

COOLEY LLP
MICHAEL G. RHODES (116127) (rhodesmg@cooley.com)
MATTHEW D. BROWN (196972) (brownmd@cooley.com)
JEFFREY M. GUTKIN (216083) (gutkinjm@cooley.com)
101 California Street, 5th Floor
San Francisco, CA 94111-5800
Telephone: (415) 693-2000
Facsimile: (415) 693-2222

Attorneys for Defendant FACEBOOK, INC.

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

**FACEBOOK, INC.'S MOTION TO DISMISS
FIRST AMENDED CLASS ACTION
COMPLAINT**

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

Date: July 28, 2011
Time: 1:30 p.m.
Courtroom: 4
Judge: Hon. Lucy H. Koh
Trial date: None Set

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 28, 2011 at 1:30 p.m. or as soon thereafter as this motion may be heard in the above-entitled court, located at 280 South First Street, San Jose, California, in Courtroom 4, 5th Floor, Defendant Facebook, Inc. ("Facebook") will move to dismiss the First Amended Class Action Complaint (the "Complaint") filed by Plaintiffs. Facebook's Motion is made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, and all pleadings and papers on file in this matter, and upon such other matters as may be presented to the Court at the time of hearing or otherwise.

STATEMENT OF RELIEF SOUGHT

Facebook seeks an order pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) dismissing Plaintiffs' Complaint and each of the three Claims for Relief alleged therein for lack of standing and for failure to state a claim upon which relief can be granted.

STATEMENT OF ISSUES TO BE DECIDED

1. Because Plaintiffs fail to allege an injury in fact that gives them standing under Article III of the United States Constitution, should the Complaint be dismissed?
2. Because Facebook's actions are entitled to immunity under the Communications Decency Act, 47 U.S.C. § 230, should the Complaint be dismissed?
3. Because the Complaint fails to state a claim upon which relief can be granted under the California statute on misappropriation of the right of publicity, Civil Code section 3344, should the First Claim for Relief be dismissed?
4. Because the Complaint fails to state a claim upon which relief can be granted under California Business and Professions Code section 17200, should the Second Claim for Relief be dismissed?
5. Because the Complaint fails to state a claim upon which relief can be granted under the theory of unjust enrichment, should the Third Claim for Relief be dismissed?

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Facebook is a social networking website that connects people with their friends, families,
4 and communities. Facebook has always been a free service, and to join, Facebook users
5 (“Users”) need only provide their name, age, gender, and a valid e-mail address. Users do not
6 need to post any content to use the site, but if they choose to do so, they may share information
7 with others about virtually anything—vacation photos, news about their everyday lives, links to
8 websites they think are interesting, or opinions about world events. Users can communicate to
9 their friends that they “Like” a Facebook page related to a local restaurant, a politician, a brand of
10 shoes, or an article in the area newspaper. Users may also share information about which
11 applications they use and games they play on the Facebook platform. In addition, Users may use
12 the “Places” feature to tell their friends and family where they are and what local businesses they
13 frequent. Facebook’s ability to allow Users to share information with others in these varied and
14 unique ways is one of the fundamental reasons so many people use the site.

15 The First Amended Class Action Complaint (“Complaint”) is brought on behalf of a
16 putative class of adults and minors¹ who are Facebook Users. In essence, it alleges that Facebook
17 wrongfully republished to Users’ friends certain information that Users previously voluntarily
18 published to that very same group of friends. According to Plaintiffs, when Facebook
19 republished the *same information to the same group of friends* as a story sponsored by an
20 advertiser, Facebook (1) violated California Civil Code section 3344, (2) violated the California
21 Unfair Competition Law, Business and Professions Code section 17200 (“UCL”), and (3) was
22 unjustly enriched.

23 Plaintiffs’ Complaint is insufficient as a matter of law and should be dismissed. *First*, and
24 fatal to all three claims, Plaintiffs have not alleged any cognizable injury in fact that would give
25 them standing to bring suit under Article III of the U.S. Constitution. *Second*, the federal
26 Communications Decency Act (“CDA”), 47 U.S.C. § 230, bars all three claims. As many courts

27 _____
28 ¹ Minors must be at least 13 years of age to register with Facebook.

1 have held, Congress enacted CDA section 230 to promote the development of the Internet and to
 2 protect the Internet as an active forum for free and open speech. Accordingly, the statute grants
 3 websites broad immunity from liability for publishing information posted by users. *Third*,
 4 Plaintiffs' claim under Civil Code section 3344 should be dismissed because the Complaint fails
 5 to allege the required element of injury, and because Plaintiffs consented to the alleged use of
 6 their names and likenesses that they now challenge. Further, the "newsworthy" exemption
 7 codified in section 3344(d) protects Facebook's republication of a User's comments, activities
 8 and opinions about content on Facebook to the likely interested audience of the User's Facebook
 9 friends. This is particularly so when the Court construes the statute, as it must, in light of the
 10 substantial First Amendment concerns that would be raised by a ruling that would inhibit Users'
 11 ability to communicate to their friends about content posted on Facebook, or Facebook's ability to
 12 republish that information to those same friends. *Fourth*, as a court in this district recently held,
 13 because Facebook is a free service, Plaintiffs cannot allege facts suggesting that they suffered
 14 injury in fact or lost money or property as a result of unfair competition, and, as such, they lack
 15 standing to bring a claim under the UCL. Moreover, the Complaint fails to allege facts that
 16 would support such a claim under the "unlawful," "fraudulent," or "unfair" prongs of section
 17 17200. *Fifth*, because unjust enrichment is not an independent cause of action in California, and
 18 because Plaintiffs—who used Facebook for free—fail to allege facts entitling them to restitution,
 19 this claim fails as well. Accordingly, the Complaint should be dismissed with prejudice.

20 **II. STATEMENT OF FACTS²**

21 Facebook operates a free social networking website that permits anyone with access to a
 22 computer and an Internet connection to create a profile page, find and connect with their friends
 23 and loved ones around the world, and share information about themselves and their lives.
 24 (Compl. ¶ 13.) This information can include almost anything, such as "texts, images, web links,
 25 and video" selected and posted by the Facebook User. (*Id.* ¶ 17.) Users join, in large part, to
 26 "establish social network relationships within the site" and to view content "produced by other

27 ² This Statement of Facts is based on the allegations in the First Amended Complaint, which
 28 Facebook assumes as true for the purposes of this motion but does not thereby admit.

