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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

In re: Facebook Internet Tracking Litigation

Case No. 12-md-02314 EJD

**DECLARATION OF NATALIE NAUGLE IN
 SUPPORT OF DEFENDANT FACEBOOK,
 INC.'S RESPONSE TO PLAINTIFFS'
 ADMINISTRATIVE MOTION TO FILE
 UNDER SEAL**

JUDGE: Edward J. Davila
COURTROOM: 4
TRIAL DATE: Not Yet Set

REDACTED

Exhibit 2

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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN JOSE DIVISION**

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16
17 IN RE: FACEBOOK, INC. INTERNET
18 TRACKING LITIGATION

No. 5:12-md-02314-EJD-NC

**THIRD AMENDED CONSOLIDATED
CLASS ACTION COMPLAINT FOR:**

- I. BREACH OF CONTRACT**
- II. BREACH OF IMPLIED COVENANT
OF GOOD FAITH AND FAIR
DEALING**

DEMAND FOR JURY TRIAL

21
22 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
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1 **I. INTRODUCTION**


2 1. On April 22, 2010, defendant Facebook, Inc. (“Facebook” or “Defendant”)
3 launched the “Like” button outside of the Facebook domain. Within weeks it became the single
4 most important social plugin ever created, quickly surpassing Facebook’s “Share” button.

5 2. Less than five weeks after the Like button launch, 50,000 websites had installed it;
6 less than ten weeks after launch, web site consultants were calling it “ubiquitous.” By June 2012,
7 a quarter of the top 10,000 websites formally integrated Facebook plugins just on their homepages.
8 By November 2013, Facebook claimed on its developer blog that its Like and Share buttons drove
9 more referral traffic than all other social networks combined.

10 3. Today, Facebook says that web pages containing the Like button and its other
11 plugins are viewed more than 30 *billion* times each day, and more than 7 million websites now
12 incorporate them. As the *Huffington Post* summed up, the Like button is now “omnipresent.”

13 4. When a Facebook subscriber logs into his or her Facebook account, a number of
14 “cookies”—including session cookies and tracking cookies—are written to the user’s browser.
15 Several of these cookies can be used to identify the subscriber. When a subscriber visits a webpage
16 with a Facebook social plugin (such as the Facebook Like button), Facebook and the first-party
17 website cause the user’s browser to re-direct the user’s communication, via the file path of the
18 referrer URL of the page being requested, along with all available Facebook tracking and session
19 cookies, *to Facebook* in real-time.

20 5. The re-directed communications are acquired by Facebook regardless of whether
21 the subscriber actually clicks on a Like or Share button or even knows of its existence. Thirty
22 billion times per day, Facebook causes computers around the world to report the real-time Internet
23 communications of more than one billion people—including the entire file path of URLs
24 containing sensitive, personal content—to Facebook. When Facebook’s session and tracking
25 cookies link the URLs to specific persons, anonymity disappears. Facebook can link the web
26 browsing of more than one billion people to their actual identities.

27  6. Given the enormous privacy implications of Facebook’s ubiquitous insight into
28 web traffic, Facebook promised subscribers that it would not receive user-identifying cookies via

1 its plugins on third-party websites if the subscriber interacts with these websites while logged out
2 of Facebook. Facebook made this promise from the very first day Facebook launched the Like
3 button. From the very first day, however, Facebook broke this promise; logging out did not remove
4 all user-identifying cookies and in fact new user-identifying cookies were written to the browsers
5 of logged-out subscribers via the plugins. Discovery has revealed that from the very first day,
6 Facebook knew it was breaching its contractual promises, and chose to keep this breach quiet
7 despite internal concerns.

8 7. On September 25, 2011, an independent researcher in Australia publicly revealed
9 that logging out of a Facebook account failed to remove user-identifying cookies—in particular
10 the *c_user*, *lu* and *datr* cookies. The following day (September 26, 2011), the story was picked up
11 by the *Wall Street Journal*, and circulated around the world. Congress demanded (and received)
12 testimony from Facebook, and the FTC investigated.

13 8. Facebook quickly admitted the problem, and at some point prior to October 3, 2011,
14 issued fixes with respect to the *c_user* and *lu* cookies. But Facebook continued to use the *datr*
15 cookie to track subscribers post-logout after October 3, 2011.

16 9. The plaintiffs are four Facebook subscribers whose Internet use was tracked by
17 Facebook after April 22, 2010 while the plaintiffs were logged out of their Facebook accounts.
18 They bring claims for breach of contract and breach of the implied covenant of good faith and fair
19 dealing on behalf of themselves and other similarly-situated Facebook subscribers in the United
20 States (the “Class”).

21 **II. JURISDICTION AND VENUE**

22 10. This Court has personal jurisdiction over Defendant Facebook because Facebook
23 is headquartered in this District.

24 11. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act
25 (“CAFA”), 28 U.S.C. § 1332(d), because this is a class action in which the amount in controversy
26 exceeds \$5,000,000, and at least one member of the class is a citizen of a state other than California

27 or ware.

1 12. This Court also has discretionary supplemental jurisdiction over the state law
2 claims in this action pursuant to 28 U.S.C. § 1367 because the state law claims form part of the
3 same case or controversy as those that give rise to two previously asserted but dismissed federal
4 claims under the Federal Wiretap Act, 18 U.S.C. § 2511 (the “Wiretap Act”) and the Stored
5 Communication Act, 18 U.S.C. § 2701 (“SCA”).

6 13. Venue is proper in this District because Defendant Facebook is headquartered in
7 this District. In addition, the Facebook Statements of Rights and Responsibilities in force since
8 April 22, 2010, which governs the relationship between Facebook and its subscribers—including
9 the plaintiffs—provides for exclusive venue in state or federal courts located in Santa Clara
10 County, California.

11 **III. THE PARTIES**

12 14. Plaintiff Mrs. Perrin Davis (“Davis”) is an adult domiciled in Illinois. Davis has
13 had an active Facebook account since before April 22, 2010.

14 15. Plaintiff Prof. Cynthia Quinn (“Quinn”) is an adult domiciled in Hawaii. Quinn
15 has had an active Facebook account since before April 22, 2010.

16 16. Plaintiff Dr. Brian Lentz (“Lentz”) is an adult domiciled in Virginia. Lentz has had
17 an active Facebook account since before April 22, 2010.

18 17. Plaintiff Mr. Matthew Vickery (“Vickery”) is an adult domiciled in Washington
19 State. Vickery has had an active Facebook account since before April 22, 2010.

