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18 **UNITED STATES DISTRICT COURT FOR THE**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**

21 DZ Reserve and Cain Maxwell (d/b/a Max
22 Martialis), individually and on behalf of others
23 similarly situated,

24 Plaintiffs,

25 v.

26 FACEBOOK, INC.,

27 Defendant.

Case No.: 3:18-cv-04978-JD

PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS
THIRD AMENDED CONSOLIDATED
CLASS ACTION COMPLAINT

Date: July 30, 2020
Time: 10:00 am
Court: Courtroom 11, 19th Floor
Hon. James Donato

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1 **I. INTRODUCTION**

2 Over nearly two years of litigation, Facebook has told this Court its Potential Reach metric is
3 “simply a free tool” advertisers can use, whether or not they buy an ad. Facebook has suggested
4 advertisers, including Plaintiffs, should never have relied on Potential Reach, because it does not affect
5 billing or actual delivery of ads. Facebook also suggested to this Court – as it had to the public – that
6 inflation of its Potential Reach metric could never be misleading because it was not designed to match
7 the census, and any inaccuracies were caused by travelers and commuters.

8 The facts tell a different story. Behind closed doors, Facebook stated: “When creating
9 advertising campaigns, advertisers frequently rely on the estimated audience to understand the potential
10 reach of their campaigns and set the bid and budget strategy. Thus, this number is arguably the single
11 most important number in our ads creation interfaces.”

12 Facebook knew for years its Potential Reach was inflated and misleading. While Facebook
13 brushed aside Plaintiffs’ allegations here, years ago it admitted the VAB report – relied upon in
14 Plaintiffs’ Complaint – “has the order of magnitude in inflation correct.” Facebook knew the problem
15 was largely due to fake and duplicate accounts — but, the company made a “deliberate decision” not
16 to remove duplicate or fake accounts from Potential Reach. And senior executives blocked employees
17 from fixing the problem, because it believed the “revenue impact [would be] significant.”

18 Facebook knew it was wrong. As the product manager for Potential Reach put it: “it’s revenue
19 we should have never made given the fact it’s based on wrong data.” Another employee stated “[t]he
20 status quo in ad Reach estimation and reporting is deeply wrong.” The only question was, “[h]ow long
21 can we get away with the reach overestimation.” After learning these facts, Plaintiffs amended their
22 complaint to add claims for fraud and a request for punitive damages, because Facebook’s officers
23 engaged in or ratified conduct despicable under California law.

24 In its latest Motion to Dismiss (“Mot.,” ECF 177) Facebook asserts the same arguments it has
25 raised before – including arguments this Court has rejected. In its Motion, Facebook continues to
26 downplay its potential reach metric as nothing more than a “free tool” — even though its internal
27 documents show it long understood Potential Reach is “arguably the single most important number.”
28 Facebook contends Plaintiffs do not state a claim of breach of implied covenant of good faith and fair

1 dealing — even though its own documents demonstrate it made a “deliberate decision” to mislead its
 2 advertising customers, and the company knew this was “deeply wrong.” And Facebook asserts
 3 Plaintiffs fail to state a claim for quasi-contract because Facebook did not unjustly retain a benefit—
 4 even though its own senior employee admitted Facebook obtained monies “it should have never made
 5 given the fact [Potential Reach] is based on wrong data.” The facts speak for themselves. The Court
 6 should deny the Motion. Facebook’s egregious conduct warrants no different outcome.

7 **II. FACTUAL BACKGROUND**

8 **A. Facebook Knows Potential Reach Is Important to Advertisers**

9 Facebook earns “substantially all of [its] revenue” by selling advertising. TAC ¶ 1. Before
 10 purchasing advertisements through Facebook’s Ads Manager, advertisers input information about their
 11 advertisements, including audience targeting criteria and budget. *Id.* ¶¶ 29; 33. On multiple consecutive
 12 pages on Ads Manager displayed prior to purchase, Facebook makes a “Potential Reach” representation
 13 below a graphic labeled “Audience Size.” *Id.* ¶¶ 30-31; 33. The “Potential Reach” representation states
 14 “Potential Reach: _____ people.” *Id.* ¶ 31, as depicted in Figure 2 of the TAC:



15
 16
 17
 18
 19
 20 *Id.*, Fig. 2. Potential Reach provides the number of “people [are] in an ad set’s target audience.” *Id.* ¶ 3.

21 Facebook’s large purported potential reach is widely acknowledged as one of the main reasons
 22 advertisers chose to purchase advertisements from Facebook. *Id.* ¶¶ 19-22. Facebook’s internal
 23 documents show personnel knew Potential Reach is a material representation relied upon by
 24 advertisers. *Id.* ¶ 61. Facebook acknowledged “advertisers ‘frequently rely’ on Potential Reach ... [and]
 25 this number is arguably the single most important number in our ads creation interfaces.” *Id.* ¶ 61.
 26 Advertisers use Facebook “because the potential reach is unmatched by any other social media
 27 platform.” *Id.* ¶ 21. Reach inflation thus has “real consequences for an advertiser’s overall
 28 communications plan” because advertisers rely on Potential Reach when choosing whether to advertise

1 on Facebook, *id.* ¶ 18, how much to budget for ad campaigns, *id.* ¶¶ 18, 61, how to formulate bid
2 strategy, *id.* ¶ 61, and how to select and modify demographic targeting settings, *id.* ¶¶ 3, 22, 29, 36.