1 Facebook.com [Users].” (*Id.* ¶ 13.) Facebook has become “the de facto method of
2 communication among friends for a significant portion” of its Users. (*Id.*)

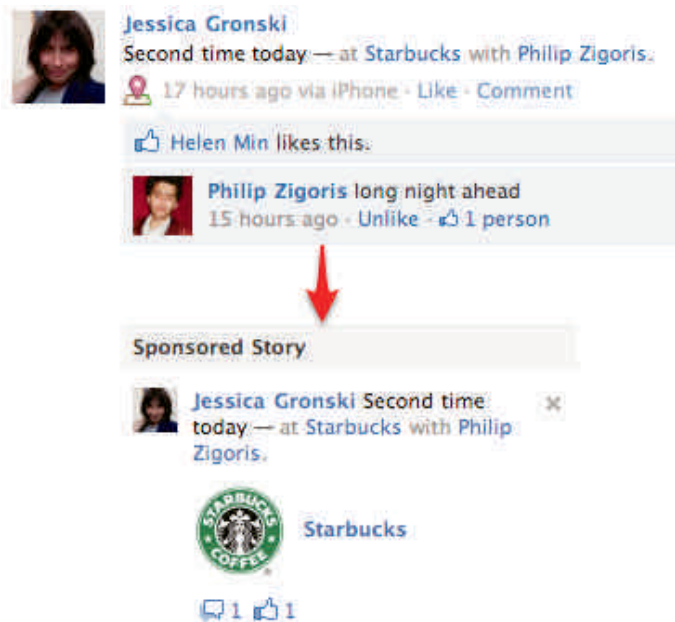
3 To join Facebook, Users must register and provide their real names; they may, but need
4 not, choose and upload a “profile image.”³ (Compl. ¶¶ 14, 24.) Once Users have a profile page,
5 they may begin connecting with other Users they know on Facebook. (*Id.* ¶ 16.) To do so, they
6 invite the other User to become one of their Facebook “Friends.” (*Id.*) If the other User accepts
7 the invitation, he or she has “explicit permission to post content” on the User’s News Feed, to see
8 the information that the User voluntarily shares on the site, and to send the User messages. (*Id.*)
9 However, even among a User’s Friends, a User can control who can see the content on their
10 profile page via their privacy settings. (*See* Declaration of Ana Yang Muller (“Yang Decl.”),
11 filed herewith, ¶ 5, Ex. D.)

12 Facebook offers Users an array of options for sharing content and communicating. Chief
13 among these is “Posting,” whereby Users can add content onto their profile page such as
14 statements of what is on their minds (called “status updates”), messages to their Friends, photos,
15 links to other websites, videos, etc. (Compl. ¶¶ 15, 20.) These posts, one of the primary methods
16 of interacting on the site, are shown to a User’s Facebook Friends. (*Id.* ¶¶ 17, 20.) Users may also
17 signal to their Friends that they like almost anything—e.g., pages for politicians, products,
18 organizations, music, or causes—on Facebook, or even content on webpages outside of
19 Facebook, by clicking on a button labeled “Like” that is associated with that content. (*Id.* ¶ 22.)
20 When a User “Likes” content, that statement of opinion may appear on the User’s profile page,
21 and in his or her Friends’ News Feeds, depending on the User’s privacy settings. (*Id.* ¶¶ 15, 22,
22 *see also* Yang Decl. Ex. B) Users may also use the “Places” feature to check in at a location and
23 announce where they are to their Friends. (*Id.* ¶ 21.) Because a check-in can be at a local coffee
24 shop or at the dog park down the street, it may or may not include a reference to a business
25 establishment. (*Id.*) That information too may be posted on the User’s profile page and in his or
26 her Friends’ News Feeds. (*Id.* ¶¶ 15, 23.) Additionally, Users may use applications and games

27 ³ Users can and do use a range of photos for their profile image, including pets, cars, cartoon
28 characters, nature scenes, etc.

1 created by other software developers that are offered on the Facebook platform, and that activity
2 may also be shared with Friends. (*Id.* ¶ 24.)

3 In January 2011, Facebook launched a new feature called “Sponsored Stories.” (Compl.
4 ¶ 24.) The Complaint alleges that, in certain circumstances, this tool republishes a User’s
5 previously “posted content,” consisting of Likes, check-ins, Posts, or use of certain applications,
6 along with the User’s name and/or profile image, as a story sponsored by an advertiser regarding
7 the content to which the User’s action related. (*Id.*) Although the Complaint alleges these
8 Sponsored Stories are advertisements (*id.*), this inaccurate characterization of Sponsored Stories
9 is a legal conclusion which the Court need not accept as a true factual allegation. Regardless, the
10 Complaint admits Sponsored Stories are *only* triggered when the User’s original posting already
11 “relates to an advertiser” and are only shown to the Friends who had previously been shown the
12 same content in their News Feeds. (*Id.* ¶¶ 20, 24.) Thus, the Complaint alleges Facebook may
13 have republished, as a Sponsored Story next to Angel Fraley’s Friends’ News Feeds, the message
14 “Angel Fraley likes [Product X]” and her profile picture, which is the very same content that was
15 previously published when she voluntarily “Liked” “Product X”. (*Id.* ¶¶ 15, 22, 40.) An example
16 of a User-created Post that appears on the User’s profile page and in Friends’ News Feeds (on
17 top), and a corresponding Sponsored Story displayed to the same friends (below) looks like this:



1 Plaintiffs allege that this republication, using their names and/or profile images,
 2 constitutes a misappropriation of their right of publicity under section 3344, a violation of the
 3 UCL, and unjust enrichment. (Compl. ¶¶ 65, 76, 79.) But the Complaint does not allege that any
 4 of the named Plaintiffs uploaded a profile picture that was an actual “likeness” of themselves.
 5 Plaintiffs also do not allege that their privacy settings permitted anyone to view content they
 6 posted. Nor does the Complaint provide any specific examples of products or services that
 7 Plaintiffs “Liked,” places they checked into, or any applications they used or games they played
 8 that *even may have* resulted in a Sponsored Story. Moreover, the Complaint alleges no facts
 9 whatsoever supporting the allegation that Plaintiffs suffered a loss of money they would have
 10 otherwise received for the use of their names and/or profile images. (*Id.* ¶¶ 43, 77.)

11 **III. APPLICABLE STANDARDS**

12 A court may dismiss a claim under Federal Rule of Civil Procedure 12(b)(1) based on lack
 13 of subject matter jurisdiction, and the motion may attack either the Complaint on its face or the
 14 existence of subject matter jurisdiction in fact. *See Thornhill Publ’g Co. v. Gen. Tel. & Elecs.*
 15 *Corp.*, 594 F.2d 730, 732-33 (9th Cir. 1979). If a complaint does not establish standing under
 16 Article III of the U.S. Constitution, a federal court does not have subject matter jurisdiction to
 17 hear the case. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101-02 (1998).

18 A court may dismiss a claim under Rule 12(b)(6) when “there is no cognizable legal
 19 theory or an absence of sufficient facts alleged to support a cognizable legal theory.” *Navarro v.*
 20 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). In deciding a motion under Rule 12(b)(6), “all material
 21 allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn
 22 from them.” *Id.* However, as the Supreme Court recently emphasized, “labels and conclusions,
 23 and a formulaic recitation of the elements of a cause of action will not” survive a motion to
 24 dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “[A] complaint must contain
 25 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’
 26 A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
 27 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*

1 *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). A plaintiff must
 2 therefore plead “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 1949.

3 **IV. ARGUMENT**

4 **A. Plaintiffs Lack Standing Under Article III Because They Have Not Alleged**
 5 **Injury in Fact.**

6 It is axiomatic that Plaintiffs must, as a threshold matter, allege some injury in fact that
 7 permits them to assert a claim. Under Article III, federal courts do not have jurisdiction to hear a
 8 case where no injury has been alleged. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61
 9 (1992) (To have standing to pursue a claim in federal court a plaintiff must allege (1) that they
 10 suffered injury in fact; (2) that there is a causal connection between the injury and the alleged
 11 conduct; and (3) that the injury may be redressed by a favorable decision.); *see also Whitmore v.*
 12 *Arkansas*, 495 U.S. 149, 155 (1990) (an injury in fact is one that is “distinct and palpable,” not
 13 “abstract”). Moreover, in a class action, each named plaintiff must establish that they “personally
 14 have been injured” and thus have standing to bring the cause of action. *Lierboe v. State Farm*
 15 *Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (citation omitted).

