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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN MATEO**

**UNLIMITED JURISDICTION**

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

**PLAINTIFFS' OPPOSITION TO FACEBOOK'S DEMURRER**

**-- Complex Case --**
**Assigned For All Purposes To**
**Hon. Gerald J. Buchwald, Dept. 10**

HEARING DATE: May 17, 2019
HEARING TIME: 9:00 A.M.
LOCATION: DEPT. 10

Complaint Filed: July 11, 2018

Trial Date: None Set

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## I. INTRODUCTION

Despite Facebook's 'kitchen sink' approach to briefing, the complaint before this Court is sufficiently detailed and consistent with California law to overcome Facebook's demurrer. Not one of Facebook's arguments have merit, even considering the extraneous material Facebook references in the demurrer. Accordingly, the demurrer should be overruled, and the case be allowed to proceed to trial.

## II. THE ALLEGATIONS OF THE COMPLAINT

Defendant Facebook, Inc. ("Facebook") is a ubiquitous social-media conglomerate with an annual revenue in excess of ten billion dollars. (See Complaint For Declaratory And Injunctive Relief [hereafter, "Compl."] at ¶¶ 8, 18.) Facebook derives its revenue almost exclusively (98%) from targeting consumer-users like Plaintiffs with ads. (*Ibid.*) This business model is made possible by encouraging users, such as the Plaintiffs, to upload personal and private data to Facebook's platform—which Facebook in turn collects, stores, aggregates and discerns other traits about consumers, and further monetizes. (*Id.* at ¶¶ 19-22.) The type of data Facebook maintains and monetizes is incomprehensibly vast, with over 1,000 categories and 52,000 attributes for each individual user and not necessarily limited to: age, gender, relationship status, familial relationships, contact information, religious affiliation, political party affiliation, birthdate, education, workplace, job titles, GPS location, interests, hobbies, likes, and behaviors. (*Ibid.*) Facebook also tracks and collects data regarding a user's browsing history, app usage, ad interactions, and even information on user purchases, and the private contact information of anyone that user interacts with online since the dawn of the smartphone era. (*Id.* at ¶¶ 35-36.) Every time a user interacts with Facebook in any way, whether it is "liking" a post, interacting with an advertisement, playing a game, writing a friend, sharing links, or utilizing any one of the thousands of third-party apps, Facebook collects and categorizes that data for use and monetization. (*Id.* at ¶¶ 25-26.)

Without the informed consent of users, Facebook shares and allows third-parties to obtain personal private information, all in an effort to assist advertisers and other third-parties of an unknown nature (*i.e.*, Cambridge Analytica in this case). (*Id.* at ¶¶ 20-21.) The number of third-parties gaining access to Facebook's user data is legion (*id.* at ¶ 31) and includes well-known companies that penetrate nearly every facet of a consumer's modern daily life including, *inter alia*, Tinder, Spotify, Uber, Yelp, and Netflix. (*Id.* at ¶¶ 20-21, 31.) These companies and their applications ("apps") also, in turn,

reciprocate by allowing Facebook to collect and sell any data that the third-parties themselves collect. (*Ibid.*) Third-party apps are an indispensable part of Facebook's business model, allowing them to claim an unrivaled market-share dominance, all of which would be impossible without the personal and private data of Facebook's users. (*Id.* at ¶¶ 28-31.) However, Facebook's strategy to prioritize revenue over protection of its users' data privacy has resulted in an unrelenting torrent of stories about data breaches and privacy violations. (See, e.g., *id.* at ¶¶ 37-39, fn. 37, 43-48.) Without obtaining the consent of Facebook users, Facebook knowingly and intentionally allowed third-party app developers, including some companies who are suspected of undue influence by autocratic foreign governments, access to users' private and personal data—despite assurances from Facebook that it would protect users. (*Id.* at ¶¶ 38-39, 51-54.) Even more disturbing, Facebook's agreements with these third-parties allowed them access to the private data of not just the people who used their products, *but those users' Facebook friends and contacts*. (*Id.* at ¶¶ 40-41 [emphasis added].) Cambridge Analytica, through Facebook's willful blindness and an app called "*ThisIsYourDigitalLife*," exploited users and their data (including Plaintiffs') to target and manipulate their voting habits. (*Id.* at ¶ 42.) The app allowed for access to the personal, private (and monetizable) information of almost **87 million users**—despite the fact that those users never authorized the collection or sharing of personal information in this manner. (*Id.* at ¶¶ 43-45.)

