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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RYAN UNG, CHI CHENG and ALICE ROSEN, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. FACEBOOK, INC., Defendant.	Case No. 11-CV-02829-JF-PSG **FACEBOOK, INC.'S MOTION TO DISMISS PLAINTIFFS' CLASS ACTION COMPLAINT** **FED. R. CIV. PRO. 12(b)(1), 12(b)(6)** Date: To be determined Time: To be determined Judge: Hon. Jeremy Fogel Courtroom: 3 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 a date and at a time that is to be determined by the Court,[1] in the above-entitled court, located at 280 South First Street, San Jose, California, Defendant Facebook, Inc. ("Facebook") will move to dismiss with prejudice the Class Action Complaint ("Complaint") filed by Plaintiffs. Facebook's Motion is made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 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 the Court at the time of hearing or otherwise.

STATEMENT OF RELIEF SOUGHT

Facebook seeks an order pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) dismissing with prejudice Plaintiffs' Complaint and each of the two Causes of Action alleged therein for lack of standing and failure to state a claim upon which relief can be granted.

STATEMENT OF ISSUES TO BE DECIDED

1. Because Plaintiffs fail to allege an injury in fact that gives them standing under Article III of the United States Constitution, should the Complaint be dismissed?

2. Because the Complaint fails to state a claim upon which relief can be granted under Article I, Section 1 of the California Constitution, should the First Cause of Action be dismissed?

3. Because the Complaint fails to state a claim upon which relief can be granted for unjust enrichment, should the Second Cause of Action be dismissed?

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[1] This case is currently assigned to Judge Jeremy Fogel, who will be leaving the Northern District of California to head the Federal Judicial Center in October 2011. However, before removal of this action to this Court, the state court (Judge Peter Kirwan of the Santa Clara Superior Court) entered a stipulated order setting a schedule for briefing and hearing this Motion that does not permit a hearing before October. (Dkt. No. 1, Ex. 6.) This Court has therefore instructed the parties to submit their briefing on the Motion and that a hearing date and time will be set once the case is reassigned.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Facebook is a social networking website that enables people to connect and share with their friends, families, and communities. Facebook is free. To join, Facebook users ("Users") need only provide their name, age, gender, and a valid e-mail address, and agree to Facebook's terms of service. Once Users register, they create a profile page and may begin connecting with other Users by inviting them to become Facebook "Friends." Users can share virtually anything through Facebook—vacation photos, news about their everyday lives, links to websites or articles they think are interesting, or opinions about world events. When a Facebook User shares content with his or her Friends, that action appears on the User's profile page and may appear in his or her Friends' News Feeds (which are running lists of content updates posted by each of the Users' Friends), depending on the User's privacy settings.

Facebook offers Users an array of options for sharing content and communicating with each other both on Facebook and third-party websites. Plaintiffs bring this putative class action based on two features that Facebook makes available for free on third-party websites via the Facebook Platform. The first feature is the Facebook "Like" button. If a third-party website operator adds the "Like" button on its site, and a Facebook User clicks the button for some particular content, the User's "Like" statement may be displayed to Facebook Friends who visit the third-party website, as well as on the User's profile page on Facebook. Users may choose to share content on a third-party website to communicate to their Facebook Friends that they like an article on a newspaper's website, a product on a retailer's website, a song or video on a media website, an entry on a blog, and so on. The second feature is "Facebook Connect." If a third-party website has integrated Facebook Connect, a Facebook User can log in to the site using his or her Facebook account and then share links to content (articles, videos, etc.) directly on that site with the User's Friends.

Plaintiffs do not take issue with these features per se, apparently recognizing the significant benefits that they provide by helping to personalize the Internet for hundreds of millions of users. Indeed, almost every major website incorporates multiple social plug-ins or

widgets that allow visitors to share with others through various services, including Facebook. Plaintiffs claim instead that Facebook improperly uses the "Like" button and Facebook Connect to collect information about Plaintiffs' web browsing history. Plaintiffs further claim—with no factual support whatsoever—that Facebook sells this web browsing information to third parties for marketing purposes. Based on these allegations, Plaintiffs assert two legal claims: that Facebook (1) has violated their right to privacy under the California Constitution and (2) has been unjustly enriched.

