

David T. Biderman, Bar No. 101577  
DBiderman@perkinscoie.com  
Perkins Coie LLP  
1888 Century Park E., Suite 1700  
Los Angeles, CA 90067-1721  
Phone: 310.788.9900  
Facsimile: 310.788.3399

Thomas J. Tobin, Bar No. 319538  
TTobin@perkinscoie.com  
Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Facsimile: 206.359.9000

Attorneys for Defendant  
Amazon.com, Inc.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

AMANDA CAUDEL, *individually, and on  
behalf of those similarly situated,*

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

Case No. 2:20-cv-00848-KJM-KJN

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT AMAZON.COM, INC.'S  
MOTION TO DISMISS**

**ORAL ARGUMENT REQUESTED**

Date: January 22, 2021

Time: 10 A.M.

Judge: Hon. Kimberly J. Mueller

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. STATEMENT OF FACTS .....	2
A. Amazon Customers Purchasing Digital Content Assent to the Terms of Service.....	2
B. Amazon Prime Users Purchasing Digital Content Assent to the Terms of Service.....	3
C. Plaintiff Does Not Allege Any of Her Purchased Digital Conduct is Unavailable and Has Continued to Purchase Such Content Post-Filing.....	4
D. Plaintiff Seeks Equitable Relief Under California Consumer Protection Statutes.....	5
III. LEGAL STANDARDS.....	6
A. Standards for Dismissal Under Rule 12(b)(1).....	6
B. Standards for Dismissal Under Rule 12(b)(6).....	6
IV. ARGUMENT .....	7
A. Plaintiff Lacks Article III Standing to Pursue Her Claims. ....	7
B. The Complaint Fails to State a Cognizable Claim Because Plaintiff Agreed to and is Bound by the Terms of Use of the Amazon Prime Limited Digital Content License and Fails to Allege Cognizable Harm. ....	9
C. Plaintiff's Consumer Claims Are Barred Because They Are Entirely Predicated on Plaintiff's Non-Cognizable Contract Legal Theory. ....	11
D. Plaintiff's Claims Also Must Be Dismissed Because Plaintiff Cannot Allege a Basis for Injunctive Relief. ....	13
V. CONCLUSION .....	15

TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Balistreri v. Pacifica Police Dep’t</i> , 901 F.2d 696 (9th Cir. 1990).....	12
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	7
<i>Birdsong v. Apple, Inc.</i> , 590 F.3d 955 (9th Cir. 2009).....	9
<i>Boland, Inc. v. Rolf C. Hagen (USA) Corp.</i> , 685 F.Supp.2d 1094 (E.D. Cal. 2010).....	12
<i>Caracciolo v. Facebook, Inc.</i> , 700 F. App’x 588 (9th Cir. 2017) .....	13
<i>Crawford v. Beachbody, LLC</i> , 2014 WL 6606563 (S.D. Cal. Nov. 5, 2014) .....	11
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006) .....	13
<i>Ekin v. Amazon Servs., LLC</i> , 84 F.Supp.3d 1172 (W.D. Wash. 2014).....	10, 11
<i>Fagerstrom v. Amazon.com, Inc.</i> , 141 F.Supp.3d 1051 (S.D. Cal. 2015), <i>aff’d</i> , <i>Wiseley v. Amazon.com, Inc.</i> , 709 F. App’x 862 (9th Cir. 2017) .....	10, 11
<i>Fteja v. Facebook, Inc.</i> , 841 F.Supp.2d 829 (S.D.N.Y. 2012).....	11
<i>Goldie’s Bookstore, Inc. v. Superior Court</i> , 739 F.2d 466 (9th Cir. 1984).....	14
<i>Green v. United States</i> , 630 F.3d 1245 (9th Cir. 2011).....	6
<i>Grill v. BAC Home Loans Servicing LP</i> , 2011 WL 127891 (E.D. Cal. Jan.14, 2011).....	12
<i>Hamilton v. General Mills, Inc.</i> , 2016 WL 6542840 (D. Or. Nov. 2, 2016).....	8
<i>In re Excel Innovations, Inc.</i> , 502 F.3d 1086 (9th Cir. 2007).....	14
<i>Kwikset Corp. v. Superior Court</i> , 51 Cal. 4th 310 (2011) .....	8

TABLE OF AUTHORITIES

	Page
1 <i>Lee v. State of Oregon,</i>	
2 107 F.3d 1382 (9th Cir. 1997) <i>as amended</i> (Apr. 16, 1997).....	8
3 <i>Lujan v. Defs. of Wildlife,</i>	
4 504 U.S. 555 (1992).....	6, 7
5 <i>M.A. Mortenson Co. v. Timberline Software Corp.,</i>	
6 998 P.2d 305 (Wash. 2000).....	10
7 <i>McKee v. Audible, Inc.,</i>	
8 2017 WL 4685039 (C.D. Cal. July 17, 2017).....	10
9 <i>McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.,</i>	
10 339 F.3d 1087 (9th Cir. 2003).....	14
11 <i>Metro–Goldwyn–Mayer Studios, Inc. v. Grokster, Ltd.,</i>	
12 518 F.Supp.2d 1197 (C.D. Cal. 2007).....	14
13 <i>Morales v. Chase Home Fin. LLC,</i>	
14 2011 WL 1670045 (N.D. Cal. Apr. 11, 2011) .....	12
15 <i>Nelsen v. King County,</i>	
16 895 F.2d 1248 (9th Cir. 1990).....	8
17 <i>Nicosia v. Amazon.com, Inc.,</i>	
18 384 F.Supp.3d 254 (E.D.N.Y. 2019), <i>aff’d</i> , 815 F. App’x 612 (2d Cir. 2020).....	10, 11
19 <i>Peters v. Amazon Services LLC,</i>	
20 2 F.Supp.3d 1165 (W.D. Wash. 2013).....	10, 11
21 <i>Puentes v. Wells Fargo Home Mtg., Inc.,</i>	
22 160 Cal.App.4th 638, 72 Cal.Rptr.3d 903 (2008).....	12
23 <i>Red v. General Mills, Inc.,</i>	
24 2015 WL 9484398 (C.D. Cal. Dec. 29, 2015) .....	9
25 <i>Riensch v. Cingular Wireless LLC,</i>	
26 2006 WL 3827477 (W.D. Wash. Dec. 27, 2006).....	10
27 <i>Sampson v. Murray,</i>	
28 415 U.S. 61 (1974).....	14
<i>Schmier v. U.S. Court of Appeals,</i>	
279 F.3d 817 (9th Cir. 2002).....	7
<i>Selden v. Airbnb, Inc.,</i>	
2016 WL 6476934 (D.D.C. Nov. 1, 2016).....	11
<i>Sharp v. Kelso,</i>	
2018 WL 4521019 (E.D. Cal. Sept. 20, 2018).....	8

