

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VIANCA MARQUEZ, et al.,
Plaintiffs,
v.
ADOBE, INC.,
Defendant.

Case No. 25-cv-06562-NC

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS WITH LEAVE TO
AMEND; DENYING DEFENDANT’S
MOTION TO STRIKE; AND
DENYING PLAINTIFF’S MOTION
FOR CORRECTIVE ACTION**

Re: ECF 7, 21

This class action case against Defendant Adobe Inc. brought by Plaintiffs Stephanie Wohlfel and Vianca Marquez arises from Defendant’s alleged unlawful and deceptive practices related to its subscription services. These subscription services are governed in part by Defendant’s Terms of Use (TOU), which includes an arbitration provision with a delegation clause, pre-litigation requirements, and a class action waiver. Defendant moves to dismiss Plaintiffs’ Complaint under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1), arguing that Plaintiffs did not comply with the requirements, lacked standing, and failed to sufficiently state a claim. Defendant also moves to strike Plaintiffs’ class claims due to the class action waiver under Federal Rule of Civil Procedure 12(f). Plaintiffs then moved the Court to order corrective action for the class under Federal Rule of Civil Procedure 23(d).

1 As further explained below, the Court GRANTS Defendant’s motion to dismiss
2 with leave to amend because Plaintiffs did not sufficiently allege that they complied with
3 the TOU’s pre-litigation requirements. Further, the Court DENIES without prejudice
4 Defendant’s motion to strike and Plaintiff’s motion for corrective action because it finds
5 both motions moot in light of its motion to dismiss ruling.

6 **I. BACKGROUND**

7 **A. Factual Background**

8 Plaintiffs’ Complaint alleges the following facts:

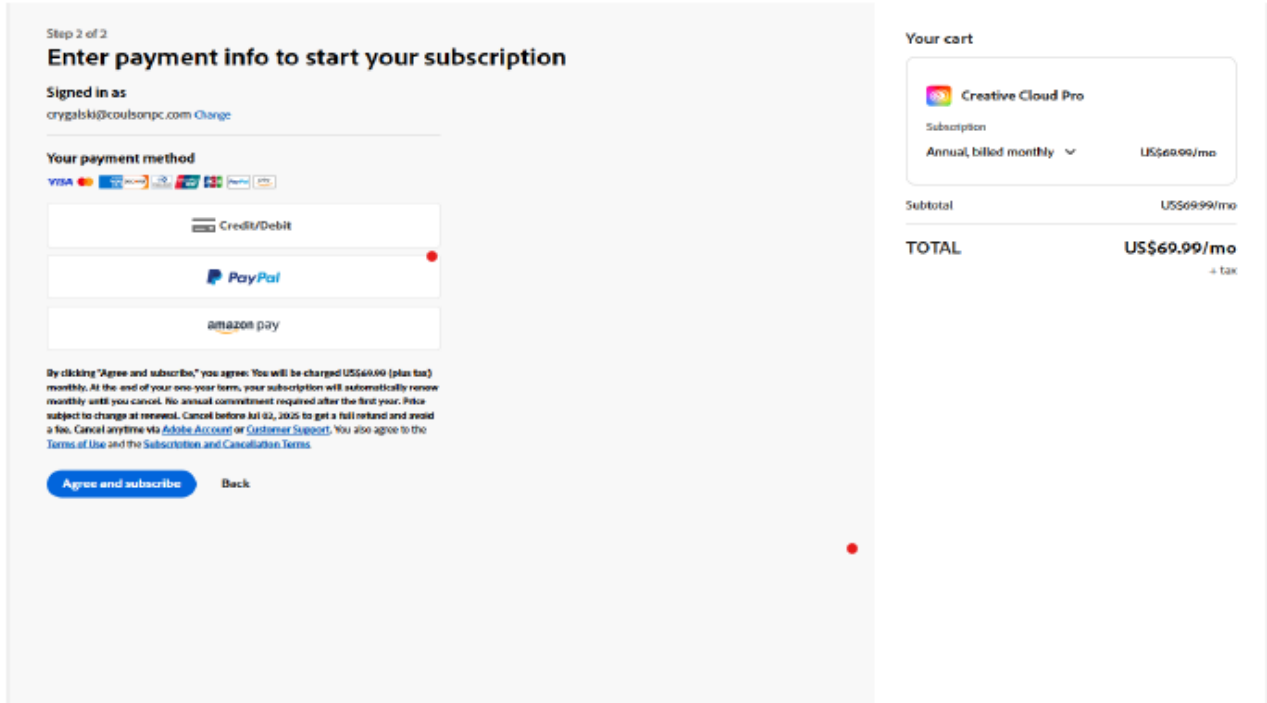
9 Defendant, under its subscription models, provides access to its products and
10 services through tiered subscription plans that automatically renew at the end of the
11 subscription period. ECF 1 (Compl.) ¶ 26. One of these subscription plan options is called
12 “Annual, billed monthly (‘ABM’),” which is an annual commitment that consumers pay
13 for in monthly installments *Id.* ¶¶ 27–28.