Plaintiffs' Complaint fails as a matter of law. As an initial matter, Plaintiffs fail to allege facts sufficient to establish that they have suffered an injury in fact that would give them standing under Article III of the U.S. Constitution. Plaintiffs do not specify what, if any, personal information Facebook has collected or disclosed through the addition of the Facebook "Like" button or the integration of Facebook Connect on a third-party website. The Complaint relies on vague, generalized allegations that say nothing about the named Plaintiffs or how they were harmed by Facebook. Nor have Plaintiffs alleged that they ever attempted to—or actually could—sell information related to their browsing history.

Additionally, the Complaint fails to state a claim upon which relief can be granted. Plaintiffs' claims are essentially repackaged arguments regarding alleged liability for the use of "browser cookies" that were litigated and rejected more than ten years ago, since which time the Internet has developed substantially and cookies have been widely employed by reputable websites to promote convenience and customization. Plaintiffs' claim under Article I, Section 1 of the California Constitution fails because the Complaint does not allege facts that, if true, would satisfy the three elements of such a claim. Plaintiffs have failed to allege any legally protected privacy interest, any reasonable expectation of privacy, or any "serious invasion" of such a privacy interest. Plaintiffs' claim for unjust enrichment fails because there is no such claim in California and because Plaintiffs have failed to allege sufficient facts to support any alternative legal theory that would give rise to a restitutionary remedy. Nor can they because Facebook is a free service and Facebook does not charge third-party websites to add the Like button or integrate with Facebook Connect.

Accordingly, Facebook respectfully requests that the Court grant this Motion and dismiss the Complaint with prejudice.

II. FACTUAL BACKGROUND[2]

Facebook operates a free social networking website, with more than 500 million registered users. (Compl. ¶ 8.) Facebook offers Users an array of options for sharing content and communicating. Facebook makes available to third-party websites, for free on its Platform, two features that allow Facebook Users to share content on those websites with their Facebook Friends. (*Id.* ¶¶ 10-13.) The first feature is the Facebook "Like" button, which has a "thumbs-up" symbol accompanied by the word "Like," and is typically displayed by a participating website alongside the many other sharing plug-ins and widgets that other services offer. (*Id.* ¶ 10.) The Like button allows a Facebook User to share content on third-party websites that the User finds interesting, funny, or for which the User has an affinity. (*Id.*) If a third-party website operator has the "Like" button on its site, and a User who is logged into Facebook clicks the button for some particular content, the User's "Like" statement may be displayed to Facebook Friends who visit the third-party website, as well as on the User's profile page on Facebook. (*Id.* ¶¶ 10-11.) The second feature is "Facebook Connect." (*Id.* ¶ 13.) If a third-party website has integrated Facebook Connect, a Facebook User can log in to the site using his or her Facebook account and then share content directly on that site with the User's Friends. (*Id.*) Both features enable third-party websites to create a more personalized and social online experience for visitors to their sites.

Plaintiffs allege that Facebook tracks the websites "Internet users" visit by placing "cookies" in their web browsers. (Compl. ¶¶ 14-15.) A cookie, also known as a "browser cookie" or an "HTTP cookie," "is a piece of information sent by a web server to a web browser that the browser software is expected to save and to send back whenever the browser makes additional requests of the server (such as when the user visits additional webpages at the same or related sites)." *In re Pharmatrak, Inc. Privacy Litig.*, 329 F.3d 9, 14 (1st Cir. 2003) (footnote

[2] By discussing the Complaint's factual allegations for purposes of this motion, Facebook does not thereby make any admission of fact.

omitted). Even ten years ago, cookies were "commonly used by Web sites to store useful information such as usernames, passwords, and preferences, making it easier for users to access Web pages in an efficient manner." *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 502-03 (S.D.N.Y. 2001). Because cookies make it easier for users to access websites and allow for a better user experience, they are used by almost every major Internet website today. *See Pharmatrak*, 329 F.3d at 14 ("Cookies are widely used on the Internet by reputable websites to promote convenience and customization."); *Netscape Commc'ns Corp. v. Valueclick, Inc.*, 684 F. Supp. 2d 678, 682 (E.D. Va. 2009) ("[T]oday the 'cookies' technology is ubiquitous . . . .").

