1

2

3

4

5

6

7

8

UNITED STATES DISTRICT COURT

9

NORTHERN DISTRICT OF CALIFORNIA

10

SAN JOSE DIVISION

11

12

In re Facebook Internet Tracking Litigation

Case No. 5:12-md-02314-EJD

13

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

14

Re: Dkt. No. 162

15

16

17

18

Plaintiffs' third amended complaint alleges that Defendant Facebook, Inc. violated its

19

contractual obligations by tracking logged-out Facebook users on third-party websites. Facebook

20

now moves to dismiss for the third time. Facebook's motion will be granted.

21

I.   BACKGROUND

22

In this putative class action, Plaintiffs allege that Facebook improperly tracked the web

23

browsing activity of logged-out Facebook users on third-party websites.[1] Third Am. Compl.

24

("TAC"), Dkt. No. 157. Plaintiffs previously asserted a variety of common law claims and claims

25

26

[1] For a more detailed discussion of Plaintiffs' factual allegations, see this Court's orders granting
Facebook's motion to dismiss Plaintiffs' first amended complaint (Dkt. No. 87 at 2–6) and

27

Facebook's motion to dismiss Plaintiffs' second amended complaint (Dkt. No. 148 at 1–3).

28

Case No.: 5:12-md-02314-EJD

United States District Court
Northern District of California

1   for violations of federal and state statutes. After two rounds of motions to dismiss, this Court

2   dismissed the majority of Plaintiffs' claims with prejudice for lack of standing and for failure to

3   state a claim. Order Granting Def.'s Mot. to Dismiss ("MTD Order"), Dkt. No. 148. This Court

4   granted leave to amend only as to Plaintiffs' claims for breach of contract and breach of the duty

5   of good faith and fair dealing. Id. Plaintiffs timely filed their third amended complaint. Facebook

6   now moves to dismiss under Fed. R. Civ. P. 12(b)(6) and 15(c). Def.'s Mot. to Dismiss ("MTD"),

7   Dkt. No. 162.

8   **II.   LEGAL STANDARD**

9   A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of claims

10   alleged in the complaint. Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir.

11   1995). Dismissal "is proper only where there is no cognizable legal theory or an absence of

12   sufficient facts alleged to support a cognizable legal theory." Navarro v. Block, 250 F.3d 729, 732

13   (9th Cir. 2001). The complaint "must contain sufficient factual matter, accepted as true, to 'state a

14   claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting

15   Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

16   **III.   DISCUSSION**

17   Plaintiffs' TAC asserts causes of action for (1) breach of contract (TAC ¶¶ 139–48) and (2)

18   breach of the duty of good faith and fair dealing (TAC ¶¶ 149–61). Plaintiffs also seek to enlarge

19   the scope of the proposed class.

20   **A.   Breach of Contract**

21   Plaintiffs allege that each of them entered into a contract with Facebook that consisted of

22   (1) Facebook's Statement of Rights and Responsibilities ("SRR"), (2) Facebook's Privacy Policy,

23   and (3) relevant pages from Facebook's Help Center. TAC ¶ 140. According to Plaintiffs,

24   Facebook promised in the contract that it would not track the web browsing activity of logged-out

25   Facebook users on third-party websites. Id. ¶ 142. Plaintiffs allege that Facebook broke that

26   promise by collecting data about logged-out users' browsing activity and using cookies to connect

27

28   Case No.: 5:12-md-02314-EJD

1   that activity to users' identities. Id.

2   To state a claim for breach of contract, Plaintiffs must allege that (1) they entered into a

3   contract with Facebook, (2) Plaintiffs performed or were excused from performance under the

4   contract, (3) Facebook breached the contract, and (4) Plaintiffs suffered damages from the breach.

5   Oasis W. Realty, LLC. v. Goldman, 51 Cal. 4th 811, 821 (2011) (citing Reichert v. General Ins.

6   Co., 68 Cal. 2d 822, 830 (1968)). "In an action for breach of a written contract, a plaintiff must

7   allege the specific provisions in the contract creating the obligation the defendant is said to have

8   breached." Woods v. Google Inc., No. 05:11-cv-1263-JF, 2011 WL 3501403, at *3 (N.D. Cal.

9   Aug. 10, 2011).

10   The parties agree that the SRR constitutes a contract. MTD 8; Pls.' Opp'n to Def.'s Mot. to

11   Dismiss ("Opp'n"), Dkt. No. 163. However, the SRR itself does not contain a promise to not track

12   logged-out users. Rather, Plaintiffs argue that the operative contract is a combination of provisions

13   from Facebook's SRR, Facebook's Privacy Policy,[2] and Facebook's Help Center pages.[3]

14   **i.   The Data Use Policy was not incorporated by reference into the Statement of
                      Rights and Responsibilities.**
15
         Plaintiffs cite the following language from Facebook's Data Use Policy (dated September
16
     7, 2011):
17
                  We receive data whenever you visit a . . . site with a Facebook
18   feature (such as a social plugin). This may include the date and time
                  you visit the site; the web address, or URL, you're on; technical
19   information about the IP address, browser and the operating system
                  you use; and, if you are logged in to Facebook, your User ID.

20   TAC ¶ 60 (emphasis added). Plaintiffs argue that this language "implicitly promises to the average

21   user that Facebook will not receive [a user-identifying] cookie when the user is not logged in." Id.