14 Consumers can purchase Defendant’s products online at Adobe.com by selecting
15 the desired product and completing a series of enrollment steps. *Id.* ¶ 43. At the beginning
16 of the enrollment process, consumers are typically first shown the subscription options
17 available for that product. *Id.* ¶ 44. Defendant intentionally obscures material terms of the
18 ABM plan, including that the subscription is a one-year commitment and not a monthly
19 plan, the existence of an early termination fee, the relationship of the early termination fee
20 to the one-year contract, and the amount of the early termination fee. *Id.* ¶ 39.

21 Example D in the Complaint shows the final checkout page. *Id.* ¶ 59. This page,
22 under the payment methods, directly above the “Agree and subscribe” button, and in
23 boldface, stated that customers “also agree to the Terms of Use” when they click the
24 “Agree and subscribe” button. *Id.*, Example D. The Terms of Use (TOU) are in a blue
25 hyperlink. *Id.*

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Example D



Section 14 of the August 1, 2022, TOU is titled “Dispute Resolution, Class Action Waiver, Arbitration Agreement” (Dispute Resolution Provision or DRP) and contains six subsections. ECF 8-1 (TOU).¹

Subsection 14.1, titled “Notice of Claim and Required Information Dispute Resolution Process,” states:

If you have any concern or dispute that Adobe Customer Care is unable to resolve (“Claim”), you agree to first try to resolve the dispute informally and in good faith by contacting us and providing a written Notice of Claim to the address you provided in section 18.2 (Notice to Adobe). The Notice of Claim must provide Adobe with fair notice of your identity, a description of the nature and basis of your claim, and the relief you are seeking, including the specific amount of any monetary relief you are seeking, and cannot be combined with a Notice of Claim for other individuals. If any dispute related to your Claim is not resolved within 60 days of receipt, any resulting legal actions must be resolved

¹ The TOU was not attached to Plaintiff’s Complaint. However, the Court takes judicial notice of the document. The TOU is “not subjective to reasonable dispute,” publicly available, a standard document capable of ready and accurate determination, and relevant to Plaintiff’s claims. See *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015). The Court takes judicial notice that the TOU exists but not whether it was a binding contract on Adobe and the Plaintiffs. See *id.*

1 through either small claims court or final and binding arbitration,
2 including any dispute about whether arbitration is required for the
3 dispute, subject to the exceptions set forth below. Neither party shall
4 initiate legal action until 60 days after the Notice of Claim is received.
5 This agreement to arbitrate shall apply, without limitation, to all claims
6 that arose or were asserted before the effective date of the Terms. The
7 arbitrator, and not any federal, state, or local court or agency, shall have
8 the exclusive authority to resolve any dispute relating to the
9 interpretation, applicability or enforceability of the Terms or formation
10 of the Terms, including whether any dispute between us is subject to
11 arbitration (i.e., the arbitrator will decide the arbitrability of any dispute)
12 and whether all or any part of these Terms are void or voidable. Claims
13 related to the Terms, Services, or Software are permanently barred if not
14 brought within one year of the event resulting in the Claim.