16 Plaintiffs have not sufficiently alleged any injury in fact. First, the Complaint contains
 17 only generalized allegations that Plaintiffs’ names and/or likenesses have been used at some
 18 point, in some undefined Sponsored Story, because Plaintiffs posted content on or after January
 19 25, 2011. (Compl. ¶¶ 38, 39.) The Complaint does not even allege that any of the named
 20 Plaintiffs posted content related to any Facebook advertiser, which, as Plaintiffs admit, is a
 21 prerequisite to a Sponsored Story occurring. (*Id.* ¶ 24.) Nor do they allege that their privacy
 22 settings permitted anyone to view the relevant content or any Sponsored Story associated with it.
 23 Plaintiffs’ generalized allegations do not allege a “distinct and palpable” injury in fact.

24 Further, although the Complaint alleges that Plaintiffs’ “likenesses” were used in
 25 association with some undefined Sponsored Story, the Complaint does not allege that, at all
 26 relevant times, Plaintiffs had elected to upload profile images or that those images were actual
 27 likenesses of each named Plaintiff (many Facebook users elect not to upload any profile picture at
 28 all, and many others choose to upload an image of something other than their own likeness).

1 Lastly, the Complaint admits that, in each instance, Sponsored Stories are triggered by a
 2 User's voluntary use of optional Facebook features and are only shown to the same group of
 3 people with whom the User already shared the same information (e.g., Angel Fraley Likes
 4 Product X; Paul Wang has checked into advertiser location Y). (*Id.* ¶ 40.) The Complaint never
 5 explains how such republication of information a User has voluntarily shared—to the same
 6 audience with which the User has voluntarily shared it—could cause injury to anyone, much less
 7 how it supposedly injured the named Plaintiffs.

8 At most, the Complaint makes a wholly conclusory claim regarding Plaintiffs' injuries,
 9 alleging that Plaintiffs "were deprived of fair market value remuneration" for the use of their
 10 names and/or profile photos in which they had a "vested interest." (Compl. ¶¶ 43, 77). This
 11 cryptic assertion is at most a *legal conclusion*, which the Court is not bound to accept. *See*
 12 *Twombly*, 550 U.S. at 555 (noting the court need not accept the truth of legal conclusions couched
 13 as factual allegations). Plaintiffs allege absolutely no facts suggesting that their names and/or
 14 likenesses have any commercial value or that they could ever have received any payment for their
 15 names and/or likenesses in the absence of Facebook's alleged conduct. Even if Plaintiffs had
 16 made this highly implausible allegation, courts have already considered and rejected the notion
 17 that private individuals have a compensable *property* interest in their names and/or likenesses.
 18 *See Thompson v. Home Depot, Inc.*, No. 07cv1058 IEG (WMc), 2007 WL 2746603, at *3 (S.D.
 19 Cal. Sept. 18, 2007) (holding that use of plaintiff's personal information such as a name and
 20 telephone number for marketing purposes did not confer a property interest in the information to
 21 plaintiff, since such information is not "property" under Cal. Bus. & Prof. Code section 17200);
 22 *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005) ("there is
 23 [] no support for the proposition that an individual passenger's personal information has or had
 24 any compensable value in the economy at large"); *Dwyer v. Am. Express Co.*, 273 Ill. App. 3d
 25 742, 749 (Ill. App. Ct. 1995) (cardholder name has little or no intrinsic value apart from its
 26 inclusion on a categorized list; instead "[d]efendants create value by categorizing and
 27 aggregating" the names). *See also infra* § IV.D (discussing standing requirement of UCL).

1 Plaintiffs' attempt to argue that they have suffered economic harm is thus unavailing and does not
 2 support any allegation that they have suffered injury in fact for Article III purposes.

3 Additionally, Plaintiffs may not save their claim by alleging that the mere violation of the
 4 asserted state statutes gives them standing. "[T]he mere allegation of a violation of a California
 5 statutory right, without more, does not confer Article III standing. A plaintiff invoking federal
 6 jurisdiction must also allege some actual or imminent injury resulting from the violation"
 7 *Lee v. Chase Manhattan Bank*, No. C07-04732 MJJ, 2008 WL 698482, at *5 (N.D. Cal. Mar. 14,
 8 2008) (citing *Lujan*, 504 U.S. at 560-61); *see also Robins v. Spokeo, Inc.*, No. CV10-05306
 9 ODW, 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011) (allegations that website violated statute
 10 which provided private right of action did not allege injury in fact for standing purposes without
 11 some allegations of "actual or imminent" harm); *cf. Los Angeles Haven Hospice, Inc. v. Sebelius*,
 12 --- F.3d ---, No. 09-56391, 2011 WL 873303, at *8 (9th Cir. Mar. 15, 2011) (publication
 13 pending) (noting "less tangible forms of injury, such as the deprivation of an individual right
 14 conferred by statute" *may* confer Article III standing if the harm is "sufficiently particularized and
 15 concrete to demonstrate injury-in-fact"). This principle flows from the rule, repeatedly affirmed
 16 by Supreme Court jurisprudence, that a plaintiff only has standing if he or she suffered "a distinct
 17 and palpable injury to himself." *See Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100
 18 (1979); *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase
 19 Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would
 20 not otherwise have standing."); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009)
 21 ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be
 22 removed by statute.").

23 Even if this Court were to follow decisions which find Article III standing based on
 24 alleged violation of a statute, which it should not, Plaintiffs have failed to meet this standard.
 25 Such decisions look to the text of the statute to determine whether a plaintiff has alleged all of the
 26 statute's elements. *See Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)
 27 (concluding the court must look to the text of the federal statute to determine whether plaintiffs
 28 had alleged a violation that thereby conferred Article III standing). Plaintiffs however, have not

1 alleged the injury necessary to state a claim under either Cal. Civ. Code section 3344 or Cal. Bus.
 2 & Prof. Code section 17200. Both statutory provisions specifically require proof of injury to state
 3 a claim. *See* Cal. Civ. Code § 3344(a) (using the word “injured” four times to state that
 4 defendants may only be liable to “the person or persons injured as a result thereof”); Cal. Bus. &
 5 Prof. Code § 17204 (requiring both injury in fact and a loss of money or property to state a claim
 6 under the UCL). Permitting Plaintiffs to proceed in federal court without proof of injury in fact
 7 would impermissibly read a key element out of both the statutes under which Plaintiffs have sued.

8 Because Plaintiffs have not alleged injury in fact as required to have standing in this Court
 9 under Article III, their Complaint should be dismissed.

10 **B. Plaintiffs’ Claims Are Barred by the Federal Communications Decency Act,**
 11 **47 U.S.C. § 230.**

12 Under section 230 of the CDA, “[n]o provider or user of an interactive computer service
 13 shall be treated as the publisher or speaker of any information provided by another information
 14 content provider.” 47 U.S.C. § 230(c)(1). Section 230 precludes any application of state law that
 15 interferes with this rule, providing that “[n]o cause of action may be brought and no liability may
 16 be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).
 17 Facebook is entitled to CDA section 230 immunity here because Plaintiffs seek to hold Facebook
 18 liable for information provided by another party—namely, Plaintiffs themselves.

