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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Facebook Privacy Litigation PLAINTIFF(S), v. DEFENDANT(S).	CASE NUMBER: 10-cv-02389-JW
	NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff Mike Robertson, as a representative of the class, hereby appeals to
Name of Appellant
the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(j)(2)
☐ Interlocutory Appeals
☐ Sentence imposed:

☐ Bail status:

Civil Matter

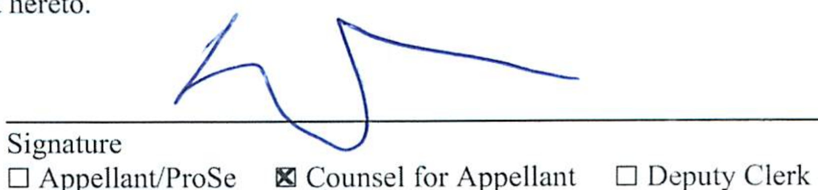
☒ Order (specify):
Granting Defendant's Motions to Dismiss, and Denying Plaintiffs' Motion to Alter Judgment

☒ Judgment (specify):
Dismissal of Action With Prejudice

☐ Other (specify):

Imposed or Filed on 5/12/2011, 11/22/2011, & 2/21/2012. Entered on the docket in this action on Dkt Nos. 91, 106, 107 & 115.

A copy of said judgment or order is attached hereto.



March 21, 2012
Date

Signature
☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

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EXHIBIT A

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Facebook Privacy Litigation

NO. C 10-02389 JW

ORDER DENYING MOTION TO AMEND JUDGMENT

Presently before the Court is Plaintiffs' Motion to Amend Judgment.[1] The Court finds it appropriate to take the Motion under submission without oral argument. See Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court DENIES Plaintiffs' Motion to Amend Judgment.

A. Background

A detailed summary of the factual background of this case is provided in the Court's May 12, 2011 Order.[2] The Court reviews the procedural history relevant to the present Motion.

On May 12, 2011, the Court granted in part and denied in part Defendant's motion to dismiss. (See May 12 Order.) On June 13, 2011, Plaintiffs filed an Amended Complaint pursuant to the Court's May 12 Order.[3] On November 22, 2011, the Court granted Defendant's motion to

[1] (Plaintiffs' Motion to Alter or Amend Judgment, or, Alternatively, for Relief from Judgment and Supporting Memorandum, hereafter, "Motion," Docket Item No. 109.)

[2] (Order Granting in part and Denying in part Defendant's Motion to Dismiss, hereafter, "May 12 Order," Docket Item No. 91.)

[3] (First Amended Consolidated Class Action Complaint, hereafter, "FAC," Docket Item No. 92.)

dismiss the Amended Complaint with prejudice.[4] The same day, the Court entered judgment pursuant to its November 22 Order. (Docket Item No. 107.)

Presently before the Court is Plaintiffs' Motion to Amend Judgment.

B. Standards

The Federal Rules of Civil Procedure provide that a party may file a "motion to alter or amend a judgment" no later than twenty-eight days after entry of judgment. Fed. R. Civ. P. 59(e). In general, a Rule 59(e) motion may be granted on one of "four basic grounds," namely: "(1) if [the] motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if [the] motion is necessary to present newly discovered or previously unavailable evidence; (3) if [the] motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law." Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011) (citation omitted). Because specific grounds for a Rule 59(e) motion are not provided in the Federal Rules of Civil Procedure, "the district court enjoys considerable discretion in granting or denying [such a] motion." Id. (citation omitted). However, amending a judgment after it has been entered is "an extraordinary remedy which should be used sparingly." Id. (citation omitted).

C. Discussion

Plaintiffs contend that the Court should amend its judgment to deny Defendant's motion to dismiss Plaintiffs' claim under the Stored Communications Act ("SCA"),[5] on the ground that the Court's November 22 Order "contains manifest errors of fact" concerning Plaintiffs' claim under the SCA.[6] (Motion at 1-4.) In particular, Plaintiffs contend that the Court's November 22 Order

[4] (Order Granting Defendant's Motion to Dismiss with Prejudice, hereafter, "November 22 Order," Docket Item No. 106.)

[5] (See November 22 Order at 3-6 (discussing both the SCA and Plaintiffs' claim under that Act); see also May 12 Order at 9-10 (discussing the SCA and Plaintiffs' claim under it in an earlier version of the Complaint).)

[6] Plaintiffs contend that their Motion to Amend Judgment "is directed solely at [their] SCA cause of action, and not any of [their] other causes of action." (Motion at 1 n.1.)

United States District Court
For the Northern District of California

dismissed Plaintiffs' SCA claim on the basis of a "mistake of fact,"[7] insofar as the November 22 Order failed to recognize that "the communications at issue [in this case] were not requests to be connected to advertisers, but rather were communications between Plaintiffs and Facebook concerning [Plaintiffs'] private Facebook browsing and virtual filing cabinet activities."[8] (Id. at 2.) Defendant responds that the Court did not make any "manifest error of fact" in its November 22 Order, and that Plaintiffs "simply disagree with the Court's decision."[9]

Here, in its November 22 Order, the Court stated the following:

> Upon review, the Court finds that Plaintiffs' argument relies on two mutually inconsistent propositions. On the one hand, Plaintiffs allege that the communications at issue in this case were requests to be connected to specific advertisements; that the requests were addressed to advertisers; and that Defendant merely acted as the "intermediary" for those communications. . . . On the other hand, Plaintiffs contend that Defendant acted as [a remote computing service ("RCS")] provider for purposes of Plaintiffs' claim under the SCA. . . . On the first view, if the communications were addressed to advertisers, then they were not sent to Defendant in order for Defendant to provide the "processing or storage" of Plaintiffs' "data," which means that Defendant was not acting as an RCS provider with respect to the communications. [Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 901-02 (9th Cir. 2008).] By contrast, on the second view, if Defendant was acting as an RCS provider for purposes of Plaintiffs' claim, then it must be the case that Plaintiffs' communications consisted of "data" which Plaintiffs sent to Defendant for "processing or storage." However,

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[7] The Court observes that Plaintiffs' contention is: (1) that the Court "misconstrue[d]" Plaintiffs' argument; and (2) that such a misconstrual constitutes an "error of fact" for purposes of Rule 59(e). (Motion at 2-4.) It is not clear that a court's alleged misconstrual of a party's allegations constitutes an "error of fact" within the meaning of Rule 59(e), though other district courts have treated such an alleged misconstrual in that way. See, e.g., Indep. Trust Corp. v. Stewart Info. Servs. Corp., No. 10-cv-4430, 2011 WL 1831586, at *3-4 (N.D. Ill. May 11, 2011). Regardless, as the Ninth Circuit explained in Herron, a court "considering a Rule 59(e) motion is not limited merely to [the four "basic grounds" upon which a Rule 59(e) motion may be granted]," but may consider whether amendment "may be appropriate" under other circumstances. Herron, 634 F.3d at 1111.

[8] Plaintiffs bring their Motion to Amend Judgment under Fed. R. Civ. P. 59(e), but also request relief from the Court's Judgment under Fed. R. Civ. P. 60(b). (Motion at 1-2.) However, the grounds under which Plaintiffs move for relief under Rule 60(b) appear to be identical to the grounds under which they move under Rule 59(e). (See id. (contending, as to Plaintiffs' claim for relief from judgment pursuant to Rule 60(b), solely that "there are mistakes and other reasons [sic] inherent in the Court's judgment that entitle Plaintiffs to relief from that judgment").) Accordingly, the Court treats Plaintiffs' Motion to Amend Judgment solely as a Motion brought pursuant to Rule 59(e).

[9] (Facebook, Inc.'s Opposition to Plaintiffs' Motion to Alter or Amend Judgment, or, Alternatively, for Relief from Judgment at 3-5, Docket Item No. 113.)