8 Subsection 14.2 of the TOU, titled “No Class Actions,” states:

9 You may only resolve disputes with us on an individual basis, and you
10 may not bring a claim as a plaintiff or a class member in a class,
11 consolidated, or representative action. Nonetheless, if any portion of this
12 class action waiver is deemed unenforceable or invalid as to a particular
13 remedy, then that remedy (and only that remedy) must be severed from
14 the arbitration and may be sought in court. The parties agree, however,
15 that any adjudication of remedies not subject to arbitration shall be stayed
16 pending the outcome of any arbitrable claims and remedies.

13 Subsection 14.3 of the TOU goes over the arbitration rules. Subsection 14.4 of the
14 TOU outlines the exceptions to arbitration, which includes small claims and injunctive
15 relief. It states that “either party may elect to have any Claim that is subject to the
16 jurisdiction of small claims court decided in small claims court,” and that “[a]ny dispute
17 about whether a Claim qualifies for small claims court shall be resolved by that court, not
18 an arbitrator.” TOU, Subsection 14.4. It also states that “[i]f a party has a dispute in
19 which they seek to obtain both preliminary injunctive relief and other forms of relief, the
20 party may go to court to seek preliminary injunctive relief but must arbitrate its claims or
21 seek relief in small claims court for all other forms of relief.” *Id.*

22 Subsection 14.6 of the TOU, titled “Acceptance of Arbitration and Right to Opt
23 Out,” states:

24 Within the first thirty (30) days of your use of the Services and Software
25 or the date of the last update to section 14 (Dispute Resolution, Class
26 Action Waiver, Arbitration Agreement) of the Terms, whichever is later,
27 you have the right to opt out of the arbitration and class action waiver
28 provisions of section 14 (Dispute Resolution, Class Action Waiver,
Arbitration Agreement) by sending us written notice of your decision at
the address set forth in section 18.2 (Notice to Adobe). If you opt out of
these provisions, Adobe will also not be bound by them.

1 Between July 2023 and September 2023, Plaintiff Wohlfiel purchased
2 approximately ten ABM subscriptions for Lightroom. Compl. ¶ 93. From November
3 2023 to January 2024, Wohlfiel began progressively cancelling her subscription, paying
4 the early termination fee for each cancelled product. *Id.* ¶ 100.

5 In or around mid-June 2023, Plaintiff Marquez purchased an ABM subscription for
6 Adobe Acrobat. *Id.* ¶ 101. Marquez initiated the cancellation process in or around mid-
7 July 2023 but ceased the process after learning about the early termination fee. *Id.* ¶ 106.

8 **B. Procedural Background**

9 Plaintiffs Wohlfiel and Marquez brought their Complaint individually and on behalf
10 of all others similarly situated against Defendant Adobe Inc. Compl.

11 Defendant moved to dismiss the entirety of Plaintiffs' Complaint under Rule
12 12(b)(1) and/or Rule 12(b)(6), and in the alternative, moved to strike all class claims under
13 Rule 12(f). ECF 7. Plaintiffs opposed. ECF 18. To support their opposition, Plaintiffs
14 filed a declaration with exhibits. ECF 19. Defendant replied. ECF 20.

15 Plaintiffs then filed a motion for corrective action under Rule 23(d). Defendant
16 opposed. ECF 28. Plaintiffs replied. ECF 30.

17 The Court subsequently ordered the parties to file supplemental briefing. ECF 43.
18 Defendant filed its supplemental brief at ECF 44, and Plaintiffs filed their supplemental
19 brief at ECF 45.

