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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: FACEBOOK PRIVACY LITIGATION

Case No. 10-CV-02389-JW

FACEBOOK, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Date: October 17, 2011
Time: 9:00 a.m.
Courtroom: 15 (18th Floor)
Judge: Hon. James Ware
Trial Date: Not Yet Set

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I. INTRODUCTION

Plaintiffs' Opposition only confirms their inability to adequately plead any claim. Plaintiffs' FAC fails to remedy the deficiencies of the prior Complaint, which this Court dismissed, and the Opposition does nothing to further Plaintiffs' cause.

Plaintiffs have elected not to oppose Facebook's motion to dismiss the Wiretap Act claim (Count I), and have abandoned their claim that Facebook, acting as an "electronic communication service" provider, violated section 2702(a)(1) of the Stored Communications Act ("SCA") (Count II). Accordingly, those claims should be dismissed with prejudice.

Plaintiffs' remaining claims fare no better. Plaintiffs now rest their SCA claim exclusively on section 2702(a)(2), asserting that Facebook violated the SCA in its capacity as a "remote computing service" provider (Count II). Even accepting the FAC's factual allegations as true, they do not plausibly suggest that Facebook was acting as a provider of "computer storage or processing services" when a User clicked on an ad on Facebook and a "referrer header" was transmitted to the advertiser. The FAC also does not support the contention that the allegedly disclosed "communications" were carried or maintained on Facebook "solely for the purpose of providing storage or computer processing services" to Plaintiffs, as required under the statute. Moreover, as this Court held previously, under any reading of the FAC, the statutory "addressee or intended recipient" exception precludes liability because Plaintiffs allege the communications at issue were either between Plaintiffs and Facebook or between Plaintiffs and advertisers.

Plaintiffs insist that they have now included "detailed allegations" as to how Facebook introduced computer contaminants in violation of California Penal Code section 502(c)(8) (Count IV). The allegations in the FAC are substantively indistinguishable from the allegations in the previously-dismissed Complaint; the closest Plaintiffs came to a substantive change was the addition of a single sentence parroting the language of the statute. Further, Plaintiffs fail to address Facebook's arguments regarding various elements of section 502(c)(8), such as whether Plaintiffs' computers operated differently after the supposed contaminants were introduced.

As to Plaintiffs' claim for breach of contract (Count VI), Plaintiffs fail to allege any actual and appreciable damages, a necessary element. Plaintiffs merely rehash the unsupported and previously-rejected allegations of their prior Complaint, and still include no plausible allegation that Facebook gave any personal information to an advertiser, much less that they suffered actual and appreciable damages as a result. Plaintiffs' attempt to distinguish cases holding similar allegations insufficient falls flat, as does the assertion that a market for individualized data exists.

Finally, Plaintiffs' fraud claim under California Civil Code sections 1572-1573 (Count VII) also fails with Plaintiffs' inability to allege actual damages. Moreover, Plaintiffs' Opposition does not substantively address the FAC's failure to allege *when* Plaintiffs clicked on any advertisement, which leaves unanswered the key question whether they did so in the time period during which they allege User IDs or Usernames were sent in referrer headers.

II. ARGUMENT

A. Plaintiffs Do Not Oppose Facebook's Motion to Dismiss Their Wiretap Act Claim (Count I) and Have Abandoned Their Claim That Facebook Is an ECS Provider Under the SCA (Count II).

Facebook moved to dismiss Plaintiffs' claim under the Wiretap Act, 18 U.S.C. § 2511(3)(a), pursuant to Rule 12(b)(6). (Mot. at 9-10, 14-18.) In their Opposition, Plaintiffs have not opposed this part of Facebook's motion to dismiss, nor have they otherwise addressed their Wiretap Act claim in any way. Accordingly, Count I of the FAC should be dismissed with prejudice. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1131 (N.D. Cal. 2008) (dismissing claim without leave to amend where plaintiff's opposition failed to address the claim or defendant's motion to dismiss); *Dipaola v. JPMorgan Chase Bank*, No. C 11-2605 SI, 2011 WL 3501756, at *5 (N.D. Cal. Aug. 10, 2011) (same).