TABLE OF AUTHORITIES

	<b>Page</b>
1 <i>SmileCare Dental Grp. v. Delta Dental Plan of Cal. Inc.</i> ,	
2 88 F.3d 780 (9th Cir. 1996).....	7
3 <i>Sonner v. Premier Nutrition Corp.</i> ,	
4 971 F.3d 834 (9th Cir. 2020), <i>as amended</i> (Aug. 20, 2020) .....	14, 15
5 <i>Unique Functional Prods., Inc. v. JCA Corp.</i> ,	
6 2012 WL 367245 (S.D. Cal. Feb. 3, 2012) .....	12
7 <i>United States v. Elias</i> ,	
8 921 F.2d 870 (9th Cir. 1990).....	14
9 <i>Weber v. Amazon.com, Inc.</i> ,	
10 2018 WL 6075341 (C.D. Cal. Apr. 02, 2018).....	10
11 <i>Wolfe v. Strankman</i> ,	
12 392 F.3d 358 (9th Cir. 2004).....	6
13 <b>STATUTES</b>	
14 California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, <i>et seq.</i> .....	passim
15 Consumers Legal Remedies Act, Cal. Civ. Code § 1750, <i>et seq.</i> .....	6, 7, 15
16 False Advertising Law, Cal. Bus. & Prof. Code § 17500, <i>et seq.</i> .....	6, 7, 15
17 <b>OTHER AUTHORITIES</b>	
18 Fed. R. Civ. P. 12(b)(1).....	6, 7
19 Fed. R. Civ. P. 12(b)(6).....	6, 7, 11
20 U.S. Constitution art. III.....	passim
21	
22	
23	
24	
25	
26	
27	
28	

**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendant Amazon.com, Inc. (“Amazon”) hereby submits this memorandum of points and authorities in support of its Motion to Dismiss the Complaint of Plaintiff Amanda Caudel (“Caudel” or “Plaintiff”).

**I. INTRODUCTION**

Plaintiff’s Complaint is premised on speculative harm tied to contingent future events involving the actions of third-parties, which may or may not occur. This kind of conjecture about unaccrued future injury is too hypothetical to sustain Article III standing, and the Complaint should be dismissed. Moreover, even if Plaintiff had suffered any cognizable injury, her claims would fail on the merits because a contract between the parties explicitly allows for the practices of which she complains.

Plaintiff claims that Defendant Amazon’s Prime Video service, which allows consumers to purchase video content for streaming or download, misleads consumers because sometimes that video content might later become unavailable if a third-party rights’ holder revokes or modifies Amazon’s license. The Complaint points vaguely to online commentary about this alleged potential harm but does not identify any Prime Video purchase unavailable to Plaintiff herself. In fact, *all* of the Prime Video content that Plaintiff has ever purchased *remains available*. And Plaintiff has continued to buy content on Amazon Prime Video even *after* this Complaint was filed, making thirteen such purchases. These facts discredit any claim that Plaintiff has been injured.

What’s more, the possibility that certain content might become unavailable is explicitly disclosed as part of terms of use repeatedly and conspicuously presented to consumers who buy content on Amazon Prime Video. Plaintiff and other Amazon Prime Video customers are required to and do consent to Amazon’s fully-disclosed, hyperlinked conditions and terms of use before making video content purchases. The most relevant agreement here—the Prime Video Terms of Use—is presented to consumers every time they buy digital content on Amazon Prime Video. These Terms of Use expressly state that purchasers obtain only a limited license to view video content and that purchased content may become unavailable due to provider license restriction or other reasons. So, beyond failing to allege harm sufficient to support Article III standing, Plaintiff’s

consumer law claims are barred on the merits because they are predicated on a non-cognizable contract theory and Plaintiff cannot allege that any independent unlawful, unfair or fraudulent conduct that could support her claim for injunctive relief.

The Complaint should be dismissed.

## II. STATEMENT OF FACTS

### A. Amazon Customers Purchasing Digital Content Assent to the Terms of Service.

Amazon offers a wide variety of services to customers, including the Prime Video service. Prime Video is a platform that allows customers who have signed up for the service to gain access to digital movies, television shows, and other video content (collectively “Digital Content”) for either download or streaming. *See* Compl. ¶ 1; *see also* Declaration of Marcela Viegas in Support of Motion to Dismiss (“Viegas Decl.”) ¶ 12, Ex. B (“Amazon Prime Video Terms of Use”).

