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12
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SAN MATEO**

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16
17 LEAH BALLEJOS, AUDREY ELLIS, and
18 TAMEIKA MARTIN,

19 Plaintiffs,

20 v.

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

22 Defendants.
23
24
25

CASE NO. 18-CIV-03607

**REPLY IN SUPPORT OF DEMURRER OF
DEFENDANT FACEBOOK, INC.**

Department: 10

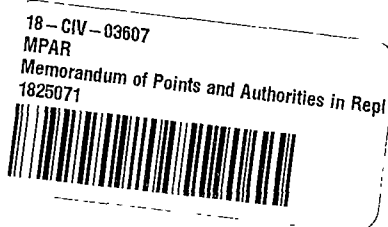
Honorable Judge: Gerald J. Buchwald

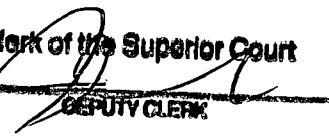
Complaint Filed: July 11, 2018

Hearing Date: May 22, 2019

Hearing Time: 9:00 a.m.

Trial Date: November 4, 2019



FILED
SAN MATEO COUNTY
MAY 15 2019
Clerk of the Superior Court
By 
DEPUTY CLERK

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TABLE OF CONTENTS

Page

I. INTRODUCTION6

II. ARGUMENT7

 A. Plaintiffs Lack UCL Standing.....7

 1. Plaintiffs Do Not Allege Economic Injury7

 2. Plaintiffs Fail To Allege That Their Own Data Was Shared.....8

 3. Plaintiffs Do Not Allege Any Legally Protected Privacy Interest.....9

 4. Plaintiffs Consented To The Alleged Data-Sharing.....9

 5. Plaintiffs Fail To Allege Reliance Or Causation11

 B. Plaintiffs’ Claims Are Time-Barred11

 C. Plaintiffs Have Not Alleged Unlawful, Fraudulent, Or Unfair Conduct12

 D. Plaintiffs Have An Adequate Remedy At Law.....14

 E. Plaintiffs Cannot State A Cause Of Action Under The FAL.....14

III. CONCLUSION.....15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *Allied Grape Growers v. Bronco Wine Co.* (1988)
203 Cal.App.3d 432 14

5 *Amburgey v. CaremarkPCS Health, LLC* (C.D.Cal. Sept. 21, 2017)
2017 WL 7806634 9

6

7 *In re Anthem, Inc. Data Breach Litig.* (N.D.Cal. May 27, 2016)
2016 WL 3029783 8

8

9 *Archer v. United Rentals, Inc.* (2011)
195 Cal.App.4th 807 7

10 *Aryeh v. Canon Bus. Sols., Inc.* (2013)
55 Cal.4th 1185 12

11 *Belton v. Comcast Cable Holdings, LLC* (2007)
151 Cal.App.4th 1224 13

12

13 *Birdsong v. Apple, Inc.* (9th Cir. 2009)
590 F.3d 955 9

14

15 *Buller v. Sutter Health* (2008)
160 Cal.App.4th 981 13

16 *Corona v. Sony Pictures Entm't, Inc.* (C.D.Cal. June 15, 2015)
2015 WL 3916744 8

17 *Day v. AT&T Corp.* (1998)
63 Cal.App.4th 325 15

18

19 *Doe I v. AOL, LLC* (N.D.Cal. 2010)
719 F.Supp.2d 1102 8

20 *Durell v. Sharp Healthcare* (2010)
183 Cal.App.4th 1350 8, 11

21

22 *Fox v. Ethicon Endo-Surgery, Inc.* (2005)
35 Cal.4th 797 12

23 *Fraley v. Facebook, Inc.* (N.D. Cal. 2011)
830 F.Supp.2d 785 8

24

25 *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007)
148 Cal.App.4th 97 10

