COOLEY LLP
MICHAEL G. RHODES (116127) (rhodesmg@cooley.com)
MATTHEW D. BROWN (196972) (brownmd@cooley.com)
BENJAMIN H. KLEINE (257225) (bkleine@cooley.com)
KELLY A. COOKE (258003) (kcooke@cooley.com)
MEGAN L. DONOHUE (266147) (mdonohue@cooley.com)
101 California Street, 5th Floor
San Francisco, CA 94111-5800
Telephone: (415) 693-2000
Facsimile: (415) 693-2222

Attorneys for Defendant FACEBOOK, INC.

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 MOTION TO DISMISS FIRST AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

F.R.C.P. 12(b)(6)

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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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 17, 2011 at 9:00 a.m. or as soon thereafter as this motion may be heard in the above-entitled court, located at 450 Golden Gate Avenue, San Francisco, California, in Courtroom 15 (18th Floor), Defendant Facebook, Inc. ("Facebook") will move to dismiss with prejudice the First Amended Consolidated Class Action Complaint filed by Plaintiffs. Facebook's Motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) and is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Request for Judicial Notice filed herewith, the Declaration of Ana Yang Muller and accompanying Exhibits filed herewith, and all pleadings and papers on file in this matter, and upon such other matters as may be presented to this Court at the time of hearing or otherwise.

STATEMENT OF RELIEF SOUGHT

Facebook seeks an order, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissing with prejudice the First Amended Consolidated Class Action Complaint and each of its causes of action for failure to state a claim upon which relief can be granted.

STATEMENT OF ISSUES TO BE DECIDED

1. Because Plaintiffs fail to state a claim upon which relief can be granted for each remaining cause of action—alleged violations of 18 U.S.C. § 2510 *et seq.*, 18 U.S.C. § 2701 *et seq.*, Cal. Penal Code § 502(c)(8), Cal. Civil Code §§ 1572-73, and breach of contract—should the First Amended Consolidated Class Action Complaint be dismissed with prejudice?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In a May 12, 2011 Order (the "Dismissal Order"), this Court dismissed all eight claims in Plaintiffs' original consolidated complaint (the "original Complaint") for failure to state a claim, although it granted leave to amend certain but not all of the claims. Plaintiffs' First Amended Consolidated Class Action Complaint ("FAC") attempts to salvage their remaining claims with what amounts to non-substantive, cosmetic revisions. The FAC contains the same conclusory allegations, is based on essentially the same underlying facts, realleges the same rejected legal theories, and suffers from the same deficiencies that were fatal to the original Complaint.

The core allegations in the FAC remain the same: for a period of time in 2010, when a Facebook user ("User") clicked on an advertisement on Facebook, as a result of the "referrer header" function in the User's web browser, a URL (Internet address) was transmitted to an advertiser that potentially contained (i) the User's "User ID" or "Username" and (ii) basic information about the type of webpage from which the User was navigating. Because the FAC only superficially changes Plaintiffs' original complaint, each of the remaining claims should be again dismissed—this time with prejudice.

Plaintiffs' Wiretap Act and SCA claims (Counts I and II) fail for several reasons. *First*, the FAC cannot overcome several explicit statutory exceptions to liability: for disclosure of communications made to a provider of an electronic communication service; for disclosure to an "addressee or intended recipient"; and for disclosure to a third party with the consent of an addressee or intended recipient. *Second*, the alleged disclosures did not involve the "contents of a communication" as required for liability under both statutes. *Third*, Plaintiffs fail to allege that Facebook divulged a communication "while in transmission," as required by the Wiretap Act. *Fourth*, to the extent that Plaintiffs' SCA claim is based on vague and speculative allegations that advertisers could possibly have navigated to Users' profile pages and viewed information posted there, the claim should be dismissed because, in addition to other deficiencies, two statutory exceptions to liability apply.

Nor have Plaintiffs adequately alleged facts to support their other claims. Plaintiffs do no more than recite the elements of their claim for violation of California Penal Code § 502(c)(8) (Count IV), with no specific allegations of what contaminant was introduced, of how any alleged contaminant affected operation of their computers, or that any instructions were actually introduced into their computers. Plaintiffs' breach of contract claim (Count VI) lacks any facts supporting the necessary "appreciable and actual damages"; to the contrary, the FAC makes it clear that Plaintiffs cannot allege such damage because, as the Court stated previously, Facebook is a free service. And Plaintiffs' fraud claim (Count VII) both fails to satisfy the heightened Rule 9(b) pleading standard—since the FAC fails to state, among other things, how any particular alleged representation was false or when Plaintiffs allegedly clicked on advertisements—and fails to allege the necessary element of damages.

Plaintiffs' FAC should thus be dismissed with prejudice.

II. STATEMENT OF FACTS

Facebook operates a free social networking website, with over 500 million active Users. (FAC ¶ 10.) It allows anyone who registers, agrees to the site's terms of service, and has access to the Internet to create a profile page where they can share content and updates with Friends about their activities. (*Id.* ¶¶ 11, 13.) Users do not pay a fee to use Facebook. (FAC ¶ 11.) Instead, Facebook earns revenue, in part, by selling advertising space to third parties. (*See id.* ¶¶ 25-27.) Third-party advertisers may choose to target their ads to different groups of Users—for example, based on criteria such as age, interests, or location—in accordance with Facebook's terms. Advertisers cannot target specific Users on Facebook. (*See id.*)

Facebook assigns a generic, numerical "User ID" (or "UID") to each User for internal operational purposes. The User ID associated with some Users may be contained in the technical Internet address (the "URL"[1]) on their profile pages on Facebook (e.g., http://www.facebook.com/profile.php?id=123456789), to allow Facebook to display the correct information on that page. (*See id.* ¶ 14.) Other Facebook Users have elected to create unique

[1] A "Uniform Resource Locator" specifies the location of a webpage or file on the Internet.

Facebook "Usernames" (nicknames, initials, or other phrases or terms of the Users' choosing) for the purpose of providing personalized, public Internet addresses for their profile pages. (*See id.* ¶ 14.) For example, a San Francisco lawyer named John Smith could choose to create the Username "SmithEsq" or "sanfranlawyer" or "Johnny." In such cases, a User's chosen "Username" (and not the User ID) would appear in the URL for his or her profile page (e.g., http://www.facebook.com/SmithEsq, http://www.facebook.com/sanfranlawyer, or http://www.facebook.com/Johnny). Not all Facebook Users have a Username, and a Username need not, and often does not, consist of the User's real name.

