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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN MATEO**

LEAH BALLEJOS, AUDREY ELLIS, and TAMEIKA MARTIN,

Plaintiffs,

v.

FACEBOOK, INC., a Delaware corporation, and DOES 1 through 100,

Defendants.



CASE NO. 18-CIV-03607

**NOTICE OF DEMURRER AND DEMURRER BY DEFENDANT FACEBOOK, INC. TO PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES**

*[Declaration of Kristin A. Linsley and [Proposed] Order Sustaining Defendant's Demurrer to Plaintiffs' Complaint filed concurrently herewith]*

Department: 10

Honorable Judge: Gerald J. Buchwald

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Complaint Filed: July 11, 2018

Hearing Date: May 3, 2019
Hearing Time: 2:00 p.m.

Trial Date: None set

**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

PLEASE TAKE NOTICE THAT on May 3, 2019, at 2:00 p.m. or as soon thereafter as the matter may be heard, in San Mateo County Superior Court, Southern Branch, located at 400 County Center, Redwood City, California 94063, Defendant Facebook, Inc. will and hereby does demur to the Complaint, and each cause of action therein, asserted by Plaintiffs Leah Ballejos, Audrey Ellis, and Tameika Martin, pursuant to Section 430.10(e) of the California Code of Civil Procedure, on the ground that the Complaint fails to state a cause of action against Facebook.

This demurrer is based upon this Notice of Demurrer and Demurrer, the Memorandum of Points and Authorities concurrently filed herewith, the Declarations of Kristin Linsley and Michael Duffey concurrently filed herewith, the Court's file, and such other oral and documentary evidence and arguments as may be presented at the hearing of this demurrer.

DATED: April 2, 2019

GIBSON, DUNN & CRUTCHER LLP

By: Kristin A. Linsley

*Attorneys for Defendant Facebook, Inc.*

## DEMURRERS TO PLAINTIFFS' COMPLAINT

Defendant Facebook, Inc. demurs to the Complaint and each cause of action stated therein on the following grounds:

## DEMURRER TO ENTIRE COMPLAINT

1. Pursuant to Code of Civil Procedure section 430.10, subd. (e), Defendant demurs to Plaintiffs' Complaint, in its entirety, on the ground that the Complaint fails to state facts sufficient to constitute a cause of action against Facebook.

## DEMURRER TO FIRST CAUSE OF ACTION
## (Violation of Bus. & Proc. Code § 17200 *et seq.*)

2. Pursuant to Code of Civil Procedure section 430.10, subd. (e), Facebook demurs to the First Cause of Action on the ground that it fails to state facts sufficient to constitute a cause of action. Specifically, Plaintiffs fail to plead the loss of money or property or an injury in fact as a result of Facebook's alleged conduct; Plaintiffs' claim is barred by the statute of limitations; and Plaintiffs do not adequately allege that Facebook engaged in any unfair, fraudulent, or unlawful conduct within the meaning of Business and Professions Code, Section 17200 *et seq.*

## DEMURRER TO SECOND CAUSE OF ACTION
## (Violation of Bus. & Prof. Code § 17500 *et seq.*)

3. Pursuant to Code of Civil Procedure section 430.10, subd. (e), Facebook demurs to the Second Cause of Action on the ground that it fails to state facts sufficient to constitute a cause of action. Specifically, Plaintiffs fail to plead the loss of money or property or an injury in fact as a result of Facebook's alleged conduct; Plaintiffs' claims are barred by the statute of limitations; and Plaintiffs do not adequately allege a violation of Business and Professions Code, Section 17500 *et seq.*

## PRAYER

WHEREFORE, Facebook prays:

1. That Plaintiffs take nothing by reason of the Complaint;

2. That Facebook's Demurrer to the Complaint and the specific causes of action set forth therein be sustained;

3. That the Complaint be dismissed against Facebook without leave to amend;

4. That Facebook recovers its costs of suit; and

5. For any other or further relief as this Court deems just and proper.

DATED: April 2, 2019

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Kristin A. Linsley

*Attorneys for Defendant Facebook, Inc.*

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## I. INTRODUCTION

Plaintiffs are three Facebook users who allegedly "received notification that [their] personal data *may* have been accessed by [thisisyourdigitallife]"—a third-party app operated by Dr. Aleksandr Kogan. (Compl. ¶¶ 11-13 [emphasis added].) Plaintiffs allege that if their data was shared with Dr. Kogan's app, then it is possible Dr. Kogan may have given their data to Cambridge Analytica, in violation of Facebook's policies. (Compl. ¶ 2). And if Cambridge Analytica obtained access to Plaintiffs' data, it is possible it may have sent targeted ads to Plaintiffs regarding the 2016 election. (*Ibid.*)

This is the full extent of Plaintiffs' allegations. Based on this speculative chain of events, which—even if true—resulted in nothing more than Plaintiffs' possibly seeing different ads than they otherwise might have seen, Plaintiffs ask this Court to issue sweeping injunctive relief aimed at changing Facebook's business model. But California law prohibits Plaintiffs' causes of action and the relief they seek. Facebook's demurrer should be sustained without leave to amend and this action should be dismissed with prejudice.

**Plaintiffs lack standing.** Under well-established California law, Plaintiffs cannot maintain causes of action under the Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.* (UCL), or the False Advertising Law, Bus. & Prof. Code § 17500 *et seq.* (FAL), unless they have suffered "some form of economic injury" to their "money or property." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 323.) California law is equally clear that the sharing of an individual's personal information is insufficient to meet this requirement. (*Archer v. United Rentals, Inc.* (2011) 195 Cal.App.4th 807, 816). Plaintiffs have not alleged any loss of "money or property" and, for that reason alone, their claims fail.

