

Exhibit B

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

In re Zynga Privacy Litigation

NO. C 10-04680 JW

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS**

_____ /
This case is a putative class action brought against Zynga Game Network (“Defendant”), a company which provides gaming application programs for its members to play on Facebook. Plaintiffs allege that Defendant unlawfully transmits the personally identifiable information of its users to third parties, in violation of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510, *et seq.* and various state laws. The facts alleged in this case are identical to those alleged in In re Facebook Privacy Litigation.¹

Presently before the Court is Defendant’s Motion to Dismiss.² The Court finds it appropriate to take the matter under submission without oral argument. See Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS in part and DENIES in part Defendant’s Motion to Dismiss.

¹ No. C 10-02389 JW.

² (Defendant Zynga Inc.’s Notice of Motion and Motion to Dismiss Consolidated Amended Class Action Complaint; Memorandum of Points and Authorities, hereafter, “Motion,” Docket Item No. 49.)

1 **A. Discussion**

2 Because this case involves the same claims, and because Defendant's Motion raises the same
3 defects in Plaintiffs' Complaint³ as were raised by the similar Motion in In re Facebook Privacy
4 Litigation, the Court reviews its ruling in that case as relevant to resolving the current Motion.

5 On May 12, 2011, the Court issued an Order granting in part Facebook's Motion to Dismiss
6 in In re Facebook Privacy Litigation.⁴ The Court found that the Facebook Plaintiffs had Article III
7 standing, because they alleged a violation of their statutory rights under 18 U.S.C. §§ 2510. (Id. at
8 7-8.) As to their causes of action, the Court found: (1) that the Facebook Plaintiffs failed to state a
9 claim under the Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*, because the Facebook Plaintiffs were either
10 alleging that the "electronic communications" at issue were sent to Facebook or to advertisers, and
11 in either case, the transmission was exempted from liability under the Wiretap Act; (2) that the
12 Facebook Plaintiffs failed to state a claim under the Stored Communications Act, 18 U.S.C. §§ 2701,
13 *et seq.*, because the Facebook Plaintiffs were either alleging that the communications at issue were
14 sent to Facebook or to advertisers, and in either case, Facebook was permitted to divulge the
15 communications under the Stored Communications Act; (3) that the Facebook Plaintiffs failed to
16 state a claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§
17 17200, *et seq.*, because a private plaintiff under the UCL needs to allege that he lost money or
18 property, but the Facebook Plaintiffs did not allege that they lost money, and personally identifiable
19 information does not constitute property for purposes of a UCL claim; (4) that the Facebook
20 Plaintiffs failed to state a claim under California's Computer Crime Law, Cal. Penal Code § 502,
21 because the applicable sections of that statute require that a defendant's actions be taken "without
22 permission," but it was impossible for Facebook to not have permission to access its own website;
23 (5) that the Facebook Plaintiffs failed to state a claim under the Consumers Legal Remedies Act

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25 ³ (Consolidated Amended Class Action Complaint, hereafter, "Complaint," Docket Item No.
26 34.)

27 ⁴ (See Order Granting in part and Denying in part Defendant's Motion to Dismiss, hereafter,
28 "Facebook Order," Docket Item No. 91 in No. C 10-2389 JW.)

1 (“CLRA”), Cal. Civ. Code §§ 1750, *et seq.*, because a violation of the CLRA may only be alleged by
 2 someone who has purchased or leased goods or services, and the Facebook Plaintiffs alleged that
 3 they received Facebook’s services “free of charge”; (6) that the Facebook Plaintiffs failed to state a
 4 claim for breach of contract, because California law requires a showing of “appreciable and actual
 5 damage” to assert a breach of contract claim, and the Facebook Plaintiffs failed to allege any such
 6 damages; (7) that the Facebook Plaintiffs failed to state a claim under Sections 1572 and 1573 of the
 7 California Civil Code, because they failed to allege that they relied upon any allegedly fraudulent
 8 misrepresentations; and (8) that the Facebook Plaintiffs failed to state a claim for unjust enrichment,
 9 because they alleged an express contract with Facebook, and a plaintiff may not assert an unjust
 10 enrichment claim while also alleging an express contract. (*Id.* at 8-16.)⁵

11 Thus, consistent with its findings in In re Facebook Privacy Litigation, with respect to
 12 Defendant’s Motion to dismiss in this case, the Court finds as follows:

- 13 (1) Plaintiffs have Article III standing, because they allege a violation of their statutory
 14 rights under the Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*, and because if Plaintiffs are
 15 able to show that Defendant transmitted the contents of its users’ communications in
 16 the manner alleged, they will have effectively demonstrated that all of the users of
 17 Defendant’s website suffered the same injury, which will necessarily mean that each
 18 individual Plaintiff will have demonstrated that he was injured. (See Facebook Order
 19 at 7-8.)⁶