The FAC alleges that, when a User clicked on an advertisement on Facebook, the following occurred as a result of the "referrer header" function in the User's web browser: a URL was transmitted to an advertiser that potentially contained (i) the User's User ID or Username and (ii) basic information about the type of webpage from which the User was navigating. (*Id*. ¶¶ 35, 41-43.) As the FAC acknowledges, the referrer header function is a "standard web browser function" effected by third-party web browsers—not Facebook—that occurs on the Internet whenever a person clicks on a link to another website (including online advertisements). (*Id*. ¶¶ 35, 41.) Indeed, the FAC concedes that the referrer header function has been "provided by standard web browsers since . . . May 1996" (well before Facebook even existed). (*Id*. ¶ 41.) The "Referrer Header [function] reveals the specific web page address" (the URL) a person was viewing when he or she clicked on a link to another website. (*Id*. ¶ 35.)

The FAC alleges that "Facebook began disclosing communications containing user's [sic] usernames/UIDs no later than February 2010 when Facebook implemented a website 'upgrade' that began to embed ever more detailed data within Referrer Headers." (*Id.* ¶ 38.) Plaintiffs allege that sometime after May 21, 2010, when Facebook was alerted to the issue by the Wall Street Journal, URLs transmitted to advertisers from Facebook no longer included User IDs or Usernames. (*Id.* ¶ 39.) The FAC claims—incorrectly—that an advertiser could use the User ID or Username to collect additional information about the User by navigating to the Facebook User's profile page to view any information the User had posted there. (*Id*. ¶ 36.) In fact, even if an advertiser were to take the step of navigating to a particular User's profile page, the advertiser

would only be able to see information that was publicly available—in other words, information the User made available to anyone on the Internet, as opposed to information available only to the User's Friends. Also, Users' names, profile pictures, and certain basic information are always publicly available on Facebook, as plainly disclosed in Facebook's Privacy Policy and Privacy Guide (relied on by Plaintiffs in their FAC). (Declaration of Ana Yang Muller ("Yang Decl."), filed herewith, Ex. B ¶ 3 (Privacy Policy); *id.* Ex. C ¶ 2 (Privacy Guide).)[2]

Plaintiffs assert generally that Facebook shared "personally identifiable information" with advertisers. (FAC ¶¶ 1, 3, 34.) Conspicuously, as with the original Complaint, the FAC does not identify what, if any, of Plaintiffs' information was supposedly disclosed. The only allegation specific to Plaintiffs is that they "clicked on at least one third-party advertisement displayed on Facebook" during the "relevant time period." (*Id*. ¶¶ 4, 5.) Plaintiffs do not identify the "relevant time period" when they purportedly clicked on an advertisement, anything specific about the advertisement, or what information was allegedly disclosed by their actions. Nor do Plaintiffs allege that any advertiser ever used such unspecified information to gather any personal information, much less any information specific to Plaintiffs. Plaintiffs do not allege that they even have Usernames, much less that they have Usernames that reflect their real names.[3]

Again, as in the original Complaint, Plaintiffs state as legal conclusions that they have "suffered irreparable injury," "suffered harm," and "suffered loss." (FAC ¶¶ 106, 111, 133; *see also id*. ¶¶ 105, 110, 122.) But the FAC does not aver that any of Plaintiffs' information has been disclosed or that such disclosure resulted in any actual injury. The closest Plaintiffs come is a hypothetical allegation that advertisers "could" obtain "confidential and sometimes highly sensitive information" about a User. (*Id*. ¶ 44.) The FAC contains an academic discussion of the

[2] Also attached as Exhibit A is what the Complaint alternatively refers to as the "Statement of Rights and Responsibilities" (FAC ¶¶ 29, 33), "Terms and Conditions" (*id*. ¶¶ 46, 64, 114), "Terms of Use" (*id*. ¶ 33), and "Terms of Service" (*id.* ¶ 49(b)), and what Facebook formally refers to as the "Statement of Rights and Responsibilities." On the Facebook website, the SRR is also sometimes referred to as "Terms." (Yang Decl. ¶ 2, Ex. A.)

[3] Again, Facebook requires that Users provide their real names when they register and create a profile. But a "Username" is different—it is voluntary, and need not be the User's real name.

hypothetical value of personal information (*id.* ¶ 23), but does not allege any facts suggesting that Plaintiffs ever attempted to sell their own information for economic gain.

III. APPLICABLE STANDARDS

A court may dismiss a claim under Rule 12(b)(6) when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In deciding a motion under Rule 12(b)(6), "all material allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them." *Id*. However, as the Supreme Court has emphasized, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not" survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). A plaintiff must therefore plead "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 1949.

"[T]o '[p]revent [] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting . . . documents upon which their claims are based,'" a court may consider a writing referenced in a complaint if the complaint relies on the document and its authenticity is unquestioned. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (quoting *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir.1998) (superseded by statute on other grounds)).[4]

[4] As discussed in the Request for Judicial Notice filed herewith, the FAC references Facebook's Statement of Rights and Responsibilities (SRR), Privacy Policy, and Privacy Guide (FAC ¶¶ 27-33), which, under applicable legal principles, the Court may properly consider in ruling on this motion. Copies of these three documents are attached as Exhibits A through C to the Yang Declaration, filed herewith.

IV. ARGUMENT[5]

A. Plaintiffs Fail to State a Claim for Violation of the Wiretap Act or Stored Communications Act (Counts I and II).

The Court previously dismissed Plaintiffs' claims under the Wiretap Act and the SCA as it was clear from the original Complaint that any alleged disclosures were made to entities authorized to receive Plaintiffs' communications. (Dismissal Order at 9.) The FAC fails to remedy these deficiencies and the claims fail as a matter of law for other reasons as well.