Even apart from the failure to allege a loss of "money or property," Plaintiffs do not articulate any harm that they suffered as a result of the alleged sharing of their information, much less harm that would satisfy the UCL's strict "injury in fact" requirement. (*Kwikset*, *supra*, 51 Cal.4th at 322.) They do not identify any specific content that they shared on Facebook, nor do they identify any such content that was inappropriately shared, or any adverse consequence that allegedly befell them as a result of such sharing. Because Plaintiffs suffered no cognizable injury, their claims cannot proceed.

**Plaintiffs consented to the sharing.** Plaintiffs' claims also fail because they consented to the sharing of their information. Although they allege in conclusory fashion that any sharing occurred "without [their] consent" (Compl. ¶¶ 11-13), the contracts they entered with Facebook—of which this Court may take judicial

notice, as Plaintiffs rely on them in the Complaint—reveal that Plaintiffs consented to their data being shared with third-party apps and device manufacturers, and that they had options to limit app sharing or turn it off entirely. Even more, the operative contract, at all times, disclosed the risk that a user's data might be misused by third-party apps and websites. Under California law, these disclosures—and the accompanying waiver of liability for third-party conduct—are fatal; they preclude any claim based on the alleged sharing of data.

**Plaintiffs fail to state a UCL or FAL claim.** Plaintiffs also fail to plead facts establishing the necessary elements of a UCL or FAL claim. Among other problems, Plaintiffs do not and cannot show that any of the practices about which they are complaining were unfair, fraudulent, or unlawful in any way, particularly given their consent to all of the challenged practices and the absence of any allegation of reliance. Plaintiffs also fail to allege, and cannot allege, that any of the challenged practices caused an injury to competition, as the better reasoned cases in this area require.

**Plaintiffs' claims are time-barred.** Plaintiffs' own allegations also make clear that their claims are time-barred. Plaintiffs allege that, in 2012, Facebook entered into a widely publicized consent decree with the Federal Trade Commission (FTC) that focused on the same issues underlying Plaintiffs' claims. The FTC's 2011 Complaint and 2012 Consent Order—the latter of which Plaintiffs directly reference in their Complaint—put Plaintiffs on notice that third-party apps could access user data via permissions from their friends and that users could use their settings to limit the sharing of information with apps. (See Linsley Decl. Ex 1 ¶¶ 9, 18.). Plaintiffs' claims, filed more than six years after they knew or should of known of Facebook's challenged practices, are time-barred.

Because the Complaint is facially—and fatally—defective, Facebook's demurrer should be sustained and the Complaint should be dismissed without leave to amend.[1]

## II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' factual allegations are drawn primarily from March 2018 articles in *The New York Times* and *The Guardian*, reporting that the political consulting firm Cambridge Analytica had obtained data about Facebook users and used that data to target advertising during the 2016 U.S. Presidential election. Plaintiffs allege that Alexander Kogan obtained data from Facebook users and the users' friends through his app, "This Is Your Digital Life" (Compl. ¶¶ 2, 43–44); that Kogan shared Facebook users' data with Cambridge

[1] Facebook met and conferred with Plaintiffs' counsel and noted these deficiencies, but they declined to withdraw their claims. (See Linsley Decl. ¶ 2.)

Analytica in violation of Facebook's policies (*id.* ¶¶ 46–48); that Facebook took insufficient steps to confirm that Kogan deleted this data as demanded by Facebook (*id.* ¶¶ 46–47, 49); and that Cambridge Analytica used the data "to help target its messaging" "as a consultant for Donald Trump's presidential campaign" (*id.* ¶ 48).

The Complaint also draws from later reporting on Facebook's alleged data-sharing agreements with device manufacturers and "whitelist[ed]" apps. (Compl. ¶¶ 37-41.) Plaintiffs allege that Facebook had undisclosed agreements with electronic device manufacturers that allowed the manufacturers to access the data of users and their friends without consent (*id.* ¶¶ 37-38), and that Facebook allowed certain companies to obtain users' friends' data after Facebook announced that it would be updating the platform to prevent apps from obtaining friends' data (*id.* ¶¶ 40-41).

The Complaint asserts two causes of action against Facebook. Count I alleges that Facebook violated the UCL by engaging in "unlawful," "fraudulent," and "unfair" conduct. Plaintiffs allege that Facebook's conduct was "unlawful" because it violated (i) article 1, section 1 of the California Constitution; (ii) the California Customer Records Act, Civil Code § 1798.80; and (iii) the implied duty of good faith and fair dealing. (Compl. ¶ 68.) They allege that Facebook's conduct was "fraudulent" because its alleged failure to adhere to its "empty promises" to protect user privacy "was likely to deceive the general public." (*Id.* ¶¶ 1, 69.) And they allege Facebook's conduct was "unfair" because "Facebook users were assured their data would be used only in the manner indicated in the Company's terms of service and Data Use Policy." (*Id.* ¶ 70.) In Count II, Plaintiffs assert that Facebook violated the FAL by publicly and falsely representing (i) "that it would protect and not permit the unauthorized transfer or use of personal data"; (ii) "that [it] does not share information unless the user grants permission or Facebook provides notice to the user"; and (iii) that it "investigated suspicious activity or violations of its terms of use or policies." (*Id.* ¶ 75.)