19 Among the express policy considerations Congress sought to advance through the
 20 immunity provisions of CDA section 230 were “to promote the continued development of the
 21 Internet and other interactive computer services and other interactive media” and “to preserve the
 22 vibrant and competitive free market that presently exists for the Internet and other interactive
 23 computer services, unfettered by Federal or State regulation.” 47 U.S.C. §§ 230(b)(1)–(2). The
 24 Ninth Circuit has explained that by enacting the CDA, Congress intended “to preserve the free-
 25 flowing nature of Internet speech and commerce” *Fair Housing Council of San Fernando*
 26 *Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008); *see also Delfino v. Agilent*
 27 *Techs., Inc.*, 145 Cal. App. 4th 790, 802-03 (2007) (noting immunity is intended to “avoid the
 28 chilling effect” on online speech that liability would impose). Therefore, section 230 “provides

1 broad immunity [to websites that publish] content provided primarily by third parties.” *Carafano*
 2 *v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *see also Barrett v. Rosenthal*, 40
 3 Cal. 4th 33, 57 (2006) (section 230 provides “blanket immunity from tort liability for online
 4 republication of third party content.”). The Ninth Circuit has reaffirmed this broad immunity,
 5 declaring that “close cases . . . must be resolved in favor of immunity, lest we cut the heart out of
 6 Section 230 by forcing websites to face death by ten thousand duck-bites” *See*
 7 *Roommates.com*, 521 F.3d at 1174.

8 Courts have held that Section 230 bars claims alleging misappropriation of name and
 9 likeness (right of publicity). *See Carafano*, 339 F.3d at 1125 (upholding section 230 immunity
 10 for interactive dating website against misappropriation claim); *Perfect 10, Inc. v. CCBill LLC*,
 11 488 F.3d 1102, 1118-19 (9th Cir. 2007) (affirming website’s section 230 immunity against right
 12 of publicity claims, noting “Congress’s expressed goal of insulating the development of the
 13 Internet from various state-law regimes”). In fact, this federal immunity encompasses all state
 14 statutory and common law causes of action. *See Perfect 10*, 488 F.3d at 1118-19 (affirming
 15 immunity from plaintiffs’ claims for unfair competition and false advertising); *Jurin v. Google*
 16 *Inc.*, 695 F. Supp. 2d 1117, 1122-23 (E.D. Cal. 2010) (dismissing plaintiffs’ claim for unjust
 17 enrichment, negligent and intentional interference with contractual relations and prospective
 18 advantage, and fraud). Immunity under section 230 is a proper ground on which to grant a
 19 motion to dismiss. *See, e.g., Black v. Google Inc.*, No. 10-02381 CW, 2010 WL 3222147, at *3
 20 (N.D. Cal. Aug 13, 2010) (granting motion to dismiss with prejudice under Section 230 noting
 21 “any amendment would be futile”); *Jurin*, 695 F. Supp. 2d at 1122-23; *Young v. Facebook, Inc.*,
 22 No. 10-cv-03579-JF/PVT, 2010 WL 4269304, at *5 (N.D. Cal. Oct. 25, 2010); *see also Nemet*
 23 *Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255-58 (4th Cir. 2009) (courts should
 24 “resolve the question of § 230 immunity at the earliest possible stage of the case” (citing
 25 *Roommates.com*, 521 F.3d at 1175)).

26 Section 230 immunity requires that (1) the defendant be a provider or user of an
 27 interactive computer service, (2) the cause of action treat the defendant as a publisher or speaker
 28 of the information, and (3) the information be provided or developed by another information

1 content provider. *See Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 830 (2002) (section 230
 2 immunizes interactive computer service providers where these three factors are met). These
 3 elements are met here.

4 *First*, Facebook is undoubtedly an “interactive computer service,” which is defined as
 5 “any information service . . . that provides or enables computer access by multiple users to a
 6 computer server.” *See* 47 U.S.C. § 230(f)(2); *Young*, 2010 WL 4269304, at *5 (finding Facebook
 7 is an interactive computer service and granting motion to dismiss under section 230); *Finkel v.*
 8 *Facebook, Inc.*, No. 102578/09, 2009 N.Y. Misc. LEXIS 3021, at *3-4 (N.Y. Sup. Ct. Sept. 15,
 9 2009) (granting Facebook’s motion to dismiss under section 230); *see also Roommates.com*, 521
 10 F.3d at 1162 n.6 (“[T]he most common interactive computer services are websites.”).

11 *Second*, Plaintiffs’ claims seek to treat Facebook as the publisher or speaker of the content
 12 they provided. Plaintiffs allege that Facebook published Plaintiffs’ “posted content”—for
 13 example, information about unspecified pages they “Liked,” games they played, and places they
 14 visited—with Plaintiffs’ names and likenesses in a Sponsored Story. (Compl. ¶¶ 23, 24, 39-40.)
 15 But, as discussed above, Facebook is merely republishing the same content that a User already
 16 posted on his or her profile page and published to Friends’ News Feeds, consistent with the
 17 User’s privacy settings.

18 *Third*, the information was provided or developed by another information content
 19 provider, i.e., Plaintiffs themselves—and not Facebook. All such information, including a User’s
 20 name and likeness and their Likes, check-ins, Posts to their News Feeds, and use of an application
 21 that is part of Sponsored Stories, is voluntarily provided by Users. (*Id.* ¶¶ 6-10, 17, 21-22, 24.)
 22 In fact, the Complaint specifically notes that most of the content on Facebook is produced by
 23 Facebook Users. (*Id.* ¶ 13.) Users often share with their network of Friends a variety of
 24 information, including photographs or videos, personal messages, links to other websites, or
 25 information surrounding upcoming events or special interest groups. (*Id.* ¶¶ 16-17.) Indeed, the
 26 Complaint notes that posting content is the main method by which Users, including Plaintiffs
 27 themselves, interact on Facebook. (*Id.* ¶ 20.) More specifically, the Complaint admits that *Users*
 28 publish to their Friends the fact that they have been to a location when they Check-in, or that they

1 Like a particular item when they use the Like button, or generally Post information about a
 2 product, website, brand or service on Facebook. (*Id.* ¶¶ 21-24.) In fact, they admit that all such
 3 information is “posted content” made by Plaintiffs. (*Id.* ¶ 24.) Thus, according to the Complaint,
 4 it is Plaintiffs as Facebook Users who provided all of the information at issue, including their
 5 names, likenesses, and content about brands or other content on Facebook, and Plaintiffs who
 6 decided to share the information with Friends and potentially with others.

7 The law is clear that when a user of a website selects which information to publish, the
 8 user constitutes “another information content provider” for purposes of section 230. *See Goddard*
 9 *v. Google*, 640 F. Supp. 2d 1193, 1197 (N.D. Cal. 2009) (holding that a website operator cannot
 10 be treated as the publisher or speaker of content on the website if “users ultimately determine
 11 what content to post”). Courts have held that section 230 immunity applies even when the
 12 content provider is the party suing over the website’s display of that content. *See generally Doe*
 13 *II v. MySpace, Inc.*, 175 Cal. App. 4th 561 (2009) (upholding website’s section 230 immunity as
 14 to claims arising from information published by plaintiffs); *Doe v. MySpace, Inc.*, 528 F.3d 413
 15 (5th Cir. 2008); *Doe IX v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009).