20 18. Defendant Facebook is a Delaware corporation which maintains its headquarters at
21 1 Hacker Way, Menlo Park, California 94025. Facebook is a “social network” that permits its
22 members to interact with one another through a web site located at www.facebook.com. Facebook
23 has surpassed 2 billion monthly active users, more than 200 million of whom reside in the United
24 States.



1 **IV. FACTUAL ALLEGATIONS**

2 **A. The Facebook Statement of Rights and Responsibilities**

3 19. The agreement governing Facebook’s relationship with subscribers starts with the
4 “Statement of Rights and Responsibilities” or “SRR.” The SRR incorporates a number of other
5 documents by reference and hyperlinks.¹ The oldest relevant SRR is dated April 22, 2010, and is
6 attached to this complaint as Exhibit A.

7 20. Updated SRRs produced in discovery are dated August 25, 2010 (see Exhibit B),
8 October 4, 2010 (see Exhibit C) and April 26, 2011 (see Exhibit D).

9 21. Each of these SRRs, regardless of date, provides that “[t]he laws of the State of
10 California will govern this Statement, as well as any claim that might arise between you and us,
11 without regard to conflict of law provisions.” *See, e.g.*, SSR dated April 22, 2010 at ¶ 15, Ex. A,
12 FB_MDL_00000014.

13 22. Subscribers agree to the terms of the SRR upon initial creation of the account.

14 23. In the preamble, the SRR also provides that the agreement renews each and every
15 time a subscriber uses the website: “By using or accessing Facebook, you agree to this Statement.”
16 Ex. A, FB_MDL_00000012.

17 24. The very first section of the SRR governs privacy, stating:

18 Your privacy is very important to us. We designed our Privacy Policy to make
19 important disclosures about how you can use Facebook to share with others and
20 how we collect and can use your content and information. We encourage you to
read the Privacy Policy, and to use it to help make informed decisions.

21 Ex. A. at ¶ 1, FB_MDL_00000012.

22 25. In the language excerpted above, the words “Privacy Policy” were hyperlinked on
23 the Facebook website and linked directly to the Privacy Policy.²

24 26. The SRR dated April 22, 2010 includes six documents incorporated by reference
25 and hyperlinked at the end of the document: (1) the Privacy Policy (later called the Data Use

26 ¹ A hyperlink electronically provides direct access from one internet location/file to another,
27 typically by clicking a highlighted word or icon.

28 ² As of April 26, 2011, the name of this policy was changed to the “Data Use Policy.”

1 Policy), (2) the Payment Terms, (3) the Platform Policy, (4) Developer Principles and Policies,
2 (5) Advertising Guidelines, and (6) Promotions Guidelines (together, the “Additional
3 Documents”). *See* Ex. A, FB_MDL_00000014. Later SRRs include additional links.

4 27. Immediately to the right of “Privacy Policy:” Facebook states: “The Privacy Policy
5 is designed to help you understand how we collect and use information.” Ex. A,
6 FB_MDL_00000014.

7 28. Each of the Additional Documents is an agreement with terms agreed to by
8 Facebook and subscribers. For example, the Payment Terms use the phrase “you agree” more than
9 a dozen times.

10 29. Each of the Additional Documents are incorporated by reference and hyperlink into
11 the SRR, and together form a single agreement.

12 30. Each of the Additional Documents contains hyperlinks back to the SRR, and each
13 contains at least one hyperlink to the Privacy Policy.

14 31. Some of the Additional Documents also link to each other; for example, the
15 Payment Terms hyperlink to the Advertising Policy.


16 32. The SRR states that “[t]his Statement makes up the entire agreement between the
17 parties regarding Facebook[.]” *See, e.g.*, SSR dated April 22, 2010 at ¶ 18.1, Ex. A.
18 FB_MDL_00000014.

19 33. Facebook did not intend paragraph 18.1 to render all Additional Documents legal
20 nullities but rather to confirm that the SRR includes the hyperlinked Additional Documents—they
21 function as a single agreement.

22 **B. The Privacy Policy**

23 34. Historical versions of the Privacy Policy produced in discovery to date are provided
24 as Exhibits E through H to this complaint.

25 35. The Privacy Policy is incorporated by reference and hyperlink into the SRR.

26 36. Several terms in the Privacy Policy are defined with reference to the SRR, see e.g.,
27 Ex.  ¶ 4 (“Facebook Platform”), FB_MDL_00000008, and changes to the Privacy Policy can
28 only be made in accordance with the SRR. *See, e.g.*, Ex. G, ¶ 9, FB_MDL_00000036.

1 37. The Privacy Policy is an agreement. For example, in the September 7, 2011
2 version, under the “Change of Control” section, Facebook states, “If the ownership of our business
3 changes, we may transfer your information to the new owner so they can continue to operate the
4 service. ***But they will still have to honor the commitments we have made in this privacy policy.***”
5 Ex. H, Section VI (Change of Control) (emphasis added), FB_MDL_00000048.

6 38. Additionally, in earlier versions of the Privacy Policy, the terms were referred to as
7 “promises” rather than “commitments.” *See, e.g.*, Ex. G, ¶ 6, Transfer in Event of Sale or Change
8 of Control (“In such a case, your information would remain subject to the promises made in any
9 pre-existing Privacy Policy”), FB_MDL_00000035.

10 39. Likewise, in the December 22, 2010 version, Facebook states, “By using or
11 accessing Facebook, you agree to our privacy practices outlined here.” *See* Ex. G, ¶ 1 (Scope),
12 FB_MDL_00000032. This language is nearly identical to the binding language in the SRR. *See*
13 *also id.* ¶ 9 (“By using Facebook, you consent to having your personal data transferred to and
14 processed in the United States.”), FB_MDL_00000036.

15 **C. The Help Center**

16 40. Relevant portions of Facebook’s Help Center produced in discovery are attached to
17 this complaint as Exhibits I through S and MM through PP.

18 41. The Privacy Policy is long, dense, and complicated. A December 8, 2011 inquiry
19 from the United States House of Representatives noted that Facebook’s privacy policy was “longer
20 than that of all other social networks and exceed in length the United States Constitution We
21 are concerned . . . that long, complex privacy policy statements make it difficult for consumers to
22 understand how their information is being used.” *See* Ex. T., p. 8, FB_MDL_00000247.

23 42. In its January 6, 2012 response to the Congressional inquiry, Facebook agreed:

24 We also agree that long and complex privacy policies can make it difficult for
25 consumers to understand how their information is being used. . . . we use a layered
26 approach, summarizing our practices on the front page and then allowing people to
click through the Policy for more details.

27 *Id.* , FB_MDL_00000248.

1 43. The Privacy Policy repeatedly hyperlinked to Facebook’s Help Center (consisting
2 of a series of “frequently asked questions”) as a part of this “layered approach,” and the Help
3 Center is thus incorporated into the Privacy Policy by reference and hyperlink. It is impossible to
4 understand the Privacy Policy without the Help Center.