20 All parties have consented to magistrate judge jurisdiction. ECF 5; ECF 13.

21 **II. LEGAL STANDARD**

22 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
23 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "To
24 survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as
25 true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S.
26 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When
27 reviewing a 12(b)(6) motion, a court "must accept as true all factual allegations in the
28 complaint and draw all reasonable inferences in favor of the non-moving party." *Retail*

1 *Prop. Trust v. United Bd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir.
 2 2014). A court, however, need not accept as true “allegations that are merely conclusory,
 3 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Secs.*
 4 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). A claim is facially plausible when it “allows
 5 the court to draw the reasonable inference that the defendant is liable for the misconduct
 6 alleged.” *Id.* If a court grants a motion to dismiss, leave to amend should be granted
 7 unless the pleading could not possibly be cured by the allegation of other facts. *Lopez v.*
 8 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

9 **III. DISCUSSION**

10 **A. The Court Dismisses Plaintiffs’ Complaint Under Rule 12(b)(6) for** 11 **failure to allege compliance with the DRP**

12 Defendant first argues that Plaintiffs’ Complaint must be dismissed because
 13 Plaintiffs did not comply with the TOU’s pre-litigation dispute resolution requirements in
 14 its DRP that are a condition precedent to their ability to bring claims against Adobe in any
 15 forum. ECF 7 at 1–2. Plaintiffs respond that the DRP and all of its subsections are
 16 unconscionable, and therefore unenforceable. ECF 18 at 9. Defendant responds that the
 17 Court should dismiss these arguments because the delegation clause delegates Plaintiffs’
 18 unconscionability challenges to an arbitrator, not the Court. The Court finds that it can
 19 assess the DRP’s enforceability, that the DRP is not unconscionable and is enforceable,
 20 and that Plaintiffs did not sufficiently allege compliance with the pre-litigation
 21 requirements. As such, the Court dismisses Plaintiffs’ Complaint under Rule 12(b)(6).

22 **1. The Parties Agreed to the August 1, 2022, TOU and its DRP**

23 There is no dispute that the August 1, 2022, TOU was in effect when Plaintiffs
 24 purchased their Adobe subscriptions and that it DRP contains an arbitration agreement.
 25 *See* ECF 18 at 3–5. An enforceable contract will be found if “(1) the website provides
 26 reasonably conspicuous notice of the terms to which the consumer will be bound; and (2)
 27 the consumer takes some action, such as clicking a button . . . that unambiguously
 28 manifests his or her assent to those terms.” *Singh v. Adobe Inc.*, 797 F. Supp. 3d 1038,

1 1045 (N.D. Cal. 2025) (citing *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856
2 (9th Cir. 2022)).

3 Here, Defendant’s website provided reasonably conspicuous notice of the terms to
4 which Plaintiffs would be bound. While Plaintiffs characterize the presentation of the
5 TOU as “purposeful obfuscation” in another portion of their brief because “the TOU is
6 presented and accessible only through a hyperlink presented in small typeface and buried in
7 an inconspicuous paragraph at the end of the process,” the Court is not persuaded by this
8 characterization. ECF 18 at 11. Like other final checkout pages that courts have
9 previously found to give reasonably conspicuous notice, Defendant’s checkout page at
10 Example D conspicuously displayed an advisal regarding acceptance of the TOU above the
11 action button, bolded the text directly above the “Agree and subscribe” button clearly
12 stating that “By clicking ‘Agree and subscribe,’ . . . [y]ou also agree to the Terms of Use
13 and Subscription and Cancellation Terms,” and conspicuously distinguished the TOU
14 hyperlink from the surrounding text in bright blue font. Compl., Example D; *Singh*, 797 F.
15 Supp. 3d at 1048. Further, there is no dispute that Plaintiffs clicked the “Agree and
16 subscribe” button to buy their subscriptions. ECF 7 at 7.

