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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ANTHONY DITIRRO, KATYA BRESLER, AND MICHELLE SHUMATE, individually and on behalf of others similarly situated,

Plaintiffs,

v.

FACEBOOK, INC., a Delaware corporation,

Defendant.

Case No. 5:14-cv-00132-PJH

DEFENDANT FACEBOOK, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 11, 2014
Time: 9:00 a.m.
Courtroom: 3
Judge: Hon. Phyllis J. Hamilton
Trial Date: None 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 June 11, 2014 at 9:00 a.m. or as soon thereafter as this motion may be heard in the above-entitled Court, located at 1301 Clay Street, Oakland, California, in Courtroom 3, Third Floor, Defendant Facebook, Inc. ("Facebook") will move to dismiss Plaintiffs' First Amended Complaint ("FAC"). Facebook's motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) and is based on this Notice of Motion and Motion to Dismiss, the Memorandum of Points and Authorities herein, the concurrently filed Declaration of Sandeep N. Solanki ("Solanki Decl.") and the exhibits thereto, the concurrently filed Request for Consideration of Documents Incorporated into the First Amended Complaint, all pleadings and papers on file, and on such other matters as may be properly before the Court.

STATEMENT OF RELIEF SOUGHT

Facebook respectfully seeks dismissal of Counts Three through Ten of the FAC, with prejudice, for failure to state a claim.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiffs' claim for false light invasion of privacy should be dismissed with prejudice because the allegedly false statements are not "highly offensive" to a reasonable person, and because Plaintiffs have failed to comply with California Civil Code section 45a.

2. Whether Plaintiffs' claim for violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq.*, should be dismissed with prejudice because Plaintiffs allege no loss of money or property, as required to confer standing, and allege no facts to support either the alleged misrepresentations by Facebook or their reliance thereon.

3. Whether Plaintiffs' claim for violation of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civil Code §§ 1750 *et seq.*, should be dismissed with prejudice because Plaintiffs are not "consumers" and Facebook does not offer a "good or service" within the meaning of the statute, because Plaintiffs have failed to allege a CLRA injury, and because Plaintiffs' fraud-based allegations are insufficiently pleaded.

4. Whether Plaintiffs' negligence claim should be dismissed with prejudice because Plaintiffs allege no cognizable duty of care, because the economic-loss doctrine bars their claim, and because they fail to allege appreciable damages.

5. Whether Plaintiffs' claim for breach of contract should be dismissed with prejudice because they fail to identify a provision of the contract that Facebook allegedly breached, allege no cognizable damages, allege no conduct supporting an implied contract, and allege an implied-contract claim wholly duplicative of their express-contract claim.

6. Whether Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing should be dismissed because Plaintiffs fail to identify the contract provisions allegedly frustrated by Facebook, allege no cognizable damages, and allege a claim that duplicates Plaintiffs' breach-of-contract claim.

7. Whether Plaintiffs' claim for unjust enrichment should be dismissed with prejudice because that cause of action does not exist under California law.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit against Facebook distills down to one essential claim—Plaintiffs deny that they clicked on a Facebook "Like" button associated with particular content, even though Facebook's objective, computerized records, including the information in Plaintiffs' own accounts, establish that Plaintiffs did click the Like button for that (and many other types of) content. Plaintiffs offer no basis whatsoever to rule out perfectly plausible and benign explanations for their claims, including that Plaintiffs clicked "Like" and forgot, or that they clicked inadvertently and did not realize it. Instead, Plaintiffs insist, with no evidence other than their own say-so, that Facebook intentionally planted a single fake Like in each of their accounts (among many other Likes that Plaintiffs *do not dispute*). Even though the popularity of Facebook is proof enough of the site's ability to accurately record and share the posts, content, and social actions of over one billion people, Plaintiffs maintain that these three disputed Likes cannot have arisen from their own actions. Plaintiffs' claims lack any plausible factual basis.

Plaintiffs seek redress for their purported "embarrassment, shock . . . anxiety, and dismay"

in learning that their friends may have seen that they liked, respectively, USA Today, Kohl's, and Duracell. While Plaintiffs "ha[ve] nothing negative to say about" these businesses (which Plaintiffs can also "Unlike" at any time), they nevertheless claim "irreparable harm" and "cruel and unjust hardship and humiliation." Plaintiffs seek money damages, *inter alia*, because they "did not receive the benefit of the bargain for which they contracted and . . . paid valuable consideration" when they joined Facebook's free service. They also seek punitive damages.

Plaintiffs' claims are baseless. All but two should be dismissed immediately, and the remainder will fail early in the litigation (and cannot support class-wide allegations, in any case). Plaintiffs' claim for false-light invasion of privacy (Count 3) is insupportable, because Plaintiffs did not and cannot allege that the disputed Likes are "highly offensive," and have not pleaded the statutorily required "special damages" required for such a claim. Plaintiffs' unfair-competition and false-advertising claims (Counts 4 and 5) fail because Plaintiffs allege no cognizable "loss of money or property" from their use of Facebook's free service, and because they fail to adequately allege the misrepresentations or the required reliance. Plaintiffs' claim under the Consumers Legal Remedies Act (Count 6) is, likewise, untenable both because Plaintiffs are not "consumers," and Facebook's free website is not a "good or service," under the CLRA.

Plaintiffs' inapt negligence and contract claims (Counts 7, 8, and 9) fare no better. As to negligence, Plaintiffs allege no viable source of a duty owed by Facebook, and bring claims that are barred by the economic-loss doctrine. Similarly, Plaintiffs' contract claim identifies no term that Facebook breached and fails to allege cognizable damages. Plaintiffs' claim under the implied covenant of good faith also fails because it specifies no term of the contract that was frustrated, alleges no cognizable damages, and impermissibly duplicates their breach-of-contract claim. Finally, Plaintiffs' unjust-enrichment claim (Count 10) cannot go forward because there is no such standalone claim.

For all these reasons, this case should never have been brought. The bulk of it should now be dismissed with prejudice, with the remainder to be disposed of after targeted, individualized discovery regarding Plaintiffs' Facebook accounts and activities.

II. STATEMENT OF FACTS

Facebook is the world's largest social networking service, with more than one billion users worldwide. (FAC ¶ 9.) It is, and always has been, free to use. To join Facebook, a person must register for the service (FAC ¶ 10), and agree to Facebook's terms of use (known as the "Statement of Rights and Responsibilities" or "SRR") (*see* FAC ¶¶ 18, 96, 98). Each person has a personal profile page (or "Timeline"), which he or she can populate with photographs, interests, and other information. (FAC ¶¶ 11, 16.) A person may also connect with others as "Friends" (FAC ¶ 10), and may elect to share certain content with them (*see* FAC ¶¶ 10, 11, 22).

