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FACEBOOK, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re: Facebook Internet Tracking Litigation

Case No. 5:12-md-02314 EJD

FACEBOOK'S REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING *SPOKEO*'S APPLICATION TO FACEBOOK'S MOTION TO DISMISS

Judge: Hon. Edward J. Davila
Trial Date: None Set

I. INTRODUCTION

Plaintiffs' Supplemental Brief argues that, beyond the allegations of economic harm that this Court has already deemed deficient for purposes of standing, they have alleged an "intangible" "loss of privacy" in connection with their Wiretap Act, SCA, and CIPA claims. (Pl. Br. at 1, 4.) While *Spokeo* reaffirmed that an "intangible" harm may satisfy Article III's injury-in-fact requirement, *Spokeo* also made clear that not all allegations of such harm will suffice. Applying the principles set out in *Spokeo*, Plaintiffs' claimed "loss of privacy," a theory of harm not alleged in the SAC, is not a "concrete" injury as required by Article III.

Spokeo identifies two inquiries that this Court may consider in determining whether an intangible harm satisfies the "concreteness" requirement. First, the Court may consider whether the alleged harm "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." Slip op. at 9. While Plaintiffs' brief includes a hodgepodge of historical references and conclusory statements on privacy interests, Plaintiffs have not shown that the kind of harm to those interests they claim has ever been sufficient to bring a lawsuit in English or American courts. (Pl. Br. at 4-5.) Second, the Court may take into account "the judgment of Congress." But that judgment is limited. The entire point of *Spokeo* is that a plaintiff does not "automatically" have standing whenever Congress "purports to authorize [a] person to sue to vindicate [a statutory] right." Slip op. at 9. The mere violation of a statute, "divorced from any concrete harm," *will not* suffice. *Id*. at 9-10. Although Plaintiffs point to the enactment of the Wiretap Act and SCA as evincing Congressional intent to protect certain privacy interests associated with electronic communications (Pl. Br. at 4-5), the SAC does *not* actually allege a "concrete, *de facto*" injury resulting from these alleged statutory violations. The SAC fails to identify how the alleged violations caused Plaintiffs to suffer "real," "actually exist[ing]" injuries that are not "abstract," "conjectural," or "hypothetical." Slip op. at 7-8.

Accordingly, Plaintiffs do not have standing for their Wiretap Act, SCA, and CIPA claims. And for the reasons set out in Facebook's previous briefing and argument (and identified by the Court in its prior decision), Plaintiffs do not have standing for their other claims, either.

II. ARGUMENT

A. Plaintiffs Have Not Alleged Any Harm in Connection with their Wiretap Act, SCA, and CIPA Claims that has "Traditionally Been Regarded as Providing a Basis for a Lawsuit in English or American Courts."

Spokeo explained that in determining "whether an [alleged] intangible harm constitutes injury in fact" under Article III, "it is instructive to consider whether [that] intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for *a lawsuit* in English or American courts." *Id*. at 9 (emphasis added).[1] For this Constitutional inquiry, the Court cited the detailed historical analysis conducted in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*. *Id*. (citing *Vermont*, 529 U. S. 765, 775–777 (2000)). There, the Court explored whether a qui tam relator had standing even though he had suffered no direct injury. *Vermont*, 529 U.S. at 768. Under longstanding precedent, the Court first looked to the history of qui tam actions in "England and the American Colonies," and determined that such lawsuits were "prevalent [] in the period immediately before and after the framing of the Constitution." *Id*. at 774-77. The Court undertook this analysis because "the Constitution established that '[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Id.* at 774 (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J.)).