Plaintiffs seek various forms of injunctive relief, including an order requiring Facebook to institute various specific data management practices and audit procedures, change how it interacts with third-party apps, and make other operational changes. (Compl. at pp. 28–29.) They also seek declaratory relief. (*Id.* ¶ 10, p. 28 [seeking "declaration that Facebook has engaged in unlawful conduct" and declaration of "data breach" pursuant to Civil Code § 1798.80 *et seq.*]. Plaintiffs do not seek monetary damages.

## III. LEGAL STANDARD

A demurrer "test[s] the sufficiency of a complaint by raising questions of law," including "whether

the complaint states facts sufficient to constitute a cause of action." (*Award Metals, Inc. v. Super. Ct.* (1991) 228 Cal.App.3d 1128, 1131.) To survive a demurrer, "a pleading must contain factual allegations supporting the existence of all the essential elements" of the causes of action asserted therein. (*Mobley v. L.A. Unif. Sch. Dist.* (2001) 90 Cal.App.4th 1221, 1239.) Although courts "assume the truth of all facts properly pleaded," they need not assume the truth of "contentions, deductions or conclusions of fact or law." (*Cansino v. Bank of Am.* (2014) 224 Cal.App.4th 1462, 1468; see *Maystruk v. Infinity Ins. Co.* (2009) 175 Cal.App.4th 881, 886.) Courts also do not assume the truth of allegations that are contrary to facts judicially noticed. (*Cansino, supra*, 224 Cal.App.4th at p. 1468.) "Because standing goes to the existence of a cause of action, lack of standing may be raised by demurrer[.]" (*Peterson v. Cellco P'Ship* (2008) 164 Cal.App.4th 1583, 1589.) And "where the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 401; *San Mateo Union High Sch. Dist. v. City of San Mateo* (2013) 213 Cal.App.4th 418, 441 [plaintiff must prove "reasonable possibility"].)

## IV. ARGUMENT

### A. Plaintiffs Lack Standing To Pursue Claims Under The UCL And FAL

The UCL and FAL impose a standing requirement that Plaintiffs do not—and cannot—meet: By virtue of Proposition 64, a private individual cannot bring a UCL or FAL claim unless that person can show that he or she "has suffered injury in fact and has lost money or property as a result of" the alleged unfair competition that forms the basis for the claim. (Bus. & Prof. Code, § 17204; § 17535.) As the Court of Appeal has explained this requirement, "in the aftermath of Proposition 64, only plaintiffs who have suffered actual damage may pursue a private UCL action." (*Peterson, supra*, 164 Cal.App.4th at p. 1590; see also *Troyk v. Farmers Grp., Inc.* (2009) 171 Cal.App.4th 1305, 1348 n.31 [to bring a claim under UCL or FAL, plaintiff must allege that he or she "lost money or property" as a result of the alleged violation].) Thus, "[a] private plaintiff must make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or property caused by unfair competition." (*Peterson, supra*, 164 Cal.App.4th at p. 1590.) And to establish "injury in fact" the plaintiff must "set forth a basis for a claim of *actual economic injury* as a result of an unfair and illegal business practice." (*Aron v. U-Haul Co. of Cal.* (2006) 143 Cal.App.4th 796, 803 [emphasis added].) A plaintiff alleging fraud-based claims under the UCL or FAL also must make a showing of "actual

reliance ... in accordance with well-settled principles regarding the element of reliance in ordinary fraud action." (*In re Tobacco II Cases* (*Tobacco II*) (2009) 46 Cal.4th 298, 306.)

Here, Plaintiffs do not and cannot allege facts showing that they lost money or property due to Facebook's conduct, or that they suffered a legal "injury in fact." Nor do they allege that they relied to their detriment on any of the allegedly untrue statements. For these reasons, the claims fail at the threshold.

**1. Plaintiffs Do Not Allege That They "Lost Money Or Property"**

Plaintiffs do not and cannot allege that they lost "money or property" as a result of Facebook's alleged conduct. The sole harm each plaintiff alleges is that she "received notification that her personal data may have been accessed by the App [i.e., Kogan's app, thisisyourdigitallife] without her consent." (Compl. ¶¶ 11-13). This is not a loss of money or property, for multiple reasons. To show a loss of money or property, a plaintiff must "demonstrate some form of economic injury." (*Kwikset, surpa,* 51 Cal. 4th at p. 323.) For example, "[a] plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." (*Ibid.*) Plaintiffs allege none of these types of economic harm here.

To evade this defect, Plaintiffs posit that they "have a property interest" in their data and have "lost [that] property interest" because their information was shared without their consent. (Compl. ¶¶ 71–72.) But courts repeatedly have held that an individual's personal information is not "property" for purposes of the UCL's standing requirement. (See *Archer*, *supra*, 195 Cal.App.4th at p. 816 [Plaintiffs who alleged "the unlawful collection and recordation of their personal identification information, an invasion of their right to privacy," failed to allege a loss of money or property]; *In re iPhone Application Litig.*, (N.D. Cal. Sept. 20, 2011) 2011 WL 4403963, at *14 ["'personal information' does not constitute money or property under the [California] UCL"]; *Ruiz v. Gap, Inc.* (N.D. Cal. 2008) 540 F.Supp.2d 1121, 1127 [finding no "authority to support the contention that unauthorized release of personal information constitutes a loss of property"].) Nor can Plaintiffs have lost any money or property by using Facebook, because Facebook is a *free* service. (See *In re Sony Gaming Networks & Customer Sec. Breach Litig.* (S.D. Cal. 2012) 903 F.Supp.2d 942, 966 [plaintiffs failed to allege "lost money or property" where they subscribed to a free service].)