As in the original Complaint, Count I of the FAC asserts that Facebook violated 18 U.S.C. § 2511(3)(a) of the Wiretap Act (FAC ¶ 65), which provides that "a person or 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) 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). An "electronic communication service" means any service that provides Users the ability to send or receive electronic communications. *Id.* § 2510(15). An "electronic communication" is "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce . . . ." *Id.* § 2510(12). The "contents" of an electronic communication means "any information concerning the substance,

[5] Several of Plaintiffs' claims included in the FAC have already been dismissed with prejudice. These claims include Count III (for violation of the Unfair Competition Law, California Business and Professions Code section 17200 *et seq.*), the majority of Count IV (for violation of subsections (c)(1), (2), (3), (6), & (7) of California Penal Code section 502), Count V (for violation of the Consumers Legal Remedies Act, California Civil Code section 1750 *et seq.*), and Count VIII (for unjust enrichment). Plaintiffs state that they are including them in the FAC only to preserve them for the purposes of appeal (*see* FAC, headings to Counts III, IV, V, and VIII), so Facebook does not address them in this Memorandum, but instead moves to dismiss them on the ground that they have already been dismissed with prejudice by the Court. In addition, the Dismissal Order disagreed with Facebook's argument that Plaintiffs do not have Article III standing to bring the present suit as they have not alleged injury in fact. Facebook continues to contend that this case should be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of Article III standing, and preserves this issue in the event of any appeal.

purport, or meaning of that communication." *Id.* § 2510(8). By contrast, "customer records" held by an electronic communication service—including a subscriber's name, address, connection records, records of session times and durations, service utilization data, subscriber number or identity, and payment methods—are not subject to the same limits on disclosure. *Id.* § 2702(c).

Also as in the original Complaint, Count II of the FAC asserts that Facebook violated 18 U.S.C. §§ 2702(a)(1) and (a)(2) of the SCA.[6] (FAC ¶ 83.) Section 2702(a)(1) provides that "a person or 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). Section 2702(a)(2) provides that "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 . . . on behalf of . . . a subscriber or customer . . . ." *Id.* § 2702(a)(2).

There are a number of relevant exceptions to liability under these statutes. The Wiretap Act contains an exception that allows a provider of an electronic communication service (here, Facebook) to divulge the contents of a communication made to the provider itself. 18 U.S.C. § 2511(3)(a) ("a person or 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*) . . ." (emphasis added)). Exceptions under both the Wiretap Act and the SCA also allow providers to divulge the contents of a communication to "an addressee or intended recipient" of such communication. *Id.* §§ 2511(3)(a), 2702(b)(1). Further, under both statutes, a provider may divulge the contents of a communication "with the lawful consent of the originator or any addressee or intended recipient of such communication." *Id.* §§ 2511(3)(b)(ii), 2702(b)(3). And neither statute prohibits disclosure of communications if the system "is

[6] The same conduct cannot be a violation of both the Wiretap Act and the SCA because they are mutually exclusive: one statute addresses communications while they are in transit, and the other statute addresses communications while they are in storage. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878-79 (9th Cir. 2002) (holding that the Wiretap Act protects communications during "transmission" while the SCA protects communications while "stored").

configured so that such electronic communication is readily accessible to the general public." *Id.* § 2511(2)(g)(i) (applicable to both the Wiretap Act and the SCA).

Plaintiffs fail to state a claim for violation of either the Wiretap Act or the SCA for several reasons. *First*, the FAC does not overcome the various statutory exceptions to liability: for disclosure of a communication made to the service provider itself (18 U.S.C. § 2511(3)(a)); for disclosure to an addressee or intended recipient of a communication (*id.* §§ 2511(3)(a), 2702(b)(1)); and for disclosure to a third party with the consent of an addressee or intended recipient of a communication (*id.* §§ 2511(3)(b)(ii), 2702(b)(3)). No matter how one reads the strained and sometimes contradictory allegations in the FAC regarding the nature of the alleged User communications allegedly disclosed by Facebook, one or more of these exceptions applies. Accordingly, the FAC fails to state a claim for violation of the Wiretap Act and the SCA for the same reasons set forth in this Court's prior Dismissal Order. (*See* Dismissal Order at 8-10.)

Second, the disclosures alleged in the FAC did not, in any event, involve the "contents of a communication" under the Wiretap Act or the SCA, a necessary element of both claims.

Third, the FAC does not allege facts plausibly suggesting that Facebook divulged a communication "while in transmission"; thus, the FAC fails to state a claim for violation of the Wiretap Act on this additional ground.

Fourth, to the extent that Plaintiffs' SCA claim is based on an alternative factual theory—their vague and speculative allegations that advertisers could possibly have navigated to Users' profile pages and viewed information posted there—the claim should be dismissed for several additional reasons, including the applicability of two statutory exceptions to liability.

1. Facebook cannot be held liable under the Wiretap Act or the SCA because the addressee or intended recipient of all communications alleged in the FAC was either Facebook or a third-party advertiser.

Wiretap Act

This Court previously ruled that the Wiretap Act claim (Count I) failed to state a claim. (Dismissal Order at 9.) Plaintiffs claimed that they did not consent to Facebook's disclosure of their User IDs or Usernames or information about the webpage Plaintiffs were viewing when they clicked on an advertisement. (*Id.* at 8 (citing original Complaint ¶ 56).) The Court reasoned that

there were two possible ways to view these allegations. Under the first view, Plaintiffs alleged that when they clicked on an advertisement, the click constituted an electronic communication from Plaintiffs to Facebook, with the content of that communication being a request that Facebook send a further electronic communication to an advertiser. (*Id.* at 8.) Under the second view, Plaintiffs alleged that the click constituted an electronic communication from Plaintiffs to the advertiser. (*Id.* at 8-9.) The Court held "that as a matter of law, Plaintiffs cannot state a claim under the Wiretap Act under either interpretation." (*Id.* at 9.) If the communication was to Facebook, the Court explained, Facebook cannot be liable for divulging it under 18 U.S.C. § 2511(3)(a)'s exception for communications "to such person or entity" providing an electronic communication service. (Dismissal Order at 9.)[7] Alternatively, the Court explained, if the communication was to an advertiser, Facebook cannot be liable for divulging it under 18 U.S.C. § 2511(3)(a)'s "addressee or intended recipient" exception. (Dismissal Order at 9.) Accordingly, the Court dismissed the Wiretap Act claim, "with leave to amend to allege specific facts showing that the information allegedly disclosed by Defendant [Facebook] was not part of a communication from Plaintiffs to an addressee or intended recipient of that communication." (*Id.*) *See also In re Zynga Privacy Litig.*, No. 10-cv-04680 JW, at 4, 6 (N.D. Cal. June 15, 2011).

Plaintiffs have not made any material amendments to their Wiretap Act claim or elsewhere in the FAC that cure the infirmities identified by the Court. (*See* FAC ¶¶ 58-67.) Plaintiffs continue to allege that the communications that form the basis of their Wiretap Act claim were from Plaintiffs to either Facebook or advertisers. Again, under the pertinent statutory exceptions, "as a matter of law, Plaintiffs cannot state a claim under the Wiretap Act under either interpretation." (Dismissal Order at 9.) Accordingly, for the reasons set forth above and in the Dismissal Order, Count I of the FAC should be dismissed with prejudice.