26 *Gardner v. Safeco Ins. Co.* (N.D.Cal. June 6, 2014)
2014 WL 2568895 14

27

28 *In re Google Inc.* (3d Cir. 2015)
806 F.3d 125 8

1	<i>Graham v. Bank of Am., N.A.</i> (2014) 226 Cal.App.4th 594	11
2		
3	<i>Gregory v. Albertson's, Inc.</i> (2002) 104 Cal.App.4th 845	13
4	<i>Hill v. NCAA</i> (1994) 7 Cal.4th 1	9
5		
6	<i>In re iPhone Application Litig.</i> (N.D.Cal. Sept. 20, 2011) 2011 WL 4403963	7
7	<i>Korea Supply Co. v. Lockheed Martin Corp.</i> (2003) 29 Cal.4th 1134	14
8		
9	<i>Krottner v. Starbucks Corp.</i> (9th Cir. 2010) 628 F.3d 1139	8
10	<i>Kwikset Corp. v. Superior Court</i> (2011) 51 Cal.4th 310	7, 8
11		
12	<i>Littlejohn v. Costco Wholesale Corp.</i> (2018) 25 Cal.App.5th 251, 264	15
13	<i>McAdam v. State Nat'l Ins. Co.</i> (S.D.Cal. Sept. 24, 2012) 2012 WL 4364655	14
14		
15	<i>Melvin v. Reid</i> (1931) 112 Cal.App. 285	9
16	<i>Mendoza v. JPMorgan Chase Bank, N.A.</i> (2016) 6 Cal.App.5th 802, 810	8
17		
18	<i>Mission Oaks Ranch, Ltd. v. Cty. of Santa Barbara</i> (1998) 65 Cal.App.4th 713, <i>disapproved on other grounds by Briggs v. Eden Council for</i> <i>Hope & Opp.</i> (1999) 19 Cal.4th 1106	10
19		
20	<i>Moss v. Infinity Ins. Co.</i> (N.D.Cal. 2016) 197 F.Supp.3d 1191	14
21	<i>People v. Toomey</i> (1984) 157 Cal.App.3d 1	14
22		
23	<i>Perkins v. LinkedIn Corp.</i> (N.D.Cal. 2014) 53 F.Supp.3d 1190	10
24	<i>Philips v. Ford Motor Co.</i> (N.D.Cal. July 7, 2015) 2015 WL 4111448	14
25		
26	<i>Prudential Home Mortg. Co. v. Superior Court</i> (1998) 66 Cal.App.4th 1236	14
27	<i>Remijas v. Neiman Marcus Grp., LLC</i> (7th Cir. 2015) 794 F.3d 688	8
28		

1	<i>Rubenstein v. The Gap, Inc.</i> (2017) 14 Cal.App.5th 870, 877.....	14, 15
2		
3	<i>Ruiz v. Gap, Inc.</i> (N.D.Cal. 2008) 540 F.Supp.2d 1121.....	7
4	<i>Scott v. JPMorgan Chase Bank, N.A.</i> (2013) 214 Cal.App.4th 743.....	13
5		
6	<i>Smith v. Facebook, Inc.</i> (9th Cir. 2018) 745 F.App'x 8.....	9, 10
7	<i>Smith v. State Farm Mut. Auto. Ins. Co.</i> (2001) 93 Cal.App.4th 700.....	13
8		
9	<i>In re Sony Gaming Networks & Customer Data Sec. Breach Litig.</i> (S.D.Cal. 2012) 903 F.Supp.2d 942.....	7, 8
10	<i>Sprinkles v. Assoc. Indem. Corp.</i> (2010) 188 Cal.App.4th 69.....	10
11		
12	<i>In re Tobacco II Cases</i> (2009) 46 Cal.4th 298.....	11
13	<i>Van Patten v. Vertical Fitness Grp., LLC</i> (9th Cir. 2017) 847 F.3d 1037.....	8
14		
15	<i>Weinstat v. Dentsply Int'l, Inc.</i> (2010) 180 Cal.App.4th 1213.....	11
16	<i>In re Yahoo Mail Litig.</i> (N.D.Cal. 2014) 7 F.Supp.3d 1016.....	10
17		
18	Statutes	
19	Bus. & Prof. Code, § 17208.....	11
20	Bus. & Prof. Code, § 17500.....	14
21	Civ. Code, § 1798.81.5.....	12
22	Civ. Code, § 1798.82.....	12
23	Evid. Code, § 452, subd. (h).....	10
24	Other Authorities	
25	4 Witkin, Cal. Proc. 5th Plead. § 431 (2008).....	10
26		
27		
28		

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3
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5
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I. INTRODUCTION

Plaintiffs' opposition brief confirms the many reasons why this case should be dismissed on the pleadings. Plaintiffs still cannot explain how (if at all) they personally used the Facebook platform, what data (if any) is at issue, and what harm (if any) they purport to have suffered. Binding California case law requires dismissal.

No identified harm to Plaintiffs. Plaintiffs make no effort to identify *any* information that they shared on Facebook and that could conceivably give rise to a privacy violation or cause of action. Plaintiffs try to obscure this deficiency by pointing to information that Facebook users *may* share as a *general matter* and that Facebook *may* store or collect, but Plaintiffs cannot bring causes of action based on conduct relating to *other*, unnamed Facebook users who are strangers to this case.