Plaintiffs allege that Facebook places cookies in Facebook Users' web browsers and collects Users' most recent browsing history each time they visit a site displaying the Facebook "Like" button. (Compl. ¶ 15(a).)[3] As for non-Facebook Users, Plaintiffs allege that Facebook (i) places cookies in their web browsers when they first visit a site integrated with Facebook Connect and (ii) collects their most recent browsing history when they subsequently visit a site displaying the Facebook "Like" button. (Compl. ¶ 15(c).) Plaintiffs allege that the information collected about non-Facebook Users is "anonymous"; according to the Complaint, only after a non-User *becomes* a Facebook User "can" that information possibly be connected with his or her Facebook account. (*Id.*) The Complaint does not allege that Facebook has actually done so. (*See id.*)

Plaintiffs purport to bring claims on behalf of themselves and two subclasses of Internet

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[3] As stated in Facebook's Privacy Policy, to which all Users agree when they register for the site and of which this Court may take judicial notice (*see* Request for Judicial Notice filed herewith):

> **Cookie Information.** We use "cookies" (small pieces of data we store for an extended period of time on your computer, mobile phone, or other device) to make Facebook easier to use, to make our advertising better, and to protect both you and Facebook. For example, we use them to store your login ID (but never your password) to make it easier for you to login whenever you come back to Facebook. We also use them to confirm that you are logged into Facebook, and to know when you are interacting with Facebook Platform applications and websites, our widgets and Share buttons, and our advertisements. You can remove or block cookies using the settings in your browser, but in some cases that may impact your ability to use Facebook.

(Declaration of Ana Yang Muller ("Yang Decl."), filed herewith, Ex. B (Privacy Policy) § 2.)

users. The first proposed subclass includes "all Facebook members who visited a website displaying the Facebook 'Like' button from April 22, 2010 to the date of filing of this complaint." (Compl. ¶ 19.) The second proposed subclass includes "all non-Facebook members who visited a website in the Facebook Connect network and subsequently visited a website displaying the Facebook 'Like' button from April 22, 2010 to the date of the filing of this complaint." (*Id.*)

According to the Complaint, Plaintiff Ryan Ung is a registered Facebook User who, during some unspecified period, visited certain unspecified third-party websites that displayed the "Like" button. (Compl. ¶ 4.) Plaintiffs Chi Cheng and Alice Rosen are not Facebook users but, during some unspecified period, allegedly visited certain unspecified websites integrated with Facebook Connect and subsequently visited other unspecified sites that displayed the "Like" button. (*Id.* ¶¶ 5, 6.) The Complaint does not indicate that Plaintiffs Cheng or Rosen ever registered as Facebook Users.

Although Plaintiffs allege in conclusory fashion that Facebook "collected [their] browsing histor[ies]" and "personally identifiable information" without consent (*id.* ¶¶ 4-6), the Complaint does not allege specifically what, if any, personal information Facebook has supposedly collected from them along with their browsing histories. Nor does the Complaint allege that Facebook has disclosed any of Plaintiffs' personal information to third parties, much less any specific facts suggesting that Plaintiffs were harmed in any way. The Complaint further alleges that the information allegedly collected by Facebook is "an asset *of the sort* that is priced, bought, and sold in discrete units for marketing purposes" (*id.* ¶ 16 (emphasis added)), but contains no specific factual allegations concerning any such sale of information allegedly collected from Plaintiffs or otherwise.

III. APPLICABLE STANDARDS

A court may dismiss a claim under Federal Rule of Civil Procedure 12(b)(1) based on lack of subject matter jurisdiction, and the motion may attack either the complaint on its face or the existence of jurisdiction in fact. *See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 732-33 (9th Cir. 1979). If a complaint does not establish standing under Article III of the U.S. Constitution, a federal court does not have subject matter jurisdiction to hear the case. *See*

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-02 (1998).