A "very popular feature" on Facebook's website is the "Like Button," which "allow[s] users to express their appreciation of content such as other [users'] Facebook status, comments, and posted photos." (FAC ¶ 13.) People can also "Like" Facebook Pages, which are maintained by companies, charitable organizations, and others. (FAC ¶¶ 12, 14-15, Ex. C.) The Facebook Like button appears not only on Facebook, but "is embedded in over 7.5 million websites." (FAC ¶ 17.) Plaintiffs allege that "[a] single click on a like button by a particular Facebook user [may] advertise to . . . others that a particular user backs or likes a particular company's product or service." (FAC ¶ 15.)[1]

A statement that a person has "Liked" a Facebook Page (e.g., "Jane Smith Likes Barack Obama") may appear contextually in a number of places throughout the site, including on the person's Timeline, on the Facebook Page that the person Liked, and on the home page (or News Feed)[2] of the person's Friends. (FAC ¶¶ 12-16, Exs. A-C.) For example, if Jane Smith Liked the Oakland A's on Facebook, and the Oakland A's posted a photo from a recent victory or displayed an advertisement for an upcoming game, Facebook may display, as context, the statement "Jane Smith Likes the Oakland A's" next to the photo or ad. (*See id.*) People always maintain control over who can see their Likes (whether next to ads or otherwise)—e.g., no one, Friends, a custom

[1] Plaintiffs claim that a "single click on a like button . . . will advertise to thousands of others" that the user Likes content on Facebook. (FAC ¶ 15.) But a person's Likes are shared only with the audience he or she chooses via his or her privacy settings.

[2] The News Feed is a running list of updates from and about a user's Friends. (FAC, Exs. A-B.)

group of Friends, or the public—and they can Unlike Pages at any time. (*Id.* ¶¶ 13-22.)

Plaintiffs are three longtime Facebook users who have Liked a variety of content on Facebook but take issue with a single Like in each of their accounts that was allegedly republished next to an advertisement.[3] Plaintiff DiTirro, who has used Facebook since 2009, alleges that, in approximately "November of 2013, [he] received notification from one of his Facebook friends that [he] was featured on Facebook, 'Liking' USA TODAY newspaper in a Facebook sponsored advertisement." (FAC ¶¶ 18, 24.) DiTirro claims that "he is not an avid reader of USA TODAY," does not "endorse the newspaper," and has "never clicked his 'Like Button' on USA TODAY's website, USA TODAY's Facebook page, nor any Facebook content or advertisement featuring USA TODAY." (FAC ¶¶ 25-27.) Plaintiff Bresler, who has used Facebook since 2008, makes the same claims regarding ads for Duracell in which she allegedly appeared. (FAC ¶¶ 19, 32-34.) Plaintiff Shumate, who has also used Facebook since 2008, makes the same claims with respect to ads for Kohl's. (FAC ¶¶ 20, 39-41.)[4] Plaintiffs bring ten claims on behalf of a putative nationwide class, including false-light invasion of privacy, violations of the UCL, FAL, and CLRA, negligence, breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. (FAC ¶¶ 57-111.)

Plaintiffs claim that Facebook "knowingly," "willfully," "intentionally," and "maliciously" made allegedly false statements about them. (*See, e.g.*, FAC ¶¶ 28, 31, 91.) Although Plaintiffs have used Facebook for the past *five to six years*, the FAC does nothing to undermine the more plausible explanation that Plaintiffs "Liked" the content at issue and simply *forgot* that they did. Plaintiffs' FAC also fails to acknowledge that they may have *inadvertently* Liked the content at issue by misclicking on the Facebook website (or elsewhere) or by mistapping on their mobile phones. In fact, nowhere in the FAC do Plaintiffs dispute that the

[3] Plaintiffs' claims do not arise from their appearance in ads generally, and they do not challenge Facebook's practice of selling ads displaying statements that Users "Like" particular things on Facebook. Indeed, Plaintiffs concede, as they must, that all Users consent to Facebook's commercial use of their name, photos, and other content by agreeing to the SRR. (*See* FAC ¶ 98.)

[4] The attached screenshot for Shumate (FAC, Ex. C) is not actually an ad, but a page displaying her Likes in her personal profile. Of the twelve-plus pages displayed, Shumate apparently claims to not recall liking only the Kohl's Facebook Page.

Likes in question appear on their own "Activity Log," which is a personal record of all of one's activity on Facebook. Nor do Plaintiffs offer any explanation as to why Facebook would falsely attribute these Likes to them, among the many other Likes that Plaintiffs do not challenge.

Plaintiffs also do not claim that the *content* that appeared next to their Like statements was offensive. To the contrary, each Plaintiff "has nothing negative to say" about the companies in whose ads he or she allegedly appeared. (FAC ¶¶ 25, 33, 40.) Parroting various elements of their chosen causes of action, however, Plaintiffs allege—incongruously—that the allegedly false Likes caused them "cruel and unjust hardship and humiliation" (FAC ¶ 61), "impairment of their reputation" (FAC ¶ 63; *see also id.* ¶ 73), and a loss of money or property, "including but not limited to . . . misappropriation of their likenesses (which has monetary value), the lessened value of DEFENDANT'S service to them, and the diminishment in value of their personal information" (FAC ¶ 93). Plaintiffs plead no facts in support of these allegations, as discussed below.

III. LEGAL STANDARD

Rule 12(b)(6) requires dismissal when a plaintiff fails to present a cognizable legal theory or to allege sufficient facts supporting a legal theory upon which relief may be granted. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Although "all material allegations . . . are accepted as true," *id.*, "labels and conclusions, and a formulaic recitation of the elements [cannot defeat dismissal]," and "courts are not bound to accept as true a legal conclusion couched as a factual allegation," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation omitted).

Once a court sets aside conclusory assertions, it considers the *well-pleaded* factual allegations to assess whether the plaintiff has pleaded sufficient facts to state a facially plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "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." *Id.* at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

IV. ARGUMENT

A. Plaintiffs fail to state a claim for false-light invasion of privacy (Claim Three).

Plaintiffs allege that Facebook portrayed them in a false light by displaying statements that they "Liked" content on Facebook (USA Today, Duracell, and Kohl's) when they had not clicked a Like button for that content. (FAC ¶¶ 77-86.) To state a claim for false-light invasion of privacy, a plaintiff must plead (1) a public disclosure, (2) that places plaintiff in a false light, (3) that would be highly offensive to a reasonable person. *See Fellows v. Nat'l Enquirer, Inc.*, 42 Cal. 3d 234, 238 (1986); *Brahmana v. Lembo*, No. C-09-00106 RMW, 2010 U.S. Dist. LEXIS 24784, at *10-11 (N.D. Cal. Mar. 17, 2010). Plaintiffs' false-light claim fails because, among other things, they fail to allege (and cannot allege) that the alleged false light would be "highly offensive" to a reasonable person and because they fail to comply (and cannot comply) with California Civil Code section 45a.

1. The alleged false light is not "highly offensive" to a reasonable person.

"[T]o be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person." *Fellows*, 42 Cal. 3d at 238-39; *see also Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 694-95 (9th Cir. 1998). "The plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy." Restatement 2d of Torts, § 652E, cmt. c; *see also Brahmana*, 2010 U.S. Dist. LEXIS 24784, at *10-11 ("To avoid a conflict with First Amendment rights, courts have narrowly construed the 'highly offensive' standard." (citation omitted)).