[7] Facebook also cannot be liable for divulging such a communication because, under the Wiretap Act, a service provider may divulge the contents of a communication "with the lawful consent of the originator or any addressee or intended recipient of such communication." *Id.* §§ 2511(3)(b)(ii). Facebook would be the addressee or intended recipient, and Facebook had its own consent to divulge the communication to a third party. (*Cf.* Dismissal Order at 10 & n.8 (discussing identical provision of SCA and case law, and dismissing SCA claim).)

SCA

This Court also held that Plaintiffs' SCA claim in the original Complaint (Count II) failed to state a claim. Directly tracking the analysis of the Wiretap Act claim, the Court stated that Plaintiffs alleged in the SCA claim that the communications at issue were sent either to Facebook or to advertisers. (Dismissal Order at 10.) The Court held that "[u]nder either interpretation, Plaintiffs fail to state a claim under the Stored Communications Act." (*Id.* at 10.) If the communication was to Facebook, the Court explained, Facebook cannot be liable for divulging it because, under the SCA, a service provider may divulge the contents of a communication "with the lawful consent of the originator or any addressee or intended recipient of such communication." 18 U.S.C. § 2702(b)(3). Facebook would be the addressee or intended recipient, and Facebook had its own consent to divulge the communication to third-party advertisers. (Dismissal Order at 10 & n.8 (discussing 18 U.S.C. § 2702(b)(3) and *In re Am. Airlines, Inc., Privacy Litig.*, 370 F. Supp. 2d 552, 560-61 (N.D. Tex. 2005)).) Alternatively, the Court explained, if the communication was to an advertiser, Facebook cannot be liable for divulging it under 18 U.S.C. § 2702(b)(1)'s "addressee or intended recipient" exception. (Dismissal Order at 9-10.) Accordingly, the Court dismissed the SCA claim, again (as with the Wiretap Act claim) "with leave to amend to allege specific facts showing that the information allegedly disclosed by Defendant [Facebook] was not part of a communication from Plaintiffs to an addressee or intended recipient of that communication." (*Id.* at 10.) *See also In re Zynga Privacy Litig.*, No. 10-cv-04680 JW, at 4, 6.

Plaintiffs amended the SCA claim to include a number of strained and sometimes contradictory allegations regarding the nature of the communications that allegedly were disclosed by Facebook. (FAC ¶¶ 73-78.) These amendments, however, fail to cure the fundamental problem identified in the Dismissal Order because every "alternative" fact pattern Plaintiffs aver nevertheless falls within the § 2702(b)(3) or § 2702(b)(1) exceptions. The "contents of communications" (according to Plaintiffs, consisting of User IDs, Usernames, or, more vaguely, "PII") that Plaintiffs claim Facebook disclosed to advertisers were all disclosed by Plaintiffs to either Facebook or an advertiser—that is, an addressee or intended recipient.

Plaintiffs' primary allegation (FAC ¶¶ 73-77) is that when Plaintiffs clicked on an advertisement, the click constituted a communication to Facebook, the content being a "request[] that Facebook connect the user to the specific advertisement" (FAC ¶ 74). Plaintiffs allege that rather than disclosing the "bare request to be taken to the advertisement," Facebook disclosed to the advertiser, "via a 'Referrer Header,'"[8] Plaintiffs' "personal information, including UIDs and [U]sernames." "[D]isclosure of the user PII," the FAC alleges, "violates the SCA." (FAC ¶ 77.) Plaintiffs' convoluted allegations still fail to state a claim because in order for the disclosure of "PII" to be a violation of the SCA, that PII must constitute the contents of a communication. And, according to the FAC itself, such communications are from Plaintiffs *to Facebook*. (*See, e.g.*, FAC ¶¶ 73, 76 (stating that users share PII with Facebook for the "specific purpose[] of registering to use the service").) Facebook would be the addressee or intended recipient of these communications, and, even if the FAC's allegations were true, Facebook would have its own consent to divulge the communication to third-party advertisers. (Dismissal Order at 10 & n.8.)[9]

Apparently recognizing the vulnerability of its primary allegation, Plaintiffs have included a series of "facts in the alternative," hoping that if all of them get thrown against the wall, one will stick. (FAC ¶ 78.) None of these alternative, contradictory sets of allegations escape the fundamental fact that the alleged communications at issue fall into the "addressee or intended recipient" exception under § 2702(b)(3) (if the communication was to Facebook) or § 2702(b)(1) (if the communication was to an advertiser).

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[8] The allegation in FAC ¶ 77 that Facebook is responsible for the transmission of referrer headers is contradicted by other allegations in the FAC. The FAC states that "[t]he HTTP Referrer Header is a *standard web browser function* provided by *web browsers* since the HTTP 1.0 specification in *May 1996*" (before Facebook even existed). (FAC ¶ 41 (emphasis added).)

[9] Although Plaintiffs repeatedly assert that Facebook's alleged disclosures are contrary to Facebook's Privacy Policy (*see* FAC ¶¶ 35, 64, 76), that allegation has no bearing on whether Facebook may consent to disclosure of such information under the SCA. As this Court explained in its Dismissal Order, "a defendant [is] not liable under the [SCA] 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.'" (Dismissal Order at 10 n.8 (citing *In re Am. Airlines, Inc., Privacy Litig.*, 370 F. Supp. 2d at 560-61).)

Plaintiffs' first set of "facts in the alternative" is based on the alleged transmission by Facebook of "an additional communication containing the user's [U]sername and/or UID to the Advertiser." (FAC ¶ 78(i).) Again, even if these allegations were true, Facebook would have been an intended recipient of the original "communication containing the user's [U]sername and/or UID," and therefore would be authorized to disclose the information under § 2702(b)(3).

Plaintiffs' second set of "facts in the alternative" alleges that "Facebook exceeds its authority to disclose records about its users by sending [U]sernames and/or UIDs to the Advertiser." (FAC ¶ 78(ii).) This allegation concedes that Usernames and User IDs are "records" rather than "contents of communications" under the SCA; thus, under the express provisions of § 2702(c)(6), Facebook may disclose such "records" to "any person other than a governmental entity," including a third-party advertiser. (*See infra* § IV(A)(2).) But, again, even if this allegation were interpreted to mean that Usernames and User IDs were "contents of communications," Facebook was the intended recipient of those communications and, therefore, there is no liability under § 2702(b)(3).