This conduct is made more egregious because Facebook has ignored prior consent decrees, made false statements to the public and its users, and entirely failed to protect its users by auditing developers or enforcing its own terms of use or third-party privacy policies. (*Id.* at ¶¶ 59-61.) Facebook has allowed third-parties free reign to plunder the valuable private and personal data of Facebook's users. (*Ibid.*) Further, in a transparent effort to fraudulently conceal their malfeasance, Facebook has repeatedly and falsely assured regulators, the United States Congress, and its users that no private data is inappropriately shared with third-parties without the user's consent and that users have purported "complete control" over who has access to their valuable personal and private data. (*Id.* at ¶¶ 3, 51-58, 68.)

Plaintiffs Leah Ballejos, Audrey Ellis, and Tameika Martin are all Facebook users who learned of Cambridge Analytica's breach of their personal and valuable user data in March 2018 when the situation became public through the publication of an article in the *New York Times*, and when they received notification on their accounts that their data may have been accessed by *ThisIsYourDigitalLife*

without their consent. (*Id.* at ¶¶ 2, 11-13, 76.) Plaintiffs now seek injunctive and declaratory relief only. (See Compl., Prayer for Relief.)

## III. LEGAL STANDARD AND FACEBOOK'S DISGUISED MOTION FOR SUMMARY JUDGMENT

A demurrer raises one issue: whether the complaint states a cause of action under any possible legal theory. (*Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1224.) "[A]ll material facts properly pleaded, however improbable they may be" is "accept[ed] as true for purposes of this proceeding." (*Ibid.*)

Further, Facebook's citation to extrinsic matter must be rejected: "The hearing on demurrer may *not* be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 114 [emphasis added].) Even if notice is taken, "[u]tilizing judicially noticed documents in ruling on a demurrer is only proper when the documents are not used to determine disputed factual issues." (*Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 653-54, 660-61 ["trial court's conclusions...are contrary to the express allegations in the amended complaint. The trial court erred in sustaining respondents' demurrer"].)

## IV. ARGUMENT

### A. Plaintiffs Have Alleged Violations of the UCL

California's Unfair Competition Law ("UCL") (Bus. & Prof. Code, §§ 17200, *et seq.*), protects consumers from unfair business practices, and is "sweeping, embracing anything that can properly be called a business practice and at the same time is forbidden by law." (*Cel-Tech Commc'ns., Inc. v. L.A. Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) The UCL recognizes three independent but interrelated improper acts: unlawful, unfair, and fraudulent conduct. (*Boschma v. Home Loan Center, Inc.* (2011) 129 Cal.Rptr.3d 874.) Each 'prong' provides an independent basis for relief with injunctive relief recognized as the "primary" remedy under the UCL. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 319.) The use of the UCL to obtain a public injunction has been repeatedly and routinely upheld by California's courts. (See, e.g., *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963, 972-74 [requiring a warning to be placed on all ads and products for the next ten years

because the company was liable for false advertising]; *Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304 [granting injunction of "broad public interest"].)

**1. Plaintiffs Have Adequately Alleged Unlawful Conduct**

"Unlawful business acts or practices within the meaning of the UCL include anything that can properly be called a business practice and that at the same time is forbidden by law." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457 [citation omitted].) "By extending to business acts or practices which are 'unlawful,' the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. Even if the violation of another law does not create a private right of action, if the violation constitutes unfair competition, it is actionable." (*Id.* at pp. 1474-75; see also, *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949-50.) The complaint alleges multiple violations of the law.

First, Plaintiffs more than adequately allege a violation of California's constitutional right to privacy by identifying: (i) a legally protected privacy interest in their personal online data; (ii) a reasonable expectation of privacy under these circumstances; and (iii) Facebook's misconduct constituted and resulted in a serious invasion of their privacy. (See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.) While Facebook initially asserts that Plaintiffs' personal data is not "a legally protected privacy interest," but in so claiming, Facebook ignores the copious amount of private and personal information Facebook collects, discerns, and aggregates for each and every user. (See Demurrer at p. 18; compare with, Compl. ¶¶ 19-22 [noting Facebook's collection of data on users includes demographic, location, interest, and behavior information that spans 98 categories and encompasses 52,000 separate attributes, including details such as "income" or "relationship statuses"[1]].) This volume of data about each user's personal life unquestionably falls within the ambit of a legally protected privacy interest. (See, e.g., *Valley Bank of Nev. v. Superior Court* (1975) 15 Cal.3d 652, 656 ["[W]e may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life."]; *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th

[1] Since 2011, Facebook's "relationship status" data indicates a user's sexuality. (Jared Keller, "Facebook Adds Same-Sex Relationship Statuses," *The Atlantic* (Feb. 11, 2011), https://www.theatlantic.com/technology/archive/2011/02/facebook-adds-same-sex-relationship-statuses/71431/

1693, 1701 [agreeing that ""the details of one's personal life," including sexuality, generally fall within a protected zone of privacy."]) Facebook's argument thus cannot be reconciled with well-established case law recognizing the privacy protections for the Plaintiffs' data and "details of one's personal life."

