

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOSE PALOMINO, et al.,  
Plaintiffs,  
v.  
FACEBOOK, INC.,  
Defendant.

Case No. 16-cv-04230-HSG

**ORDER GRANTING MOTION TO  
DISMISS WITH PREJUDICE**

Re: Dkt. No. 22

Pending before the Court is a motion to dismiss the first amended complaint (“FAC”) brought by Defendant Facebook, Inc. Dkt. No. 22. Having considered Defendant’s motion, Plaintiffs’ opposition, and all related papers, the Court finds the matter appropriate for decision without oral argument. *See* Civil L.R. 7-1(b). For the reasons below, the Court GRANTS the motion to dismiss.

**I. BACKGROUND**

On September 19, 2016, Plaintiffs Jose Palomino and Jason Huhn filed the FAC against Defendant Facebook, Inc., asserting two claims for violation of New Jersey’s Truth-in-Consumer Contract, Warranty, and Notice Act (the “TCCWNA”), N.J.S.A. §§ 56:12-15 and 56:12-16. Dkt. No. 15 (“FAC”). Plaintiffs purport to represent a class of all “similarly situated New Jersey residents who created a Facebook account, and/or who agreed to [Facebook’s] Terms of Service within the applicable statute of limitations.” *See id.* ¶ 63.

For the purpose of deciding this motion, the Court accepts the following as true: Defendant operates www.facebook.com (“Facebook”), “a popular social networking website that allows registered users to create profiles, upload photos and video, send messages and keep in touch with friends, family and colleagues.” *Id.* ¶ 3. Defendant “generates billions of dollars in

1 revenues from advertising through the appropriation of the names, photographs, likenesses and  
 2 identities of Plaintiffs and other consumers.” *Id.* In order to access Facebook’s website, users  
 3 must create a Facebook account and agree to Facebook’s Terms of Service. *Id.* ¶ 4. Facebook’s  
 4 Terms of Service contain a California choice-of-law provision, stating that “[t]he laws of the State  
 5 of California will govern [the Terms of Service], as well as any claim that might arise between [a  
 6 user] and [Defendant], without regard to conflict of law provisions.” *Id.* ¶ 60. The Terms of  
 7 Service also contain provisions that purport to “1) disclaim liability for claims brought for  
 8 Defendant’s negligent, willful, malicious and wanton misconduct; 2) bar claims for personal and  
 9 economic injury and punitive damages; and 3) ban consumers from asserting claims against  
 10 Defendant for deceptive and fraudulent conduct.” *Id.* ¶ 5. Finally, the Terms of Service provide  
 11 that the above limitations on liability may be inapplicable in certain jurisdictions, without  
 12 specifying whether the limitations are applicable in New Jersey. *Id.* ¶ 7.

13 According to Plaintiffs, Facebook’s Terms of Service violate two provisions of the  
 14 TCCWNA. First, Plaintiffs assert that the Terms of Service violate § 56:12-15 of the TCCWNA,  
 15 which provides:

16 No seller, lessor, creditor, lender or bailee shall in the course of his  
 17 business offer to any consumer or prospective consumer or enter  
 18 into any written consumer contract or give or display any written  
 19 consumer warranty, notice or sign after the effective date of this act  
 20 which includes any provision that violates any clearly established  
 legal right of a consumer or responsibility of a seller, lessor,  
 creditor, lender or bailee as established by State or Federal law at the  
 time the offer is made or the consumer contract is signed or the  
 warranty, notice or sign is given or displayed.

21 *Id.* ¶¶ 71-77. Second, Plaintiffs contend that Facebook’s Terms of Service violate §56:12-16,  
 22 which states that a consumer contract, warranty, notice, or sign, cannot cause a consumer to waive  
 23 his rights under the TCCWNA and that “[n]o consumer contract, notice or sign shall state that any  
 24 of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without  
 25 specifying which provisions are or are not void, unenforceable or inapplicable within the State of  
 26 New Jersey.” *Id.* ¶¶ 78-81.