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 recently emphasized, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not" suffice. *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.*

Additionally, "in order to '[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 but not explicitly incorporated therein 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) (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (incorporating by reference insurance terms of service and administrative documents because the claim necessarily relied on plaintiff having been a member of the insurance plan)). As discussed in greater detail in the accompanying Request for Judicial Notice filed herewith, the Complaint relies on the Facebook Statement of Rights and Responsibilities and Privacy Policy (*see* Compl. ¶¶ 4, 9, 15), which, under the applicable legal principles, the Court may properly consider in ruling on this motion.[4]

[4] Facebook Users agree to the Facebook Statement of Rights and Responsibilities ("SRR") when they register with the site. (*See* Yang Decl. Ex. A.) The SRR and Privacy Policy can be found by clicking on a link labeled "Terms" at the bottom of the Facebook webpage. (*See id.* ¶ 2.) The SRR and Privacy Policy are attached as Exhibits A and B to the Yang Declaration.

IV. ARGUMENT

A. Plaintiffs Have Not Alleged Injury in Fact and Thus Lack Article III Standing.

To have Article III standing to maintain an action in federal court, a plaintiff bears the burden of alleging facts sufficient to establish that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The alleged injury in fact must be "concrete in both a qualitative and temporal sense." *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990). Plaintiffs must "allege an injury to [themselves] that is 'distinct and palpable' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citations omitted). In a putative class action, the named plaintiffs purporting to represent the class must establish that they personally have standing to bring the cause of action. If the named plaintiffs cannot maintain the action on their own behalf, they may not seek such relief on behalf of the class. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("[E]ven named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" (citations omitted)); *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1020 (9th Cir. 2003) (same).

Plaintiffs here have failed to allege any harm that constitutes injury in fact. Plaintiffs do not allege that they themselves have suffered *any* actual harm—economic or otherwise—arising from Facebook's alleged collection of their browsing history. Plaintiffs do not specify what sites they visited or when, nor do Plaintiffs indicate whether they ever proactively deleted cookies allegedly stored in their web browser. Importantly, Plaintiffs do not allege that the browsing histories Facebook is alleged to have collected contained any sensitive personal data about them, that Facebook disclosed their browsing information to third parties, or that Plaintiffs suffered any emotional or economic harm arising from Facebook's alleged collection of their browsing history.

Indeed, Plaintiffs admit that to the extent alleged "data profiles" exist for individuals in their proposed "non-Facebook members" subclass (including Plaintiffs Cheng and Rosen), the data profiles were "anonymous." (*See* Compl. ¶ 15; *see also id.* ¶¶ 5-6 (Plaintiffs Cheng and Rosen are "non-Facebook member[s]"); *id.* ¶ 14 (browsing history is collected "in some cases" for non-members).)

Instead of alleging specific harm, Plaintiffs rely on insinuation and speculation to *suggest* that Facebook *might* have collected personal information of some individuals and *might* have sold it to third parties. For example, the Complaint alleges that "[a]nyone who has used the Internet to seek advice about hemorrhoids, sexually transmitted diseases, abortion, drug rehabilitation[,] [or] dementia . . . ***can be reasonably certain*** that Facebook has tracked ***at least some of*** those visits and ***in many cases***, identified them with a particular individual . . . ." (*Id.* ¶ 14 (emphasis added).) Further compounding the conjectural nature of the alleged injury, Plaintiffs do not even allege that they themselves visited any such sites. Similarly, Plaintiffs also allege that Facebook collects information that "***can*** easily be incorporated into a personal profile for sale to marketers of all sorts, or to be put at the disposal of the United States or state government agencies" (*id.* (emphasis added)) and that "[t]he personal information collected by Facebook is an asset ***of the sort*** that is priced, bought, and sold in discrete units for marketing purposes" (*id.* ¶ 16 (emphasis added)). But, again, Plaintiffs fail to allege that such sales or transmission actually took place. Finally, Plaintiffs also claim that "[p]ersonal data ***is viewed*** as currency" and allege that "a company called 'Allow Ltd.' . . . offer[s] to sell people's personal information on their behalf." (*Id.* ¶¶ 17-18 (emphasis added).) But Plaintiffs do not allege that any such sales of *their* information has taken place, or even that they have *attempted* to sell their own information.[5]