5 44. The Privacy Policy repeatedly directs subscribers, via reference and hyperlink, to
6 the Help Center for more information. The April 22, 2010 Privacy Policy, for example, linked to
7 the Help Center 18 times. *See generally* Ex. A.

8 45. Sometimes, Facebook would migrate language between the Help Center and the
9 body of the Privacy Policy, underscoring the unified nature of these pages.

10 46. For example, in its description of “cookies,” the Privacy Policy discloses that “we
11 use them to store your login ID . . . to make it easier for you to login whenever you come back to
12 Facebook. We also use them to confirm that you are logged into Facebook.” Ex. F, ¶ 2 (Cookie
13 Information), FB_MDL_00000028. Near exact language also appears in the Help Center page,
14 “How does Facebook use cookies?” *See* Ex. N, FB_MDL_00064915.

15 **D. How Facebook Tracks Internet Use Through the “Like” Button**

16 47. When signing up for a Facebook account, subscribers fill out an electronic form,
17 sending communications to Facebook which personally identifies them:



18

19 **Sign Up**
It's free and always will be.

20 First Name:

21 Last Name:

22 Your Email:

23 Re-enter Email:

24 New Password:

25 I am:

26 Birthday:

27 Why do I need to provide my birthday?

28

Cookie	Sample Value	Information Contained
c_user ³	50001111	User's Facebook ID
datr	tdnZTOt21HOTpRkRzs-6tjKP	Unique Browser ID
lu	ggIZehqTLbjoZ5Wgg	Encrypted ID of the last user
p	101045999	User's channel partition
presence	EM426705095EuserFA21B0911298286 A2EstateFDutF1426705095426Et2F	[REDACTED]
xs	2%3A99105e8977f92ec5869cf73dd4a32f7	Session number and other information
sct	1316000000	Insecure indicator
act	1311234574586%2F0	Timestamp and counter of user actions

54. The sample values above come from a report published by Nik Cubrilovic, an independent researcher in Australia, on September 25, 2011 ([REDACTED]).

- a. The *c_user* cookie (sometimes the *a_user* cookie), which is the user ID, identifies the subscriber because Facebook assigned that ID to the user upon creating an account.
- b. The *lu* ("last user") cookie contains the user ID (encrypted) of the last user to use that browser, which would precisely identify the current user if the computer is not a shared computer. *See, e.g., Ex. U, FB_MDL_00005503* ([REDACTED]).
- c. [REDACTED]. *See, e.g., Ex. V, p. 5, FB_MDL_00005420* ([REDACTED]).
- d. [REDACTED]. *See, e.g., Ex. U, FB_MDL_00005502* ([REDACTED]).

³ During 2010 and 2011, Facebook used several cookies to identify users, including the *a_user*, *c_user*, and *m_user* cookies.

1 e. Facebook also assigns each browser a unique identifier (the *datr* cookie)
2 which can and does identify actual current users when a computer is not a
3 shared computer. [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED] See Ex. U, FB_MDL_00005501.

7 f. Indeed, Facebook publicly confirmed in its response to Mr. Cubrilovic
8 (available on his blog): “We also maintain a cookie association between
9 accounts and browsers.”

10 g. Finally, [REDACTED]

11 [REDACTED]

12 55. When a logged-in subscriber visits a webpage with a Facebook Like button, a copy
13 of the referrer URL is acquired by Facebook along with the cookies noted above.

14 56. Facebook acquires an enormous amount of individualized data for each
15 communication. Facebook receives the full referral URL (including the exact subpage of the
16 precise items being purchased or viewed), and through the use of cookies, correlates that URL
17 with the user ID, time stamp, browser settings, and even the type of browser used. Facebook not
18 only acquires an exact copy of the user’s communication with, for example, Walmart, but can put
19 the communication in the precise context of the time of day and other user actions on the same
20 website. Facebook acquires all of this information before the communications between the user
21 and the third-part website is completed.

22 **E. Facebook Promised Not to Track Logged-Out Subscribers**

23 57. The very first section of the SRR governs privacy, stating:

24 Your privacy is very important to us. We designed our Privacy Policy to make
25 important disclosures about how you can use Facebook to share with others and
26 how we collect and can use your content and information. We encourage you to
read the Privacy Policy, and to use it to make informed decisions.



1 Ex. A. at ¶ 1, FB_MDL_00000012. The words “Privacy Policy” above were hyperlinked to the
2 Privacy Policy on the Facebook website, and starting September 7, 2011, linked to the Data Use
3 Policy.

4 58. The Privacy Policy is incorporated into and is a part of the Facebook – user contract.

5 59. Implicitly, Facebook agrees in its contract with users that it would respect user
6 privacy and not collect data in ways not agreed to in the Privacy Policy. It is therefore an implicit
7 term of the SRR that Facebook would not track users post-logout using user-identifying cookies.

8 60. The Data Use Policy dated Sept. 7, 2011 states:


9 We receive data whenever you visit a . . . site with a Facebook feature (such as a
10 social plugin). This may include the date and time you visit the site; the web
11 address, or URL, you’re on; technical information about the IP address, browser
12 and the operating system you use; and, if you are logged in to Facebook, your
13 User ID.

14 Ex. H, FB_MDL_00000043. This provision, explaining that Facebook will receive a user-
15 identifying cookie when “you are logged in to Facebook,” implicitly promises to the average user
16 that Facebook will not receive such a cookie when the user is not logged in.

17 61. The Help Center pages are incorporated by reference into the Privacy Policy and
18 are a part of the contract.

19 62. In the Help Center page, “Does Facebook use cookies if I don’t have an account or
20 have logged out of my account?” Facebook promised: “When you log out of Facebook, we remove
21 the cookies that identify your particular account[.]” Ex. I, FB_MDL_00064918.

22 63. In the Help Center page, “What information does Facebook receive about me when
23 I visit a website with a Facebook social plugin?” Facebook explained that it receives “technical
24 information” about IP addresses, browsers, and operating systems to help “optimize your
25 experience . . . or let[] us know that you are logged into Facebook.” Ex. J, FB_MDL_00064922.
26 Facebook implicitly promised in this section that it would not receive user-identifying information
27 if the user logged out of Facebook.

28 64. In a later version of the same Help Center page, Facebook explicitly added: “If you
are  logged into Facebook, we *also* see your user ID number and email address.” Ex. K,

1 FB_MDL_00064913 (emphasis added). Because Facebook limited this language to logged-in
2 users, Facebook promised that if the user were not logged in, Facebook would not “see your user
3 ID number and email address.”