Facebook also moved to dismiss in its entirety Plaintiffs' claim under the SCA, 18 U.S.C. § 2702(a)(1)-(2), pursuant to Rule 12(b)(6). (Mot. at 11-17, 18-20.) Count II of the FAC (FAC ¶¶ 68-88) asserts that Facebook violated two sections of the SCA: section 2702(a)(1), which pertains to "electronic communication service" ("ECS") providers, and section 2702(a)(2), which pertains to "remote computing service" ("RCS") providers. Plaintiffs have abandoned their claim that Facebook is liable as an ECS provider, and now argue that Facebook was acting as an RCS at

all relevant times. (Opp'n at 3 (stating that "Plaintiffs' claims concern Facebook's remote computing service"); *id.* at 3 n.1 (same).) Accordingly, their claim under section 2702(a)(1) (FAC ¶¶ 69-79) should be dismissed with prejudice.

B. Plaintiffs Have Failed to State a Claim for Violation of 18 U.S.C. § 2702(a)(2), Pertaining to RCS Providers, and This Remaining Half of Their SCA Claim Should Also Be Dismissed (Count II).

Plaintiffs' Opposition makes clear that their SCA claim now rests solely on the allegation that Facebook was acting as an RCS provider and violated section 2702(a)(2) by purportedly divulging the supposed contents of Plaintiffs' communications.[1] (Opp'n at 2-10.) Plaintiffs' argument mischaracterizes the allegations in their own complaint and misstates the law.

1. Under the FAC's allegations, Facebook was not acting as an RCS provider in connection with the alleged disclosures of "communications" at issue.

As Plaintiffs admit, whether Facebook is acting as an ECS provider or an RCS provider for purposes of an SCA claim "depends on the particular service function at issue." (Opp'n at 3.)

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[1] Section 2702(a)(2) provides:

> (a) Prohibitions.— ***Except as provided in subsection (b)*** or (c)—
> . . .
> (2) ***a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service***—
> (A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;
> (B) ***solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing***[.]

18 U.S.C. § 2702(a)(2) (emphases added). Section 2702(b), in turn, provides in part:

> (b) Exceptions for disclosure of communications.— ***A provider described in subsection (a) may divulge the contents of a communication—***
> ***(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient; [or]***
> . . .
> ***(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service[.]***

Id. § 2702(b)(1), (3) (emphases added).

When a website "provides to users thereof the ability to send or receive wire or electronic communications," it is acting as an *ECS* provider (in which case the SCA prohibits disclosure of the contents of any such communications while in "temporary, intermediate storage" or when stored for "backup protection," subject to statutory exceptions). *Quon v. Arch Wireless Operating Co. Inc.*, 529 F.3d 892, 900 (9th Cir. 2008) (citing 18 U.S.C. § 2510(15) & (17)), *rev'd on other grounds*, 130 S. Ct. 2619 (2010) (reviewing Fourth Amendment holding only). In contrast, for a website like Facebook to be considered an *RCS* provider, it must be "'provi[ding] to the public [] computer storage or processing services by means of an electronic communications system.'" *Id.* (quoting 18 U.S.C. § 2711(2)). The FAC fails to allege facts plausibly showing that the alleged disclosure took place while Facebook was acting as a provider of "computer storage or processing services" as those terms are understood under the SCA.

The Ninth Circuit has explained that a website provides "storage" services when the website "operates as a virtual filing cabinet." *Id.* at 901-02 (citing S. Rep. No. 99-541, at 2-3 (1986)). The court noted that instances where "physicians and hospitals maintain medical files in offsite data banks" were examples of "storage" considered by Congress. *Id.* This interpretation is further supported by case law. *See id.* at 901 (storing text messages for back-up purposes did not transform provider into "virtual filing cabinet" such that it became RCS rather than ECS); *Theofel v. Farey-Jones*, 341 F.3d 978, 984-85 (9th Cir. 2003) (service that held e-mails for back-up protection, but not long-term storage, was not an RCS); *United States v. Standefer*, No. 06-CR-2674-H, 2007 WL 2301760, at *5 (S.D. Cal. Aug. 8, 2007) (transactions on website permitting users to buy and sell gold were not for "storage," and thus website was not an RCS). Although difficult to ascertain from Plaintiffs' Opposition, which obscures the FAC's core factual allegations, the crux of Plaintiffs' claim is that when a User clicked on an ad on Facebook, a "referrer header" (part of standard web browser functionality) was transmitted to the advertiser. According to the FAC, the referrer header contained a URL that potentially contained the User's User ID or Username (nickname or alias) and basic information about the type of webpage from which the User was navigating. (FAC ¶¶ 35, 41-43, 74.) Nothing in the FAC's allegations suggests that the referrer header was disclosed while being held in "storage" by Facebook, or that

the User could re-access this referrer header on Facebook similar to a "virtual filing cabinet."