No injury to money of property. Plaintiffs do not identify a single authority to support their theory that the alleged sharing of their personal information satisfies the "lost money or property" standing requirement of the UCL. To the contrary, courts uniformly have held that personal information is not "property" within the meaning of the UCL, and the mere dissemination of personal information cannot confer UCL standing.

No allegation of reliance. Plaintiffs do not dispute that they fail to allege "actual reliance," which the California Supreme Court has held is required (along with other elements) for any fraud-based UCL claim.

Plaintiffs' claims are untimely. Plaintiffs do not dispute that the 2011 FTC complaint against Facebook put them on notice of the conduct about which they complain.

No valid theory under UCL. Plaintiffs have not stated a cause of action under any subpart of the UCL. Their theory of an "unlawful" practice fails because they alleged no facts amounting to a violation of either the constitutional right of privacy, the California Customer Records Act, or the implied covenant of good faith and fair dealing. They cannot allege any "fraudulent" practice because they have failed to plead the elements of a fraud claim, including the necessary element of reliance. And, they cannot plead an "unfair" practice because they allege harm only to consumers and not to competition—an element that, as this Court has previously noted, is required for a UCL "unfairness" claim.

1 No valid theory under FAL. Plaintiffs' FAL claim fails for the same reasons, and for the additional
2 reason that Facebook disclosed all the data sharing practices at issue in the Complaint in the policies that
3 Plaintiffs admit they accepted and to which they admittedly agreed. Facebook's conduct cannot be
4 misleading where Facebook fully disclosed, and Plaintiffs consented to, the complained-of practices. For all
5 these reasons, the Court should sustain the demurrer and dismiss this case.

6 **II. ARGUMENT**

7 **A. Plaintiffs Lack UCL And FAL Standing**

8 **1. Plaintiffs Do Not Allege Economic Injury**

9 Plaintiffs do not dispute that Facebook is a free service and that none of them lost any money as a
10 result of the practices alleged in the Complaint. Lacking any allegation of the actual "economic injury"
11 required for UCL and FAL standing (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 323), Plaintiffs
12 vaguely assert that they had a "property interest" in the Facebook data allegedly shared with third parties.
13 (Opp. at p. 10.) But courts have repeatedly—and unanimously—held that "personal information" is not
14 "property" under the UCL and that allegedly improper sharing of such information does not satisfy the
15 standing requirement of the UCL and the FAL. (See Demurrer at p. 15; *Archer v. United Rentals, Inc.* (2011)
16 195 Cal.App.4th 807, 816 [no UCL standing where plaintiffs "failed to demonstrate how such privacy
17 violation translates into a loss of money or property"]; *In re iPhone Application Litig.* (N.D.Cal. Sept. 20,
18 2011) 2011 WL 4403963, at p. *14 ["Numerous courts have held that a plaintiff's 'personal information'
19 does not constitute money or property under the UCL."]; *In re Sony Gaming Networks & Customer Data*
20 *Sec. Breach Litig.* (S.D.Cal. 2012) 903 F.Supp.2d 942, 966 [no UCL standing because purported "property
21 value in one's information[] do[es] not suffice as injury under the UCL" and plaintiffs used defendant's
22 "services free of cost"]; *Ruiz v. Gap, Inc.* (N.D.Cal. 2008) 540 F.Supp.2d 1121, 1127 [no UCL standing
23 where plaintiff cited no "authority to support the contention that unauthorized release of personal
24 information constitutes a loss of property"].)

25 Unable to escape the holdings of these cases, Plaintiffs focus instead on irrelevant procedural
26 distinctions. They point out that *Archer* was decided on summary judgment rather than demurrer, but do not
27 refute its holding that a privacy violation alone cannot confer UCL standing. And they cannot and do not
28 seriously contest that UCL standing is a threshold issue that the Court can and must assess on a demurrer.

1 (See *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1359–1366 [affirming order sustaining
2 demurrer for lack of UCL standing].) It also is not relevant that *Ruiz* was decided before the Supreme Court’s
3 decision in *Kwikset* (Opp. at pp. 11–12), as *Kwikset* only *confirmed* that “a plaintiff now must demonstrate
4 some form of economic injury” to have UCL standing. (51 Cal.4th at p. 323.)