## 27 II. DISCUSSION

28 On October 14, 2016, Defendant filed the currently pending motion to dismiss Plaintiffs’

1 FAC. Dkt. No. 22. Defendant moves to dismiss on two independent grounds: (1) Plaintiffs  
 2 agreed to Facebook’s Terms of Service containing a California choice-of-law provision, and thus  
 3 California law, and not New Jersey’s TCCWNA, governs the parties’ relationship and (2) even if  
 4 New Jersey law could apply to this action, Plaintiffs cannot state a claim under the TCCWNA  
 5 because Defendant is not a “seller” and Plaintiffs are not “consumers” as defined by the statute.  
 6 *See* Dkt. No. 22 at 3-4.

7 **A. Legal Standard**

8 Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain  
 9 statement of the claim showing that the pleader is entitled to relief[.]” A defendant may move to  
 10 dismiss a complaint for failing to state a claim upon which relief can be granted under Federal  
 11 Rule of Civil Procedure 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the  
 12 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”  
 13 *Mendondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule  
 14 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to relief that is plausible on  
 15 its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible  
 16 when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that  
 17 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

18 In reviewing the plausibility of a complaint, courts “accept factual allegations in the  
 19 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”  
 20 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless,  
 21 courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of  
 22 fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.  
 23 2008). If dismissal is appropriate under Rule 12(b)(6), a court “should grant leave to amend even  
 24 if no request to amend the pleading was made, unless it determines that the pleading could not  
 25 possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.  
 26 2000) (quotation marks and citation omitted).

27 **B. Analysis**

28 The Court begins its analysis with Defendant’s argument that the Terms of Service contain

1 an enforceable California choice-of-law clause, and thus the TCCWNA is inapplicable. Because  
 2 the Court agrees that the California choice-of-law clause is enforceable, it need not address  
 3 Defendant's alternate argument that Plaintiffs fail to state a claim under the TCCWNA.

4 **i. The Choice-of-Law Clause Governs this Dispute**

5 First, the Court must determine whether the California choice-of-law clause encompasses  
 6 this suit. "A federal court sitting in diversity ordinarily must follow the choice-of-law rules of the  
 7 State in which it sits." *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct.  
 8 568, 582 (2013). The California Supreme Court has held that "a valid choice-of-law clause, which  
 9 provides that a specified body of law 'governs' the 'agreement' between the parties, encompasses  
 10 all causes of action arising from or related to that agreement, regardless of how they are  
 11 characterized, including tortious breaches of duties emanating from the agreement or the legal  
 12 relationships it creates." *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 470 (1992).

13 Here, Plaintiffs concede that they agreed to Facebook's Terms of Service providing that  
 14 "[t]he laws of the State of California will govern [the Terms of Service], as well as any claim that  
 15 might arise between [a user] and [Defendant], without regard to conflict of law provisions." FAC  
 16 ¶ 60. Under the unambiguous language of *Nedlloyd*, the California choice-of-law clause  
 17 encompasses Plaintiffs' claims because they arise from or relate to the Terms of Service. *See*  
 18 *Nedlloyd*, 3 Cal. 4th at 470.

19 **ii. The Choice-of-Law Clause is Enforceable**

20 Having determined that Plaintiffs' claims fall within the scope of the choice-of-law clause,  
 21 the Court must decide whether the clause is enforceable as to Plaintiffs' claims. California has a  
 22 "strong policy favoring enforcement of" choice-of-law provisions. *Id.* at 465. In analyzing the  
 23 enforceability of a choice-of-law clause, the Court must first determine "(1) whether the chosen  
 24 state has a substantial relationship to the parties or their transaction, or (2) whether there is any  
 25 other reasonable basis for the parties' choice of law." *Washington Mut. Bank, FA v. Superior*  
 26 *Court*, 24 Cal. 4th 906, 916 (2001). If either test is met, "the parties' choice generally will be  
 27 enforced unless" the party asserting the law of an alternate state "can establish both that the chosen  
 28 law is contrary to a fundamental policy" of the alternate state and that the alternate state "has a

1 materially greater interest in the determination of the particular issue.” *Id.* at 917; *see also*  
 2 Restatement (Second) of Conflict of Laws § 187 (1971).

