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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Zynga Privacy Litigation

NO. C 10-04680 JW

**ORDER GRANTING DEFENDANT’S
MOTION TO STRIKE; GRANTING
DEFENDANT’S MOTION TO DISMISS**

Presently before the Court are Defendant’s Motion to Strike¹ and Defendant’s Motion to Dismiss.² The Court conducted a hearing on October 17, 2011. Based on the papers submitted to date and oral argument, the Court GRANTS Defendant’s Motion to Strike and GRANTS Defendant’s Motion to Dismiss.

A. Background

A detailed summary of the factual background of this case is provided in the Court’s June 15, 2011 Order.³ The Court reviews the procedural history relevant to the present Motion.

On June 15, 2011, the Court granted in part and denied in part Defendant’s previous motion to dismiss. (See June 15 Order.) On July 15, 2011, Plaintiffs filed an Amended Complaint pursuant to the Court’s June 15 Order.⁴

¹ (Defendant Zynga Inc.’s Notice of Motion and Motion to Strike the Corrected Second Amended Consolidated Class Action Complaint’s Causes of Action Already Dismissed with Prejudice, hereafter, “Motion to Strike,” Docket Item No. 71.)

² (Defendant Zynga Inc.’s Notice of Motion and Motion to Dismiss Corrected Second Amended Consolidated Class Action Complaint, hereafter, “Motion to Dismiss,” Docket Item No. 72.)

³ (Order Granting in part and Denying in part Defendant’s Motion to Dismiss, hereafter, “June 15 Order,” Docket Item No. 64.)

⁴ (Corrected Second Amended Consolidated Class Action Complaint, hereafter, “SAC,” Docket Item No. 67.)

1 **B. Standards**

2 **1. Motion to Strike**

3 Pursuant to Federal Rule of Civil Procedure 12(f), “the court may order stricken from any
4 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”
5 The Ninth Circuit has held that “[t]he function of a 12(f) motion to strike is to avoid the expenditure
6 of time and money that must arise from litigating spurious issues by dispensing with those issues
7 prior to trial.” Sidney-Vinsein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983) (citation
8 omitted).

9 However, “[m]otions to strike are generally regarded with disfavor because of the limited
10 importance of pleading in federal practice, and because they are often used as a delaying tactic.”
11 Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003). Accordingly,
12 such motions should be denied unless the matter has no logical connection to the controversy at
13 issue and may prejudice one or more of the parties to the suit. See S.E.C. v. Sands, 902 F. Supp.
14 1149, 1166 (C.D. Cal. 1995); LeDuc v. Kentucky Cent. Life Ins. Co., 814 F. Supp. 820, 830 (N.D.
15 Cal. 1992). When considering a motion to strike, the court “must view the pleadings in a light most
16 favorable to the pleading party.” In re 2TheMart.com, Inc. Securities Litig., 114 F. Supp. 2d 955,
17 965 (C.D. Cal. 2000).

18 **2. Motion to Dismiss**

19 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against
20 a defendant for failure to state a claim upon which relief may be granted against that defendant.
21 Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient
22 facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699
23 (9th Cir. 1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-534 (9th Cir. 1984).
24 For purposes of evaluating a motion to dismiss, the court “must presume all factual allegations of the
25 complaint to be true and draw all reasonable inferences in favor of the nonmoving party.” Usher v.
26 City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved
27 in favor of the pleading. Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973).

1 However, mere conclusions couched in factual allegations are not sufficient to state a cause
 2 of action. Papasan v. Allain, 478 U.S. 265, 286 (1986); see also McGlinchy v. Shell Chem. Co., 845
 3 F.2d 802, 810 (9th Cir. 1988). The complaint must plead “enough facts to state a claim for relief
 4 that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Courts
 5 may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by
 6 amendment. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000).

7 **C. Discussion**

8 **1. Motion to Strike**

9 Defendant moves to strike from the Second Amended Complaint the Third, Fourth and Fifth
 10 Causes of Action, on the ground that although the Court has already dismissed them with prejudice,
 11 Plaintiffs “substantially amended the language of those causes of action” when re-alleging them in
 12 the Second Amended Complaint.⁵ (Motion to Strike at 2-3.) Plaintiffs respond that these causes of
 13 action should not be stricken, because they “assert those claims for the first time on behalf of a new
 14 plaintiff . . . and a new Subclass” in the Second Amended Complaint, and as to the original Plaintiffs
 15 and Class “merely state [the] claims . . . to preserve them, for appellate purposes.”⁶

16 In the context of 12(f) motions, the type of “impertinent matter” that may properly be struck
 17 from a complaint by a district court “consists of statements that do not pertain, and are not
 18 necessary, to the issues in question.” Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th
 19 Cir. 2010) (citation omitted). Where a claim is dismissed with prejudice, an attempt to replead that
 20 claim with “supplemental allegations” in an amended complaint is “gratuitous,” and a district court
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23 ⁵ The causes of action at issue were brought under California’s Unfair Competition Law,
 24 California’s Consumer Legal Remedies Act and the Computer Fraud and Abuse Act. (See June 15
 25 Order at 6-7.) In the June 15 Order, the Court dismissed each of these causes of action “with
 26 prejudice.” (Id.)

27 ⁶ (Plaintiffs’ Opposition to Zynga’s Motion to Strike the Corrected Second Amended
 28 Consolidated Class Action Complaint’s Causes of Action Already Dismissed with Prejudice at 2-3,
 Docket Item No. 76.) The Court observes that Plaintiffs did not seek leave to amend their previous
 Amended Complaint so as to add the new Plaintiff named in the Second Amended Complaint.

1 acts “within its discretion to ignore it.” Crichton v. Golden Rule Ins. Co., 576 F.3d 392, 395-96 (7th
2 Cir. 2009).

3 Here, the Court explicitly dismissed the causes of action in question “with prejudice.” (June
4 15 Order at 6-7.) Nonetheless, Plaintiffs replead these causes of action, with supplemental
5 allegations, in their Second Amended Complaint, on the ground that these causes of action have “not
6 been ruled upon as to the Subclass.” (See, e.g., SAC at 24.) However, since the Court has already
7 dismissed these causes of action with prejudice as to the class in its entirety, it necessarily follows
8 that they have also been dismissed as to any subset of that class (e.g. the putative “Subclass”).
9 Because these causes of action have been dismissed with prejudice in their entirety, they do not
10 pertain to the remaining issues at question in this case. Whittlestone, 618 F.3d at 974. Thus, the
11 Court finds good cause to strike these causes of action.⁷

12 Accordingly, the Court GRANTS Defendant’s Motion to Strike.

13 2. Motion to Dismiss

14 Because this case involves similar claims, and because Defendant’s Motion to Dismiss raises
15 the same defects in Plaintiffs’ Second Amended Complaint as were raised by the similar Motion in
16 In re Facebook Privacy Litigation, the Court reviews its ruling in that case as relevant to resolving
17 the current Motion.

18 On November 22, 2011, the Court issued an Order granting Facebook’s Motion to Dismiss in
19 In re Facebook Privacy Litigation.⁸ In that Order, the Court found that the plaintiffs in that case: (1)
20 failed to state a claim under the Stored Communications Act, because they were alleging that
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24 ⁷ Plaintiffs may retain these causes of action, as they were pleaded in the earlier First
25 Amended Complaint, for purposes of appeal. See, e.g., Miletak v. Allstate Ins. Co., No. C 06-03778
26 JW, 2007 WL 7061350, at *4 (N.D. Cal. July 18, 2007) (explaining that a plaintiff “must reallege
even dismissed causes of action in order to preserve them for appeal” under Ninth Circuit caselaw).

27 ⁸ (See Order Granting Defendant’s Motion to Dismiss with Prejudice, hereafter, “Facebook
28 Order,” Docket Item No. 106 in No. C 10-2389 JW.)

1 Facebook was acting as an “RCS provider”⁹ in relation to the communications at issue, but that
 2 argument relied on the mutually inconsistent propositions that (a) the communications were
 3 addressed to advertisers and (b) the communications consisted of “data” which was sent to Facebook
 4 for “processing or storage”; (2) failed to state a claim under Cal. Penal Code § 502(c)(8), because
 5 they alleged that the transmissions at issue were caused by a “standard web browser function,”
 6 rather than by a “contaminant” introduced to the plaintiffs’ computers by Facebook to “usurp” the
 7 “normal operations” of those computers; (3) failed to state a claim for breach of contract, because
 8 they failed to show that they suffered “appreciable and actual damage”; and (4) failed to state a
 9 claim under Cal. Civ. Code §§ 1572 and 1573, because they failed to show that they had suffered
 10 non-speculative damages. (Facebook Order at 4-9.)

11 Thus, consistent with its findings in In re Facebook Privacy Litigation, with respect to
 12 Defendant’s Motion to Dismiss in this case, the Court finds that Plaintiffs’ claims under the Wiretap
 13 Act and Stored Communications Act fail. Plaintiffs’ allegations as to both of these claims rest on
 14 their contention that Defendant “was acting as an RCS provider at the time it non-consensually
 15 divulged the contents of Plaintiffs’ . . . communications.”¹⁰ However, Plaintiffs also allege that the
 16 “electronic communications” at issue in this case are “transmission[s]” between “the user and at
 17 least Facebook” which enables the user “to play a Zynga gaming app.”¹¹ Thus, consistent with In re
 18 Facebook Privacy Litigation, the Court finds that Plaintiffs’ allegations rely on the following
 19 mutually inconsistent propositions: (1) the communications were addressed to “at least Facebook,”

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 21 ⁹ As the Ninth Circuit has explained, an “electronic communication service” (“ECS”) is
 22 statutorily defined as “any service which provides to users thereof the ability to send or receive wire
 23 or electronic communications.” Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 900 (9th
 Cir. 2008) (citing § 2510(15)). By contrast, a “remote computing service” (“RCS”) is statutorily
 defined as “the provision to the public of computer storage or processing services by means of an
 electronic communications system.” Id. (citing § 2711(2)).

24 ¹⁰ (Plaintiffs’ Opposition to Zynga’s Motion to Dismiss Corrected Second Amended
 25 Consolidated Class Action Complaint at 4, hereafter, “Opp’n,” Docket Item No. 77.)

26 ¹¹ (SAC ¶ 43; see also Opp’n at 5 (characterizing Plaintiffs’ allegations about the electronic
 27 communications at issue as follows: “when [Plaintiffs] use a Zynga gaming app, they transmit
 28 electronic communications through the [I]nternet to at least Facebook to enable [themselves] to play
 and interact with a Zynga gaming app”).)

1 and were for the purpose of enabling the user to play a gaming app; and (2) the communications
 2 consisted of “data” sent to Defendant for “processing or storage.”¹² Accordingly, the Court
 3 DISMISSES Plaintiffs’ claims under the Wiretap Act and Stored Communications Act.

4 In addition, Plaintiffs state two claims which are significantly different from claims stated by
 5 the plaintiffs in In re Facebook Privacy Litigation: (1) a claim for breach of contract; and (2) a claim
 6 for breach of the covenant of good faith and fair dealing. The Court considers each of these claims
 7 in turn.

8 **a. Breach of Contract**

9 At issue is whether Plaintiffs state a claim for breach of contract.

10 In its June 15 Order, the Court found that Plaintiffs’ claim for breach of contract failed
 11 “because California law requires a showing of ‘appreciable and actual damage’ to assert a breach of
 12 contract claim, but Plaintiffs only allege that they have ‘suffered and will continue to suffer damages
 13 and losses.’” (June 15 Order at 4-5.) Accordingly, the Court granted Defendant’s motion to dismiss
 14 Plaintiffs’ cause of action for breach of contract without prejudice, with leave to amend “to allege
 15 specific facts showing appreciable and actual damages in support of their claim.” (Id. at 7.)

16 Here, in support of their breach of contract claim, Plaintiffs allege that they suffered “actual
 17 and appreciable damages” as follows:

18 [Plaintiffs’] personally identifiable information . . . has ascertainable value. . . .
 19 [Plaintiffs’] actual and appreciable damages take the form of the value of their [personally
 20 identifiable information] that [Defendant] wrongfully shared with its advertisers and other
 third parties . . . [In addition, the] actual and appreciable damages for Subclass members take
 the form of the monies they paid for [Defendant’s] virtual currency.

21 (SAC ¶ 151.)

22 Thus, Plaintiffs’ breach of contract claim relies on two allegations: (1) the allegation that, as
 23 to the Class as a whole, Plaintiffs suffered “appreciable and actual damages” in the form of the loss
 24 of the “value” of their personally identifiable information; and (2) the allegation that, as to the

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 26 ¹² Further, the Court finds that Plaintiffs’ claims under the Wiretap Act fail for the same
 27 reasons that the plaintiffs’ Wiretap Act claims failed in In re Facebook Privacy Litigation, as
 explained in the Court’s May 12, 2011 Order in that case. (See Order Granting in part and Denying
 in part Defendant’s Motion to Dismiss, Docket Item No. 91 in No. C 10-2389 JW.)

1 Subclass only, Plaintiffs suffered “appreciable and actual damages” in the “form of the monies they
 2 paid” for Defendant’s “virtual currency.”¹³ Upon review, however, the Court finds that neither of
 3 these allegations support Plaintiffs’ breach of contract claim. First, consistent with its findings in In
 4 re Facebook Privacy Litigation, the Court finds that Plaintiffs’ theory that their personally
 5 identifiable information has “value” that they have “lost” lacks legal support, and thus does not
 6 constitute a showing of “appreciable and actual damages” in the context of Plaintiffs’ breach of
 7 contract claim. (See Facebook Order at 7-9.) Second, as to the Subclass, Plaintiffs do not allege
 8 that members of the Subclass paid money for goods which Defendant failed to deliver. Plaintiffs
 9 merely allege that members of the Subclass purchased “virtual goods” from Defendant. (SAC ¶ 77.)
 10 However, Plaintiffs do not allege that Defendant failed to give members of the Subclass the “virtual
 11 goods” for which they paid money. Instead, as discussed above, the “breach of contract” alleged to
 12 have occurred here involved “divulging, transmitting, renting, selling, [and] otherwise providing
 13 [Plaintiffs’] personally identifiable information to third parties in breach of the terms of its
 14 Agreement.”¹⁴ (Id. ¶ 150.) Thus, Plaintiffs’ allegation that members of the Subclass paid “monies”
 15 for Defendant’s “virtual currency” has no connection to Plaintiffs’ allegations regarding the
 16 “contract” not to divulge their personally identifiable information. Accordingly, the Court finds that

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 18 ¹³ Plaintiffs allege that they had to “affirmatively assent and agree to be bound by
 19 [Defendant’s] Privacy Policy” (the “Agreement”) in order “to register for and use [Defendant’s]
 20 gaming apps,” and that the Agreement constitutes “a valid and enforceable contract between
 21 Plaintiffs and the Class on the one hand, and [Defendant] on the other.” (SAC ¶¶ 144-45.) Further,
 Plaintiffs allege that Defendant breached the Agreement by “divulging, transmitting, renting, selling,
 [and] otherwise providing [Plaintiffs’] personally identifiable information to third parties.” (Id.
 ¶ 150.) Because the Court finds that Plaintiffs fail to adequately allege the damages element of their
 breach of contract claim, the Court does not reach any other issues in regard to this claim.

22 ¹⁴ Although Plaintiffs’ Second Amended Complaint is confused as to this point, it appears
 23 that Plaintiffs are attempting to conflate two possible theories of breach of contract: (1) the theory
 24 that Defendant had a “contract” with Plaintiffs not to disclose their personally identifiable
 25 information to third parties; and (2) the theory that Defendant had a separate contract with the
 26 Subclass to sell them “virtual goods.” As to the first theory, as discussed above, Plaintiffs fail to
 27 state a claim because they cannot show that the loss of the “value” of their personally identifiable
 information constitutes damages for purposes of breach of contract. As to the second theory,
 Plaintiffs fail to state a claim because they do not allege that Defendant *breached* the contract in
 question, i.e., they do not allege that Defendant failed to sell them the “virtual goods” for which they
 had paid. (See Facebook Order at 7 (explaining that, under California law, a plaintiff must plead
 “defendant’s breach” of a contract in order to plead a breach of contract claim).)

1 Plaintiffs have failed to show “appreciable and actual damages *in support of* [their] claim” for
 2 breach of contract. (See June 15 Order at 7) (emphasis added).

3 Accordingly, the Court GRANTS Defendant’s Motion to Dismiss Plaintiffs’ cause of action
 4 for breach of contract.

5 **b. Breach of the Covenant of Good Faith and Fair Dealing**

6 At issue is whether Plaintiffs state a claim for breach of the covenant of good faith and fair
 7 dealing.¹⁵

8 If a plaintiff’s allegations of the breach of the covenant of good faith and fair dealing “do not
 9 go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek
 10 the same damages or other relief already claimed in a companion contract cause of action, they may
 11 be disregarded as superfluous as no additional claim is actually stated.” Bionghi v. Met. Water Dist.
 12 of So. Cal., 70 Cal. App. 4th 1358, 1370 (Cal. Ct. App. 1999).

13 Here, Plaintiffs state a cause of action for breach of contract by alleging that Defendant
 14 breached its contract with Plaintiffs “by divulging, transmitting, renting, selling, [and] otherwise
 15 providing their personally identifiable information to third parties in breach of the terms of its
 16 Agreement.” (SAC ¶ 150.) Similarly, Plaintiffs state a cause of action for breach of the covenant of
 17 good faith and fair dealing by alleging that Defendant “violated its promises and divulged its users’
 18 personally identifiable information to third parties without their authorization or consent.” (Id. ¶
 19 161.) Plaintiffs do not seek separate damages or different relief for these two causes of action.
 20 Thus, because Plaintiffs’ cause of action for breach of the covenant of good faith and fair dealing
 21 relies on the same alleged acts, and seeks the same relief, as Plaintiffs’ cause of action for breach of
 22 contract, it “may be disregarded as superfluous.” Bionghi, 70 Cal. App. 4th at 1370.

23 Accordingly, the Court GRANTS Defendant’s Motion to Dismiss Plaintiffs’ cause of action
 24 for breach of the covenant of good faith and fair dealing.

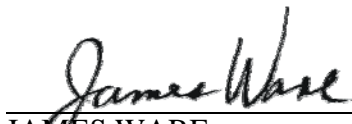
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 26 ¹⁵ The Court observes that Plaintiffs added a cause of action for breach of the covenant of
 27 good faith and fair dealing to their Second Amended Complaint without being granted leave to
 28 amend as to this cause of action. Nonetheless, the Court addresses the merits of this cause of action
 so as to arrive at a final resolution of Plaintiffs’ claims.

1 **D. Conclusion**

2 The Court GRANTS Defendant's Motion to Strike and GRANTS Defendant's Motion to
3 Dismiss.

4 Because the Court has already granted Plaintiffs leave to amend to allege specific facts as to
5 the claims discussed above, and because the Court finds that Plaintiffs continue to fail to state a
6 claim as to each of the claims, the Court finds that further amendment would be futile. Accordingly,
7 the Second Amended Complaint is dismissed with prejudice.

8
9 Dated: November 22, 2011



10 JAMES WARE
United States District Chief Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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15 **Dated: November 22, 2011**

Richard W. Wieking, Clerk

16
17 **By: /s/ JW Chambers**
Susan Imbriani
Courtroom Deputy

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