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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ANGEL FRALEY; PAUL WANG; SUSAN MAINZER; JAMES H. DUVAL, a minor, by and through JAMES DUVAL, as Guardian ad Litem; and WILLIAM TAIT, a minor, by and through RUSSELL TAIT, as guardian ad Litem; individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FACEBOOK, INC, a corporation; and DOES 1-100,

Defendants.

Case No. 11-CV-01726 LHK (PSG)

FACEBOOK, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED CLASS ACTION COMPLAINT

F.R.C.P. 12(b)(1), 12(b)(6)

Date: September 29, 2011
Time: 1:30 p.m.
Courtroom: 4
Judge: Hon. Lucy H. Koh
Trial date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs' Opposition makes clear that their claims are based on what they think the law should be, rather than what the law actually is. For example, Plaintiffs assert that they have been injured and are entitled to relief under Section 3344 because Facebook made money republishing content Plaintiffs voluntarily shared with their Facebook Friends. But the authorities uniformly hold that a defendant's gain does *not* establish a plaintiff's harm. Plaintiffs also claim that both *Cohen v. Facebook* and one of the Section 3344 decisions it relies upon were wrongly decided and should not be followed; but Plaintiffs' Opposition reveals that they fundamentally misunderstand the purpose of Section 3344, and the authorities Plaintiffs cite contradict, rather than support, their arguments. With respect to the Communications Decency Act, Plaintiffs claim that Facebook's addition of a logo and relocation of their statements (from the center column of their Friends' Facebook pages to the right column of their Friends' Facebook pages) makes Facebook a "content provider;" but Plaintiffs ignore the many decisions holding that a publisher may "edit," "alter," or "increas[e] the visibility" of third-party content and retain CDA § 230 immunity as long as the "basic form and message" of the content is intact.

In the end, Plaintiffs' Opposition is long on rhetoric, but short on legal support. Facebook's motion to dismiss should be granted.

II. ARGUMENT

A. Facebook's Alleged Economic Gain is Not an "Injury In Fact" to Plaintiffs.

Article III requires an injury in fact. *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990). Plaintiffs claim to have standing because Facebook violated Section 3344 and the UCL, depriving Plaintiffs of $750 in statutory damages under Section 3344 and "monies for the endorsement of products and companies . . . ." (Opp'n at 5-6.) Plaintiffs' bid for standing fails because: (1) a statutory violation without actual harm does not confer standing and (2) even if it did, as discussed below, Plaintiffs have failed to state a claim under Section 3344 or the UCL.

"[I]njury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). "[T]he mere allegation of a violation of a California statutory right, without more, does not confer Article III standing . . .

[and a] plaintiff invoking federal jurisdiction must also allege some actual or imminent injury resulting from the violation . . . ." *Lee v. Chase Manhattan Bank*, No. C07-04732 MJJ, 2008 WL 698482, at *5 (N.D. Cal. Mar. 14, 2008); *see also* Mot. at 9-10 (citing cases). Plaintiffs do not claim that they ever could have been paid for the use of their names and likenesses absent Facebook's alleged conduct, or that Facebook lessened the value of their names and likenesses. Plaintiffs also do not allege that the display of these items (to their Friends) next to statements they ***previously shared with those very same Friends*** caused them emotional harm.[1] Instead, Plaintiffs' claim of injury in fact distills to this: because Facebook allegedly earned money by republishing Plaintiffs' statements to their Friends, Plaintiffs are entitled to get that money. As Plaintiffs put it, "being deprived of the economic value of these 'endorsements' is injury." (Opp'n at 8.) As discussed in Facebook's Motion, and below, this is simply not the law. A ruling sustaining this never-before-recognized theory of injury would *contradict* numerous authorities, including Judge Seeborg's rejection of this very theory of injury. (*See infra* Part II(B).)

Additionally, the Supreme Court's recent grant of a Writ of Certiorari in *Edwards v. First Am. Fin. Corp.*, 610 F.3d 514 (9th Cir. 2010), draws into question the line of cases Plaintiffs cite for the proposition that *properly pled* allegations of statutory violations[2] can satisfy Article III standing requirements. *E.g.*, *Fulfillment Services Inc. v. UPS, Inc.*, 528 F.3d 614 (9th Cir. 2008) (relied upon in *Edwards*). The Court granted certiorari to review whether plaintiffs alleging a statutory violation without a clear showing that they were personally injured can have standing. *See First Am. Fin. Corp. v. Edwards*, No. 10-708, --- S. Ct. ---, 2011 WL 2437037 (U.S. June 20, 2011) (referring to the petition for certiorari available at 2010 WL 4876485).