Plaintiffs here argue they have alleged a kind of intangible "privacy" harm merely by virtue of alleging violations of the Wiretap Act, SCA and CIPA,[2] which prohibit unauthorized interception of communications and unauthorized access of stored communications (subject to numerous details and exceptions). (Pl. Br. at 4-5.) But Plaintiffs do not provide *a single case* that indicates this kind

[1] Plaintiffs cite the Supreme Court's recent order in *Pundt v. Verizon Communications, Inc.*, No. 15-785, 2016 WL 2945235, at *1 (U.S. May 23, 2016). This two-sentence "GVR" does not address the merits of the case. Plaintiffs appear to cite the order for the proposition that injury in fact need not always be economic harm. (Pl. Br. at 2-3.) Facebook does not dispute this point; the problem here is that the SAC only alleges a theory of economic harm that is contrary to this Circuit's case law.

[2] The argument for standing in Plaintiffs' supplemental brief is premised on the assertion that Facebook violated "statutory rights designed to protect privacy." (Pl. Br. at 4.) This argument is inapplicable to Plaintiffs' other eight claims, which arise from tort law or from statutes not intended to protect privacy. In this way, Plaintiffs' argument has no bearing on their standing to bring these other claims, which should be dismissed for lack of standing for the same reasons that this Court dismissed those brought in the FAC. (*See* Order at 8-11; MTD at 8; Dkt. No. 109 ("Reply") at 2.)

of alleged harm has historically been sufficient on its own to bring a lawsuit in English or American courts. Instead, they offer one criminal case and a smattering of non-legal materials, none of which informs the historical inquiry *Spokeo* and *Vermont* require. For example, Plaintiffs invoke *Katz v. United States*, but that decision concerns a criminal appeal, does not discuss standing, and has no bearing on what can serve as a "basis for lawsuit." 389 U.S. 347 (1967). Plaintiffs also cite a 1798 letter from Thomas Jefferson and an 1853 treatise written by a political philosopher to buttress their historical argument. (Pl. Br. at 4-5.) While each document opines on the importance of privacy, none discusses a category of privacy harm that has long been recognized "*as providing a basis for a lawsuit* in English or American courts."[3] *Spokeo*, slip op. at 9 (emphasis added).

Plaintiffs' reliance on a single subcommittee report from ECPA's legislative history fares no better. (Pl. Br. at 5 (citing Senate Hearing before the Committee on the Judiciary, 99th Congress, 1st Session, on S.1667).) Plaintiffs claim that this report is evidence that "the right to privacy" existed before ECPA was enacted. (*Id*.) Plaintiffs offer no pin cite, thus making it unclear what language they draw on for support, but nothing in the document suggests that the kind of harm they are alleging has historically constituted an injury in fact for purposes of Article III standing.

To the contrary, courts have found that the kind of harm alleged by Plaintiffs does *not* satisfy the injury-in-fact requirement—in part, because there is no historical precedent suggesting otherwise. In *In re Google, Inc. Privacy Policy Litig.*, No. C 12-01382 PSG, 2012 WL 6738343, at *5 (N.D. Cal. Dec. 28, 2012), the court "observe[d] that Plaintiffs ha[d] raised serious questions regarding Google's respect for consumers' privacy. But before it may consider these questions, the court must heed the constraints Article III imposes upon its jurisdiction to do so." *Id*. at *4. The court dismissed for lack of standing, noting that "nothing in the precedent of the Ninth Circuit or other appellate courts confers standing on a party that has brought statutory or common law claims based

[3] Plaintiffs also cite an article that claims some Internet users have stopped engaging in online activities because of privacy concerns. (Pl. Br. at 5 (citing Rafi Goldberg, "Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities").) But this article likewise says nothing about whether those privacy concerns can form a basis for a lawsuit. Nor do Plaintiffs allege that *they* have modified their Internet behavior because of privacy concerns, meaning that the opinion offered by the article is not particularized to any Plaintiff.

on nothing more than the unauthorized disclosure of personal information[.]" *Id*. at *5; *see also In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2011 WL 4403963, at *4 (N.D. Cal. Sept. 20, 2011) ("The Court does not take lightly Plaintiffs' allegations of privacy violations. However, for purposes of the standing analysis under Article III, Plaintiffs' current allegations are clearly insufficient."); *id.* at *5 ("Plaintiffs have not identified a concrete harm from the alleged collection and tracking of their personal information sufficient to create injury in fact.").