The alleged false statements here ("Tony DiTirro Likes USA Today," "Kat Bresler Likes Duracell," and "Michelle Shumate Likes Kohl's") do not meet this standard. Plaintiffs themselves acknowledge that they have "nothing negative to say" about the companies that they are alleged to have Liked (FAC ¶¶ 25, 33, 40)—a candid admission belying any claim that Plaintiffs were offended by the alleged statements. Nor can Plaintiffs claim that a reasonable person would take offense to mere affiliation with well-known American companies, or that such

affiliation would expose them to "hatred, contempt, ridicule, or obloquy," *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623, 636 (2001).[5] The alleged statements here are, instead, of the type that has been repeatedly deemed too trivial to support a false-light claim. *See, e.g.*, *Newcombe*, 157 F.3d at 694-95 (no false-light claim where magazine ad "made it appear that [plaintiff] endorses alcohol"); *Silva v. Hearst Corp.*, No. CV 97-4142 DDP, 1997 U.S. Dist. LEXIS 22653, at *7-8 (C.D. Cal. Aug. 21, 1997) ("it is not highly offensive to state that a person has benefactors"); *Hunley v. Orbital Scis. Corp.*, No. CV-05-1879-PHX-DGC, 2007 U.S. Dist. LEXIS 24101, at *7 (D. Ariz. Mar. 27, 2007) (listing plaintiff as attendee of seminar on professionalism "cannot fairly be characterized as highly offensive to a reasonable person").[6]

Unable to meet their pleading burden, Plaintiffs attempt a sleight-of-hand, alleging that "[t]he *publicity* created by DEFENDANT was offensive and objectionable to PLAINTIFFS and Class members, and to a reasonable person of ordinary sensibilities." (FAC ¶ 82 (emphasis added).) But this is not enough. Unwanted publicity is an independent element of the tort, *see Pacini v. Wells Fargo Bank, N.A.*, No. 12-04605 RS, 2012 U.S. Dist. LEXIS 183151, at *11 (N.D. Cal. Dec. 26, 2012), and cannot be used to meet the "highly offensive" standard. False light simply is not actionable unless the allegedly false statement, itself, is "highly offensive to a reasonable person." *Fellows*, 42 Cal. 3d at 238-39; *Silva*, 1997 U.S. Dist. LEXIS 22653, at *6 ("[T]he *statements* complained of must be highly offensive to a reasonable person." (citation omitted; emphasis added)); Judicial Council of Cal. Civ. Jury Instructions ("CACI") No. 1802. Because Plaintiffs have not alleged (and cannot allege) that the claimed false statements would be highly offensive to a reasonable person, and because they allege no facts to support such a claim, their false-light claim must fail.

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[5] Indeed, more than 1.8 million people on Facebook Like USA Today; another 6 million people Like Duracell; and nearly 11 million people Like Kohl's. *See* https://www.facebook.com/usatoday; https://www.facebook.com/duracell; https://www.facebook.com/kohls.

[6] These allegations fall far short of the false light statements that have been held to satisfy the highly offensive standard. *See, e.g.*, *M.G.*, 89 Cal. App. 4th at 636 (suggestion that individual had been molested supports false-light claim); *Tollefson v. Price*, 430 P.2d 990, 991-92 (Ore. 1967) (statement that plaintiff does not pay his debts is highly objectionable); *Dean v. Guard Pub. Co.*, 744 P.2d 1296, 1298-99 (Ore. App. 1987) (portrayal of individual as an alcoholic in need of inpatient aversion treatment supports false-light claim).

2. Plaintiffs fail to comply with Civil Code section 45a.

Plaintiffs' false-light claim should also be dismissed for the independent reason that it fails to comply with Civil Code section 45a, which provides: "Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." In *Fellows v. National Enquirer*, the California Supreme Court made this provision applicable to false-light claims, reasoning that "[s]ince virtually every published defamation would support an action for false light invasion of privacy, exempting such actions from the requirement of proving special damages would render the statute a nullity." 42 Cal. 3d at 251.[7] Thus, under section 45a, a false-light claim is actionable only if (1) the alleged false statement is defamatory on its face, or (2) plaintiff "plead[s] and pro[ves] special damages." *Id.*; *see also Newcombe*, 157 F.3d at 694-95.

Plaintiffs' claims do not satisfy either prong of section 45a. First, the alleged false statements (e.g., "Tony DiTirro Likes USA Today") are not defamatory on their face.[8] A defamatory statement is one that "exposes a[] person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Cal. Civ. Code § 45 (defining libel); *id.* § 44 (libel is a form of defamation). To be defamatory on its face, however, the statement must be "defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact . . . ." Cal. Civ. Code § 45a; *see also Newcombe*, 157 F.3d at 694-95. The statements here (e.g., "Tony DiTirro Likes USA Today") are not defamatory and could not be, absent facts outside the alleged ads themselves (no such facts are pleaded). *See Newcombe*, 157 F.3d at 694-95 ("The only way an average person viewing the advertisement [suggesting that the plaintiff was endorsing alcohol] might think that it was defamatory was if the person [knew plaintiff was] . . . a recovering

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[7] *See also Selleck v. Globe Int'l, Inc.*, 166 Cal. App. 3d 1123, 1133-34 (1985) ("An action for invasion of privacy by placing the plaintiff in a false light in the public eye is in substance equivalent to a libel claim. A plaintiff alleging false light, therefore, must satisfy the requirement[s] [for a defamation claim]."); *accord Kapellas v. Kofman*, 1 Cal. 3d 20, 35 (1969).

[8] "[W]hether a publication is libelous on its face is [a question] of law, and must be measured by 'the effect the publication would have on the mind of the average reader.'" *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1010 (9th Cir. 2001) (quoting *Newcombe*, 157 F.3d at 695).

alcoholic; this is a textbook example of 'explanatory matter.'"); *Downing*, 265 F.3d at 1010 (absent extrinsic evidence, "an average person viewing the Quarterly would [not] think it defamatory if Appellants' picture was included in a section [containing] . . . nude models"). The alleged false statements plainly cannot satisfy this prong.

In addition, Plaintiffs cannot, and do not, plead special damages. In the context of a false-light claim, special damages are "all damages which plaintiff alleges and proves that he has suffered in respect to his ***property, business, trade, profession or occupation***, including such amounts of money as the plaintiff alleges and proves he has expended as a result[.]" Cal. Civ. Code § 48a(4)(b) (emphasis added). And "[t]he facts, . . . amount, . . . and the means of occasioning" such damages must be pleaded "with particularity." *Shook v. Pearson*, 99 Cal. App. 2d 348, 352 (1950); Fed. R. Civ. P. 9(g) ("If an item of special damage is claimed, it must be specifically stated.").[9] Plaintiffs cannot meet this standard because they are contractually barred from pursuing special damages against Facebook. (*See* Solanki Decl., Ex. A, SRR § 16.3 ("[Facebook] WILL NOT BE LIABLE TO YOU FOR ANY LOST PROFITS OR OTHER CONSEQUENTIAL, SPECIAL, INDIRECT, OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS STATEMENT OR FACEBOOK[.]").) This provision forecloses Plaintiffs from claiming special damages as a matter of law.[10] *See, e.g.*, *Datalex (Ireland) Ltd. v. PSA, Inc.*, No. CV 01-06482 DDP (VBKx), 2003 U.S. Dist. LEXIS 27563, at *5, *13 (C.D. Cal. Jan. 30, 2003) (in software licensing agreement, barring consequential damages based on clause disclaiming "LIABILITY FOR ANY ACTUAL, CONSEQUENTIAL, INCIDENTAL, PUNITIVE, SPECIAL OR INDIRECT DAMAGES, COSTS OR EXPENSES"). Nor have Plaintiffs even tried to claim special damages. Indeed, Plaintiffs' requested relief on

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[9] While the requirement that plaintiff plead special damages arises from state law, the requirement that special damages be specifically pleaded stems from Federal Rule of Civil Procedure 9(g). *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 12 F. Supp. 2d 1035, 1047 (C.D. Cal. 1998).