B. Facebook's Alleged Benefit is Not a Cognizable Injury Under Section 3344.

Establishing "injury" is an element of a Section 3344 claim. *See* Civil Code § 3344(a) (using the word "injured" four times); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir.

[1] Plaintiffs' lawyers' assurances that Plaintiffs can allege emotional harm (Opp'n. at 11 n.9), are legally meaningless.

[2] As discussed in Sections II(B) and (F), Plaintiffs' claims are not *properly pled* because Plaintiffs have not met the actual injury requirements in the relevant statutes. (*See also* Mot. at 10.)

1998). Plaintiffs' novel theory of injury—because Facebook derived a benefit, Plaintiffs were injured—is contrary to the law and would radically expand the scope of Section 3344.

In *In re Doubleclick Inc. Privacy Litigation*, plaintiffs alleged that they were injured by misappropriation of their personal information, including their "names, e-mail addresses, home and business addresses, [and] telephone numbers." 154 F. Supp. 2d 497, 503 (S.D.N.Y. 2001). They argued that because advertisers paid the defendant for this information, that value "must, in some part, have rightfully belonged to plaintiffs."[3] *Id.* at 525. The district court disagreed, noting that "although demographic information is valued highly (as Doubleclick undoubtedly believed when it paid over one billion dollars for [the database of information])," that value "has never been considered a[n] economic loss to the subject." *Id*. Likewise, in *LaCourt v. Specific Media, Inc.*, despite the plaintiffs' allegation that their personal information had "discernable value [] to [the d]efendant," the court found no injury in fact where the plaintiffs failed to allege that they: (1) "ascribed an economic value" to their personal information, (2) attempted a value-for-value exchange of it, or (3) were deprived of its value. No. SACV 10-1256-GW(JCGx), 2011 WL 1661532, at *2, *4-5 (C.D. Cal. Apr. 28, 2011). *Many* courts have reached the same conclusion. *Folgelstrom v. Lamps Plus, Inc*., 195 Cal. App. 4th 986, 993-94 (2011) ("that the address had value to Lamps Plus, such that the retailer paid [] a license fee for its use, does not mean that its value to plaintiff was diminished in any way"); *Dwyer v. Am. Express Co*., 652 N.E.2d 1351, 1356 (Ill. App. Ct. 1995) (cardholder name has little or no intrinsic value; instead, "[d]efendants create value by categorizing and aggregating" the names); *In re JetBlue Airways Corp. Privacy Litig*., 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005); *Thompson v. Home Depot, Inc.*, No. 07-cv-1058 IEG (WMc), 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18, 2007); *Archer v. United Rentals,*

[3] Plaintiffs attempt to distinguish *Doubleclick* by arguing that it did not involve "names and likenesses" and involved allegations that the plaintiffs were deprived of the economic value of the "giving of one's attention" to advertising. (Opp'n at 12.) This is incorrect. *See In re Doubleclick Privacy Litig.*, 154 F. Supp. 2d at 525 (plaintiffs alleged that they "suffered economic damages consisting of the value of (1) the opportunity to present plaintiffs with advertising; and (2) *the demographic information DoubleClick has collected*" (emphasis added)). Moreover, although the court was considering a claim under the Computer Fraud and Abuse Act, its discussion of economic injury was not in any way limited to that statute. *Id.*

Inc., 195 Cal. App. 4th 807, 816 (2011). Tellingly, Plaintiffs do not cite a single case reaching the opposite conclusion.

Plaintiffs attempt to distinguish these authorities by arguing that the alleged misappropriation of a name or likeness for use in an advertisement is "qualitatively very different" from the misappropriation of personal information for marketing purposes. (Opp'n at 11-12.) Judge Seeborg's recent decision in *Cohen* makes clear that Plaintiffs are wrong. Like Plaintiffs here, the *Cohen* plaintiffs alleged that their names and likenesses were used, without their consent, to "endorse," "promote," and "advertise" a service (in that case, Facebook's "Friend Finder service"). (*See*, *e.g.*, Declaration of Matthew D. Brown ("Brown Decl.") Ex. A, *Cohen* Class Action Complaint ("*Cohen* Compl.") ¶¶ 11, 13, 45.) Plaintiffs alleged that Facebook created these "false endorsements . . . all in an effort to increase Facebook's already massive user reach and the corresponding advertising revenue," and that the misappropriation entitled Plaintiffs to "any profits from the unauthorized uses" as well as actual and statutory damages under Section 3344. (*Id.* ¶¶ 13, 55, Prayer for Relief.) Accepting these allegations as true, the court granted Facebook's motion to dismiss and held that Plaintiffs' misappropriation allegations did not show that Facebook had "cause[d] them any cognizable harm, regardless of the extent to which that disclosure could also be seen as an implied endorsement by [plaintiffs] of the service." *Cohen v. Facebook, Inc.*, No. C 10-5282 RS, --- F. Supp. 2d ---, 2011 WL 3100565, at *5 (N.D. Cal. June 28, 2011). The Court also held that emotional injury is the "'gist' of a misappropriation claim" and that "plaintiffs must, at a minimum, plead that they suffered mental anguish as a result of the alleged misappropriation, and a plausible supporting factual basis for any such assertion." *Id*. at *6. The ruling also rejected the *Cohen* plaintiffs' argument that they had injury under Section 3344 "because the statute provides for minimum damages of $750 for misappropriation of a plaintiff's name or likeness." *Id.*[4] Thus, Judge Seeborg squarely rejected the theory underlying