3 **B. Facebook Knew for Years Its Potential Reach is Misleading and Concealed It to**
4 **Protect Its Bottom Line**

5 Facebook’s Potential Reach is systematically inflated. For example, in August 2018, Facebook
6 represented to its advertisers that it had a Potential Reach of 230 million adults (i.e. 18 years old or
7 over). *Id.* ¶ 39. According to United States Census data, there are 250 million adults in the U.S., only
8 68% of which—or 170 million—use Facebook, according to Pew. *Id.* ¶¶ 38, 40. For 18 to 34-year-olds,
9 Facebook represents to advertisers a Potential Reach of 100 million people. But there are only 76
10 million 18 to 34-year-olds in the U.S. *Id.* ¶ 43. And Pew found that only 80% of them—or 61 million—
11 use Facebook. *Id.* After a report was published in the fall of 2017 report (“Report”) alleging that
12 Facebook’s Potential Reach was inflated and exceeded the Census numbers, Facebook employees
13 conducted analysis comparing Facebook’s Potential Reach to US census statistics and acknowledged
14 internally that the Report has “the order of magnitude in inflation correct.” *Id.* ¶ 65.

15 Documents now confirm senior executives knew for years Potential Reach was inflated and
16 misleading – yet they failed to act, and even took steps to conceal the problem. *Id.* ¶¶ 5, 60-92. One
17 Facebook employee wrote, “My question lately is: how long can we get away with the reach
18 overestimation?” *Id.* ¶ 86. In fall 2017, Facebook COO Sheryl Sandberg acknowledged in an internal
19 email she had known about problems with Potential Reach for years. *Id.* ¶ 66. The Potential Reach
20 Product Manager (Yaron Fidler) proposed a fix that would have decreased the Potential Reach
21 numbers. *Id.* ¶¶ 80-81. But Facebook’s metrics leadership team rejected his proposal because the
22 “revenue impact” for Facebook would be “significant.” *Id.* ¶¶ 80-82, 84. Fidler responded, “it’s
23 revenue we should have never made given the fact it’s based on wrong data.” *Id.* ¶ 82. Fidler’s
24 proposals to fix the flawed metric were repeatedly rejected. *Id.* ¶ 91. Instead, Facebook developed
25 talking points to deflect from the truth. Facebook claimed Potential Reach inflation is caused by
26 travelers, and repeatedly reminded advertisers and the public that “the Potential Reach is not designed
27 to match the census.” *Id.* ¶ 71. Facebook used these same talking points in its prior motion to dismiss.
28 ECF 65, Facebook’s MTD CAC, at 7-8.

1 Facebook employees acknowledged Potential Reach is misleading because Potential Reach
 2 itself states it is a measurement of “people” when it is, at best, a measurement of accounts. TAC ¶¶ 30-
 3 32; 67-69; 87-88; Figure 2. Facebook made “a deliberate decision not to remove duplicate or fake
 4 accounts from the Potential Reach metric.” *Id.* ¶ 67. In early 2018, a Facebook analysis found
 5 removing duplicate accounts from Potential Reach would cause a 10% drop in Potential Reach. *Id.*
 6 ¶ 80. In the summer of 2018, Fidler proposed changing Facebook’s Potential Reach metric so it would
 7 no longer include the words “people” or “reach” and instead make clear the metric is based on
 8 accounts. *Id.* ¶ 87. Fidler explained this change would align the “metrics description” with “reality.”
 9 *Id.* ¶ 87. Fidler acknowledged this would come at the “cost of losing the people based narrative.” *Id.*
 10 ¶ 87. Multiple Facebook employees agreed with Fidler that “people-based marketing” was core to
 11 Facebook’s value proposition and that it would thus “be costly to change to accounts...” The proposed
 12 change from “people” to “accounts” was not implemented. *Id.* ¶ 88.

13 C. Named Plaintiffs Purchased Advertisements from Facebook

14 Plaintiff DZ Reserve purchased approximately \$1 million in Facebook advertisements (on the
 15 Facebook and Instagram platforms) from December 2017 to December 2018, and ran nationwide
 16 campaigns, as well as campaigns targeted at specific cities. *Id.* ¶¶ 94-101. Plaintiff Maxwell purchased
 17 approximately \$ 400 in Facebook advertisements from September 2018 to May 2019. *Id.* ¶¶ 102-108.
 18 Both plaintiffs entered into a contract with Facebook that includes the Self-Serve Ad Terms (“SSAT”).
 19 Mot. at 4. The SSAT states advertisers can “target [their] desired audience by buying ads to be delivered
 20 on Facebook, Instagram or our published network.” ECF 178-5, SSAT.