5 Not one of Plaintiffs’ own citations (see Opp. pp. 10–11) supports their “property interest” theory.
6 Most of these cases relate to fraud and identity theft—*i.e.*, real, financial harm—arising out of data breaches
7 (see *In re Anthem, Inc. Data Breach Litig.* (N.D.Cal. May 27, 2016) 2016 WL 3029783, at p. *15; *Corona v.*
8 *Sony Pictures Entm’t, Inc.* (C.D.Cal. June 15, 2015) 2015 WL 3916744, at p. *3; *Krottner v. Starbucks Corp.*
9 (9th Cir. 2010) 628 F.3d 1139, 1143; *Remijas v. Neiman Marcus Grp., LLC* (7th Cir. 2015) 794 F.3d 688,
10 693), or paid services (see *Doe I v. AOL, LLC* (N.D.Cal. 2010) 719 F.Supp.2d 1102, 1109–1111.)
11 Similarly, in *Fraley v. Facebook, Inc.* (N.D. Cal. 2011) 830 F.Supp.2d 785, the court found standing only
12 because the plaintiffs alleged that they suffered economic injury from “failure to compensate them for
13 their valuable endorsement of third-party products and services.” (*Id.* at p. 811.) Plaintiffs here, by
14 contrast, allege no facts to suggest that Facebook’s actions threatened them with identity theft or fraud,
15 deprived them of the benefit of their bargain, or denied them compensation owed—again, Facebook is
16 *free*. (See *In re Sony, supra*, 903 F.Supp.2d at p. 966.)¹ Lacking economic injury, Plaintiffs cannot allege
17 UCL standing. The Court should sustain Facebook’s demurrer on that basis alone.

18 2. Plaintiffs Fail To Allege That Their Own Data Was Shared

19 Plaintiffs concede that their data may not have been shared with the thisisyourdigitallife app at all
20 (Opp. p. 12.)—a fact that would eliminate even the possibility of any claim of injury, even if data-sharing
21 were sufficient to establish standing in the first instance. Plaintiffs may not, as they suggest, file a
22 complaint without facts to establish standing so that they can take discovery to determine if their data was
23 “improperly accessed” (*ibid.*)—rather, they have “the burden to allege and establish standing” in the first
24 instance. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810 [affirming order
25 sustaining demurrer].) Indeed, courts routinely dismiss claims asserting similarly speculative harms for
26

27
28 ¹ Plaintiffs also cite *Van Patten v. Vertical Fitness Grp., LLC* (9th Cir. 2017) 847 F.3d 1037, and *In re Google Inc.* (3d Cir. 2015) 806 F.3d 125, but those cases actually *dismissed* UCL claims for lack of standing.

1 failure to meet the standing requirement of the UCL. (See Demurrer at p. 17; *Birdsong v. Apple, Inc.* (9th
2 Cir. 2009) 590 F.3d 955, 961; *Amburgey v. CaremarkPCS Health, LLC* (C.D.Cal. Sept. 21, 2017) 2017
3 WL 7806634, at p. *3.) Plaintiffs’ allegations that their data “*may have been* accessed by the App”
4 (Compl. ¶¶ 11–13, italics added) are nearly identical to the speculative claims in these cases. (See
5 *Birdsong*, 590 F.3d at 961 [“consumers ‘may’ listen to their iPods at unsafe levels” causing hearing loss];
6 *Amburgey*, 2017 WL 7806634, at p. *3 [drugs that Plaintiffs had purchased “may have” been damaged
7 from being stored at unsafe temperatures].) Indeed, Plaintiffs’ claims are even more speculative than the
8 harms alleged in these cases because Plaintiffs fail to explain or identify what substantive harm, if any,
9 they have suffered as a result of the possible sharing of their data. (Compl. ¶¶ 11–13.)

10 **3. Plaintiffs Do Not Allege Any Legally Protected Privacy Interest**

11 Plaintiffs assert they have a privacy interest in the data disclosed to the thisisyourdigitallife app
12 because Facebook allegedly collects or infers information about each user’s “personal life” for its own
13 internal use such as for targeting ads. (Opp. at p. 4.) This argument fails for two key reasons. First,
14 Plaintiffs have not alleged that any such data was actually collected about them and disclosed to the
15 thisisyourdigitallife app—nor could they, as that app had access only to limited categories of largely public
16 data. (See Compl. ¶ 45 [alleging that the app collected data such as “place of residence, status updates,
17 photos, and personal interests”].) Second, categories of information that Facebook may infer about *users*
18 *generally* does not address what, if any, information *Plaintiffs themselves* shared with Facebook or if any
19 such information was sensitive and confidential. Plaintiffs do not have a legally protected privacy interest
20 in general categories of information that Facebook may or may not have on *other users*. (See *Hill v. NCAA*
21 (1994) 7 Cal.4th 1, 5 [California constitution protects only “the dissemination or misuse of *sensitive* and
22 *confidential* information”].) Because Plaintiffs do not allege that any of their own “sensitive and
23 confidential” data was actually shared, they cannot establish any privacy violation. (See Demurrer at p. 17;
24 *Melvin v. Reid* (1931) 112 Cal.App. 285, 290 [“There can be no privacy in that which is already public.”].)