Indeed, when facing the same allegations about the same underlying events, the U.S. District Judge in the related federal multi-district litigation (MDL) in the Northern District of California explained that, in his view, "the plaintiffs have not adequately alleged ... 'economic harm.'" (Linsley Decl. Ex. 2 at p. 1.) The Court reiterated this position at the hearing on Facebook's motion to dismiss, stating that he was "not buying" Plaintiffs' "allegations about economic harm." (Linsley Decl. Ex. 3 at p. 156:3-5.) Because Plaintiffs have not alleged that they lost money or property as a result of Facebook's conduct, they lack standing.

**2. Plaintiffs Do Not Allege Any Other "Injury In Fact"**

Because Plaintiffs cannot allege a loss of "money or property" within the meaning of Proposition 64, this Court need go no further. But even if that were not the case, Plaintiffs also cannot meet the *separate* UCL/FAL requirement that they have suffered an "injury in fact" as a result of Facebook's conduct. The "injury in fact" requirement was intended to mirror the constitutional standing rules for federal court. (Prop. 64, § 1, subd. (e), [stating voter's intent to apply "the standing requirements of the United States Constitution" to UCL claims].) As a result, looking to federal law, the California Supreme Court has held that an "injury in fact" for UCL purposes is "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not conjectural or hypothetical." (*Kwikset, supra*, 51 Cal.4th at 322, citations omitted, [citing and quoting *Lujan v. Defs. of Wildlife* (1992) 504 U.S. 555, 560].)

Plaintiffs allegations do not meet this standard. Although the Complaint recites the words "injury in fact" (¶¶ 72, 78), they allege no specific facts indicating how or in what way they actually were injured. As noted above, the only relevant allegation is that they "received notification" that their personal data "may have been accessed by the App without [their] consent." (*Id.* ¶¶ 11-13.) This allegation is far too speculative to establish an actual or imminent injury, as required to meet the "injury in fact" requirement. (See *Kwikset, supra*, 51 Cal.4th at p. 322 [injury must be "actual or imminent, not 'conjectural' or 'hypothetical'"]; see also *Birdsong, supra*, 590 F.3d at p. 961 [conjectural allegations that some iPods have "capability" of producing unsafe levels of sounds and that consumers "may" listen to them at unsafe levels were insufficient to establish injury in fact].) And even apart from that problem, Plaintiffs (1) fail to allege a legally protected privacy interest in the data they choose to share on Facebook; (2) fail to allege facts specifically identifying the information that allegedly was disclosed; (3) fail to allege a reasonable expectation of privacy in light of their express consent to the sharing of their data with the "thisisyourdigitallife" app; and (4) fail to identify any

other harm that they suffered as a result of the alleged data sharing.

**a. Plaintiffs' Alleged Injury Is Too Speculative and Conjectural**

Plaintiffs' allegations are too speculative to demonstrate an "injury in fact." An "injury in fact" must be "actual or imminent" and cannot be "conjectural" or "hypothetical." (See *Kwikset, supra*, 51 Cal.4th at p. 322 [injury in fact must be "actual or imminent, not 'conjectural' or 'hypothetical'"].) Plaintiffs' allegation is that they "received notification" that their personal data "may have been accessed by the App without [their] consent." (Compl. ¶¶ 11-13.) Courts routinely reject similar noncommittal and conjectural allegations as insufficient to meet the "injury in fact" requirement. (See, e.g., *Birdsong v. Apple, Inc.* (9th Cir. 2009) 590 F.3d 955, 961; *Amburgey v. CaremarkPCS Health, LLC* (C.D. Cal. Sept. 21, 2017) 2017 WL 7806634 at *3.) For example, in *Birdsong*, the Ninth Circuit held that allegations that "some iPods have the 'capability' of producing unsafe levels of sound and that consumers 'may' listen to their iPods at unsafe levels combined with an 'ability' to listen for long periods of time" were too hypothetical to demonstrate an actual or imminent injury. (590 F.3d at p. 961.) Likewise, in *Amburgey*, the court rejected claims that drugs that the Plaintiffs had purchased "may have" been damaged from being stored at unsafe temperatures. (2017 WL 7806634 at *3.) So too here, Plaintiffs' allegations that unidentified personal data "may have been accessed by the App" fail to demonstrate an actual or imminent injury.

**b. Plaintiffs Fail To Allege That They Posted Protected, Private Information on Facebook**

Plaintiffs also fail to allege that their Facebook data contained private information. As noted above, each of the three Plaintiffs alleges only that she "has a Facebook account and received a notification that her personal data may have been accessed by the [thisisyourdigitallife App] without her consent." (Compl. ¶¶ 11-13.) These vague allegations cannot support a privacy-related claim. Plaintiffs have not alleged what information, if any, they shared on Facebook or the privacy settings they chose, nor do they affirmatively allege that any such information was actually compromised. Plaintiffs do not have a legally protected privacy interest in non-sensitive information that they may have posted on Facebook, or information they set to be "public" or shared with a large group of friends (or friends of friends). (See *Melvin v. Reid* (1931) 112 Cal.App. 285, 290 ["There can be no privacy in that which is already public."].) Because Plaintiffs have failed to allege any facts to suggest that the information they may have, or may not have, posted on Facebook is "sensitive and confidential," they have failed to allege any privacy violation or privacy-related harm.