Nor do Plaintiffs adequately allege that Facebook was providing "computer processing services" at any time relevant to this case. The Ninth Circuit has explained that when Congress enacted the SCA in 1986, the term "computer processing services" referred to the outsourcing of data to a remote third party for "sophisticated processing." *Quon*, 529 F.3d at 902 (citing Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209-13 (2004)). Such services were necessary "before the advent of advanced computer processing programs such as Microsoft Excel," which now permit companies such as hospitals and banks to process data in-house rather than outsourcing it. *Id.*

This type of complex outsourced processing is not performed by standard websites. In *Standefer*, the court considered whether an "e-gold" website, which permitted users to buy and sell gold, provided "computer processing services." *See Standefer*, 2007 WL 2301760, at *5. The court determined that "processing services" by an RCS refers to outsourcing functions for complex processing, *id.* (citing S. Rep. 99-541), and held that users of the e-gold website did not "outsource tasks," but simply used the website to transfer ownership to other users, *id*. (citing Kerr, 72 Geo. Wash. L. Rev. at 1213-14 (concluding that eBay is not an RCS because it is simply used as a destination to buy and sell items, not to outsource data processing)). Similarly, a request by a Facebook User to connect with an advertiser, by clicking on an ad, and the resulting navigation to the advertiser's webpage by the User's browser, have nothing to do with outsourcing data for complex processing. This is standard website/Internet functionality and, if anything, is far more analogous to the "ability to send or receive wire or electronic communications," the service provided by an *ECS* provider, *see* 18 U.S.C. § 2510(15) (defining "electronic communication service"), not an *RCS* provider.

In their Opposition, Plaintiffs now seem to be arguing that because they clicked on third-party ads while they were using Facebook—and Facebook happens to allow Users to store their content—then the "crux" of their SCA claim is based on Facebook's alleged actions as a provider of "computer storage services." (*See* Opp'n at 3-4 (referring to allegations concerning the "pictures, videos, [and] biographical information" that Users can elect to upload to their profile

pages).) This assertion is unsupported by the FAC.[2] Plaintiffs' theory of liability is premised on Facebook's alleged transmittal of a URL to third-party advertisers when Plaintiffs clicked on ads. (FAC ¶¶ 35, 38, 41-43.) In Count II itself, Plaintiffs allege that "[w]hen a Facebook user clicks on an advertisement posted on Facebook's website, the user sends a message to Facebook requesting that Facebook connect the user to the specific advertisement" and that, "[w]hile the user may intend to or think s/he is communicating directly with the advertiser, technically, the user is communicating with Facebook." (FAC ¶ 74.) Plaintiffs cannot plausibly complain about any alleged wrongful disclosure of information or content held in storage, and indeed have previously disavowed such a claim.[3] The FAC does not allege that Facebook was acting as a provider of "computer storage or processing services" in connection with the alleged disclosures.

2. The allegedly disclosed "communications" were not carried by or maintained on Facebook "solely for the purpose of providing storage or computer processing services" to Plaintiffs.

Plaintiffs' effort to hold Facebook liable as an RCS also fails because they do not and cannot allege that the "communications" at issue were being "carried or maintained on that service [Facebook] . . . on behalf of a subscriber or customer . . . ***solely for the purpose*** of providing storage or computer processing services to such subscriber or customer . . . ." 18 U.S.C. § 2702(a)(2) (emphasis added). According to the FAC, the alleged "communications" from Plaintiffs were sent to "request[] that Facebook connect the user to the specific advertisement" (FAC ¶ 74)—in other words, for the purpose of Facebook providing an

[2] With respect to their original Complaint, Plaintiffs specifically argued that their theory of liability was "*not* that Facebook disclosed information voluntarily published on User profiles to advertisers." (Opp'n to Mot. to Dismiss Consol. Class Action Compl. at 16 & n.12 (emphasis added).)