4 65. In an even later version of the same Help Center page, Facebook made its promise
5 more explicit, adding:

6 If you’re logged out or don’t have a Facebook account and visit a website with the
7 Like button or another social plugin, your browser sends us a more limited set of
8 information. **For example, because you’re not logged in to Facebook, we don’t
receive your user ID.**

9 Ex. M, FB_MDL_00064920 (emphasis added). This exact language also appeared in a second
10 Help Center page. *See* Ex. L, FB_MDL_00064919.

11 66. In Help Center “Does Facebook have the ability to see what I’m doing on non-
12 Facebook sites?” Facebook reminded users that it would not be able to see what users do on other
13 websites unless the user logs in:

14 **Does Facebook have the ability to see what I’m doing on non-Facebook sites?**

15 Facebook cannot track your actions on external sites unless you decide to connect
16 your Facebook account to that site and/or explicitly decide to publish a story to your
17 Wall via the Like button. For example, if you are on Digg, and digg an article or
18 comment on an article, Facebook will only be notified of the actions for which Digg
wants to create a story. Facebook will have no access to other actions you have
taken or other information involving your Digg account.

19 To take advantage of the ability to generate stories from another site, you must
20 “connect” your Facebook account to that site, *or otherwise be logged into
Facebook while you interact with one of these sites.*

21 Ex. MM, FB_MDL_00064926 (emphasis added); *see also* Ex. NN, FB_MDL_00064927 (same);
22 Ex. OO, FB_MDL_00064928 (same); Ex. PP, FB_MDL_00064929 (same).

23 67. In the Help Center page, “How do social plugins work?”, Facebook promised:

24 ***You only see a personalized experience with your friends if you are logged into
25 your Facebook account.*** If you are not already logged in, you will be prompted to
26 log in to Facebook before you can use a plugin on another site.



27 At a technical level, social plugins work when external websites put an iframe from
28 Facebook.com on their sites, as if they were agreeing to give Facebook some real
estate on their websites. ***When you visit one of these sites, the Facebook iframe***

1 *can recognize if you are logged into Facebook. If you are logged in, it'll show*
2 *personalized content within the plugin as if you were on Facebook.com directly.*
3 Even though the iframe is not on Facebook, it is designed with all the privacy
4 protections as if it were.

5 Ex. R, FB_MDL_00064901 (emphasis added); *see also* Ex. S, FB_MDL_00064905 (same).
6 Implicit in this Help Center page is the promise that Facebook would remove any user-identifying
7 cookies from browsers of users who had logged out.

8 **F. Facebook Breached Its Promise Not To Track Logged-Out Subscribers**

9 **1. *Background***

10 68. As soon as the Like button was rolled out on April 22, 2010, Facebook found it had
11 a problem— [REDACTED].

12 If user identities were disaggregated from web history, the value of the Like button would diminish
13 substantially.

14 69. Facebook product manager Austin Haugen noted in an internal email, dated
15 October 28, 2010, [REDACTED]
16 [REDACTED]
17 [REDACTED] *See* Ex. W, p. 1,
18 FB_MDL_00007340.

19 70. A few months later, after reviewing detailed cookie data, Mr. Haugen determined
20 that only approximately [REDACTED] *See* Ex. X, p. 4, FB_MDL_00005394.

21 71. The genesis for these discussions was pressure coming directly from [REDACTED]
22 [REDACTED]. In an email dated September 21, 2010, Mr. Haugen wrote: [REDACTED]
23 [REDACTED] *See* Ex. Y, p. 2, FB_MDL_00002731.

24 72. As an alternative to convincing subscribers to stay logged in, Facebook came up
25 with an easy interim solution: break Facebook's promise and track users post-logout. This was
26 done by failing to delete cookies containing User IDs (such as *lu*), by continuing to use the *datr*
27 cookie and associating that cookie with User IDs, [REDACTED]
28 [REDACTED].



1 73. At the same time, three Facebook employees filed a patent application (later
2 assigned to Facebook), facilitating the *post-logout* tracking of Facebook users on other websites.


3 74. On February 8, 2011, Kent Matthew Schoen, Gregory Luc Dingle, and Timothy
4 Kendall (Facebook’s “Director of Monetization”) filed a patent application entitled
5 “Communicating Information in a Social Network System about Activities from Another
6 Domain.”⁴ As the first claim in the Patent Application explains, the applicants were seeking to
7 patent:

8 A method for tracking information about the activities of users of a social
9 networking system while on another domain, the method comprising: maintaining
10 a profile for each of one or more users of the social networking system . . . ; receiving
11 one or more communications from a third-party website having a different domain
12 than the social network system, each message communicating an action taken by a
13 user of the social networking system on the third-party website; logging the actions
14 taken on the third-party website in the social networking system . . . ; and correlating
15 the logged actions with one or more advertisements presented to one or more users.

13 Patent Application at 2.

14 75. The detailed description of this tracking method reveals that it enables Facebook to
15 capture and log actions taken by Facebook users on websites other than Facebook, *even when the*
16 *user is not logged in:*

17 [0054] As described above, in particular embodiments, the social network system
18 100 also logs actions that a user takes on a third party website 140. The social
19 network system 100 may learn of the user’s actions on the third party website via
20 any of a number of methods. In particular embodiment, in response to certain
21 actions such as, a user registering with a third-party website 140, purchasing a
22 product from a third-party website 140, downloading a service from a third-party
23 website 140, or otherwise making a conversion, the third-party website 140
24 transmits a conversion page, such as a confirmation or “thank you” page to the user
25 at the user’s client device. In particular embodiment, this page includes an
26 embedded call or code segment (e.g., JavaScript) in the HTML or other structured
27 document code (e.g., in an HREF (Hypertext REFerence) that, in particular
28 embodiments, generates a tracking pixel that, when executed by the client’s
browser or other rendering application, generates a tracking pixel or image tag that
is then transmitted to the social network system (*whether the user is logged into
the social network system or not*). The tracking pixel or image tag then
communicates various information to the social network system about the user’s
action on the third-party website. By way of example, the tracking pixel or call may
transmit parameters such as the user’s ID (user ID as registered with the social
network system), a product ID, information about the third-website, timestamp

4  U.S. Patent Application No. 20110231240, filed February 8, 2011 and published September
22, 2011 (the “Patent Application”) at 1.

1 information about the timing of the purchase or other action, etc. In one example,
2 if the third party website 140 is a commercial website on which users may purchase
3 items, the third party website 140 may inform the social network system 100 in this
4 manner when a user of the social network system 100 buys an item on the third
5 party website 140.