21 ⁵ The Court dismissed the Facebook Plaintiffs’ causes of action under the Wiretap Act,
 22 Stored Communications Act, Cal. Penal Code § 502(c)(8), breach of contract, and Cal. Civ. Code §§
 23 1572 and 1573 without prejudice, giving the Facebook Plaintiffs leave to amend as to each. (*Id.* at
 16-17.) The Court dismissed the Facebook Plaintiffs’ causes of action under the UCL, Cal. Penal
 Code §§ 502(c)(1), (2), (3), (6), & (7), the CLRA, and for unjust enrichment with prejudice. (*Id.*)

24 ⁶ Defendant’s reliance on LaCourt v. Specific Media, Inc., No. SACV 10-1256-GW, 2011
 25 WL 1661532 (C.D. Cal. Apr. 28, 2011) in support of its contentions regarding Article III standing is
 26 misplaced. (See Statement of Recent Decision in Support of Zynga’s Motion to Dismiss, Docket
 27 Item No. 61.) First, LaCourt is, obviously, not binding on this Court. Moreover, in LaCourt, the
 28 plaintiffs alleged injury-in-fact on the theory that the defendant, by “taking and retaining” the
 plaintiffs’ “personal information,” had deprived the plaintiffs of the “economic value” of that
 information. See LaCourt, 2011 WL 1661532, at *4. The court found that it “would be very

- 1 (2) Plaintiffs’ claims under the Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*, and Stored
 2 Communications Act, 18 U.S.C. §§ 2701, *et seq.*, fail because Plaintiffs appear to
 3 allege either that the electronic communications in question were sent to Defendant
 4 itself, to Facebook, or to advertisers, but both Acts exempt addressees or intended
 5 recipients of electronic communications from liability for disclosing those
 6 communications.⁷ (See Facebook Order at 8-10.)
- 7 (3) Plaintiffs’ claim under the UCL fails because Plaintiffs do not allege that they lost
 8 money as a result of Defendant’s conduct, but instead allege that Defendant
 9 unlawfully shared their “personally identifiable information” with third-party
 10 advertisers.⁸ However, personal information does not constitute property for
 11 purposes of a UCL claim. (See Facebook Order at 10-11.)
- 12 (4) Plaintiffs’ claim under the CLRA fails because a violation of the CLRA may only be
 13 alleged by a “consumer,” i.e. an individual who purchases or leases goods or services,
 14 but as discussed previously, Plaintiffs allege that Defendant’s services are available
 15 for free. (See Facebook Order at 14.)
- 16 (5) Plaintiffs’ claim for breach of contract fails because California law requires a
 17 showing of “appreciable and actual damage” to assert a breach of contract claim, but
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20 difficult to conclude at this point,” on the basis of those allegations, that the plaintiffs had
 21 established standing. *Id.* at *6. However, the court did not hold that the plaintiffs could not
 22 “articulate some actual or imminent injury in fact”; it merely found that “at this point [the plaintiffs]
 23 haven’t offered a coherent and factually supported theory of what that injury might be.” *Id.* Finally,
 24 the plaintiffs in *LaCourt* did not bring a cause of action under the Wiretap Act, which is the statute
 25 under which this Court finds that Plaintiffs have Article III standing.

26 ⁷ (Compare Complaint ¶¶ 1-5, 8 (alleging that Defendant itself “collects personally
 27 identifiable information” from its users) with *id.* ¶ 76 (alleging that Defendant’s users, by using
 28 Defendant’s “gaming apps,” are “asking [Defendant] to send an electronic communication to
 Facebook”) and *id.* ¶ 72 (alleging that Defendant allows users to “send electronic communications to
 advertisers by clicking on advertising banners within or through [Defendant’s] gaming apps”).)

⁸ (See Complaint ¶¶ 1-3; see also *id.* at ¶ 21 (alleging that Defendant “does not charge . . . a
 fee” to use its services).)

1 Plaintiffs only allege that they have “suffered and will continue to suffer damages and
2 losses.”⁹ (See Facebook Order at 14-15.)