25 **4. Plaintiffs Consented To The Alleged Data-Sharing**

26 Plaintiffs’ claims fail for the additional reason that Plaintiffs consented to the exact practices at issue
27 in their Complaint. (See Demurrer at pp. 18–20; *Hill, supra*, 7 Cal.4th at p. 26 [plaintiff that manifests “a
28 voluntary consent” does not suffer a privacy injury]; *Smith v. Facebook, Inc.* (9th Cir. 2018) 745 F.App’x 8,

1 8–9 [a “reasonable person viewing [Facebook’s] disclosures would understand” its data sharing practices,
2 thereby “constitut[ing] Plaintiffs’ consent”].) Here, Plaintiffs do not dispute that Facebook disclosed that
3 apps could access information about users and their friends in its Data Use Policy. Nor do they dispute that
4 by agreeing to Facebook’s terms and policies, Plaintiffs consented to these data sharing practices. (See
5 *Smith, supra*, 745 F.App’x at pp. 8–9.) Instead, they label these facts “extrinsic matter” and ask the Court
6 to ignore them. (Opp. at p. 3.) But all of the documents Facebook cites are judicially noticeable
7 because there is no dispute over their authenticity or “accuracy.” (Evid. Code, § 452, subd. (h); cf.
8 *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 114.) Indeed, Plaintiffs
9 themselves incorporated them by reference into their Complaint. (See Compl. ¶ 17 [Terms of Service],
10 ¶ 52 [Nov. 15, 2013 Data Use Policy], ¶ 53 [Jan. 30, 2015 Data Use Policy], ¶ 54 [Sept. 29, 2016 Data
11 Use Policy].) Plaintiffs may not rely on documents to support their claims (see Compl. ¶ 69(c)) but at
12 the same time prevent Facebook from citing those same documents in its demurrer. (*Mission Oaks
13 Ranch, Ltd. v. Cty. of Santa Barbara* (1998) 65 Cal.App.4th 713, 720–721 [plaintiffs may not
14 mischaracterize contracts on which they rely], *disapproved on other grounds by Briggs v. Eden Council
15 for Hope & Opp.* (1999) 19 Cal.4th 1106, 1123, fn. 10; 4 Witkin, Cal. Proc. 5th Plead. § 431 (2008).)

16 Nor is Plaintiffs’ consent a “question of fact” inappropriate for the demurrer stage. (Opp. at p. 13.)
17 Plaintiffs admit that they entered into contracts with Facebook and “agree[d] to adhere to Facebook’s terms
18 of service and other policies” (Compl. ¶ 68(c)). This constitutes consent *as a matter of law*. (See *Sprinkles
19 v. Assoc. Indem. Corp.* (2010) 188 Cal.App.4th 69, 76 [“When the facts are undisputed, as they are deemed
20 to be in connection with a demurrer, the interpretation of a contract, including the resolution of any ambiguity,
21 is a question of law.”]; see also *Smith, supra*, 745 F.App’x at pp. 8–9 [affirming order dismissing complaint
22 where “the practice complained of falls within the scope of Plaintiffs’ consent to Facebook’s Terms and
23 Policies”]; *In re Yahoo Mail Litig.* (N.D.Cal. 2014) 7 F.Supp.3d 1016, 1028 [granting motion to dismiss
24 where terms of service “establishe[d] explicit consent”]; *Perkins v. LinkedIn Corp.* (N.D.Cal. 2014) 53
25 F.Supp.3d 1190, 1214 [granting motion to dismiss where “a reasonable user ... consented to the collection
26 of email addresses”].)

27 Finally, Plaintiffs argue that they did not consent to Facebook’s data-sharing practices because the
28 thisisyourdigitallife app and Cambridge Analytica misused Facebook user data. (Opp. at pp. 13–14.) But the

1 misconduct of these third parties, which Facebook does not operate or control, has no bearing on whether
2 Plaintiffs consented to *Facebook* sharing their data in the first instance. Plaintiffs do not dispute that if their
3 information was shared pursuant to Facebook’s terms (and they have not alleged otherwise), they consented
4 to that sharing, including with the *thisisyourdigitallife* app and other third parties, like device manufacturers,
5 by agreeing to Facebook’s policies.