6 Patent Application at 5.

7 76. In certain circumstances, Facebook has to hack its way past data protection software
8 to do this: Facebook deposits a cookie that deliberately and without a user's consent bypasses
9 security settings on the user's browser for the purpose of gathering intelligence about what the
10 user does on the Internet in real time, such as what sites are visited, whether purchases are made,
11 or whether information is downloaded or a link forwarded to a friend. This information is instantly
12 relayed back to Facebook, substantially enhancing the value of Facebook's vast repository of
13 personal data. This is all done whether the Facebook user is logged onto Facebook *or logged off*.

14 77. Technically, this is how the Patent Application describes the bypass:

15 [0099] In one embodiment, the third party website 140 and/or the social network
16 system 100 determine whether the user is a user of the social network system 100.
17 For example, the third party website 140 may access a cookie on the user's
18 computer, where the cookie is associated with the social network system 100. Since
19 the social network system 100 and the third party website 140 are on different
20 domains, the user's browser program may include security features that normally
21 prevent a website from one domain from accessing content on other domains. To
22 avoid this, the third party website 140 may use nested iframes, where the third party
23 website 140 serves a web page that includes a nested iframe in the social network
24 website's domain, thereby allowing the nested iframe to access the user information
25 and send the information back to the third party website 140. Repeated nesting of
26 iframes further allows the social networking site 100 to communicate information
27 back to the third party website 140. By using this technique, the third party website
28 140 and the social network system 100 can communicate about the user without
sharing any of the user's personal information ***and without requiring the user to
log into the social network system 100.***

Patent Application 10-11 (emphasis added).

78. Although Facebook's name does not appear in the Patent Application, the Patent
Application is listed in the U.S. Patent & Trademark Office database as assigned to Facebook.
Tellingly, Mr. Kendall, Facebook's "Director of Monetization," is not an inventor nor a computer
scientist. According to his LinkedIn profile, Mr. Kendall's job description at Facebook is "Product
Strategy & Development for Facebook's revenue generating products." Essentially, Mr. Kendall
is ged with devising creative ways to sell user information to advertisers and third-party
websites.

2. *Facebook Failed to Expire User-Identifying Cookies Upon Logout*

1
2 79. To comply with its promise to remove user-identifying cookies upon logout,
3 Facebook reset the *c_user* cookie from the browser. This is the basic user ID cookie, but as noted
4 by Mr. Cubrilovic, it didn't actually clear until the session expired. Facebook only changed its
5 state from a persistent cookie to a session cookie—meaning it never actually was removed post-
6 logout unless and until the user actually closed and restarted the browser.

7 80. Far worse, Facebook knowingly kept two other user-identifying cookies in place
8 for the explicit purpose of tracking users post-logout, even after the expiration of the session.

9 [REDACTED] noted on February 7, 2011: [REDACTED]
10 [REDACTED]
11 [REDACTED] See Ex. V (emphasis added),
12 FB_MDL_00005416.

13 81. Two weeks later, on February 19, 2011, Facebook employee Douglas Purdy drafted a
14 table [REDACTED]
15 [REDACTED] which acknowledged that the [REDACTED] were still present for
16 logged out users. See Ex. U, FB_MDL_00005503-04. Facebook engineer Matt Jones made a
17 number of revisions and comments, and said [REDACTED]
18 [REDACTED] *Id.* at 2 (emphasis
19 added), FB_MDL_00005502.

20 82. Mr. Himel concluded by saying: [REDACTED]
21 [REDACTED]
22 [REDACTED] See Ex. U, p. 1, FB_MDL_00005501.

23 3. [REDACTED]
24 [REDACTED]

25 83. [REDACTED]
26 [REDACTED]
27 [REDACTED]

28 84. On June 5, 2010, an engineering task was created called [REDACTED]



1 [REDACTED] Facebook engineering director Alex Himel commented, [REDACTED]

2 [REDACTED]
3 [REDACTED] See Ex. Z, FB_MDL_00000734.

4 85. On June 7, 2010, Mr. Himel created a task with the tag [REDACTED] and assigned it to
5 engineer Chuck Rossi. The task noted:

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 See Ex. AA, FB_MDL_00005470 (underlining added).

12 86. The following month, July 2010, Mr. Himel [REDACTED]
13 [REDACTED] but noted later in an August 19, 2010 email that changes
14 still had not been made:

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 Ex. BB, FB_MDL_00002992.

20 87. Even after Mr. Himel's August 19 email above, [REDACTED]
21 [REDACTED]. For example, on January 28,
22 2011, Alex Himel noted that [REDACTED]

23 [REDACTED] See Ex. CC, FB_MDL_00000622. An unknown Facebook employee
24 responded, [REDACTED]

25 [REDACTED] *Id.*
26 (emphasis added).

27  88. [REDACTED]
28 [REDACTED]

1 For example, Facebook engineering director Alex Himel assigned [REDACTED]

2 [REDACTED] to engineer Adam Wolff on January 27, 2011:

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 See Ex. DD, FB_MDL_00005356.

7 **G. Facebook's Post-Logout Tracking Breached Expectations of Good Faith and**
8 **Fair Dealing**

9 89. The Facebook Privacy Policy, which includes the Help Center pages, is consistent
10 with all public representations made by Facebook. For example, on April 26, 2010, Facebook
11 explained how the social plug-ins affect Facebook users on its "Facebook Notes" blog. Facebook
12 was clear that "you only see a personalized experience with your friends if you are logged into
13 your Facebook account." This is identical language to the Help Center page shown in Exhibit R,
14 FB_MDL_00064901.

15 90. In 2010, when privacy rights and civil liberties organizations raised a number of
16 privacy concerns associated with social plug-ins and other changes to the Facebook Privacy Policy,
17 it was believed and understood that Facebook was only tracking logged in users via the Like
18 button. So, for example, the ACLU, Center for Democracy and Technology, Center for Digital
19 Democracy, Consumer Action, Consumer Watchdog, Electronic Privacy Information Center,
20 Electronic Frontier Foundation, and the Privacy Rights Clearinghouse jointly wrote to Facebook
21 CEO Mark Zuckerberg regarding a number of "outstanding privacy problems." See Open Letter
22 dated June 16, 2010, attached as Ex. EE. The authors objected that the Like buttons "provide
23 Facebook with information about every visit to the site *by anyone who is logged in to Facebook[.]*"
24 *Id.* at 2 (emphasis added). Not one of these well-respected and tech-savvy privacy groups
25 understood or believed that Facebook was also tracking logged out as well as logged in users,
26 which would have been a far more serious concern.