1 Plaintiffs allege that the communications at issue were requests to be connected to advertisements, not data to be processed or stored.[10]
2
3 Upon review, the Court does not find good cause to amend its judgment. In its November 22
4 Order, the Court examined Plaintiffs' Amended Complaint and found that Plaintiffs' argument
5 regarding their SCA claim relied on "two mutually inconsistent propositions," namely: (1) the
6 allegation that the communications were addressed to advertisers, from which it would necessarily
7 follow that the communications were not sent to Defendant for the purpose of "processing or
8 storage" of Plaintiffs' "data";[11] and (2) the allegation that Defendant acted as an RCS provider for
9 purposes of Plaintiffs' SCA claim, from which it would necessarily follow that the communications
10 at issue consisted of "data" for "processing or storage" which Plaintiffs sent to Defendant.[12] Thus,
11 in its November 22 Order, the Court expressly recognized that one way to interpret Plaintiffs'
12 Amended Complaint is the way proposed by Plaintiffs in the present Motion, namely, an
13 interpretation under which the communications at issue were sent from Plaintiffs to Defendant.
14 However, the Court found that Plaintiffs had failed to state a claim under the SCA, *regardless* of
15 whether Plaintiffs were alleging that the communications at issue were addressed to advertisers or to
16 Defendant. (November 22 Order at 5-6.) Thus, the Court finds that Plaintiffs have not shown that
17 they are entitled to the "extraordinary remedy" of an amended judgment, insofar as they have not
18 shown that the Court committed a "manifest error of fact" in its November 22 Order. Herron, 634
19 F.3d at 1111.
20 Accordingly, the Court DENIES Plaintiffs' Motion to Amend Judgment.[13]
21

22 [10] (November 22 Order at 5-6.)

23 [11] (See, e.g., FAC ¶ 74 (alleging 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
24 connect the user to the specific advertisement," which means that "Facebook actually acts as the intermediary between the user and the advertiser").)

25 [12] (See, e.g., FAC ¶ 81 (alleging that Facebook acts as an RCS provider).)

26 [13] In their Motion, Plaintiffs also request leave to amend their complaint to "clarify[] the details" concerning their SCA claim. (Motion at 5.) However, the Ninth Circuit has clearly stated
27 that "once judgment has been entered in a case, a motion to amend [a] complaint can only be
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1 **D. Conclusion**

2 The Court DENIES Plaintiffs' Motion to Amend Judgment.

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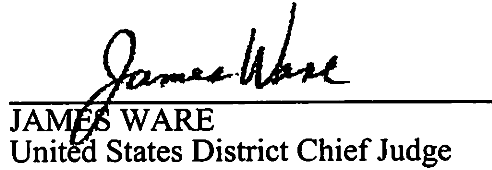
5 Dated: February 21, 2012



JAMES WARE
United States District Chief Judge

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26 entertained if the judgment is first reopened under a motion brought under Rule 59 or 60." Lindauer v. Rogers, 91 F.3d 1355, 1357 (9th Cir. 1996). Thus, in light of the Court's denial of Plaintiffs' Motion to Amend Judgment, the Court may not entertain Plaintiffs' request for leave to amend their complaint. Id.
27
28

United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

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Dated: February 21, 2012

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Susan Imbriani
Courtroom Deputy

EXHIBIT B

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Facebook Privacy Litigation

NO. C 10-02389 JW

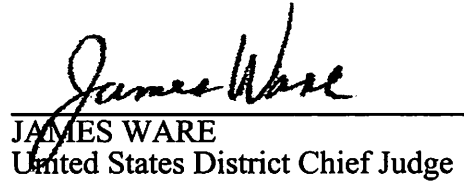
JUDGMENT

_______________________________________/

Pursuant to the Court's November 22, 2011 Order Granting Defendant's Motion to Dismiss With Prejudice, judgment is entered in favor of Defendant Facebook, Inc. and against Plaintiffs David Gould and Mike Robertson.

Each party shall bear their own fees and costs. The Clerk shall close this file.

Dated: November 22, 2011



JAMES WARE
United States District Chief Judge

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Dated: November 22, 2011

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Susan Imbriani
Courtroom Deputy

United States District Court
For the Northern District of California

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EXHIBIT C

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Facebook Privacy Litigation

NO. C 10-02389 JW

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

Presently before the Court is Defendant's Motion to Dismiss.[1] The Court conducted a hearing on October 17, 2011. Based on the papers submitted to date and oral argument, the Court GRANTS Defendant's Motion to Dismiss.

A. Background

A detailed summary of the factual background of this case is provided in the Court's May 12, 2011 Order.[2] The Court reviews the procedural history relevant to the present Motion.

On May 12, 2011, the Court granted in part and denied in part Defendant's previous motion to dismiss. (See May 12 Order.) On June 13, 2011, Plaintiffs filed an Amended Complaint pursuant to the Court's May 12 Order.[3]

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[1] (Defendant's Motion to Dismiss First Amended Consolidated Action Complaint, hereafter, "Motion," Docket Item No. 96.)

[2] (Order Granting in part and Denying in part Defendant's Motion to Dismiss, hereafter, "May 12 Order," Docket Item No. 91.)

[3] (First Amended Consolidated Class Action Complaint, hereafter, "FAC," Docket Item No. 92.)

United States District Court
For the Northern District of California

B. Standards

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-534 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. Papasan v. Allain, 478 U.S. 265, 286 (1986); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988). The complaint must plead "enough facts to state a claim for relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000).

C. Discussion

Defendant moves to dismiss on the grounds that: (1) Plaintiffs fail to state a claim under either the Wiretap Act or Stored Communications Act ("SCA"), inasmuch as the "addressee or intended recipient" of all communications alleged in the First Amended Complaint was either Defendant or a third-party advertiser; (2) Plaintiffs fail to state a claim under Cal. Penal Code § 502(c)(8), as they do not adequately allege that Defendant introduced a "computer contaminant" into their computers to "usurp" the normal function of those computers; (3) Plaintiffs fail to state a claim for breach of contract, because they do not allege that they have suffered any actual damages; and (4) Plaintiffs fail to state a claim under Cal. Civ. Code §§ 1572 and 1573, because they fail to plead this claim adequately under the heightened pleading standard of Rule 9(b). (Motion at 7-25.)

Plaintiffs respond that: (1) Defendant is liable under the SCA, because it was acting as a "remote computing service provider," and thus cannot rely on the "intended recipient" exception to liability; (2) Defendant introduced computer instructions that "usurped" the normal operation of Plaintiffs' computers, in violation of Cal. Penal Code § 502(c)(8); (3) Plaintiffs state a claim for breach of contract, because they have adequately alleged actual damages; and (4) Plaintiffs state a claim under Cal. Civ. Code §§ 1572 and 1573, because they allege that they relied on Defendant's alleged fraudulent misrepresentations.[4]

The Court considers each ground in turn.

1. Stored Communications Act

At issue is whether Plaintiffs state a claim under the SCA.[5]

Under the SCA, an entity providing an electronic communication service to the public "shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service."[6] 18 U.S.C. § 2702(a)(1). However, a provider of an electronic communication service may divulge the contents of a communication to an addressee or intended recipient of such a communication. Id. § 2702(b)(1). A provider of an electronic communication

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[4] (See Plaintiffs' Opposition to Facebook's Motion to Dismiss First Amended Consolidated Class Action Complaint at 2-18, hereafter, "Opp'n," Docket Item No. 101.)

[5] Although the Amended Complaint includes causes of action under both the Wiretap Act and SCA, Plaintiffs' Opposition does not address either the Wiretap Act cause of action or Defendant's Motion to Dismiss as to that cause of action. When this issue was raised at the hearing, Plaintiffs maintained that they have reserved their rights to assert a claim under the Wiretap Act. However, Plaintiffs' vague statement at oral argument is insufficient to save this claim in light of their blatant failure to respond to Defendant's Motion. Accordingly, the Court concludes that Plaintiffs have abandoned their Wiretap Act cause of action, which is therefore dismissed with prejudice. See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1131 (N.D. Cal. 2008) (concluding, where plaintiffs' opposition did not address a claim or defendants' arguments regarding that claim in a motion to dismiss, that the plaintiffs "have abandoned the claim," and granting the motion to dismiss the claim "without leave to amend").