[4] Plaintiffs here also argue they were injured because they are "celebrities to their friends" and, therefore, their names and likenesses have an economic value. (Opp'n at 9.) The *Cohen* court rejected this theory too, holding that "plaintiffs' suggestion that they have an [economic] interest here merely because they are known to their Facebook friends does not rise" to "a protectable economic interest." *Cohen,* 2011 WL 3100565, at *6 (dismissing plaintiffs' claims under the

all of Plaintiffs' claims here. The allegation that Facebook earned money by using Users' identities as endorsements does *not*, he ruled, give rise to a cognizable injury under Section 3344.

The nanny-recommendation analogy that the Court discussed at the recent hearing confirms that Plaintiffs here, like the *Cohen* plaintiffs, have not alleged any plausible injury. If Plaintiff Fraley had voluntarily put a recommendation for a nanny on a free, *physical bulletin board* that could be seen by her friends, and then one of her friends hired that nanny, it would be clear that Fraley was not injured and that the nanny would not owe Fraley any money, regardless of the benefit the nanny derived from the recommendation.[5] Now suppose that the bulletin board, like a typical Facebook News Feed, was so frequently used that the recommendation for the nanny was quickly covered over by other items posted on the board. Then suppose that the nanny paid someone a small fee to take Fraley's original recommendation and move it to the side of the board, where it was not likely to be covered over by later posts. In this hypothetical, Fraley still could not claim to be injured by her friends seeing the very post that she knowingly put on the bulletin board, and still would have no plausible claim that she was owed money, either because of the benefit conferred on the nanny or the benefit conferred on the party that moved her recommendation to a place where her friends were more likely to see it.[6]

Facebook's Sponsored Stories are no different. Plaintiffs voluntarily took actions on Facebook, such as clicking the "Like" button for Unicef, which triggered posts on their profile pages and in their Friends' News Feeds, about which Plaintiffs never complain. Facebook later redisplayed the same statements on the right-hand side, where they were more likely to be seen. Redisplaying the same content, to the same Friends, cannot plausibly injure Plaintiffs.

Plaintiffs attempt to distinguish the *Cohen* decision by claiming that the *Cohen* plaintiffs

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Lanham Act).

[5] Scores of Internet sites provide platforms on which people—using their names and likenesses—share opinions about music, politics, restaurants, hotels, electronics, potential employers, etc.

[6] This analogy shows that Plaintiffs here unharmed, even if none of the Plaintiffs actually liked the things they "Liked." If Fraley posted a non-genuine recommendation for the nanny on the free bulletin board to get "a free software demonstration" (SAC ¶ 66), what basis could she have to claim injury if that recommendation, which she gave in order to receive a benefit for herself, was moved to the side of the board where it would not be covered up?

did not allege that Facebook "derive[d] any economic benefit" from the alleged misappropriation. (Opp'n at 9-10 (emphasis in original).) Not so. The *Cohen* complaint *repeatedly* alleged, and Judge Seeborg treated as true, that Facebook profited from the misappropriation of Users' names and likenesses.[7] (*See*, *e.g.*, *Cohen* Compl. ¶ 12 ("The misappropriation of names, photographs and likenesses alleged herein has a direct commercial purpose, namely, to increase Facebook's user base, thereby increasing the intensity of such use, all for the purpose of generating additional revenues."); ¶ 7 ("As a direct and proximate result, Facebook can sell more advertisements and charge more for those advertisements, thereby increasing the company's profits.").)