Digital Content is offered multiple ways on Amazon Prime—through subscriptions, rentals, purchases, pay-per-view, and free. Viegas Decl. Ex. B at 2. All Digital Content, regardless of how offered, is provided to customers on Prime Video through the grant of a limited license. *Id.* at 3 (“Digital Content may be available as Subscription Digital Content, Rental Digital Content, Purchased Digital Content, PPV Digital Content, Free Digital Content, or any combination of those, *and in each case is subject to the limited license grant below.*”) (emphasis added); *see also id.* at 6 (“Subject to payment of any charges to rent, purchase, or access Digital Content . . . Amazon grants you a . . . limited license . . .”). Digital Content is offered to customers under a limited license, in part, because some of that Content is owned by third-parties who ultimately control its access and availability. *See id.* at 3 (referring to “restrictions imposed by content providers”).

Purchased Digital Content, that is, Digital Content that users can acquire for “on-demand viewing over an indefinite period of time,” is likewise provided via limited license. *Id.* The Prime Video Terms of Use therefore has a specific provision that explains that Purchased Digital Content may become unavailable to users and limits Amazon’s liability if this occurs:

**i. Availability of Purchased Digital Content.** Purchased Digital Content will generally continue to be available to you for download or streaming from the Service, as applicable, but may become unavailable due to potential content provider licensing restrictions or for other

reasons, and Amazon will not be liable to you if Purchased Digital Content becomes unavailable for further download or streaming.

*Id.* at 6. Thus, the Prime Video Terms of Use plainly and repeatedly explain the limited license users acquire when using the service, and expressly advise that Purchased Digital Content may become unavailable to the user due to downstream licensing restrictions or for other reasons.

**B. Amazon Prime Users Purchasing Digital Content Assent to the Terms of Service.**

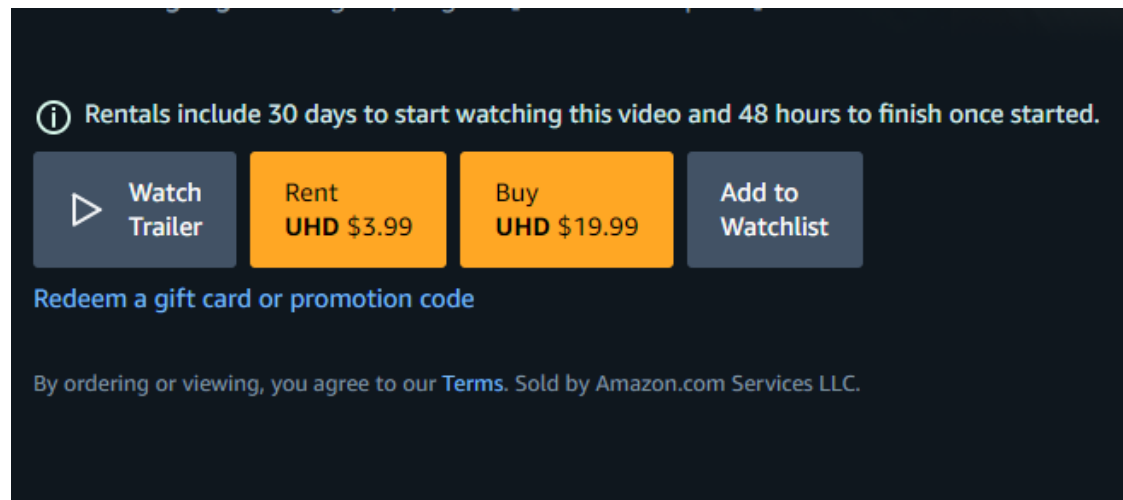
It is impossible to acquire Digital Content on Amazon Prime, including Purchased Digital Content, without first assenting to Amazon’s Conditions of Use (“COU”). Viegas Decl. ¶¶ 4-5. The COU is an agreement that governs all Amazon services, including the Amazon Prime Video service. *Id.* ¶¶ 8-9; *see also id.* Ex. A at 2 (“**By using Amazon Services, you agree to these conditions. Please read them carefully.** . . . When you use an Amazon Service (for example, Your Profile, Gift Cards, Amazon Video, Your Media Library, Amazon devices, or Amazon applications) you also will be subject to the guidelines, terms and agreements applicable to that Amazon Service (‘Service Terms’).”). Customers must have an Amazon account to acquire Amazon Prime Video Purchased Digital Content and must assent to the COU in order to establish an Amazon account. *Id.* ¶¶ 4-7.

Customers accessing Prime Video must likewise also assent to that service’s terms of use. The Amazon Prime Video Terms of Use state: “Each time you visit, browse, or use the Amazon Prime Video service, you accept this Agreement.” *Id.* Ex. B at 2.

Customers who acquire Purchased Digital Content on Prime Video are presented with a link to the Amazon Prime Video Terms of Use at the point-of-sale and informs customers that they “agree” to those Terms whenever they order or view Digital Content. The purchase page for all Digital Content states directly under the “Buy” button: “By ordering or viewing, you agree to our Terms.” Viegas Decl. ¶ 11. A screen shot from the Prime Video platform with an excerpted image depicting how this language appears is depicted in Figure No. 1, below:



FIG. 1: EXCERPT OF PRIME VIDEO POINT-OF-PURCHASE SCREEN



*Id.* As shown above, the word “Terms” is called out by formatting in blue text and provides a link to a page called “Amazon Prime Video Terms of Use” that contains the terms governing each customer’s limited license and access to Digital Content. *Id.* ¶ 12. This, of course, includes the specific disclosure that Purchased Digital Content “may become unavailable due to potential content provider licensing restrictions or for other reasons.” *Id.* Ex. B at 6.