[6] As the Ninth Circuit has explained, an "electronic communication service" ("ECS") is statutorily defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 900 (9th Cir. 2008) (rev'd on other grounds by City of Ontario v. Quon, 130 S. Ct. 2619 (2010)) (citing § 2510(15)). By contrast, a "remote computing service" ("RCS") is statutorily defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." Id. (citing § 2711(2)).

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For the Northern District of California

1 service may also divulge the contents of a communication with "the lawful consent" of an addressee
2 or intended recipient of such a communication. Id. § 2702(b)(3).
3 Here, Plaintiffs allege as follows:
4 [Defendant] is an electronic communications provider within the meaning of the [SCA].
5 When a [user of Defendant's website] clicks on an advertisement posted on [Defendant's] website, the user sends a message to [Defendant] requesting that [Defendant]
6 connect the user to the specific advertisement. . . . In other words, [Defendant] actually acts as the intermediary between the user and the advertiser.
7 [Defendant] is also a "remote computing service" provider pursuant to [the SCA].
8 (FAC ¶¶ 69, 74, 81.)
9 Upon review, the Court finds that Plaintiffs fail to state a claim under the SCA. In its May
10 12 Order, the Court observed that Plaintiffs were either alleging "that the communications at issue
11 were sent to Defendant or to advertisers." (May 12 Order at 10.) The Court explained that, under
12 either interpretation, Plaintiffs had failed to state a claim under the SCA. (Id.) As the Court
13 explained, if the communications were sent to Defendant, then Defendant was their "addressee or
14 intended recipient," and thus was permitted to divulge the communications to advertisers so long as
15 it had its own "lawful consent" to do so. (Id. (citing 18 U.S.C. § 2702(b)(3)).) In the alternative, if
16 the communications were sent to advertisers, then the advertisers were the addressees or intended
17 recipients of those communications, and Defendant was permitted to divulge the communications to
18 them. (Id. (citing 18 U.S.C. § 2702(b)(1)).) Thus, the Court granted Defendant's motion to dismiss
19 Plaintiffs' cause of action under the SCA without prejudice, "with leave to amend to allege specific
20 facts showing that the information allegedly disclosed by Defendant was not part of a
21 communication from Plaintiffs to an addressee or intended recipient of that communication." (Id.)
22 Here, in their Amended Complaint, Plaintiffs specifically allege that the "message[s]" at
23 issue in this case were sent to advertisers, with Defendant acting as the "intermediary" for those
24 messages. (FAC ¶ 74.) Thus, Plaintiffs allege that their communications were sent by Defendant to
25 the intended recipients of the communications, namely, advertisers. Further, Plaintiffs contend that
26 Defendant "was acting as an RCS provider at the time that it non-consensually divulged the contents
27 of Plaintiffs' communications." (Opp'n at 2.) However, Plaintiffs also contend that because "all
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1 user communications carried or maintained on an RCS [provider]'s computers are sent to it directly
2 by the user, [the RCS provider] is an 'intended recipient' of all the [user's] communications," which
3 means that the "intended recipient" exception to liability under the SCA cannot be applicable to an
4 RCS provider. (Id. at 6-7.)
5 In order to address Plaintiffs' claims, the Court finds that it is necessary to consider the
6 difference between an ECS provider and an RCS provider under the SCA. The SCA defines an ECS
7 as "any service which provides to users thereof the ability to send or receive wire or electronic
8 communications." 18 U.S.C. § 2510(15). By contrast, the SCA defines an RCS as "the provision to
9 the public of computer storage or processing services by means of an electronic communications
10 system." Id. § 2711(2). As the Ninth Circuit has explained, when the SCA was passed in 1986,
11 Congress intended the term "RCS" to refer to an "off-site third party" which performed the tasks of
12 "processing or storage of data" for subscribers to the RCS. Quon, 529 F.3d at 901-02 (citations
13 omitted). In speaking of "processing" data, Congress referred to a business practice of
14 "transmit[ting] their records to remote computers to obtain sophisticated data processing services" of
15 the type that is currently performed by "advanced computer processing programs such as Microsoft
16 Excel." Id. at 902. In speaking of the "storage of data," Congress referred to a business practice of
17 maintaining files in "offsite data banks," which acted as a "virtual filing cabinet." Id.
18 Upon review, the Court finds that Plaintiffs' argument relies on two mutually inconsistent
19 propositions. On the one hand, Plaintiffs allege that the communications at issue in this case were
20 requests to be connected to specific advertisements; that the requests were addressed to advertisers;
21 and that Defendant merely acted as the "intermediary" for those communications. (FAC ¶¶ 69, 74,
22 81.) On the other hand, Plaintiffs contend that Defendant acted as an RCS provider for purposes of
23 Plaintiffs' claim under the SCA. (Opp'n at 2.) On the first view, if the communications were
24 addressed to advertisers, then they were not sent to Defendant in order for Defendant to provide the
25 "processing or storage" of Plaintiffs' "data," which means that Defendant was not acting as an RCS
26 provider with respect to the communications. Quon, 529 F.3d at 901-02. By contrast, on the second
27 view, if Defendant was acting as an RCS provider for purposes of Plaintiffs' claim, then it must be
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the case that Plaintiffs' communications consisted of "data" which Plaintiffs sent to Defendant for "processing or storage." However, Plaintiffs allege that the communications at issue were requests to be connected to advertisements, not data to be processed or stored.[7]

Accordingly, the Court finds that Plaintiffs fail to state a claim under the SCA.

2. Cal. Penal Code § 502(c)(8)

At issue is whether Plaintiffs state a claim under Cal. Penal Code § 502(c)(8).

Cal. Penal Code § 502, the Comprehensive Computer Data Access and Fraud Act, was enacted to expand the degree of protection to individuals, businesses and government agencies from "tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems." Cal. Penal Code § 502(a). Section 502 creates liability for any person who "knowingly introduces any computer contaminant into any computer, computer system, or computer network." Id. § 502(c)(8).

Here, Plaintiffs allege as follows:

> [Defendant] knowingly and without permission introduced a computer contaminant . . . by introducing computer instructions designed to record or transmit to advertisers Plaintiffs' and the Class's personally-identifiable information on [Defendant]'s computer networks without the intent or permission of Plaintiffs or the Class in violation of § 502(c)(8). These instructions usurped the normal operations of the relevant computers, which by normal operation would not transmit the [personally identifiable information] of Plaintiff [and] the Class members.

(FAC ¶ 104.)

Upon review, the Court finds that Plaintiffs do not allege facts adequate to state a claim under Cal. Penal Code § 502(c)(8). In its May 12 Order, the Court found that Plaintiffs, in their earlier Complaint, had failed to "allege any facts suggesting that Defendant introduced computer instructions designed to 'usurp the normal operation' of a computer, computer system or computer

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[7] In light of the Court's disposition of Plaintiffs' SCA claim, the Court does not reach the merits of Plaintiffs' contention that "only ECS providers, and not RCS providers like [Defendant], may avail themselves of the SCA's 'intended recipient' exception." (Opp'n at 4.) Further, the Court notes that Defendant contends that it was acting only as an ECS provider, and not as an RCS provider, in regard to the communications at issue in this case. (See Facebook, Inc.'s Reply in Support of Motion to Dismiss First Amended Consolidated Class Action Complaint at 3-5, Docket Item No. 102.) However, in light of the Court's disposition of Plaintiffs' SCA claim, the Court does not reach the question of whether Defendant was acting as an RCS provider.