17 As an initial matter, the Court finds that the parties formed a valid agreement to
18 arbitrate by assenting to the August 1, 2022, TOU and its DRP.

19 **2. The Court Can Assess Whether the DRP is Unconscionable**
20 **Despite its Delegation Clause Because Defendant Waived its Right**
21 **to Arbitrate Gateway Issues.**

22 Plaintiffs argue that they are not bound to the pre-litigation requirements in the
23 TOU’s DRP because the DRP and all its subsections are unconscionable. ECF 18 at 9.
24 However, the DRP has a delegation clause that states that “[t]he arbitrator, and not any
25 federal, state, or local court or agency, shall have the exclusive authority to resolve any
26 dispute relating to the interpretation, applicability or enforceability of the Terms or
27 formation of the Terms, including whether any dispute between us is subject to
28 arbitration.” TOU, Subsection 14.1. As such, Defendant argues that Plaintiffs’ DRP

1 challenges are for an arbitrator and are not properly before the Court unless they
2 specifically challenge the delegation provision itself. ECF 20 at 2. The Court finds that
3 Defendant waived their right to compel arbitration under the delegation clause, and thus,
4 the Court, not the arbitrator, determines gateway issues like unconscionability.

5 A court cannot compel arbitration where neither party requested it. *Wren v. Sletten*
6 *Const. Co.*, 654 F.2d 529, 537 (9th Cir. 1981). Further, the right to arbitration “may be
7 waived or modified by the parties.” *Id.* The test for waiver of the right to compel
8 arbitration consists of two elements: (1) knowledge of an existing right to compel
9 arbitration; and (2) intentional acts inconsistent with that existing right. *Hill v. Xerox Bus.*
10 *Servs., LLC*, 59 F.4th 457, 468 (9th Cir. 2023). Here, both elements have been satisfied as
11 to the right to compel under the delegation clause.

12 First, Defendant had knowledge of the right to compel arbitration under the
13 delegation clause—it stated that the “TOU delegate[s] to an arbitrator disputes relating to
14 the ‘enforceability’ of the TOU” and cited the delegation clause. ECF 20 at 2 n.1.

15 Second, Defendant intentionally acted inconsistently with its right to compel
16 arbitration. “There is no concrete test to determine whether a party has engaged in acts
17 inconsistent with its right to arbitrate; rather, we consider the totality of the parties’
18 actions.” *Hill*, 59 F.4th at 471. Courts have found this element satisfied “when a party
19 chooses to delay his right to compel arbitration by actively litigating his case to take
20 advantage of being in federal court.” *Id.* Here, Defendant appears to be actively litigating
21 its case—it filed a motion to dismiss before a district court that requested a ruling on the
22 merits. *See, generally*, Compl. Its reply brief in support of its motion to dismiss similarly
23 contained substantive arguments. *See, generally*, ECF 20. More confusingly, despite
24 acknowledging and arguing for their right to compel arbitration under the delegation
25 clause, as well as being warned by Plaintiffs that their position was that it had waived the
26 right to compel arbitration, Defendant has not requested the Court to compel arbitration
27 under the delegation clause. *See, e.g.*, ECF 32 at 2 n.1. To the contrary, Defendant
28 explicitly argues that “the Court should not direct that the delegated issue be heard

1 *exclusively* by an arbitrator.” ECF 44 at 3 (emphasis in original). It was not enough for
 2 Defendant to “reserve[] its right to compel arbitration.” ECF 32 at 2; *Hill*, 59 F.4th at 471
 3 (“A statement by a party that it has a right to arbitration in pleadings or motion is not
 4 enough to defeat a claim of waiver.”). These actions, taken all together, show actions
 5 inconsistent with the right to compel arbitration under the delegation clause. *See In Re*
 6 *Mirant Corp. v. Castex Energy, Inc.*, 613 F.3d 584, 591 (5th Cir. 2010) (“A party cannot
 7 keep its right to demand arbitration in reserve indefinitely while it pursues a decision on
 8 the merits before the district court.”).