**C. Plaintiff Does Not Allege Any of Her Purchased Digital Content is Unavailable and Has Continued to Purchase Such Content Post-Filing.**

Plaintiff nonetheless alleges the Prime Video service’s use of the word “Buy” at point-of-sale in connection with Purchased Digital Content is misleading. Compl. ¶¶ 8-11. She claims this is so because of the possibility that Purchased Digital Content, “may become unavailable due to potential content provider licensing restrictions or for other reasons.” *Id.* ¶¶ 68, 85 (same); *accord* ¶ 57 (alleging Purchased Digital Content “could become unavailable for viewing due to the content provider licensing restrictions or other reasons”).

The Complaint’s only specific factual allegations regarding Purchased Digital Content purportedly becoming unavailable to consumers are: (1) an anonymous posting on Reddit by a user claiming to have lost access to a movie purchased on Amazon Prime; and (2) an eight-year-old

1 online article from Consumer Reports describing a consumer who purchased the movie “Puss In  
 2 Boots,” but purportedly temporarily lost access to stream it. *Id.* ¶¶ 13, 15; *see also* Declaration of  
 3 Thomas J. Tobin in Support of Motion to Dismiss (“Tobin Decl.”) Exs. A, B, C.<sup>1</sup> The Complaint  
 4 omits the fact that each of these sources—correctly—acknowledge that the Prime Video Terms of  
 5 Use tell consumers that Purchased Digital Content may become unavailable due to licensing  
 6 restrictions. Tobin Decl. Ex. A at 1, Ex. B at 2.

7 Plaintiff’s allegations of harm are similarly sparse. She does not point to a single instance  
 8 where she lost access to Purchased Digital Content; the Complaint merely alleges that she made  
 9 unspecified purchases “in reliance on representations” that she would not lose such access. Compl.  
 10 ¶ 30. The Complaint further alleges that had she known about the “potential” that she “may” lose  
 11 access to Purchased Digital Content, *id.* ¶¶ 65, 85, that “[she] would not have bought the Video  
 12 Content from Defendant or would have paid substantially less for it,” *id.* ¶ 19.

13 In truth, *all* Purchased Digital Content that Plaintiff has acquired remains available to her  
 14 for viewing. Since establishing an Amazon account in January 2016, Plaintiff has purchased Digital  
 15 Content thirty-six (36) times. Viegas Decl. ¶ 14. All thirty-six of these titles remain available to  
 16 Plaintiff for viewing. *Id.*

17 Moreover, despite claiming to have been misled into buying Purchased Digital Content in  
 18 the manner alleged in the Complaint, Plaintiff has nonetheless bought Purchased Digital Content  
 19 on *thirteen separate occasions* since the April 24, 2020, filing of the Complaint itself. *Id.* ¶ 15. In  
 20 other words, even though Plaintiff repeatedly alleges that “she would not have bought” Purchased  
 21 Digital Content from Amazon Prime if she had known about the potential loss of access to that  
 22 Content, Compl. ¶¶ 19, 55, 66, 83, she has done that exact thing thirteen different times between  
 23 April 24, 2020, and September 6, 2020, Viegas Decl. ¶¶ 14-15.

#### 24 **D. Plaintiff Seeks Equitable Relief Under California Consumer Protection Statutes.**

25 The terms and conditions applicable to Purchased Digital Content are governed by  
 26 enforceable contracts between Plaintiff and Amazon (*e.g.*, the COU and the Prime Video Terms of

27  
 28 <sup>1</sup> The movie “Puss in Boots” is, in fact, available as Purchased Digital Content on Amazon Prime.  
 Tobin Decl. Ex. C (Prime Video listing page for purchase of “Puss in Boots” movie).

Use). *See* Section II.A, *supra*. Yet, Plaintiff has not asserted a claim for breach of contract nor does the Complaint have any other causes of action that sound in law or seek damages. Instead, Plaintiff exclusively seeks injunctive relief under three consumer protection statutes: California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et seq.*; False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500, *et seq.*; and Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.*

### III. LEGAL STANDARDS

#### A. Standards for Dismissal Under Rule 12(b)(1).

Under Article III of the U.S. Constitution, the federal courts may only decide “cases” and “controversies.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To have standing to sue in federal court: (1) the plaintiff must have suffered an actual, concrete, and particularized injury in fact; (2) there must be a causal connection between the alleged injury and the challenged conduct such that the injury is fairly traceable to the conduct complained of; and, (3) it must be likely that the injury will be redressed by a favorable decision. *Id.* at 560–61. The party invoking federal jurisdiction has the burden of establishing these three elements. *Id.* at 561. If a plaintiff lacks standing, the action must be dismissed. Fed. R. Civ. P 12(b)(1).

In deciding a Rule 12(b)(1) motion, the court may consider materials beyond the pleadings when a defendant makes a factual challenge to subject matter jurisdiction.<sup>2</sup> *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Accordingly, evidence that goes to the court’s subject matter jurisdiction may be submitted and considered when deciding a Rule 12(b)(1) motion. *See Green v. United States*, 630 F.3d 1245, 1248 n.3 (9th Cir. 2011) (On a Rule 12(b)(1) motion, “proof of jurisdictional facts may be supplied by affidavit, declaration, or any other evidence properly before the court, in addition to the pleadings challenged by the motion”).

#### B. Standards for Dismissal Under Rule 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff’s factual allegations “must

---

<sup>2</sup> Given that Amazon contests Plaintiff’s standing, Paragraphs 14 and 15 of the Viegas Declaration concerning Plaintiffs’ purchases via Amazon Prime Video and the ongoing availability of these purchases are admissible under Rule 12(b)(1). *See Green*, 630 F.3d at 1248 n.3.