21 D. The Court Denied Facebook’s Motion to Dismiss Plaintiffs’ UCL Claim

22 On December 21, 2018, Plaintiffs filed their Consolidated Amended Complaint. ECF 55. On
 23 February 7, 2019, Facebook moved to dismiss. ECF 65. The Court denied Facebook’s motion to
 24 dismiss Plaintiffs’ UCL claim. ECF 83. On June 17, 2019, Plaintiffs filed their Second Amended
 25 Complaint. After a hearing on October 17, 2019, the Court dismissed Plaintiffs’ breach of contract
 26 claim, finding the SSAT does not create a contractual obligation for the Potential Reach or Estimated
 27 Daily Reach. ECF 130. The Court took Plaintiffs’ quasi-contract and breach of covenant of good faith
 28 and fair dealing claims under submission. *Id.* Before the Court issued a ruling on those two claims,

1 Plaintiffs filed a Third Amended Complaint on April 15, 2020, adding claims for fraudulent
2 misrepresentation and fraudulent concealment, and seeking punitive damages. ECF 166.¹

3 **III. STANDARD**

4 “In evaluating a [12(b)(6)] motion to dismiss, the court must assume that the plaintiff’s
5 allegations are true and must draw all reasonable inferences in his or her favor.” *Buckley v. Cnty. of*
6 *San Mateo*, 2017 WL 3394747, at *1 (N.D. Cal. Aug. 8, 2017) (Donato, J.). A plaintiff must allege
7 “enough facts to state a claim to relief that is plausible on its face,” and a claim is facially plausible
8 “when the pleaded factual content allows the court to draw the reasonable inference that the defendant
9 is liable for the misconduct alleged.” *Id.* at *1 (internal quotations omitted).

10 **IV. ARGUMENT**

11 **A. Plaintiffs Plead Breach of the Implied Covenant of Good Faith and Fair Dealing**

12 “The implied covenant of good faith and fair dealing is that neither party will do anything that
13 will injure the right of the other to receive the benefits of the agreement.” *Openshaw v. FedEx Group*
14 *Package Sys., Inc.*, 576 F. App’x 685, 687 (9th Cir. 2014). No violation of an express contract term is
15 required. *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 937 (9th Cir. 1999) (breach of a specific
16 provision of the contract not necessary). Rather, the purpose of the implied covenant is “to prevent a
17 contracting party from engaging in conduct which (while not technically transgressing the express
18 covenant) frustrates the other party’s rights of the benefits of the contract.” *Mahmoud v. Select*
19 *Portfolio, Inc.*, 2018 WL 278621, at *5 (N.D. Cal. Jan. 3, 2018) (*quoting Marsu, B.V.* 185 F.3d at 937–
20 38). As the Court put it, breach of the implied covenant can occur where a contract is “performed
21 without zest and verve” even though the conduct “doesn’t necessarily rise to a technical level of
22 breach.” ECF 129, Oct. 17, 2019 Hr’g Trans. at 18:12-17; *see also*, Rest. (Second) of Contracts § 205
23 cmt. d (1981) (“lack of diligence and slacking off” examples of breach of good faith).

24 Facebook’s inaccurate and misleading Potential Reach interfered with a benefit expressly
25 conferred by the contract to allow advertisers to “target [their] desired audience by buying ads to be
26 delivered on Facebook, Instagram or [Facebook’s] published network.” ECF 178-5, SSAT. And, here

27
28 ¹ Facebook asserts this is Plaintiffs’ “fifth” or “sixth” amendment. In fact, Plaintiffs amended their contract claims *once* since consolidation and the fraud claims have never been amended.

1 Facebook did not merely ‘drag its feet’ in providing inaccurate and misleading Potential Reach.
 2 Rather, Facebook knew for years its Potential Reach was misleading, and concealed that fact to
 3 preserve its own bottom line. TAC ¶¶ 60-92.

4 **1. Facebook Frustrated Plaintiffs’ Ability to Target Their Advertisements by**
 5 **Providing Inflated and Misleading Potential Reach**

6 Facebook asserts Plaintiffs’ implied covenant claim fails because no “specific contractual
 7 provision” has been frustrated. Mot. at 6-7. But Facebook unfairly interfered with Plaintiffs’ rights to
 8 receive the benefits of the contract by hindering Plaintiffs’ audience targeting, a benefit expressly
 9 conferred by the contract: “You can target your desired audience by buying ads to be delivered on
 10 Facebook, Instagram or our published network.” ECF 178-5, SSAT at 1.² As Plaintiffs point out in the
 11 Complaint, advertisers use Potential Reach, in part, to “understand how [their] targeting and placement
 12 choices affect the number of people [they] could reach.” TAC ¶ 36. Facebook acknowledges Potential
 13 Reach is a “tool” provided to advertisers “to evaluate the type of people to target...” ECF 103, MTD
 14 SAC at 1. Facebook knows this is a tool advertisers “frequently rely” upon. TAC ¶ 61. Thus, by
 15 providing inflated and misleading Potential Reach, Facebook interfered with a benefit (audience
 16 targeting) expressly promised to Plaintiffs in the contract. This is a breach of the covenant of good
 17 faith and fair dealing. *See e.g., Trombley Enterprises, LLC v. Sauer, Inc.*, 2019 WL 452044, at *5–6
 18 (N.D. Cal. Feb. 5, 2019) (motion to dismiss denied because “misrepresentation ... interfered with
 19 [plaintiff’s] ability to perform the contract in a reasonable, orderly and efficient manner...”).