**c. Plaintiffs Do Not Allege Any Legally Protected Privacy Interest**

Plaintiffs also identify no facts to support their assertion that Facebook "violated users' right to privacy established in article I, section 1 of the Constitution of the State of California." (Compl. ¶ 68.) They assert that Facebook users "have a legally protected privacy interest in their personal data that they did not consent to have shared" (*ibid.*), but this theory contradicts Supreme Court precedent interpreting Article I, section 1 as protecting only "the dissemination or misuse of *sensitive* and *confidential* information," and not establishing a legally protected privacy interest in any and all information about a person. (*Hill v. NCAA* (1994) 7 Cal.4th 1, 5 [emphasis added].) To determine whether information is "sensitive and confidential" courts look to whether "well-established social norms" support a legally protected privacy interest in a "particular class of information." (*Id.* at p. 35.) Plaintiffs' theory is that *all* Facebook data, by its very nature and regardless of the specific content or user settings, are "legally protected" (Compl. ¶ 68) but they do not identify a single "well-established social norm" to support this premise. And, in fact, the contrary is true: As Plaintiffs admit, Facebook is a "popular social media platform" that people join ***to share information*** with their friends, family, and social contacts, allowing them to be part of a "conversation." (Compl. ¶¶ 18, 30.) Plaintiffs do not allege *anything* about their own privacy settings: for all we know from the Complaint, Plaintiffs' information was set to be publicly available, or available to a large group of "friends" or "friends of friends." Certainly, there is no indication that Plaintiffs intended for the information they shared on Facebook to be strictly confidential in any sense that would qualify it for protection by the California Constitution. (*See* Compl. ¶¶ 11-13 [alleging only that they have Facebook accounts].) For this reason, Plaintiffs have not alleged an injury to any legally protected privacy interest.

**d. Plaintiffs Consented To Any Alleged Sharing**

Even if Plaintiffs had alleged that they posted private information on Facebook, their own allegations make clear that they consented to the sharing alleged in the Complaint. To pursue an invasion-of-privacy claim a plaintiff "must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant." (*Hill, supra*, 7 Cal.4th at p. 26.) This is because, as the maxim "volenti non fit injuria" concisely states, a person who consents is not injured. (Rest.2d Torts, § 892A, com. a.) Accordingly, an individual whose words or conduct indicates that he or she consented to the relevant conduct cannot pursue a privacy claim. (See *Gill v. Hearst Publ'g Co.* (1953) 40 Cal.2d 224, 230, 253 P.2d 441 [plaintiffs waived

right to privacy by a "pose voluntarily assumed in a public market place"]; *Aisenson v. Am. Broad. Co.* (1990) 220 Cal.App.3d 146, 162, 269 Cal.Rptr. 379 [whether intrusion is 'highly offensive to a reasonable person' may turn on extent to which person whose privacy is at issue "voluntarily entered into the public sphere."].)

Plaintiffs consented to sharing their data with their friends and, in turn, with third-party apps used by their friends, including the thisisyourdigitallife app, when they agreed to Facebook's terms of service and data use policy, which clearly disclosed this practice and also how users could opt out of it. The version of Facebook's Data Use Policy in effect in 2013 and 2014, for example, told users that apps they accessed would receive their User ID, any information they shared publicly, and their friends' User IDs, also called a "friend list." (Duffey Decl. Ex. 6 at pp. 8-9 [Nov. 15, 2013 Data use Policy].)[2] Facebook further explained that apps could access additional information about a user's friends:

> Just like when you share information by email or elsewhere on the web, information you share on Facebook can be re-shared. This means that if you share something on Facebook, anyone who can see it can share it with others, including the games, applications, and websites they use.

(*Id.* at p. 9.) Facebook's policies even provided examples of such sharing by a user's friends:

> For example, one of your friends might want to use a music application that allows them to see what their friends are listening to. To get the full benefit of that application, your friend would want to give the application her friend list – which includes your User ID – so the application knows which of her friends is also using it. Your friend might also want to share the music you "like" on Facebook.

(*Id.*) Facebook also informed users how to prevent such sharing of their data by their friends: "If you want to completely block applications from getting your information when your friends and others use them, you will need to turn off all Platform applications." (*Id.*)

Plaintiffs also consented to sharing their data with device manufacturers. Facebook's Data Use Policy clearly stated that it would "give your information to the people and companies that help us provide, understand, and improve the services we offer. For example, we may use outside vendors to help host our website, serve photos and videos." (Duffey Decl. Ex. 6 at 15.) Device manufacturers, with which Facebook

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[2] The Court may take judicial notice of these agreements as "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid.Code, § 452, subd. (h).) Courts may take judicial notice of agreements between the parties where the agreement governs the relationship between the parties and the authenticity of the documents is not in dispute. (See *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754.) These versions of Facebook's terms of service and data use policies, all of which have been posted publicly on Facebook's website, and which are capable of ready determination through publicly accessible internet archiving services, are not subject to reasonable dispute. And plaintiffs specifically rely on the terms of these agreements in arguing that Facebook made misrepresentations to Facebook users and in arguing that Facebook failed to comply with the terms of the agreements.

partnered to deliver a Facebook experience on users' mobile devices, are just the kind of companies that "help host our website" to "help [Facebook] provide ... the services [it] offers," as referenced in this disclosure.

Plaintiffs admit that "[w]hen establishing their Facebook accounts, users enter into a contractual agreement with the Company" and "agree to adhere to Facebook's terms of service and other policies." (Compl. ¶ 68(c).) Courts routinely dismiss similar claims where users consented to conduct disclosed in the defendant's terms of service. (*See Smith v. Facebook, Inc.* (9th Cir. 2018) 745 F.App'x 8, 8-9 [holding that a "reasonable person viewing [Facebook's] disclosures would understand" the practices at issue in that case, thereby "constitut[ing] Plaintiffs' consent"]; *In re Yahoo Mail Litig.* (N.D. Cal. 2014) 7 F.Supp.3d 1016, 1028; *Perkins v. LinkedIn Corp.* (N.D. Cal. 2014) 53 F.Supp.3d 1190, 1214.) Because Plaintiffs consented to the data sharing practices outlined in the Complaint, their claims are not viable.