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1 network." (May 12 Order at 13 n.11.) Here, likewise, Plaintiffs fail to allege any facts in support of
2 their claim. Moreover, elsewhere in their Amended Complaint Plaintiffs allege that Defendant
3 "shares its users' sensitive [personally identifiable] information with third party advertisers without
4 its users' knowledge or consent" by sending to advertisers a "Referrer Header" which "reveals the
5 specific web page address the user was viewing prior to clicking the advertisement." (FAC ¶¶ 34,
6 35.) Plaintiffs further allege that this "Referrer Header" is a "standard web browser function
7 provided by web browsers since . . . 1996." (Id. ¶ 41.) Thus, on Plaintiffs' own allegations,
8 Defendant's alleged transmission of personally identifiable information is caused by a "standard
9 web browser function," rather than by a "contaminant" introduced to Plaintiffs' computers by
10 Defendant to "usurp" the "normal operations" of those computers.[8]

11 Accordingly, the Court finds that Plaintiffs fail to state a claim under Cal. Penal Code
12 § 502(c)(8).

13 **3. Breach of Contract**

14 At issue is whether Plaintiffs state a claim for breach of contract.

15 Under California law, to state a cause of action for breach of contract a plaintiff must plead:
16 "the contract, plaintiffs' performance (or excuse for nonperformance), defendant's breach, and
17 damage to plaintiff therefrom." Gautier v. General Tel. Co., 234 Cal. App. 2d 302, 305 (Cal. Ct.
18 App. 1965). California law requires a showing of "appreciable and actual damage" to assert a
19 breach of contract claim. Aguilera v. Pirelli Armstrong Tire Corp., 223 F.3d 1010, 1015 (9th Cir.
20 2000). Nominal damages and speculative harm do not suffice to show legally cognizable damage
21 under California contract law. Ruiz v. Gap, Inc., 622 F. Supp. 2d 908, 917 (N.D. Cal. 2009).

22 Here, Plaintiffs allege that they suffered "actual and appreciable damages [in] the form of the
23 value of their [personally identifiable information] that [Defendant] wrongfully shared with

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25 [8] The Court is not aware of any cases in which a court has allowed a plaintiff to pursue a claim under Cal. Penal Code § 502(c)(8) under allegations comparable to those in this case. As
26 another court in the Northern District has explained, § 502(c)(8) is aimed at "'viruses or worms[]' and other malware that usurps the normal operation of the computer or computer system." See In re
27 iPhone Application Litig., No. 11-MD-02250-LHK, 2011 WL 4403963, at *13 (N.D. Cal. Sept. 20, 2011).

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advertisers."[9] (FAC ¶ 122.) However, the Court has already rejected Plaintiffs' theory that their personally identifiable information has value.[10] Thus, the Court finds that Plaintiffs fail to show that they have suffered "appreciable and actual damage," which means that their breach of contract claim fails. Aguilera, 223 F.3d at 1015.

Plaintiffs' reliance on Claridge v. RockYou, Inc.[11] is misplaced. In Claridge, the court considered a similar allegation that a "defendant's role in allegedly contributing to the breach of [the] plaintiff's [personally identifiable information] caused plaintiff to lose the 'value' of their [sic] [personally identifiable information], in the form of their breached personal data." Id. at *4. In assessing this allegation, the court noted that the plaintiff was "advancing a novel theory of damages," and observed that there was "no clearly established law regarding the sufficiency of allegations of injury in the context of the disclosure of online personal information." Id. Recognizing the "paucity of controlling authority" in this area, and that the theory of damages by way of "unauthorized disclosure of personal information via the Internet" was a "relatively new" one, the court "decline[d] to hold at this juncture" that the plaintiff had "failed to allege an injury in fact sufficient to support Article III standing." Id. at *5. Thus, far from having "expressly embraced the damages theory [presented by Plaintiffs],"[12] the court in Claridge explicitly asserted that there was "no clearly established law" to support this kind of "novel theory of damages." Rather, the court merely declined to dismiss the entirety of the plaintiff's case for lack of Article III standing, and found the "plaintiff's allegations of harm sufficient at this stage to allege a generalized injury in

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[9] Plaintiffs allege that Defendant requires users of its website to assent to its "Terms and Conditions and Privacy Policy" (the "Agreement"), and that the Agreement constitutes "a valid and enforceable contract between Plaintiffs and the Class on the one hand, and [Defendant] on the other." (FAC ¶¶ 115-16.) Plaintiffs further allege that Defendant breached the Agreement by disclosing "Plaintiffs' and the Class's personal information to its advertiser partners." (Id. ¶ 121.) Because the Court finds that Plaintiffs fail to adequately allege the damages element of their breach of contract claim, the Court does not reach any other issues in regard to this claim.

[10] (See May 12 Order at 11 n.10 (rejecting Plaintiffs' theory that their personal information itself either "constitutes currency" or "is a form of property").)

[11] No. C 09-6032 PJH, 2011 WL 1361588 (N.D. Cal. Apr. 11, 2011).

[12] (Opp'n at 13.)

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fact." Id. at *5. In light of the continuing absence of controlling authority, or even clear persuasive authority, in support of Plaintiffs' theory of damages, the Court finds that Plaintiffs have failed to show "actual and appreciable damages," and thus have failed to state a claim for breach of contract.

Accordingly, the Court finds that Plaintiffs fail to state a claim for breach of contract.

4. Cal. Civ. Code §§ 1572 and 1573

At issue is whether Plaintiffs state a claim under Cal. Civ. Code §§ 1572 and 1573.

Sections 1572 and 1573 deal with actual and constructive fraud. See Cal. Civ. Code §§ 1572, 1573. In California, the elements of a cause of action for fraud are: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." Engalla v. Permanente Med. Group, 15 Cal. 4th 951, 974 (1997). To plead a cause of action for fraud under California law, a plaintiff must "establish damages," because "[d]eception without resulting loss is not actionable fraud." Leegin Creative Leather Products, Inc. v. Diaz, 131 Cal. App. 4th 1517, 1525 (Cal. Ct. App. 2005). Where a "claim of damages" is merely "speculative," it fails to support a cause of action for fraud. Id. at 1526.

Here, as discussed above, Plaintiffs' theory of damages is that they suffered "actual" damages due to the loss in "value" of their personally identifiable information. However, as discussed above, this theory is not supported by any controlling legal precedents, and as such is purely speculative. Under California law, such a theory of damages cannot support a cause of action for fraud. Diaz, 131 Cal. App. 4th at 1525-26. Thus, Plaintiffs have failed to state a claim for fraud.

Accordingly, the Court finds that Plaintiffs fail to state a claim under Cal. Civ. Code §§ 1572 and 1573.

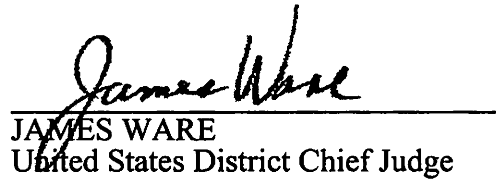
D. Conclusion

The Court GRANTS Defendant's Motion to Dismiss.

Because the Court has already granted Plaintiffs leave to amend to allege specific facts as to each of the claims discussed above, and because the Court finds that Plaintiffs continue to fail to

state a claim as to each of the claims, the Court finds that further amendment would be futile. Accordingly, the Amended Complaint is dismissed with prejudice.

Dated: November 22, 2011



JAMES WARE
United States District Chief Judge

United States District Court
For the Northern District of California

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United States District Court
For the Northern District of California

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13 **Dated: November 22, 2011** **Richard W. Wieking, Clerk**

14 **By: /s/ JW Chambers**
15 **Susan Imbriani**
Courtroom Deputy

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EXHIBIT D

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re Facebook Privacy Litigation

NO. C 10-02389 JW

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs[1] bring this putative class action against Facebook, Inc. ("Defendant") alleging violations of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510, *et seq.*, California's Unfair Competition Law, California Business & Professions Code §§ 17200, *et seq.*, and breach of contract. Plaintiffs allege that Defendant intentionally and knowingly transmitted personal information about Plaintiffs to third-party advertisers without Plaintiffs' consent.