Cohen and *Miller v. Collectors Universe, Inc.* both held that a non-celebrity plaintiff with no established value in his or her name or likeness must plead "mental anguish" to state a claim under Section 3344. *Cohen*, 2011 WL 3100565, at *6; *Miller*, 159 Cal. App. 4th 988, 1006 (2008). Plaintiffs claim these cases were wrongly decided and that "this Court should not follow [these] opinions." (Opp'n at 10.) Plaintiffs assert that *Cohen* erroneously relied on *Miller*, which had, in turn, misinterpreted *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App 2d 82 (1955). (*Id*.) This is not supportable. In fact, the plaintiffs in *Fairfield* similarly alleged that the defendant had reaped a "pecuniary gain and profit" from the use of plaintiff's name in advertising, but the court noted that the "only damages suffered by [such a plaintiff] resulted from mental anguish," and that the plaintiff in *Fairfield* was entitled to "compensation for injury to his peace of mind and to his feelings." *Fairfield*, 138 Cal. App. 2d at 87-90 (citations omitted).[8]

Plaintiffs also make the baseless argument that their claims are viable because "there is nothing to suggest that the Legislature did not [] intend to allow the non-celebrity to also recover [under Section 3344] . . . where there is a misappropriation of his or her name or likeness for the

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[7] In *Cohen*, Judge Seeborg wrote that "the court must accept all material allegations in the complaint as true, even if doubtful, and construe them in the light most favorable to the non-moving party." *Cohen,* 2011 WL 3100565, at *2.

[8] Although Plaintiffs imply that *Cohen* relied exclusively on *Miller*, the *Cohen* plaintiffs also argued that their claims of injury were "entirely consistent with the holding in *Fairfield*," which they claimed required a presumption of economic and/or noneconomic injury for non-celebrities. (Brown Decl. Ex. B, at 16.) Thus, Judge Seeborg necessarily considered *and rejected* that argument when he held that the *Cohen* plaintiffs had alleged no cognizable injury.

economic advantage of a defendant." (Opp'n at 10.) But Plaintiffs cite neither legislative nor decisional authority suggesting that the legislature *did intend* to allow such a recovery, and both *Cohen* and *Miller* held that it did not. *Cohen*, 2011 WL 3100565, at *6 ("nothing . . . in the statute [] suggests that a plaintiff is entitled to the minimum damages award even in the absence of showing any harm"); *Miller*, 159 Cal. App. 4th at 1002 (legislative history shows that "the gist of the cause of action" under Section 3344 is "injury to the feelings" (citation omitted)).

Finally, accepting the theory of injury that Plaintiffs posit—for individuals with no alleged commercial interest in their name and likeness and no plausible emotional harm—would dramatically expand the scope of Section 3344 liability. Today, a claim under Section 3344 "has two aspects: (1) the right of publicity protecting the commercial value of celebrities' names and likenesses, and (2) 'the appropriation of the name and likeness that brings injury to the feelings, that concerns one's own peace of mind, and that is mental and subjective.'" *Miller*, 159 Cal. App. 4th at 1005 (citation omitted). Regarding the right of publicity, the California Supreme Court has explained, in the very cases on which Plaintiffs rely (Opp'n at 9), that Section 3344 protects the "[y]ears of labor [that] may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion." *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 399 (2001). For example, the *Lugosi* opinion, which Plaintiffs cite, involved the publicity rights of an established celebrity, and has been cited for the proposition that *a pre-existing commercial value* in one's identity is the foundation of the right of publicity. *See id.* (Section 3344 protects the investment of "money, time and energy" to create "commercial value in one's identity" (quoting *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 834-35 (1979)); *see also Winter v. DC Comics*, 30 Cal. 4th 881, 889 (2003) (Section 3344 protects "the economic value generated by the celebrity's fame").[9] No decision that Plaintiffs cite, or that Facebook has identified, has ever expanded the statutory right of publicity to plaintiffs whose names and likenesses have no particular commercial value. Instead, individuals who cannot allege any commercial interest in their name

[9] As noted, Plaintiffs' assertion that they are "celebrities to their friends" does not establish that they have a protectable commercial interest. *See Cohen*, 2011 WL 3100565, at *10.

and likeness may only seek relief under Section 3344 for alleged mental anguish. As the court in *Miller* explained:

> [T]he legislative history of section 3344(a) reveals the statutory minimum damages were meant to compensate non-celebrity plaintiffs who suffer the *Fairfield* form of mental anguish yet no discernible commercial loss. To the extent Miller suffered commercial loss . . . his recourse was to prove actual damages like any other plaintiff whose name has commercial value.

Miller, 159 Cal. App. 4th at 1006. This is precisely the reasoning that led Judge Seeborg to conclude in *Cohen* that the plaintiffs, who had no developed commercial value in their names, had to "at a minimum, plead that they suffered mental anguish" and "a plausible supporting factual basis for any such assertion." *Cohen*, 2011 WL 3100565, at *6.

