

****E-filed 4/10/12****

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

ROBYN COHEN, et al.,

No. C 10-5282 RS

Plaintiffs,

v.

**ORDER DENYING MOTION FOR
ATTORNEY FEES**

FACEBOOK, INC.,

Defendant.

_____ /

In this putative class action, plaintiffs contend that defendant Facebook, Inc. violated California Code of Civil Procedure Civil Code §3344 by using the names and likenesses of members of the Facebook social network, without authorization or compensation, to promote its “Friend Finder” service.¹ Having obtained a final dismissal of the complaint and judgment in its favor, Facebook now seeks to recover attorney fees in the amount of \$706,950.31, pursuant to a fee-shifting provision in §3344.

The parties were asked to provide supplemental briefing as to whether Facebook could be deemed a “prevailing party” entitled to recover fees, given the basis on which it sought and obtained

¹ A more complete description of the factual background and of additional claims advanced by plaintiffs is set forth in orders dated June 28, 2011, and October 27, 2011, granting the two motions to dismiss Facebook brought in this action, the latter without leave to amend.

1 dismissal of the action. Although Facebook's second motion to dismiss invoked both Rule 12(b)(1)
2 (lack of jurisdiction), and 12(b)(6) (failure to state a claim) of the Federal Rules of Civil Procedure,
3 the conclusion that plaintiffs could not proceed ultimately rested on a determination that they lacked
4 the requisite "injury in fact" necessary under federal Constitutional standards to support jurisdiction
5 in this Court. As such, the dismissal does not support an attorney fee award, and Facebook's motion
6 must be denied.

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8 1. Basis of the dismissal

9 A threshold question is whether the First Amended Complaint was dismissed for lack of
10 jurisdiction or failure to state a claim. If the latter, Facebook plainly would be a "prevailing party"
11 entitled to recover at least some portion of the fees it incurred in defending this action.² In
12 addressing this issue, plaintiffs overstate the effect of the order requesting further briefing, which
13 they characterize as having conclusively determined that the dismissal was for lack of standing
14 under Article III. To the contrary, the order for further briefing observed only that there is a
15 "reasonable basis to contend" the dismissal did not reach the merits of the §3344 claim, and that it
16 "arguably" was based on federal constitutional limitations. *See* Order dated February 3, 2012 at
17 2:13-14.

18 Facebook's motion to dismiss the original complaint relied solely on Rule 12(b)(6). Some of
19 the arguments presented in that motion had nothing to do with the issue of whether plaintiffs had
20

21 ² Plaintiffs' argument that Facebook may not recover fees because the judgment does not provide
22 for fees and it made no timely motion to amend the judgment, is unavailing. *See Metcalf v. Borba*,
23 681 F.2d 1183, 1184 (9th Cir. 1982)("a postjudgment request for attorney's fees is not a 'motion to
24 alter or amend the judgment' subject to the time limitation of Rule 59(e) of the Federal Rules of
25 Civil Procedure."). Similarly, plaintiffs' arguments that Facebook has inadequately supported its
26 fee claim might require a reduction in the amount awarded and/or providing the parties an
27 opportunity to develop the record further, but would not support outright denial of the motion. *See*
28 Order dated December 1, 2011 (denying plaintiffs' motion to compel production of billing records,
while advising that if a right to fee recovery existed but the evidence as to the amount was
inadequate, Facebook will "either be required to submit additional documentation at that juncture, or
any fee award will be adjusted accordingly, as may be appropriate.") In light of the conclusion that
Facebook is not entitled to recover fees, plaintiffs' various additional challenges to the amount of
the claim need not be addressed.

1 adequately alleged “injury,” and could only have been presented under Rule 12(b)(6). While
2 Facebook possibly could have argued a lack of Article III standing at that juncture, it instead
3 challenged plaintiffs’ allegations that they had suffered “injury in fact” as unduly conclusory under
4 the pleading standards of *Twombly* and *Iqbal*. The decision to cast the argument as a failure to state
5 a claim was reasonable, particularly given that there is little dispute that a plaintiff who can
6 plausibly allege “mental anguish” is entitled to seek statutory damages under §3344, and such
7 allegations presumably would satisfy federal constitutional standing requirements as well. Indeed,
8 at the hearing on the first motion to dismiss, plaintiffs indicated a willingness to amend to make
9 such allegations. Accordingly, there is no doubt that the original complaint was dismissed for
10 failure to state a claim. That dismissal, however, was with leave to amend, and therefore did not
11 render Facebook a “prevailing party” for fee-shifting purposes.

12 In their First Amended Complaint, plaintiffs elected not to pursue a theory based on “mental
13 anguish,” and instead claimed a right to recover merely based on the alleged violation of the terms
14 of the statute. Facebook’s second motion to dismiss expressly invoked Rule 12(b)(1) and federal
15 Constitutional limitations on standing.³ Significantly, Facebook offered substantial argument and
16 numerous authorities for the proposition that “mere allegation of a statutory violation” does not
17 confer jurisdiction under Article III for a federal court to hear a plaintiff’s claims. *See Second*
18 *Motion to Dismiss* at 10:1-11:12. Although the order granting the motion to dismiss did not
19 explicitly discuss the cases cited by Facebook, the conclusion that the California Legislature’s
20 provision for statutory damages did not support the claim was fundamentally grounded in the
21 “injury in fact” requirements of the federal Constitution.⁴

22 _____
23 ³ Indeed, Facebook’s second motion even characterized the first order of dismissal as having
24 implicated the constitutional issue, “[a]lthough not couched specifically in Article III terms.”
Second Motion to Dismiss at 7:15.