20 Citing *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589 (9th Cir. 2020) and *Sharp*
 21 *v. Nationstar Mortg., LLC*, 701 F. App’x 596 (9th Cir. 2017), Facebook contends the implied covenant
 22 claim is duplicative and superfluous to Plaintiffs’ previously dismissed breach-of-contract claim. Mot.
 23 at 6-7. *Internet Tracking Litigation* and *Sharp* are inapposite. In both cases, the plaintiffs’ implied
 24 covenant claims did not differ from their breach of contract claims. *In re Facebook*, 956 F. 3d, at 610;
 25 *Sharp*, 701 F. App’x at 598. Here, Plaintiffs’ implied covenant claim is tethered to a *different*

26 ² Plaintiffs can rely on this term in the SSAT because it is undisputed the SSAT is part of the
 27 contract, and Facebook argues Plaintiffs’ implied covenant claim depends on the full contents of the
 28 SSAT. *See* Mot. at 4; Facebook’s Request for Judicial Notice, ECF 179, at 6-7; *see also, Tellabs, Inc.*
v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (courts “must consider ... documents
 incorporated into the complaint by reference and matters of which a court may take judicial notice.”)

1 contractual provision than Plaintiffs’ previously dismissed breach-of-contract claim. Plaintiffs’
 2 implied covenant claim is based on Facebook’s interference with a benefit expressly conferred in the
 3 SSAT (audience targeting), while Plaintiffs’ previously dismissed breach-of-contract claim was based
 4 on a legal theory the Court rejected – that the Potential Reach metric on Ads Manager is an express
 5 contractual term. *See* ECF 89, SAC, at ¶¶ 30, 120. Because the two claims can be “distinguished,”
 6 Plaintiffs’ claim is neither duplicative nor superfluous under California law. *See Daly v. United*
 7 *Healthcare Ins. Co.*, 2010 WL 4510911, at *5-6 (N.D. Cal. 2010).

8 **2. Facebook’s “Disclaimers” Relate to the Delivery and Performance of**
 9 **Advertisements — Not Potential Reach**

10 Facebook asserts Plaintiffs’ implied covenant claim would “create an obligation inconsistent
 11 with the express term[s] of the agreement” because the contract “explicitly disclaims an audience reach
 12 or target guarantee.” Mot. at 8. Plaintiffs’ implied covenant claim is not “inconsistent” with either
 13 clause. Starting in May 2018, Facebook’s SSAT stated, “[w]e do not guarantee the reach or
 14 performance that your ads will receive, such as the number of people who will see your ads or the
 15 number of clicks your ads will get.” ECF 178-6, SSAT. **But the “reach” referenced in the no-**
 16 **guarantee clause is a *different* metric than the Potential Reach.** Reach is the number of people who
 17 actually see the ads, which is only reported *after* the ad is purchased. “Potential Reach” is a metric
 18 shown to advertisers *before* the ad is purchased, when they are in the process of designing their ad
 19 campaigns, and measures the number of people within an ad set’s *target audience*. It is a separate
 20 calculation and a separate representation on Ads Manager. *See* TAC ¶¶ 29-31. Furthermore, because
 21 the reach no-guarantee clause was only added to the SSAT in May 2018, it does not affect Plaintiff
 22 DZ Reserve’s claim related to advertisements it purchased prior to May 2018. *See Id.* ¶ 96 (DZ Reserve
 23 began purchasing Facebook advertisements in December 2017); *compare* ECF 178-6 with 178-5
 24 (versions of SSAT from before and after May 2018).

25 Nor is Plaintiffs’ implied covenant claim inconsistent with the SSAT clause which states
 26 “[w]hen serving your ad, we use best efforts to deliver the ads to the audience you specify ... though
 27 we cannot guarantee in every instance that your ad will reach its intended target.” ECF 178-6, SSAT.
 28 That clause also concerns Facebook’s delivery of ads, *not* advertisers’ selection of audience targeting

1 criteria. And, even assuming *arguendo* this clause applied to Plaintiffs’ audience targeting, it gives
 2 Facebook discretion so long as it uses best efforts. This is not inconsistent with Plaintiffs’ implied
 3 covenant claim, because “where a contract confers one party with discretionary power . . . a duty is
 4 imposed to exercise that discretion in good faith and in accordance with fair dealing.” *Lever Your Bus.*
 5 *Inc. v. Sacred Hoops & Hardwood, Inc.*, 2020 WL 2465658, at *6 (C.D. Cal. May 11, 2020) (internal
 6 citations omitted); *see also, Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 500 (1985).³

7 **B. Plaintiffs State a Claim for Quasi-Contract**

8 To state a claim for quasi-contract, the plaintiff must allege (1) a defendant’s receipt of a benefit
 9 and (2) unjust retention of the benefit at the plaintiff’s expense. *Peterson v. Cellco Partnership*, 164
 10 Cal. App. 4th 1583, 1593 (2008). Plaintiffs adequately plead both elements.