Further, as discussed *infra* in Section IV.E., consent is not a valid defense to overcome the reasonable expectation of privacy in Plaintiffs' and other users' personal data. The complaint also properly alleges a serious violation of privacy. "[T]he "serious invasion" prong is intended only to allow courts to "'weed out claims that involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant.'" (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 1006 [citing *Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 331].) Nothing in Plaintiffs' allegations suggest the privacy violation was "insignificant" or merely "*de minimis*" as Plaintiffs have now identified the enormous scope, volume, and amount of data Facebook has collected on users like Plaintiffs. (Compl. ¶ 7 ["collects, maintains, and monetizes an *unprecedented* amount of personal data" and "has more than *2 billion* monthly users."]; see also, *id.* ¶¶ 44, 59.) These allegations amount to a serious violation. As such, Plaintiffs have pled the requisite factual allegations necessary to demonstrate a violation of California's constitutional right to privacy.

Second, Plaintiffs have also alleged a violation of California's Customer Records Act. Facebook improperly contends that the user data taken by the *ThisIsYourDigitalLife* app and Cambridge Analytica does not fall within the statutory definition of "personal information." (Demurrer at p. 22.) Facebook ignores the expansive definition for "personal information" in the titular section of the statute. (Civ. Code § 1798.80(e) [""Personal information" means any information that identifies, relates to, describes, *or is capable of being associated with, a particular individual*, including, *but not limited to*, his or her name,...physical characteristics or description, address, telephone number,...education, employment, employment history,...or any other financial information"] [emphasis added].) Plaintiffs' allegations include information of this nature (and more) which Facebook has abused. (Compl. ¶¶ 19-22, 45, 49, 59.) Further, contrary to Facebook's claim, this level of exploitation of personal information was never consented to by the Plaintiffs or any other users. (See *id.* ¶¶ 1-3, 5, 35, 45 ["never authorized"].)

Third, Plaintiffs have alleged a valid claim for breach of implied covenant of good faith and fair dealing. Facebook attacks this claim as a sufficient predicate violation under the UCL's unlawful prong by mistakenly relies exclusively on cases that pre-date the California Supreme Court's decision in *Zhang v. Superior Court* (2013) 57 Cal.4th 364. In *Zhang*, the California Supreme Court held that "bad faith" insurance practices satisfied the unlawful prong because the insurer possessed an "obligation to act fairly and in good faith to meet its contractual responsibilities [as] imposed by the common law, as well as statute." (*Id.* at p. 380.) As in *Zhang*, Facebook has acted in bad faith and its conduct amounted to "misinforming" plaintiffs. (*Id.* at p. 383; compare with, Compl. ¶ 10 ["This action arises from Facebook's repeated misrepresentations"]; see, *id.* at ¶¶ 35, 55, 57; see also, *Solution 21 Inc. v. Hiscox Ins. Co.* (C.D.Cal. Mar. 27, 2017, No. 8:17-cv-244-JLS-DFMx) 2017 U.S.Dist.LEXIS 216956, at *9-10 ["The Court therefore concludes that [plaintiff]'s claim of breach of the implied covenant of good faith and fair dealing may serve as a predicate violation for a UCL claim."])

Finally, contrary to Facebook's arguments, Plaintiffs have also identified the bad faith conduct Facebook and its executives perpetrated (Compl. ¶¶ 33-41); alleged the actual harm suffered by Plaintiffs through inadequate protections of its constitutional right to privacy (*id.* ¶¶ 46-50); and Plaintiffs have not consented to this level of sharing and abuse of private information (*infra*, Section IV.E.), as Facebook failed to clearly disclose how data could be accessed and taken by third-parties.

**2. Plaintiffs Have Adequately Alleged Unfair Conduct**

"A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." (*McKell*, 142 Cal.App.4th at p. 1473.) While the parties have noted that "[t]he standard for determining what business acts or practices are "unfair" in consumer actions under the UCL is currently unsettled" (*Zhang,* 57 Cal.4th at 380, fn. 9), courts often favor a balancing test. (See, e.g., *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 718 ["The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim"].) While Facebook argues the Plaintiffs must instead "tether" an unfair UCL action to a legislatively declared

policy (Demurrer at p. 24) adopting this proposed test would be contrary to the intent and broad scope of the UCL. (*Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th 581, 596 ["'tethering' a finding of unfairness to 'specific constitutional, statutory or regulatory provisions' does not comport with the broad scope of section 17200."])

