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FACEBOOK, INC.

11  
12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 OAKLAND DIVISION

15 LLE ONE, LLC, d/b/a Crowd Siren and  
d/b/a Social Media Models, and  
16 JONATHAN MURDOUGH, on behalf of  
themselves and all others similarly situated,

17 Plaintiffs,

18 v.

19 FACEBOOK, INC.,

20 Defendant.  
21  
22

Lead Case No. 4:16-cv-06232-JSW  
Related Case No. 4:17-cv-00233-JSW

**DEFENDANT FACEBOOK, INC.'S  
NOTICE OF MOTION AND MOTION TO  
DISMISS THIRD CAUSE OF ACTION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Date: December 14, 2018  
Time: 9:00 a.m.  
Dept: Courtroom 5, 2nd Floor  
Judge: Hon. Jeffrey S. White

Trial Date: None Set

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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on December 14, 2018, at 9:00 a.m., or as soon thereafter as this matter may be heard, Defendant Facebook, Inc. (“Defendant” or “Facebook”) will, and hereby does, move the Court, in Courtroom 5, 2nd Floor of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, CA 94612, for an order dismissing Plaintiffs’ Third Cause of Action.

Facebook brings this motion pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, the Declaration of Michelle S. Ybarra, Facebook’s Request for Judicial Notice, the Proposed Order filed herewith, the complete files and records in this action, the arguments of counsel, and any other matters that may properly come before the Court for its consideration.

**STATEMENT OF ISSUE TO BE DECIDED**

Whether Plaintiffs failed to plead their Third Cause of Action for fraud with the particularity required by Federal Rule of Civil Procedure 9(b).

Dated: October 5, 2018

KEKER, VAN NEST & PETERS LLP

By: /s/ Michelle Ybarra  
MICHELLE YBARRA

Attorneys for Defendant  
FACEBOOK, INC.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs filed this putative class action after Facebook announced that it had  
4 miscalculated two video advertising metrics. In their Fourth Amended Complaint, Plaintiffs  
5 mischaracterize isolated statements from a handful of documents to manufacture a claim for  
6 fraud. Their allegations are false; in fact, Facebook identified the miscalculated metrics through  
7 its own efforts, promptly addressed them, and disclosed them to its advertising clients and the  
8 public. In any event, Plaintiffs are unable to plead a single fact showing they actually *relied* on  
9 the metrics at issue. Instead, they make only the conclusory assertion that they “did rely on  
10 Facebook’s inflated viewership metrics when deciding whether and how to purchase video  
11 advertising from Facebook.” ECF No. 145 at ¶117.

12 The Federal Rules of Civil Procedure require more than such vague allegations to state a  
13 claim for fraud. Rule 9(b) requires that “each element of fraud”—including the plaintiffs’  
14 justifiable reliance on the alleged misrepresentation—“must be factually and specifically  
15 alleged.” *Heredia v. Wells Fargo Bank*, No. 16-CV-02820-DMR, 2016 WL 4608238, at \*3 (N.D.  
16 Cal. Sept. 6, 2016). Plaintiffs’ boilerplate statements devoid of facts fall far short of the  
17 particularity that Rule 9(b) requires. Accordingly, Plaintiffs fail to state a claim for fraud, and the  
18 Court should dismiss that claim.

19 **II. BACKGROUND<sup>1</sup>**

20 In August and September 2016, Facebook announced that two of its non-billable video ad  
21 metrics, “Average Duration of Video Viewed” and “Average % of Video Viewed,” had been  
22 improperly calculated. ECF 145 (Fourth Amended Complaint) ¶¶ 29-30. The miscalculation  
23 occurred because Facebook calculated the “Average Duration of Video Viewed” by dividing the  
24 total amount of time spent watching a video (watch time) by the total number of users who  
25 watched the video for three seconds or more, rather than according to the intended calculation. *Id.*  
26 This discrepancy also affected the “Average % of Video Viewed” metric because that metric used

27 <sup>1</sup> For the purposes of this motion to dismiss, Facebook treats the well-pleaded factual allegations  
28 of the operative complaint as true, as it must.

1 the Average Duration of Video Viewed metric in its calculation. *Id.* These non-billable metrics  
2 were two of many metrics that Facebook made available to video advertisers.