In short, Plaintiffs' allegations are precisely the kinds of conjectural and hypothetical

[5] Plaintiffs' generalized, conclusory statement—contained only within their *unjust enrichment* cause of action—that Facebook has "s[old] [personal information] to third parties for marketing purposes" (Compl. ¶ 35) is not only false but is unsupported by sufficient factual allegations to support the claim. *See Iqbal*, 129 S. Ct. at 1949 (2009) ("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"); *id.* (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)).

assertions that do not support a finding of injury in fact. *See Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988) (affirming dismissal of complaint for lack of Article III standing where "speculative inferences" were necessary to establish injury); *Gaos v. Google, Inc.*, No. 10-CV-04809-JW, at *5 (N.D. Cal. Apr. 7, 2011) (dismissing complaint for lack of Article III standing where plaintiffs failed to allege that they were affected by challenged practices); *Two Jinn, Inc. v. Gov't Payment Serv., Inc.*, No. 09CV2701 JLS (BLM), 2010 WL 1329077, at *3 (S.D. Cal. Apr. 1, 2010) (dismissing complaint for lack of Article III standing where the alleged injury was "mere conjecture"); *Lee v. Capital One Bank*, No. C 07-4599 MHP, 2008 WL 648177, at *2 (N.D. Cal. Mar. 5, 2008) (dismissing complaint for lack of Article III standing where alleged injuries were "hypothetical" and not "actual or imminent").

Furthermore, the collection of browsing history or demographic data does not support a finding of economic loss, as the Southern District of New York ruled over ten years ago. *See DoubleClick*, 154 F. Supp. 2d at 525 (holding that "plaintiffs have failed to state any facts that could support a finding of economic loss" arising from defendant's alleged use of cookies to track plaintiffs' browsing history and demographic data). Nor does the alleged collection of personal information otherwise support a finding of economic loss. *See Thompson v. Home Depot, Inc.*, No. 07-cv-1058 IEG (WMc), 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18, 2007) (holding that plaintiff's alleged use of personal information for marketing purposes did not confer a property interest to plaintiff under California's Unfair Competition Law); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005) ("There is [] no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large."); *Archer v. United Rentals, Inc.*, 195 Cal. App. 4th 807, 126 Cal. Rptr. 3d 118, 124 (2011) (holding that "collection and recordation" of plaintiffs' personal information did not constitute loss of money or property); *Dwyer v. Am. Express Co.*, 273 Ill. App. 3d 742, 749 (Ill. App. Ct. 1995) (holding that cardholder name has little or no intrinsic value apart from its inclusion on a categorized list; instead, "[d]efendants create value by categorizing and aggregating" the names).

These issues were recently addressed by the Central District of California in *LaCourt v.*

Specific Media, Inc., No. SACV 10-1256-GW(JCGx), 2011 WL 1661532, at *3-5 (C.D. Cal. Apr. 28, 2011). In *LaCourt*, the plaintiffs alleged that Specific Media had used what are known as "flash cookies" (which plaintiffs argued were used to circumvent standard HTTP cookies) to collect names, e-mail addresses, home and business addresses, telephone numbers, web searches, and browser histories. *Id.* at *5. The court granted Specific Media's motion to dismiss on Article III grounds, finding that the plaintiffs "d[id] not specifically allege that Plaintiffs themselves were affected by [Specific Media's alleged conduct]." *Id.* at *4. The court further found that even if the plaintiffs had alleged that they were affected by Specific Media's conduct, they also had not included any particularized facts regarding how they suffered economic injury, and dismissed the complaint for lack of standing on that basis as well. *Id.* at *4-5. The court cited *Doubleclick* approvingly, noting that while "not binding, . . . [*Doubleclick*'s] reasoning at least suggests that the question of Plaintiffs' ability to allege standing is a serious one" and that "[i]t would be very difficult to conclude at this point that Plaintiffs have met their burden of establishing that this Court has subject matter jurisdiction." *Id.* at *6.