[3] At most, the FAC pleads an alternative theory: that if an advertiser hypothetically were to navigate to a User's profile page (using a User ID or Username obtained from a referrer header) and see certain information there—such as the User's name, profile picture, or gender—such viewing by the advertiser would somehow constitute an improper disclosure by Facebook under the SCA. (*See, e.g.*, FAC ¶ 83.) To the extent Plaintiffs are resting their SCA claim on such a theory, the claim should be dismissed for four additional reasons. (*See* Mot. at 18-20.) Plaintiffs have failed to address these arguments in any substantive manner in their Opposition.

"electronic communication service" (*e.g.*, FAC ¶ 69). Thus, Plaintiffs' section 2702(a)(2) claim should be dismissed with prejudice on this independent ground.

3. The alleged disclosures fall within the SCA's "addressee or intended recipient" exceptions.

This Court dismissed the SCA claim in the original Complaint because the allegedly disclosed communications fell within the SCA's "addressee or intended recipient" exceptions to liability. (Dismissal Order at 10.) The Court reasoned that there were two possible ways to view Plaintiffs' allegations: the communications at issue were sent either to Facebook or to advertisers. The Court held that under either interpretation, Plaintiffs failed to state a claim. (*Id*.) If the communications were to Facebook, Facebook would not be liable under 18 U.S.C. § 2702(b)(3). (*Id*. at 10 & n.8.) Alternatively, if the communications were to advertisers, Facebook would not be liable under 18 U.S.C. § 2702(b)(1). (*Id*. at 9-10.) Plaintiffs' efforts to avoid the Court's ruling are unavailing; the SCA claim should again be dismissed, this time with prejudice.

a. To the extent the FAC alleges that the communications at issue are between Plaintiffs and Facebook, any alleged disclosure falls within section 2702(b)(3)'s "addressee or intended recipient" exception.

To the extent the FAC is construed as alleging that the purported communications were made to Facebook (as opposed to the advertiser), the exception under section 2702(b)(3) applies, and Facebook, as the "addressee or intended recipient," cannot be liable for divulging the contents of such communications. Section 2702(b)(3) provides that an RCS provider cannot be liable for divulging the contents of a communication *either* "with the lawful consent of . . . an addressee or intended recipient of such communication" (Facebook), *or* "with the lawful consent of . . . the [RCS] subscriber" (here, Plaintiffs). 18 U.S.C. § 2702(b)(3). Plaintiffs insist that the "addressee or intended recipient" exception under section 2702(b)(3) does not apply to RCS providers, and that only the "subscriber" exception applies. (Opp'n at 4-6.) But the interpretation urged by Plaintiffs is contrary to the text of the statute and to Ninth Circuit precedent.

Section 2702(b)(3)'s plain language leaves no doubt that RCS providers may invoke any of *three* consent-based exceptions to liability, including the "addressee or intended recipient"

exception applicable here. Section 2702(b)(3) provides: "[a] provider described in subsection (a) may divulge the contents of a communication— . . . (3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service[.]" Because subsection (a) unambiguously "describe[s]" both RCS and ECS providers, *see* 18 U.S.C. § 2702(a), section 2702(b)(3)'s "addressee or intended recipient" exception is plainly available to RCS and ECS providers alike. Significantly, section 2702(b)(3)'s second clause, creating an *additional* exception based on consent of "the subscriber in the case of remote computing service," neither modifies nor restricts the broader preceding clause, and thus leaves intact the "addressee or intended recipient" exception relevant here.

Significantly, the Ninth Circuit has already rejected Plaintiffs' construction of section 2702(b)(3), confirming that "both an ECS and RCS can release private information to, or with the lawful consent of, 'an addressee or intended recipient of such communication,' [18 U.S.C.] § 2702(b)(1), (b)(3), whereas only an RCS can release such information 'with the lawful consent of . . . the subscriber.' *Id.* § 2702(b)(3)." *Quon*, 529 F.3d at 900. In *Quon*, the Ninth Circuit reversed a district court decision that endorsed the statutory construction advanced by Plaintiffs here. *See* 445 F. Supp. 2d 1116, 1130 (C.D. Cal. 2006), *rev'd in part and aff'd in part*, 529 F.3d 892. In correcting the district court's error on appeal, the *Quon* court undertook "a deliberate decision to resolve the issue, [making] that ruling . . . the law of the circuit," *see United States v. Johnson*, 256 F.3d 895, 915-16 (9th Cir. 2001) (Kozinski, J., concurring), as opposed to unreasoned dicta, as Plaintiffs contend (Opp'n at 5 n.5). *Quon* is controlling and dispositive here.