Presently before the Court is Defendant's Motion to Dismiss.[2] The Court conducted a hearing on March 28, 2011. Based on the papers submitted to date and oral argument, the Court GRANTS in part and DENIES in part Defendant's Motion to Dismiss.

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[1] Named Plaintiffs are David Gould and Mike Robertson, both of whom are residents of California who have been registered users of Defendant's services since at least 2008.

[2] (See Defendant's Motion to Dismiss Consolidated Class Action Complaint, hereafter, "Motion," Docket Item No. 75.)

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II. BACKGROUND

In a Consolidated Class Action Complaint[3] filed on October 11, 2010, Plaintiffs allege as follows:

Defendant is a Delaware corporation that maintains its headquarters in Santa Clara County, California. (Complaint ¶ 6.) Defendant operates the world's largest social networking website. (Id. ¶ 11.) Defendant allows anyone with access to a computer and Internet connection to register for its services free of charge. (Id. ¶ 12.) One of the few requirements Defendant places on its registrants is that they provide their actual names. (Id. ¶ 13.) Once registered, a user of Defendant's website may also post personal information to a "profile" webpage. (Id. ¶ 14.)

Each user of Defendant's website has a user ID number which uniquely identifies that user. (Complaint ¶ 15.) If a person knows the user ID number or "username" of an individual who is a user of Defendant's website, that person can see the user's profile webpage and see the user's real name, gender, picture, and other information. (Id.)

Defendant now "serves more ad[vertisement] impressions than any other online entity." (Complaint ¶ 18.) Because it possesses personal information about its users, Defendant's advertisers are able to target advertising to users of Defendant's website. (Id. ¶ 19.) Defendant's own policies prohibit Defendant from revealing any user's "true identity" or specific personal information to advertisers. (Id. ¶¶ 20-25.)

When a user of Defendant's website clicks on an advertisement posted on the website, Defendant sends a "Referrer Header" to the corresponding advertiser. (Complaint ¶ 28.) This Referrer Header reveals the specific webpage address that the user was looking at prior to clicking on the advertisement. (Id.) Thus, Defendant has caused users' Internet browsers to send Referrer Header transmissions which report the user ID or username of the user who clicked on an advertisement, as well as information identifying the webpage the

[3] (Consolidated Class Action Complaint, hereafter, "Complaint," Docket Item No. 36.)

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user was viewing just prior to clicking on that advertisement. (Id.) Because of this, when an advertiser receives a Referrer Header transmission from Defendant, the advertiser can obtain substantial additional information about a user of Defendant's website, such as the user's name, gender and picture. (Id. ¶ 29.) Through these transmissions, Defendant shares users' personal information with third-party advertisers without users' knowledge or consent, in violation of Defendant's own policies. (Id. ¶ 27.)

Defendant began these transmissions no later than February, 2010, and they continued until May 21, 2010. (Complaint ¶¶ 31-33.) Software engineers employed by Defendant knew or should have known that these transmissions would divulge private user information to third-party advertisers. (Id. ¶ 36.) As a result of Defendant's misconduct, Plaintiffs "suffered injury." (Id. ¶ 109.)

On the basis of the allegations outlined above, Plaintiffs assert eight causes of action: (1) Violation of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2510, *et seq.*; (2) Violation of the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.*; (3) Violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (4) Violation of California's Computer Crime Law, Cal. Penal Code § 502; (5) Violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*; (6) Breach of Contract; (7) Violation of Cal. Civ. Code §§ 1572, 1573; and (8) Unjust Enrichment.

Presently before the Court is Defendant's Motion to Dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6).

III. STANDARDS

A. Lack of Subject Matter Jurisdiction

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for a motion to dismiss for lack of subject-matter jurisdiction. A Rule 12(b)(1) motion may be either facial, where the inquiry is confined to the allegations in the complaint, or factual, where the court is permitted to look beyond the complaint to extrinsic evidence. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). On a facial challenge, all material allegations in the complaint are assumed true, and the question for

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the court is whether the lack of federal jurisdiction appears from the face of the pleading itself. See Wolfe, 392 F.3d at 362; Thornhill Publishing Co. v. General Telephone Electronics, 594 F.2d 730, 733 (9th Cir. 1979). When a defendant makes a factual challenge "by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject-matter jurisdiction." Safe Air For Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). The court need not presume the truthfulness of the plaintiff's allegations under a factual attack. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000); Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). However, in the absence of a full-fledged evidentiary hearing, disputes in the facts pertinent to subject-matter are viewed in the light most favorable to the opposing party. Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996). The disputed facts related to subject-matter jurisdiction should be treated in the same way as one would adjudicate a motion for summary judgment. Id.

B. Failure to State a Claim

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-534 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. Papasan v. Allain, 478 U.S. 265, 286 (1986); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988). The complaint must plead "enough facts to state a claim for relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Courts

may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000).

IV. DISCUSSION

Defendant moves to dismiss on the grounds that: (1) Plaintiffs fail to allege injury-in-fact that would give them standing to maintain an action in federal court; (2) Plaintiffs fail to state a claim under the Wiretap Act, because they do not allege disclosure of the "contents of a communication"; (3) Plaintiffs fail to state a claim under the Stored Communications Act, because they do not allege disclosure of the "contents of a communication" and because the same conduct cannot be a violation of both the Wiretap Act and the Stored Communications Act; (4) Plaintiffs fail to state a claim under the UCL because they lack standing, since they have not alleged that they have lost money or property; (5) Plaintiffs fail to state a claim under Cal. Penal Code § 502 because Defendant's activities do not amount to the type of "hacking" or "breaking into a computer" that the law was intended to prohibit; (6) Plaintiffs fail to state a claim under the CLRA, because such claims can only be brought by consumers; (7) Plaintiffs fail to state a claim for Breach of Contract, because they do not allege that they suffered appreciable or actual damage; (8) Plaintiffs fail to state a claim under Cal. Civ. Code §§ 1572 and 1573, because they do not allege that they relied upon Defendant's representations or were damaged by them; and (9) Plaintiffs fail to state a claim for Unjust Enrichment, because Plaintiffs cannot assert unjust enrichment while simultaneously alleging a breach of contract. (Motion at 6-24.)

Plaintiffs respond that: (1) Plaintiffs have alleged a violation of their statutory rights, which is a sufficient allegation of injury-in-fact to give them standing; (2) Plaintiffs state a claim under the Wiretap Act, because Plaintiffs allege that Defendant disclosed the contents of Plaintiffs' communications to entities that were not intended recipients of those communications, and the communications were not "readily accessible to the general public"; (3) Plaintiffs state a claim under the Stored Communications Act, because Plaintiffs allege that Defendant disclosed the contents of Plaintiffs' communications to entities that were not intended recipients of those communications,

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and the communications were not "readily accessible to the general public";[4] (4) Plaintiffs state a claim under the UCL, because they have alleged facts sufficient to establish standing under the UCL, and have alleged that Defendant violated each of the three "prongs" of the UCL; (5) Plaintiffs state a claim under Cal. Penal Code § 502, because they allege that Defendant accessed their personal data in an unauthorized way; (6) Plaintiffs state a claim under the CLRA, because they are "consumers" within the meaning of the CLRA; (7) Plaintiffs state a claim for Breach of Contract, because they have alleged actionable damages caused by the diminution in value of Plaintiffs' personal information; (8) Plaintiffs state a claim under Cal. Civil Code §§ 1572 and 1573, because they have pleaded in sufficient detail Defendant's fraudulent actions; and (9) Plaintiffs state a claim for Unjust Enrichment in the alternative to Breach of Contract, because they are entitled to simultaneously allege the existence of an express contract and maintain a claim for unjust enrichment. (Opp'n at 4-25.) The Court addresses each ground in turn.