16 Nor does Facebook’s republication of User-created content as a Sponsored Story alter this
 17 analysis. Courts uniformly hold that websites do not lose immunity under Section 230 based on
 18 the performance of editorial functions such as deciding whether to publish, withdraw, postpone,
 19 edit, or alter content provided by their users. *See Batzel v. Smith*, 333 F.3d 1018, 1031 n.18 (9th
 20 Cir. 2003) (explaining that “the exercise of a publisher’s traditional editorial functions—such as
 21 deciding whether to publish, withdraw, postpone or alter content—do not transform an individual
 22 into a ‘content provider’ within the meaning of § 230” (internal quotation marks and citation
 23 omitted)); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (section 230 precludes
 24 courts from entertaining lawsuits that “would place a computer service provider in a publisher’s
 25 role” even if they exercise traditional editorial functions, so long as the content originated with a
 26 third-party user); *Ramey v. Darkside Prods., Inc.*, No. 02-730 (GK), 2004 WL 5550485, at *7
 27 (D.D.C. May 17, 2004) (defendant was not an information content provider merely because it
 28 edited the ads posted on its website). This is so even when websites use neutral tools to

1 categorize the content provided by users or suggest what content users might provide. *See, e.g.,*
 2 *Roommates.com*, 521 F.3d at 1172 (fact that “interactive computer service ‘classifies user
 3 characteristics . . . does not transform [it] into a ‘developer’ of the underlying misinformation”)
 4 (citing *Carafano*, 339 F.3d at 1124); *see also Goddard*, 640 F. Supp. 2d at 1197-98 (by providing
 5 a keyword search tool to advertisers who used the tool to post illegal information, Google did not
 6 become the content provider even if Google “should have known” that the tool would lead to the
 7 improper posting, so long as the users ultimately determined what content to post). Indeed, the
 8 Ninth Circuit has warned that an interpretation of CDA immunity that was not broad enough to
 9 include websites’ classification of information “would sap section 230 of all meaning.”
 10 *Roommates.com*, 521 F.3d at 1172. Thus, Plaintiffs’ allegations that Facebook republishes as a
 11 Sponsored Story the same User-published information that appears on their profile pages and in
 12 their Friends’ News Feeds do not make Facebook into an information content provider.
 13 Accordingly, Facebook is entitled to Section 230 immunity here.

14 **C. Plaintiffs Fail to State a Claim for Misappropriation Under California Civil**
 15 **Code Section 3344.**

16 To state a claim under California Civil Code section 3344, Plaintiffs must allege
 17 (1) defendant’s use of plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to
 18 defendant’s advantage, commercially or otherwise; (3) lack of consent; (4) resulting injury; (5) a
 19 knowing use by the defendant; (6) for the purposes of advertising; and (7) a direct connection
 20 between the alleged use and the commercial purpose. Cal. Civ. Code § 3344(a); *Fleet v. CBS,*
 21 *Inc.*, 50 Cal. App. 4th 1911, 1918 (1996); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th
 22 Cir. 1998). The Complaint does not allege any injury sufficient to state a claim for violation of
 23 section 3344, and Plaintiffs gave consent to any such use of their names and likenesses. Further,
 24 Plaintiffs’ claim fails because Facebook’s actions are protected by the “newsworthy” exemption
 25 under the statute. Accordingly, the Court should dismiss the claim as a matter of law.

26 **1. Plaintiffs have not alleged any actionable injury under section 3344.**

27 Plaintiffs have failed to allege facts supporting any actionable injury, a necessary element
 28 to state a claim under section 3344. *See* Cal. Civ. Code § 3344(a) (using the term “injured” four

1 separate times to describe who may recover under the statute); *Eastwood v. Super. Ct.*, 149 Cal.
 2 App. 3d 409, 417 (1983) (to plead a violation of section 3344, Plaintiffs must allege injury);
 3 *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001) (resulting injury is a
 4 necessary element of a claim under section 3344). Although the Complaint contains the
 5 conclusory allegation that Plaintiffs lost the “fair market value” they could have recovered for the
 6 use of their names and/or likenesses (Compl. ¶ 43), Plaintiffs plead no facts in support of this
 7 legal conclusion. They have not alleged that they have previously received remuneration for the
 8 use of their name or likeness, or that they have ever sought to obtain such remuneration. It is
 9 insufficient for Plaintiffs to assert, without any supporting factual allegations, that they would
 10 have received payment for the use of their names and/or profile images. They therefore have not
 11 pled facts sufficient to allege any injury, nor stated a claim that is “plausible on its face.”
 12 *Ashcroft*, 129 S. Ct. at 1949.

13 **2. Plaintiffs consented to the use of their names and likenesses in**
 14 **association with sponsored content.**

15 The first statement within Facebook’s Statement of Rights and Responsibilities (“SRR”) informs Users that it “governs [Facebook’s] relationship with users and others who interact with
 16 Facebook. By using or accessing Facebook, you agree to this statement.” (See Yang Decl, ¶ 2, Ex. A.) As acknowledged recently by the Northern District of California, when a party “accesses
 17 or uses” Facebook’s website, these terms are binding. See *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-05780 JW, 2010 WL 3291750, at *7 n.20 (N.D. Cal. July 20, 2010) (stating that
 18 “in the act of accessing or using Facebook’s websites alone, [defendant] Power acceded to the
 19 Terms of Use and became bound by them”); see also *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1052 (N.D. Cal. 2010) (holding that party consented to forum selection clause in
 20 website’s terms of service where terms were condition to accessing website). Plaintiffs allege
 21 they are Facebook Users who accessed and used the website (Compl. ¶¶ 6-10), and, thus, they are
 22 bound by the SRR.
 23

24 As the Complaint acknowledges, under Facebook’s SRR, Users give Facebook permission
 25 to use their names and/or likenesses in association with sponsored content. (Compl. ¶ 27.)
 26
 27
 28

1 Section 10.1 expressly tells Users that “[y]ou can use your privacy settings to limit how your
 2 name and profile picture may be associated with commercial, sponsored, or related content (such
 3 as a brand you like) served or enhanced by us.” (*Id.* (citing SRR § 10.1).) Section 10.1 further
 4 states: “You give us permission to use your name and profile picture in connection with that
 5 content, subject to the limits you place.” (*Id.*) Under this provision, Plaintiffs gave express
 6 consent for Facebook to use their names and/or profile images in connection with “sponsored
 7 content” such as Sponsored Stories, subject to the privacy limitations they select. Therefore,
 8 Plaintiffs cannot state a claim under section 3344. *See Fleet*, 50 Cal. App. 4th at 1918 (a lack of
 9 consent is a required element under section 3344).⁴