Other authorities also recognize that an RCS provider may invoke any of the consent exceptions listed under section 2702(b)(3). *See, e.g.*, *In re Am. Airlines Inc. Privacy Litig.*, 370 F. Supp. 2d 552, 560-61 (N.D. Tex. 2005) (applying "intended recipient" exception without regard to whether the defendant was an RCS or ECS provider, implicitly recognizing irrelevance of provider type to "intended recipient" exception under section 2702(b)(3)) (cited in Dismissal Order at 10 n.8); D.O.J., Cybercrime & Intellectual Prop. Div., *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, ch. 3, at 136 (3d ed. Sept. 2009), *available at* http://www.cybercrime.gov/ssmanual/index.html ("The SCA allows the voluntary

disclosure of contents when: (1) the disclosure is made to the intended recipient of the communication, with the consent of the sender or intended recipient, to a forwarding address, or pursuant to specified legal process, § 2702(b)(1)-(4); (2) in the case of a remote computing service, the disclosure is made with the consent of a subscriber, § 2702(b)(3) . . . ."). In fact, Plaintiffs' contention is belied by one of their own cases, which implicitly recognizes that RCS providers may invoke a *wider range* of consent exceptions than may ECS providers, consistent with Facebook's position. *See Flagg v. City of Detroit*, 252 F.R.D. 346, 359 (E.D. Mich. 2008) ("If this service is deemed to be an RCS, then the consent of the 'subscriber' is sufficient . . . . In contrast, if a service is determined to be an ECS, then *only* the 'lawful consent of the originator or an addressee or intended recipient' of a communication will suffice[.]" (citing 18 U.S.C. § 2702(b)(3) (emphasis added)) (cited in Opp'n at 5).

Finally, Plaintiffs find little support in *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010), which offers only the conclusory, footnoted dictum of a court from another district. *See id.* at 973 n.17 (cited in Opp'n at 5). That case provides no reason to depart from the weight of authorities, including the Ninth Circuit's controlling decision in *Quon*, or the clear text of the statute, and the Court should not do so here.[4]

b. To the extent the FAC alleges that the communications at issue are between Plaintiffs and advertisers, any alleged disclosure falls within section 2702(b)(1)'s "addressee or intended recipient" exception.

Consistent with this Court's Order dismissing the SCA claim in the original Complaint, Facebook again argued that to the extent the FAC is read to allege that the communications at issue were sent by Plaintiffs to advertisers, rather than by Plaintiffs to Facebook, Facebook cannot be liable for divulging those communications under section 2702(b)(1)'s "addressee or intended

[4] Plaintiffs argue that such an interpretation of section 2702(b)(3) would mean that "all of the SCA's protections against unauthorized disclosure of communications would be eviscerated, and any RCS provider would be exonerated from any and all of its disclosures." (Opp'n at 6-7.) Not so. In the course of providing computer storage or processing services, an RCS provider may come into possession of communications of which it is not the addressee or intended recipient. Just because the RCS provider had been provided with those communications by the subscriber, section 2702(b)(3) would not grant *carte blanche* immunity from liability for divulging them.

recipient" exception. (Mot. at 9, 11-12.) Plaintiffs have not addressed this argument in their Opposition, thus conceding that the SCA claim must be dismissed to the extent it is based on the theory that the allegedly-disclosed communications were between Plaintiffs and advertisers.

4. The Disclosures Were Not of the "Contents" of "Communications."

Plaintiffs do not challenge the substance of Facebook's argument that User IDs or Usernames are customer records under the SCA, not the "contents" of "communications," thereby conceding that Facebook's position is correct. (*See* Opp'n at 8.) Plaintiffs instead argue that when a User clicked on an ad, a "referrer URL" (or "referrer header") was transmitted to an advertiser that contained the Internet address of the webpage from which the User was navigating along with the User's User ID or Username, and that this transmitted referrer URL disclosed the "contents of a communication." (Opp'n at 8-10; *see also* FAC ¶¶ 35, 41-43.) As discussed in Facebook's Motion, a referrer URL is not a "communication" within the intended scope of the SCA, and, even if it were a communication, the alleged disclosure is not of the "contents" of any such communication. (Mot. at 14-17 (citing authorities).)