9 The Court finds that Defendant waived its right to compel arbitration under the
 10 delegation clause and is barred from making any arguments on the basis of such a right.²

11 3. The DRP is not Unconscionable and can be Enforced

12 With the waiver of the delegation clause, the Court can hear gateway issues. The
 13 Court therefore addresses Plaintiffs’ arguments that the DRP is unconscionable and thus,
 14 they are not bound by the DRP’s pre-litigation requirements, one-year limitation, and class
 15 waiver, and properly brought their claims in this Court.

16 Under California law, “a contractual provision is unenforceable if it is both
 17 procedurally and substantively unconscionable.” *Kilgore v. KeyBank, Nat’l Ass’n*, 718
 18 F.3d 1052, 1058 (9th Cir. 2013) (citing *Armendariz v. Found. Health Psychcare Servs.,*
 19 *Inc.*, 24 Cal. 4th 83, 89 (2000)). These two prongs operate on a sliding scale: the lesser the
 20 procedural unconscionability, the greater substantive unconscionability must be shown,
 21 and vice versa. *Armendariz*, 24 Cal. 4th at 89. “When evaluating procedural

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 24 ² The DRP provides for another avenue of arbitration beyond gateway issues—it states that
 25 after going through pre-litigation requirements, “[i]f any dispute related to your Claim is
 26 not resolved within 60 days of receipt, any resulting legal actions must be resolved through
 27 either small claims court or final and binding arbitration.” TOU, Subsection 14.1. The
 28 Court finds that Defendant did not waive this right to compel arbitration, as Defendant
 alleged that Plaintiffs did not go through the pre-litigation requirements and thus believed
 that this dispute was not yet ripe for arbitration. *See Cox v. Ocean View Hotel Corp.*, 533
 F.3d 1114, 1125 (9th Cir. 2008) (finding that the party’s actions were not inconsistent with
 the right to arbitrate given its understanding that the dispute was not yet ripe for
 arbitration). As such, Defendant can still compel arbitration under this statement.
 Defendant’s waiver is limited to arbitration under the delegation clause.

1 unconscionability, courts focus on oppression or surprise that results from unequal
2 bargaining power; while evaluating substantive unconscionability, courts are more
3 concerned with overly harsh or one-sided results.” *Klink v. ABC Phones of N.C.*, No. 20-
4 cv-06276-EMC, 2021 WL 3709167, at *9 (N.D. Cal. Aug. 20, 2021) (citing *Sonic-*
5 *Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145 (2013)).

6 **a. The DRP is not Unconscionable Because there is an Opt-**
7 **Out Provision.**

8 Plaintiffs allege that the entirety of the DRP is unenforceable because it is both
9 procedurally and substantively unconscionable. ECF 18 at 10. The Court finds that the
10 DRP is not procedurally unconscionable, and it can therefore enforce the DRP.

11 Plaintiffs argue that the DRP is procedurally unconscionable because it is a contract
12 of adhesion, Defendant has superior bargaining power over its legally unsophisticated
13 consumers, and there was purposeful obfuscation of the TOU. ECF 18 at 10–11.
14 However, the TOU contains an opt-out provision that states that a consumer has “the right
15 to opt out of the arbitration and class action waiver provisions of section 14 (Dispute
16 Resolution, Class Action Waiver, Arbitration Agreement).” TOU, Subsection 14.6. The
17 Ninth Circuit has held that “the threshold inquiry in California’s unconscionability analysis
18 is whether the arbitration agreement is adhesive,” and “an arbitration agreement is not
19 adhesive if there is an opportunity to opt out.” *Mohamed v. Uber Techs., Inc.*, 848 F.3d
20 1201, 1210 (9th Cir. 2016) (citations omitted). As such, because the DRP has an opt-out
21 provision, it is not adhesive.