Plaintiffs' third set of alternative allegations is merely a slight variation on the first two sets, in which Plaintiffs allege that they "provide[d] PII to Defendant for the sole purpose of communicating that information to . . . 'friends,'" not advertisers, but Facebook nevertheless sent their "PII" to advertisers. (FAC ¶ 78(iii).) Although Plaintiffs have used, in this set of alternative facts, an extremely vague allegation that "PII" [10] is provided to Facebook and sent to advertisers, Plaintiffs clearly allege elsewhere in the FAC that it is actually User IDs and/or Usernames that are sent to advertisers via referrer headers. (*See* FAC ¶¶ 76-77.) These specific allegations trump the vaguely generalized assertion that "PII" is sent to advertisers. *See Chem. Device Corp. v. Am.*

[10] To the extent that Plaintiffs' vague allegation concerning the provision of "PII" may suggest that something more than User IDs or Usernames (such as real names or profile pictures) was provided to advertisers, the documents that Plaintiffs themselves cite and rely on state in explicit terms that basic User information, such as Users' real names and profile pictures, shall be publicly available. (Yang Decl. Ex. B ¶ 3; *id.* Ex. C ¶ 2.) Plaintiffs' allegation that such information was provided for the "sole purpose of communicating that information . . . to friends" is therefore contradicted by the documents on which they rely, and the court may refuse to accept the allegation as true.

Cyanamid Co., No. C-89-1739 WHO, 1990 WL 56164, at *3 (N.D. Cal. Jan. 11, 1990) ("[T]he Court is not bound to accept conclusory legal allegations in the complaint when more specific allegations in the pleadings are at variance with those conclusions.") (citing *Heller v. Roberts*, 386 F.2d 832 (2d Cir. 1976)); *accord Perlman v. Zell*, 938 F. Supp. 1327, 1347 (N.D. Ill. 1996) (where specific factual allegations conflict with general allegations, the specific allegations control). Regardless, this allegation specifically states that the User sends this information "to Defendant." Accordingly, Facebook is an intended recipient of such information under Plaintiffs' own allegation, and the exception under § 2702(b)(3) applies.

Plaintiffs' fourth and final set of alternative allegations is a variation on the third set, in which Plaintiffs state that "when a Facebook user clicks on an ad, the user does not intend to send Facebook nor the Advertiser any information regarding his or her true identity." (FAC ¶ 78(iv).) Again, Plaintiffs concede that this information constitutes "records" (*id.*), not "contents of communications"; therefore, Facebook may disclose it under the express provisions of § 2702(c)(6). (*See infra* § IV(A)(2).) And, again, even if this allegation were construed to mean that this information was "contents of communications," the "intended recipient" exception would apply. Whatever "the information regarding his or her true identity" may be (which the FAC leaves intentionally vague), the only information allegedly disclosed by Facebook is the User's Username or User ID, which, as discussed above, is subject to the § 2702(b)(3) "intended recipient" exception.

As with the original Complaint, the alleged "communications" that form the basis of Plaintiffs' SCA claim were from Plaintiffs to either Facebook or advertisers. In either scenario, statutory exceptions apply, and Count II of the FAC should be dismissed with prejudice.

2. The disclosures alleged in the FAC did not involve the "contents of a communication" under the Wiretap Act or the SCA.

Plaintiffs' allegations center on disclosure of User IDs and Usernames included in referrer headers (i.e., within the referrer URL containing the Internet address of the webpage) transmitted by third-party browsers to advertisers. As an initial matter, a referrer URL is not a "communication" within the intended scope of the statutes, but simply identifies the location of a

webpage on the Internet, much as, for example, a postal address is not the communication itself, but simply an identification of a location. Plaintiffs thus fail to satisfy the threshold requirement under the Wiretap Act and the SCA that the alleged disclosures involve a "communication." *See* 18 U.S.C. §§ 2510(12); 2711(1).

Facebook also cannot be held liable because only the disclosure of "the *contents* of a communication" while in transmission or in electronic storage by a service provider is prohibited. *See* 18 U.S.C. §§ 2511(3)(a), 2702(a)(1), 2702(a)(2) (emphasis added). The "contents" of a communication means "any information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8). Basic information such as a User ID or Username does not constitute the "contents" of a communication, but instead constitutes, at most, a User "record," which is governed by separate statutory provisions that do not prohibit disclosure. *See Jessup-Morgan v. Am. Online, Inc.*, 20 F. Supp. 2d 1105, 1108 (E.D. Mich. 1998) (holding disclosure of an AOL User ID was not the "'content' of electronic communications" under 18 U.S.C. § 2702). The User records that were allegedly disclosed by Facebook do not reveal the substance of any private communications. *See id*. (noting customer account information is not the content of a communication); *cf. United States v. N.Y. Tel. Co*., 434 U.S. 159, 167 (1977) (a pen register does not reveal the "'contents' of communications" under the Wiretap Act (as it existed before amendments in 1986) because it does not reveal the existence of a communication, just the telephone number).

This distinction was recently recognized by another court in the Northern District of California in *Sams v. Yahoo!, Inc.*, No. cv-10-5897-JF (HRL), 2011 WL 1884633, at *7 (N.D. Cal. May 18, 2011). In that case, the plaintiff challenged Yahoo's disclosure of records under the SCA, arguing the government's subpoena was invalid. *Id.* at *2. The disclosure included all records regarding "the Yahoo! ID 'lynnsams' or 'lynnsams@yahoo.com' . . . including name and address, date account created, account status, Yahoo! E-mail [sic] address, alternative e-mail address, registration from IP, date IP registered and login IP addresses associated with session time and dates." *Id.* at *6. The court reasoned that all such information "is not content-based" information subject to strict restrictions but "user identification information" which could be

disclosed, without notice to the user, under 18 U.S.C. § 2703(c)(2). *Sams*, 2011 WL 1884633, at *7. The court also rejected the plaintiff's argument that all aspects of a communication, including the identity of the parties, was intended to be protected by the SCA, because the 1986 amendments struck out the phrase "the identity of the parties to such communication or the existence" of the communication from 18 U.S.C § 2510(8)'s definition of contents. *Id*. at *6-7.