Using the balancing approach, Plaintiffs' allegations demonstrate that the impact upon the alleged victims (Plaintiffs and other Facebook users) is significant (Compl. ¶¶ 7, 18) and cannot be justified by Facebook (*id.* ¶ 10.) In addition, given the motives of the wrongdoer (exploiting consumer privacy interests to augment corporate profits), this consumer action readily satisfies the unfair prong. (*Id.* ¶ 9.) Reviewing the complaint as a whole, the conduct alleged is clearly "immoral, unethical and oppressive." (*People v. Casa Blanca Convalescent Homes* (1984) 159 Cal.App.3d 509, 530.) As alleged, Facebook's conduct exposed a vast amount of their consumers' sensitive, private information, which the consumers (like Plaintiffs) never expected nor agreed to. (Compl. ¶ 45.) Yet, Plaintiffs and the public have never been compensated for their data, and Facebook has continued to make billions of dollars on it. (*Id.* ¶¶ 8, 18.) Accordingly, this prong is adequately pled.

**3. Plaintiffs Have Adequately Alleged Fraudulent Conduct**

Under the "fraudulent conduct" prong, Plaintiffs must show that [the] representations were false or were likely to have misled "reasonable consumers." (*Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1241.) "A fraudulent business practice is one which is likely to deceive the public. It may be based on representations to the public which...may be accurate on some level but will nonetheless tend to mislead or deceive. A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under the UCL." (*McKell*, 142 Cal.App.4th at p. 1471 [citing *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282].) As the California Supreme Court noted: "The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. A common law fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. *None of these elements* are required to state a claim for injunctive relief under the UCL." (*In re Tobacco II Cases*, *supra*, 46 Cal.4th at p. 312 [citations omitted].) "This distinction reflects the UCL's focus on the defendant's conduct, rather than

the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." (*Ibid.* [citing *Fletcher v. Sec. Pac. Nat'l Bank* (1979) 23 Cal.3d 442, 453].) "Reliance is proved by showing that the defendant's misrepresentation or nondisclosure was an immediate cause of the plaintiff's injury-producing conduct." (*In re Tobacco II Cases*, 46 Cal. 4th at p. 326.) Thus, Plaintiffs need not show actual reliance as Facebook claims, but rather the focus is on Facebook's conduct and Plaintiffs need only show that a reasonable consumer would have been misled.

Plaintiffs have adequately alleged facts to support a fraud theory under the UCL. First, Plaintiffs' allegations provide in painstaking detail Facebook's misrepresentations (and omissions) to the public and its users about how their data will be collected and shared (Compl. ¶¶ 51-55), how users could purportedly manage or protect their own data (*id.* ¶¶ 35, 56-57, 58 [noting Facebook CEO's "lies" to Congress]), how Facebook failed to protect users despite ample time and resources to do so (*id.* ¶¶ 59-62), and omissions of how inadequate their privacy protection measures have been. (*Id.* ¶¶ 35-37.) Accordingly, Facebook's deceptive conduct meets the fraudulent prong of the UCL.

**B. Plaintiffs Have Alleged Violations of California's False Advertising Law**

"Section 17500 makes it unlawful for any [entity]...to make or disseminate...before the public...any statement...which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." (*People v. Toomey* (1984) 157 Cal.App.3d 1, 16.) "[A] statement is false or misleading if members of the public are likely to be deceived...The statute affords protection against the probability or likelihood as well as the actuality of deception or confusion.'" (*Ibid.*) Here, similar to Plaintiffs' allegations under the UCL's fraudulent prong, Plaintiffs have alleged Facebook made misleading statements to its users and the public through a misinformation campaign that misled what personal data is shared, how sharing could be limited, what measures were taken to adequately protect users, and how inadequate their privacy protection policies have been and continue to be. (Compl. ¶¶ 35-37, 51-62.)

Facebook contends that it sufficiently disclosed this information to Plaintiffs and to the public and that an exculpatory clause relieves it of liability as a result of third-party actions. (Demurrer at pp. 25-26.) However there is a dispute of a material nature as to whether the privacy violations fell within the Terms of Use's accepted conduct (see, *infra*, Section IV.E.); and whether the exculpatory clause

contradicts Facebook's prior and consistent statements that it would safeguard user's private data. (Compl. ¶¶ 33-35, 53, 61.) Additionally, Facebook's claims that it purportedly complied with the literal interpretation of the Terms of Use (Demurrer at p. 26), is not only disputed, but Facebook fails to account for the fact that under California law, section 17500 encompass statements "which may be accurate on some level, but will nonetheless tend to mislead or deceive." (*Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332-333.) "A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer [such as by providing a false sense of security over personal user data, how it can be managed, or how it would be accessed and shared to third-parties, and], such as by failure to disclose other relevant information, is actionable." (*Id.*) The false advertising law claim is properly pled.