A. Injury-in-Fact

At issue is whether Plaintiffs have alleged injury-in-fact sufficiently to establish standing.

To satisfy the standing requirements of Article III, a plaintiff must show that he has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Gest v. Bradbury, 443 F.3d 1177, 1181 (9th Cir. 2006) (citing Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000)). The injury required by Article III can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing." Edwards v. First Am. Corp., 610 F.3d 514, 517 (9th Cir. 2010) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)). In such cases, the "standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Id. (quoting Warth, 422 U.S. at 500)).

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[4] Plaintiffs do not distinguish between their claims under Title I of the ECPA (the Wiretap Act) and Title II of the ECPA (the Stored Communications Act). (See Plaintiffs' Opposition to Facebook's Motion to Dismiss Consolidated Class Action Complaint 11-17, hereafter, "Opp'n," Docket Item No. 86.) Instead, Plaintiffs appear to assume that the same allegations suffice to state a claim under both the Wiretap Act and the Stored Communications Act. (See id. at 11.)

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Here, Plaintiffs allege as follows:

> From at least February 2010, and until May 21, 2010, Defendant transmitted to advertisers communications which disclosed both users' identities and the URL of the webpage the user was viewing when that user clicked on an advertisement. (Complaint ¶¶ 31-33.) By divulging user identities and other user information to advertisers without user consent, Defendant intentionally violated, *inter alia*, 18 U.S.C. § 2511(3)(a). (Id. ¶ 57.) Both Plaintiffs were registered users of Defendant's services during the relevant time period. (Id. ¶¶ 4, 5.) Both Plaintiffs clicked on at least one third-party advertisement displayed on Defendant's website during the relevant time period. (Id.)

Based on the allegations above, and without addressing the merits of the claim, the Court finds that Plaintiffs allege a violation of their statutory rights under the Wiretap Act, 18 U.S.C. §§ 2510, *et seq*. The Wiretap Act provides that any person whose electronic communication is "intercepted, disclosed, or intentionally used" in violation of the Act may in a civil action recover from the entity which engaged in that violation. 18 U.S.C. § 2520(a). Thus, the Court finds that Plaintiffs have alleged facts sufficient to establish that they have suffered the injury required for standing under Article III.[5]

Defendant's contention that at the pleading stage of a class action, each individual plaintiff must include allegations sufficient to establish injury-in-fact as to each of them is mistaken. (Motion at 6-7.) In Hepting v. AT&T Corp.,[6] the court rejected a similar argument. In Hepting, the court considered allegations that the defendant had "created a dragnet" which collected the contents of its customer's communications. Id. at 1000. The court found that it would be impossible for "any one plaintiff [to] have failed to demonstrate injury-in-fact if that plaintiff effectively demonstrates that all class members have so suffered." Id. The court held that the mere fact that the named plaintiffs each alleged that they were the defendant's "customers during the relevant time period" was sufficient to establish that the defendant's alleged conduct "would have imparted a concrete injury on each of them." Id. Similarly, if Plaintiffs here are able to show that Defendant transmitted

[5] A plaintiff may satisfy the injury-in-fact requirements to have standing under Article III, and thus may be able to "bring a civil action without suffering dismissal for want of standing to sue," without being able to assert a cause of action successfully. See Doe v. Chao, 540 U.S. 614, 624-25 (2004) (stating that a plaintiff may have "injury enough to open the courthouse door, but without more [may have] no cause of action" under which he can successfully obtain relief).

[6] 439 F. Supp. 2d 974 (N.D. Cal. 2006).

the contents of its users' communications in the manner alleged, they will have effectively demonstrated that all of the users of Defendant's website suffered the same injury, which will necessarily mean that each individual Plaintiff will have demonstrated that he was injured.

Accordingly, the Court DENIES Defendant's Motion to Dismiss on the ground that Plaintiffs have failed to allege injury-in-fact sufficient to establish standing.

B. Wiretap Act

At issue is whether Plaintiffs state a claim under the Wiretap Act.

The Wiretap Act states that an entity "providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient." 18 U.S.C. § 2511(3)(a).

Here, Plaintiffs allege as follows:

> When a user of Defendant's website clicks on an advertisement banner displayed on that website, the user is asking Defendant to send an electronic communication to the advertiser who supplied the advertisement. (Complaint ¶ 56.) However, users do not expect and do not consent to Defendant's disclosure of all contents of that communication. (Id.) Users expect that certain aspects of their communications concerning advertisers–namely, their identities and the webpage they were viewing at the time they clicked on an advertisement–will be configured by Defendant to be private. (Id.)

Based on the allegations above, the Court finds that there are two possible ways to understand Plaintiffs' allegations. On the first view, Plaintiffs allege that when a user of Defendant's website clicks on an advertisement banner displayed on that website, that click constitutes an electronic communication from the user to Defendant.[7] Under this interpretation, the content of the user's communication with Defendant is a request that Defendant "send [a further] electronic communication to [an] advertiser." On the second view, Plaintiffs allege that when a user of Defendant's website clicks on an advertisement banner, that click constitutes an electronic

[7] This interpretation is embraced by Plaintiffs themselves in their Opposition, though the Consolidated Class Action Complaint itself is ambiguous on this point. (See Opp'n at 11-12, 16.)

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communication from the user to the advertiser. Under this interpretation, Plaintiffs are merely "asking Defendant" to pass the communication along to its intended recipient, who is the advertiser.

The Court finds that as a matter of law, Plaintiffs cannot state a claim under the Wiretap Act under either interpretation. Under the first interpretation, the communication is sent from the user to Defendant. However, the Wiretap Act states that an "entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (*other than one to such person or entity, or an agent thereof*) . . . " 18 U.S.C. § 2511(3)(a) (emphasis added). Because, under the first interpretation, the communication at issue is one from a user *to* Defendant, Defendant cannot be liable under the Wiretap Act for divulging it. Under the second interpretation, the communication is sent from the user to an advertiser. However, the Wiretap Act states that an "entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication . . . to any person or entity *other than an addressee or intended recipient of such communication*." Id. (emphasis added). Because, under the second interpretation, the communication at issue is a communication from a user to an advertiser, the advertiser is its "addressee or intended recipient," and Defendant cannot be liable under the Wiretap Act for divulging it. Thus, because Plaintiffs cannot state a claim under the Wiretap Act on their own allegations, the Court dismisses Plaintiffs' Wiretap Act claim.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action under the Wiretap Act without prejudice, with leave to amend to allege specific facts showing that the information allegedly disclosed by Defendant was not part of a communication from Plaintiffs to an addressee or intended recipient of that communication, if so desired.

C. Stored Communications Act

At issue is whether Plaintiffs state a claim under the Stored Communications Act.

Under the Stored Communications Act, an entity providing an electronic communication service to the public "shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). However, a provider of an electronic communication service may divulge the contents of a communication to an

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addressee or intended recipient of such communication. Id. § 2702(b)(1). A provider of an electronic communication service may also divulge the contents of a communication with "the lawful consent" of an addressee or intended recipient of such communication. Id. § 2702(b)(3).

As discussed previously, Plaintiffs either allege that the communications at issue were sent to Defendant or to advertisers. Under either interpretation, Plaintiffs fail to state a claim under the Stored Communications Act. If the communications were sent to Defendant, then Defendant was their "addressee or intended recipient," and thus was permitted to divulge the communications to advertisers so long as it had its own "lawful consent" to do so.[8] 18 U.S.C. § 2702(b)(3). In the alternative, if the communications were sent to advertisers, then the advertisers were their addressees or intended recipients, and Defendant was permitted to divulge the communications to them. Id. § 2702(b)(1). Thus, because Plaintiffs cannot state a claim under the Stored Communications Act on their own allegations, the Court dismisses Plaintiffs' Stored Communications Act claim with prejudice.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action under the Stored Communications Act without prejudice, with leave to amend to allege specific facts showing that the information allegedly disclosed by Defendant was not part of a communication from Plaintiffs to an addressee or intended recipient of that communication, if so desired.