This distinction between "contents of a communication," which are controlled by §§ 2702(a)(1) and (a)(2), and "customer records," which are controlled by § 2702(a)(3), is regularly recognized by the courts. For instance, §§ 2702(a)(1) and (a)(2) are applied to actual communications that by their nature contain "content." *See Theofel v. Farey-Jones*, 359 F.3d 1066, 1070 (9th Cir. 2004) (applying § 2702(a)(2) to email messages); *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 900 (9th Cir. 2008) (applying §§ 2702(a)(1) and (a)(2) to text messages), *rev'd on other grounds*, 130 S. Ct. 2619 (2010); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d. 965, 972 (C.D. Cal. 2010) (applying §§ 2702(a)(1) and 2702(a)(2) to private messages and posts on social networking sites); *Viacom Int'l Inc. v. YouTube Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008) (applying §2702(a)(2) to videos). In contrast, § 2702(a)(3) has been applied to subscriber identification information, i.e., customer records. *See Jessup*, 20 F. Supp. 2d at 1108 (applying § 2702(a)(3) to AOL User ID); *Freedman v. Am. Online, Inc.*, 325 F. Supp. 2d 638, 646 (E.D. Va. 2004) (applying § 2702(a)(3) to Internet subscriber account information such as user's screen name and membership start date).

The distinction between the "contents of a communication" and a user "record" is important because the statutes place much more restrictive limits on the disclosure of the contents of communications than they do on the disclosure of user records. For instance, under the SCA, a provider has broad discretion to disclose a customer record "to any person other than a governmental entity," 18 U.S.C. § 2702(c)(6), or to a governmental entity when authorized by § 2703, *id.* § 2702(c)(1). Under § 2703(c), a government entity can require an electronic communication service provider or a remote computing service provider to disclose customer "records," including a User's name, address, telephone connection records, records of session times and durations, service utilization, subscriber number or identity (including temporarily

assigned network address), and payment methods. *Id*. § 2703(c)(2). The User IDs and Usernames that Plaintiffs allege Facebook disclosed constitute, at most, a "subscriber number or identity," which is specifically defined by statute as a "record," not "contents of a communication." *See id*. § 2703(c)(2); *see also United States v. Kennedy*, 81 F. Supp. 2d 1103, 1107-09 (D. Kan. 2000) (applying § 2703(c) to Internet subscriber account information, including name, e-mail address, and membership history); *Freedman v. Am. Online, Inc*., 412 F. Supp. 2d 174, 181 (D. Conn. 2005) (noting for Fourth Amendment purposes courts have "universally" held there is a distinction between "the content of electronic communications, which [are] protected, and non-content information, including a subscriber's screen name and corresponding identity, which [are] not"). Under the express provisions of § 2702(c)(6), Facebook may disclose such "records" to "any person other than a governmental entity," including a third-party advertiser.

The language and structure of the Wiretap Act and the SCA reflect that the information of which Plaintiffs complain (User IDs and Usernames) are, at most, User "records," not "contents of communications." Counts I and II should be dismissed with prejudice for this reason as well.

3. The FAC does not allege facts plausibly suggesting Facebook divulged a communication "while in transmission" under the Wiretap Act.

Plaintiffs' allegations under the Wiretap Act are insufficient for an additional, independent reason: they do not allege that Facebook "divulged" their User IDs or Usernames contemporaneously with transmission of that information by Plaintiffs. *See Konop*, 302 F.3d at 876-79 (Wiretap Act covers only communications "in transmission" and not "in storage"). (FAC ¶¶ 58-67; *see also id.* ¶ 62 (acknowledging that the Wiretap Act covers only disclosure of communications "while in transmission," stating that "[t]he Wiretap Act prevents an electronic communications service provider from intentionally divulging the contents of any communication *while in transmission on that service* . . . .") (emphasis added).)

Here, Plaintiffs allege that Facebook improperly divulged their "user identities and other user information to advertisers without their consent" (FAC ¶ 65), which Plaintiffs allege occurred when they "click[ed] on an advertisement banner" on Facebook (FAC ¶ 64). But the FAC alleges that Plaintiffs' User IDs and User Names were transmitted to Facebook at an earlier

time—namely, when they registered for the site—rather than when Plaintiffs later clicked on an advertisement. (*See*, *e.g.*, FAC ¶ 12 (alleging that Users provide their names when they register to use facebook.com); *id.* ¶ 73 ("When a user signs up for Facebook's services, the user provides PII to Defendant . . . .").) Plaintiffs therefore do not allege that their User IDs or Usernames were divulged by Facebook *while in transmission*—i.e., at the same time Plaintiffs originally transmitted them to Facebook. Thus, the Wiretap Act claim should be dismissed with prejudice.

4. To the extent Plaintiffs' SCA claim is based on hypothetical allegations of advertisers viewing Users' profile pages, it should be dismissed.

Although unclear, Plaintiffs appear to allege an alternative factual theory in support of their SCA claim—their vague and speculative allegations (with no supporting facts or specific examples) that, with a User ID or Username obtained from a referrer header, an advertiser could possibly have navigated to a User's profile page and viewed information posted there. (*See* FAC ¶¶ 27, 36-37, 83.) Plaintiffs appear to allege that the information on a User's profile page constitutes the contents of stored communications—that is, communications from the User to Facebook. And, according to this theory, if an advertiser were to navigate to a User's profile page (using a User ID or Username obtained from a referrer header) and see the information there—including the User's real name, profile picture, gender, etc.—such viewing by the advertiser would somehow constitute an improper disclosure by Facebook under the SCA. (*See* FAC ¶¶ 80-83.) To the extent Plaintiffs rest their SCA claim on this alternative theory,[11] the claim should be dismissed for reasons in addition to those above (*see supra* §§ IV(A)(1)–(2)).

First, Plaintiffs have not adequately alleged that any information was "divulged" by anyone—certainly not Facebook—a necessary starting point for any SCA claim. *See* 18 U.S.C. §§ 2702(a)(1)–(2). According to this theory, a third party may have navigated to a particular webpage and viewed information that was publicly visible there.

[11] In their opposition to Facebook's earlier motion to dismiss the original Complaint, Plaintiffs stated that their theory is "*not* that Facebook disclosed information voluntarily published on User profiles to advertisers" and that "this is *not* the crux of Plaintiffs' claims." (Plaintiffs' Opposition to Facebook's Motion to Dismiss Consolidated Class Action Complaint, 16 & n.12 (emphasis added).) Facebook makes the argument here given that the same or similar language is still contained in the FAC.

Second, as demonstrated above (*see supra* §§ IV(A)(1)–(2)), disclosure of a User ID or Username in a referrer header is not a violation of the SCA; thus, subsequent use of the properly disclosed User ID or Username by a third party (not Facebook) to navigate to a webpage cannot be the basis for an independent violation of the SCA by Facebook.