**e. Plaintiffs Fail To Allege Any Other Injury In Fact**

Plaintiffs have not alleged facts to demonstrate any other "injury in fact." Plaintiffs allege that Cambridge Analytica used their data "to help target [Donald Trump's campaign's] messaging." (Compl. ¶ 48.) But they make no effort to explain how or why they were injured by this conduct. Plaintiffs also allege that Facebook shared data with device manufacturers, including Apple, Amazon, BlackBerry, Microsoft, Samsung, and Huawei, and suggest that this posed a "clear danger" because these corporations had "their own agenda in terms of using collected personal data" or, in the case of Huawei, have been suspected of "undue influence by foreign government interests." (Compl. ¶¶ 37-39.) But Plaintiffs do not allege any actual harm as a result of this alleged data-sharing: Plaintiffs do not allege that any of these companies actually misused Facebook user data, let alone Plaintiffs' data. In fact, plaintiffs do not allege *any* facts to show that *they*, as opposed to other Facebook users, were affected by these practices. (*See* Compl. ¶¶ 37-39 [making only general allegations about device manufacturers].) That is insufficient to establish standing.

**3. Plaintiffs Fail To Allege Reliance Or Causation**

"Proposition 64 requires that a plaintiff's economy injury come 'as a result of' the unfair competition or a violation of the false advertising law." (*Kwisket, supra,* 51 Cal.4th at p. 326.) The Supreme Court has read this language to mean that a plaintiff asserting a UCL or FAL claim that is based on misrepresentation or fraud must demonstrate "actual reliance" on the allegedly misleading or false statements. (*Ibid.*; *Tobacco II, supra* 46 Cal.4th at pp. 325 n.17, 328 ["a fraud theory involving false advertising and misrepresentations

to consumers" must allege "actual reliance"].) Because Plaintiffs' claims are "based on a fraud theory involving false advertising and misrepresentations to consumers," (Compl. ¶ 10 ["This action arises from Facebook's repeated misrepresentations to the general public ...."]), the actual reliance requirement applies to all of Plaintiffs' claims.

Plaintiffs have not even attempted to allege reliance, nor could they do so. None of the Plaintiffs alleges that she read or viewed any allegedly misleading statements or materials, much less that she changed her behavior in response to any such statement. Because Plaintiffs have completely failed to allege reliance, they cannot pursue their UCL or FAL claims.

**B. Plaintiffs' Claims Are Time-Barred**

The facts underlying Plaintiffs' claims establish that they are barred by the four-year statute of limitations that applies to UCL and FAL claims. (See Cal. Bus. & Prof. Code § 17208.) Under California law, "a cause of action accrues at the time when the cause of action is complete with all of its elements," and the discovery rule provides a limited exception that "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discovery, the cause of action." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806-807.) This is not a "hypertechnical approach," but rather asks whether "the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." (*Id.* at p. 807.)

In their Complaint, Plaintiffs admit that Facebook, in August 2012, entered into a Consent Decree with the FTC that addressed the same data privacy issues that underlie their claims. (Compl. ¶ 62.) The FTC's November 2011 Complaint—which preceded the Consent Decree and was widely publicized in the national media—put the public on notice that third-party apps on Facebook could access user data via permissions from users' friends, and that users needed to use their App settings to control or limit the sharing of information with apps. (Linsley Decl. Ex. 1 ¶¶ 9, 18.)[3] Plaintiffs did not file this action until July 11, 2018, nearly 6 years after entry of the Consent Decree and nearly 7 years after the FTC's widely publicized Complaint—both of which put the public on notice of the very practices of which Plaintiffs now complain. Accordingly, each of Plaintiffs' causes of action is time-barred.

[3] This Court may take Judicial Notice of the FTC Complaint because it is referenced in plaintiffs' Complaint, it is an "Official act[] of the ... executive ... department[] of the United States" (Evid.Code § 452, subd. (c)), and it is "not reasonably subject to dispute and [is] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (Evid. Code § 452, subd. (h)).

## C. Plaintiffs Fail To Allege A Cause Of Action Under The UCL

Even if Plaintiffs had standing to bring a UCL claim, they do not and cannot allege facts demonstrating that Facebook engaged in any "unlawful," "fraudulent," or "unfair" business practice.

### 1. Plaintiffs Fail To Allege An "Unlawful" Claim

Plaintiffs allege that Facebook engaged in unlawful business practices by violating Plaintiffs' constitutional right to privacy, failing to comply with the California Customer Records Act (Civil Code § 1798.80, *et seq.* ("CCRA")), and breaching the implied covenant of good faith and fair dealing. Plaintiffs do not allege facts sufficient to state an claim under any of these theories.