1 be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550  
 2 U.S. 544, 555 (2007). The allegations must “plausibly suggest[],” and not merely be consistent  
 3 with, the claimed wrongful conduct. *Id.* at 557. The court may dismiss a complaint as a matter of  
 4 law for “(1) lack of cognizable legal theory or (2) insufficient facts under a cognizable legal claim.”  
 5 *SmileCare Dental Grp. v. Delta Dental Plan of Cal. Inc.*, 88 F.3d 780, 783 (9th Cir. 1996) (citation  
 6 omitted).

#### 7 IV. ARGUMENT

8 Plaintiff’s Complaint must be dismissed under Rule 12(b)(1) because Plaintiff fails to allege  
 9 an injury-in-fact sufficient for Article III standing. The Complaint also fails to allege a cognizable  
 10 claim under any legal theory. The Amazon COU and Prime Video Terms of Use are enforceable  
 11 agreements. Plaintiff’s consumer protection claims must therefore be dismissed under  
 12 Rule 12(b)(6) because they are entirely predicated on Plaintiff’s non-cognizable contract claim.  
 13 And Plaintiff’s claimed speculative injury, which has not occurred, can be remedied, if at all, in  
 14 damages.

##### 15 A. Plaintiff Lacks Article III Standing to Pursue Her Claims.

16 Plaintiff lacks standing because the claimed injury-in-fact that is the gravamen of her  
 17 Complaint—the possibility that her Purchased Digital Content could become unavailable—has not  
 18 materialized. The Complaint acknowledges that there is only a “potential” that this harm “may”  
 19 occur, depending on the speculative future acts of unnamed third-parties. Compl. ¶¶ 68, 85.  
 20 Moreover, Plaintiff’s own conduct establishes that she did not suffer any economic injury when she  
 21 acquired Purchased Digital Content, as she has repeatedly continued to do so since filing the  
 22 Complaint.

23 Plaintiff must affirmatively allege facts to establish an Article III injury. *Lujan*, 504 U.S. at  
 24 560–61. A cognizable Article III injury “must have actually occurred or must occur imminently;  
 25 hypothetical, speculative or other ‘possible future’ injuries do not count in the standings calculus.”  
 26 *Schmier v. U.S. Court of Appeals*, 279 F.3d 817, 821 (9th Cir. 2002) (citation omitted). Statutory  
 27 standing under the UCL, FAL, and CLRA is coextensive with Article III standing insofar as each  
 28 cause of action requires an allegation of injury to the Plaintiff—specifically, an economic injury.

1 *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 324 (2011).

2 Cognizable Article III injuries cannot depend on a “chain of speculative contingencies.”  
 3 *Lee v. State of Oregon*, 107 F.3d 1382, 1388 (9th Cir. 1997) *as amended* (Apr. 16, 1997) (collecting  
 4 cases). In deciding whether an injury is too speculative, courts are to “focus qualitatively on whether  
 5 the plaintiff has made ‘an *individualized* showing that there is “a very significant” possibility that  
 6 the future harm will ensue.’” *Id.* at 1388–89 (citation omitted); *accord Sharp v. Kelso*, 2018 WL  
 7 4521019, at \*2 (E.D. Cal. Sept. 20, 2018) (noting that “multi-link chain of inferences” are “‘too  
 8 speculative’ to constitute a cognizable injury in fact” in case involving stolen laptop where it was  
 9 speculative whether stolen laptop contained any of plaintiff’s information) (citation omitted).

10 Here, the Complaint’s claimed harm is that rights to Purchased Digital Content might be  
 11 lost thus “leaving the consumer without the ability to enjoy” that Content. Compl. ¶ 9. Yet, as to  
 12 Plaintiff’s Purchased Digital Content, this harm has *never occurred*. *See Viegas Decl.* ¶ 14. All  
 13 thirty-six titles of Purchased Digital Content that Plaintiff has bought remain available to her. *Id.*  
 14 Thus, she’s alleged nothing more than the “potential” that some of this content “may” become  
 15 unavailable at some later point in time if the third-party who holds the downstream licensing rights  
 16 revokes them. Compl. ¶¶ 62, 68, 85. This chain of “speculative contingencies” is insufficient to  
 17 support standing. *Nelsen v. King County*, 895 F.2d 1248, 1252 (9th Cir. 1990). The rest of the  
 18 Complaint further illustrates the speculative nature of the threatened harm. Plaintiff points to just  
 19 one unverified instance of Purchased Digital Content becoming unavailable on Amazon Prime, via  
 20 an anonymous posting on Reddit that does not concern Plaintiff at all. This sort of unverified  
 21 assertion regarding the experience of non-parties is insufficient to establish any “‘significant  
 22 possibility’ that [] future harm will ensue” to Plaintiff herself. *Lee*, 107 F.3d at 1388–89 (citation  
 23 omitted); *accord Hamilton v. General Mills, Inc.*, 2016 WL 6542840, at \*3 (D. Or. Nov. 2, 2016)  
 24 (dismissing “[n]on-party commentary on an issue-driven website bulletin board” as insufficient to  
 25 establish an Article III injury as to the plaintiff himself).

26 Nor does the Complaint allege a plausible economic injury sufficient to support Article III  
 27 standing. Plaintiff alleges that she “would not have bought” Purchased Digital Content had she  
 28 known about the possibility—one that was plainly disclosed in the Prime Video Terms of Use, *see*

1 Section II.B, *supra*—that the Content could become unavailable. Compl. ¶ 19. Yet, Plaintiff has  
 2 continued to repeatedly buy Purchased Digital Content even after she filed the Complaint, at least  
 3 thirteen different times between April 24, 2020, and September 6, 2020. *See* Viegas Decl. ¶ 15.