27 91. From the start of the rollout of the Like button and thereafter, Facebook consistently
28 tol[REDACTED] the public that it was not tracking users post-logout. In a series of interviews with USA Today

1 in mid-November, 2011, for example, Facebook said it did not log any personal information
2 associated with Internet surfing by logged out users—all logging would be done only by an
3 anonymous browser cookie. When asked if even the anonymous data could somehow be re-
4 associated with the browsing history, Facebook reiterated: “We’ve said that we don’t do it, *and*
5 *we couldn’t do it without some form of consent and disclosure.*”⁵

6 **H. Facebook’s Post-Logout Tracking Revealed**

7 92. In 2010, Australian researcher and blogger Nik Cubrilovic discovered that
8 Facebook cookies were tracking users’ Internet communications even after users had logged out
9 of Facebook.

10 93. Cubrilovic’s investigation revealed that several personally identifiable cookies
11 remained on users’ browsers post logout, and that some cookies (for example, the *lu* and *datr*
12 cookies) even remained after the browser was closed and restarted. Despite its representations to
13 the contrary, Facebook was in fact secretly tracking its users’ Internet communications after logout
14 via these cookies that Facebook had promised it had removed.

15 94. Mr. Cubrilovic contacted Facebook on November 14, 2010 to report his findings
16 and ask Facebook to fix the problem. He received no response. Again, on January 12, 2011, Mr.
17 Cubrilovic wrote to Facebook alerting it to his findings. Again, Facebook refused to respond. Mr.
18 Cubrilovic of course had no way of knowing that Facebook [REDACTED]

19 [REDACTED].
20 95. On September 25, 2011, Mr. Cubrilovic made his findings public. He wrote, “Even
21 if you are logged out, Facebook still knows and can track every page you visit.” He explained that
22 “[t]his is not what ‘logout’ is supposed to mean – Facebook is only altering the state of the cookies
23 instead of removing all of them when a user logs out.” Mr. Cubrilovic had revealed what [REDACTED]

24 [REDACTED]
25 [REDACTED]
26 _____
27 ⁵ See Acohido, Byron, *How Facebook Tracks you across the Web*, USA TODAY, Nov. 16, 2011.
28 <http://www.usatoday.com/tech/news/story/2011-11-15/facebook-privacy-tracking-data/51225112/1>.

1 [REDACTED] See Ex. V
2 (emphasis added), FB_MDL_00005416.

3 96. Mr. Cubrilovic’s blog post spread globally and was picked up the next day by the
4 *Wall Street Journal*, in addition to dozens of other news outlets.⁶ Journalist Erik Sherman, writing
5 for *CBS News*, for example, succinctly expressed Facebook users’ feelings:

6 Many who use Facebook who don’t like the idea of other sites reporting information
7 back have typically logged out of the system before going elsewhere. (I know I
8 have.) What Cubrilovic argues is that this does no good[.]⁷

9 97. Facebook told the *Wall Street Journal* that the user-identifying data was not
10 “logged” and the information is “quickly deleted” anyway.

11 98. These statements to the *Wall Street Journal* were incorrect [REDACTED]
12 [REDACTED] included
13 as Exhibit FF, FB_MDL_00053202, the story was corrected to remove Facebook’s assurances
14 regarding logging and deletion.

15 99. On the same day, Facebook engineer Gregg Stefancik contacted Mr. Cubrilovic and
16 admitted that Cubrilovic raised “important issues.” Mr. Stefancik, however, never disclosed that
17 [REDACTED]. Instead, he misleadingly told Mr.
18 Cubrilovic only that a “bug” caused a particular user-identifying cookie—the *a_user* cookie—not
19 to clear on logout, advising, “We will be fixing that today.”

20 100. Facebook further admitted that the Company had not “done as good a job as we
21 could have to explain our cookie practices. Your post presents a great opportunity for us to fix
22 that.”

23 101. Mr. Stefancik also told Mr. Cubrilovic that “if you log out, [the *lu*] cookie does not
24 contain your user ID” and is used to protect people using public computers. However, the *lu*

25 ⁶ See Jennifer Valentino-DeVries, “Facebook Defends Getting Data from Logged Out Users,”
26 *Wall Street Journal* (Sept. 26, 2011).

27 ⁷ See Erik Sherman, *Facebook’s New Policy Bust: Users Log In but They Can’t Log Out*, *CBS*
28 *News* (Sept. 26, 2011). <https://www.cbsnews.com/news/facebooks-new-privacy-bust-users-log-in-but-they-cant-log-out-update/>.

1 cookie actually did contain the encrypted user ID of the last user, so Mr. Stefancik's comment was
2 deeply misleading. Mr. Stefancik's comment would only be true if an intervening Facebook user
3 were to use the shared computer and then the original user returned without logging into Facebook.
4 For anyone else, the *lu* cookie continued to identify logged out users, and continued to do so for
5 some time thereafter.

6 102. Within hours of the publication of Mr. Cubrilovic's report, employees at Facebook
7 realized that the company had been violating promises made in the Privacy Policy. In an email,
8 [REDACTED]
9 [REDACTED]. See Ex. LL, p. 1,
10 FB_MDL_00017708. The referenced Help Center page is the same page included as Exhibit K to
11 this complaint.

12 103. Independently of [REDACTED], upon seeing
13 Mr. Cubrilovic's report, [REDACTED]
14 [REDACTED]
15 [REDACTED] Ex. GG, FB_MDL_00058738.

16 [REDACTED]
17 [REDACTED]
18 104. [REDACTED]
19 [REDACTED] (the Help Center page attached as Exhibit
20 K), [REDACTED] Ex. GG,
21 FB_MDL_00058739. This Help Center page [REDACTED]
22 [REDACTED] just several hours earlier, as noted above.

23 105. Also on the same day, September 25, 2011, [REDACTED]
24 [REDACTED]
25 [REDACTED]:

26 [REDACTED]
27 [REDACTED]
28 [REDACTED]



1 [REDACTED]
2 Ex. HH, FB_MDL_00043989 (underlining added).

3 106. Not everyone at Facebook was happy about the removing of the User ID from the
4 *lu* cookie upon logout. [REDACTED]

5 [REDACTED]
6 [REDACTED] Ex. II, FB_MDL_00043461. [REDACTED]


7 [REDACTED] *Id.* [REDACTED]

8 [REDACTED]
9 [REDACTED] *Id.*, FB_MDL_00043460. [REDACTED]
10 [REDACTED]

11 107. Three days after the Cubrilovic revelations, on September 28, 2011, U.S.
12 Representatives Edward Markey⁸ and Joe Barton, then Co-Chairmen of the Congressional Bi-
13 Partisan Privacy Caucus, submitted a joint letter to the Chairman of the Federal Trade Commission
14 urging the FTC to expand its investigation of Facebook. *See* Ex. JJ. The FTC had already
15 commenced an investigation related to the Like button rollout and changes to Facebook’s Privacy
16 Policy in 2010, prior to discovery of the secret and pervasive post-logout tracking.