#### a. California Constitution Article I, Section 1

As shown above, Plaintiffs do not allege facts showing any violation of the constitutional right to privacy because they do not and cannot allege (1) any legally protected privacy interest; (2) facts to identify any personal privacy violation; and (3) a reasonable expectation of privacy that Facebook would not share their data with third-party apps even though Plaintiffs consented to this practice. (See pp. 16-21 *supra.*)

#### b. California Customer Records Act

Nor do Plaintiffs state a violation CCRA, which requires businesses to implement security measures to protect certain types of personal information from illegal hacks and to disclose any relevant breach. (See Civ. Code § 1798.82(b).) Plaintiffs fail to allege that the data disclosed to the thisisyourdigitallife app falls under the narrow statutory definition of "personal information," defined as a consumer's name in combination with a social security number, drivers' license number, or credit card information (Civ. Code § 1798.81.5(d)(1)(A)), or a consumer's email or account information in combination with a password or security code (*id.* § 1798.81.5(d)(1)(B)). Their only specific factual allegation is that the thisisyourdigitallife app collected data about their location, Facebook friends, "liked" content, current city, status updates, photos, and personal interests. (Compl. ¶¶ 42, 45.) They offer not a single fact suggesting that the App collected passwords, security questions, or other information within the statutory definition of "personal information." And although Plaintiffs recite the language of that definition in conclusory terms (*id.* ¶ 68(b)), they nowhere offer specific facts to support that recitation. Nor could they—because, as Plaintiffs well know, it simply is not true: the thisisyourdigitallife app did not request or obtain password or security information from users and none of the many news articles and sources that Plaintiffs cite in their Complaint suggest otherwise.

Finally, Plaintiffs fail to allege that their information was obtained by an "unauthorized person" as

the CRRA requires. (See Civ. Code § 1798.82(a).) As noted, Plaintiffs consented to sharing their data with apps through friends, including the thisisyourdigitallife app, and also consented to the sharing of data with third party entities such as device manufacturers. (*See* pp. 19-21 *supra*.) The apps and device manufacturers that Plaintiffs allege obtained Facebook user data were not "unauthorized person[s]." Nor was there any "breach" of Facebook's security system. (See Civ. Code § 1798.82(a).) The app and other third parties did not breach Facebook's security systems, but rather obtained the data with consent from users and their friends.

**c. Implied Covenant Of Good Faith And Fair Dealing**

Plaintiffs' implied covenant of good faith and fair dealing theory fails. Plaintiffs fail to allege which contract terms Facebook did not satisfy, much less how Facebook's conduct allegedly deprived them of the benefit of a right under such a term. The unadorned allegation that Facebook "interfered with users' right to receive the benefits of the Company's data use policies" (Compl. ¶ 68(c)) is insufficient because it does not identify *which* policies are at issue or how Facebook's conduct deprived them of the benefit of such a policy.

Plaintiffs' implied covenant claim fails because such an alleged violation can form the predicate for a UCL claim only if it also constitutes unlawful, unfair, or fraudulent conduct. (*Puentes v. Wells Fargo Home Mortg., Inc.* (2008) 160 Cal. App. 4th 638, 645; see also *Shrover v. New Cingular Wireless Servs., Inc.* (9th Cir. 2010) 622 F.3d 1035, 1044 ["a common law violation such as breach of contract is insufficient" to state a claim under the unlawful prong]; *Boland, Inc. v. Rolf C. Hagen (USA) Corp.* (E.D. Cal. 2010) 685 F.Supp.2d 1094, 1110 ["A breach of contract, and by extension, a breach of the implied covenant of good faith and fair dealing, is not itself an unlawful act for purposes of the UCL."].) Plaintiffs do not allege how Facebook's alleged breach is independently "unfair, unlawful, or fraudulent" such that it could act as a predicate violation.

Plaintiffs' implied covenant claim also fails because it is a species of contract claim (see *Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 429), and, "[u]nder California law, a breach of contract claim requires a showing of appreciable and actual damage" (*Aguilera v. Pirelli Armstrong Tire Corp.* (9th Cir. 2000) 223 F.3d 1010, 1015). As discussed above, Plaintiffs have failed to allege any appreciable or actual harm, and their implied covenant claim fails on this basis.

Finally, Facebook's challenged practices—allowing third-party apps to request and collect data from users' friends—were expressly disclosed in the Data Use Policy, which was part of Facebook's contract with users. (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 804 [no implied covenant claim where

"the subject is completely covered by the contract."].) Accordingly, Plaintiffs' implied covenant claim fails.

**2. Plaintiffs Fail To Allege A "Fraudulent" Claim**

Plaintiffs also cannot state a UCL cause of action based on a "fraud" theory. As discussed above, Plaintiffs fail to allege "actual reliance"—a necessary element of any "fraudulent" claim under the UCL. (*Tobacco II, supra,* 46 Cal.4th at p. 328.) Plaintiffs also have not alleged, as they must, any specific facts constituting fraudulent or deceptive practices. (*S. Bay Chevrolet v. GM Acceptance Corp.* (1999) 72 Cal.App.4th 861, 888 ["The test is whether *the public* is likely to be deceived."].) As shown, Facebook fully disclosed how users' data could be shared with third-party apps and gave users the option to restrict or turn off sharing with apps. Plaintiffs cannot shown that Facebook's conduct was misleading because Facebook clearly disclosed this practice in its Data Use Policy, to which Plaintiffs agreed. Facebook also disclosed its practice of sharing data with partners such as device manufacturers, so there was no deception there either.

**3. Plaintiffs Fail To Allege An "Unfair" Claim**

Nor can Plaintiffs state a UCL cause of action under an "unfair" theory. Multiple Courts of Appeal have held that, under *Cel-Tech Comm., Inc. v. Los Angeles Cell. Tel. Co.* (1999) 20 Cal.4th 163, an allegedly unfair business practice under the UCL must be "'tethered' to a legislatively declared policy or ha[ve] some actual or threatened impact on competition." (*Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1239-40; *Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 853-854; *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 999.) Although some appellate courts have gone the other way on this point, Facebook submits that this is the better reading of *Cel-Tech* and urges this Court to adopt it. Under that construction, a plaintiff seeking to allege a claim of "unfair" practices must allege that the practice injured competition: injury to individual consumers is not enough. (*Belton, supra,* 151 Cal.App.4th at 1239-40.) Because Plaintiffs have not alleged facts showing that the conduct they allege is "tethered" to a legislatively declared policy or has some actual or threatened impact on competition, their claim fails.