4 These post-filing purchases, with admitted knowledge of the express Prime Video limited  
 5 license and limitations on potential future availability, further belie any claim that Plaintiff relied  
 6 upon or purportedly suffered economic injury from the use restrictions established under the limited  
 7 license she purchased and to which she agreed. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th  
 8 Cir. 2009) (holding plaintiff failed to allege any “economic harm” as to headphones claimed to be  
 9 “worth less” than their purchase price because of alleged risk to hearing, where defendant  
 10 affirmatively warned of that risk and where that risk of such harm occurring was “hypothetical”);  
 11 *see also Red v. General Mills, Inc.*, 2015 WL 9484398, at \*5 (C.D. Cal. Dec. 29, 2015) (plaintiff  
 12 failed to allege facts to support an economic injury under UCL where plaintiff’s purchases of  
 13 product were made with knowledge of alleged harm the purchase may cause).

14 **B. The Complaint Fails to State a Cognizable Claim Because Plaintiff Agreed to and is**  
 15 **Bound by the Terms of Use of the Amazon Prime Limited Digital Content License**  
**and Fails to Allege Cognizable Harm.**

16 Even if Plaintiff had alleged a cognizable Article III harm—and she has not—her claims  
 17 would still fail on the merits. Plaintiff’s consumer protection claims fail as a matter of law because  
 18 they are predicated on the Amazon COU to which Plaintiff and all Amazon Prime customers agreed  
 19 and are bound by that provide no basis for relief to Amazon Prime customers under the express  
 20 terms of the COU and the accompanying Prime Video Terms of Use.

21 Plaintiff’s allegation that consumers do not “accept any terms pursuant to a clickwrap  
 22 agreement,” Comp. ¶ 5, is belied by her assent, on no less than three occasions, to the terms  
 23 governing the purchase of digital content on the Amazon Prime Video platform. Establishing an  
 24 Amazon account is a necessary pre-requisite for an Amazon Prime Video purchase. When Plaintiff  
 25 became an Amazon customer she assented to Amazon’s COU. She further assented to Amazon  
 26 Prime’s Terms of Use when acquiring Purchased Digital Content on Amazon Prime. Viegas Decl.  
 27 ¶¶ 11-13. These agreements govern the parties’ obligations and make clear that Plaintiff has  
 28 received everything to which she is entitled from her purchases.

1 An individual does not need to read an agreement in order to be bound by it. *See M.A.*  
 2 *Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 313 (Wash. 2000). A merchant term  
 3 of service agreement in an online consumer transaction is valid and enforceable when the consumer  
 4 had reasonable notice of the terms of service. *Weber v. Amazon.com, Inc.*, 2018 WL 6075341, at \*6  
 5 (C.D. Cal. Apr. 02, 2018) (applying Washington law)—actual or inquiry (constructive) notice of  
 6 the terms of service, like a hyperlinked alert, and affirmative online action to demonstrate assent);  
 7 *see Riensche v. Cingular Wireless LLC*, 2006 WL 3827477, at \*1 (W.D. Wash. Dec. 27, 2006)  
 8 (plaintiff assented to arbitration clause when he indicated his agreement to the terms of service  
 9 online).<sup>3</sup>

10 Courts in Washington, California, and across the country have repeatedly held that the  
 11 Amazon COU (and similar Amazon agreements) are binding and enforceable contracts between  
 12 the consumer and Amazon. *See Fagerstrom v. Amazon.com, Inc.*, 141 F.Supp.3d 1051, 1073 (S.D.  
 13 Cal. 2015), *aff'd*, *Wiseley v. Amazon.com, Inc.*, 709 F. App'x 862 (9th Cir. 2017) (Amazon  
 14 customers consent to COU when signing up for an Amazon account and finalizing purchases);  
 15 *Peters v. Amazon Services LLC*, 2 F.Supp.3d 1165, 1168 (W.D. Wash. 2013) (plaintiff assented to  
 16 Amazon's Business Solutions Agreement ("BSA") when he clicked a box during the sign-up  
 17 process "indicating he had read and agreed to the BSA."); *Nicosia v. Amazon.com, Inc.*, 384  
 18 F.Supp.3d 254, 269–70 (E.D.N.Y. 2019) (user must accept the Amazon Prime Terms and  
 19 Conditions to enroll in Amazon Mom program), *aff'd*, 815 F. App'x 612 (2d Cir. 2020); *Ekin v.*  
 20 *Amazon Servs., LLC*, 84 F.Supp.3d 1172, 1175–76 (W.D. Wash. 2014) (customers signing up for  
 21 Amazon Prime must accept Amazon's Prime Terms and Conditions); *McKee v. Audible, Inc.*, 2017  
 22 WL 4685039, at \*11 n.7 (C.D. Cal. July 17, 2017) (Amazon COU enforceable; disclosure and  
 23 hyperlink to terms of service on checkout page are of same nature as those upheld in courts across  
 24 multiple districts, including those applying Washington law).

25 Plaintiff had notice of the COU and is bound by it. The hyperlinked words "Conditions of

---

26  
 27 <sup>3</sup> Washington law, exclusive of conflicts of law principles, expressly governs the Amazon COU  
 28 and the other agreements at issue. Viegas Decl. Ex. A at 7. However, Amazon's COU and terms of  
 use are enforceable agreements under Washington and California law.



Use” directed Plaintiff to the COU, which govern *all Amazon Services*, including Amazon Prime Video. Amazon customers cannot sign up for an Amazon account without agreeing to the Conditions of Use. Viegas Decl. ¶¶ 4-5. When Plaintiff clicked “Create your Amazon account,” she consented to the COU. *Id.* ¶¶ 6, 7; *Selden v. Airbnb, Inc.*, 2016 WL 6476934, at \*5 (D.D.C. Nov. 1, 2016). The COU is therefore a binding contract between Plaintiff and Amazon. *Id.*; *Fteja v. Facebook, Inc.*, 841 F.Supp.2d 829, 834 (S.D.N.Y. 2012); *Peters*, 2 F.Supp.3d at 1168.