3 **a. California Has a Substantial Relationship to the Parties**

4 The Court finds that the first requirement to enforce the California choice-of-law clause is  
 5 met. California has a substantial relationship to the parties because “Defendant is headquartered  
 6 in California and maintains its principal place of business in California,” FAC ¶ 12. *See In re*  
 7 *Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155 (N.D. Cal. 2016) (finding  
 8 substantial relationship to, and reasonable basis for, California choice-of-law clause because  
 9 Facebook has its principal executive offices and corporate headquarters in California); *see also*  
 10 *Estrella v. Freedom Fin. Network, LLC*, No. C 09-03156 SI, 2010 WL 2231790, at \*5 (N.D. Cal.  
 11 June 2, 2010) (finding California had a substantial relationship to the parties and the transaction  
 12 because the defendant was headquartered in California and had its principal place of business in  
 13 California).

14 **b. California Law is Not Contrary to Fundamental New Jersey Policy**

15 Because the Court has found that California has a substantial relationship to the parties, the  
 16 burden shifts to Plaintiffs to show that application of California law would violate fundamental  
 17 New Jersey policy. *Ridenhour v. UMG Recordings, Inc.*, No. C 11-1613 SI, 2012 WL 463960, at  
 18 \*3 (N.D. Cal. Feb. 13, 2012). The Court finds that Plaintiffs have failed to carry their burden.

19 The New Jersey Supreme Court has explained that the purpose of the TCCWNA “is to  
 20 prevent deceptive practices in consumer contracts by prohibiting the use of illegal terms or  
 21 warranties in consumer contracts.” *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 428 (2013)  
 22 (quoting *Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co.*, 207 N.J. 428, 457 (2011)). Plaintiffs  
 23 further allege that the TCCWNA is meant to “prevent confusion and deception among consumers  
 24 as to both their legal rights, and the responsibilities of businesses” and to “incentivize businesses  
 25 to draft documents that are clear and understandable to all consumers, and that plainly explain the  
 26 legal rights of consumers and the legal responsibilities of businesses.” *See* FAC ¶¶ 3, 18.

27 According to Plaintiffs, the TCCWNA seeks to protect New Jersey’s fundamental policy of  
 28 “protecting consumers from unequal bargaining power and any illegal and misleading terms that

1 arise out of such relationships.” *See* Dkt. No. 28 at 5.

2 Even assuming *arguendo* that the TCCWNA’s goal of protecting consumers from  
3 deceptive practices and unequal bargaining power constitutes fundamental New Jersey policy,  
4 Plaintiffs have failed to show that California’s consumer protection law is contrary to New Jersey  
5 policy. As an initial matter, California’s consumer protection laws have been recognized as  
6 “among the strongest in the country.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224,  
7 242 (Cal. Ct. App. 2001). More specifically, California’s Consumer Legal Remedies Act  
8 (“CLRA”) declares it unlawful for a business to “[r]epresent[] that a transaction confers or  
9 involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by  
10 law” or to “[i]nser[t] an unconscionable provision in [a] contract.” Cal. Civ. Code § 1770 (a)(14),  
11 (a)(19). Additionally, California makes unlawful the dissemination of any “untrue or misleading”  
12 statements in connection with the advertising or sale of goods or services. Cal. Bus. & Prof. Code  
13 § 17500. And, unlike the TCCWNA, California law proscribes unfair and fraudulent business  
14 practices in addition to illegal terms or warranties. *See* Cal. Bus. & Prof. Code § 17200. In light  
15 of California’s broad consumer protection laws, the Court finds that California laws, like the  
16 TCCWNA, seek to prevent confusion and deception among consumers and to incentivize  
17 businesses to draft clear and understandable business documents.