11 **1. Quasi-Contract Claim is Not Barred by Parties’ Express Contract**

12 The contracts entered into between Plaintiffs and Facebook will not foreclose Plaintiffs’ quasi-
 13 contract claim unless they cover the metrics at issue in this case: Potential Reach and Estimated Daily
 14 Reach. As Facebook concedes, “[I]t is well-established that an action based on a ‘quasi-contract cannot
 15 lie where there exists between the parties a valid express contract covering the same subject matter.’”
 16 Mot. at 9 (citing *Morawski v. Lightstorm Entm’t, Inc.*, 599 F. App’x 779, 780 (9th Cir. 2015)). If the
 17 factfinder determines Facebook’s contracts do not cover Potential Reach and Estimated Daily Reach,
 18 then Plaintiffs can recover in quasi-contract, on the theory it would be inequitable for Facebook to
 19 retain funds it gained by virtue of those misleading metrics. *See Ball v. Johanns*, 2008 WL 269069, at
 20 *3 (E.D. Cal. Jan. 29, 2008). This is precisely what the Court determined here: “the SSAT *does not*
 21 *create a contractual obligation* as to the accuracy of the *Potential Reach or Estimated Daily Reach.*”
 22 ECF 130, Minutes for Proceedings on Oct. 10, 2019 (emphasis added).

23 Faced with this ruling, Facebook conflates Potential Reach and actual reach, so that the contract
 24 covers the subject of this lawsuit. Mot. at 10. Not so. As Facebook concedes, Mot. at 11, Plaintiffs
 25 never claim they were misled about advertisements’ ad delivery, i.e., *actual* reach. Facebook itself

26 _____
 27 ³ At best, Facebook’s disclaimers are ambiguous, and therefore present a question for the jury.
 28 *See Lambotte v. IAC/Interactive Corp.*, 2008 WL 4829882 (C.D. Cal. Nov. 4, 2008) (motion to
 dismiss denied because “the disclaimer does not unambiguously conflict with plaintiffs’ breach of the
 covenant of good faith and fair dealing claim.”).

1 repeatedly stressed the distinction between the Potential Reach metric at issue and an advertisement’s
 2 actual reach. *See, e.g.*, ECF 65 at 3 (Potential Reach and Estimated Daily Reach “are only estimates . .
 3 . and neither figure represent[s] actual campaign reach”; ECF 103 at 4 (citation omitted) (“reach
 4 estimates do not affect the number of people to whom its ad is actually delivered”). Facebook cannot
 5 now argue Potential Reach is the same as actual ad delivery and therefore covered by the contract.
 6 Because the Court found Potential Reach is not in the contract, Plaintiffs can pursue their quasi-contract
 7 claim. *See Ball*, 2008 WL 269069, at *3.

8 **2. Plaintiffs Allege Facebook Unjustly Retained a Benefit**

9 Facebook asserts it did not unjustly retain a benefit as a result of its inflated and misleading
 10 Potential Reach. Mot. at 11. But Facebook admits in its own documents it unjustly retained a benefit.
 11 When Facebook’s Product Manager tried to fix Potential Reach, he justified the “significant” “revenue
 12 impact,” by pointing out: “its revenue we should have never made given the fact it’s based on wrong
 13 data.” TAC ¶ 82. This alone is dispositive.

14 In the face of these facts, Facebook argues it did not retain a benefit because “Potential Reach
 15 estimates do not affect the pricing, payment or delivery of Facebook advertisements.” Mot. at 11. Once
 16 again Facebook misconstrues Plaintiffs’ allegations. Plaintiffs do not claim they were mis-billed or that
 17 there was an error in the delivery of their ads. *See* ECF 68 at 6 (same clarification in response to this
 18 identical argument in Facebook’s first Motion to Dismiss). Instead, Plaintiffs plead Facebook
 19 misrepresented, at the point of purchase, the potential number of people their advertisements could
 20 reach. TAC ¶¶ 23-52; *see also*, ECF 68 at 6. Plaintiffs allege Facebook unjustly enriched itself by
 21 inflating Potential Reach, and representing it is based on people rather than accounts to make
 22 advertising on its platform appear more effective and valuable than it really was, leading Plaintiffs to
 23 pay more money than they otherwise would have paid. TAC ¶ 132. Facebook’s documents confirm this
 24 allegation. Accordingly, Plaintiffs sufficiently allege Facebook unjustly retained a benefit.

25 **C. Plaintiffs State a Claim for Fraudulent Misrepresentation**

26 Facebook knew for years its Potential Reach was inflated and misleading. Internal documents
 27 reveal Facebook, including its senior-most executives, understood Potential Reach is systematically
 28 inflated and Potential Reach falsely represents it is a measurement of people, when in fact it is a

1 measurement of accounts, including fake and duplicate accounts. Yet Facebook failed to fix the
2 problem, and took steps to conceal it, to protect Facebook’s revenue. Upon learning this information,
3 Plaintiffs amended their complaint to add a claim for common law fraud.