[10] Identical or substantially identical provisions were in place when each of the named Plaintiffs signed up for Facebook. (*See* Solanki Decl., Ex. B ("Limitation on Liability"); *id.*, Ex. C ("Limitation on Liability"); *id.*, Ex. D, § 14.3.) Section 16.3 forecloses special and consequential damages with respect to Plaintiffs' other claims, as well, and limits the total recovery available to Plaintiffs. (*See* Solanki Decl., Ex. A § 16.3.)

this claim is limited to "general damages in an amount according to proof." (FAC ¶ 84.)[11]

Plaintiffs' allegations are, in any event, too conclusory to satisfy Plaintiffs' burden of pleading special damages with particularity. *See* Fed. R. Civ. P. 9(g). For example, as to Plaintiffs' claim that Facebook "decreased [the] value of their personal information," Plaintiffs provide no supporting facts at all; they do not explain, for example, the circumstances of the alleged diminution, how much was supposedly lost, how they found out, or that they have been unable to monetize their personal information as a result. In the absence of these critical particulars, Plaintiffs cannot pursue special damages.[12]

B. Plaintiffs fail to state claims under the UCL and FAL (Claims Four and Five).

Plaintiffs' claims under the UCL and FAL fail because Plaintiffs have alleged no loss of money or property, depriving them of standing to pursue their claims, and allege no specific facts to support either the alleged misrepresentations by Facebook or their reliance thereon.

1. Plaintiffs lack standing under the UCL and FAL.

To bring a claim under the UCL or FAL, Plaintiffs must demonstrate that they "lost

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[11] Plaintiffs' cursory allegations elsewhere in the FAC also do not plead special damages. To the extent Plaintiffs claim reputational harm, embarrassment, mental anguish, humiliation, and hurt feelings (*see, e.g.*, FAC ¶¶ 61, 73), they allege items only of general, not specific, damages. *See* Cal. Civ. Code § 48a(4)(a) ("'[G]eneral damages' are damages for loss of reputation, shame, mortification and hurt feelings[.]"). Plaintiffs also claim to have suffered "decreased value of their personal information, the lessened value to them of DEFENDANT'S Facebook service, loss of time in correcting DEFENDANT'S false representations and/or communicating with Friends to correct these false representations, loss of reputation, misappropriation of their likenesses (which have monetary value)[.]" (FAC ¶ 113; *accord* FAC ¶ 100.) But these alleged harms do not relate to Plaintiffs' "property, business, trade, profession or occupation[.]" Cal. Civ. Code § 48a(4)(b); *cf. Newcombe*, 157 F.3d at 694-95 ("medications . . . , gasoline for travel . . . , telephone calls, purchase of the subject magazine, [and] photocopy of the ad," did not constitute special damages in false light action).

[12] *See, e.g., Core-Vent Corp. v. Nobel Indus. Swed. A.B.*, No. 97-552494, 1998 U.S. App. LEXIS 22175, at *20 n.6 (9th Cir. Sept. 9, 1998) (alleged injury to business, without "identify[ing] any particular purchaser who refrained from buying [product]," was insufficiently particular); *Code Rebel, LLC v. Aqua Connect, Inc.*, CV 13-4539 RSWL (MANx), 2013 U.S. Dist. LEXIS 137937, at *12-13 (C.D. Cal. Sept. 24, 2013) ("bare allegation that [plaintiff] has or will sustain damages in excess of $100,000.00," without facts about business's value, lacked particularity); *KEMA, Inc. v. Koperwhats*, No. C 09-1587 MMC, 2010 U.S. Dist. LEXIS 90803, at *22-24 (N.D. Cal. Sept. 1, 2010) (Rule 9(g) not satisfied where FAC failed to identify "'particular purchasers' who will not deal with plaintiffs, or the 'transactions of which [plaintiffs] claim[] to have been deprived,' but, rather, contains only a conclusory allegation that . . . plaintiffs 'have suffered damages in the form of. . . lost revenue and damage to their business position and reputation'" (citation omitted)).

money or property" as a result of Facebook's alleged actions. *See* Cal. Bus. & Prof. Code § 17204 (UCL); Cal. Bus. & Prof. Code § 17535 (FAL); *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 325 (2011). Plaintiffs have failed to adequately allege a loss of either.

First, Plaintiffs have not alleged (and cannot allege) that they paid money to Facebook, which has always been free to users. Plaintiffs allude to lost "money" three times (FAC ¶¶ 93, 100, 106), but allege no factual detail as to the amount or circumstances of the alleged loss. Thus, the FAC does not plead a cognizable loss of money. *See Twombly*, 550 U.S. at 555 ("labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," and "courts are not bound to accept as true a legal conclusion couched as a factual allegation").

Similarly, Plaintiffs have failed to allege a loss of property. Plaintiffs cursorily allege that they lost "money or property, including but not limited to loss to their reputations, the misappropriation of their likenesses (which has monetary value), the lessened value of DEFENDANT'S service to them, and the diminishment in value of their personal information." (FAC ¶ 93.) Of these alleged losses, the only "property" even arguably at issue is Plaintiffs' personal information.[13] However, it is well established that "personal information does not constitute property for purposes of a UCL claim." *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 714 (N.D. Cal. 2011) (dismissing UCL claim with prejudice); *see Thompson v. Home Depot, Inc.*, No. 07-cv-1058 lEG, 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18, 2007) ("personal information" is not property under the UCL); *In re Google Inc. Street View Elec. Commc'ns Litig.*, 794 F. Supp. 2d 1067, 1086 (N.D. Cal. 2011) (lost personal data is not "lost property for purposes of determining Proposition 64 standing"); *see also In re Google Inc. Cookie Placement Consumer Privacy Litig.*, --- F. Supp. 2d ----, No. 12-2358-SLR, 2013 WL 5582866, at *10 (D.

[13] Plaintiffs' allegations of reputational injury, emotional injury, and the "the lessened value to them of DEFENDANT'S Facebook service" do not establish a loss of property under the UCL or FAL. *See Kwikset*, 51 Cal. 4th at 325 (plaintiff must suffer economic injury to have standing under UCL); *see also, e.g., In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 966 (S.D. Cal. 2012) (loss of free third-party services is not a loss of money or property under UCL and FAL); *Robinson v. HSBC Bank USA*, 732 F. Supp. 2d 976, 988 (N.D. Cal. 2010) (reputational injury, based on ridicule resulting from display of advertisements next to pictures of plaintiff's property, not a loss of money or property under UCL).

Del. Oct. 9, 2013); *Low v. LinkedIn Corp.*, No. 11-cv-01468-LHK, 2011 WL 5509848, at *5-6 (N.D. Cal. Nov. 11, 2011); *Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 994 (2011).

Plaintiffs' allegations are also inadequate because Plaintiffs allege no specifics about the losses they allegedly sustained. Indeed, Plaintiffs fail to allege *a single fact* suggesting that their names and likenesses have value (to Plaintiffs, Facebook, or otherwise), that Plaintiffs have attempted to monetize them, or that the value of that information has been diminished. Plaintiffs also do not allege how Facebook's *free* service, which they continue to utilize, has been lessened in value to them. Plaintiffs also do not plausibly allege reputational harm; indeed, as previously discussed, they each concede that they have "nothing negative to say" about the companies in whose ads they appeared. (FAC ¶¶ 25, 33, 40.)