6 **5. Plaintiffs Fail To Allege Reliance Or Causation**

7 Plaintiffs concede that their Complaint contains no allegation of “actual reliance,” asserting instead
8 that reliance is unnecessary. (Opp. at p. 8.) That is not the law. As the California Supreme Court has
9 explicitly held, a plaintiff “must plead and prove *actual reliance* to satisfy the standing requirement of [the
10 UCL].” (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 328, italics added; see *Durell, supra*, 183 Cal.App.4th
11 at p. 1355 [“[A] consumer suing a business under the ‘fraud’ prong of the UCL must show actual reliance on
12 the alleged misrepresentation, rather than a mere factual nexus between the business’s conduct and the
13 consumer’s injury.”]; *Weinstat v. Dentsply Int’l, Inc.* (2010) 180 Cal.App.4th 1213, 1222 [same]; *Graham*
14 *v. Bank of Am., N.A.* (2014) 226 Cal.App.4th 594, 614 [affirming order sustaining demurrer without leave to
15 amend where plaintiff failed to plead actual reliance].) Plaintiffs also cannot rely on *Tobacco II*’s observation
16 that “individualized reliance on specific misrepresentations” is not required where “those misrepresentations
17 ... were part of an extensive and long-term advertising campaign” (46 Cal.4th at p. 328), for the simple reason
18 that their Complaint alleges no such long-term advertising campaign. This Court should reject Plaintiff’s
19 invitation to error.

20 * * *

21 In sum, Plaintiffs lack standing to assert their UCL and FAL claims for a host of independent
22 reasons. They fail to allege the requisite loss of money or property, fail to allege anything about their
23 own data on Facebook’s platform—such as whether it was private, sensitive, or even shared at all—and
24 fail to allege reliance or causation. In any event, they consented to the actions about which they
25 complain. The Court should sustain Facebook’s demurrer for any one of these reasons.

26 **B. Plaintiffs’ Claims Are Time-Barred**

27 Plaintiffs concede that they were on notice of Facebook’s alleged conduct as early as 2011, providing
28 yet another independent basis to sustain Facebook’s demurrer. (Demurrer at p. 21; see Opp. at p. 21 [arguing

1 Plaintiffs were not “indisputably put on notice as a result of the 2012 FTC Consent Decree” but silent as to
2 2011 FTC Complaint]; Bus. & Prof. Code, § 17208; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th
3 797, 807.) Plaintiffs invoke the continuing violation doctrine, “which posits that a cause of action challenging
4 a recurring wrong may accrue not once but each time a new wrong is committed.” (*Aryeh v. Canon Bus. Sols.,*
5 *Inc.* (2013) 55 Cal.4th 1185, 1189.) But *Aryeh*—the only case Plaintiffs cite in support—involved “unfair
6 charges in monthly bills” that resulted in “recurring breaches.” (*Ibid.*) Plaintiffs here, by contrast, identify no
7 examples of how they personally were subject to “separate, recurring invasions of the same right.” (*Id.* at
8 p. 1198.) In fact, Plaintiffs allege *nothing* about their use of Facebook, including whether they ever shared *any*
9 information on the platform, such that it was even possible for Facebook to violate their privacy rights.

10 **C. Plaintiffs Have Not Alleged Unlawful, Fraudulent, Or Unfair Conduct**

11 **1. Unlawful Practices.** Plaintiffs have no cause of action under the UCL’s “unlawful” provision
12 because each of their three predicate claims—constitutional privacy, California Customer Records Act
13 (“CCRA”), and implied covenant of good faith and fair dealing—fails.

14 *First*, as shown above, Plaintiffs fail to allege any legally protected privacy interest or invasion of
15 their own privacy. Their inability to plead any such interest or injury dooms their constitutional privacy
16 claim.