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[8] Plaintiffs do not contend that Defendant would be unable to give itself "lawful consent" to divulge Plaintiffs' communications to Defendant. In similar situations, courts have held that a defendant cannot be liable under the Stored Communications Act for disclosing communications where the defendant was itself the "addressee or intended recipient" of those communications. See, e.g., In re Am. Airlines, Inc., Privacy Litig., 370 F. Supp. 2d 552, 560-61 (N.D. Tex. 2005) (holding that a defendant was not liable under the Stored Communications Act for disclosing personal information of which it was the intended recipient, even if the defendant was "contractually bound by its privacy policy not to disclose [such] information" and could be held liable for breach of contract for doing so).

1 **D. UCL**

2 At issue is whether Plaintiffs state a claim for violation of the UCL.

3 To assert a UCL claim, a private plaintiff needs to have "suffered injury in fact and . . . lost
4 money or property as a result of the unfair competition." Rubio v. Capital One Bank, 613 F.3d
5 1195, 1203 (9th Cir. 2010). A plaintiff's "personal information" does not constitute property under
6 the UCL. Thompson v. Home Depot, Inc., No. 07cv1058 IEG, 2007 WL 2746603, at *3 (S.D. Cal.
7 Sept. 18, 2007).

8 Here, Plaintiffs do not allege that they lost money as a result of Defendant's conduct.
9 Instead, Plaintiffs allege that Defendant unlawfully shared their "personally identifiable
10 information" with third-party advertisers. (Complaint ¶¶ 1-3.) However, personal information does
11 not constitute property for purposes of a UCL claim. Thompson, 2007 WL 2746603, at *3.

12 Plaintiffs' reliance on Doe 1 v. AOL, LLC[9] is misplaced. In AOL, the court considered
13 claims under the UCL brought by plaintiffs whose personal and financial information had been
14 disclosed to the public by an Internet service provider. Id. at 1111. Significantly, the AOL court
15 found that the defendant's "disclosure of members' undeniably sensitive information," including
16 such "highly-sensitive financial information" as credit card numbers, social security numbers,
17 financial account numbers and passwords, was "not something that members bargained for when
18 they signed up and *paid fees for* [the defendant's] service." Id. at 1113 (emphasis added). The
19 court's opinion in AOL does not stand for the broad proposition that personal information of any
20 kind "equates to money or property." (See Opp'n at 9.) Rather, it indicates that a plaintiff who is a
21 *consumer* of certain services (i.e., who "paid fees" for those services) may state a claim under
22 certain California consumer protection statutes when a company, in violation of its own policies,
23 discloses personal information about its consumers to the public. See AOL, 719 F. Supp. 2d at
24 1111-13. Here, by contrast, Plaintiffs do not allege that they paid fees for Defendant's services.
25 Instead, they allege that they used Defendant's services "free of charge." (Complaint ¶ 12.)
26

27 [9] 719 F. Supp. 2d 1102 (N.D. Cal. 2010).

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1 Because Plaintiffs allege that they received Defendant's services for free, as a matter of law,
2 Plaintiffs cannot state a UCL claim under their own allegations. Thus, the Court dismisses
3 Plaintiffs' UCL claim with prejudice.[10]
4 Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
5 under the UCL with prejudice.
6 **E. Cal. Penal Code § 502**
7 At issue is whether Plaintiffs state a claim under Cal. Penal Code § 502.
8 Cal. Penal Code § 502, the Comprehensive Computer Data Access and Fraud Act, was
9 enacted to expand the degree of protection to individuals, businesses and government agencies from
10 "tampering, interference, damage, and unauthorized access to lawfully created computer data and
11 computer systems." Cal. Penal Code § 502(a). With one exception, the subsections of Section 502
12 that potentially apply in this case require that the defendant's actions be taken "without permission."
13 See Cal. Penal Code §§ 502(c)(1), (2), (3), (6), & (7). Individuals may only be subjected to liability
14 for acting "without permission" under Section 502 if they "access[] or us[e] a computer, computer
15 network, or website in a manner that overcomes technical or code-based barriers." Facebook, Inc. v.
16 Power Ventures, Inc., No. C 08-05780-JW, 2010 WL 3291750, at * 11 (N.D. Cal. July 20, 2010).
17 Additionally, Section 502 creates liability for any person who "knowingly introduces any computer
18 contaminant into any computer, computer system, or computer network." Cal. Penal Code §
19 502(c)(8).
20 In a recent case, this Court considered the meaning of the term "without permission" in
21 Section 502. See Power Ventures, 2010 WL 3291750, at *6. In Power Ventures, the Court found
22 that the statutory language of Section 502, caselaw, and legislative intent all failed to provide clear
23

24 [10] Plaintiffs further contend that personal information itself: (1) "constitutes currency"; and (2) is a form of property. (See Opp'n at 6-11.) However, Plaintiffs offer no caselaw in support of
25 these propositions. As another court has noted when confronted with a similar claim: "Nor has [the plaintiff] presented any authority to support the contention that unauthorized release of personal
26 information constitutes a loss of property. Without any such authority, the Court is constrained to find that [the plaintiff] has not alleged any loss of property and therefore has not stated a valid claim
27 under [the UCL]." Ruiz v. Gap, Inc., 540 F. Supp. 2d 1121, 1127 (N.D. Cal. 2008).
28

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guidance as to how to interpret this term. Id. at *6-10. The Court found that the statute would be unconstitutionally vague unless it was read narrowly, so as to provide adequate notice of the conduct which it criminally prohibits. Id. at *10. The Court then held that the statute must be read to limit criminal liability to circumstances "in which a user gains access to a computer, computer network, or website to which access was restricted through technological means," since anyone "applying the technical skill necessary to overcome such a barrier will almost always understand that any access gained through such action is unauthorized." Id. at *11. Applying that construction of the statute to the facts before it, the Court concluded that the defendant could only be held liable for a violation of Section 502 if the plaintiff could prove that the defendant "circumvented . . . technical barriers" that had been put in place to block defendant's access to the plaintiff's website. Id. at *12.

Here, Plaintiffs' allegations under those subsections of Section 502 which require a defendant to act "without permission" allege that Defendant acted "without permission" under that statute.[11] (Complaint ¶¶ 86-91.) However, Plaintiffs do not allege that Defendant circumvented technical barriers to gain access to a computer, computer network or website. To the contrary, Plaintiffs allege that Defendant caused "nonconsensual transmissions" of their personal information as a consequence of Defendant's "re-design" of its own website. (Id. ¶¶ 34-36.) It is thus impossible, on Plaintiffs' own allegations, for Defendant to be liable under the subsections of

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[11] Plaintiffs also allege a violation of Cal. Penal Code § 502(c)(8), which unlike the other sections of Cal. Penal Code § 502(c) does not require that a defendant act "without permission." Cal. Penal Code § 502(c)(8) applies to any person who "knowingly introduces any computer contaminant into any computer, computer system, or computer network." The term "computer contaminant" is defined as follows:

> . . . any set of computer instructions that are designed to modify, damage, destroy, record, or transmit information within a computer, computer system, or computer network without the intent or permission of the owner of the information. They include, but are not limited to, a group of computer instructions commonly called viruses or worms, that are self-replicating or self-propagating and are designed to contaminate other computer programs or computer data, consume computer resources, modify, destroy, record, or transmit data, or in some other fashion usurp the normal operation of the computer, computer system, or computer network.

Cal. Penal Code § 502(b)(10).