2. Plaintiffs fail to allege particular misrepresentations and reliance.

Plaintiffs' claims under the UCL and FAL are premised on the allegation that Facebook misrepresented that "[Plaintiffs] would own and control their personal information" and that Facebook "would not disseminate false, incorrect or untruthful information, and specifically would not falsely attribute sponsorship, endorsement, preference or approval in the form of 'Likes' to them when they had not in fact 'Liked' a product, service or company." (FAC ¶¶ 21, 23.) Plaintiffs further allege that they were "fraudulently induced to register with Facebook . . . based on their understanding that DEFENDANT would not fabricate false information about them and broadcast it to their Friends and others." (FAC ¶ 89; *see also id.* ¶ 96.)

Because these claims are based on alleged misrepresentations, Plaintiffs must allege that they relied upon the misrepresentations when joining and using Facebook. *Kwikset Corp.*, 51 Cal. 4th at 326 (for UCL claims based on misrepresentations, plaintiffs must prove reliance); *In re Tobacco II*, 46 Cal. 4th 298, 326 (2009) ("Reliance is proved by showing that the defendant's misrepresentation or nondisclosure was an immediate cause of the . . . injury-producing conduct." (internal quotations and citation omitted)). Additionally, because UCL and FAL claims based on misrepresentation "sound in fraud," all elements must meet the particularity requirement of Federal Rule of Civil Procedure 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-05 (9th Cir. 2003); *Kearns v. Ford Motor Co.*, 567 F. 3d 1120, 1125 (9th Cir. 2009). Under Rule

9(b), Plaintiffs must "allege that [they] [were] exposed to a *particular* representation that is claimed to be deceptive," as well as "the 'specifics' of [their] reliance upon such misrepresentations." *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 924 (N.D. Cal. 2012) (emphasis added). In other words, Plaintiffs must plead the "who, what, when, where, and how" of the misconduct charged. *Vess*, 317 F.3d at 1106.

Plaintiffs fall far short of their pleading burden. Indeed, Plaintiffs have not alleged that they were exposed to, or relied on, *any* particular statement by Facebook. Rather, they refer generically to "statements, including but not limited to [Facebook's] terms of use" (FAC ¶ 96), "false and misleading representations and omissions" (FAC ¶ 99), "Facebook's terms and conditions and other information provided by DEFENDANT" (FAC ¶¶ 18-20), Facebook's "expressed purpose" (FAC ¶ 22), and its "mission and policies" (FAC ¶ 23). Without identifying specific misrepresentations by Facebook, Plaintiffs cannot plead reliance. *See Kwikset*, 51 Cal. 4th at 326-27; *Donohue*, 871 F. Supp. 2d at 924 (plaintiffs must allege "particular [mis]representation" and "specifics" of reliance). Additionally, Plaintiffs' cursory recitation fails even to approach the required level of specificity under Rule 9(b). *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2003) (affirming dismissal of fraud-based claim where complaint "contain[ed] not a word of the . . . specific [alleged misrepresentation]" and plaintiff "did not attach the [alleged misrepresentations] to her complaint or to any other filing"); *Baltazar v. Apple, Inc.*, CV 10-3231-JF, 2011 U.S. Dist. LEXIS 13187, at *9-10 (N.D. Cal. Feb. 10, 2011) (dismissing UCL claim because plaintiffs did not allege "content of the alleged misrepresentations . . . in [defendant's] commercials and [ads]").

C. Plaintiffs fail to state a claim under the CLRA (Claim Six).

Plaintiffs' CLRA claims fail because (1) Plaintiffs are not "consumers" within the meaning of the statute, (2) Facebook does not offer "goods or services" within the meaning of the statute, (3) Plaintiffs have failed to allege a CLRA injury, and (4) Plaintiffs' fraud-based allegations are pleaded with insufficient specificity.

An action under the CLRA may be brought only by a "consumer," defined as an individual who purchases or leases any goods or services for personal, family, or household

purposes. *See In re Facebook Privacy Litig.*, 791 F. Supp. 2d at 717 (citing *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005)). Because Facebook is free, Plaintiffs have not purchased or leased anything from Facebook. Moreover, although Plaintiffs allege that they "provide[d] personal information, and post[ed] content" on Facebook (*see, e.g.*, FAC ¶ 99), courts have repeatedly held that an exchange of personal information for software or services is beyond the scope of the CLRA. *See, e.g., In re Facebook Privacy Litig.*, 791 F. Supp. 2d at 717 (dismissing CLRA claim against Facebook with prejudice, reasoning that "a 'consumer' is [one] who purchases or leases any goods or services for personal, family or household purposes. . . . Plaintiffs' contention that their personal information constitutes a form of 'payment' to [Facebook] is unsupported by law"); *In re Google Inc. Cookie Placement*, 2013 WL 5582866, at *11 (dismissing CLRA claim, reasoning that "Plaintiffs did not pay for the advertisements and the contention that their personal information constitutes a form of 'payment' to Google 'is unsupported by law"); *Yunker v. Pandora Media, Inc.*, No. 11-3113 JSW, 2013 WL 1282980, at *12 (N.D. Cal. Mar. 26, 2013) (dismissing CLRA claim in part because plaintiff alleged "he purchased the defendant's services with his PII" and not with money).

Plaintiffs' CLRA claim also fails because Facebook's software-based website is neither a "good" nor a "service" within the meaning of the CLRA. *See, e.g., Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2010 WL 3910169, at *14 (N.D. Cal. Oct. 5, 2010) (software is not a good or service under the CLRA); *Yunker*, 2013 WL 1282980 at *13 (mobile application is not the type of tangible chattel that the CLRA defines as a good); *In re Google Inc. Cookie Placement*, 2013 WL 5582866, at *10 (website browser is not a service under the CLRA); *In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2011 WL 4403963, at *10 (N.D. Cal. Sept. 20, 2011) (software is neither a good nor service under the CLRA). Thus, claims arising from the use of a free website, like Facebook, are not actionable under the CLRA.

Plaintiffs also allege no economic injury from their use of Facebook, as discussed *supra* Section IV.A.2, B.1. Without such injury, they cannot state a claim under the CLRA. *See In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2013 WL 6212591, at *6 (N.D. Cal. Nov. 25, 2013) (CLRA claim requires reliance and resulting economic injury); *Kaing v. Pulte Homes, Inc.*,

No. 09-5057 SC, 2010 U.S. Dist. LEXIS 21320, at *12 (N.D. Cal. Feb. 18, 2010) (same).

Finally, as with their UCL and FAL claims, Plaintiffs' CLRA claims fail because they are based on alleged misrepresentations by Facebook (*see* FAC ¶ 103), but fail to allege any specific misrepresentation to which they were exposed or on which they relied. Plaintiffs' CLRA claim thus fails for lack of reliance, *see Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010) (CLRA claim failed because plaintiff alleged no facts showing that he "relied on any representation by" defendant), and because they have failed to provide the "who, what, when, where, and how" required by Rule 9(b), *see Vess*, 317 F.3d at 1106.

D. Plaintiffs fail to state a claim for negligence (Claim Seven).

The "elements of any negligence cause of action [are] duty, breach of duty, proximate cause, and damages." *Berkley v. Dowds*, 152 Cal. App. 4th 518, 526 (2007); *see also Artiglio v. Corning Inc.*, 18 Cal. 4th 604, 614 (1998). Plaintiffs' claim fails for several independent reasons.