Plaintiffs assert that *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008), supports their position that transmission of URLs constitutes disclosures of the contents of communications. That decision did not hold that URLs are "communications" as that term is defined under the SCA, but instead refers to URLs as "internet activity." *Id.* at 510 n.6. The case was looking not at the SCA or any other provision of the Electronic Communications Privacy Act ("ECPA"), but at surveillance generally in the broader context of the Fourth Amendment. *Id.* (analyzing the constitutionality of "surveillance techniques" employed by the government). Unlike the SCA, the Fourth Amendment prohibits a variety of government surveillance techniques, whether they involve communications or merely activities (like Internet usage). Thus, while government surveillance of Internet activity may raise constitutional questions under the Fourth Amendment, thereby inviting analysis in the *Forrester* opinion, *Forrester* does not hold that URLs are the "contents" of "communications" as those terms are used in the SCA. Moreover, the decision merely noted in dicta relegated to a footnote that *surveillance* of URLs "*might* be more constitutionally problematic" for Fourth Amendment purposes, 512 F.3d at 504

(emphasis added), not that disclosures of URLs via the standard operation of Internet browsers could or would reveal the "contents" of "communications" for purposes of the SCA. The case cited by the *Forrester* court, *In re Application of the United States of America for an Order Authorizing the Use of a Pen Register and Trap on [xxx] Internet Service Account/User Name [xxxxxx@xxx.com]*, 396 F. Supp. 2d 45, 48 (D. Mass. 2005), considered portions of the ECPA but did *not* hold that disclosure of a URL reveals the contents of communications. Rather, the court remarked that URLs *that contained unique search terms provided by the user* would constitute the contents of communications. *See id.* at 49. Thus, neither case supports Plaintiffs' argument that the referrer URLs alleged here disclosed the "contents" of "communications" under the SCA.

C. The FAC's Allegations About a "Computer Contaminant" Are Substantively Indistinguishable From the Previously-Dismissed Complaint (Count IV).

In response to Facebook's Motion to Dismiss (Mot. at 20-22), Plaintiffs insist that they have now included "detailed allegations" as to how Facebook supposedly introduced computer contaminants in violation California Penal Code section 502(c)(8), pointing to paragraphs 3, 33-44, and 104 of the FAC. In fact, these paragraphs simply rehash the allegations of the previous complaint—already rejected by this Court—with somewhat different syntax and synonyms, and by changing the position of paragraphs and inserting the text of the statute. (*Compare, e.g.*, Plaintiffs' Consolidated Class Action Complaint ("Compl.") ¶ 3 *with* FAC ¶ 3 (changing "in violation of" to "in clear contrast to"); Compl. ¶ 35 *with* FAC ¶ 42 (changing "site" in "company" and "releasing" in "disclosing"); Compl. ¶ 32 *with* FAC ¶ 44 (repositioning the unaltered paragraph); *see also* FAC ¶ 104 (parroting the statute by stating that Facebook "usurped the normal operations of the relevant computers").) In some instances Plaintiffs have actually decreased the detail of their allegations. (*Compare* Compl. ¶ 28 (stating "[t]hrough the design of the Facebook website, Facebook's page addresses, and Facebook advertisement system Facebook has caused users' browsers to send Referrer Header transmissions that report the user ID or username of the user who clicked an ad, as well as the page the user was viewing just prior to clicking on the ad"), *with* FAC ¶ 35 (stating "[t]hrough the design of its system, Facebook sends Referrer Headers containing UIDs and the usernames to advertisers"); Compl. ¶¶ 29, 31 *with*

FAC ¶¶ 36, 38 (deleting detail).) The "new" allegations are substantively indistinguishable from those in the original complaint dismissed by the Court.