22

23   _____

24   [2] During the alleged class period, Facebook changed the title of this document from "Privacy
     Policy" to "Data Use Policy." Opp'n 4 n.4. As discussed below, Facebook also changed the
     substance of the document. In this order, unless otherwise indicated, the term "Privacy Policy"
25   refers to both the Privacy Policy and the Data Use Policy.
     [3] Plaintiffs' statement of their cause of action for breach of contract does not identify the specific
26   contractual language that Facebook allegedly breached. TAC ¶¶ 139–48. However, Plaintiffs
     identify specific contractual language in their brief in opposition to Facebook's motion to dismiss.
27   Opp'n 4 (citing factual allegations in the TAC at ¶¶ 24, 57, 60, and 62–67).

28   Case No.: 5:12-md-02314-EJD

1   Plaintiffs argue that this version of the Data Use Policy is part of the contract because it

2   was incorporated by reference into the SRR. Opp'n 4–5. Under California law, for the terms of

3   another document to be incorporated by reference into an executed document, "the reference must

4   be (1) clear and unequivocal, the (2) reference must be called to the attention of the other party

5   and he must consent thereto, and (3) the terms of the incorporated document must be known or

6   easily available to the contracting parties." Woods, 2011 WL 3501403, at *3 (quoting Troyk v.

7   Farmers Grp., Inc., 171 Cal. App. 4th 1305, 1331 (2009)).

8   Here, Plaintiffs argue that the Privacy Policy was incorporated by reference into the SRR

9   because of the following language in the SRR:

10   Your privacy is very important to us. We designed our Privacy
            Policy to make important disclosures about how you can use
11   Facebook to share with others and how we collect and can use your
            content and information. We encourage you to read the Privacy
12   Policy, and to use it to help make informed decisions.

13   TAC ¶¶ 24, 57.[4] According to Plaintiffs, this language means that the Privacy Policy is

14   incorporated by reference into the SRR because the "SRR expressly refers to the Privacy Policy,

15   says that the Policy is important, links to that Policy and tells users to read it to make important

16   decisions about their privacy." Opp'n 5.

17   Plaintiffs' complaint cites four versions of Facebook's SRR, dated April 22, 2010 (TAC

18   Ex. A), August 25, 2010 (TAC Ex. B), October 4, 2010 (TAC Ex. C), and April 26, 2011 (TAC

19   Ex. D). TAC ¶¶ 19–20. The excerpt quoted above appears in all four versions of the SRR.

20   As discussed above, Plaintiffs argue that Facebook's Data Use Policy promised that

21   Facebook would not track logged-out users. However, the version of the Data Use Policy that

22   contains this language was not published until September 7, 2011—more than four months after

23   the latest version of the SRR (dated April 26, 2011) that Plaintiffs attach to their complaint. See

24   TAC Ex. D (attaching the April 26, 2011, version of the SRR), Ex. H (attaching the September 7,

25

---

26   [4] Plaintiffs' opposition brief quotes additional language from the SRR that is not cited in the TAC:
     "You may also want to review the following documents: Privacy Policy: the Privacy Policy is
27   designed to help you understand how we collect and use information." Opp'n 5.

1   2011, version of the Data Use Policy). Earlier versions of the Privacy Policy did not contain the

2   language that Plaintiffs allege constitutes a promise not to track logged-out users. Compare id. Ex.

3   H (attaching the September 7, 2011, version of the Data Use Policy, which states that Facebook

4   "receive[s] data whenever you visit a . . . site with a Facebook feature (such as a social plugin) . . .

5   . [including], if you are logged in to Facebook, your User ID") (emphasis added), with id. Ex. E

6   (attaching the April 22, 2010, version of the Privacy Policy), Ex. F (attaching the October 5, 2010,

7   version of the Privacy Policy), and Ex. G (attaching the December 22, 2010, version of the

8   Privacy Policy).

9   As Facebook points out, the SRR does not use the term "Data Use Policy" and does not

10   contain any other references to the Data Use Policy. MTD 11–12. Nor could it, since the Data Use

11   Policy Plaintiffs cite and rely on did not exist until several months after Facebook published the

12   most recent version of its SRR that Plaintiffs attach to their complaint. Plaintiffs do not address

13   this deficiency in their opposition brief. Compare MTD 11–12 (noting that the Data Use Policy

14   "was active starting on September 7, 2011," and that the policy "was not incorporated into any of

15   the SRR versions attached to the TAC, and was therefore not a part of the contract"), with Opp'n

16   4–5 (arguing that the SRR "expressly refers to the Privacy Policy," but offering no response to

17   Facebook's point that the Data Use Policy was not operative at the time the cited SRR was

18   published). In addition, Plaintiffs do not allege that earlier versions of the Privacy Policy

19   contained similar promises to not track logged-out users.[5]

20   As such, the Court finds that the Data Use Policy was not incorporated by reference into

21

22   _____

23   [5] During the hearing on Facebook's motion on November 16, 2017, Plaintiffs' counsel argued that
     the September 7, 2011, Data Use Policy is incorporated into the April 26, 2011, SRR because
     Facebook's users continuously agree to the SRR each time they use or access Facebook. Plaintiffs

24   base this argument on the following statement from the SRR: "By using or accessing Facebook,
     you agree to this Statement." TAC Ex. D. Under this theory, Plaintiffs argue that they agreed to

25   the SRR on or after September 7, 2011, which means that the Data Use Policy would have been
     incorporated into the contract between the parties as of that date. This argument fails for two

26   reasons: first, the TAC does not identify the dates that Plaintiffs "used or accessed" Facebook; and
     second, Plaintiffs have not alleged that the April 26, 2011, version of the SRR remained in effect

27   as of September 7, 2011.

28   Case No.: 5:12-md-02314-EJD

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.

fastcase®
Smarter legal research.