10 Consistent with section 10.1, Plaintiffs and other Users could limit the creation of
 11 Sponsored Stories via their privacy settings. Facebook’s Help Center, from which Plaintiffs
 12 quote in their complaint (Compl. ¶ 29), affirms this in a question and answer that Plaintiffs
 13 ignore, entitled “Where can I view and edit my privacy settings for sponsored content?” (Yang
 14 Decl. ¶ 3, Ex. B)⁵ The question and answer notes that “Sponsored Stories are only delivered to
 15 your confirmed friends and *respect the privacy settings you configure for News Feed*.” (*Id.*)
 16 (emphasis added). The question and answer also contains a link to a page giving Users more
 17 information about such privacy settings. (*Id.*) For example, the page contains questions and
 18 answers that explain that Users can change the privacy setting for each piece of content they post
 19 and determine whether it will appear in their Friends’ News Feeds. (*Id.* ¶ 4, Ex. C) It also
 20 explains that Users can include or exclude specific friends from viewing their content. (*Id.* ¶ 5,
 21 Ex. D) Thus, if Users select privacy settings that restrict information such as Likes, check-ins,
 22 Posts, or their use of applications from being published to their News Feed and seen by their

23
 24 ⁴ Plaintiffs purport to bring this action on behalf of a subclass of minors, and argue that the
 25 consent of their parents would be necessary under section 3344. (Compl. ¶ 41.) However,
 26 putting consent aside, the minor Plaintiffs’ claims are nonetheless barred because they lack
 standing, Facebook has immunity for all users under CDA section 230, Plaintiffs fail to allege any
 injury under section 3344 and the minors’ expressions are entitled to section 3344’s
 “newsworthy” exemption as discussed below.

27 ⁵ True and correct copies of Facebook’s Statement of Rights and Responsibilities and the Help
 28 Center questions and answers are attached as Exhibits A-D to the Yang Declaration.

1 Friends, those limitations will apply to how their names and likenesses are used in Sponsored
2 Stories.

3 Although the Complaint cites a different question and answer from the Help Center
4 (Compl. ¶ 29), the information cited does not contradict the consent provided by Section 10.1 of
5 the SRR. In that question, entitled “Can I opt out of seeing or being featured in sponsored News
6 Feed stories,” the answer notes that there is no way to opt out of seeing or being featured in such
7 stories. That does not mean, as described above, that Users may not “limit” the use of their
8 names and/or profile images by customizing their privacy settings. Users can and do, as these
9 judicially noticeable Help Center pages that Plaintiffs chose not to mention make clear.

10 Regardless of how each particular User elects to use his or her privacy settings, in SRR
11 Section 10.1, each “[User] give[s] [Facebook] permission to use [his or her] name and profile
12 picture in connection with [sponsored] content.” Accordingly, the Complaint fails to state a claim
13 for violation of section 3344.

14 **3. Facebook’s republication of information already displayed by Users in**
15 **their News Feeds is newsworthy and exempt under section 3344(d).**

16 Section 3344 states explicitly that newsworthy speech is not the proper subject of a
17 misappropriation claim: “a use of a name, voice, signature, photograph, or likeness in connection
18 with any news, public affairs, or sports broadcast or account, or any political campaign shall not
19 constitute a use for which consent is required under subdivision (a).” Cal. Civ. Code § 3344(d).
20 As discussed above, *supra* § II, the Complaint alleges that a Sponsored Story may be generated
21 only if a User engages in some action—e.g., Liking an item on Facebook, checking in at a
22 business, Posting information about a product, or using an application or game—that he or she
23 has chosen to share with Friends and that would otherwise appear on the User’s profile page and
24 Friends’ News Feeds. (*Id.* ¶¶ 21, 22, 24.) Thus, in all cases, a Sponsored Story republishes
25 content that the User previously posted and made available to his or her Friends. (*Id.*) Sponsored
26 Stories are never shown outside of a User’s selected group of Friends. (*Id.* ¶¶ 16, 17, 24,
27 specifically noting that Sponsored Stories are only shown “on [User’s] Friends pages”). Because
28

1 Facebook's alleged use of Users' names and likenesses falls within this broad "newsworthy"
 2 exemption, the Complaint fails to state a cause of action under section 3344.⁶

3 The term "newsworthy" under section 3344 is broadly construed, and "is not limited to
 4 'news' in the narrow sense of reports of current events. 'It extends also to the use of names,
 5 likenesses, or facts in giving information to the public for purposes of education, amusement or
 6 enlightenment, when the public may reasonably be expected to have a legitimate interest in what
 7 is published.'" See *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 225 (1998) (quoting Rest.
 8 2d Torts § 652D, com. j, p. 393). The key is whether the use of the name and/or likeness relates
 9 to information in which the audience has a legitimate interest. See *Montana v. San Jose Mercury*
 10 *News, Inc.*, 34 Cal. App. 4th 790, 793-95 (1995) (dismissing claim under section 3344(d) because
 11 republication of football player's image "report[ed] newsworthy items of public interest"); see
 12 also *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 546 (1993) (holding section 3344(d)
 13 precluded claim for use of likeness in surfing documentary because the public is "entitled to know
 14 about things, people, and events that affect it").

15 The California Supreme Court has recognized that "legitimate interest" analysis for
 16 purposes of the analogous "newsworthy" exception to a claim for public disclosure of private
 17 facts parallels the analysis in cases involving the constitutional right to freedom of speech. See
 18 *Shulman*, 18 Cal. 4th at 214-16 (critical issue for both tort and constitutional law inquiries is the
 19 presence or absence of a "public interest," noting that "the requirements of tort law and the
 20 Constitution have generally been assumed to be congruent" (citing Rest.2d Torts. § 652D, com. d,
 21 p. 388)); see also *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 681 (2010) ("[T]he tort of
 22 appropriation of name and personality, whether labeled a form of intrusion into privacy or a
 23 publicity right, invokes constitutional protections."). Thus, if there is a legitimate public interest
 24
 25

26 ⁶ Although Plaintiffs conclusorily allege that the information republished by Facebook was not
 27 used in conjunction with "news," this assertion is both a legal conclusion that the Court is not
 28 bound to accept as true, *Twombly*, 550 U.S. at 555, and contradicted by the facts pled in the
 Complaint.

1 in speech for First Amendment purposes, the speech also qualifies as “newsworthy” under section
2 3344(d). *See Shulman*, 18 Cal. 4th at 216.

3 Facebook’s republication of Users’ names and/or profile images, in association with their
4 actions to Like, check-in, or Post about content on Facebook is newsworthy on two grounds.
5 First, expressions of consumer opinion are matters of public interest under the First Amendment.
6 For instance, in *Paradise Hills Associates. v. Procel*, the Court of Appeal held that the First
7 Amendment protects a consumer’s statements and signs about the quality of a developer’s
8 construction. 235 Cal. App. 3d 1528, 1544 (1991). The court recognized that members of the
9 public have an interest in “improv[ing] their relative position vis-à-vis the suppliers and
10 manufacturers of consumer goods” and thus “[t]hey clearly have an interest in matters which
11 affect their roles as consumers” *Id.* (quoting *Concerned Consumers League v. O’Neill*, 371
12 F. Supp. 644, 648 (E.D. Wis. 1974)). The consumer’s expression of an opinion about a product is
13 therefore protected by the First Amendment. *Id.*; *see also Morningstar, Inc. v. Super. Ct.*, 23 Cal.
14 App. 4th 676, 697 (1994) (opinions analyzing advertisements for financial products are protected
15 by the First Amendment); *Lowe v. S.E.C.*, 472 U.S. 181, 210 n.58 (1985) (consumer opinion
16 about commercial products such as loudspeakers and marketable securities are protected speech
17 under the First Amendment); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425
18 U.S. 748, 764-65 (1976) (society has “a strong interest in the free flow of commercial information
19 So long as we preserve a predominantly free enterprise economy, the allocation of our
20 resources in large measure will be made through numerous private economic decisions. It is a
21 matter of public interest that those decisions, in the aggregate, be intelligent and well informed.”).