3 Plaintiffs filed this putative class action in October 2016, after Facebook of its own accord  
4 announced and corrected the error. The two current putative class representatives—LLE One,  
5 LLC and Jonathan Murdough—are the ninth and tenth to assume that role. Six of their eight  
6 predecessors declined to proceed after Judge Henderson ordered that they had to plead reliance to  
7 state a claim under California Business & Professions Code § 17200. *See* ECF No. 8 (Amended  
8 Class Action Complaint), ECF No. 65 (Order Granting in Part Facebook’s Motion to Dismiss),  
9 and ECF No. 70 (Second Amended Class Action Complaint, omitting six plaintiffs from the prior  
10 complaint).

11 On August 20, 2018, Plaintiffs filed their Fourth Amended Complaint adding a new claim  
12 for fraud. Specifically, Plaintiffs allege that “Facebook either knew that the average viewership  
13 metrics it was reporting to Plaintiffs and Class members was false or reported those metrics  
14 recklessly and without regard for their truth” and that “Facebook intended that Plaintiffs and  
15 Class members rely on its average viewership metrics.” ECF No. 145 at ¶¶115-116. The  
16 allegations related to their purported reliance on the miscalculated metrics, however, are scant.  
17 Plaintiffs allege only:

18 [Plaintiffs] relied on the metrics, purchasing more video advertising services from  
19 Facebook than [they] otherwise would have. . .

20 Plaintiffs and Class members did rely on Facebook’s inflated viewership metrics  
when deciding whether and how to purchase video advertising from Facebook.

21 ECF No. 145 at ¶¶74, 81, 117. These assertions are the entirety of Plaintiffs’ allegations that they  
22 ever relied on the miscalculated metrics.

### 23 **III. LEGAL STANDARD**

24 A Rule 12(b)(6) motion to dismiss must be granted unless the complaint alleges well-  
25 pleaded “facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,  
26 550 U.S. 544, 570 (2007); *see also Aschroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). The “non-  
27 conclusory ‘factual content’” and reasonable inferences therefrom must be “plausibly suggestive  
28 of a claim entitling the plaintiff to relief.” *Moss v. United States Secret Serv.*, 572 F.3d 962, 968-

1 72 (9th Cir. 2009) (citations omitted). Conclusory allegations are properly disregarded. *Id.*

2 To state a claim for fraud under California law, a party must allege: “(1) misrepresentation  
3 (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3)  
4 intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting  
5 damage.” *Baltazar v. Apple, Inc.*, No. CV-10-3231-JF, 2011 WL 588209, at \*3 (N.D. Cal. Feb.  
6 10, 2011) (quoting *Lazar v. Superior Ct.*, 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981  
7 (1996)).

8 Rule 9(b) further demands that fraud be pled with particularity. Fed. R. Civ. Proc. 9(b).  
9 “Averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the  
10 misconduct charged” and “must set forth more than the neutral facts necessary to identify the  
11 transaction.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). “Each element in a  
12 cause of action for fraud . . . must be factually and specifically alleged.” *Heredia*, No. 16-CV-  
13 02820-DMR, 2016 WL 4608238, at \*3 (ellipsis in original; internal quotation marks omitted).  
14 “Vague or conclusory allegations are insufficient to satisfy Rule 9(b)’s particularity requirement.”  
15 *Id.*

16 Here, Plaintiffs have failed to plead any facts—let alone specific facts—alleging  
17 justifiable reliance in support of their fraud claim. Plaintiffs’ fraud claim should therefore be  
18 dismissed.

#### 19 **IV. ARGUMENT**

##### 20 **A. The specificity required by Rule 9(b) extends to all elements of Plaintiffs’ 21 fraud claim, including reliance.**

22 As courts in this Circuit and others have repeatedly recognized, Rule 9(b)’s mandate that  
23 “[e]ach element in a cause of action for fraud . . . must be factually and specifically alleged”  
24 extends equally to the element of justifiable reliance. *Heredia*, No. 16-CV-02820-DMR, 2016  
25 WL 4608238, at \*3; *see also Learning Works, Inc. v. The Learning Annex, Inc.*, 830 F.2d 541,  
26 546 (4th Cir. 1987) (“Reasonable, detrimental reliance upon a misrepresentation is an essential  
27 element of a cause of action for fraud [under Maryland law] and such reliance must be pleaded  
28 with particularity” under Rule 9(b)); *ScanSource, Inc. v. Datavision-Protologix, Inc.*, No. CIV-