4 Facebook asserts Plaintiffs do not plead fraud with particularity and do not allege reasonable
5 reliance. In so doing, Facebook rehashes its prior failed motions to dismiss Plaintiffs’ fraud claim under
6 the UCL. *See* ECF Nos. 65 at 3-10, 103 at 14-15. The Court already rejected these arguments *twice*,
7 and should reject them again here. ECF Nos. 83 (denying motion to dismiss UCL claim), 130
8 (“Facebook’s attempt to revisit the denial of dismissal of the UCL claim is an improper request for
9 reconsideration, and denied.”).

10 Specifically, Facebook contends Plaintiffs do not plead the “specific content” that misled them
11 into purchasing ads on Facebook, as required under Rule 9(b). Mot. at 12. This is the *identical* argument
12 Facebook raised in its failed motions to dismiss Plaintiffs’ UCL fraud claim. *See* ECF 65 at 4 (arguing
13 Plaintiffs did not “specify which statements [each of them] actually saw and relied upon” as required
14 by Rule 9(b)); *see also* ECF 103 at 14. The Court rejected these arguments. *See* ECF Nos. 83, 130.
15 Facebook also asserts Plaintiffs could not have reasonably relied on Potential Reach because there is
16 no connection to “the price they were charged for their ad campaigns” and no alleged “surprise or
17 dissatisfaction with their actual advertising reach results.” Mot. at 12. This, too, is an argument
18 Facebook made before, and the Court twice rejected. *See* ECF Nos. 65 at 4-5 (arguing Plaintiffs did not
19 plead reliance because Potential Reach does not “represent actual campaign reach or campaign
20 reporting,” “affect [ad] delivery,” or “guarantee results”), 103 (contending Plaintiff Maxwell did not
21 plead reliance); *rejected in* ECF Nos. 83 and 130.

22 Facebook’s reasonable reliance argument is particularly curious in light of the documentary
23 evidence amassed to date. Behind closed doors, Facebook acknowledges advertisers “frequently rely”
24 on Potential Reach. Facebook’s own employees recommended removal of the words “people” or
25 “reach” from Potential Reach, and instead make clear that the metric is based on “accounts.” TAC ¶ 87.
26 But Facebook executives refused, because the “people-based narrative” is core to Facebook’s value
27 proposition, and it would be “costly” to Facebook “to change [from people] to accounts.” *Id.* ¶ 88.
28 Regardless, under California law, “a presumption, or at least an inference, of reliance arises wherever

1 there is a showing that a misrepresentation was material,” as it is here. *Engalla v. Permanente Med.*
 2 *Grp., Inc.*, 15 Cal. 4th 951, 976-77 (1997); *see also Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1107 (9th
 3 Cir. 2013) (materiality is a question of fact).

4 Facebook also asserts Plaintiffs do not allege they reasonably relied on the “people statement.”
 5 Mot. at 12. Facebook misstates the allegations in the Complaint by asserting Plaintiffs’ fraud claim “is
 6 premised on two statements.” That is incorrect. Plaintiffs’ fraudulent misrepresentation claim is based
 7 on one statement: Facebook’s Potential Reach. TAC ¶¶ 142-148. The Potential Reach representation
 8 states: “Potential Reach: _____ people.” *Id.* ¶ 31, as depicted in Figure 2 of the TAC:



14 *Id.*, Fig. 2. Here the Potential Reach representation includes the word “people,” as well as the word
 15 “reach,” which implies people. *Id.* ¶ 87. Plaintiffs allege the single Potential Reach representation is
 16 false and misleading *for two reasons*. First, Potential Reach is inflated. *Id.* ¶ 143. Second, Potential
 17 Reach is misleading because it uses the word “people” when it is (at best) a measurement of accounts.
 18 *Id.* ¶¶ 68, 144. And, “Potential Reach is not a measurement of people because it includes fake and
 19 duplicate accounts.” *Id.* ¶ 144. Facebook’s documents also contradict its assertion there are two
 20 separate statements. When Facebook’s Product Manager for Potential Reach proposed fixing the
 21 metric, he proposed a single fix – changing the words “people” and “reach” to make clear the metric
 22 refers to accounts so as to align Potential Reach “with reality.” *Id.* ¶ 87.

23 Plaintiffs allege they read and relied on Facebook’s “Potential Reach” statement, *see* TAC
 24 ¶¶ 98, 105, and the Potential Reach statement includes the word “people.” *Id.* ¶¶ 30-31. This reliance
 25 was reasonable, especially given the factual allegations referenced above. *See e.g., Id.* ¶ 61; 67-69; 87-
 26 88; *Engalla*, 15 Cal. 4th at 976-77; *Hinojos*, 718 F.3d 1107. Plaintiffs also plead they would have
 27 purchased fewer Facebook ads and they would have paid a lower price had they known Potential Reach
 28 is calculated based on accounts rather than people. TAC ¶ 158. This is sufficient.