First, Plaintiffs allege no cognizable source of legal duty independent of their contractual relationship with Facebook, as required to support a negligence claim. *See, e.g., Rodriguez v. Bank of N.Y. Mellon*, No. 13-CV-1830-GPC, 2014 U.S. Dist. LEXIS 6501, at *27-28 (S.D. Cal. Jan. 17, 2014) (dismissing negligence claim because "Plaintiff fails to show how, absent a valid contractual relationship, Defendants owed any duty to Plaintiff"); *Missud v. Oakland Coliseum Joint Venture*, No. 12-02967 JCS, 2013 U.S. Dist. LEXIS 91528, at *55-58 (N.D. Cal. June 27, 2013) (dismissing negligence claim because "the only injury alleged under this negligence theory is that Plaintiffs' expectations under the contract were frustrated"); *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Policy Mgmt. Sys. Corp.*, No. C 93-4232 CW, 1996 U.S. Dist. LEXIS 21823, at *17-18 (N.D. Cal. Jan. 9, 1996) (same because "Plaintiffs do not specify any . . . duty which would have arisen between the parties independent of their contractual duties").

In an attempt to concoct such a duty, Plaintiffs claim that Facebook "assumed a duty to exercise reasonable care not to misrepresent information about Plaintiffs" "[b]y soliciting and encouraging PLAINTIFFS and Class members to register and use Facebook and post content, and by agreeing to accept PLAINTIFFS' and Class members' content and information." (FAC ¶ 111.) But Plaintiffs cite no statute, regulation, legal doctrine, or special relationship that would

impose such an obligation on Facebook in the absence of a contract. Rather, like Plaintiffs' contract claim (FAC ¶¶ 97-101), their negligence claim amounts to a complaint that Facebook failed to operate the site in a manner that conformed to their expectations, based on unspecified statements by Facebook (e.g., in the course of "soliciting" and "encouraging" Plaintiffs' use of the site). (FAC ¶ 111.) Because Plaintiffs have identified no source of duty outside of the parties' contract, their allegations cannot support a negligence claim. *See, e.g., In re iPhone Application Litig.*, 2011 WL 4403963, at *9 (dismissing negligence claim because "Plaintiffs have not yet adequately pled or identified a [non-contractual] legal duty on the part of Apple to protect users' personal information from third-party app developers"); *Carillo v. Nationwide Mut. Fire Ins. Co.*, No. C 07-1979 JF, 2007 U.S. Dist. LEXIS 47919, at *5 (N.D. Cal. June 25, 2007) (dismissing negligence claim that simply "repackag[ed] . . . the breach of contract claim").

Plaintiffs' negligence claim is also barred by the "economic-loss rule." Under that rule, "[g]enerally speaking, in actions for negligence, liability is limited to damages for physical injuries and recovery of economic loss is not allowed." *Kalitta Air, LLC v. Cent. Tex. Airborne Inc.*, 315 F. App'x 603, 605 (9th Cir. 2008); *see also In re Sony Gaming Networks & Customer Data Breach Litig.*, 903 F. Supp. 2d at 961 (absent an exception, "a plaintiff's tort recovery of economic damages is barred unless such damages are accompanied by some form of *physical* harm (i.e., personal injury or property damage)." (emphasis added)); *McKinney v. Google, Inc.*, No. 5:10-CV-01177 EJD, 2011 U.S. Dist. LEXIS 97958, at *23 (N.D. Cal. Aug. 30, 2011) (collecting cases). When it applies, the rule bars recovery of economic damages, such as "the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury." *Aas v. Super. Ct.*, 24 Cal. 4th 627, 636 (2000), *superseded by statute on other grounds*; *see also In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1064 (N.D. Cal. 2012) ("Purely economic damages to a plaintiff which stem from disappointed expectations from a commercial transaction must be addressed through contract law; negligence is not a viable cause of action for such claims."); *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004) ("The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations").

Plaintiffs do not claim that they sustained physical injury or property damage, which, alone, is fatal to their negligence claim. *See, e.g.*, *McKinney*, 2011 U.S. Dist. LEXIS 97958, at *23 (dismissing negligence claim on that basis). Moreover, each of Plaintiffs' asserted damage claims is unequivocally barred by the doctrine. For example, Plaintiffs seek damages for the "lessened value to them of DEFENDANT'S Facebook service," "misappropriation of their likenesses (which [allegedly] have monetary value)," and "loss of time in correcting DEFENDANT'S false representations and/or communicating with Friends to correct these false representations." (FAC ¶ 113.) But these items plainly stem from the alleged frustration of Plaintiffs' contractual expectations, not from physical harm or property damage. *See, e.g.*, *In re Sony*, 903 F. Supp. 2d at 960 (in data-breach case, economic-loss rule barred recovery for "credit monitoring, loss of use and value of [defendant's] services, loss of use and value of prepaid Third Party Services, and diminution of the value of their [purchased products]");[14] *see Aas*, 24 Cal. 4th at 639 (economic-loss rule "does not support recovery of damages representing the lost benefit of a bargain, such as the cost of [repair]"). Plaintiffs' alleged reputational injuries (FAC ¶ 113) fare no better, as such damages "constitute consequential economic losses, not claims of personal injury or property damage." *Barrier Specialty Roofing & Coatings, Inc. v. Ici Paints N. Am., Inc.*, No. CV 07-1614 LJO TAG, 2008 U.S. Dist. LEXIS 104963, at *16 (E.D. Cal. May 6, 2008); *see also Nucal Foods, Inc. v. Quality Egg LLC*, 918 F. Supp. 2d 1023, 1030 (E.D. Cal. 2013) ("[L]oss of reputation and lost profits and sales, is covered by the economic loss rule and cannot sound in tort."). Plaintiffs' asserted emotional damages also cannot save their claim because such damages, themselves, are not recoverable in negligence absent physical injury or other circumstances not present here. *See, e.g.*, *Yu v. Signet Bank/Va.*, 69 Cal. App. 4th 1377, 1397

[14] Cases in other jurisdictions have similarly applied the economic-loss doctrine to foreclose damages for nonphysical harm in user-content and data-breach cases. *See, e.g.*, *AmeriFirst Bank v. TJX Cos.*, 564 F.3d 489, 498 (1st Cir. 2009) (alleged damage to "property interest in [] payment card information, which the security breach rendered worthless," was barred by the economic loss doctrine because it was "not a result of physical destruction of property"); *Pa. State Emps. Credit Union v. Fifth Third Bank*, 398 F. Supp. 2d 317, 330 (M.D. Pa. 2005) (where data breach allegedly allowed theft of credit cards, economic loss doctrine barred negligence claim, because "the costs of replacing the cards" did not result from physical damage); *Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, 918 N.E.2d 36, 46 (Mass. 2009) (same).

(1999) (emotional injury not compensable because "appellants suffered no physical injury as a consequence of respondents' conduct"); *Branch v. Homefed Bank*, 6 Cal. App. 4th 793, 801 (1992) (in negligence action, vacating award of damages for emotional injury that was not accompanied by physical harm).