17 108. The letter also expressed concern that Facebook told the *Wall Street Journal* on
18 September 26, 2011 that correcting the problem “will take a while.”

19 109. Congressmen Markey and Barton stated in a press release accompanying the FTC
20 letter, “[I]n this instance, Facebook has admitted to collecting information about its users even
21 *after its users had logged out of Facebook.*” They continued, “*We believe that tracking users*
22 *without their knowledge or consent raises serious privacy concerns.* When users log-out of
23 Facebook, they are under the impression that Facebook is no longer monitoring their activities.
24 We believe this impression should be the reality.”

25
26
27 
28 ⁸ Congressman Markey is now Senator Markey.

1 110. The FTC sued Facebook under Section 5 of the FTC Act for multiple counts of
2 misrepresenting its Privacy Policy, alleging that Facebook engaged in deceptive trade practices.
3 *In the Matter of Facebook Inc.*, FTC File No. 0923184.

4 111. On November 29, 2011, Facebook settled with the FTC, agreeing to an
5 unprecedented 20 years of independent privacy audits. No fine was levied because a civil fine is
6 not an available remedy absent a violation of a prior Commission order.

7 112. Marc Rotenberg, Executive Director of the Electronic Privacy Information Center,
8 wrote to the FTC submitting an official comment and asking for clarification of a number of points,
9 including whether the settlement covered Facebook’s post-logout tracking revealed two months
10 prior. In response, the FTC confirmed it did. The complaint “does allege that Facebook violated
11 Section 5 of the FTC Act by falsely representing to users the protections provided by their privacy
12 settings, [and] *by making other false promises regarding privacy[.]*” See Letter from FTC to
13 EPIC dated July 27, 2012 at p. 3, Ex. KK (emphasis added).

14 **V. PLAINTIFF-SPECIFIC FACTUAL ALLEGATIONS**


15 113. Plaintiff Davis is an adult domiciled in Illinois and has an active Facebook account
16 and has had an active account since before April 22, 2010.

17 114. She accessed the Internet and visited websites containing Facebook social plugins
18 from at least one computer that was not a shared computer.

19 115. On this same computer, Facebook installed user-identifying cookies while she was
20 logged into her Facebook account.

21 116. Facebook failed to expire the user-identifying cookies on these computers when
22 Mrs. Davis logged out of her Facebook account. Facebook was thus able to—and in fact did—
23 track her internet use when visiting Facebook-enabled websites.

24 117. Plaintiff Quinn is an adult domiciled in Hawaii and has an active Facebook account
25 and has had an active account since before April 22, 2010.

26 118. She accessed the Internet and visited websites with Facebook social plugins from
27 at  one computer that was not a shared computer.

28

1 119. On this same computer, Facebook installed user-identifying cookies while she was
2 logged into her Facebook account.

3 120. Facebook failed to expire the user-identifying cookies on these computers when
4 Prof. Quinn logged out of her Facebook account. Facebook was thus able to—and in fact did—
5 track her internet use when visiting Facebook-enabled websites.

6 121. Plaintiff Lentz is an adult domiciled in Virginia and has an active Facebook account
7 and has had an active account since before April 22, 2010.

8 122. He accessed the Internet and visited websites containing Facebook social plugins
9 from a computer he shared with his wife.

10 123. On this same computer, Facebook installed user-identifying cookies while Dr.
11 Lentz was logged into his Facebook account.

12 124. Facebook failed to expire the user-identifying cookies on these computers when Dr.
13 Lentz logged out of his Facebook account. Facebook was thus able to—and in fact did—track his
14 internet use when visiting Facebook-enabled websites.

15 125. Plaintiff Vickery is an adult domiciled in Washington State and has an active
16 Facebook account and has had an active account since before April 22, 2010.


17 126. He accessed the Internet and visited websites containing Facebook social plugins
18 from at least one computer that is not a shared computer.

19 127. On this same computer, Facebook installed user-identifying cookies while Mr.
20 Vickery was logged into his Facebook account.

21 128. Facebook failed to expire the user-identifying cookies on these computers when
22 Mr. Vickery logged out of his Facebook account. Facebook was thus able to—and in fact did—
23 track his internet use when visiting Facebook-enabled websites.

24 129. None of these four plaintiffs consented to the tracking and interception of their
25 logged-off communications.

26 **VI. STATUTE OF LIMITATIONS**

27  130. The following claims (since dismissed) were brought on a class basis within days
28 of the public reports of post-logout tracking, and the statutes of limitations are thus tolled:

1 (1) Violation of Federal Wiretap Act; (2) Violation of the Stored Communications Act;
2 (3) Violation of CIPA § 631; (4) Invasion of Privacy; (5) Intrusion Upon Seclusion; (6) Trespass
3 to Chattels; and (7) the California Computer Crime Law.

4 131. The two claims asserted in this Third Amended Complaint were first asserted on
5 November 30, 2015 in the Second Amended Complaint, but relate to the identical “conduct,
6 transaction or occurrence” set out in the First Amended Complaint and thus relate back to the date
7 of filing of the First Amended Complaint. All relevant statutes of limitations have therefore also
8 been tolled.


9 **VII. CLASS ACTION ALLEGATIONS**

10 132. This is a class action pursuant to Rules 23(a) and (b)(3) of the Federal Rules of
11 Civil Procedure on behalf of a Class of all persons who had active Facebook accounts and used
12 Facebook between April 22, 2010 and a later date to be determined upon the completion of
13 discovery, and whose personally identifiable Internet use was tracked at times when not logged
14 into their Facebook accounts.

15 133. Excluded from the Class are the Court, Facebook, and its officers, directors,
16 employees, affiliates, legal representatives, predecessors, successors and assigns, and any entity in
17 which any of them have a controlling interest.

18 134. The members of the Class are so numerous that joinder of all members is
19 impracticable.

20 135. Common questions of law and fact exist as to all members of the Class and
21 predominate over any questions affecting solely individual members of the Class. The questions
22 of law and fact common to the Class include:

- 23 a. whether the SRR is a legally binding contract;
- 24 b. whether the SRR incorporates by reference the Privacy Policy;
- 25 c. whether the Privacy Policy incorporates by reference the Help Center pages;
- 26 d. whether the claims in this action are governed by California law;
- 27  e. whether the *lu* cookie in fact included a User ID;
- 28 f. whether Facebook in fact failed to expire the *lu* cookie upon logout;

- 1 g. when Facebook in fact caused the User ID contained in the *lu* cookie to
- 2 collapse to a zero value upon logout;
- 3 h. the length of time Facebook continued to track logged-out subscribers even
- 4 after the *lu* cookie was fixed;
- 5 i. whether Facebook in fact wrote *presence* cookies to the browsers of logged-
- 6 out subscribers and whether the *presence* cookie included a User ID;
- 7 j. whether Facebook in fact failed to expire the *datr* cookie upon logout;
- 8 k. whether Facebook in fact could link *datr* cookies to User IDs;
- 9 l. whether Facebook's tracking of the Internet use of logged out subscribers
- 10 was done in bad faith; and
- 11 m. whether Facebook's tracking of the Internet use of logged out subscribers
- 12 was unfair dealing.