Plaintiffs' interpretation of Section 3344 has no legal support whatsoever. Plaintiffs cite *Miller* for the claim that Section 3344 is meant to protect the rights of non-celebrities (Opp'n at 8), but Plaintiffs simultaneously say this Court "should not follow" *Miller*'s holding that non-celebrities who cannot prove economic damages must prove mental anguish (*id.* at 10). Plaintiffs cite *Lugosi* for the claim that Section 3344 "does not require the noncelebrity to allege some sort of specific entitlement or track record of being paid" (*id*. at 8), but fail to recognize (or admit) that that case concerned the world-famous Dracula actor, Bela Lugosi, who had exactly such a track record. Plaintiffs even pull a quote from *Comedy III* that says "the right of publicity . . . [is] a right to prevent others from misappropriating *the economic value generated by the celebrity's fame*" (*id*. at 9), without realizing that this is *precisely* why their own claims fail.

Allowing Plaintiffs to recover without alleging either a commercial value in their identities or an emotional injury would directly contradict *Cohen* and drastically expand the scope and meaning of Section 3344. The Court should decline Plaintiffs' invitation to make new law.

C. Sponsored Stories Are Newsworthy Under Section 3344(d).

Plaintiffs' Section 3344 claim also fails because Sponsored Stories are newsworthy and exempt from liability. (Mot. at 18-22.) Plaintiffs' arguments to the contrary are unavailing and, at times, perplexing. For instance, Plaintiffs argue, "[t]hat Plaintiffs chose to interact in some way with a website does not . . . constitute their consent or agreement that such actions are 'newsworthy.'" (Opp'n at 13.) This is irrelevant. If a use of a name or likeness is newsworthy,

that "shall not constitute a use for which consent is required . . . ." Cal. Civ. Code § 3344(d).

Plaintiffs also claim that the cases Facebook cites that "involv[e] celebrities of one sort or another" are not are relevant because Plaintiffs "are not public figures." (Opp'n at 13-14 & n.11.) But Plaintiffs' position is internally contradictory, as just four pages earlier they assert they are "celebrities to their friends" (i.e., to the precise audience that can see Sponsored Stories). (Opp'n at 9.) Further, the operative question is not whether Plaintiffs are celebrities or public figures, but whether "the public may reasonably be expected to have a legitimate interest in what is published." *Shulman v. Grp. W Prods., Inc*., 18 Cal. 4th 200, 225 (1998) (quoting Restatement (Second) of Torts, § 652D, com. j, p. 393). As Plaintiffs' Facebook Friends are the only audience that sees Sponsored Stories involving Plaintiffs (SAC ¶ 26), and are necessarily people with whom Plaintiffs are connected, that audience has a legitimate interest in what Plaintiffs are doing on Facebook. As Judge Seeborg said, "Facebook exists because its users *want* to share information—often about themselves—and to obtain information about others . . . ." *Cohen*, 2011 WL 3100565, at *1 (emphasis in original). Thus, Plaintiff Mainzer's Friends have a "legitimate interest," *Shulman*, 18 Cal. 4th at 225, in knowing that she "Liked" Unicef. (SAC ¶¶ 70-71; *see also id*. ¶ 73 ("Warrior Dash" sporting event was "intriguing" to Plaintiff Wang).)

Plaintiffs concede that expressions of consumer opinions are a "matter of public interest under the First Amendment" (Opp'n at 14-15), which they can hardly deny given the authorities Facebook's Motion cites (Mot. at 19-20).[10] However, Plaintiffs rely on *Abdul-Jabbar v. GMC*, 85 F.3d 407 (9th Cir. 1996), for the claim that any commercial use of newsworthy speech removes the speech from Section 3344(d). This decision is inapposite. In *Abdul-Jabbar*, the court ruled that use of a sports figure's record within an advertisement for a product (an automobile) with which he had absolutely no connection was not "automatically privileged," as it was not a news account. *Id.* at 416. Here, by contrast, Facebook redisplayed information about the voluntary

[10] These cases also make clear that newsworthy speech can come from non-celebrities. *See Paradise Hills Assocs. v. Procel*, 235 Cal. App. 3d 1528, 1544 (1991) (opinion by home buyer protected speech); *Morningstar, Inc. v. Super. Ct*., 23 Cal. App. 4th 676, 696-97 (1994) (opinion by financial research company protected speech); *Concerned Consumers League v. O'Neill*, 371 F. Supp. 644, 648 (E.D. Wis. 1974) (opinion by upholstery customer protected speech).

connection each Plaintiff had made with a product, service or organization. The challenged speech does nothing more than truthfully report what content the Plaintiffs "Liked" and it would be impossible to pass on the social news that Plaintiff Mainzer clicked on the Like button of Unicef without referring to both the Plaintiff and the organization. Plaintiff Mainzer's action on Facebook *is* the newsworthy account that the *Abdul-Jabbar* court found lacking.