Independent of the economic-loss doctrine, Plaintiffs' negligence claim fails because Plaintiffs allege no "appreciable, nonspeculative, present injury," which is "an essential element of a tort cause of action." *Aas*, 24 Cal. 4th at 646. As noted, Plaintiffs claim damages for the "decreased value of their personal information," "lessened value to them of [the] Facebook service," "loss of time in correcting DEFENDANT'S false representations and/or communicating with Friends to correct these false representations," "loss of reputation," and "misappropriation of their likenesses (which have monetary value)[.]"" (FAC ¶ 113.) However, as discussed above, Plaintiffs plead not a single fact in support of these alleged harms. *See supra* Section IV.A.2, B.1; *Twombly*, 550 U.S. at 555 ("labels and conclusions[] . . . will not do"). Additionally, Plaintiffs' allegations of "embarrassment, shock, anger, confusion, anxiety, and dismay" (FAC ¶ 113) are contradicted by Plaintiffs' admissions that they have "nothing negative to say" about the companies to which Facebook allegedly attributed their Likes without permission. (FAC ¶ 25); *see Iqbal*, 556 U.S. at 663-64 (reviewing court should "draw on its experience and common sense" in determining whether complaint states plausible claim); *Kennedy v. Bank of Am., N.A.*, No. 12-CV-952 YGR, 2012 U.S. Dist. LEXIS 58636, at *12 (N.D. Cal. Apr. 26, 2012) ("the Court need not accept allegations that are contradicted by other allegations in the complaint"). For these reasons, Plaintiffs' negligence claim must be dismissed.

E. Plaintiffs fail to state a claim for breach of contract (Claim Eight).

To state a claim for breach of contract, Plaintiffs must plead: "[1] the contract, [2] plaintiffs' performance (or excuse for nonperformance), [3] defendant's breach, and [4] damage to plaintiff therefrom." *Gautier v. Gen. Tel. Co.*, 234 Cal. App. 2d 302, 305 (1965). "A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor's conduct." *Yari v. Producers Guild of Am., Inc.*, 161 Cal. App. 4th 172, 182 (2008); *see also Div.*

of Labor Law Enforcement v. Transpac. Transp. Co., 69 Cal. App. 3d 268, 275 (1977). Plaintiffs' contract claim fails on several counts.

1. Plaintiffs fail to identify the contract term(s) allegedly breached.

To state a contract claim, "[t]he complaint must identify the specific provision of the contract allegedly breached by the defendant." *Donohue*, 871 F. Supp. 2d at 930 (dismissing claim on that basis); *see Bilodeau v. McAfee, Inc.*, No. 12-CV-04589-LHK, 2013 U.S. Dist. LEXIS 89226, at *39-41 (N.D. Cal. June 24, 2013) (same because plaintiff "fails to identify in what contract Defendants assumed the obligation to 'honestly and accurately inform [her] about the true condition of [her] computer,' much less identify [its] specific provisions" and warning that "[a]ny amended complaint . . . must identify the essential terms of the agreement and specific allegations of breach"); *McAfee v. Francis*, No. 5:11-CV-00821-LHK, 2011 U.S. Dist. LEXIS 83878, at *5-6 (N.D. Cal. Aug. 1, 2011) (same because "Plaintiffs . . . do not specify the exact terms of the agreements . . . allegedly breached").[15]

Plaintiffs allude to vague contractual duties, but fail to identify a single contract term that Facebook allegedly breached. (*E.g.*, FAC ¶ 22 ("PLAINTIFFS . . . understood . . . from the terms and conditions that . . . "); FAC ¶ 99 ("DEFENDANT agreed, whether explicitly or impliedly, not to interject false content and/or make false representations about PLAINTIFFS . . .").) Plaintiffs' contract claims fail for this reason alone. *See Donohue*, 871 F. Supp. 2d at 930; *see Bilodeau*, 2013 U.S. Dist. LEXIS 89226, at *39-41; *McAfee*, 2011 U.S. Dist. LEXIS 83878, at *5-6.

2. Plaintiffs allege no appreciable damage from the alleged breach.

Plaintiffs also allege no cognizable contract damages, as required to plead a claim for breach of contract. *See First Commercial Mortg. Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001); *Ruiz v. Gap, Inc.*, 622 F. Supp. 2d 908, 917 (N.D. Cal. 2009) ("Under California law, a breach of

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[15] This requirement applies whether the alleged contract is express or implied. *See, e.g., Coyotzi v. Countrywide Fin. Corp.*, No. CV F 09-1036 LJO SMS, 2009 U.S. Dist. LEXIS 91084, at *19 (E.D. Cal. Sept. 15, 2009) (dismissing contract claim because complaint "fails to identify a specific contract and merely references 'express and implied terms of written agreements'"); *Sweet v. Bridge Base Inc.*, No. CV F 08-1034 AWI GSA, 2009 U.S. Dist. LEXIS 44712, at *12-13 (E.D. Cal. May 28, 2009) (dismissing implied-contract claim because plaintiffs failed to allege facts supporting parties' agreement to term at issue).

contract claim requires a showing of appreciable and actual damage." (citation omitted)).

First, Plaintiffs do not (and cannot) allege that they were monetarily damaged, since use of Facebook is free. Plaintiffs also get nowhere by alleging "that they did not receive the benefit of the bargain for which they contracted and for which they paid valuable consideration in the form of their Facebook membership and presence, personal information, and Facebook content," and that they thus "overpaid for the bargained-for service." (FAC ¶ 101.) Courts have long rejected the theory that the abstract economic loss of personal information can form the basis for damages, including contract damages. *See, e.g.*, *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1028-29 (N.D. Cal. 2012) (rejecting theory that, as a result of alleged breach, '"Plaintiffs relinquished [] valuable personal property without compensation to which they were each due[,]'" explaining that "alleged decrease in the value of Plaintiffs' personal information does not constitute cognizable contract damages"); *In re iPhone Application Litig.*, 2011 WL 4403963, at *5; *In re Jetblue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 326 (E.D.N.Y. 2005) (loss of privacy from disclosure of data to third party "is not a damage available in a breach of contract action").

Third, Plaintiffs plead no facts in support of their damages theory. For example, they do not allege that their "membership and presence, personal information, and Facebook content" has any specific, calculable monetary value (FAC ¶ 101), that they "'reasonably expect[ed] that they would be compensated for the 'value' of their personal information,' [or] . . . have been foreclosed from opportunities to capitalize on the value of their personal data," *Low*, 900 F. Supp. 2d at 1029 (citation omitted); *see also LaCourt v. Specific Media, Inc.*, No. 10-cv-1256 GW (JCGx), 2011 WL 1661532, at *5 (C.D. Cal. Apr. 28, 2011) (no injury because plaintiffs alleged no facts showing they "ascribed an economic value" to their personal information, attempted a value-for-value exchange of the information, or were deprived of its value). Plaintiffs' bare allegation that "they did not receive the benefit of the[ir] bargain" cannot sustain this claim.

3. Plaintiffs' implied-contract claim fails for additional reasons.

Plaintiffs' implied-contract claim consists of a single allegation that "DEFENDANT agreed, *whether explicitly or implicitly*, not to interject false content and/or make false representations about PLAINTIFFS and Class members that would be visible to other Facebook

users[.]" (FAC ¶ 99 (emphasis added).) This claim fails for at least two additional reasons.