3 In addition, Plaintiffs state a claim under the Computer Fraud and Abuse Act (“CFAA”), 18
4 U.S.C. §§ 1030, *et seq.* The CFAA was enacted “to enhance the government’s ability to prosecute
5 computer crimes,” and was originally designed “to target hackers who accessed computers to steal
6 information or to disrupt or destroy computer functionality.” LVRC Holdings LLC v. Brekka, 581
7 F.3d 1127, 1130 (9th Cir. 2009). The section of the CFAA that creates a right of action for private
8 persons injured by such crimes specifies that a civil action under the CFAA “may be brought only if
9 the conduct involves [one out of a list of five prescribed factors].” Id. at 1131 (citing 18 U.S.C. §
10 1030(g)). Those factors are as follows: (1) “loss to 1 or more persons during any 1-year period . . .
11 aggregating at least \$5,000 in value”; (2) “the modification or impairment, or potential modification
12 or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals”;
13 (3) “physical injury to any person”; (4) “a threat to public health or safety”; and (5) “damage
14 affecting a computer used by or for an entity of the United States Government in furtherance of the
15 administration of justice, national defense, or national security.” 18 U.S.C. §§ 1030(c)(4)(A)(i)(I)-
16 (V).

17 Here, Plaintiffs allege as follows:

18 Defendant caused Plaintiffs to suffer damage or loss by misappropriating and
19 disclosing to others Plaintiffs’ personally identifiable information. (Complaint ¶ 98.)
20 Defendant caused damage or loss during a one-year period aggregating in excess of \$5,000.
(Id. ¶ 99.)

21 The Court finds that Plaintiffs’ allegation of a violation of the CFAA depends on the
22 allegation that Plaintiffs’ personally identifiable information constitutes a form of money or
23 property, such that Defendant’s alleged misappropriation and disclosure of that information would
24 constitute “damage or loss . . . in excess of \$5,000.” However, Plaintiffs offer no legal authority in
25 support of the theory that personally identifiable information constitutes a form of money or
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27 ⁹ (Complaint ¶ 125.)

1 property. In the absence of any such authority, the Court finds that Plaintiffs fail to allege monetary
 2 damage or loss caused by Defendant.¹⁰ (See Facebook Order at 11 n.10.) Thus, the Court dismisses
 3 Plaintiffs' CFAA claim with prejudice.

4 **B. Conclusion**

5 The Court GRANTS in part and DENIES in part Defendant's Motion to Dismiss as follows:

- 6 (1) The Court DENIES Defendant's Motion to Dismiss on the ground that Plaintiffs lack
 7 standing under Article III;
- 8 (2) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
 9 under the Wiretap Act without prejudice, with leave to amend to allege specific facts
 10 showing that the information allegedly disclosed by Defendant was not part of a
 11 communication from Plaintiffs to an addressee or intended recipient of that
 12 communication;
- 13 (3) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
 14 under the Stored Communications Act without prejudice, with leave to amend to
 15 allege specific facts showing that the information allegedly disclosed by Defendant
 16 was not part of a communication from Plaintiffs to an addressee or intended recipient
 17 of that communication;
- 18 (4) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Cause of Action
 19 under the UCL with prejudice;
- 20 (5) The Court GRANTS Defendants' Motion to Dismiss Plaintiffs' Cause of Action
 21 under the CLRA with prejudice;

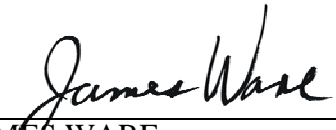
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 23 ¹⁰ Plaintiffs' reliance on United States v. Nosal, No. 10-10038, 2011 U.S. App. LEXIS 8660
 24 (9th Cir. Apr. 28, 2011) in support of their allegations under the CFAA is misplaced. (See
 25 Statement of Recent Decisions in Support of Plaintiffs' Response in Opposition to Zynga's Motion
 26 to Dismiss, Docket Item No. 63.) In Nosal, the Ninth Circuit "clarif[ied]" its holding in Brekka to
 27 explain that under the CFAA, "an employee accesses a computer in excess of his or her
 28 authorization when that access violates the employer's access restrictions." 2011 U.S. App. LEXIS
 8660, at *21. Nosal is not pertinent here, because: (1) the Ninth Circuit's holding in Nosal was
 limited to the context of an employee's access to his employer's computer system; and (2) Nosal
 involved a criminal prosecution under the CFAA, and nothing in the opinion speaks to the provision
 of the statute providing for a private right of action.

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- (6) The Court GRANTS Defendant’s Motion to Dismiss Plaintiffs’ Cause of Action for breach of contract without prejudice, with leave to amend to allege specific facts showing appreciable and actual damages in support of their claim; and
- (7) The Court GRANTS Defendant’s Motion to Dismiss Plaintiffs’ Cause of Action under the CFAA with prejudice.

Any Amended Complaint shall be filed on or before **July 15, 2011** and shall be consistent with the terms of this Order.

Dated: June 15, 2011



JAMES WARE
United States District Chief Judge

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

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15 **Dated: June 15, 2011**

Richard W. Wieking, Clerk

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By: /s/ JW Chambers
Susan Imbriani
Courtroom Deputy