17 *Second*, Plaintiffs cannot establish the elements of a CCRA violation because the information
18 disclosed to Kogan’s app and Cambridge Analytica does not qualify as “personal information” under that
19 statute. Plaintiffs’ arguments to the contrary rely mistakenly on the CCRA’s titular section rather than the
20 specific definitions of “personal information” that define Facebook’s potential obligations under the CCRA.
21 (See Civ. Code, § 1798.81.5(d)(1) [setting definition of “personal information” for section regarding
22 business’s obligations to protect customer information]; *id.* § 1798.82(h) [setting definition of “personal
23 information” for section regarding business’s obligations to notify customers of a data breach containing
24 customer information].) Plaintiffs do not dispute that they have failed to allege disclosure of data meeting
25 the applicable definition of “personal information” in §§ 1798.81.5 and 1798.82. Further, although Plaintiffs
26 claim that they did not consent to the “exploitation of [their] personal information,” as Facebook’s terms of
27 service and Data Use Policies make clear, Plaintiffs did consent to *sharing* their data with the
28

1 thisisyourdigitallife app and other third parties, such as device manufacturers. For these reasons, Plaintiffs
2 have failed to identify any “unauthorized person” that Facebook improperly allowed to obtain Plaintiffs’ data.

3 *Third*, Plaintiffs do not dispute that an implied covenant claim can serve as a predicate for a claim
4 under Section 17200’s “unlawful” prong only if it independently constitutes “unlawful, unfair, or fraudulent
5 conduct.” They assert that their claim against Facebook meets this standard because they have alleged “bad
6 faith” conduct based on Facebook’s “repeated misrepresentations.” (Opp. at p. 6.) But, to the extent this
7 claim is rooted in fraud or misrepresentations, Plaintiffs must plead actual reliance, which they have not done.

8 **2. *Fraudulent Practices.*** Plaintiffs fail to state a claim for any fraudulent practice under the UCL
9 because they have failed to allege the necessary element of “actual reliance,” as shown above. Nor do
10 Plaintiffs allege, as they must, facts indicating that Facebook’s conduct is likely to deceive reasonable
11 members of the public. (See *S. Bay Chevrolet v. GM Acceptance Corp.* (1999) 72 Cal.App.4th 861, 888
12 [“The test is whether *the public* is likely to be deceived.”]) Facebook fully disclosed its data sharing practices
13 to users and Plaintiffs consented to these practices by accepting and agreeing to abide by Facebook’s terms.
14 (See, supra pp. 9-11.) Facebook’s conduct cannot be misleading where it fully disclosed the relevant conduct
15 and Plaintiffs consented to the complained-of practices. Further, Plaintiffs’ allegations do not come close to
16 meeting the specificity requirement for fraud claims. (See *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214
17 Cal.App.4th 743, 765.) Plaintiffs must “allege with particularity who made the [allegedly fraudulent]
18 statements, when they were made, what was actually stated, or why they were false,” but have failed to do
19 so. (*Ibid.*) That they have not done so further dooms their fraud-based claims.

20 **3. *Unfair Practices.*** Plaintiffs have not alleged “unfair” practices because they have not alleged any
21 harm to competition. (*Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1239–1240;
22 see also *Gregory v. Albertson’s, Inc.* (2002) 104 Cal.App.4th 845, 853–854; *Buller v. Sutter Health* (2008)
23 160 Cal.App.4th 981, 999.) Plaintiffs argue that the Court should ignore these cases and instead follow a line
24 of cases favoring a balancing test weighing the practice’s “impact on its alleged victim ... against the reasons,
25 justifications and motives of the alleged wrongdoer.” (Opp. at p. 6; *Smith v. State Farm Mut. Auto. Ins. Co.*
26 (2001) 93 Cal.App.4th 700, 718.) But the better reading of *Cel-Tech* is that adopted in the first line of cases,
27 as this Court has recognized, such that Plaintiffs must show a harm to competition. (March 3, 2019 Hearing
28

1 Transcript 61:2-4 [“the pleading requirement for the plaintiff is to allege and then later prove an injury to
2 competition in itself”].) Plaintiffs do not dispute that they have not alleged, and cannot allege, any such harm.

3 **D. Plaintiffs Have An Adequate Remedy At Law**

4 Plaintiffs do not dispute that the UCL was “never intended” to become an “all-purpose substitute
5 for a tort or contract claim.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1151.)
6 Nor do they dispute that their claims against Facebook arise from the contracts governing their relationship
7 with Facebook. (See Demurrer at p. 25.) And Plaintiffs make no effort to distinguish the cases Facebook
8 cited in its demurrer holding that they “may only seek equitable relief under California’s UCL where
9 [they] ha[ve] no adequate remedy at law.” (*Moss v. Infinity Ins. Co.* (N.D.Cal. 2016) 197 F.Supp.3d 1191,
10 1203; accord *Philips v. Ford Motor Co.* (N.D.Cal. July 7, 2015) 2015 WL 4111448, at p. *16; *Gardner*
11 *v. Safeco Ins. Co.* (N.D.Cal. June 6, 2014) 2014 WL 2568895, at p. *7; *McAdam v. State Nat’l Ins. Co.*
12 (S.D.Cal. Sept. 24, 2012) 2012 WL 4364655, at *3.) Finally, Plaintiffs’ reliance on *Allied Grape Growers*
13 *v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432, 453 is misplaced. Not only does that decision pre-date
14 the persuasive holdings in *Moss*, *Philips*, *Gardner*, and *McAdam*, but the Court of Appeal more recently
15 confirmed that the adequacy of statutory remedies “preclud[es] equitable relief under the Business and
16 Professions Code.” (*Prudential Home Mortg. Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1250.)
17 Because Plaintiffs could seek a legal remedy for their alleged injuries under contract, their equitable claims
18 are inappropriate.