Because Plaintiffs have not alleged any cognizable injury to establish standing under Article III, the Complaint should be dismissed.

B. Plaintiffs Fail to State a Claim under Article I, Section 1 of the California Constitution.

Cookies have long been used by websites across the Internet for the convenience of, and to provide a more personalized experience for, visitors to those websites. *See Pharmatrak*, 329 F.3d at 14; *Valueclick*, 684 F. Supp. 2d at 682. Accordingly, it is not surprising that courts have repeatedly rejected attempts to impose liability on websites based merely on the placement of cookies that collect browsing history. *See, e.g., DoubleClick*, 154 F. Supp. 2d at 526-27 (dismissing with prejudice claims under the Wiretap Act (Title I of the Electronic Communications Privacy Act ("ECPA")), Stored Communications Act (Title II of the ECPA), and the Computer Fraud and Abuse Act). Plaintiffs' attempt to repackage this theory of liability as a claim under the California Constitution also fails as a matter of law and should be rejected.

To state a claim for violation of the California constitutional right to privacy, Plaintiffs

must allege sufficient facts establishing three elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *See Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 66 (1994). Plaintiffs here have failed to allege facts to support any of these elements, instead offering only improper legal conclusions. Accordingly, Plaintiffs' claim should be dismissed. *See Iqbal*, 129 S. Ct. at 1949 (noting that "[t]hreadbare recitals of the elements of a cause of action . . . do not suffice" to survive a motion to dismiss).

1. Plaintiffs Fail to Allege a Legally Protected Privacy Interest.

Plaintiffs assert that they have a "legally protected interest in their personal Internet browsing history" (Compl. ¶ 30), but such a legal conclusion need not be accepted as true for the purposes of a motion to dismiss. *See Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) ("conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim"); *accord Iqbal*, 129 S. Ct. at 1949. The California Supreme Court has recognized two classes of protected privacy interests: (1) "informational privacy," which protects "interests in precluding the dissemination or misuse of sensitive and confidential information," and (2) "autonomy privacy," which protects "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference . . . ." *Hill*, 7 Cal. 4th at 35. Although a privacy interest may exist in certain types of highly sensitive information, *see*, *e.g.*, *Susan S. v. Israels*, 55 Cal. App. 4th 1290, 1295-98 (1997) (confidential mental health records); *Urbaniak v. Newton*, 226 Cal. App. 3d 1128, 1140-41 (1991) (HIV status), the Complaint does not allege that Facebook has either collected—or disclosed—*any* such highly personal information from any of the Plaintiffs or that any of the Plaintiffs even have such interests to protect. (*See, e.g.*, Compl. ¶¶ 4-6.) Further, Plaintiffs admit that any data profiles that could potentially exist for "non-Facebook members," such as Plaintiffs Cheng and Rosen, were stored "anonymous[ly]." (*See id.* ¶ 15.) Because Plaintiffs have failed to allege that Facebook has violated a legally protected privacy interest, Plaintiffs' claim should be dismissed.

2. Plaintiffs Fail to Allege a Reasonable Expectation of Privacy in the Circumstances.

Plaintiffs have also failed to allege that they had a reasonable expectation of privacy in their browsing history. "A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." *Hill*, 7 Cal. 4th at 37. "[C]ustoms, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." *Id.* at 36. "[T]he presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant." *Id.* at 37.

Plaintiffs fail to establish a reasonable expectation of privacy for individuals in their "members" subclass (including Plaintiff Ung), because Facebook plainly discloses its use of cookies in its Privacy Policy, which is published on its website and agreed to by all Users as a condition to using the website:

> **Cookie Information.** We use "cookies" (small pieces of data we store for an extended period of time on your computer, mobile phone, or other device) *to make Facebook easier to use, to make our advertising better, and to protect both you and Facebook*. For example, we use them to store your login ID (but never your password) to make it easier for you to login whenever you come back to Facebook. We also use them to confirm that you are logged into Facebook, and *to know when you are interacting with Facebook Platform applications and websites, our widgets and Share buttons, and our advertisements*. You can remove or block cookies using the settings in your browser, but in some cases that may impact your ability to use Facebook.