D. Plaintiffs Consented to the Challenged Use of Their Names and Likenesses.

As Plaintiffs admit, Section 10.1 of Facebook's Statement of Rights and Responsibilities ("SRR") tells a User, "[y]ou can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us." (SAC ¶ 32.) It then states, "You give us permission to use your name and profile picture in connection with that content, subject to the limits you place." (*Id*.)

Plaintiffs complain that "when Plaintiffs signed up to use the Facebook service, prior to January 25, 2011, Sponsored Story advertisements did not exist and were thus not included in the SRR." (Opp'n at 15.) But that is irrelevant, because Section 10.1—the only consent provision the SAC references—encompasses all "commercial, sponsored, or related content" and, thus, necessarily includes Sponsored Stories, which Plaintiffs claim are a "commercial advertisement." (SAC ¶ 61.) The consent in Section 10.1 was in the SRR, in substantially the same form, long before Facebook introduced Sponsored Stories and, indeed, user consent to Facebook's republication of content posted on the site has been a part of Facebook's terms of use since before any of the named Plaintiffs joined Facebook. (*See* Exs. A2–C2 to Supplemental Declaration of Ana Yang Muller (applicable versions of the SRR published between 2007 and 2010).[11])

Plaintiffs also continue to turn a blind eye to the many ways, identified in Facebook's Motion, that a User may limit the use of his name or profile picture in any Sponsored Story. Although it is correct that "not interact[ing] with any 'like' buttons" and "not uploading a profile picture" are ways for Users to limit Sponsored Stories, Facebook certainly never "admit[ed]" those were "the only way to not have a Sponsored Story created," as Plaintiffs claim. (Opp'n at

[11] These materials are subject to judicial notice on the bases set forth in Facebook's previously filed request for judicial notice.

16.) To the contrary, Facebook detailed how its privacy settings can restrict information, such as User Likes, from being published to their Friends (as Sponsored Stories or otherwise), as explained in Facebook's Help Center. (*See* Mot. at 17 (citing Yang Decl. Exs. B-D).)

Finally, *Cohen*'s ruling on consent expressly turned on *different* provisions of Facebook's SRR and never addressed the provisions at issue here. *See Cohen*, 2011 WL 3100565, at *3-4.

E. Facebook Is Not a "Content Provider" under CDA § 230.

All of Plaintiffs' claims also fail because they seek to hold Facebook liable for publishing User-provided content. (Mot. at 11-15.) Though Plaintiffs continue to blur the facts, their Opposition now acknowledges that their actions on Facebook generate News Feed stories (*see* Opp'n at 22), which Plaintiffs have never claimed constitute a misappropriation of their names and likenesses. Instead, Plaintiffs contend that Facebook did too much to alter this content, when it was displayed as a Sponsored Story, thereby making Facebook a "content provider" with no CDA § 230 immunity. (Opp'n at 21-25.) In essence, Plaintiffs argue that Facebook: (1) translated a User's voluntary clicking of the button labeled "Like" associated with Unicef into the words "User likes Unicef;" (2) moved News Feed statements from the center column to the "right-hand table along with other ads;" and (3) added a logo. (Opp'n at 4, 22 & n.17.)[12]

These alleged changes are only editorial and do not alter the essential content, which comes from Users themselves. Consequently, treating Facebook as a "content provider" in these circumstances would be contrary to a host of relevant authorities. *See Batzel v. Smith*, 333 F.3d 1018, 1031 & n.18 (9th Cir. 2003) (CDA § 230 "necessarily precludes liability for exercising the usual prerogative of publishers . . . to edit the material published *while retaining its basic form and message*" (emphasis added)); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 828-29 (2002) (the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" do not transform an individual into a "content provider"); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010) ("[s]o long as a third party

[12] Plaintiffs also assert, for the first time, that Facebook may include information such as "Jane Doe and 3 others like Rosetta Stone" in Sponsored Stories. (Opp'n at 22.) This combination of several User-provided statements is no different than combining comments in an online forum.

willingly provides the essential published content, the interactive service provider receives full immunity regardless of the editing [] process" (citation omitted)); *Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822, at *6 (C.D. Cal. May 4, 2011) ("Absent a changing of the . . . substantive content . . . liability cannot be found.").[13]