**C. The Complaint Alleges Injury and Standing (Loss of Money or Property)**

Post-Prop. 64, a plaintiff satisfies the standing requirements by showing he or she has "lost money or property." (Bus. & Prof. Code, § 17204.) Facebook now seeks to constrain the "broad power [of this Court] under the UCL to enjoin on-going wrongful business conduct in whatever context such activity might occur" by asserting an extremely narrow interpretation of the standing requirement. (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 230; but see, Demurrer at pp. 15-17.) This argument ignores a clear reminder from the First Appellate District Court of Appeal that the "remedial power" that "the Legislature has given the courts…to prevent [unfair business practices]" is "*extraordinarily broad*." *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1257 [emphasis added].) Thus, Facebook's argument fails for a multitude of reasons.

First, the California Supreme Court has made clear that "innumerable ways" exist in which UCL standing may be satisfied. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 323.) Nothing "purport[s] to define or limit the concept of "lost money or property," nor can or need we [the Court] supply an exhaustive list of the ways" that standing is met. (*Ibid.*) For example, a plaintiff can demonstrate sufficient standing if a property interest was diminished; deprivation of property to which he or she has a cognizable claim; and/or plaintiff will be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. (*Ibid.*) Indeed, even the *potential* for loss in the future when seeking UCL-based injunctive relief is sufficient. (*Lejbman v. Transnational Foods, Inc.* (S.D.Cal. Mar. 12, 2018, No. 17-CV-1317-CAB-MDD) 2018 U.S.Dist.LEXIS 40244, at

*17-19 ["conclud[ing that] Plaintiff has adequately alleged an actual or imminent risk of future harm. Therefore, Plaintiff has standing to seek injunctive relief."]) Here, Plaintiffs' allegations demonstrate not only the risk of ongoing and future harm (Compl. ¶¶ 1, 10), but that Plaintiffs' property interests, which Facebook unquestionably recognizes (see *id.* at ¶ 52 [noting Facebook's own policy language that "you [the user] always own all of your information"]) have been diminished or harmed through improper access of their personal and private data by third-party entities like Cambridge Analytica. (See *id.* at ¶¶ 11-13, 45, 71-72; see also *Law Offices of Mathew Higbee v. Expungement Assistance Services* (2013) 214 Cal.App.4th 544, 561 [holding that, *inter alia*, the "the value of his law practice had diminished, [and therefore] succeeded in alleging at least an identifiable trifle of injury as necessary for standing under the UCL."])

Second, if one has alleged loss money or property, injury-in-fact has been generally established. (*Kwikset*, 51 Cal.4th at p.325 ["proof of lost money or property will largely overlap with proof of injury in fact"].) Plaintiffs here have alleged an invasion of a legally protected interest that is distinct (see *supra*, at Section IV.A.1.; see also, Compl. ¶¶ 19-22, 45) and such an invasion satisfies the injury requirement. (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1346-48 ["invasion of a legally protected interest" satisfied the injury requirement and the "alleged 'injury in fact' and 'lost money' are one and the same."])

Finally, citing mostly inapposite cases or those involving summary judgment, Facebook claims that data abuse—the loss of data and control over personal private information—is not sufficient for standing. However, many courts have found standing and/or loss of property where, as here, the complaint alleges more than just a one-time data breach. (See Compl. ¶¶ 1, 10, 64-65; see also, *In re Anthem, Inc. Data Breach Litig.* (N.D.Cal. May 27, 2016, No. 15-MD-02617-LHK) 2016 U.S.Dist.LEXIS 70594, at *130-31 [allegations of potential acts of fraud involving plaintiffs' personal identifying information ("PII") "could be read to infer that an economic market existed...and that the value of [p]laintiffs' PII decreased as a result of the Anthem data breach"]; *Corona v. Sony Pictures Entm't, Inc.* (C.D.Cal. June 15, 2015, No. 14-CV-09600 RGK (Ex)) 2015 U.S.Dist.LEXIS 85865, at *4-5 [plaintiffs sufficiently pleaded injury where "the[ir] PII was stolen and posted on file-sharing websites for identity thieves to download"]; *Krottner v. Starbucks Corp.* (9th Cir. 2010) 628 F.3d 1139, 1143

[holding that plaintiffs "alleged a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data"]; *Doe 1 v. AOL, LLC* (N.D.Cal. 2010) 719 F.Supp.2d 1102, 1109-11 [holding that plaintiffs were injured by defendant's collection and publication of "highly sensitive personal information," including, *inter alia*, information regarding plaintiffs' personal issues]; *San Luis & Delta-Mendota Water Auth. v. United States DOI* (E.D.Cal. 2012) 905 F.Supp.2d 1158, 1171; *Remijas v. Neiman Marcus Group, LLC* (7th Cir. 2015) 794 F.3d 688, 693 [concluding that where data breach is perpetrated by a sophisticated thief, it is plausible to assume a substantial risk of harm]; *Van Patten v. Vertical Fitness Group, LLC* (9th Cir. 2017) 847 F.3d 1037, 1043 [noting that "[a]ctions to remedy defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts," and finding that the plaintiffs had standing to pursue their privacy claim]; *In re Google Inc.* (3d Cir. 2015) 806 F.3d 125, 134 [noting that "the Supreme Court itself has permitted a plaintiff to bring suit for violations of federal privacy law absent any indication of pecuniary harm," and that the plaintiffs had standing to pursue privacy tort claims arising from the defendant's web tracking activity].)