D. Plaintiffs Properly State a Claim for Fraudulent Concealment

1 Plaintiffs allege Facebook fraudulently concealed Potential Reach is inflated and misleading.
2
3 *Id.* ¶ 150; *see also, id.* ¶¶ 60-92. Facebook argues it had no duty to disclose its Potential Reach metric
4 is inflated and misleading because “Potential Reach estimates” do not “relate to the central
5 functionality of their ads campaigns,” and therefore its failure to disclose the inflation was not fraud.
6 Mot. at 13-14. But Facebook misapplies the “central functionality” test. A defendant has a duty to
7 disclose defects that “go to the central function” of its products or services, as Facebook’s inflated and
8 misleading Potential Reach does here. *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 863–64 (9th Cir. 2018)
9 (holding slave labor in the supply chain is not “related to the chocolate’s function as chocolate.”).

10 This Court’s decision in *Norcia v. Samsung Telecommunications Am., LLC* is instructive. 2018
11 WL 4772302 (N.D. Cal. Oct. 1, 2018) (Donato, J.). There, plaintiffs alleged “Samsung engaged in
12 omissions relating to the Galaxy S4 smartphone’s speed and performance, and more specifically, that
13 Samsung ‘intentionally programmed the Galaxy S4 to fool benchmark apps and to create false
14 perceptions regarding the speed and performance of these devices.’” *Id.* at *1. The Court held plaintiffs
15 satisfied *Hodsdon’s* central functionality test, because “[n]o reasonable person could disagree that
16 ‘speed and performance’ go to the heart of a smartphone’s central function.” *Id.* at *2 (noting plaintiffs
17 had sufficiently alleged facts demonstrating the importance of the speed and performance feature).

18 Here, Plaintiffs similarly allege Potential Reach goes to the heart of Facebook’s ad services,
19 and Potential Reach allows advertisers to effectively target their ads. *See e.g.*, TAC ¶¶ 3, 18. Facebook
20 recognizes Potential Reach is “arguably the single most important number” in its advertising interface,
21 and advertisers “frequently rely” on Potential Reach. *Id.* ¶ 61. Plaintiffs also used Potential Reach to
22 customize their demographic targets, set their budget, and develop their bid strategy. *Id.* ¶¶ 18-19, 61,
23 99-100, 105-07. Because Potential Reach was inflated, the performance of each of these tools was
24 affected. And, like in *Norcia*, Plaintiffs allege Facebook “intentionally” concealed Potential Reach’s
25 inflation and the prevalence of duplicate and fake accounts “to create false perceptions regarding”
26 Potential Reach and the effectiveness of Facebook’s ad targeting. *Norcia*, 2018 WL 4772302 at *1.
27 These allegations are sufficient to state a claim.
28

1 Contrary to Facebook’s assertion, the Ninth Circuit never held that a product must be
2 “unusable” to trigger a duty to disclose. *See Hodsdon*, 891 F.3d at 864 (noting that corrupted hard
3 drives or defective computer screens that render those products “incapable of use by any consumer”
4 demonstrate that central functionality of a product is not based on subjective preferences). Several
5 courts – including this Court – have found a duty to disclose even when the product still works. *Norcia*,
6 2018 WL 4772302 at *2 (central function related to diminished speed and performance of the phone,
7 no allegation phone was unusable), *Beyer v. Symantec Corp.*, 333 F. Supp. 3d 966, 980 (N.D. Cal.
8 2018) (vulnerabilities in computer security software relate to central functionality of the software
9 despite lack of allegation that vulnerabilities were exploited; no allegation of unusability); *In re Apple*
10 *Inc. Device Performance Litig.*, 386 F. Supp. 3d 1155, 1179 (N.D. Cal. 2019) (diminished battery
11 capacity “goes to the central functionality of the devices”; no allegation of unusability).

12 Facebook misapplies a pair of district court decisions to assert a defect must render a product
13 “unusable” for the defect to relate to the product’s central function. Mot. at 13-14. In *Knowles v. Arris*
14 *Int’l PLC*, 2019 WL 3934781, at *15 (N.D. Cal. Aug. 20, 2019), *appeal pending* (N.D. Cal. Dec. 6,
15 2019), plaintiffs alleged defects rendered a modem unusable; but, after fact and expert discovery, the
16 court found “because Plaintiffs have not identified a genuine dispute of material fact as to whether any
17 latency issues impaired the SB6190 Modem’s central function, summary judgment is warranted.” Here
18 Plaintiffs at the pleading stage do not allege Facebook’s ad services are unusable. In *Ahern v. Apple*
19 *Inc.*, 411 F. Supp. 3d 541, 567 (N.D. Cal. 2019), plaintiffs alleged Apple had a duty to disclose filter
20 defects resulting in smudges in the corners of the screen; the court held “small, gray haze in the corners
21 of the screen” do not impact the central function of the computer. *Id.* at 568. Here, Plaintiffs
22 sufficiently allege Potential Reach goes to the central function of Facebook’s ad services – as
23 Facebook admits in its documents.

24 Facebook also argues fraudulent concealment is barred by the economic loss rule. “Broadly
25 speaking, the economic loss rule is intended to police the boundary between tort and contract damages,
26 and holds that certain damages should be remedied only in contract.” *Jones v. Progressive Cas. Ins*
27 *Co.*, 2018 WL 4521919, at *2 (N.D. Cal. Sept. 19, 2018) (Donato, J.). “[T]he rule is often
28 misinterpreted to bar all tort recovery for ‘purely’ economic losses[, but a]pplying the rule in that

1 fashion makes scant sense because torts like fraud and negligent misrepresentation exist precisely to
2 remedy purely economic losses.” *Id.* at *3 (citing *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d
3 865, 874-75 (9th Cir. 2007)). Here Plaintiffs seek to recover economic losses due to Facebook’s
4 fraudulent concealment.

