plaintiffs were exposed to the materials; and explain how such materials were false or misleading." Janney v. Mills, 944 F.Supp.2d 806, 815 (N.D. Cal. 2013).

Here, Plaintiff has identified specific promotional materials. Specifically, he alleges that consumers are given the option to "Buy" digital content in a variety of ways via a smart phone, computer or tablet, through the iTunes app or on Apple TV. FAC ¶ 2. Plaintiff then includes a representative sample of this option on the iTunes Store, including a picture of the options for "Sonic The Hedgehog"; "Westworld, Season 3"; and "Bridges Live: Madison Square Garden". See id. at 2-3. Plaintiff has also explained how such materials are false or misleading as he notes that reasonable consumers expect "buying" the content means access cannot be revoked. Id. ¶ 15. However, he explains how this is untrue as Apple reserves the right

terminate the consumers' access and use at any time. Id. ¶¶ 16, 17. And while Apple contends Plaintiff has not alleged he bought a movie or acted on the "Buy" representation, he has. See id. ¶ 25 ("Had Plaintiff and Class members known the truth, they would not have bought the Digital Content from Defendant or would have paid substantially less for it.") (emphasis added); see also id. ¶ 53 ("Defendant has violated the CLRA by representing that the Digital Content it sold to Plaintiff and the Class had been 'purchased'") (emphasis added); id. ¶ 58 ("Plaintiff and the Class members paid for Digital Content they thought they were purchasing") (emphasis added).

Thus, the only remaining question is whether Plaintiff has sufficiently pled the "when." While Plaintiff does not specify exactly when he or the other class members were exposed to these representations, the class consists of those who purchased content from August 13, 2016 through class certification and trial. Id. ¶ 32. The Court finds this allegation is sufficient. See In Re ConAgra Foods Inc., 908 F.Supp.2d 1090, 1100 (C.D. Cal. 2012) (finding Rule 9(b) was satisfied where plaintiffs alleged that the representation appeared on product labeling throughout the class period); see also United States v. United Healthcare Insurance Company, 848 F.3d 1161, 1180 (9th Cir. 2016) ("a complaint need not allege a precise time frame, describe in detail a single specific transaction or identify the precise method used to carry out the fraud" to comply with Rule(9)(b))(internal quotation marks and citation omitted). Plaintiff need not plead the exact date(s) he made his purchases to provide Apple with adequate notice to defend the charges as

this is a class action and Apple will have to defend the representations made throughout the class period anyway. See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009) (noting one of the purposes of Rule 9(b) is to provide defendants with adequate notice to allow them to defend the charge); see also Bly-Magee v. California, 236 F.3d 2014, 2019 (9th Cir. 2001) ("To comply with Rule 9(b), allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.") (internal quotation marks and citation omitted). Plaintiff has pled his claims with enough specificity to satisfy Rule 9(b).

D. Reasonable Consumer

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. California's FAL prohibits any "untrue or misleading" advertising. Id. § 17500. And California's CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770(a). Under the UCL, FAL, and CLRA, conduct is deceptive or misleading if it is likely to deceive a "reasonable consumer." Williams v. Gerber Products Co., 552 F.3d 934, 938 (9th Cir. 2008). "Under the reasonable consumer standard, [plaintiffs] must show that members of the public are likely to be deceived." Id. (internal quotation marks and citations omitted). The threshold for this "reasonable consumer" standard is higher than a "mere

possibility" that the label "might conceivably be misunderstood by some few consumers viewing it in an unreasonably manner." Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003). Instead, the reasonable consumer standard necessitates a likelihood "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Id. California courts "have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." Williams, 552 F.3d at 938. Only in rare situations is granting a motion to dismiss on this basis appropriate. Id. at 939.