Indeed, missing from Facebook's demurrer is discussion of a case that survived a similar challenge by Facebook now, which found sufficient loss of money and property based on use of 'likes' without consent of the plaintiffs. (*Fraley v. Facebook, Inc.* (N.D.Cal. 2011) 830 F.Supp.2d 785, 799 ["To the extent Plaintiffs allege they can prove that their endorsement of commercial products to their Facebook Friends has concrete, quantifiable value for which they are entitled to compensation, the Court finds that [p]laintiffs have properly alleged loss of money or property for purposes of establishing standing under the UCL."]) In the present case, Plaintiffs' complaint sets forth the basis for standing and cognizable loss of property and money sufficient to survive the demurrer.

None of the cases cited by Facebook compel a different conclusion as they either involve a determination on summary judgment or are otherwise distinguishable. (See, e.g., *Archer v. United Rentals, Inc.* (2011) 195 Cal.App.4th 807, 816) [summary judgment]; *In re iPhone Application Litig.* (N.D.Cal. Sep. 20, 2011, No. 11-MD-02250-LHK) 2011 U.S.Dist.LEXIS 106865 [allowing leave to amend to allege an injury in conjunction with their data privacy allegations]; *Ruiz v. Gap, Inc.* (N.D.Cal. 2008) 540 F.Supp.2d 1121 [pre-*Kwikset* decision finding at that time that there was a lack of

authority to hold that data theft constituted a UCL violation]; *In re Sony Gaming Networks & Customer Sec. Breach Litig.* (S.D. Cal. 2012) 903 F.Supp.2d 942 [leave to amend to show lost money or property].)

Similarly, Facebook's averments that Plaintiffs' injuries are too speculative should be rejected. Plaintiffs have alleged that they received notice that their data may have been shared with the *ThisIsYourDigitalLife* app. Of course, only *Facebook* and its partners can know for sure whether Plaintiffs' data was or was not improperly accessed. Plaintiffs cannot be forced to allege further without the benefit of any discovery. The cases cited by Facebook involve alleged injuries far more speculative and conjectural than the one here. (*Birdsong v. Apple, Inc.* (9th Cir. 2009) 590 F.3d 955 [plaintiffs failed to allege that they were put at greater risk of hearing loss from allegedly defective headphones]; *Amburgey v. CaremarkPCS Health, L.L.C.* (C.D.Cal. Sep. 21, 2017, No. SACV 17-00183-CJC(KESx)) 2017 U.S.Dist.LEXIS 219019 [plaintiffs failed to allege that drug shipment techniques caused them any harm].) None of these cases concern situations where plaintiffs were directly informed by the defendant that they may have been harmed and then were denied the opportunity to test that harm on a demurrer.

**D. Plaintiffs' Injunctive and Declaratory Relief**

"[T]he primary form of relief available under the UCL to protect consumers from unfair business practices is an *injunction*" and other relief, like restitution, is considered "ancillary." (*In re Tobacco II Cases, supra,* 46 Cal.4th at p. 319.) Courts have consistently made clear that a "trial court has "*broad* power under the UCL to 'enjoin on-going wrongful business conduct *in whatever context* such activity might occur.'" (*Tucker, supra,* 208 Cal.App.4th at p. 230; see also, *JTH Tax,* 212 Cal.App.4th at p. 1257 ["The remedial power granted under [the UCL] is extraordinarily broad. Probably because false advertising and unfair business practices can take many forms, the Legislature has given the courts the power to fashion remedies to prevent their 'use or employment' in whatever context they may occur."])

Facebook now improperly seeks to limit the powers of this Court by arguing that UCL injunctive relief cannot be sought absent an inadequate remedy at law. (Demurrer at pp. 24-25.) Because the equitable powers granted by the Legislature are so broad, "[t]here is no merit to this contention." (*Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432, 453 ["[defendant] claims that [plaintiff] was not entitled to obtain the equitable remedy of injunction where there is an adequate remedy at law. There is no merit to this contention."]) Moreover, Plaintiffs have alleged ongoing risk of harm in the

future (Compl. ¶¶ 1, 10), and contractual remedies will plainly be inadequate to address Plaintiffs' concerns. (See *Thompson v. Transamerica Life Ins. Co.* (C.D.Cal. Dec. 26, 2018, No. 2:18-cv-05422-CAS-GJSx) 2018 U.S.Dist.LEXIS 216312, at *38. ["[D]eclining to find, at this stage, that plaintiff has an adequate remedy at law" and noting the "ongoing current and future harm" to plaintiff].) The equitable and injunctive relief sought herein is proper.