13 136. Plaintiffs' claims are typical of the claims of other Class members, as all members
14 of the Class were similarly affected by Facebook's wrongful conduct in violation of federal law as
15 complained of herein.

16 137. Plaintiffs will fairly and adequately protect the interests of the members of the Class
17 and have retained counsel that is competent and experienced in class action litigation. Plaintiffs
18 have no interest that is in conflict with, or otherwise antagonistic to, the interests of the other Class
19 or Subclass members.

20 138. A class action is superior to all other available methods for the fair and efficient
21 adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the
22 damages individual Class members have suffered may be relatively small, the expense and burden
23 of individual litigation make it impossible for members of the Class and Subclass to individually
24 redress the wrongs done to them. There will be no difficulty in management of this action as a
25 class action.



1 **VIII. COUNTS**

2 **COUNT I**

3 **BREACH OF CONTRACT**

4 139. Plaintiffs hereby incorporate all other paragraphs as if fully stated herein.

5 140. Facebook entered into a contract with each Plaintiff consisting of the SRR, Privacy
6 Policy, and relevant Help Center pages.

7 141. The contract contains enforceable promises that Facebook made to the Plaintiffs
8 and the Class.


9 142. Facebook promised that it would not track user's web browsing after log-out except
10 on an anonymous basis. If a subscriber were logged out and visited a website with Facebook
11 functionality, Facebook promised it would only receive technical information. Instead, Facebook
12 received personally-identifiable information which it directly integrated into Facebook's database
13 entries of the very User ID that Facebook promised only to track for logged-in users.

14 143. Under the contract, Plaintiffs and Class members transmitted personally
15 identifiable information to Facebook in exchange for use of Facebook and Facebook's promise
16 that it would not track users' communications or access their computing devices or web-browsers
17 while the users were logged-off of Facebook.

18 144. Plaintiffs did all, or substantially all, of the things that the contract required them
19 to do.

20 145. By reason of the conduct described herein, Facebook materially and uniformly
21 breached its contract with Plaintiffs and each of the Class members by tracking their personally
22 identifiable Internet communications while they were logged-off of Facebook.

23 146. Facebook collects revenues in large part because the personal information
24 submitted by its users and the tracking of their Internet communications across a wide variety of
25 websites increases the value of Facebook's advertising services. As a result of Facebook's breach
26 of the contract, it was unjustly enriched.

27  147. Facebook is liable for at least nominal damages as a result of the breach.

28

1 148. As a further result of Facebook’s breach, Plaintiffs and the class sustained non-
2 monetary privacy damages in an amount to be proven at trial.

3 **COUNT II**

4 **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

5 149. Plaintiffs hereby incorporate all other paragraphs as if fully stated herein.

6 150. In every contract or agreement there is an implied promise of good faith and fair
7 dealing under California law.

8 151. In dealings between Facebook and its users, Facebook has power affecting the
9 rights of its users.

10 152. Facebook entered into a contract with each Plaintiff consisting of the SRR, Privacy
11 Policy, and relevant Help Center pages.

12 153. Facebook promised to respect and protect its users’ privacy.


13 154. Facebook promised to abide by the terms of its Privacy Policy and the promises in
14 any relevant Help Center pages.

15 155. In assurances given outside of the contractual context—for example in the
16 Facebook Pages blog and in comments made the press—Facebook assured its customers that it
17 would not track the Internet use of users who were not logged into their Facebook accounts.

18 156. Plaintiffs did all, or substantially all, of the things that the contract required them
19 to do.

20 157. Despite its contractual privacy promises not to track users while they were logged-
21 off, Facebook took actions in breach of those contractual promises, tracking users while they were
22 logged-off thereby depriving Plaintiffs and the Class of the privacy benefits agreed to in their
23 contract with Facebook.

24 158. Facebook’s tracking of the Internet communications of logged-off users was
25 objectively unreasonable given Facebook’s privacy promises.

26 159. Facebook’s conduct in tracking the Internet communications of logged-off users
27 eva  the spirit of the bargain made between Facebook and the Plaintiffs.
28

1 160. Facebook’s conduct in this case abused its power to specify terms—in particular,
2 Facebook failed to accurately disclose its tracking of users while they were logged-off Facebook.

3 161. As a result of Facebook’s misconduct and breach of its duty of good faith and fair
4 dealing, Plaintiffs and the Class suffered damages. Plaintiffs and the Class members did not
5 receive the benefit of the bargain for which they contracted and for which they paid valuable
6 consideration in the form of their personal information and privacy, which, as alleged above, has
7 ascertainable value to be proven at trial.

8 **IX. PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiffs respectfully request that this Court:

10 A. Certify this action as a class action pursuant to Rule 23 of the Federal Rules of Civil
11 Procedure;

12 B. Award compensatory and nominal damages to Plaintiffs and the Class against
13 Defendant for all damages sustained as a result of Defendant’s wrongdoing, in an amount to be
14 proven at trial, including interest thereon;

15 C. Permanently restrain Defendant, and its officers, agents, servants, employees, and
16 attorneys, from installing cookies on its users’ computers that could track the users’ computer
17 usage after logging out of Facebook or otherwise breaching its contracts with subscribers;

18 D. Award Plaintiffs and the Class their reasonable costs and expenses incurred in this
19 action, including counsel fees and expert fees; and

20 E. Grant Plaintiffs such further relief as the Court deems appropriate.

21 **X. JURY TRIAL DEMAND**

22 The Plaintiffs demand a trial by jury of all issues so triable.

23 ///

24 ///

25 ///



28

1 Dated: August 25, 2017

Respectfully submitted,

2 **KAPLAN, FOX & KILSHEIMER LLP**

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19 **ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)**

20 I, David A. Straite, attest that concurrence in the filing of this document has been obtained
21 from the other signatory. I declare under penalty of perjury under the laws of the United States of
22 America that the foregoing is true and correct.

23 Executed this 25th day of August, 2017, at New York, New York.

24 /s/ David A. Straite
25 DAVID A. STRAITE