25 ⁴ The order inadvertently omitted reference to Rule 12(b)(1) in the “legal standards” section, and it
26 contains other references that are, at a minimum, ambiguous as to the basis of the dismissal.
27 Facebook’s argument that it obtained a dismissal under Rule 12(b)(6) is therefore not frivolous.
28 Additionally, it is true that the lack of an “injury” sufficient to support jurisdiction under Article III
might also defeat plaintiffs’ claims on the merits, to the extent the availability of statutory damages
is not a substitute for injury as an element of the claim even under California law. The overlap
between the arguments, and ambiguity in the dismissal order, however, does not assist Facebook,

1 As alluded to in the order for further briefing, California courts have general jurisdiction,
 2 and are not constrained by Article III. See *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 322 n.
 3 5 (2011) (“There are sound reasons to be cautious in borrowing federal standing concepts, born of
 4 perceived constitutional necessity, and extending them to state court actions where no similar
 5 concerns apply.”) Facebook may very well be correct that a California court could conclude that
 6 plaintiffs have suffered no legally cognizable injury, even without reference to Article III. This
 7 Court, however, was constrained by the federal Constitution, and upon finding no injury-in-fact
 8 within the meaning of federal law, lacked jurisdiction to decide anything more.⁵ Accordingly, the
 9 dismissal of the First Amended Complaint without leave to amend was based on plaintiffs’ lack of
 10 standing under Article III.

11
 12 2. “Prevailing party” status

13 Facebook argues that even if it obtained a dismissal based on constitutional limitations as to
 14 the jurisdiction of this court, it nonetheless is a prevailing party entitled to fee recovery because it,
 15 “realized its litigation objectives, whether by judgment, settlement, or otherwise.” *Santisas v.*
 16 *Goodin*, 17 Cal. 4th 599, 621-22 (1998); see also, *Donner Mgmt. Co. v. Schaffer*, 142 Cal. App. 4th
 17 1296, 1310 (2006) (“[P]revailing party status should be determined by the trial court based on an
 18 evaluation of whether a party prevailed ‘on a practical level.’”) (citations omitted); *Coltrain v.*
 19 *Shewalter*, 66 Cal. App. 4th 94, 107 (1998) (a defendant’s litigation objective is “to make the
 20 plaintiff go away with its tail between its legs . . .”). The parties are in agreement that California
 21 law governs the question of whether Facebook is entitled to recover fees. As noted in the order for
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23 because unless there was Article III jurisdiction in the first instance, any statement implying that
 24 plaintiffs could not satisfy substantive elements of the claim was effectively surplusage.

25 ⁵ The very structure of Facebook’s second motion to dismiss is also consistent with this analysis.
 26 Facebook first argued that plaintiffs’ lack of Article III standing barred *all* of their claims. Only in
 27 subsequent sections did Facebook present alternative arguments going to each of the claims,
 28 asserting that plaintiffs had not adequately alleged the “elements” of those claims relating to
 injury—i.e. that the claims were subject to dismissal under Rule 12(b)(6) even if there was
 jurisdiction.

1 further briefing, however, California courts have had no occasion to address the specific question of
2 whether a defendant who obtains a dismissal based on a federal court's lack of jurisdiction under
3 Article III is a "prevailing party."

4 The California appellate decision in *Hon v. Marshall*, 53 Cal. App. 4th 470 (1997), however,
5 is instructive. There, a defendant obtained summary judgment in a case brought under California's
6 Fair Employment and Housing Act, based on the plaintiffs' failure to exhaust administrative
7 remedies. Following federal precedents in Title VII actions, the court concluded the defendant
8 could not recover attorney fees, in light of the fact that, "when a complaint is dismissed for lack of
9 jurisdiction, the defendant cannot be a 'prevailing party.'" *Id.* at 477. While *Hon* involved various
10 policy issues not relevant here, it reflects a recognition by a California court that in at least some
11 circumstances the interpretation of "prevailing party" should not be so broad as to include every
12 defendant who obtains a dismissal or judgment that may appear favorable.

13 Additionally, under *Branson v. Nott*, 62 F.3d 287 (9th Cir. 1995), there is a serious question
14 as to whether a federal court even has *jurisdiction* to award attorney fees once it has determined it
15 lacks jurisdiction to hear the merits of the controversy. "[F]ee shifting provisions cannot themselves
16 confer subject matter jurisdiction." *Id.* at 293 (*quoting Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th
17 Cir. 1990). Although *Branson* involved a federal fee shifting statute, there is no obvious reason the
18 same principle would not apply to a state law claim dismissed for lack of jurisdiction.

19 Even assuming there is no jurisdictional bar to awarding fees, the nature of the dismissal
20 Facebook obtained here simply does not warrant characterizing it as having prevailed under §3344
21 for purposes of fee-shifting. While it may have achieved its "objective" of a dismissal, the decision
22 in effect was only that plaintiffs had sued in a forum that could not decide their claims, not that the
23 claims failed for a substantive reason. Although California courts recognize a broad range of case
24 outcomes as supporting fee awards to prevailing parties where there is an applicable fee-shifting
25 statute, Facebook has not shown that the result here falls within those types of dispositions.
26 Accordingly, the motion for an award of attorney fees is denied.

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1 IT IS SO ORDERED.

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3 Dated: 4/9/12



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

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