Third, to the extent Plaintiffs allege an advertiser may have viewed a User's profile page, the advertiser could have viewed only what was accessible to any other third party on the Internet. The FAC concedes that Users voluntarily provide the information posted on their profile pages for the purpose of sharing that information with others online. (FAC ¶¶ 11, 13.) And Plaintiffs have alleged no facts whatsoever (nor can they) that any information that could have been accessed by third-party advertisers on their profile pages was private or unavailable to the general public. Instead, any such information was made publicly available by the User to everyone on the Internet. Furthermore, Users' names, profile pictures, and certain basic information are always publicly available on Facebook, as plainly disclosed in Facebook's Privacy Policy and Privacy Guide. (Yang Decl. Ex. B ¶ 3; *id.* Ex. C ¶ 2.) Accordingly, everyone on the Internet, including advertisers, were the intended recipients of such information on a User's profile page, and the exception to liability applies. 18 U.S.C. § 2702(b)(1) (service provider "may divulge the contents of a communication . . . to an addressee or intended recipient of such communication").

Fourth, the SCA does not prohibit disclosure of communications if the system "is configured so that such electronic communication is readily accessible to the general public." 18 U.S.C. § 2511(2)(g)(i) (applicable to "this chapter [the Wiretap Act] or chapter 121 of this title [the SCA]"). Recently, this Court interpreted the "readily accessible" exception under the Wiretap Act and concluded a presumption of accessibility applies only in narrow circumstances, such as traditional radio technology or broadcast radio, wherein the communication medium is designed or intended to be public. *In re Google Inc. Street View Elec. Commc'ns Litig.*, No. CV 10-MD-02184-JW, at *19 (N.D. Cal. June 29, 2011).[12] An Internet page configured to display to

[12] The *Google Street View* case involved allegations that Google collected a substantial amount of data from individuals' home Wi-Fi networks via mobile software technology that decoded and decrypted the data as it streamed wirelessly, including usernames, passwords and personal emails. In support of its motion to dismiss claims brought under the Wiretap Act, Google argued that

all Internet users everywhere fits comfortably within the presumption, as it is part of a medium that is designed or intended to be public, i.e., publicly available Internet pages.

The application of the "readily accessible" exception to publicly available Internet pages has been recognized by the Eleventh Circuit in *Snow v. DirecTV, Inc*., 450 F.3d 1314, 1321-22 (11th Cir. 2006). In that case, the court analyzed the "readily accessible" exception, and concluded that "[t]he legislative history and the statutory structure clearly show that Congress did not intend to criminalize or create civil liability for acts of individuals who 'intercept' or 'access' communications that are otherwise readily accessible by the general public." *Id.* at 1320-21. This included the "World Wide Web" in instances where "individuals can easily and readily access websites hosted throughout the world." *Id.* at 1321-22 (holding "[t]o survive a motion to dismiss, [Plaintiff] must have alleged, at a minimum, facts from which we could infer that his electronic bulletin board was not readily accessible to the general public"). Because Plaintiffs do not point to any *private* communication that allegedly was divulged to an advertiser, the SCA claim must be dismissed. *See* 18 U.S.C. §§ 2511(2)(g)(i).

For the foregoing reasons, Plaintiffs fail to state a claim under the Wiretap Act or the SCA, and Counts I and II should be dismissed with prejudice.

B. Plaintiffs Do Not Allege Facebook Introduced a Computer Contaminant, As Required Under California Penal Code § 502(c)(8) (Count IV).

To state a claim under California Penal Code § 502(c)(8), Plaintiffs must allege that Facebook introduced a computer contaminant[13] into their computer, system or network. As the

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such Wi-Fi communications were "readily accessible to the general public" and thus qualified for an exemption on liability under 18 U.S.C. § 2511(2)(g)(i). Facebook contends that the "readily accessible to the general public" exception should not be restricted *exclusively* to traditional radio broadcasts.

[13] A contaminant is defined by section 502(b)(10) as "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).

Court noted when it dismissed the original Complaint, Plaintiffs 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 network" that would support a claim under California Penal Code ¶ 502(c)(8). (*See* Dismissal Order at 13 n.11.) The FAC does not allege any additional facts to alter this conclusion.

The FAC keeps the original conclusory statement that Facebook "introduced a computer contaminant, as defined in § 502(b)(10), by introducing computer instructions designed to record or transmit to advertisers Plaintiffs' and the Class's personally-identifiable information on Facebook's computer networks without the intent or permission of Plaintiffs . . . in violation of § 502(c)(8)." (FAC ¶ 104.) It then adds the equally conclusory statement that "[t]hese instructions usurped the normal operations of the relevant computers, which by normal operation would not transmit the PII of Plaintiff and/or the Class members." (*Id.*) Plaintiffs have not alleged what contaminant Facebook introduced or how their computers operated differently after the alleged contaminant was introduced. Nor have Plaintiffs alleged that the instructions were actually introduced onto their computers, systems, or networks rather than simply being a part of how the Facebook website operates and indeed how the Internet works. Plaintiffs simply heap repetitions of the statute's elements on top of legal conclusions that the Court has already found insufficient. As courts have often observed, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *accord Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555 ("[t]hreadbare recitals of the elements of the cause of action, supported by mere conclusory statements," are not taken as true).

Plaintiffs' own allegations also recognize that the referrer header function is "a standard web browser function provided by web browsers since the HTTP 1.0 specification in May 1996." (FAC ¶ 41.) They allege that the disclosure of Usernames or User IDs occurs when developers use "GET based forms for the submission of sensitive data" and that this issue is "well known" among developers. (*Id.* ¶ 42.) A well-recognized software development function is not analogous to "self-replicating or self-propagating" viruses or worms intended to "contaminate

other computer programs" that "usurp" the computer's normal function. Under Plaintiffs' theory, any computer program that works as intended, but has unintended consequences, would make the developer criminally liable and subject him or her to vast civil liability. Plaintiffs' allegations are thus as baseless as Plaintiffs' original assertion that Facebook acted "without permission" when it accessed information within its own system.

Because Plaintiffs have failed to allege facts sufficient to support their claim under section 502(c)(8), their claim should be dismissed with prejudice.

C. Plaintiffs' Breach of Contract Claim Must Be Dismissed for Failure to Allege that Plaintiffs Have Suffered, or are Likely to Suffer, Any Actual Damages As a Result of a Breach (Count VI).

This Court dismissed the breach of contract claim in the original Complaint, "with leave to amend to allege specific facts showing appreciable and actual damages in support of their claim, if so desired." (Dismissal Order at 15.) *See also In re Zynga Privacy Litig.*, No. 10-cv-04680 JW, at 4-5, 6. As with the original Complaint, Plaintiffs again fail to allege specific facts sufficient to support a claim that they have suffered appreciable and actual damage. This Court should dismiss Plaintiffs' breach of contract claim with prejudice.