First, Plaintiffs cannot recover on an implied-contract theory because they allege the existence of an express contract (*see, e.g.*, FAC ¶¶ 98, 103), covering the same subject matter (*see* FAC ¶ 99 ("DEFENDANT agreed, ***whether explicitly or implicitly***, not to interject false content . . . .") (emphasis added)). Because "[a] contract is *either* express or implied," an action "based on an implied-in-fact . . . contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 U.S. Dist. LEXIS 171813, at *35-36 (N.D. Cal. Dec. 5, 2013) (emphasis added; citation omitted); *see also Roling v. E*Trade Secs., LLC*, 756 F. Supp. 2d 1179, 1189 (N.D. Cal. 2010) ("[E]xistence of an express contract indisputably precludes allegations regarding an implied contract for the same subject matter."). This rule applies with special force here because the SRR includes an integration clause (SRR § 19.2 ("This Statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreements")) that forecloses the possibility of an implied contract between Facebook and Plaintiffs.[16] *See Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 U.S. Dist. LEXIS 147047, at *20-21 (N.D. Cal. Oct. 9, 2013) (action for implied contract did not lie where express contract covered same subject matter and included integration clause). Plaintiffs' implied-contract claim fails as a matter of law.

Second, Plaintiffs plead no facts supporting the existence of an implied-in-fact-contract, as required to proceed under such a theory. *See, e.g., Youngman v. Nev. Irrigation Dist.*, 70 Cal. 2d 240, 246-47 (1969); *Yari*, 161 Cal. App. 4th at 182. Plaintiffs' implied-contract claim reduces to a bare allegation that Facebook agreed, "whether explicitly or implicitly," to operate the site in a particular manner. (FAC ¶ 99.) This allegation cannot support Plaintiffs' claim. *See, e.g., Duarte v. Freeland*, No. C05-02780 MJJ, 2007 U.S. Dist. LEXIS 73750, at *30 (N.D. Cal. Sept. 24, 2007) (dismissing implied-contract claim for failure to plead facts showing "the existence of any relationship or duties that were assumed by any of the parties"); *Gould v. Md. Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 1151-52 (1995) (same where "vague reference[s]" and "oblique

[16] Identical or substantially identical provisions were in place when each named Plaintiff signed up for Facebook. (*See* Solanki Decl. Ex. B ("Other"); *id.*, Ex. C ("Other"); *id.*, Ex. D, § 16.1.)

language" "failed to allege . . . facts from which a jury could find an implied-in-fact agreement").

F. Plaintiffs fail to state a claim for breach of the implied covenant of good faith and fair dealing (Claim Nine).

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing also fails. First, Plaintiffs fail to point to any particular contractual benefit of which Plaintiffs were deprived. "The implied covenant . . . [is] a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation*, 11 Cal. App. 4th 1026, 1031-32 (1992). Thus, "[t]o state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must identify the specific contractual provision that was frustrated." *Perez v. Wells Fargo Bank, N.A.*, No. C-11-02279 JCS, 2011 U.S. Dist. LEXIS 96706, at *50-51 (N.D. Cal. Aug. 29, 2011). Plaintiffs allege that "DEFENDANT breached the implied covenant of good faith and fair dealing by falsely representing content" on Facebook (FAC ¶ 105), but do not identify any contractual provision allegedly frustrated by Facebook's conduct. As such, this claim must be dismissed. *See, e.g.*, *Plastino v. Wells Fargo Bank*, 873 F. Supp. 2d 1179, 1191 (N.D. Cal. 2012) (dismissing implied covenant claim for this reason); *Perez*, 2011 U.S. Dist. LEXIS 96706, at *50-51 (same).

Additionally, as with their contract claim, Plaintiffs have alleged no cognizable contract damages. *See supra* Section IV.E.2; *see also Lyons v. Coxcom, Inc.*, 718 F. Supp. 2d 1232 (S.D. Cal. 2009); CACI No. 325 (harm to plaintiff is a required element of breach of implied covenant).

Finally, the breach-of-implied-covenant claim should be dismissed because it duplicates the breach-of-contract claim. Where the allegations in support of a breach-of-implied-covenant claim "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." *Careau & Co. v. Sec. Pac. Bus. Credit*, 222 Cal. App. 3d 1371, 1395 (1990); *see also* Order, *In re Zynga Privacy Litig.*, No. 10-cv-04680, at *8 (N.D. Cal. Nov. 22, 2011), ECF No. 85 (implied covenant claim was "superfluous" where it alleged same acts as contract claim); *Lamke v.*

Sunstate Equip. Co., 387 F. Supp. 2d 1044, 1048 (N.D. Cal. 2004) (dismissing implied-covenant claim because it "add[ed] nothing to any breach of contract claim"). Plaintiffs' contract and implied-covenant claims are founded on the same allegation: that Facebook falsely "g[a]ve the appearance that PLAINTIFFS and Class members sponsored or endorsed products, services, and/or companies in the form of 'Likes' when in fact they did not." (*Compare* FAC ¶ 105, *with* FAC ¶¶ 99-100.) This claim also fails.

G. Plaintiffs fail to state a claim for unjust enrichment (Claim Ten).

Plaintiffs' claim for "Restitution Based on Quasi-Contract / Unjust Enrichment" fails for a number of independent reasons. As an initial matter, recent California Court of Appeal decisions have made it clear that unjust enrichment does not exist as a standalone cause of action under California law. *See Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1307 (2011); *Durell*, 183 Cal. App. 4th at 1370 ("[T]here is no cause of action in California for unjust enrichment."); *Levine v. Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1138 (2010) (same); *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003) (same); *Vicuña v. Alexia Foods, Inc.*, No. 11-cv-6119, 2012 U.S. Dist. LEXIS 59408, at *7 (N.D. Cal. Apr. 27, 2012) (same); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 814-15 (N.D. Cal. 2011) (collecting authorities). As the court in *Melchior* explained, "[t]he phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so. Unjust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself." 106 Cal. App. 4th at 793 (citations and quotation marks omitted).[17]

However, even if restitution/unjust enrichment were a standalone cause of action, Plaintiffs' claim must still be dismissed. First, Plaintiffs nowhere dispute the existence of a valid, enforceable agreement. (FAC ¶ 98.) *See Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1389 (2012) ("Although a plaintiff may plead inconsistent claims that allege both the existence of an enforceable agreement and the absence of an enforceable agreement, that is not what occurred

[17] Nor is restitution a cause of action, as these cases make clear. Rather, restitution is a *remedy* that may be awarded when a plaintiff proves a particular cause of action and the requirements for a restitutionary remedy are met. In any case, restitution would not be available here because Plaintiffs do not allege that they paid any money to Facebook. Indeed, Facebook is a free service.

here. Instead, plaintiffs' breach of contract claim pleaded the existence of an enforceable agreement and their unjust enrichment claim did not deny the existence or enforceability of that agreement."); *Allen v. Hylands, Inc.*, No. 12-cv-1150, 2012 WL 1656750, at *5 (C.D. Cal. May 2, 2012) (dismissing unjust enrichment claim and holding that "absent any allegation that Plaintiffs' purchases were not enforceable agreements, Plaintiffs' quasi-contract claims are likewise not viable"). Second, even if Plaintiffs had denied the express contract, their claim for restitution/unjust enrichment still fails because they allege no facts as to *how* or *why* the express contract would be invalid or unenforceable such that the remedy for restitution would arise. *See Levine*, 189 Cal. App. 4th at 1138 (affirming sustaining of demurrer where plaintiffs "have not demonstrated any basis on which they would be entitled to restitution").

H. Plaintiffs' claims should be dismissed with prejudice.

Plaintiffs' claims should be dismissed with prejudice because they cannot amend to allege facts sufficient to state a claim. Any amendment would thus be futile and would be subject to dismissal. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (leave to amend should not be granted where amended complaint would also be subject to dismissal).

V. CONCLUSION

For the foregoing reasons, Counts Three through Ten of the FAC should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

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