In addition, Plaintiffs do not address Facebook's argument that the FAC fails to allege how their computers operated differently or whether the alleged instructions were actually introduced onto their computers, systems, or networks. (Mot. at 21; *see also* Dismissal Order at 13 n.11 (dismissing section 502(c)(8) claim because Plaintiffs failed to "allege any facts suggesting that Defendant introduced computer instructions designed to 'usurp the normal operation' of a computer . . ."). They also fail to explain how a "standard web browser function" (FAC ¶ 41), even if it has unintended consequences, is analogous to a virus or worm, or should result in liability under the Penal Code.

D. Plaintiffs Fail to Allege Actual Damages for Breach of Contract (Count VI).

As this Court has recognized, under California law, a breach of contract claim requires a showing of "appreciable and actual damage." (Dismissal Order at 15 (citing authority).) But Plaintiffs simply reiterate their prior Complaint's unsupported—and already-rejected—allegations, that they suffered damage because Facebook wrongfully shared their information (which Plaintiffs term "PII")[5] with advertisers. (FAC ¶ 122.) Plaintiffs still include no plausible allegation that Facebook gave any personal information to advertisers, much less that they suffered actual and appreciable damages as a result of such alleged disclosures.

Multiple courts have held that conclusory allegations of injury based on disclosure of personal information do not constitute actionable damages for a breach of contract claim. *See*, *e.g.*, *Dyer v. Nw. Airlines Corps.*, 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004) (dismissing breach of contract claim premised on "conclusory statements" of damage from disclosure of personal

[5] Although Plaintiffs apparently refer to all information as "PII," the only information allegedly disclosed by Facebook was the referrer headers transmitted when Users clicked on ads (FAC ¶¶ 35, 41-43). As explained in Facebook's Motion (Mot. at 3-4), the User ID is a generic numerical identifier that Facebook assigns to each User for internal operational purposes. And Facebook Usernames are optional terms (e.g., nicknames, initials, or other phrases or terms of the Users' choosing) that some—but not all—Users choose to create. Neither of these pieces of information could plausibly be alleged to have "value" to Plaintiffs or to have been diminished by their alleged inclusion in referrer headers transmitted by Users' browsers to advertisers.

information). Courts also have recognized that even if certain information can be valuable *in the aggregate*, that value implies nothing about the existence of an individualized market for that information. *See, e.g.*, *Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 994 (2011) (plaintiff failed to "allege that he suffered an economic injury" where defendant aggregated and sold consumers' address information); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1356 (Ill. App. Ct. 1995) (cardholder name has little or no intrinsic value; instead, "[d]efendants create value by categorizing and aggregating" these names); *see also LaCourt v. Specific Media, Inc.*, No. SACV 10-1256-GW(JCGx), 2011 WL 1661532, at *2, *4-5 (C.D. Cal. Apr. 28, 2011) (no evidence of "value-for-value exchange," and even assuming one, "Plaintiffs do not explain how they were 'deprived' of the economic value of their personal information").

Plaintiffs attempt to distinguish cases like *In re JetBlue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299 (E.D.N.Y. 2005) ("*JetBlue*"), as not "involv[ing] a contract where personal information itself was the benefit of the bargain sought by the defendant." (Opp'n at 14.) But Plaintiffs both confuse the pertinent facts and mischaracterize the case law. In *JetBlue* the transfer and protection of the personal information *was* part of the parties' bargain—but, as here, there was no reasonable expectation that that personal information would be held to have a "value" for which plaintiffs would be compensated. The *JetBlue* court noted plaintiffs might have expected a ticket and a promise to protect their personal information "*in return for providing their personal information to JetBlue* and paying the purchase price," but "had no reason to expect that they would be compensated for the 'value' of their personal information." *JetBlue*, 379 F. Supp. 2d at 327 (emphasis added). Indeed, it "strains credulity" to believe that the buyer would have purchased the information from each individual passenger. *Id.* If anything, Plaintiffs' argument is *less* persuasive than that of the *JetBlue* plaintiffs, because unlike in *JetBlue*, Plaintiffs here paid no money whatsoever to Facebook. They are instead left to argue, without support, that both (1) the information they provided in order to register for Facebook, and (2) the information that was allegedly disclosed, must be equivalent to currency. They are not.[6]

[6] Plaintiffs themselves were unable to locate any available market for their Facebook UIDs or Usernames, so they misrepresent four different sources in an attempt to create the illusion of such