In order to state a cause of action for breach of contract, Plaintiffs must plead four elements: "[1] the contract, [2] plaintiffs' performance (or excuse for nonperformance), [3] defendant's breach, and [4] damage to plaintiffs therefrom." *Gautier v. Gen. Tel. Co.*, 234 Cal. App. 2d 302, 305 (1965). Damages are essential to the claim. *See First Commercial Mortg. Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001). Further, "[u]nder California law, a breach of a contract claim requires a showing of *appreciable and actual damage*." *Ruiz v. Gap, Inc.*, 622 F. Supp. 2d 908, 917 (N.D. Cal. 2009) (emphasis added); *accord* Dismissal Order at 15.[14]

In the FAC, Plaintiffs make it clear that they cannot allege any actual and appreciable damage. Plaintiffs still include no plausible allegation that Facebook gave any personal

[14] Pursuant to the SRR, California law governs claims arising between the parties. (Yang Decl. Ex. A ¶ 15(1).) Accordingly, Facebook analyzes the common-law cause of action in the FAC (breach of contract) under California law.

information to an advertiser.[15] Moreover, the FAC contains no allegations of monetary or property loss specific to Plaintiffs or any other User—nor could they because Facebook is a free service. In fact, the primary change to Plaintiffs' breach of contract claim allegations appears to be that they have replaced the word "injury" with the word "damages." (*Compare* original Compl. ¶ 109 *with* first sentence of FAC ¶ 122.) Plaintiffs also reiterate the allegations from their original Complaint that Plaintiffs and Class members "paid" for Facebook's services with personal information—a theory already rejected by this Court. (*See* Dismissal Order at 14 ("Plaintiffs' contention that their personal information constitutes a form of 'payment' to Defendant is unsupported by law.").) Such conclusory allegations of harm and unsupported (and, in fact, rejected) legal theories do not state a claim for relief. *See Twombly*, 550 U.S. at 555.

D. Plaintiffs Fail to State a Claim Under California Civil Code §§ 1572 and 1573 (Count VII).

Plaintiffs have not alleged facts sufficient to state a claim for violation of California Civil Code §§ 1572 and 1573, which relate to actual and constructive fraud in the formation of contracts. An action sounding in fraud must be pled with particularity under Federal Rule of Civil Procedure 9(b) to give defendants adequate notice of the allegations. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). Thus, to satisfy Rule 9(b), "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). Furthermore, "[t]he plaintiff must set forth what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), superseded by statute on other grounds as stated in *In re Silicon Graphics, Inc. Sec. Litig.,* 970 F.

[15] 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.*, *Ruiz*, 622 F. Supp. 2d at 917 (under California law, "[plaintiff] cannot show he was actually damaged by pointing to his fear of future identity theft"); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 326-27 (E.D.N.Y. 2005) (loss of privacy and deprivations of "economic value" based on disclosure of personal information did not constitute actionable damages for a breach of contract action); *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 information).

Supp. 746, 754 (N.D. Cal. 1997). Plaintiffs must provide support for each allegation, and "mere conclusory allegations of fraud are insufficient." *Moore v. Kayport Package Express, Inc*., 885 F.2d 531, 540 (9th Cir. 1989).

Plaintiffs' allegations do not satisfy the heightened Rule 9(b) pleading standard. Plaintiffs allege that Facebook made statements in its Privacy Policy and in blog postings that Users' personal information would not be provided to third parties without consent. (FAC ¶¶ 27-31, 126.) But Plaintiffs fail to allege with specificity—as they must—*how* any particular alleged representation was false. In fact, Plaintiffs do not point to a single instance where Facebook provided any personal information associated with the named Plaintiffs (or any putative class member) to a third-party advertiser in violation of its stated policies or otherwise.

Plaintiffs furthermore fail to plead any particular facts regarding the advertisements displayed on Facebook that they allegedly clicked on. While they state that each of them "clicked on at least one third-party advertisement displayed on Facebook.com" (FAC ¶¶ 4-5), they do not state *when* they clicked on such ads, except that they did so "during the relevant time period," with no indication of what "the relevant time period" refers to. (*Id.*) This question of "when" Plaintiffs clicked on advertisements is fundamental. While Plaintiffs have defined their class to include Users who clicked on ads "at any time after May 28, 2006" (FAC ¶ 45)—and, thus, Plaintiffs may be relying on May 28, 2006 to present as "the relevant time period"—the FAC alleges that (1) a February 2010 website "upgrade" led to the inclusion of more "detailed data" in referrer headers and (2) Facebook ceased such transmissions in or around May 2010. (*See* FAC ¶¶ 38-39.) Plaintiffs' general allegation leaves open the dispositive question of whether Plaintiffs actually clicked on an advertisement during the time period in which "detailed data" was allegedly sent in referrer headers, or at some point *before or after* that time period. This Court recently dismissed claims against Google related to alleged disclosure of personal information in referrer headers for this exact reason. *See Gaos v. Google*, No. 10-CV-04809-JW, at *5 (N.D. Cal. Apr. 7, 2011) (dismissing all claims for lack of Article III standing because "Plaintiff 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").

Finally, as discussed above (*supra* § IV(C)), Plaintiffs once again fail to plead that they suffered damages—a necessary element of any fraud claim. *See Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951, 974 (1997); *Small v. Fritz Co.*, 30 Cal. 4th 167, 173-74 (2003). The disclosure of personal information is not a loss of property under California law. *See Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1128 (N.D. Cal. 2008); *Thompson v. Home Depot, Inc.*, No. 07-cv-1058 IEG (WMc), 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18, 2007). Nor have Plaintiffs articulated any other grounds supporting damages. Count VII should be dismissed with prejudice.

E. Plaintiffs' Claims Should Be Dismissed with Prejudice.

Plaintiffs' claims should be dismissed with prejudice. Even with the Court's Dismissal Order as guidance, Plaintiffs have been unable to allege legally sufficient claims. Instead, they have merely used their opportunity to amend to make superficial, cosmetic changes to their original allegations, which were already dismissed by the Court for failure to state a claim. Given Plaintiffs' failure to put forward legally sufficient allegations, granting Plaintiffs leave to amend would be futile and dismissal with prejudice is appropriate. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (leave to amend should not be granted where amendment would be futile); *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (a "district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint" (citation omitted)).

V. 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: July 15, 2011

COOLEY LLP

/s/ Matthew D. Brown
Matthew D. Brown (196972)
Attorneys for Defendant FACEBOOK, INC.