1 04-4271, 2005 WL 974933, at \*3 (E.D. Pa. Apr. 26, 2005) (dismissing fraud claim under  
2 Pennsylvania law for failure to plead reliance with particularity). Though “[i]ntent and other  
3 aspects of a *defendant’s* mental state may be alleged generally,” *In re 5-hour ENERGY Mktg. &*  
4 *Sales Practices Litig.*, No. MDL 13-2438 PSG PLAX, 2014 WL 5311272, at \*6 (C.D. Cal. Sept.  
5 4, 2014) (emphasis added), a plaintiff’s reliance may not.<sup>2</sup> Rather, “the same level of specificity is  
6 required with respect to [pleading] reliance as with respect to misrepresentations.” *Marolda v.*  
7 *Symantec Corp.*, 672 F. Supp. 2d 992, 1001 (N.D. Cal. 2009) (brackets in original; internal  
8 quotation marks omitted).

9 “Thus, the mere assertion of ‘reliance’ is insufficient. The plaintiff must allege the  
10 specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual  
11 reliance.” *Nabors v. Google, Inc.*, No. 5:10-CV-03897 EJD, 2011 WL 3861893, at \*5 (N.D. Cal.  
12 Aug. 30, 2011) (internal quotation marks omitted); *see also Kane v. Chobani, Inc.*, 973 F. Supp.  
13 2d 1120, 1127 (N.D. Cal. 2014), *vacated on other grounds sub nom. Kane v. Chobani, LLC*, 645  
14 F. App’x 593 (9th Cir. 2016) (same); *Heredia*, No. 16-CV-02820-DMR, 2016 WL 4608238, at \*3  
15 (same). “Actual reliance occurs when the defendant’s misrepresentation is an immediate cause of  
16 the plaintiff’s conduct, altering his legal relations, and when, absent such representation, the  
17 plaintiff would not, in all reasonable probability, have entered into the transaction.” *Heredia*, No.  
18 16-CV-02820-DMR, 2016 WL 4608238, at \*3 (internal quotation marks omitted). Allegations of  
19 reliance that are “entirely conclusory,” without specific facts alleged in support, are insufficient to  
20 withstand a motion to dismiss. *Id.*

21 **B. Plaintiffs’ conclusory assertions of reliance are insufficient.**

22 There can be little dispute that the bare assertion that “Plaintiffs and Class members did  
23 rely on Facebook’s inflated viewership metrics when deciding whether and how to purchase  
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25 <sup>2</sup> As the District Court for the Southern District of New York explained in *In re Bear Stearns*  
26 *Companies, Inc. Sec., Derivative & ERISA Litig.*, “reliance does not simply involve a state of  
27 mind [that may be alleged generally]; it involves specific action or inaction, and therefore must be  
28 pleaded with particularity.” 995 F. Supp. 2d 291, 313 (S.D.N.Y. 2014); *see also Amzak Corp. v.*  
*Reliant Energy, Inc.*, 2004 U.S. Dist. LEXIS 16514, at \*17 (N.D. Ill. Aug. 19, 2004) (“To  
sufficiently plead reliance, plaintiffs would have to link one or more of the alleged  
misrepresentations with a specific act of reliance”).

1 video advertising from Facebook” (ECF No. 145 at ¶¶74, 81, 117) lacks the specificity required  
2 by Rule 9(b). Other courts in this district have rejected nearly-identical allegations as deficient.  
3 For example, in *Baltazar v. Apple, Inc.*, the plaintiffs alleged that Apple’s representations that  
4 iPads could be used outdoors in temperatures up to 95° were fraudulent because iPads overheated  
5 in those conditions. No. CV-10-3231-JF, 2011 WL 588209, at \*3 (N.D. Cal. Feb. 10, 2011). Just  
6 as Plaintiffs here have done, the plaintiffs alleged reliance in conclusory terms:

7 Representative Plaintiffs and members of each of the Classes reasonably and  
8 justifiably relied on Defendant’s misrepresentations when purchasing the iPad,  
9 were unaware of the existence of facts that Defendant suppressed and failed to  
disclose and, had the facts been known, would not have purchased the iPad and/or  
would not have purchased it at the price at which it was offered. . . .

10 See Request for Judicial Notice (“RJN”), Ex. A at ¶¶ 52-53.<sup>3</sup> Judge Fogel held that the plaintiffs  
11 failed to allege specific facts “showing their actual and reasonable reliance” on any  
12 misrepresentation, and dismissed their fraud claim.