(*See* Yang Decl., Ex. B § 2 (emphases added).) Individuals do not have a reasonable expectation of privacy where they receive notice and an opportunity to consent to the activity. *Hill*, 7 Cal. 4th at 42 (holding that athletes do not have a reasonable expectation of privacy regarding urine tests, where the tests were disclosed to them and the athletes had an opportunity to consent to or refuse to participate in the testing); *Holmes v. Petrovich Dev. Co.*, 191 Cal. App. 4th 1047, 1068-72 (2011) (holding that plaintiff who used company email account to communicate with her attorney did not have reasonable expectation of privacy in that communication where company's review of her emails had been disclosed to her).

As to non-Facebook Users, Plaintiffs have alleged that any browsing data that may have been collected was done so anonymously. (Compl. ¶ 15(c).) A person cannot be said to have a reasonable expectation of privacy in anonymous data about the pages he or she has visited on the Internet, particularly because data on the Internet is routinely routed through multiple third-party servers as anonymous data packets.[6]

Plaintiffs have thus failed to allege that they held any "reasonable" expectation of privacy in their browsing histories.

3. Plaintiffs Fail to Allege Conduct by Facebook that Constitutes a Serious Invasion of a Privacy Interest.

Finally, Plaintiffs have failed to allege a *serious* invasion of a privacy interest. To be actionable as a violation of the constitutional right of privacy, an "invasion[] of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Hill*, 7 Cal. 4th at 37. However, as discussed above, Plaintiffs make no allegation that they were harmed economically or emotionally or in any other way by Facebook's alleged activities. Plaintiffs' only allegation in this regard is the statement that: "Facebook committed a serious invasion of Plaintiffs' privacy interest by using the 'Like' button and Facebook Connect to secretly track Plaintiffs' website browsing history." (Compl. ¶ 32.) But Plaintiffs' threadbare recital of the elements of a cause of action is insufficient to state a claim. *See Iqbal*, 129 S. Ct. at 1949.

Indeed, inasmuch as Plaintiffs allege that Facebook collected Plaintiffs' browsing history to serve targeted ads to Plaintiffs (*see* Compl. ¶¶ 16, 35), those allegations do not constitute a serious invasion of a privacy interest as a matter of a law. Collection of personal information in

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[6] Courts have held, in the context of the Fourth Amendment, that users do not have a reasonable expectation of privacy for similar Internet activity. *See United States v. Forrester*, 512 F.3d 500, 510 (2008) ("[E]-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information."); *People v. Stipo*, 195 Cal. App. 4th 664, 666, 668-69 (2011) (holding that a "subscriber has no expectation of privacy in the subscriber information he supplies to his Internet provider").

order to serve advertisements is "routine commercial behavior" that does not rise to the level of egregiousness required under the California Constitution. *See Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 992 (2011). The plaintiff in *Folgelstrom* alleged that the defendant retail chain had collected his zip code at check out and used it to determine his home address. *Id.* at 989. The chain then used the address "to mail him coupons and other advertisements." *Id.* at 992. The California Court of Appeal affirmed the dismissal of plaintiff's claim under the California Constitution's right to privacy, explaining that "[t]his conduct is not an egregious breach of social norms, but routine commercial behavior." *Id.*

The collection and use of personal information on the Internet in order to serve targeted advertisements is similarly routine. As the court in *In re DoubleClick Privacy Litigation* explained:

> We do not commonly believe that the economic value of our attention is unjustly taken from us when we choose to watch a television show or read a newspaper with advertisements and we are unaware of any statute or caselaw that holds it is. We see no reason why Web site advertising should be treated any differently. A person who chooses to visit a Web page and is confronted by a targeted advertisement is no more deprived of his attention's economic value than are his off-line peers. Similarly, although demographic information is valued highly . . . , the value of its collection has never been considered a[n] economic loss to the subject. Demographic information is constantly collected on all consumers by marketers, mail-order catalogues and retailers. However, we are unaware of any court that has held the value of this collected information constitutes damage to consumers or unjust enrichment to collectors. Therefore, it appears to us that plaintiffs have failed to state any facts that could support a finding of economic loss . . . .