**4. Plaintiffs' UCL Claim Is Barred Because They Have An Adequate Remedy At Law**

Plaintiffs' main theory is that Facebook breached its duties to Plaintiffs under the terms of the contracts to which Plaintiffs agreed when they signed up for Facebook. (Compl. ¶¶ 68-70.) The remedy for such a claimed breach is in contract, not a business tort claim under the UCL and FAL. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1151 [UCL was "never intended" to become an "all-purpose substitute for a tort or contract action"].) "A plaintiff may only seek equitable relief under

California's UCL where she has no adequate remedy at law." (*Moss v. Infinity Ins. Co.* (N.D. Cal. 2016) 197 F.Supp.3d 1191, 1203; *Philips v. Ford Motor Co.* (N.D. Cal. July 7, 2015) 2015 WL 4111448, at *16 ["[T]he UCL provides only the equitable remedies of restitution and injunctive relief. A plaintiff seeking equitable relief in California must establish that there is no adequate remedy at law available."].) "Where ... a plaintiff can seek money damages if she prevails on claims for breach of contract or breach of the implied covenant of good faith and fair dealing, she has an adequate remedy at law." (*Moss, supra,* 197 F.Supp.3d at p. 1203; see also *Gardner v. Safeco Ins. Co. of Am.* (N.D.Cal. June 6, 2014) No. 14–CV–02024–JCS, 2014 WL 2568895, at *7 [dismissing UCL claim where "the money damages available to [plaintiff] in the event he prevails on his claims for breach of contract and breach of the implied covenant of good faith and fair dealing may provide an adequate remedy [at law]]"); *McAdam v. State Nat. Ins. Co.* (S.D.Cal. Sept. 24, 2012) No. 12CV1333 BTM MDD, 2012 WL 4364655, at *3 [UCL claim dismissed where plaintiff "has an adequate legal remedy in the form of his breach of contract claim and does not have a legitimate claim for injunctive relief or restitution"].) Because Plaintiffs have a legal remedy for their contract-based claims, their equitable UCL claims are not appropriate.

**D. Plaintiffs Cannot State A Cause Of Action Under Bus. & Prof. Code § 17500 *et seq.***

Given Facebook's clear disclosures, no reasonable consumer would be deceived by Facebook's public statements regarding how it uses and safeguards user data. Facebook's Terms and Conditions and Statement of Rights and Responsibilities ("SRR") do not guarantee that Facebook will prevent any and all misuse of users' data—in fact, just the opposite. Facebook's Data Use Policy told users that "games, applications and website are created and maintained by other businesses and developers who are not part of, or controlled by, Facebook" (Duffey Decl. Ex. 6 at p. 8), and the SRR stated that a user's "agreement with [an] application will control how the application can use, store, and transfer ... content and information" (Duffey Decl. Ex. 2 at p. 1 [Nov. 15, 2013 SRR].) Consistent with these controls and disclosures, the SRR clearly and unambiguously waived claimed based on third-party conduct. It stated:

> FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OR THIRD PARTIES, AND YOU RELEASE US, OUR DIRECTORS, OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS AND DAMAGES, KNOWN AND UNKNOWN, ARISING OUT OF OR IN ANY WAY CONNECTED WITH ANY CLAIM YOU HAVE AGAINST ANY SUCH THIRD PARTY. (*Id.* at 6.)

Despite these clear provisions, Plaintiffs assert that Facebook falsely "represented ... that it would

protect and not permit the unauthorized transfer or use of personal data"; "that [Facebook] does not share information unless the user grants permission or Facebook provides notice to the user"; and "that [Facebook] investigated suspicious activity or violations of its terms of use or policies." (Compl. ¶ 75.) But Plaintiffs have alleged nothing to suggest that the challenged statements were false or misleading. As shown above, Facebook did not share Plaintiffs' information with the thisisyourdigitallife app without their authorization because Facebook *disclosed* this practice in its Data Use Policy, to which Plaintiffs agreed. Plaintiffs consented to transferring their data to the App and provided Facebook their permission to do so. And, as Plaintiffs admit in their Complaint, Facebook *did* investigate suspicious activity or violations of its terms of use or policies. (Compl. ¶¶ 46-50.) Plaintiffs admit that Facebook removed the thisisyourdigitallife app from the Platform, sent Kogan a formal written notice from its attorneys demanding that Kogan delete all data collected through the app, and sent similar demands to Cambridge Analytica. (*Id.*) Although Plaintiffs assert that Facebook should have done *even more*, it is apparent from their allegations that Facebook did "investigat[e] suspicious activity or violations of our terms or policies" as Plaintiffs allege it promised to do.

The Court is not required to, and should not, accept Plaintiffs "conclusory" allegations as true where they are "inconsistent" with the factual allegations alleged in the complaint and judicially noticeable facts. (*Bank of N.Y. Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th 935, 953.)

Accordingly, there is no deception here, and the Court should sustain the demurrer to Count II.

## V. CONCLUSION

Facebook's demurrers to the Complaint should be sustained and the Complaint should be dismissed.

DATED: April 2, 2019

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By: _____
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