Like other Amazon customers, Plaintiff also agreed to the Prime Video Terms of Use when she made purchases on Amazon Prime Video. *See Fagerstrom*, 141 F.Supp.3d at 1073; *Nicosia*, 384 F.Supp.3d at 269–70; *Ekin*, 84 F.Supp.3d at 1175–76. As in each of these cases, the final “checkout” page in the ordering process on Amazon.com required Plaintiff to review and confirm its order by clicking a “Buy” button. Just below that button, text conspicuously states: “By ordering or viewing, you agree to our Terms,” with the word “Terms” in blue-text and hyperlinked, leading consumers directly to the Prime Video Terms of Use. Viegas Decl. ¶¶ 11-12. Plaintiff was therefore on notice of the governing terms of these agreements when she made her purchases and is bound by their terms. *See Crawford v. Beachbody, LLC*, 2014 WL 6606563, at \*3 (S.D. Cal. Nov. 5, 2014). And, as explained, the Terms of Use repeatedly state that consumers are receiving a “limited license” to Purchased Digital Content and expressly explain that this Content “may become unavailable due to potential content provider licensing restrictions or for other reasons.” Viegas Decl. Ex. B at 6.

In short, the limited license granted to Plaintiff expressly informs customers that Purchased Digital Content may become unavailable due to potential provider licensing restrictions and expressly limits Amazon’s liability for potential future video content unavailability. The price Amazon Prime customers agree to pay when ordering or viewing digital content on Amazon Prime Video thus expressly incorporates the potential unavailability of that Purchased Digital Content. Plaintiff assented to these express contract terms and restrictions when she made her purchase.

**C. Plaintiff’s Consumer Claims Are Barred Because They Are Entirely Predicated on Plaintiff’s Non-Cognizable Contract Legal Theory.**

Dismissal under Rule 12(b)(6) can be based on “the lack of a cognizable legal theory” or



1 “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica*  
 2 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). Plaintiff’s consumer protection claims must be  
 3 dismissed because they are entirely predicated on the theory that the Amazon Prime Video Terms  
 4 of Use are somehow misleading and unenforceable. Plaintiff has failed to and cannot plead a  
 5 cognizable claim arising out of the Prime Video Terms of Use. These Terms of Use were expressly  
 6 disclosed to and accepted by Plaintiff, expressly limit the license of Purchased Digital Content, and  
 7 proscribe Amazon’s liability for the potential future unavailability of such video content.  
 8 Accordingly, plaintiff’s claims for violation of state consumer protection laws also fails. *See*  
 9 *Morales v. Chase Home Fin. LLC*, 2011 WL 1670045, at \*10 (N.D. Cal. Apr. 11, 2011) (dismissing  
 10 plaintiff’s Section 17200 claim because it was predicated on an insufficient breach of contract  
 11 action); *Grill v. BAC Home Loans Servicing LP*, 2011 WL 127891, at \*9–10 (E.D. Cal. Jan.14,  
 12 2011) (dismissing plaintiff’s Section 17200 claim when underlying claims were dismissed).

13 Even if Plaintiff could have alleged a cognizable contract-based claim, a breach of contract  
 14 may form the basis for UCL claims only if “it also constitutes conduct that is ‘unlawful, or unfair,  
 15 or fraudulent.’” *Puentes v. Wells Fargo Home Mtg., Inc.*, 160 Cal.App.4th 638, 645, 72 Cal.Rptr.3d  
 16 903, 909 (2008) (emphasis and citation omitted). An alleged breach of contract is not itself  
 17 “unlawful” conduct for purposes of unfair business practices laws. *See, e.g., Boland, Inc. v. Rolf C.*  
 18 *Hagen (USA) Corp.*, 685 F.Supp.2d 1094, 1111 (E.D. Cal. 2010) (citing, inter alia, *Puentes, supra*).  
 19 As one court also has observed, if “a simple breach of contract could form the basis for a [UCL]  
 20 claim, then virtually every contract action could be converted into a business tort.” *Unique*  
 21 *Functional Prods., Inc. v. JCA Corp.*, 2012 WL 367245, at \*5 (S.D. Cal. Feb. 3, 2012). Plaintiff  
 22 has not alleged and cannot allege that Amazon has breached the Prime Video Terms of Use because  
 23 the limited Digital Content license expressly provides that Content may become unavailable and  
 24 Amazon expressly limited liability for any potential future viewing unavailability. Nor has Plaintiff  
 25 alleged any violation of unlawful acts from other sources of substantive law on which to predicate  
 26 her consumer law claims.

27 Plaintiff’s conclusory allegations also fail to meet her burden to demonstrate that Amazon’s  
 28 COU are “unfair” or “fraudulent.” Plaintiff’s allegations that the future availability of Digital

Content to Amazon Prime customers may be limited due to provider restrictions do not adequately plead “unfair” conduct. Amazon Prime Video’s Terms of Use were fully disclosed and available to Amazon Prime customers by clicking the Terms of Use hyperlink directly below the “Buy” button and accepted by Plaintiff when she elected to purchase Digital Content. Amazon’s disclosure of the Terms of Use was plainly above board and these terms expressly describe the limited license Plaintiff purchased for Digital Content and its potential future unavailability subject to provider restrictions. Plaintiff cannot allege consumer protection claims based on the potential that her access to Purchased Digital Content might be limited by third-parties—a potential that the Prime Video Terms of Use expressly identifies as a possibility. *See Caracciolo v. Facebook, Inc.*, 700 F. App’x 588, 590 (9th Cir. 2017) (“The district court properly dismissed [plaintiff’s] breach of contract claim and UCL claim, to the extent it was premised on an alleged breach of contract, because these claims are barred by [defendant’s] terms of service, which expressly disclaim [defendant’s] responsibility for the content published by third parties.”)).