18 Notwithstanding California’s extensive body of consumer protection law, Plaintiffs  
19 maintain that the California choice-of-law clause is contrary to fundamental New Jersey policy for  
20 two main reasons: (1) for the reasons discussed by the court in *In re Facebook Biometric Info.*  
21 *Privacy Litig.*, 185 F. Supp. 3d 1155 (N.D. Cal. 2016), the enforcement of the choice-of-law  
22 provision “would effectively write out of existence New Jersey’s fundamental policy of protecting  
23 its citizens from illegal contract terms” and (2) California law does not “provide the same  
24 protections as the TCCWNA” or “afford Plaintiffs the same rights.” *See* Dkt. No. 28 at 5-6. The  
25 Court is unpersuaded.

26 As to Plaintiffs’ first argument, the Court finds that the legal issue presented in *In re*  
27 *Facebook Biometric Info. Privacy Litig.* is distinguishable from the consumer protection laws at  
28 issue here. In *In re Facebook Biometric Info. Privacy Litig.*, the court found that if it were to

1 enforce the California choice-of-law clause over Illinois’s Biometric Privacy Act (“BIPA”), “the  
 2 Illinois policy of protecting its citizens’ privacy interests in their biometric data . . . would be  
 3 written out of existence” because California has “no law or policy equivalent to BIPA.” 185 F.  
 4 Supp. 3d at 1155. As stated above, California not only has its own robust body of consumer  
 5 protection law that strives to prevent consumer deception by prohibiting unlawful business  
 6 practices and unconscionable contract provisions, but California law arguably goes further than  
 7 the TCCWNA by also proscribing unfair or fraudulent business practices. Accordingly, the Court  
 8 finds that the TCCWNA and California consumer protection law aim to accomplish the same end,  
 9 and thus California law is not contrary to fundamental New Jersey policy.

10 Plaintiffs’ next argument that California law is contrary to fundamental New Jersey policy  
 11 because it affords different rights and remedies also misses the point. Courts should not “refrain  
 12 from applying the chosen law merely because this would lead to a different result than would be  
 13 obtained under” New Jersey law. *See* Restatement (Second) of Conflict of Laws § 187 (1971); *see*  
 14 *also Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101, 1112 (N.D. Cal. 2016) (“Plaintiff has  
 15 not cited any case in which a California court refused to apply California law pursuant to a valid  
 16 contractual choice of law provision because California law offered fewer protections than another  
 17 state’s law.”). Rather, the inquiry is whether California consumer protection law is contrary to  
 18 New Jersey’s arguably fundamental policy of protecting consumers from confusion and deception  
 19 caused by businesses. The Court finds that it is not.

20 \* \* \*

21 Because California has a substantial relationship to Defendant and California law is not  
 22 contrary to fundamental New Jersey policy, the Court holds that the California choice-of-law  
 23 clause is enforceable. Accordingly, the Court GRANTS Defendant’s motion to dismiss because  
 24 the TCCWNA does not govern the Terms of Service.<sup>1</sup>

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 28 <sup>1</sup> In light of the Court’s holding that California law is not contrary to fundamental New Jersey  
 policy, the Court need not address whether California or New Jersey has a materially greater  
 interest in the determination of this action.

1 **III. CONCLUSION**

2 The Court finds that the California choice-of-law clause in Facebook's Terms of Service is  
3 enforceable and GRANTS Defendant's motion to dismiss the complaint. Any amendment would  
4 be futile given the Court's resolution of this question of law, and thus the complaint is dismissed  
5 with prejudice. *See Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir.) *amended*, 856 F.2d 111 (9th  
6 Cir. 1988). The clerk shall enter judgment in favor of Defendant and close the case. Both parties  
7 shall bear their own costs of suit.

8 **IT IS SO ORDERED.**

9 Dated: January 9, 2017

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11 HAYWOOD S. GILLIAM, JR.  
12 United States District Judge

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