5 Facebook cites a single case, decided on summary judgment, holding the economic loss rule
6 applies to fraudulent concealment. Mot. at 14, citing *Sloan v. Gen. Motors LLC*, 2020 WL 1955643,
7 at *23 (N.D. Cal. Apr. 23, 2020). But courts have repeatedly held application of the economic loss
8 rule to fraudulent concealment is inappropriate at the motion to dismiss stage, where all inferences are
9 drawn in favor of the plaintiff. See *In re Ford Motor Co. DPS6 Powershift Transmission Prod. Liab.*
10 *Lit.*, 2019 WL 3000646, at *6 (C.D. Cal. May 22, 2019) (“The Court finds insufficient support in the
11 California cases Ford cites for its distinction between fraudulent inducement by misrepresentation and
12 fraudulent inducement by omission, and therefore declines to apply the economic loss rule to the
13 omission claims at this [motion to dismiss] stage.”); *Vanella v. Ford Motor Co.*, 2020 WL 887975, at
14 *9 (N.D. Cal. Feb. 24, 2020) (quoting same and declining to apply economic loss rule to the fraudulent
15 omission claims at motion to dismiss stage); see also, *County of Santa Clara v. Atlantic Richfield Co.*,
16 137 Cal. App. 4th 292, 329 (2006) (declining to apply to economic loss rule to fraud claims including
17 fraudulent concealment.)

18 This is especially true where, as here, Plaintiffs omission claim sounds in fraudulent
19 inducement. *Yetter v. Ford Motor Co.*, 2019 WL 3254249 at *7 (N.D. Cal. July 19, 2019) (declining
20 to apply economic loss rule to fraudulent concealment and other fraud claims, “all of which sound in
21 fraudulent inducement.”); *Sloan*, 2020 WL 1955643, at *23 (citing same); *R Power Biofuels, LLC v.*
22 *Chemex LLC*, 2017 WL 1164296, at *5 (N.D. Cal. Mar. 29, 2017) ([F]raudulent inducement is a well-
23 recognized exception to the economic loss rule.”). Plaintiffs here allege Facebook’s fraudulent
24 concealment induced Plaintiffs to buy more Facebook advertisements than they otherwise would have,
25 and caused Plaintiffs to overpay for the advertisements they did purchase – all of which sound in
26 fraudulent inducement. TAC ¶¶ 158-59; see also *id.* ¶¶ 56-57. Facebook’s reliance on *Sloan* is
27 therefore both premature at the motion to dismiss stage and inapposite, as Plaintiffs allege Facebook’s
28 fraud induced them to purchase advertising services.

1 Facebook also argues the fraudulent concealment claim does not “allege with particularity the
 2 circumstances of the fraud, including how [Plaintiffs] relied on any omission about Potential Reach
 3 estimates.” ECF 177 at 14. Facebook is wrong. A plaintiff demonstrates reliance on an omission “by
 4 simply proving that, had the omitted information been disclosed, one would have been aware of it and
 5 behaved differently.” *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (internal
 6 quotations omitted) (“plaintiff must show that the defendant’s nondisclosure was an immediate cause
 7 of the plaintiff’s injury-producing conduct”; but “need not prove that the omission was the only cause
 8 or even the predominant cause, only that it was a substantial factor in his decision.”).

9 Here, Plaintiffs allege Potential Reach was an important factor in their decision to purchase
 10 ads from Facebook, that it would have been important to them to know Potential Reach was inflated,
 11 that it was comprised of accounts rather than people, and that it included fake and duplicate accounts.
 12 *See e.g.*, TAC ¶¶ 53 55-57, 68, 71. Plaintiffs purchased their ads through Facebook’s Ads Manager
 13 interface: thus they would have been able to see the omitted information had it been disclosed, because
 14 Potential Reach is displayed on Ads Manager. *Id.* ¶¶ 28, 33, 98, 105. Plaintiffs sufficiently allege
 15 reliance with respect to their fraudulent concealment claim.

16 **E. Plaintiffs May Proceed with All Claims**

17 Facebook argues the Court should dismiss Plaintiffs’ claims prior to their accrual under
 18 applicable statutes of limitations. While Facebook correctly states the statute of limitations for the
 19 implied covenant and quasi-contract claims, Facebook is incorrect regarding Plaintiffs’ fraud claims,
 20 which relate back to the original complaint. *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Res. Dev.*
 21 *Servs., Inc.*, 2012 WL 12920615, at *2 (N.D. Cal. Apr. 16, 2012). Therefore, the fraud claims accrued
 22 as of August 15, 2015 (three years prior to the filing of this suit).

23 **V. CONCLUSION**

24 For the reasons stated above, Facebook’s motion to dismiss should be denied in its entirety.

25 DATED: February 10, 2021

Respectfully submitted,

26 By: /s/ Geoffrey Graber

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