**D. Plaintiff’s Claims Also Must Be Dismissed Because Plaintiff Cannot Allege a Basis for Injunctive Relief.**

Plaintiff alleges, but does not seek recovery for damages, for any Digital Content she purchased from Amazon Prime. Plaintiff seeks only injunctive relief. But Plaintiff has failed to allege a cognizable basis for injunctive relief because Plaintiff has not alleged a predicate “unfair”, “unlawful” or fraudulent act to justify equitable relief under Washington or California consumer protection statutes.

Plaintiff also fails to allege a basis for injunctive relief generally. As the Supreme Court held in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), well-established principles of equity require a plaintiff seeking a permanent injunction to satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Id.* Plaintiff cannot meet these equitable standards.

1 Harm is irreparable when it cannot be remedied except through injunctive relief. *See Metro–*  
 2 *Goldwyn–Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F.Supp.2d 1197, 1210 (C.D. Cal. 2007).  
 3 Economic damages are not traditionally considered (and Plaintiff’s alleged injury is not) irreparable  
 4 because the injury can be remedied by a damage award. *Sampson v. Murray*, 415 U.S. 61, 90 (1974)  
 5 (the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable  
 6 injury; possibility of adequate compensatory or other corrective relief weighs heavily against a  
 7 claim of irreparable harm). Mere financial injury “will not constitute irreparable harm if adequate  
 8 compensatory relief will be available in the course of litigation.” *Goldie’s Bookstore, Inc. v.*  
 9 *Superior Court*, 739 F.2d 466, 471 (9th Cir. 1984) (finding that plaintiff’s harm would be easily  
 10 calculable in damages). Nor can “speculative” injury be the basis for a finding of irreparable harm.  
 11 *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007). The purported injury that  
 12 Plaintiff alleges is speculative and generally is of a nature that could be reduced to monetary  
 13 damages were Plaintiff to have alleged a cognizable claim.

14 Even if Plaintiff had been able to allege a cognizable legal claim against Amazon based  
 15 upon the alleged purchase of and overpayment for Amazon Prime Digital Content, Plaintiff cannot  
 16 make any showing that damages for the alleged overpayment potentially available under either  
 17 common law contract principles or consumer protection statutes would not afford her and Amazon  
 18 Prime Video customers an adequate legal remedy. The relevant test is whether an adequate damages  
 19 remedy is available, not whether plaintiff elects to pursue it, or whether plaintiff will be successful  
 20 in her pursuit. *See, e.g., McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d  
 21 1087, 1093 (9th Cir. 2003) (equitable relief not available where plaintiff had potential legal claims;  
 22 plaintiff’s choice whether to pursue legal remedies does not affect their availability); *United States*  
 23 *v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) (failure to comply with a legal remedy does not make it  
 24 inadequate). Therefore, Plaintiff’s failure to allege a potential legal remedy for damages does not  
 25 affect whether she had an adequate remedy at law.

26 In *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), *as amended* (Aug. 20,  
 27 2020), the Ninth Circuit recently affirmed the propriety of dismissal of a consumer fraud class  
 28 action for equitable restitution under California’s UCL because the plaintiff failed to show she

1 lacked an adequate legal remedy under the CLRA, or FAL for the same alleged harm. Plaintiff  
2 represented a certified class of California consumers who claimed that Premier's Joint Juice did not  
3 provide advertised health benefits. 971 F.3d at 837. Plaintiff initially sought damages and injunctive  
4 relief but voluntarily dismissed her damages claims shortly before trial (to avoid a jury trial) and  
5 proceeded solely with equitable claims for restitution. The District court granted Premier's motion  
6 to dismiss on the basis that the UCL and CLRA claims were subject to California's inadequate-  
7 remedy-at-law doctrine, and the plaintiff had an adequate damage remedy under the CLRA. *Id.* at  
8 838. Applying federal common law equitable principles, the Ninth Circuit affirmed the dismissal  
9 of plaintiff's equitable restitution claims because plaintiff failed to demonstrate that she lacks an  
10 adequate legal remedy.

11 Plaintiff's Complaint should be dismissed under the rationale of *Sonner*. Plaintiff plainly  
12 alleges that she and putative class members paid a "premium price" for purchased Digital Content  
13 that was allegedly worth materially less than its value as purportedly represented by Amazon, and  
14 they were "injured" and "lost money" by Amazon's allegedly misleading conduct and omissions.  
15 Compl. ¶¶ 16-20, 56-57, 67-68. Plaintiff thus had a potential legal remedy but chose not to assert  
16 it. *Sonner* prohibits complaints framed in this fashion from proceeding. 971 F.3d at 838.

## 17 V. CONCLUSION

18 For the foregoing reasons, Plaintiff's Complaint should be dismissed with prejudice.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Respectfully submitted,

2  
3 DATED: October 26, 2020

By: /s/ David T. Biderman  
David T. Biderman, Bar No. 101577  
DBiderman@perkinscoie.com  
Perkins Coie LLP  
1888 Century Park E., Suite 1700  
Los Angeles, CA 90067-1721  
Phone: 310.788.9900  
Facsimile: 310.788.3399

8 Thomas J. Tobin, Bar No. 319538  
TTobin@perkinscoie.com  
Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

12 Attorneys for Defendant  
Amazon.com, Inc.