13 Likewise, in *McKinney v. Google, Inc.*, the plaintiffs alleged that Google and HTC  
14 defrauded consumers by misrepresenting the quality of their phones’ network connectivity. No.  
15 5:10-CV-01177 EJD, 2011 WL 3862120, at \*1-2 (N.D. Cal. Aug. 30, 2011). The plaintiffs  
16 alleged reliance in conclusory fashion:

17 In affirmative response to the false, fraudulent and/or willful misrepresentations  
18 and concealment of material facts by Defendants, McKinney and Class members  
19 were induced to and did purchase the Google Phone and were required to pay for a  
premium T-Mobile 3G service plan.

20 McKinney and other Class members reasonably based their decision to purchase  
21 these phones and plans on the misrepresentations and omissions of material fact by  
Defendants, and were damaged thereby.

22 RJN Ex. B at ¶¶ 136-37. Judge Davila dismissed the plaintiff’s fraud claim, finding that she “has  
23 not pleaded sufficient facts about Defendants’ misrepresentation or her justifiable reliance to meet  
24 the Rule 9(b) standard.” *McKinney*, 5:10-CV-01177 EJD, 2011 WL 3862120, at \*5-6. See also,

25 \_\_\_\_\_  
26 <sup>3</sup> As set forth in the accompanying Request for Judicial Notice, Exhibit A is a true and correct  
27 copy of the First Amended Complaint in *Baltazar v. Apple*. Exhibit B is a true and correct copy of  
28 the Second Amended Complaint in *McKinney v. Google*. A court may take judicial notice of  
documents filed in other courts. *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6  
(9th Cir. 2006).

1 *e.g., Herskowitz v. Apple Inc.*, 940 F. Supp. 2d 1131, 1148 (N.D. Cal. 2013) (Plaintiff’s  
 2 allegations that she and members of the class “did reasonably rely on those misrepresentations in  
 3 purchasing Apple products” “does not rise above the level of a conclusory allegation” and “is not  
 4 sufficient, in and of itself, to satisfy the heightened requirements of Rule 9(b).”); *Panella v.*  
 5 *O’Brien*, Civ. No. 05–1790(WHW), 2006 WL 2466858, at \*9 (D.N.J. Aug 24, 2006)  
 6 (“[P]laintiff’s general statements that defendant made his misstatements knowing that plaintiff  
 7 would somehow rely on them” insufficient under Rule 9(b)).

8 Here, Plaintiffs have not pleaded any more specifics than the *Baltazar* or *McKinney*  
 9 plaintiffs did. In fact, a comparison of Plaintiffs’ allegations against those at issue in *Baltazar*  
 10 reveals they are remarkably similar boilerplate assertions:

<b>Plaintiffs’ reliance allegations</b>	<b><i>Baltazar</i> reliance allegations</b>
<p>13 [Plaintiffs] relied on the metrics,            14 purchasing more video advertising            15 services from Facebook than [they]            16 otherwise would have . . .</p> <p>17 Plaintiffs and Class members did rely            18 on Facebook’s inflated viewership            19 metrics when deciding whether and            20 how to purchase video advertising            21 from Facebook.            22 ECF No. 145 at ¶¶74, 81, 117.</p>	<p>Representative Plaintiffs and members            of each of the Classes reasonably and            justifiably relied on Defendant’s            misrepresentations when purchasing            the iPad, were unaware of the            existence of facts that Defendant            suppressed and failed to disclose and,            had the facts been known, would not            have purchased the iPad and/or would            not have purchased it at the price at            which it was offered. . . .</p> <p>Specifically, Representative Plaintiff            and members of each of the Classes            viewed APPLE’s website,            commercials and/or product            specifications, and, in reliance on            those representations, purchased the            device for use outdoors.</p> <p>RJN Ex. A at ¶¶52-53.</p>

24 As the *Baltazar* court recognized, such vague and conclusory allegations fall far short of Rule  
 25 9(b)’s specificity requirements. Plaintiffs’ fraud claim should be dismissed.

27 **V. CONCLUSION**

28 For the foregoing reasons, Facebook requests that the Court GRANT its motion to dismiss



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Plaintiffs' fraud claim.

Dated: October 5, 2018

KEKER, VAN NEST & PETERS LLP

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FACEBOOK, INC.