22 When a Facebook User says that he or she Likes certain content, posts something about it,
23 or checks-in—whether in relation to a brand, a product, an organization, or a business—that User
24 is communicating to his or her Friends an affinity for or opinion about that content. In such a
25 circumstance, “the free flow of commercial information is indispensable.” *Va. State Bd. of*
26 *Pharmacy*, 425 U.S. at 765.

27 Secondly, because the information is republished only to the User’s Friends, a group of
28 individuals with an identifiable interest in the actions of the User, that information is a matter of

1 public interest as to that group, even if the publication did not express a consumer opinion. As
 2 noted in *Shulman*, publications “giving information to the public for purposes of education,
 3 amusement or enlightenment” is “newsworthy” where it is a subject of “legitimate public
 4 interest.” *See* 18 Cal. 4th at 225. In turn, a matter is of “legitimate public interest” if “some
 5 reasonable members of the community could entertain a legitimate interest” in it which is not
 6 “governed by the tastes or limited interests of an individual judge or juror.” *Id.* Thus, even
 7 publications which merely provide “amusement” may be newsworthy if the viewing public
 8 “could entertain a legitimate interest” in them. *Id.*; *see also Montana*, 34 Cal. App. 4th at 793-96
 9 (publishing picture of quarterback who won four Super Bowls is matter of public interest); *Dora*,
 10 15 Cal. App. 4th at 546 (publishing video of surfing legend is matter of public interest because
 11 surfing “is of more than passing interest to some”); *New Kids on the Block v. News America*
 12 *Publ’g, Inc.*, 745 F. Supp. 1540, 1546 (C.D. Cal. 1990) (magazine survey asking which band
 13 member was subscriber’s “fave” was matter of public interest because the identity was used for
 14 “informative or cultural” purpose); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400,
 15 411 (2001) (finding immunity for use of little known baseball players’ names and likenesses
 16 because the game is followed by “millions of people across this country” and thus there is a
 17 public interest in its history); *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S. 2d 501, 507 (1968)
 18 (publication of comedian’s fake presidential run matter of public interest). Here, the alleged
 19 republication was to a group with an established interest in the activities and News Feed postings
 20 of the Plaintiffs—the Plaintiffs’ Friends. Coming from an individual with whom the Friend has
 21 an established relationship, the content within Sponsored Stories postings may be educational,
 22 enlightening, amusing, or all three. Thus, “reasonable members” of the Facebook community—
 23 i.e., Plaintiffs’ Friends—have a “legitimate public interest” in the information Plaintiffs have
 24 allegedly posted, and that information is “newsworthy” for purposes of the misappropriation
 25 claim. This is fatal to Plaintiffs’ claims.

26 Facebook’s free speech rights also are implicated by Plaintiffs’ claims. As confirmed
 27 recently by the Court of Appeal, “[p]ublication of matters in the public interest, which rests on the
 28 right of the public to know, and the freedom of the press to tell it, cannot ordinarily be

1 actionable.” *See Rolling Stone*, 181 Cal. App. 4th at 681 (rejecting claim for misappropriation
 2 under section 3344) (citations omitted); *see also Shulman*, 18 Cal. 4th at 225 (A publisher has
 3 “broad discretion to publish matters that are of legitimate public interest.”) (citation omitted);
 4 *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (“Freedom of the press is a ‘fundamental personal
 5 right’ which ‘is not confined to newspapers and periodicals [and] . . . comprehends every sort of
 6 publication which affords a vehicle of information and opinion.”) (citation omitted). By
 7 republishing a User’s name or likeness along with the actions the User has taken—Liking content,
 8 checking in at different locations, playing games, or Posting content—Facebook provides a forum
 9 for authentic recommendations by persons who, without pecuniary motive, have expressed their
 10 approval of a particular product or service. This serves a particularly useful purpose inasmuch as
 11 the information is republished only to the User’s group of Friends—persons with whom the User
 12 has an established relationship and for whom a User’s opinion may be particularly informative or
 13 valuable or for whom the information may be amusing. Facebook has a right to republish
 14 information on a topic that the courts have explicitly recognized is a matter of legitimate interest.
 15 On these bases, Plaintiffs’ cause of action for misappropriation falls under section 3344(d)’s
 16 “newsworthy” exemption and should be dismissed with prejudice.

17 This construction of section 3344 is further supported by the doctrine of constitutional
 18 avoidance. Where an otherwise valid interpretation of a statute raises serious constitutional
 19 problems and an alternative interpretation is “fairly possible,” the court must construe the statute
 20 to avoid the constitutional problem. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)
 21 (superseded by statute on other grounds); *see also Santa Clara Cnty. Local Transp. Auth. v.*
 22 *Guardino*, 11 Cal. 4th 220, 230 (1995). As shown above, Plaintiffs’ claim under section 3344
 23 raises serious constitutional questions under the First Amendment and Article 1, section 2 of the
 24 California Constitution. *See Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1041 (1986). The
 25 First Amendment provides broad protection for the fundamental right of free speech, and the
 26 California Constitution “independently establishes a zone of protection that is broader still.” *See*
 27 *id.* Plaintiffs’ claim puts at issue the right of Facebook Users to express their consumer opinions
 28 and communicate with their Friends, as well as the right of Facebook to republish that

1 information, as a subject in which the audience has a legitimate interest. The Court should
 2 construe section 3344 so that Facebook's republication of User communications falls within the
 3 "newsworthy" exemption and avoid these constitutional concerns.

4 **D. Plaintiffs Fail to State a Claim for Violation of California Business and**
 5 **Professions Code Section 17200.**

6 For several reasons, Plaintiffs' Second Claim for Relief under California's Unfair
 7 Competition Law (the "UCL"), Business and Professions Code section 17200, fails to state a
 8 claim upon which relief can be granted.

9 *First*, Plaintiffs lack standing to sue under the UCL because they have not alleged, and
 10 cannot allege, that they "suffered injury in fact and ha[ve] lost money or property as a result of
 11 the unfair competition." Cal. Bus. & Prof. Code § 17204; *see also Californians for Disability*
 12 *Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 227 (2006); *Animal Legal Defense Fund v. Mendes*,
 13 160 Cal. App. 4th 136, 145, 148 (2008). Plaintiffs' conclusory allegation that "Plaintiffs each lost
 14 money to which they were entitled in the form of compensation for the use of their names and
 15 interest" (Compl. ¶ 77) and their request in the Prayer for Relief for "damages ... in an amount to
 16 be determined at trial" and "restitution" (Compl. ¶ 84), without *any* factual allegations suggesting
 17 that such injury exists or is imminent, is insufficient to satisfy the "injury in fact" prong of UCL
 18 standing. *See supra* IV.A (discussing lack of injury in fact and citing authorities) *see also Troyk*
 19 *v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1346 (2009) (the California proposition adding
 20 the "injury in fact" requirement to the UCL referred specifically to the standing requirements of
 21 the United States Constitution, which include "actual or imminent, not 'conjectural' or
 22 'hypothetical'" injury) (quoting *Lujan*, 504 U.S. at 560-61). Nor have Plaintiffs satisfied the
 23 second prong of UCL standing. Plaintiffs have not alleged that they lost any money or property,
 24 nor could they as Facebook is, and always has been, a free service.