Plaintiffs do not allege any facts suggesting that Defendant introduced computer instructions designed to "usurp the normal operation" of a computer, computer system or computer network. Thus, under California law Plaintiffs fail to state a claim under Cal. Penal Code § 502(c)(8).

Section 502 which require a defendant to act "without permission," as there were clearly no technical barriers blocking Defendant from accessing its own website. Because Plaintiffs cannot state a claim under Section 502 for any action done "without permission" under their own allegations, the Court dismisses Plaintiffs' claim under Cal. Penal Code §§ 502(c)(1), (2), (3), (6), & (7) with prejudice.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action under Section 502 with prejudice as to Cal. Penal Code §§ 502(c)(1), (2), (3), (6), & (7), and without prejudice as to § 502(c)(8), with leave to amend to allege specific facts in support of their claim under § 502(c)(8), if so desired.

F. CLRA

At issue is whether Plaintiffs state a claim under the CLRA.

The CLRA provides protection to a specific category of consumers from damages suffered in connection with a consumer transaction. Robinson v. HSBC Bank USA, 732 F. Supp. 2d 976, 987 (N.D. Cal. 2010). A violation of the CLRA may only be alleged by a consumer. Von Grabe v. Spring PCS, 312 F. Supp. 2d 1285, 1303 (S.D. Cal. 2003). Under the CLRA, a "consumer" is an individual who purchases or leases any goods or services for personal, family or household purposes. Schauer v. Mandarin Gems of Cal., Inc., 125 Cal. App. 4th 949, 960 (Cal. Ct. App. 2005).

Here, Plaintiffs allege that Defendant "allows anyone . . . to register for its services free of charge." (Complaint ¶ 12.) As discussed previously, Plaintiffs' contention that their personal information constitutes a form of "payment" to Defendant is unsupported by law. Since it is not possible for Plaintiffs to state a claim pursuant to the CLRA under Plaintiffs' own allegations, the Court dismisses Plaintiffs' CLRA claim with prejudice.

Accordingly, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' Cause of Action under the CLRA with prejudice.

G. Breach of Contract

At issue is whether Plaintiffs state a claim for breach of contract.

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Under California law, to state a cause of action for breach of contract a plaintiff must plead: "the contract, plaintiffs' performance (or excuse for nonperformance), defendant's breach, and damage to plaintiff therefrom." Gautier v. General Tel. Co., 234 Cal. App. 2d 302, 305 (Cal. Ct. App. 1965). California law requires a showing of "appreciable and actual damage" to assert a breach of contract claim. Aguilera v. Pirelli Armstrong Tire Corp., 223 F.3d 1010, 1015 (9th Cir. 2000). Nominal damages and speculative harm do not suffice to show legally cognizable damage under California contract law. Ruiz v. Gap, Inc., 622 F. Supp. 2d 908, 917 (N.D. Cal. 2009).

Here, in regard to damages, Plaintiffs allege only that as a result of the alleged breach of contract, Plaintiffs "suffered injury." (Complaint ¶ 109.) However, Plaintiffs fail to allege any actual damages in their Complaint. Thus, under California law Plaintiffs fail to state a claim for breach of contract.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action for breach of contract, with leave to amend to allege specific facts showing appreciable and actual damages in support of their claim, if so desired.

H. Cal. Civ. Code §§ 1572 and 1573

At issue is whether Plaintiffs state a claim under Sections 1572 and 1573 of the California Civil Code.

Sections 1572 and 1573 deal with actual and constructive fraud. See Cal. Civ. Code §§ 1572, 1573. In California, the elements of a cause of action for fraud are: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." Engalla v. Permanente Med. Group, 15 Cal. 4th 951, 974 (1997).

Here, Plaintiffs fail to allege that they relied upon any allegedly fraudulent misrepresentations by Defendant. Thus, under California law Plaintiffs fail to state a claim for fraud under either Cal. Civ. Code § 1572 or § 1573.

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Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action under Cal. Civ. Code §§ 1572 and 1573, with leave to amend to allege specific facts in support of their claim, if so desired.[12]

I. Unjust Enrichment

At issue is whether Plaintiffs are entitled to state a claim for unjust enrichment in the alternative, given that they allege breach of an express contract.

Under California law, unjust enrichment is an action in quasi-contract. Gerlinger v. Amazon.com, Inc., 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004). However, "as a matter of law, a quasi-contract action for unjust enrichment does not lie where . . . express binding agreements exist and define the parties' rights." Villager Franchise Systems, Inc. v. Dhami, Dhami & Virk, No. CVF046393RECSMS, 2006 WL 224425 (E.D. Cal. Jan. 26, 2006) (quoting Cal. Med. Ass'n v. Aetna U.S. Healthcare of Cal., 94 Cal. App. 4th 151, 172 (Cal. Ct. App. 2001)). Although Rule 8 of the Federal Rules of Civil Procedure allows a party to state multiple, even inconsistent claims, the rule does not allow a plaintiff invoking state law to assert an unjust enrichment claim while also alleging an express contract. Gerlinger, 311 F. Supp. 2d at 856.

Here, Plaintiffs allege that they assented to Defendant's "Terms and Conditions and Privacy Policy," and that the provisions of this Policy "constitute a valid and enforceable contract" between Plaintiffs and Defendant. (Complaint ¶¶ 101, 102.) Because Plaintiffs allege that an express contract existed between themselves and Defendant, they cannot also assert an unjust enrichment claim. Gerlinger, 311 F. Supp. 2d at 856. Since it is not possible to state a claim for unjust enrichment under Plaintiffs' own allegations, the Court dismisses Plaintiffs' unjust enrichment claim with prejudice.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action for unjust enrichment with prejudice.

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[12] Any allegations of fraud must be pleaded with particularity. See Fed. R. Civ. P. 9(b).

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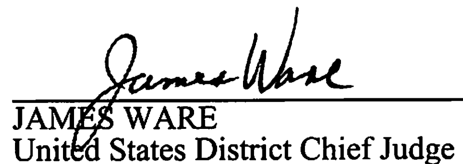
1 V. CONCLUSION

2 The Court GRANTS in part and DENIES in part Defendant's Motion to Dismiss as follows:
3 (1) The Court DENIES Defendant's Motion to Dismiss on the ground that Plaintiffs lack
4 standing under Article III;
5 (2) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
6 under the Wiretap Act with leave to amend;
7 (3) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
8 under the Stored Communications Act with leave to amend;
9 (4) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
10 under the UCL with prejudice;
11 (5) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
12 under Cal. Penal Code §§ 502(c)(1), (2), (3), (6), & (7) with prejudice, and as to
13 § 502(c)(8) with leave to amend;
14 (6) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
15 under the CLRA with prejudice;
16 (7) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action for
17 breach of contract with leave to amend;
18 (8) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
19 under Cal. Civ. Code §§ 1572, 1573 with leave to amend; and
20 (9) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action for
21 unjust enrichment with prejudice.
22 Any Amended Complaint shall be filed on or before **June 13, 2011** and shall be consistent
23 with the terms of this Order.
24
25
26 Dated: May 12, 2011



27 JAMES WARE
United States District Chief Judge
28

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: May 12, 2011 **Richard W. Wieking, Clerk**

By: /s/ JW Chambers
Susan Imbriani
Courtroom Deputy

United States District Court
For the Northern District of California

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EXHIBIT E

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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 CLASS ACTION **RULE 3-2 REPRESENTATION STATEMENT** Judge: Hon. James Ware

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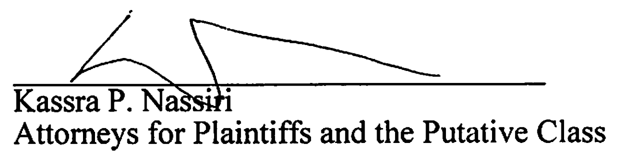
Dated: March 21, 2012

Respectfully submitted,
NASSIRI & JUNG LLP



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