22 Further, Plaintiffs’ arguments that Defendant has superior bargaining power and
23 there was purposeful obfuscation is not persuasive to show procedural unconscionability.
24 Defendant does not have superior bargaining power because Plaintiffs were able to opt-out
25 of the DRP. Further, as explained in Section III.A.1., the Court is not convinced that there
26 was purposeful obfuscation. *Supra* Section III.A.1. (finding that there was reasonably
27 conspicuous notice of the TOU). As such, these two arguments do not support a finding of
28 oppression or surprise resulting from unequal bargaining power.

1 Claim for other individuals,” and that “[n]either party shall initiate legal action until 60
2 days after the Notice of Claim is received.”

3 The parties dispute whether Plaintiffs followed the DRP’s pre-litigation dispute
4 resolution requirements in Subsection 14.1. Plaintiffs also alternatively argue that they are
5 excused from complying with the pre-litigation requirements because of Adobe’s
6 “obstructionist conduct.” ECF 18 at 17–18. However, Plaintiffs allege that they have
7 satisfied the pre-litigation requirements and facts about Adobe’s obstructionist conduct
8 only in their opposition brief and its declarations and exhibits, and not in their Complaint.
9 ECF 18 at 7. However, the Court cannot consider these outside pleadings in assessing a
10 motion to dismiss. Fed. R. Civ. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c),
11 matters outside the pleadings are presented to and not excluded by the court, the motion
12 must be treated as one for summary judgment under Rule 56.”).

13 Thus, because Plaintiffs failed to allege compliance with the pre-litigation
14 requirements that creates a condition precedent to filing this lawsuit, dismissal is warranted
15 under Rule 12(b)(6). *See Lipeles v. United Airlines, Inc.*, No. 23-cv-7143-KK-MAAX,
16 2024 WL 891792, at *3 (C.D. Cal. Jan. 9, 2024). The Court therefore does not address the
17 parties’ remaining dismissal arguments and GRANTS Defendant’s motion to dismiss
18 under Rule 12(b)(6). Because the deficiencies can be remedies, the Court does so with
19 LEAVE TO AMEND. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

20 **B. The Court Denies Defendant’s Motion to Strike Class Claims Under**
21 **Rule 12(f)**

22 Because the Court dismissed Plaintiffs’ Complaint, the Court finds that Defendant’s
23 motion to strike class claims is moot. It therefore DENIES Defendant’s motion to strike
24 class claims without prejudice.

25 **C. The Court Denies Plaintiffs’ Motion for Corrective Action Under Rule**
26 **23(d)**

27 Plaintiff moves the Court to grant protective relief under Rule 23(d), specifically
28 requesting the Court to (1) find the Post-Filing TOU promulgated by Adobe to be null and

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1 void and unenforceable as to Plaintiffs and putative class members; and (2) require Adobe
2 to obtain approval prior to promulgating any new communication that could impact
3 putative class members' rights in this case. ECF 21 at 1–2. Because the Court dismissed
4 Plaintiffs' Complaint and found that the class action waiver is enforceable, it finds that
5 Plaintiffs' requested relief to protect putative class members under Rule 23(d) is moot. It
6 therefore DENIES Plaintiffs' motion for corrective action without prejudice.

7 **IV. CONCLUSION**

8 In conclusion, the Court GRANTS Defendant's motion to dismiss with leave to
9 amend. Plaintiffs must file their amended complaint or notify the Court that they do not
10 wish to amend by April 21, 2026. Plaintiffs may not add any new parties or claims
11 without further leave of Court. Further, the Court DENIES without prejudice Defendant's
12 motion to strike and Plaintiffs' motion for corrective action.

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14 **IT IS SO ORDERED.**

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16 Dated: March 31, 2026



NATHANAEL M. COUSINS
United States Magistrate Judge

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