**E. Plaintiffs Did Not 'Consent' To the Data Abuse at Issue Here**

Facebook seeks to overcome the Plaintiffs' reasonable expectation of privacy by incredulously claiming that all Facebook users, including Plaintiffs, have consented to having every iota of its data shared with unknown third-parties. (Demurrer at pp. 18-20.) Not so. First, Facebook relies on and misinterprets *Hill, supra.* (Demurrer at p. 18.) Subsequent decisions by the Supreme Court has clarified that "*Hill* does not stand for the proposition that a person who chooses to [participate,] consents to *any* []measures the [defendant] may choose to impose no matter how intrusive or unnecessary." (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 1001 [italics in original].) Facebook's interpretation of its Terms of Use represents an intrusive and unnecessary expansion of how user data can be shared with third-parties—Plaintiffs would not and could not have consented to such an extreme and invasive measure. Indeed, Plaintiffs have explicitly alleged that no consent whatsoever, express or implied, existed to allow for a third-party like Cambridge Analytica to acquire their personal data in such a manner that would allow for creation of "psychographic profiles" they "never authorized." (Compl. ¶ 45; see also, *id.* at ¶ 11 ["without their consent"].) These allegations are accepted as true at this stage. (*Gervase*, 31 Cal.App.4th at p. 1224.)

Second, mutual consent or assent to Facebook's expansive reading of its terms of service is a "question of fact" inappropriate at the demurrer stage, especially so when "the terms thereof is the point in issue, and the evidence is conflicting or admits of more than one inference...." (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141.) Plaintiffs dispute whether Facebook's Terms of Use accurately and fully described the manner in which users can control information their friends (or unknown other parties) can share about them. As noted in the complaint and Facebook's own submissions, Facebook promises that an application, like the *ThisIsYourDigitalLife* app here, "will be allowed to use [your] information *only in connection with* the person that gave the permission, *and no*

*one else*." (See Duffey Decl. Ex. 6 at pp. 9-10 [Nov. 15, 2013 Data use Policy] [emphasis added].) Yet, Plaintiffs have made allegations that markedly differ: that the *ThisIsYourDigitalLife* app (and third-parties through the app) "had access to much of the information posted by [users that never gave direct permission to the app], including place of residence, status updates, photos, and personal interests." (See Compl. ¶ 45.) Third-parties, like Cambridge Analytica here, in turn used that data for a purpose that was never authorized by the Plaintiffs. (*Ibid.*) Further, Plaintiffs have alleged that Facebook failed to adhere to its own terms and obligations to (1) prevent the sharing of personal information with entities a user did not want, (2) to seek a user's permission before sharing information, and (3) to investigate violations of terms and policies by third-parties to protect the ultimate end-user. (Compl. ¶¶ 51-53.) Thus, at most, it is ambiguous here whether Plaintiffs consented, if at all, to have his or her information shared, and as such the issue cannot be resolved on demurrer. (*Beck Development Co. v. Southern Pacific Transportation Co.*(1996) 44 Cal.App.4th 1160, 1215, fn. 31) ["Together these [contractual] provisions were patently ambiguous with respect to [the issue] and the consent defense could not be resolved on demurrer."])[2] Facebook carries the burden to "plead and prove" the affirmative defense of consent and has failed to do so here. (*Hill*, 7 Cal.4th at p. 40.) A reasonable expectation of privacy existed in the trove of personal and private data Facebook collected and the issue is not one for a demurrer.

**F. Facebook's Statute of Limitations Defense is Without Factual or Legal Support**

Facebook speciously argues that the statute of limitations bars Plaintiffs' claims because of the existence of the FTC Consent Decree in 2012. (Demurrer at p. 21.) Again, not so. First, Facebook's argument runs directly afoul of controlling California Supreme Court authority. (See *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1198 [where conduct at issue is ongoing, the underlying limitations defense is "vitiated").] Further, the privacy violations at issue are *separate* recurring invasions of the *same* right to privacy and thus Plaintiffs' claims did not begin to run until March 2, 2018 at the earliest. (*Ibid.* ["[W]e have long settled that separate, recurring invasions of the same right can each trigger their own statute of limitations."]; see also, Compl. ¶ 2.) Consistent with *Aryeh*, Plaintiffs

[2] The California Supreme Court similarly recognizes that the propriety of a consent defense is ill-suited at the demurrer stage where the record and facts are not developed. (See *Sheehan, supra*, 45 Cal.4th at pp. 1000-01 ["But the validity of the consent theory depends on the totality of the circumstances, which this record does not establish" and holding "Plaintiffs are entitled to proceed with their case"].)

have alleged that Facebook engaged in long-standing, ongoing, and recent violations of Plaintiffs' right to privacy. (Compl. ¶ 10 ["This action arises from Facebook's repeated misrepresentations to the general public and longstanding business practice of not making user privacy a top priority."]) Facebook cannot now invoke a statute of limitations defense for its *current* violation, based on a Consent Decree that addressed (insufficiently) *prior* violations.