Here, Plaintiffs take no issue with Facebook's initial publication of Plaintiffs' statements (and actions), along with their names and likenesses, in the middle section of their Friends' Facebook pages. Yet Plaintiffs assert that when Facebook later redisplays virtually the same content, to the same Friends, "in the right-hand table along with other ads" (Opp'n at 4), Facebook somehow becomes a content provider. But "[i]ncreasing the visibility of a statement is not tantamount to altering its message." *Asia Econ. Inst.*, 2011 WL 2469822, at *6 (combining user text with HTML code and metatags). Courts have repeatedly held that similar, or even more substantial, editing does not make the website a "creator or developer" of user-generated content. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (classification of user-provided information for display); *Jurin,* 695 F. Supp. 2d at 1122-23 (providing keywords for competitors' sponsored advertising links). Nor does adding a logo change the Plaintiffs' essential content. *See Ramey v. Darkside Prods., Inc.*, No. 02-730 (GK), 2004 WL 5550485, at *7 (D.D.C. May 17, 2004) (printing website address on every published advertisement, adding photo watermark, and categorizing advertisements by subject matter called "minor alterations"); *Shiamili v. Real Estate Group of New York, Inc.*, --- N.E.2d ---, No. 105, 2011 WL 2313818, at *13-15 (N.Y. June 14, 2011) (reposting user comments after adding title and illustration).

F. Plaintiffs Fail to State a Claim for Violation of California's UCL.

1. Plaintiffs lack standing under the UCL.

As discussed in Facebook's Motion, Plaintiffs have alleged neither injury in fact nor a loss

[13] Plaintiffs do not, and cannot, dispute that the example Sponsored Story, included for illustrative purposes in Facebook's Motion (Mot. at 6), accurately reflects the *virtual identity* between a News Feed story and the subsequent redisplay of the same content as a Sponsored Story. That example shows that the News Feed "Facebook story" (Opp'n at 3), which the User's action automatically triggers, already identifies the brand associated with the User's actions (in that case Starbucks) and displays the User's name and profile picture. Again, Plaintiffs do not claim that the initial postings Facebook displayed in the center of their Friends' News Feeds are actionable.

of money or property, both of which are required for standing under the UCL. (Mot. at 7-11, 22-23); *see also* Cal. Bus. & Prof. Code § 17204; *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 322 (2011) (stating that the "narrower" standing requirements of the UCL include "a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*" (emphasis in original)). Plaintiffs cannot allege that they paid any money or property to Facebook because Facebook is, and always has been, a free service.[14] *See, e.g.*, *In re Facebook Privacy Litig.*, No. C 10-02389 JW, 2011 WL 2039995, at *7 (N.D. Cal. May 12, 2011) (Ware, C.J.) (reasoning that the plaintiffs could not allege a loss of money or property because they "received [Facebook's] services for free").[15]

2. Plaintiffs fail to adequately allege "unlawful," "unfair," or "fraudulent" conduct that could support a UCL claim.

First, Plaintiffs have failed to allege facts sufficient to state a claim for violation of Section 3344. (*Supra* Part II (B-E).) Thus, their UCL claim based on the "unlawful" prong must also fail. *See Whiteside v. Tenet Healthcare Corp.*, 101 Cal. App. 4th 693, 706 (2002) (claim under UCL "unlawful" prong fails where there is no claim based on underlying statute).[16]

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[14] Nor can Plaintiffs circumvent the "lost money or property" requirement by pointing to Section 3344 statutory damages. (Opp'n at 17.) *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1062 (N.D. Cal. 2007) ("statutory damages cannot be considered a 'loss of money or property'").

[15] Plaintiffs claim that *In re Facebook Privacy Litigation* involved only "the bare gathering of information" and that it "d[id] not mean that there can never be an injury where a service is free." (Opp'n at 18 n.14.) But Plaintiffs mischaracterize both the case itself and the proposition for which it stands. First, *In re Facebook Privacy Litigation* did not solely concern "the bare gathering of information"; rather, Plaintiffs alleged that Facebook "intentionally disclosed user identities to advertisers to enhance its profitability and revenue through advertising." (*See* Brown Decl. Ex. C ¶ 57.) Second, the proposition for which Facebook cited *In re Facebook Privacy Litigation* was not that "there can never be an *injury* where a service is free" (Opp'n at 18 n.14 (emphasis added)), but that where Plaintiffs have not paid anything to Facebook, they fail to allege that they have "*lost money or property*," and, thus, lack standing to assert claims under the UCL.

[16] Plaintiffs reference the inapposite decision in *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 177-78 (2000). Not only was *Cortez* decided before Proposition 64 amended the UCL to require "lost money or property" for standing, but *Cortez* involved employees' unpaid wages *for work already performed*, which was found to be a vested interest because earned but unpaid wages are considered the property of the employee, rather than damages. *Id*. at 178. Here, by contrast, Plaintiffs are seeking *damages*, which are not even recoverable under the UCL.