25 In another putative class action against Facebook pending in this district before Judge
 26 Ware, the Court dismissed the plaintiffs' UCL claim with prejudice because "'personal
 27 information' does not constitute property for purposes of a UCL claim." *In re Facebook Privacy*
 28 *Litig.*, No. C 10-02389 JW, at 11 (N.D. Cal. May 12, 2011) (citing *Thompson v. Home Depot*,

1 *Inc.*, No. 07cv1058 IEG, 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18, 2007)).⁷ Judge Ware also
 2 reasoned that the plaintiffs could not allege a loss of money or property because they “received
 3 [Facebook’s] services for free.” *Id.* at 11-12 (noting that UCL claim is limited to plaintiffs who
 4 *paid for* certain services and a company discloses personal information about its consumers to the
 5 public in violation of its own principles). Similarly, here, Plaintiffs cannot allege that they lost
 6 money or property as a result of the alleged conduct.

7 *Second*, Plaintiffs have not sufficiently alleged that Facebook acted “unlawfully” in
 8 contravention of the UCL, which is based on the alleged violation of their statutory publicity
 9 rights under Civil Code section 3344. (Compl. ¶¶ 69-70.) However, as shown above (*supra*
 10 § IV.C), Plaintiffs have failed to allege facts sufficient to state such a claim, and thus Plaintiffs’
 11 claim under the “unlawful” prong of section 17200 necessarily fails as well. *See Whiteside v.*
 12 *Tenet Healthcare Corp.*, 101 Cal. App. 4th 693, 706 (2002) (“unlawful” claim under UCL fails
 13 where there is no claim based on underlying statute).

14 *Third*, Plaintiffs have not alleged facts showing that Facebook acted “unfairly” within the
 15 meaning of the UCL. California courts have held that in order to state a claim for an “unfair”
 16 business practice in the context of a UCL consumer action, a plaintiff must allege facts sufficient
 17 to establish: (1) substantial consumer injury; (2) that the injury is not outweighed by
 18 countervailing benefits to consumers; and (3) that the injury is one that consumers could not
 19 reasonably have avoided. *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1403 (2006)
 20 (referring to factors under section 5 of Federal Trade Commission Act, codified at 15 U.S.C.
 21 § 45(n)); *accord Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 596 (2009). But, as
 22 discussed above, Plaintiffs have not sufficiently pled *any* injury, let alone a “substantial” injury.
 23 On the contrary, they acknowledge that Sponsored Stories are generated only when Facebook
 24 Users voluntarily share content (Compl. ¶¶ 24) that can only “be seen by other persons with
 25 whom the Member has a relationship as a Friend.” (Compl. ¶ 17.) Plaintiffs have also failed to
 26

27 ⁷ Because this recently issued decision is not yet available in online databases, a courtesy copy is
 28 attached to the concurrently filed Declaration of Jeffrey Gutkin.

1 suggest that any such injury is “not outweighed by countervailing benefits to consumers.”
 2 Therefore, Plaintiffs’ claim under the “unfair” prong of section 17200 should be dismissed.

3 *Fourth*, Plaintiffs have not alleged facts showing that Facebook is liable under the
 4 “fraudulent” prong of section 17200. Claims brought under the “fraud” prong must be pled with
 5 particularity under Federal Rule of Civil Procedure 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d
 6 1120, 1124 (9th Cir. 2009) (claims brought under the fraud prong of the UCL must be pled with
 7 specificity, stating “with particularity the circumstances constituting fraud” including the “who,
 8 what, when, where, and how’ of the misconduct charged”). To state a claim, the Complaint must
 9 allege with particularity facts demonstrating (1) a misrepresentation, (2) knowledge of its falsity,
 10 (3) intent to induce reliance, (4) that the reliance was justified, and (5) damages. *Id.* at 1126
 11 (citing *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 974 (1997)).

12 Plaintiffs’ allegations that Facebook acted fraudulently are deficient in several respects.
 13 Though the Complaint alleges that Facebook misrepresented Users’ ability to prevent their
 14 appearance in Facebook advertising because allegedly “there is no meaningful way to prevent
 15 one’s name, photograph, likeness or identity from appearing as an endorsement in Sponsored
 16 Stories” (Compl. ¶ 71), the Complaint also admits that Sponsored Stories can be generated only if
 17 a User chooses voluntarily to utilize the Post, Like, Places, or Check-in features. (*See generally*
 18 Compl. ¶¶ 17, 20-24.) Moreover, as discussed, despite Plaintiffs’ selective omission of Help
 19 Center pages, it is also clear Plaintiffs could have limited the use of their name and/or likeness in
 20 Sponsored Stories through their privacy settings. In addition, the Complaint does not allege with
 21 specificity that Facebook intended to induce Plaintiffs’ reliance, or the manner in which Facebook
 22 purportedly induced some action by the named Plaintiffs. Nor does the Complaint allege when
 23 statements about the “Sponsored Stories” feature were purportedly made to Plaintiffs, nor when
 24 their own names and/or likenesses were used, if ever. In short, the Complaint does not allege
 25 with particularity facts sufficient to demonstrate any alleged fraud, and thus fails to state a claim.

26 Finally, Plaintiffs cannot assert a claim for monetary relief. Under the UCL, monetary
 27 relief is limited to restitution, *see Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,
 28 1148 (2003), and Plaintiffs do not and cannot allege they paid money to Facebook.

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

Plaintiffs' unjust enrichment claim should also be dismissed on the ground that there is no such independent cause of action in California. *See, e.g., In re DirecTV Early Cancellation Litig.*, 738 F. Supp. 2d 1062, 1091 (C.D. Cal. 2010) (noting "unjust enrichment is not an independent claim"); *Levine v. Blue Shield of Cal*, 189 Cal. App. 4th 1117, 1138 (2010) (dismissing unjust enrichment claim because "[t]here is no cause of action in California for unjust enrichment") (internal citations omitted); *McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004) ("Unjust enrichment is not a cause of action, however, or even a remedy . . ."). Such an improperly pled claim can only survive if the court elects to reinterpret the "unjust enrichment" claim as some alternate legal theory that would give 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). Thus, Plaintiffs' unjust enrichment claim does not properly state a cause of action.

Moreover, as demonstrated above, Plaintiffs have failed to allege facts sufficient to show that Facebook fraudulently obtained a benefit from Plaintiffs in violation of section 17200. *See supra* IV.D. Plaintiffs cannot allege entitlement to restitution because Facebook is free, and Plaintiffs have not paid money to Facebook. Plaintiffs thus have not demonstrated any basis on which they would be entitled to restitution based on a theory of unjust enrichment. *See, e.g., Levine*, 189 Cal. App. 4th at 1138 (holding that there is no separate cause of action for unjust enrichment, and, where trial court sustained demurrer on other causes of action involving fraud or misrepresentation, plaintiffs did not demonstrate any basis on which they would be entitled to restitution under unjust enrichment theory).

V. CONCLUSION

Plaintiffs' First Amended Class Action Complaint should be dismissed with prejudice.

Dated: May 18, 2011

COOLEY LLP

By: /s/ Matthew D. Brown
Matthew D. Brown

Attorneys for Defendant FACEBOOK, INC.