B. Plaintiffs Have Not Alleged Any Concrete, *De Facto* Injuries Resulting from the Alleged Violation of the Wiretap Act, SCA, and CIPA.

Plaintiffs point to the enactment of the Wiretap Act and SCA as evincing Congressional intent to protect certain privacy interests associated with electronic communications. (Pl. Br. at 4-5.) But *Spokeo* makes clear that Congress's power is limited, and that simply purporting to grant individuals a right to sue is not sufficient for Article III standing, unless the statutory violation also results in concrete harm. As the Court explained:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

Id. at 9-10. In *Spokeo*, the Court acknowledged that Congress enacted FCRA "to curb the dissemination of false information," but went on to hold that "not all inaccuracies cause harm or present any material risk of harm" sufficient for standing. *Id*. at 10-11. The Court accordingly held that even a violation of the statute that resulted in false information being disclosed—the very harm that FCRA was designed to prohibit—is not enough to establish a concrete, *de facto* injury.

Plaintiffs simply ignore this limitation on Congress's power—stating only that "Facebook violated statutory rights designed to protect privacy" (Pl. Br. at 4)—but it squarely applies to Plaintiffs' Wiretap, SCA, and CIPA claims here. To establish standing, Plaintiffs must allege facts demonstrating that they suffered a concrete injury beyond the mere invasion of a statutory right—that is, they must show more than a "procedural violation" like the disclosure of information under FCRA. As Facebook explained in its previous briefing (MTD at 8), Plaintiffs have failed to do so.

Among other things, they did not provide a single URL they allege had been intercepted by Facebook. Nor did they plead that the automated receipt of a URL, or even a series of URLs (which is how the Internet works), caused them any concrete harm. As such, Plaintiffs' Wiretap Act, SCA, and CIPA claims allege nothing more than a technical infraction "divorced from any concrete harm." *Spokeo*, slip op. at 9-10.

Instead of identifying a concrete injury, Plaintiffs make abstract allegations that *might* encompass *potential* injury in fact, something explicitly proscribed by *Spokeo*. *Id*. at 8 ("When we have used the adjective "concrete," we have meant to convey the usual meaning of the term—"real," and not "abstract."). There are numerous factual scenarios that fall within Plaintiffs' generalized allegations, but would not "work any concrete harm." *Id.* at 11. For instance, Facebook is alleged to have intercepted URLs in violation of ECPA, but if the only URLs allegedly intercepted were for commonly visited webpages such as www.cnn.com, then it is "difficult to imagine how the [interception] of [such URLs], without more, could work any concrete harm." *Id.* Likewise, Plaintiffs do not contest that when they visited websites with a Like button while logged in, Facebook properly received the URLs of those sites. If Facebook were alleged to have intercepted that same URL when a Plaintiff subsequently visited that same site while logged off, there again would be no concrete harm. Plaintiffs have failed to allege facts that would transform the theoretical harm they identify into a concrete one.[4]

III. CONCLUSION

For these reasons and those set out in Facebook's previous briefing and oral argument, Plaintiffs lack standing, and the SAC should be dismissed with prejudice.

[4] Plaintiffs recognize both that "particularization" has been addressed in earlier briefing and that *Spokeo* "*does not alter this earlier analyses* [sic]" (Pl. Br. at 3 (emphasis added)), but nonetheless spend almost half of their brief discussing the issue. The Court granted the parties leave to "submit supplemental briefing providing their views of *Spokeo*'s application to this case, if any." (Dkt. No. 126 at 2.) Having recognized that *Spokeo* does not alter the particularization analysis, Plaintiffs' particularization argument is not only improper but also is unpersuasive as they point to allegations that they had Facebook accounts during the relevant period, as if that alone is sufficient to satisfy the particularization requirement. (*Id*.) It is not. Plaintiffs do not plead how the alleged conduct *affected* them at all, let alone how it caused an actual injury that is both concrete and particular to them. (*See* MTD at 10; Reply at 2.)

Respectfully submitted,

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