Second, Plaintiffs' allegations that Facebook acted fraudulently are deficient in several respects. (Mot. at 24-25.) The SAC does not allege with specificity the manner in which Facebook purportedly induced any action by Plaintiffs, nor *when* statements about the "Sponsored Stories" feature were made to Plaintiffs, nor if Plaintiffs relied on them. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (elements of fraud must be pled with particularity to sustain a UCL claim under the fraudulent prong). Moreover, the allegedly "misleading" statements Plaintiffs cite are contradicted by other Facebook statements quoted in the SAC. In one breath, Plaintiffs claim that Users were misled "into believing that they 'have full control to prevent their appearance in Facebook advertising, including Sponsored Story advertisements'" (Opp'n at 19); in the next, Plaintiffs admit that Facebook's Help Center informed Users that, apart from the use of privacy settings, "there is no way to opt out of seeing all or being featured in any Sponsored Stories" (SAC ¶ 34). Plaintiffs cannot have it both ways.

Third, "[s]imply concluding that an act is 'unfair' does not meet the standard for stating a claim under the UCL." *Jones v. PNC Bank, N.A.*, No. 10-CV-01077, 2010 WL 3325615, at *3 (N.D. Cal. Aug. 20, 2010) (Koh, J.). Instead, California courts have held that to state a claim for an "unfair" business practice in a UCL consumer action, a plaintiff must allege facts sufficient to establish: (1) substantial consumer injury; (2) that the injury is not outweighed by countervailing benefits to consumers; and (3) that the injury is one that consumers could not reasonably have avoided. *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1403 (2006).

Plaintiffs argue that *Camacho* does not set forth the applicable test and that "the proper test" is that of *South Bay Chevrolet v. GM Acceptance Corp.*, 72 Cal. App. 4th 861 (1999). (Opp'n at 20.) While it is true that "the question of what constitutes an unfair consumer practice is unsettled in California," courts in this district routinely apply the *Camacho* test when assessing "unfair" conduct under the UCL. *Juarez v. Jani-King of Cal., Inc.*, 273 F.R.D. 571, 585 (N.D. Cal. 2011); *Kilgore v. KeyBank, N.A.*, 712 F. Supp. 2d 939, 951 (N.D. Cal. 2010) ("The California Court of Appeal has continued to endorse that standard since its first articulation in *Camacho* . . . ."); *De Jose v. EMC Mortg. Corp.*, No. C-11-00139 JCS, 2011 WL 1539656, at *11 (N.D. Cal. Apr. 18, 2011) (applying *Camacho*); *Sencion v. Saxon Mortg. Servs.*, No. 10-CV-3108

JF, 2011 WL 311383, at *5 (N.D. Cal. Jan. 28, 2011) (same). Moreover, Plaintiffs mischaracterize the *Chevrolet* test, which does not require Facebook to prove a "countervailing public policy" (Opp'n at 21), but only that the court "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *S. Bay Chevrolet*, 72 Cal. App. 4th at 886 (quoting *State Farm Fire & Casualty Co. v. Super. Ct.*, 45 Cal. App. 4th 1093, 1103 (1996)). As explained above, Plaintiffs fail to sufficiently plead *any* plausible harm from republication to their Friends of content they voluntarily shared with the same Friends. Therefore, there is no harm against which to "balance" Facebook's conduct, and Plaintiffs' claims fail under *Chevrolet*.

G. Plaintiffs Fail to State a Claim for Unjust Enrichment.

Because no independent cause of action for unjust enrichment exists in California, *In re DirecTV Early Cancellation Litigation*, 738 F. Supp. 2d 1062, 1091 (C.D. Cal. 2010), such a claim can only survive if the court elects to reinterpret it as an alternate legal theory giving rise to a restitutionary remedy. *See GA Escrow, LLC v. Autonomy Corp. PLC*, No. C 08-01784 SI, 2008 WL 4848036, at *7 (N.D. Cal. Nov. 7, 2008). But there is no basis to do so here. Plaintiffs have not paid any money to Facebook because Facebook is—and has always been—free. Nor have Plaintiffs alleged facts sufficient to show that Facebook fraudulently obtained a benefit from Plaintiffs in violation of the law. *See, e.g.*, *Levine v. Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1138 (2010) (no separate cause of action for unjust enrichment where trial court sustained demurrer on other causes of action and no demonstration of entitlement to restitution on unjust enrichment theory). Plaintiffs' "unjust enrichment" claim must therefore fail.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' SAC should be dismissed with prejudice.

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