154 F. Supp. 2d at 525. Plaintiffs therefore have not alleged a serious invasion of a privacy interest, and their claim should be dismissed.

C. Plaintiffs Fail to State a Claim for Unjust Enrichment.

Plaintiffs' unjust enrichment claim should also be dismissed, on the ground that there is no such independent cause of action in California. *See, e.g.*, *LaCourt*, 2011 WL 1661532, at *8 ("This Court agrees with other courts in this district that 'unjust enrichment is not an independent claim' . . . ."); *In re DirecTV Early Cancellation Litig.*, 738 F. Supp. 2d 1062, 1091 (C.D. Cal. 2010) (noting "unjust enrichment is not an independent claim"); *Levine v. Blue Shield of Cal.*,

189 Cal. App. 4th 1117, 1138 (2010) (dismissing unjust enrichment claim because "[t]here is no cause of action in California for unjust enrichment") (citations omitted); *McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004) ("Unjust enrichment is not a cause of action, however, or even a remedy. . . ."). Moreover, Plaintiffs have failed to allege facts sufficient to support an alternative legal theory that would give rise to restitution. *See GA Escrow, LLC v. Autonomy Corp. PLC*, No. C 08-01784 SI, 2008 WL 4848036, at *7 (N.D. Cal. Nov. 7, 2008) (noting that a court may elect to reinterpret an improperly pleaded "unjust enrichment" claim as a properly pleaded cause of action granting restitution).

Even were Plaintiffs to allege a properly pleaded cause of action supporting restitution (which they do not), their claim for unjust enrichment would still fail. "An individual is required to make restitution if he or she is unjustly enriched at the *expense of another*." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010) (emphasis added) (citations omitted). But Plaintiffs do not allege that they have suffered *any* detriment to Facebook's benefit. Plaintiffs have not alleged that they paid or otherwise tendered money to Facebook—nor could they, since Facebook, Facebook Connect, and the Facebook "Like" button are free. Nor do Plaintiffs have property rights in their personal information that would be harmed had Facebook collected that information. *See In re Facebook Privacy Litig.*, --- F. Supp. 2d ----, No. C 10-02389 JW, 2011 WL 2039995, *8 (N.D. Cal. May 12, 2011) (holding that "[p]laintiffs' contention that their personal information constitutes a form of 'payment' to Defendant is unsupported by law" and dismissing claim under Consumer Legal Remedies Act); *see also id.* at *6-7 (dismissing claim under California's Unfair Competition Law because "personal information does not constitute property for purposes of a UCL claim"); *DoubleClick*, 154 F. Supp. 2d at 525 ("[W]e are unaware of any court that has held the value of this collected information constitutes damage to consumers or unjust enrichment to collectors.").

Plaintiffs also fail to plead that Facebook's alleged collection of their browsing histories was unjust. To plead unjust enrichment, it must ordinarily appear "'that the benefits were conferred by mistake, fraud, coercion or request; otherwise, though there is enrichment, it is not unjust.'" *In re Actimmune Mktg. Litig.*, No. C 08-02376, 2009 WL 3740648, at *16 (N.D. Cal.

Nov. 6, 2009) (internal quotation marks and citation omitted). Plaintiffs have not alleged that Facebook tracked their browsing histories through mistake, fraud, coercion, or request. Nor have Plaintiffs alleged any other wrongdoing that might support a cause of action granting restitution. As explained above, Plaintiffs have failed to successfully plead a claim under Article I, Section 1 of the California Constitution (*see supra* § IV. B.). *See Actimmune*, 2009 WL 3740648, at *16 ("[C]ourts routinely dismiss unjust enrichment claims where a plaintiff cannot assert any substantive claims against a defendant."); *Levine*, 189 Cal. App. 4th at 1138 (sustaining trial court's dismissal of claim for unjust enrichment where the court also dismissed plaintiffs' remaining claims). Therefore, Plaintiffs' improperly pleaded claim for unjust enrichment is unsalvageable, and should be dismissed.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Class Action Complaint should be dismissed with prejudice.

Dated: July 20, 2011

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