Apple argues that Plaintiff has failed to state a claim because he mischaracterizes the "Buy" and "Purchased" language and views it in an unreasonable manner. Mot. at 11. Apple contends that "[n]o reasonable consumer would believe" that purchased content would remain on the iTunes platform indefinitely. Id. at 12. But in common usage, the term "buy" means to acquire possession over something. Buy Definition, merriam-webster.com, https://www.merriam-webster.com/dictionary/buy (13 April 2021). It seems plausible, at least at the motion to dismiss stage, that reasonable consumers would expect their access couldn't be revoked. See Williams, 552 F.3d at 939 (noting that only in a rare situation will granting a motion to dismiss based on whether a business practice is deceptive be appropriate). Apple also argues that because a user can download purchased content for full and irrevocable access, the "Buy" and "Purchased" language is

accurate. But the Court cannot consider such factual contentions at the motion to dismiss stage. See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (explaining "factual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6).")

E. Equitable Restitution Claims

Lastly, Apple contends that under Sonner v. Premier Nutrition Corp, 971 F.3d 834 (9th Cir. 2020), Plaintiff's claims for equitable restitution under the CLRA, FAL, UCL, and unjust enrichment must be dismissed as Plaintiff has failed to establish the requested CLRA damages are inadequate. Def.'s Mot. at 14. Plaintiff appears to concede this point and in fact explicitly withdraws his unjust enrichment claim based on this precedent. See Opp'n at 14 n 4; Opp'n at 14 (arguing that Sonner does not prevent Plaintiff's injunctive relief but saying nothing about his claims for equitable restitution).

In Sonner, the plaintiff brought suit under California's UCL and CLRA. 971 F.3d at 838. Shortly before trial the plaintiff amended her complaint to seek only restitution and equitable relief. Id. The Ninth Circuit held that a plaintiff "must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL and CLRA." Id. at 844. Because plaintiff had failed to establish she lacked an adequate remedy at law, the Court found dismissal of the equitable restitution claims was warranted. Id.

Here Plaintiff has not even attempted to explain why or how the requested CLRA damages are an inadequate remedy justifying

restitution damages. See Opp'n at 14; see generally FAC. Accordingly, the Court GRANTS Defendant's motion to dismiss Plaintiff's claims for equitable restitution under the UCL, FAL, and CLRA. See e.g. Resnick v. Hyundai Motor Am., Inc., CV 16-00593-BRO (P JWx), 2017 WL 1531192 at *22 (C.D. Cal. Apr. 13, 2017) ("Failure to oppose and argument raised in a motion to dismiss constitutes waiver of that argument.") The Court also GRANTS Defendant's motion to dismiss Plaintiff's unjust enrichment claim.

The Court however agrees with Plaintiff that Sonner does not warrant dismissal of his request for injunctive relief. Money damages are an inadequate remedy for future harm, as they will not prevent Defendant from continuing the allegedly deceptive practice. See Zeiger v. WETPET LLC, No. 3:17-CV-04056-WHO, 2021 WL 756109, at *21 (N.D. Cal. Feb. 26, 2021) (noting that even assuming Sonner applies to injunctive relief the plaintiff had shown monetary damages were an inadequate remedy because damages compensate for past purchases where an injunction ensures that one can rely on a defendant's representations in the future); FAC ¶ 58 ("If the Court does not restrain Defendant from engaging in these practices in the future, Plaintiff and the Class members will be harmed in that they will continue to believe they are purchasing Digital Content for viewing and/or listening indefinitely, when in fact, the Digital Content can be made unavailable at any time.")

III. ORDER

For the reasons set forth above, the Court GRANTS in part and DENIES in part Defendant's Motion to Dismiss. Defendant's

Motion to Dismiss Plaintiff's unjust enrichment claim is GRANTED WITH PREJUDICE. Defendant's Motion to Dismiss Plaintiff's equitable claims for restitution under the UCL, FAL, and CLRA is also GRANTED WITH PREJUDICE. The remainder of Defendant's Motion to Dismiss is DENIED. Defendant's Answer to the FAC is due twenty (20) days from the date of this Order.

IT IS SO ORDERED.

Dated: April 19, 2021

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE