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FACEBOOK, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

C.M.D., by his next friend Jennifer E. DeYong, T.A.B. by her next friend Patricia A. Isaak, H.E.W. & B.A.W., by their next friend Jami A. Lemons, and A.D.Y. & R.P.Y., by their next friend Robert L. Young, Jr., individually and on behalf of all others similarly situated,

PlaintiffS,

v.

FACEBOOK, INC.,

Defendant.

Case No. 12-CV-01216-LHK

DEFENDANT FACEBOOK, INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

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

Date: September 27, 2012
Time: 1:30 p.m.
Courtroom: 8 – 4th Floor
Dist. 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 September 27, 2012 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 8, 4th Floor, Defendant Facebook, Inc. ("Facebook") will move to dismiss Plaintiffs' First Amended Complaint (the "FAC"). 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, the Declarations of Ana Yang Muller and Matthew D. Brown, the Request for Judicial Notice, and all pleadings and papers on file in this matter, and upon such other matters as may be presented to or properly considered by 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 with prejudice Plaintiffs' FAC and both of the claims for relief alleged therein for lack of standing and 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 FAC be dismissed?

2. Because Plaintiffs' claim for declaratory relief is precluded by the law-of-the-case doctrine, should Count I of the FAC be dismissed?

3. Because Plaintiffs fail to state a claim for relief under California Family Code § 6701 or § 6710, should Count I of the FAC be dismissed?

4. Because Plaintiffs fail to comply with Federal Rule of Civil Procedure 8(a), should Count II of the FAC be dismissed?

5. Because Plaintiffs' claims are preempted by the Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-08, should Count II of the FAC be dismissed?

6. Because Plaintiffs fail to state a claim upon which relief can be granted under California Civil Code § 3344, should Count II of the FAC be dismissed?

7. Because Plaintiffs lack standing to bring claims under the laws of any state in which no named Plaintiff resides, should Count II of the FAC be dismissed?

I. INTRODUCTION

Plaintiffs, residents of Illinois, bring this putative class action on behalf of a nationwide class of teenage Facebook Users and a subclass of teenage Facebook Users in Ohio, Nevada, Illinois, Florida, Massachusetts, Wisconsin, and Indiana. Plaintiffs' claims are extraordinarily (seemingly intentionally) vague, and the factual and legal bases for them are not entirely clear. Plaintiffs purport to challenge the display of their names and pictures in connection with "advertisements," but their allegations are ambiguous as to what Plaintiffs mean by that term and on what legal bases Plaintiffs are bringing their claims. Count I of the FAC seeks a declaration that Plaintiffs—and all other teenage Facebook Users in the United States—are not bound by Facebook's terms of use, called the Statement of Rights and Responsibilities ("SRR"), even though Plaintiffs have used, and continue to use, Facebook pursuant to that agreement, and even though a court in this very case has already deemed those terms binding. Count II seeks damages on behalf of the proposed subclass for alleged infringement of Plaintiffs' "right of identity," but the FAC does not specify what statute or common law Facebook allegedly violated.

Plaintiffs' claims are insufficient as a matter of law and should be dismissed with prejudice. *First*, and fatal to all claims, Plaintiffs allege no injury in fact that confers standing under Article III of the U.S. Constitution. Plaintiffs assert, in conclusory terms, that they lost a "financial interest in their inherent right to control the use of their identity." But Plaintiffs allege neither facts suggesting that their names or likenesses have economic value, nor facts showing how their display, expressly permitted by the SRR, injured Plaintiffs.

Second, Plaintiffs already argued, *and lost*, the claim asserted in Count I—that the SRR is "void" as to all teenage Facebook Users under the California Family Code. On March 8, 2012, U.S. District Judge G. Patrick Murphy ruled that Plaintiffs are bound by the SRR and transferred the action to this Court on that basis. Furthermore, the SRR is not "voidable" because Plaintiffs have received, and are still receiving, substantial benefits from their use of Facebook.

Third, Count II should be dismissed because Plaintiffs' allegations are so skeletal and

internally inconsistent that they fail to apprise Facebook of the claims being asserted. Plaintiffs do not cite a single statute or case supporting their claims for infringement of the "right to identity." Further confusing matters, though Count I is premised on California law, for Count II, Plaintiffs purport to represent a subclass of residents of seven states *other than* California, including six states where no Plaintiff resides. Given these highly ambiguous claims, Facebook cannot fully prepare its defense and will be left guessing what Plaintiffs' allegations really are.

Fourth, to the extent Count II seeks to impose liability for Facebook allegedly using the names and likeness of minors without the consent of their parents, it is preempted by the Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-08, in which Congress decided parental consent for teenagers' Internet use should *not* be required. Count II should also be dismissed because, if Plaintiffs' claims arise under California law, Plaintiffs do not allege several of the essential elements of a claim under California Civil Code section 3344 ("§ 3344").

Finally, Count II should be dismissed for lack of standing to the extent that it purports to assert claims under the laws of states in which Plaintiffs do not reside, namely, Ohio, Nevada, Florida, Massachusetts, Wisconsin, and Indiana. Additionally, even if Plaintiffs have Article III standing, they have not alleged facts that establish standing under the applicable right of publicity statutes in at least Ohio, Nevada, Indiana, or Massachusetts.

Accordingly, the FAC fails as a matter of law and should be dismissed with prejudice.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Facebook is a free social networking service that allows people aged thirteen and older to share information about themselves and to connect with their Facebook friends ("Friends") and the businesses, organizations, and causes they care about. (FAC ¶¶ 12, 13, 14, 17.) To join, Facebook users ("Users") must provide their name, age, gender, and email address (*id.* ¶ 12), and accept Facebook's terms of use. A User can also upload a "profile picture," but that is not required and the picture can be of anything, including pets, a landscape, or even other people.

According to the FAC, Users can create and update their personal Facebook "profile" by adding information about themselves and their interests and hobbies. (*Id.* ¶¶ 12-14.) Users can also express their affinity for content by clicking on a button labeled "Like" that is associated

with Facebook "Pages" created by a variety of businesses, organizations, groups, causes, and individuals. (Orig. Compl., Dkt. 2, ¶ 18.)[1] As with other user content on the site, a story about a User's action—for example, a statement that the User "Likes" a Facebook Page—may then be displayed to the audience selected by the User, usually his or her Friends, consistent with his or her privacy settings. (*See id.*) Later, and subject to the User's privacy settings, the User's Friends may also see a republication of the same story that he or she "Likes" a Facebook Page alongside a related advertisement for that Page. (*See* Orig. Compl., Dkt. 2, ¶ 19; FAC ¶ 23.)

Plaintiffs reside in Illinois and remain active users of Facebook.[2] (FAC ¶¶ 2-5; Transfer Order, Dkt. 93, at 8.) Plaintiffs assert two claims against Facebook. *First*, Plaintiffs assert a claim for declaratory relief under California law, in which they ask the Court to "find the SRR to be absolutely void" as to all teenage Facebook Users. (FAC ¶¶ 33, 46-55.) Plaintiffs previously argued for the same ruling, on the very same bases asserted in the FAC, in opposition to Facebook's motion to transfer this action from the U.S. District Court for the Southern District of Illinois (Judge G. Patrick Murphy). (Opp. to Mtn. to Trnsfr. Dkt. 78, at 3-4.) Judge Murphy ruled that Plaintiffs were bound by the SRR and enforced its forum-selection clause, over Plaintiffs' objections. (Transfer Order, Dkt. 93, at 8.) *Second*, Plaintiffs assert a claim for "infringement of the right of identity" and seek damages on behalf of a subclass of minor Users who reside in any of seven states.[3] (FAC ¶¶ 34, 56-69.) They do not allege whether their claims arise under federal or state law, or under statute or common law. Instead, Plaintiffs use generic phrases like "misappropriat[ion] [of] Plaintiffs' rights to publicity" (FAC ¶¶ 31, 66), "inherent right to control the use of their identity" (FAC ¶ 32), "statutory right to exert exclusive control

[1] To the extent necessary, the Court may judicially notice its own records and prior pleadings. *See Asdar Grp. v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290 n.1 (9th Cir. 1996).

[2] The Original Complaint was filed on behalf of two named Plaintiffs, E.K.D. and C.M.D. On March 2, 2011, five individuals moved to intervene. (Mtn. to Intervene, Dkt. 90.) Although their motion was not ruled on, those five individuals were added as new named Plaintiffs in the FAC; C.M.D., who was a named Plaintiff in the Original Complaint, continues as a named Plaintiff in the FAC, but E.K.D. does not. (Orig. Compl., Dkt. 2; FAC ¶¶ 2-5.) All Plaintiffs in the FAC are residents of Illinois and current users of Facebook. (FAC ¶¶ 2-5.)

[3] The seven states listed in the "Penalty Sub-Class" are: Ohio, Nevada, Illinois, Florida, Massachusetts, Wisconsin, and Indiana. (FAC ¶ 34.)

over their identity" (FAC ¶ 68), "statutory damages" (FAC ¶¶ 1, 69, Prayer for Relief (e)), and "unlawful practices" (FAC ¶ 37).

Previously, Plaintiffs acknowledged that they "consent[ed] to [Facebook's] use of their names and likenesses in advertising" (Orig. Compl., Dkt. 2, ¶ 21), but complained that Facebook did not obtain "consent of [their] parents or guardians" (*id*. ¶ 39). In the FAC, Plaintiffs have stripped out any mention of parental consent and replaced it with malleable references to "legal consent." (FAC ¶¶ 30, 31, 61, 63, 65, 66, 68.) Again, they do not specify what statutes, cases, or jurisdictions define "legal consent" as used in the FAC. Plaintiffs contend that without "legal consent," their "right to publicity" was violated when Facebook displayed their "names and profile pictures" in connection with "advertisements." (*Id.* ¶¶ 60-62.)

III. APPLICABLE STANDARDS

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

A court may dismiss a claim under Rule 12(b)(6) when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Under Rule 12(b)(6), though "all material allegations of the complaint are accepted as true," *id*., "labels and conclusions, and a formulaic recitation of the elements of a cause of action" cannot defeat dismissal, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Claims also must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (citation omitted).

IV. ARGUMENT

A. The Court Should Dismiss the FAC for Lack of Article III Standing.

Plaintiffs must allege an injury in fact to pursue a claim in federal court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (plaintiffs must allege that (1) they suffered an injury in fact; (2) there is a causal connection between the injury and the alleged conduct; and (3) the injury may be redressed by a favorable decision); *see also Whitmore v. Ark.*, 495 U.S. 149, 155 (1990) (an injury in fact must be "distinct and palpable," not "abstract"). Moreover, in a putative class action, each named plaintiff must establish that he or she was *personally* injured to have standing. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Without concrete and particularized factual allegations, Plaintiffs cannot establish Article III standing. *See Low v. LinkedIn Corp.*, No. 11-cv-01468-LHK, 2011 WL 5509848, at *3-4 (N.D. Cal. Nov. 11, 2011) (plaintiff was unable to articulate what information was actually disclosed or how it was connected to his identity); *see also In re iPhone Application Litig.*, No. 11-md-02250-LHK, 2011 WL 4403963, at *4 (N.D. Cal. Sept. 20, 2011) (plaintiffs failed to identify what devices they used, what applications they downloaded, or which defendant accessed their information).

Plaintiffs do not specify what cognizable harm they have suffered. Instead, Plaintiffs simply allege legal conclusions. For example, Plaintiffs claim that Facebook's "misappropriation deprives Plaintiffs of their financial interest in their inherent right to control the use of their identity causing them actual financial harm." (FAC ¶ 67.) This is exactly the type of conclusory allegation that the Court need not accept. *See Twombly*, 550 U.S. at 555 (the court need not accept the truth of legal conclusions couched as factual allegations).

Plaintiffs attempt to support their allegations of "actual financial harm" by citing a Nielsen study. (FAC ¶¶ 26-28.) The study generally discusses the ways in which advertisements with User endorsements may be effective for advertisers (FAC ¶¶ 26-28), but *does not* purport to establish that such endorsements have monetary value to Users or that Facebook derives additional revenue from them. (Brown Decl. Ex. A.) Further, the study does not demonstrate that the advertisements that Plaintiffs challenge *in this lawsuit* or any advertisement containing Plaintiffs' names or likenesses resulted in any additional value to advertisers or Facebook. (*Id.*)

Moreover, as discussed further below in Section IV.C.3, Plaintiffs do not allege that they have ever been paid for their "endorsement" or that Facebook diminished their endorsement's value. Indeed, Plaintiffs do not allege that they ever intended to seek compensation for their endorsement, or, if they did, that a market for their endorsement exists. Plaintiffs also make none of the allegations necessary to establish a claim for emotional injury. *See Robyn Cohen v. Facebook, Inc.*, No. C 10-5282-RS, 2011 WL 5117164, at *2-3 (N.D. Cal. Oct. 27, 2011).[4]

Plaintiffs' reference to an unnamed "study" on the value of demographic information (FAC ¶ 14) also does not establish injury. Courts have repeatedly found that this type of allegation does *not* confer standing, because the use of demographic information has "never been considered a[n] economic loss to the subject." *In re Doubleclick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 525 (S.D.N.Y. 2001); *see also 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, Inc.*, 195 Cal. App. 4th 807, 816 (2011).

This case is also distinguishable from *Fraley v. Facebook, Inc.*, No. CV 11-10726 LHK. As an initial matter, Facebook respectfully disagrees with the Court's ruling that the plaintiffs in *Fraley* had Article III standing. Facebook contends that when Users intentionally share their social actions with their Friends, the republication of the same content to the same Friends cannot

[4] The court in *Robyn Cohen* twice dismissed the plaintiffs' complaint. The court first dismissed on Rule 12(b)(6) grounds for, inter alia, failure to adequately allege facts satisfying the injury element under § 3344. *Robyn Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011). As Facebook reads the court's second dismissal order, the amended complaint was again dismissed on Rule 12(b)(6) grounds for, inter alia, failure to allege facts supporting the injury element under § 3344. *Robyn Cohen*, 2011 WL 5117164, at *2-3. However, in a subsequent, post-judgment order on a motion to recover fees, the court indicated that the second dismissal was on Article III grounds. (Brown Decl. Ex. B.)

cause a cognizable injury. Separate and apart from this, however, the allegations here are far less particularized and intelligible than the allegations in *Fraley*.

In *Fraley*, the plaintiffs alleged that their names and likenesses were used in association with Facebook "Sponsored Stories" (*Fraley* Second Amended Complaint ("*Fraley* SAC") ¶¶ 65-85, Brown Decl. Ex. C; *see also* Order Granting in Part and Denying in Part Facebook's Motion to Dismiss *Fraley* SAC ("*Fraley* Order") at 11, Brown Decl. Ex. D), and that Facebook was paid for those Sponsored Stories (*Fraley* SAC ¶¶ 21-22). In contrast, Plaintiffs here do not specify which generically described "advertisements" they believe to be objectionable, nor do they claim that Facebook was paid for all such "advertisements." Plaintiffs instead allege that Facebook derived some "commercial gain" from use of their names and profile pictures (FAC ¶ 23), but they do not "identif[y] a direct, linear relationship between the value of their endorsement . . . [and] *commercial profit* gained by Facebook." (*Fraley* Order at 16.) Further, in *Fraley*, the plaintiffs alleged that their names and profile pictures were shown to their *friends* in association with a Sponsored Story, and that their apparent endorsement has value to their friends. (*See Fraley* Order at 13.) In fact, the Court noted the importance of alleging that there is "economic value of an individual's commercial endorsement of a product or brand to his friends" when differentiating cases denying standing. (*Id.*) Here, Plaintiffs do not allege that their names and likenesses were shown to their "friends," but only that some advertisement was "presented to other users." (FAC ¶ 23.) Finally, in *Fraley*, plaintiffs claimed that their names and likenesses were associated with Sponsored Stories when they "Liked" a product or brand, irrespective of the plaintiff's motive in clicking the "Like" button. (*Fraley* SAC ¶¶ 25-26; *Fraley* Order at 11-12.) Here, Plaintiffs make no allegations concerning the range of actions they took, or the motivation underlying those actions, that allegedly resulted in their names and likenesses being associated with advertisements.

This case is more similar to *Robyn Cohen v. Facebook*, 798 F. Supp. 2d 1090 (N.D. Cal. 2011), than it is to *Fraley*. In *Cohen*, the court dismissed the plaintiffs' claims for alleged misappropriation of their names and likenesses in connection with the "Friend Finder" feature, which enables Users to find other Friends on Facebook. As the Court pointed out in its *Fraley*

Order, "[t]he *Cohen* plaintiffs were unable to show that their names and likenesses had any general commercial value." (*Fraley* Order at 16.) Here, like in *Cohen*, Plaintiffs appear to be seeking compensation for the display of their names and likenesses in association with, among other things, basic features of the Facebook website from which Facebook derives no revenue. (FAC ¶ 21.) In paragraph 21 of the FAC, Plaintiffs allege that their "names and profile pictures" were associated with "advertisements for [Facebook's] services." (*Id.*) It is not clear what Plaintiffs mean by "[Facebook's] services," but, under the reasoning of the *Fraley* Order, to the extent that they are seeking compensation for the display of their names and likenesses in association with any display for which Facebook does not receive payment, Plaintiffs cannot "show that their names and likenesses had any general commercial value." (*Fraley* Order at 16.)

B. The Court Should Dismiss Count I (Declaratory Relief) for Failure to State a Claim upon Which Relief Can Be Granted.

Count I of the FAC alleges that "Facebook's SSR [sic] violates [California] Family Code § 6701" and is "void and of no legal force and effect as between Plaintiffs, Class Members, and [F]acebook." (FAC ¶¶ 50-51; *see also id.* ¶ 52.) Plaintiffs claim in the alternative that "the SRR is governed by [California] Family Code § 6702 [sic] and is voidable at the discretion of Plaintiffs and Class Members." (*Id.* ¶ 52.)[5] Plaintiffs seek "a declaratory judgment . . . find[ing] the SRR to be absolutely void." (*Id.* ¶ 55; Prayer for Relief, at (b).) This claim fails for multiple reasons.

1. Count I Is Precluded Under the Law-of-the-Case Doctrine.

FAC Count I asks the Court to reverse Judge Murphy's ruling that the SRR is enforceable against Plaintiffs, which was a necessary finding underlying his transfer order. (*See* Transfer Order, Dkt. 93.) Judge Murphy's ruling is the "law of the case," and is binding here.

Under the law-of-the-case doctrine, "'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.'" *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (citation omitted); *accord Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988). The doctrine applies

[5] Family Code § 6702 does not exist. Facebook assumes that Plaintiffs intended to invoke Family Code § 6710, which governs a minor's right of disaffirmance under California law.

to the decisions of a transferor court following a § 1404 transfer. *See Christianson*, 486 U.S. at 816 & n.5 (1988); *see also, e.g.*, *NPR, Inc. v. Am. Int'l Ins. Co.*, 242 F. Supp. 2d 121, 126 (D.P.R. 2003) (applying doctrine after transfer under 28 U.S.C. § 1404(a)). As numerous courts have recognized, "[a]dherence to law of the case principles is even more important . . . where the transferor judge and the transferee judge are not members of the same court." *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169 (3d Cir. 1982). Consequently, "[w]hen an action is transferred, that which has already been done remains untouched . . . ." *Pac. Coast Marine Windshields v. Malibu Boats*, No. 1:11-cv-01594-LJO-BAM, 2011 U.S. Dist. LEXIS 139353, at *11 (E.D. Cal. Dec. 5, 2011); *see Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 (10th Cir. 1991) (collecting cases).

Under settled law, the law of the case encompasses all questions "'decided explicitly or by necessary implication in [the] previous disposition.'" *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990) (citation omitted); *accord Thomas v. Bible*, 983 F.2d 152, 154-55 (9th Cir. 1993). A district court can depart from such a decision only in "extraordinary circumstances," *Christianson*, 486 U.S. at 817, including a "change in circumstances, intervening decision of controlling law, or showing of manifest injustice," *Ferreira v. Borja*, 93 F.3d 671, 674 (9th Cir. 1996); *see also United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (enumerating a five-part test). Absent one of these requisite conditions, failure to apply the law-of-the-case doctrine is reversible error. *See Christianson*, 486 U.S. at 816 (reversing Seventh Circuit for failing to apply law-of-the-case doctrine); *Alexander*, 106 F.3d at 878 ("The district court's departure from the law of the case requires reversal . . . ."); *Thomas v. Bible*, 983 F.2d 152, 154-55 (9th Cir. 1993) (same).

Count I of the FAC is plainly barred by the law-of-the-case doctrine. This case was filed initially in the Southern District of Illinois. Facebook moved for a transfer of venue to this District pursuant to the forum-selection clause in the SRR. In its motion, Facebook argued that the forum-selection clause was enforceable against the minor Plaintiffs and that Plaintiffs' past and ongoing use of the Facebook website precluded them from disaffirming the contract. (Mtn. to Trnsfr., Dkt. 57, at 11-12.) In response, Plaintiffs argued that the SRR was absolutely void

under Family Code § 6701 (just as they do in Count I of the FAC):

> Under California law, minors are statutorily forbidden from entering into a contract that purports to "give a delegation of power" or that relates to "any personal property not in the immediate possession or control of the minor." Cal. Fam. Code § 6701 (West 2004). Facebook's SRR incorporates California law and purports to both delegate power and relate to personal property not in the minor's possession. . . Accordingly, the SSR [sic] is "absolutely void, with no necessity to disaffirm [it] to avoid [its] apparent effect." *Hakes Inv. Co. v. Lyons*, 137 P. 911, 912 (Cal. 1913). . . . As a result, no matter what actions the minors may have taken with respect to Facebook's contract, it cannot be binding upon them or any other minor.

(Opp. to Mtn. to Trnsfr., Dkt. 78, at 3-4. *Compare id.*, *with* FAC ¶¶ 49-51.)

Judge Murphy rejected this argument and enforced the SRR against Plaintiffs. (Transfer Order, Dkt. 93, at 4-6.) Indeed, after acknowledging Plaintiffs' arguments under Family Code § 6701, the court ruled:

> In the specific context of forum-selection clauses, courts, including California courts, have readily declined to permit minors to accept the benefits of a contract, then seek to void the contract in an attempt to escape the consequences of a clause that does not suit them. . . . Plaintiffs have used and continue to use facebook.com. The Court concludes that Plaintiffs cannot disaffirm the forum-selection clause in Facebook's TOS, although Plaintiffs were minors when they entered the agreement containing the clause.

(Transfer Order, Dkt. 93, at 8 (discussing cases).) Plaintiffs recognized the far-reaching implications of this ruling, and their characterization in their motion for reconsideration is telling. (Brown Decl. Ex. K (Mtn. to Rcnsdr. Trnsfr.) at 1) ("[T]he very crux of this litigation hinges on the legal enforceability of Facebook's Statement of Rights and Responsibilities against minors. . . . [T]his Court's ruling on Facebook's Motion to Transfer can be read as finding that contract may be ratified and binding upon the minor Plaintiffs. Such a finding could be ruinous to their claims.").)

Thus, Judge Murphy not only decided explicitly that the SRR may be enforced against Plaintiffs, he rejected the *very same arguments* on which Plaintiffs' first claim for relief depend.[6]

[6] Judge Murphy explicitly accepted Facebook's argument that the SRR is not voidable under Family Code § 6710, and he implicitly (and necessarily) rejected Plaintiffs' claim that § 6701 voids the SRR, as Facebook argued in its reply. (Transfer Order, Dkt. 93, at 4-8; Reply to Mtn. to

Judge Murphy's ruling is the law of the case and dispositively established the enforceability of the SRR as to the minor Plaintiffs. *See, e.g.*, *Sorensen v. Pyrate Corp.*, 65 F.2d 982, 983 (9th Cir. 1933) (where court's language "conclusively establishe[d] that it regarded the original contract as valid," defendants were "precluded by the 'law of the case' now to attack the validity of the contract"); *NPR, Inc.*, 242 F. Supp. 2d at 126 (refusing to reconsider transferor judge's choice-of-law determination, which was "a crucial part of his transfer of venue analysis").[7] Because Plaintiffs cannot demonstrate any "extraordinary circumstances" that would justify departure, *see Christianson*, 486 U.S. at 817, Count I of the FAC should be dismissed.[8]

2. Count I Should Be Dismissed Because the SRR Is Neither Void Nor Voidable by Plaintiffs.

Even if the Court were to set aside the law of the case, Count I of the FAC fails.

a. The SRR Is Not Void Under California Family Code § 6701.

Under California law, "[e]xcept as provided in Section 6701, a minor may make a contract in the same manner as an adult, subject to the power of disaffirmance under Chapter 2 (commencing with Section 6710) . . . ." Cal. Fam. Code § 6700. Section 6701, which Plaintiffs cite, provides that certain defined types of contracts with minors are absolutely void, including contracts that "give a delegation of power" or relate to "personal property not in the immediate possession or control of the minor." *Id.* § 6701(a), (c). Just as they argued before Judge Murphy,

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Trnsfr., Dkt. 79, at 3-4.) Judge Murphy was not required to explain his rejection of Plaintiffs' arguments, as the law of the case extends to a court's holdings, not its reasoning. *See Christianson*, 486 U.S. at 817 (that the court "did not explicate its rationale is irrelevant, for the law of the case turns on whether a court previously decide[d] upon a rule of law—which the Federal Circuit necessarily did—not on whether, or how well, it explained the decision" (internal quotation marks omitted)); *accord Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995).

[7] *See also, e.g.*, *Re-Source Am., Inc. v. Corning Inc.*, No. 07-CV-6048 CJS, 2007 U.S. Dist. LEXIS 87462, at *8 (W.D.N.Y. Sept. 24, 2007) ("[T]he … Court has already determined that the contractual choice of law provision . . . applies to the 'business torts' claim. This determination constitutes the law of the case."); *Strigliabotti v. Franklin Res., Inc.*, 398 F. Supp. 2d 1094, 1098 (N.D. Cal. 2005) (law-of-the-case doctrine bars motion that "advance[d] the same general attack" as previously-denied motion); *In re Coe*, 261 F. Supp. 2d 1203, 1206 (C.D. Cal. 2003).

[8] The Court should, likewise, strike the purportedly common question "[w]hether Defendant's Statement of Rights and Responsibilities is void, voidable or enforceable." (FAC ¶ 39(b).)

Plaintiffs claim that SRR § 10.1 violates both of these provisions,[9] making the SRR "absolutely void, with no necessity to disaffirm [it] to avoid [its] apparent effect." (FAC ¶ 51 (citation and quotation marks omitted).) As Judge Murphy correctly ruled, this claim is contrary to the law.[10]

First, under the Family Code, "[a] contract pursuant to which a minor agrees to . . . license . . . use of a person's likeness" is expressly *not* void, and is, instead, subject to a limited right of disaffirmance under § 6710.[11] *See* Cal. Fam. Code § 6750(a)(2). Family Code § 6751 further limits the power of disaffirmance for contracts licensing a minor's likeness, by providing that a minor cannot disaffirm such a contract once the contract has been approved by a court. *See id.* §§ 6750(a)(2), 6751; *see Warner Bros. Pictures, Inc. v. Brodel*, 31 Cal. 2d 766, 777 (1948) (explaining that former Civil Code § 36 (Family Code §§ 6750-51's predecessor statute) "withdraw[s] the right of disaffirmance from minors"); *accord Morgan v. Morgan*, 220 Cal. App. 2d 665, 672 (1963) ("Section 36 of the Civil Code takes away the minor's right to disaffirm . . . ."). If a minor's contract to license the use of her likeness were absolutely void, as Plaintiffs contend, §§ 6750 and 6751 would "be rendered superfluous, in contravention of the rules of statutory interpretation." *See, e.g.*, *Golden W. Ref. Co. v. Suntrust Bank*, 538 F.3d 1233, 1239 (9th Cir. 2008) (collecting cases); *see also, e.g.*, *Big Creek Lumber Co. v. Cnty. of Santa Cruz*, 38 Cal. 4th 1139, 1155 (2006). Plaintiffs' position is, thus, irreconcilable with these provisions.

Moreover, as Facebook showed in its motion to transfer, Family Code § 6701 is inapplicable on its face to SRR § 10.1. Cases construing § 6701(a) and its predecessor statute, Civil Code § 33, demonstrate that the proscription against a minor's contractual "delegation of power" relates to a minor's ability to appoint an agent. *See, e.g.*, *Hakes Inv. Co. v. Lyons*, 137 P.

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[9] Currently, SRR § 10.1 provides: "You 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. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place." Previous versions of the SRR have been to the same effect. (Muller Decl. Exs. A-F.)

[10] Plaintiffs' view of the enforceability of the SRR also is internally inconsistent. In Count I, they invoke California law to support the declaratory relief claim, presumably based the choice-of-law portion *in the SRR*. (Muller Decl. Ex. F.) But for that choice-of-law provision, however, there is no reason to assume that California law would govern claims brought by Illinois residents.

[11] The limitations on that right are highly relevant here and are discussed *infra* at IV.B.2.b.

911, 912 (Cal. 1913) (explaining that "the intention of the legislature in framing section 33 of the Civil Code" was to overrule judicial precedent and "declare the rule that an infant could not execute contracts through an agent having only a delegated authority executed by the infant").[12] Case law similarly confirms the irrelevance of § 6701(c), which has only been applied to prevent minors from assigning "a future interest," such as designating a beneficiary under an annuity contract. *See Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi*, 51 Cal. App. 4th 1302, 1307 (1996) ("A minor cannot make a contract relating to any personal property not in the immediate possession or control of the minor. Thus, a minor cannot contract with respect to a future interest."); *Morgan*, 220 Cal. App. 2d at 675 (voiding assignment of right to wages). These cases bear no similarity to Plaintiffs' consent to Facebook's use of their name and likeness, which is a right that, at all times, has been in their immediate custody and control. *See Taylor v. Indus. Acc. Comm'n*, 216 Cal. App. 2d 466, 474 (1963) (minor had capacity to make a contract relating to sale of newspapers in his possession). Thus, as Judge Murphy correctly ruled, Plaintiffs' reliance on Family Code § 6701(a) and (c) is unfounded. (Transfer Order, Dkt. 93, at 17.)

b. The SRR Is Not Voidable Under California Family Code § 6710.

Plaintiffs' reliance on California Family Code § 6710 is equally misplaced, as Plaintiffs cannot disaffirm their contract with Facebook. (*See* FAC ¶ 52.) As an initial matter, Facebook's transfer motion explicitly argued that Plaintiffs could not disaffirm the SRR under California law (*see* Mtn. to Trnsfr., Dkt. 57, at 11-12), and Plaintiffs failed to address this argument in their opposition (*see* Opp. to Mtn. to Trnsfr., Dkt. 78, at 3-4), or in their motion for reconsideration (*see* Brown Decl. Ex. K (Mtn. to Rcnsdr. Trnsfr.) at 3-6). Consequently, Plaintiffs have waived this claim and are precluded from arguing it now. Plaintiffs cannot avoid that result by framing

[12] *See also, e.g.*, *Blankenship v. Hearst Corp.*, 519 F.2d 418, 425 (9th Cir. 1975) (minor cannot enter partnership because he cannot delegate power under California law); *Schram v. Poole*, 111 F.2d 725, 727 (9th Cir. 1940) (minor not liable under agency theory because "[i]n California a minor cannot give a delegation of power); *Schumm v. Berg*, 37 Cal. 2d 174, 182 (1951) (contract by minor's purported agent void); *Morgan*, 220 Cal. App. 2d at 674 (minor lacked power under former Civil Code § 33 to authorize another to endorse his name on checks); *Chaffin v. Wallace Fin. Co.*, 136 Cal. App. 2d Supp. 928, 929 (1955) (minor's attempt to appoint an agent would be a void act); *see also Casey Wasserman Living Trust v. Bowers*, No. 5:09-CV-180-JMH, 2011 U.S. Dist. LEXIS 46451, at *4-7 (E.D. Ky. Apr. 29, 2011) (collecting cases).

these untimely arguments as a new count in their amended complaint. *See, e.g.*, *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 2011 U.S. Dist. LEXIS 91441, at *13-14 (C.D. Cal. 2011) (collecting cases) ("[I]n most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue.") (citation and quotation omitted); *Soriano v. Countrywide Home Loans, Inc.*, No. 09-CV-02415-LHK, 2011 U.S. Dist. LEXIS 59714 (N.D. Cal. June 2, 2011).

Moreover, under § 6710, a minor's power to disaffirm a contract is limited in several important respects, each of them fatal to Plaintiffs' claim here. First, a minor cannot continue to receive the benefits of a contract he purports to disaffirm because he must either remain bound by the contract or "disaffirm the entire contract, not just the irksome portions." *Holland v. Universal Underwriters Ins. Co.*, 270 Cal. App. 2d 417, 421 (1969). Under this principle, Plaintiffs cannot disaffirm the SRR because each of them continues, even today, to receive the benefits of the contract by using the Facebook service. (Transfer Order, Dkt. 93, at 8 ("Plaintiffs have used and continue to use facebook.com"); FAC ¶¶ 2-5.)[13] Plaintiffs' continued enjoyment of the Facebook website thus negates the "unequivocal intent to repudiate [the SRR's] binding force and effect" that would be required to disaffirm the SRR. *Spencer v. Collins*, 156 Cal. 298, 303 (1909).

Second, "Plaintiffs cannot use the infancy defense to void their contractual obligations while retaining the benefits of the contract." *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 481 (E.D. Va. 2008) (rejecting minors' attempt to disaffirm online contract after receiving its benefits (i.e., their past use of website)), *aff'd in part, rev'd in part on other grounds*, 562 F.3d 630 (4th Cir. 2009). This principle foreclosed disaffirmance in *Paster v. Putney Student Travel, Inc.*, CV 99-2062 RSWL, 1999 U.S. Dist. LEXIS 9194 (C.D. Cal. June 7, 1999), where the plaintiff sought to disaffirm a contractual forum-selection clause after completing a travel program sponsored by the defendant. *Id.* at *1-3, *7. Applying California law, the court rejected that attempt, holding that "Plaintiff . . . cannot accept the benefits of a contract and then seek to void it in an attempt to escape the consequences of a clause that do[es] not suit her." *Id.* at *7-8. As in *Paster*, Plaintiffs'

[13] The FAC states that each of the named Plaintiffs "*is* a facebook user" (FAC ¶¶ 2-5 (emphasis added)), and Facebook's records indicate that they all continue to regularly access the website.

past acceptance of contractual benefits—their longstanding use of Facebook—precludes them from disaffirming the SRR to avoid § 10.1.[14] (FAC ¶¶ 2-5; Muller Decl. Ex. F.)

Finally, Plaintiffs cannot disaffirm the SRR consistent with California's longstanding rule against wielding "the privilege of infancy as a sword, and not as a shield." *Toon v. Mack Int'l Motor Truck Corp.*, 87 Cal. App. 151, 154 (1927); *see also MacGreal v. Taylor*, 167 U.S. 688, 701 (1897) (same); (Transfer Order, Dkt. 93, at 6). At all relevant times, Plaintiffs' use of the Facebook website has been subject to the SRR. Plaintiffs' effort to disaffirm the SRR now is a transparent attempt to escape their past consent and to hold Facebook liable for conduct that was expressly authorized by Plaintiffs at the time it was done. As numerous courts have recognized, a minor's contract is "good until disaffirmed; and . . . disaffirmance [does] not have the retroactive effect of making the defendant a tort-feasor for [acting in accordance with a contract] which had not been disaffirmed at the time." *Carolina Tel. & Tel. Co. v. Johnson*, 168 F.2d 489, 494 (4th Cir. 1948); *see L.P. Steuart & Bro., Inc. v. Capital View Realty Co.*, 112 F.2d 583, 584 (D.C. Cir. 1940) ("Until the disaffirmance by [the minor], the authorized acts . . . were not wrongful"); *Casey v. Kastel*, 237 N.Y. 305, 312 (1924) ("[u]ntil the disaffirmance by the infant the authorized acts of the parties were not wrongful").

3. Count I Does Not State a Proper Claim for Declaratory Relief.

Count I also should be dismissed as an improper claim for declaratory relief. A claim for declaratory relief is not viable where it "is entirely commensurate with the relief sought through their other causes of action." *Mangindin v. Wash. Mut. Bank*, 637 F. Supp. 2d 700, 707-08 (N.D. Cal. 2009); *accord Permpoon v. Wells Fargo Bank Nat'l Ass'n*, No. 09-CV-01140-H (BLM), 2009 U.S. Dist. LEXIS 89723, at *15 (S.D. Cal. Sept. 29, 2009); *Manown v. Cal-Western Reconveyance Corp.*, No. 09 CV 1101 JM (JMA), 2009 U.S. Dist. LEXIS 68392, at *17-18 (S.D. Cal. Aug. 4, 2009). Here, Plaintiffs' claim for declaratory relief implicates, among other

[14] *See also Sheller by Sheller v. Frank's Nursery & Crafts*, 957 F. Supp. 150, 153-54 (N.D. Ill. 1997) (minors cannot "retain[] the advantage" while disaffirming contract); *Harden v. Am. Airlines*, 178 F.R.D. 583, 587 (M.D. Ala 1998) ("If [a] minor chooses benefits under the contract, he may not avoid his obligations thereunder."); 5 Williston on Contracts § 9:14 (same).

provisions, SRR § 10.1, by which the minor Plaintiffs granted consent to Facebook's alleged display of their names and likenesses. (FAC ¶¶ 48-49.) But this issue—consent—is duplicative and unnecessary in light of Count II, which will require an adjudication as to whether "Facebook [] obtained legal consent to use Plaintiffs' names and photographs." (FAC ¶ 61.) Thus, Count I of the FAC should be dismissed on this additional basis. *See, e.g.*, *Mangindin*, 637 F. Supp. 2d at 707-08 (N.D. Cal. 2009) (dismissing declaratory relief claim that was "entirely commensurate with the relief sought through their other causes of action"); *Manown*, 2009 U.S. Dist. LEXIS 68392, at *17 (declaratory relief "redundant and unnecessary").

C. The Court Should Dismiss Count II (Infringement of the Right of Identity) for Failure to State a Claim upon Which Relief Can Be Granted.

1. Count II Should be Dismissed for Failure to Comply With Rule 8(a).

Dismissal under Rule 12(b)(6) is merited where a complaint fails to satisfy the notice pleading standard set forth in Rule 8(a). *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). The pleading standard under Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). The claim must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Plaintiffs do not specify a single statute or common-law basis for their "right of identity" claim. A defendant is not given "fair notice" where plaintiff's complaint fails to inform defendant of "what law [defendant is] alleged to have violated." *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, No. 5:09-cv-04485 JF/PVT, 2010 U.S. Dist. LEXIS 133755, at *40 (N.D. Cal. Dec. 6, 2010); *see also Khan v. World Savings Bank, FSB*, No. 10-CV-04057-LHK, 2011 U.S. Dist. LEXIS 2442, at *18-19 (N.D. Cal. Jan. 11, 2011) (claim "too vague and conclusory to meet Rule 8's requirement" where plaintiff failed to "identify what specific sections of [a statue] she claim[ed] were violated, and by what specific actions of Defendant"). Plaintiffs not only fail to apprise Facebook of what laws they allege were violated, but they have conspicuously stripped out all mention of specific legal bases for their claims. The Original Complaint included a "*see*

e.g." citation referencing several statutes that Plaintiffs implied Facebook violated. (Orig. Compl., Dkt. 2, ¶ 20.) In the FAC, Plaintiffs have removed any trace of legal foundation.

Plaintiffs have further confused the matter by injecting jurisdictional uncertainty into the FAC. On the one hand, consistent with the SRR, Plaintiffs assert a claim for declaratory relief based on the application of California law to a nationwide class of minor Users.[15] (FAC ¶¶ 46-55.) On the other hand, Plaintiffs have alleged a "Penalty Sub-Class" that is comprised of minor Users who reside in Ohio, Nevada, Illinois, Florida, Massachusetts, Wisconsin, and Indiana. (FAC ¶ 34.) The composition of this subclass suggests that Plaintiffs intend to pursue claims under the laws of some or all of these states, but Facebook is forced to guess what law Plaintiffs contend applies to the subclass, as well as what causes of action may be asserted. As written, the FAC would force Facebook to prepare defenses to statutory and common-law claims arising under the laws of eight jurisdictions. Further, Facebook is unable to assess or prepare even the most basic facets of its defense, including defenses based on the applicable statute of limitations, a matter which varies widely from state to state. *Compare, e.g.*, *Wells v. Talk Radio Network-FM, Inc.*, No. 07 C 4314, 2008 U.S. Dist. LEXIS 61343, at *5 (N.D. Ill. Aug. 7, 2008) (applying one-year statute of limitations to Illinois right of publicity claim), *with Epic Metals Corp. v. Condec, Inc.*, 867 F. Supp. 1009, 1015 (M.D. Fla. 1994) (applying four-year statute of limitations to Florida right of publicity claim). Further, Plaintiffs' ambiguous allegations also limit Facebook's ability to evaluate the applicability of other potential defenses to liability, such as those under Communications Decency Act § 230, the First Amendment, and California Civil Code § 3344(d).

Finally, Plaintiffs fail to adequately apprise Facebook of the specific conduct that is the basis for their claims. In particular, Plaintiffs do not identify the range of "advertisements" they claim are objectionable, or even what they mean by "advertisement." It is unclear, for example if Plaintiffs are challenging displays for which Facebook is not paid, such as the "Friend Finder" feature found not actionable in *Robyn Cohen*, 798 F. Supp. 2d at 1097. (*See supra* Section IV.A.)

[15] California law applies to Plaintiffs' claims pursuant to the SRR. *See also infra* Sections IV.C.3, IV.C.4.

Plaintiffs cannot force Facebook to defend claims under the laws of eight jurisdictions by withholding the basic information about their case. Plaintiffs also cannot omit vital information about the specific "advertisements" they challenge. Plaintiffs must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555.

2. The Children's Online Privacy Protection Act Bars Plaintiffs' Claims.

To the extent that Plaintiffs' vague claims regarding the absence of "legal consent" seek to impose any form of parental consent requirement on Facebook, Count II is preempted by the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501-08. COPPA requires an "operator of a website or online service" to obtain parental consent before it "collects" or "use[s]" the "personal information" of a "child" only where the child is "under the age of 13." 15 U.S.C. §§ 6501(1), 6502(a); 16 C.F.R. § 312.5(a). Because only people thirteen and older can use Facebook, the FAC is inconsistent with, and preempted by, the COPPA regulatory scheme.

This conclusion follows from the structure of COPPA and its legislative history. In adopting the COPPA framework, Congress considered *and rejected* a parental consent requirement for minors aged thirteen and older, deferring in large part to teenagers' First Amendment rights to access and communicate over the Internet. *See* S. 2326, 105th Cong. § 3(a)(2)(A)(iii) (1998) (Brown Decl. Ex. E). The FTC's account of what transpired is instructive:

> In the course of drafting COPPA, Congress looked closely at whether adolescents should be covered by the law, ultimately deciding to define a "child" as an individual under age 13. This decision was based in part on the view that most young children do not possess the level of knowledge or judgment to make appropriate determinations about when and if to divulge personal information over the Internet. The FTC supported this assessment.
>
> While this parental notice and consent model works fairly well for young children, the [FTC] is concerned that it may be less effective or appropriate for adolescents. … [C]ourts have recognized that as children age, they have an increased constitutional right to access information and express themselves publicly.

Testimony of the FTC before Subcomm. on Consumer Prot., Prod. Safety, & Ins., July 15, 2010, at 14-15 (citations omitted) (Brown Decl. Ex. F); *see also* FTC, F.A.Q. about the Children's Online Privacy Prot. Rule (revised Oct. 7, 2008), No. 8 (Brown Decl. Ex. G). COPPA thus

reflects Congress's considered decision that minors aged thirteen and older should *not* be required to obtain parental consent before sharing their "personal information"[16] with a "website or online service," or before a website, such as Facebook, may "use" such information.

Critically, COPPA preempts state law that treats the use of personal information in a manner that is inconsistent with COPPA's framework:

> No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this chapter that is inconsistent with the treatment of those activities or actions under this section.

15 U.S.C. § 6502(d). This preemption clause forecloses Plaintiffs' claims to the extent they seek to hold Facebook liable for failing to obtain parental consent for minors. Indeed, because Facebook forbids children under age 13 from using its site, any claims based on a lack of parental consent would target *the very group of minors* that Congress determined should not be subject to a parental consent requirement. Such state-law claims are flatly "inconsistent with the treatment" of teenagers' Internet use prescribed by COPPA, and are therefore preempted. *See* 15 U.S.C. § 6502(d); *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1061-63 (9th Cir. 2009) (plaintiffs' claims expressly preempted because "[i]t would be logically incongruous to conclude that Congress endeavored to erect a uniform standard but simultaneously left states . . . free to . . . create more burdensome regulation"); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000) (preempting state law imposing liability for conduct authorized under federal law).

Indeed, applying COPPA's express preemption clause, a California court recently dismissed virtually identical claims in a class action brought by the same plaintiffs' counsel bringing this case.[17] In *David Cohen v. Facebook*, No. BC 444482 (Los Angeles Super. Ct.),

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[16] A minor's name and photo are "personal information" under COPPA. *See* 15 U.S.C. § 6501(8); Compl., *U.S. v. Sony BMG Music*, No. 08CV10730, ¶ 17 (S.D.N.Y. Dec. 10, 2008) (Brown Decl. Ex. H).

[17] The unsuccessful *David Cohen* suit was brought by attorneys and law firms that have also appeared as counsel of record in this case. (*Compare* Brown Decl. Ex. I at 22, *with* Dkt. 35 (Tamblyn); Dkt. 38 (Barlow); Dkt. 65 (Edward A. Wallace of Wexler Wallace LLP); Dkt. 76 (Squitieri); Dkt. 84 (Stevens); Dkt. 101 (Stuart); Dkt. 103 (Torjesen).)

plaintiffs sued under California Civil Code § 3344 and the California Constitution for Facebook's alleged failure to obtain parental consent for displaying the minors' names and likenesses in alleged advertisements. (Brown Decl. Ex. I (*David Cohen* FACCAC) ¶¶ 39-48.) On September 22, 2011, Judge Debre Weintraub sustained Facebook's demurrer without prejudice and ruled that "Plaintiffs' claims based on state law for Facebook's alleged failure to obtain the parental consent of users aged 13 to 17 to the commercial use of their name and likeness is preempted by [COPPA]." (Brown Decl. Ex. J.) The *David Cohen* plaintiffs filed an amended complaint, but then voluntarily dismissed their claims on the eve of the deadline for Facebook's renewed demurrer, presumably in recognition of their inability to plead around the court's ruling.

Here, Plaintiffs' claims are virtually identical to those rejected in *David Cohen*, as they seek to impose liability for Facebook's alleged display of minor Users' names and likenesses in advertisements and claim violations of the minors' rights of publicity. (*See*, *e.g.*, FAC ¶ 1.) Thus, to the extent Plaintiffs' claims are based on an alleged lack of parental consent, they, like in *David Cohen*, are preempted by COPPA and should be dismissed on that basis.

3. Plaintiffs Also Fail to State a Claim for Relief Under California Law.

To the extent Plaintiffs are asserting, or plan to assert, a claim under California's right of publicity statute, California Civil Code § 3344, they have failed to state a claim for relief.[18] Plaintiffs must allege, among other elements, (1) appropriation of plaintiff's name or likeness to defendant's advantage; (2) use for purposes of advertising "products, merchandise, goods, or services;" (3) plaintiff's lack of consent; and (4) resulting injury. Cal. Civ. Code § 3344(a); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998); *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1918 (1996). The FAC fails on all of these elements.

First, Plaintiffs do not allege with any specificity that Facebook gained any advantage from the alleged use of Plaintiffs' names and likenesses. Nowhere do Plaintiffs allege that Facebook gained any pecuniary benefit, or any advantage at all, from the use of *their specific* names and likenesses. Instead, Plaintiffs rely on generic allegations about the potential economic

[18] Plaintiffs previously referenced California Civil Code § 3344 (*see* Orig. Compl., Dkt. 2 ¶ 20), but they have now have excised any mention of that statute from the FAC.

value of endorsements *to advertisers*. (FAC ¶¶ 26-28.) Even if the generic allegations concerning the value of endorsements to advertisers were true, Plaintiffs do not claim that *their* endorsements in the types of ambiguous "advertisements" challenged here had any value from which Facebook could have appropriated some advantage. Moreover, as discussed, the FAC is ambiguous as to whether it also challenges *unpaid* displays of names and likenesses. *Second*, Plaintiffs consented to the use of their names and profile pictures in connection with commercial or sponsored content under the SRR, which they are bound by, under the law of the case. SRR § 10.1 states, in part: "You give us permission to use your name and profile picture in connection with [commercial, sponsored, or related content (such as a brand you like) served or enhanced by us], subject to the limits you place."[19] (FAC ¶ 48 (quoting SRR § 10.1); Orig. Compl. ¶ 21 (quoting SRR § 10.1).) Plaintiffs allege in conclusory terms that this provision does not provide "legal consent." However, as discussed above in Section IV.C.2, to the extent this allegation is based on a lack of parental consent, Plaintiffs' claims are preempted by COPPA. In fact, Plaintiffs already admitted that, unless they are able to void the SRR (which they cannot do), their claims stand little chance of success. (*See* Brown Decl. Ex. K (Mtn. to Rcnsdr. Trnsfr.) at 1) ("[T]his Court's ruling on Facebook's Motion to Transfer can be read as finding that contract may be ratified and binding upon the minor Plaintiffs. Such a finding could be ruinous to their claims.").)

Third, Plaintiffs fail to allege facts supporting any actionable injury. *See supra* Section IV.A; *see also* Cal. Civ. Code § 3344(a) (using the term "injured" four separate times to describe who may recover under the statute); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001); *Eastwood v. Super. Ct.*, 149 Cal. App. 3d 409, 417 (1983); *Robyn Cohen*, 798 F. Supp. 2d at 1097 (plaintiffs must allege facts supporting injury in addition to alleging that their name or likeness was misappropriated in violation of the statute). While Plaintiffs' FAC asserts that Facebook's "misappropriation deprives Plaintiffs of [a] financial interest . . . [and] caus[es] them actual financial harm" (FAC ¶ 32), they do not plead any facts to support this assertion.

[19] Previous versions of the SRR have been to the same effect. (Muller Decl. Exs. A-F.)

Plaintiffs do not argue that they have ever received payment for use of their name and likeness or that they have ever sought payment for use of their name and likeness. Further, Plaintiffs do not allege facts showing a causal connection between Facebook's act of "associating the names and profile pictures of its users . . . with advertisements" and any "actual financial harm" allegedly suffered by Plaintiffs. (*See* FAC ¶¶ 21, 32.)

The economic right protected by the right of publicity is the commercial value a person has created in their name or likeness, which is dependent on the person's own efforts and actions. *See Zacchini v. Scripps-Howard Broad. Co*., 433 U.S. 562, 576 (1977) (right of publicity derives from entertainer's investment of time and energy in developing act with economic value); *Winter v. DC Comics*, 30 Cal. 4th 881, 889 (2003) (if the value of the misappropriation does not "derive primarily from the celebrity's fame, 'there would generally be no actionable right of publicity'" (citation omitted)); *Smith v. NBC Universal*, 524 F. Supp. 2d 315, 325-26 (S.D.N.Y. 2007) (dismissing statutory right of publicity claim because there was no evidence of "marketability and economic value" in plaintiffs' name and likeness); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 399 (2001). *But see Fraley v. Facebook, Inc.*, --- F. Supp. 2d ---, No. 11-CV-01726-LHK, 2011 WL 6303898, at *16 (N.D. Cal. Dec. 16, 2011). The California appellate court explicitly recognized the necessity of alleging pre-existing commercial value. *See Miller v. Collector's Universe*, 159 Cal. App. 4th 988, 1002 (2008) (noting that California's common-law right of publicity often did not provide relief for "non-celebrity plaintiffs whose names lacked 'commercial value on the open market'"). Plaintiffs have not pled that their names and likenesses have any economic value. It is nonsensical to claim "financial harm" resulting from another's use of something from which Plaintiffs can derive no economic value.

Fourth, Plaintiffs have not alleged that they suffered emotional injury. *See Miller*, 159 Cal. App. 4th at 1005 ("[M]isappropriation 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." (internal quotation marks and citation omitted)). Such claims require allegations of "mental anguish" and a "plausible supporting factual basis," both of which are

absent from the FAC. *See Robyn Cohen*, 798 F. Supp. 2d at 1097.

Fifth, another judge in this district has rejected similar misappropriation claims against Facebook for lack of injury. The plaintiffs in *Robyn Cohen v. Facebook* alleged that their names and likenesses were used without their consent to promote "Friend Finder." *Robyn Cohen*, 798 F. Supp. 2d at 1092. The plaintiffs sued for, among other things, violation of § 3344. The court held that this alleged misuse of the plaintiffs' names and likenesses did not allege a cognizable injury "regardless of the extent to which [the use of their names and likenesses] could also be seen as an implied endorsement by them of the service." *Id.* at 1097. The court also rejected the plaintiffs' claim that the statutory damages provided by § 3344 constituted a cognizable injury, finding that nothing in the statute or the authority the plaintiffs cited "suggests that a plaintiff is entitled to the minimum damages award even in the absence of showing any harm." *Id.* Like the plaintiffs in *Robyn Cohen*, Plaintiffs here have pled neither a cognizable injury nor "a plausible supporting factual basis for any such assertion." *Id.*

Finally, this case is distinguishable from this Court's decision in *Fraley v. Facebook*, --- F. Supp. 2d ---, 2011 WL 6303898 (N.D. Cal. Dec. 16, 2011). As discussed, the allegations in the FAC are far less particularized than those in *Fraley* and, as part of their claims, Plaintiffs appear to be trying to hold Facebook liable for the very same activity that was found not actionable in *Robyn Cohen v. Facebook*, 798 F. Supp. 2d at 1097. (*See supra* Section IV.A.)

4. Any Claim Under the Laws of the "Penalty States" Fails.

California law governs any claim Plaintiffs might bring. Facebook's SRR § 15.1 provides: "The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions."[20] Plaintiffs

[20] Judge Murphy has ruled that Plaintiffs are bound by the SRR (Transfer Order, Dkt. 93, at 17), which is the law of the case (*supra* Section IV.B). Even if that were not so, there would be no reason to set aside the SRR's choice-of-law provision under otherwise applicable rules. A federal court sitting in diversity must apply the choice-of-law rules of the court where the action was originally brought. *See Muldoon v. Tropitone Furniture Co.*, 1 F.3d 964, 965 (9th Cir. 1993). Under Illinois law, a court will give effect to contractual choice-of-law provisions, unless the foreign law is "'dangerous, inconvenient, immoral, [or] contrary to the public policy of the local government.'" *See Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 581 (2011) (quoting *McAllister v. Smith*, 17 Ill. 328, 334 (1856)). None of these factors is present here.

previously admitted that: "Facebook's terms of membership provide that California law will govern any disputes brought by its users." (Orig. Compl., Dkt. 2, ¶ 20 n.1.) Plaintiffs also have argued California law in opposing Facebook's motion to transfer as to contractual capacity (Opp. to Mtn. to Trnsfr., Dkt 78, at 3), the definition of personal property (*id.*), and contract ratification by a minor (*id.* at 4). Additionally, Plaintiffs acknowledge that California law applies by seeking declaratory relief pursuant to the California Family Code and California case law. (FAC ¶¶ 33, 49-55.) Any claim asserted under other states' laws is inapplicable.

The FAC alleges no specific claims under the laws of the "Penalty States," and Plaintiffs lack standing to bring such claims in any event. Numerous courts in this District have held that plaintiffs cannot assert claims under the laws of states in which no named plaintiff resides. *See In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1163-64 (N.D. Cal. 2009) (Armstrong, J.); *In re Apple & AT&TM Antitrust Litig.,* 596 F. Supp. 2d 1288, 1309 (N.D. Cal. 2008) (Ware, J.); *In re GPU Antitrust Litig.*, 527 F. Supp. 2d 1011, 1026-27 (N.D. Cal. 2007) (Alsup, J.); *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1107 (N.D. Cal. 2007) (White, J.); *cf. Pecover v. Elecs. Arts Inc.*, 633 F. Supp. 2d 976, 984-85 (N.D. Cal. 2009) (Walker, J.).

Finally, Plaintiffs lack standing under the specific laws of several of the Penalty States. Some of those states limit the application of their right of publicity statutes to displays of a name or likeness within the state, which Plaintiffs have not alleged occurred. *See* Ind. Code § 32-36-1-1, Sec. 1(a); Mass Gen. Laws ch. 214, § 3A; Nev. Rev. Stat. § 597.780. Moreover, Ohio's right of publicity statute only permits claims by Ohio residents. *See* Ohio Rev. Code Ann. § 2741.03.

V. CONCLUSION

For the foregoing reasons, the FAC and all the claims therein should be dismissed.

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