Plaintiffs lean heavily on the recent decision in *Claridge v. RockYou, Inc.*, No. 09-cv-6032-PHJ, Dkt. 47 (N.D. Cal. Apr. 11, 2011), in which plaintiff alleged that defendant failed to safeguard his email addresses and passwords, which were subsequently stolen by hackers. *Id.* at 2-3. The *Claridge* court acknowledged that plaintiff's damages theory was "novel" and lacked supporting case law, and expressed "doubts about plaintiff's ultimate ability to prove his damages theory." *Id.* at 7. The court declined, at that stage, to hold as a matter of law that plaintiff lacked Article III standing, but noted that should it become apparent "that no basis exists upon which plaintiff could legally demonstrate tangible harm," plaintiff's claims would be dismissed on a later dispositive motion. *Id*. When it came time to analyze the damages element of plaintiff's breach of contract claim, the court apparently relied on the court's earlier Article III reasoning, stating that plaintiff "sufficiently alleged a general basis for harm by alleging . . . [loss of] some ascertainable but unidentified 'value' and/or property right." *Id.* at 13. *Claridge* does not provide persuasive authority for allowing Plaintiffs' contract claim to proceed here, particularly in light of the FAC's lack of any plausible factual allegations that the named Plaintiffs suffered any loss of ascertainable value or property right as a result of the alleged disclosure of referrer URLs to advertisers. This Court has already implicitly rejected other plaintiffs' reliance on *Claridge* in support of the argument Plaintiffs make here. *See In re Zynga Privacy Litig.*, No. 10-cv-04680-JW, Dkt. 64 (N.D. Cal. June 15, 2011) (plaintiffs had not properly alleged damages on their breach of contract claim, despite having raised *Claridge* in their opposition (Dkt. 53, at 31)).

E. Plaintiffs Fail to State a Claim Under Civil Code sections 1572-1573 (Count VII).

As discussed above and in Facebook's Motion, Plaintiffs again fail to allege that they suffered damages—a necessary element of any fraud claim. *See Engalla v. Permanente Med.*

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a market. (FAC ¶¶ 22-23 (cited in Opp'n at 15).) For instance, Plaintiffs cite a 2010 article about a start-up company trying to create an individual market for personal data as support for their allegation that "[t]his business model—providing online services to consumers and profiting from selling access to their PII to third-parties—has burgeoned into a multi-billion dollar per year industry" (*Id.* ¶ 22), but fail to inform the Court that the company in question *did not even have a business model* at the time of the article, and that, in fact, it *folded less than six months later*. Nor do Plaintiffs' other articles indicate in any way that a market exists for their UIDs or Usernames.

Grp., 15 Cal. 4th 951, 974 (1997). Disclosure of personal information is not a loss of property under California law. *See, e.g.*, *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1128 (N.D. Cal. 2008). Nor have Plaintiffs articulated any other grounds supporting damages. For this reason alone, the fraud claim should be dismissed.

Further, Plaintiffs' allegations do not satisfy the heightened Rule 9(b) pleading standard. (Mot. at 23-25.) One critical way the FAC falls short is its failure to allege any specific facts about advertisements displayed on Facebook that Plaintiffs allegedly clicked on. Plaintiffs claim that such facts are "irrelevant," mischaracterizing Facebook's argument as a "distort[ion]" of Rule 9(b) rather than addressing the substance of the argument. (Opp'n at 17.) The FAC's failure to allege *when* Plaintiffs clicked on any advertisement leaves unanswered the key question whether they did so in the time period during which they allege User IDs or Usernames were sent in referrer headers. Thus, the FAC offers no support for the claim that Plaintiffs relied on the alleged misrepresentations to their detriment, or that they suffered any harm. For this very reason, this Court recently dismissed claims against Google related to alleged disclosure of personal information in referrer headers. *See Gaos v. Google*, No. 10-CV-04809-JW, at *5 (N.D. Cal. Apr. 7, 2011) (plaintiff lacked Article III standing because she "failed to plead that she clicked on a link from the Google search page during the same time period that Defendant allegedly released search terms via referrer headers").

III. CONCLUSION

For the foregoing reasons, Plaintiffs fail to state a claim as a matter of law, and the First Amended Consolidated Class Action Complaint should be dismissed with prejudice.

Dated: September 1, 2011

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