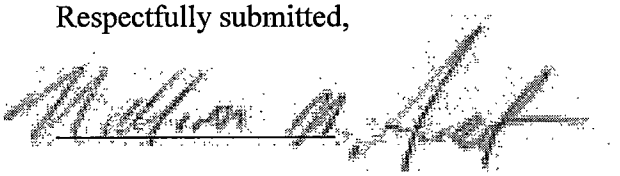
Second, nothing in the Complaint suggests, nor does Facebook assert, that the Plaintiffs were indisputably put on notice as a result of the 2012 FTC Consent Decree. (Demurrer at p. 21.) Facebook did not and cannot demonstrate that the only reasonable conclusion to be drawn is that all Plaintiffs were aware of the 2012 FTC Consent Decree. (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1252 ["[T]he question of when 'a plaintiff reasonably should have discovered facts for purposes of the accrual'" may only be decided "if the undisputed facts do not leave any room for reasonable differences of opinion"] [citation omitted].) Thus, Facebook has plainly failed to carry its burden that the statute of limitations should apply. (*Aryeh*, 55 Cal.4th at p. 1197 [defendant bears the "initial burden"], and resolution of the statute of limitations issue is thus seldom appropriate for the demurrer stage.) (*Rosas v. BASF Corp.* (2015) 236 Cal.App.4th 1378, 1393-94 ["when the limitations period commences is a factual issue"].) Facebook's timeliness argument must be rejected.

## V. CONCLUSION

Facebook's arguments are without merit and the demurrer should be overruled. In the alternative, Plaintiffs request leave to amend.

Dated: May 6, 2019

Respectfully submitted,



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**PROOF OF SERVICE**

At the time of service I was over 18 years of age and not a party to this action. My business address is 711 Van Ness Avenue, Suite 500, San Francisco, California 94102-3275, my email address is hdarling@audetlaw.com, and on May 6, 2019, I served the following specifed document(s) set forth below:

**PLAINTIFFS' OPPOSITION TO DEMURRER**

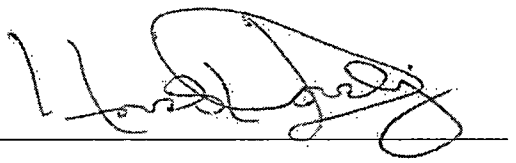
And I served said documents on the person(s) below:

| | |
|---|---|
| Orin Snyder *(pro hac vice forthcoming)*<br>osnyder@gibsondunn.com<br>GIBSON, DUNN & CRUTCHER LLP<br>200 Park Avenue<br>New York, NY 10166-0193<br>Telephone: 212.351.4000<br>Facsimile: 212.351.4035<br><br>*Attorney for Defendant Facebook, Inc.* | Joshua S. Lipshutz (SBN 242557)<br>jlipshutz@gibsondunn.com<br>Kristin A. Linsley (SBN 154148)<br>klinsley@gibsondunn.com<br>Brian M. Lutz (SBN 255976)<br>blutz@gibsondunn.com<br>Katherine Warren Martin (SBN 307403)<br>kwarren@gibsondunn.com<br>GIBSON, DUNN & CRUTCHER LLP<br>555 Mission Street, Suite 3000<br>San Francisco, CA 94105-0921<br>Telephone: 415.393.8200<br><br>*Attorneys for Defendant Facebook, Inc.* |
| Christopher B. Leach<br>cleach@gibsondunn.com<br>GIBSON, DUNN & CRUTCHER LLP<br>1050 Connecticut Avenue, N.W.<br>Washington, D.C. 20036-5306<br>Telephone: 202.955.8228<br><br>*Attorney for Defendant Facebook, Inc.* | |

And the person(s) set forth above were served by the following means of service:

| | |
|---|---|
| ☒ | **BY ELECTRONIC SERVICE.** Pursuant to an agreement between all parties that provides for the electronic service and distribution of documents under CCP § 1010.6, I caused the documents to be sent to the parties and their respective counsel via the electronic addresses associated with all counsel that have appeared in this matter to date. |

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: May 6, 2019 Signature: 

Harold Darling