19 **E. Plaintiffs Cannot State A Cause Of Action Under The FAL**

20 The FAL requires an “untrue or misleading” statement (Bus. & Prof. Code, § 17500) that would be
21 likely to deceive a “reasonable consumer” (*Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 877). As
22 explained in Facebook’s Demurrer (at pp. 25–26), and as discussed above (at p. 13) Plaintiffs’ complaint
23 alleges no such thing.

24 The two cases Plaintiffs cite in support of their FAL claim are distinguishable. In *People v. Toomey*
25 (1984) 157 Cal.App.3d 1, the defendant sold coupons without disclosing “conditions and restrictions” on the
26 use of those coupons, which consumers could review only after purchasing the coupons. The Court of Appeal
27 found that the practice violated the FAL because the “failure . . . to disclose conditions and limitations on the
28 nature and value of the product” constituted a “false or misleading statement.” (*Id.* at p. *17.) Here,

1 Facebook, *did* disclose conditions and limitations on users' use of Facebook's services (including that their
2 data may be shared with third parties), and users were instructed and encouraged to review those disclosures
3 prior to signing up for a Facebook account. (See Demurrer at pp. 25–26.)

4 Similarly, in *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, the complaint alleged that AT&T sold
5 prepaid phone cards in packaging that did not disclose that AT&T rounded up calls to the nearest minute.
6 The Court of Appeal found that the complaint stated a claim under the FAL because the “phone cards ... ,
7 whose outer packagings do not reveal the practice of rounding up, are *prepaid*. A consumer cannot read any
8 materials provided by the carrier with the card *before* buying the card, which will advise him or her of the
9 practice.” (*Id.* at p. 334.) Thus, the consumer could not know about the undisclosed rounding up “until the
10 card has been used.” (*Ibid.*) This case presents the opposite scenario—Plaintiffs used a *free* service only
11 *after* receiving Facebook's disclosures and agreeing to its terms. Plaintiffs make no effort to explain how
12 Facebook's disclosures “may be accurate on some level, but will nonetheless tend to mislead or deceive.”
13 (Opp. at p. 9, quoting *Day, supra*, 63 Cal.App.4th at pp. 333–334.)


14 Here, where Facebook plainly disclosed the conduct about which Plaintiffs complain, the Court
15 should sustain the demurrer without leave to amend. (*Littlejohn v. Costco Wholesale Corp.* (2018) 25
16 Cal.App.5th 251, 264 [affirming order sustaining demurrer without leave to amend]; *Rubenstein, supra*, 14
17 Cal.App.5th at p. 403 [same].)

18 **III. CONCLUSION**

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

20
21 DATED: May 15, 2019

GIBSON, DUNN & CRUTCHER LLP

22
23 By: 
24 Kristin A. Linsley

25 *Attorneys for Plaintiff Facebook, Inc.*

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DECLARATION OF SERVICE

I, Susanne Hoang, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, California 94105, in said County and State. On the date indicated below, I served the within:

REPLY IN SUPPORT OF DEMURRER OF DEFENDANT FACEBOOK, INC.

by placing a true and correct copy thereof in an envelope addressed to each of the persons named below at the address shown, in the manner described below:

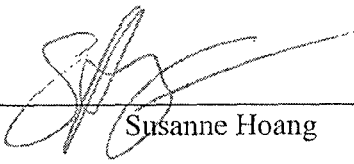
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- BY ELECTRONIC MAIL:** On the date shown below, true copy PDF version of the above-referenced document(s) were e-mailed to the e-mail address(es) of each party indicated on the service list.

- BY MAIL:** I placed a true and correct copy in a sealed envelope addressed as indicated above, on the date shown below. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document was printed on recycled paper, and that this Certificate of Service was executed by me on May 15, 2019, at San Francisco, California.



Susanne Hoang