IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

FACEBOOK, INC., SCL GROUP LIMITED, and CAMBRIDGE ANALYTICA LLC,

Defendants,

CIVIL ACTION NO.: 2018 CH 03868

FACEBOOK, INC.'S MEMORANDUM IN SUPPORT OF SECTION 2-619.1 MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY PROCEEDINGS

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I. INTRODUCTION

Just last month when the parties stood before this Court on Facebook's first motion to dismiss, this Court asked whether Cook County's Complaint was "the complaint that [Cook County] really want[s] to have before the Court." Hr'g Tr. 19:22-20:1 (Sept. 12, 2019). Cook County then agreed to amend its Complaint, attempting to repair the jurisdictional and merits defects that Facebook had identified. The amended Complaint adds some 40 paragraphs alleging a hodgepodge of new allegations, including (a) a scattershot of additional connections between Facebook and Illinois; (b) further background about Facebook's business model; and (c) more detail about the Cambridge Analytica events and Facebook's alleged reaction to them. But this new material fails to cure the fatal defects in the original pleading. To the contrary, it only confirms the deficiencies that Facebook identified the first time around. This Court should dismiss—and this time with prejudice.

First, on personal jurisdiction, the FAC adds nothing more than a slew of generalized business connections between Facebook and Illinois—an insurance registration, lobbying activities, sponsorship of certain public events—that have nothing to do with the specific cause of action alleged. Those unrelated connections are not nearly enough. Personal jurisdiction can exist here only if Cook County's specific fraud claim against Facebook arises out of the defendant's contacts with Illinois, "regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb Co. v. Superior Court of Calif.*, 137 S. Ct. 1773, 1781 (2017).

Second, Cook County's Illinois Consumer Fraud Act ("ICFA") claim fails on the merits. Now that Plaintiff has identified the specific statements in Facebook's policies that it claims were misleading, it is apparent why Plaintiff was resisting this requirement in the first place—even a cursory review of those statements reveals the facial inadequacy of Plaintiff's claims. Indeed, as several courts have now found, Facebook's user agreements clearly disclosed the precise practices Cook County challenges here. Also insufficient is Cook County's claim that Facebook engaged in a cover-up of the Cambridge Analytica data "breach": ICFA provides no cause of action for inadequate data-breach disclosure, absent a violation of Illinois's specific data-

breach disclosure statute—which Facebook is not alleged to have violated here. Cook County also does not allege with particularly any facts to suggest that Facebook acted with scienter, as required under Illinois law.

In the event this Court does not dismiss the case outright, it should dismiss pursuant to 735 ILCS 2-619(a)(3) or stay the action in light of parallel claims pending in courts across the country. Cook County's claim asks this Court to wade into important nationwide policy issues about how users share data on the internet, use privacy settings, and manage third-party access to data. These issues are being addressed in other forums, including most notably in a multi-district litigation in the Northern District of California. Reaching the same issues here risks creating inconsistent, conflicting obligations on Facebook and other companies that operate websites reaching Illinois.

II. BACKGROUND

Cook County filed its first Complaint in the wake of 2018 news articles reporting that Cambridge Analytica had improperly obtained data regarding Facebook users from Aleksandr Kogan. Kogan had obtained data from users who authorized Kogan's app, as well as limited data about those users' friends—*if* those friends' privacy and application settings allowed it—and then sold data to Cambridge Analytica in contravention of Facebook's policies. None of this was breaking news. Like the rest of the public, Facebook had learned of Kogan's misuse of the data he had obtained from users on December 11, 2015, when *The Guardian* published an article reporting those events.

Facebook moved to dismiss Cook County's first complaint on personal jurisdiction grounds and on the merits. Facebook demonstrated that the complaint failed to establish a prima facie case for personal jurisdiction because it had alleged *no* relevant contacts between Facebook and Illinois that relate to the underlying claims, and because Cook County's ICFA claim failed to identify any misleading statements or any facts to suggest Facebook acted with scienter. At a hearing on Facebook's motion, Plaintiff asked for leave to amend, which this Court granted.

Cook County filed the First Amended Complaint ("FAC") on October 3. Cook County again asserts a single ICFA claim against Facebook with two theories: Facebook (1)

misrepresented that its users' "personal data would be protected" while "permitt[ing]" third parties to collect user data "[d]espite" Facebook's user agreements, FAC ¶¶ 123-25; and (2) "conceal[ed]" Cambridge Analytica's "breach" from users, *id.* ¶ 127. Cook County also alleges generic business connections between Facebook and Illinois, in an attempt to establish personal jurisdiction. *Id.* ¶¶ 17-30.

Cook County's action is not the only one to have challenged Facebook's policies. A federal court recently dismissed some (and substantially narrowed other) claims parallel to those Cook County has brought here, finding—contrary to Cook County's theory—that Facebook's policies adequately "disclosed" that "the Aleksandr Kogans of the world [could] interact with users and obtain information of the users' friends through those interactions," *In re: Facebook, Inc. Consumer Privacy User Profile Litig.*, 2019 U.S. Dist. LEXIS, at *57 (N.D. Cal. Sept. 9, 2019) ("*Facebook Consumer Litig.*"). Another federal judge also dismissed related securities-law claims, finding that Facebook's statements about data privacy and sharing with third-party apps were not plausibly false or misleading, *In re Facebook, Inc. Sec. Litig.*, 2019 2019 U.S. Dist. LEXIS 166027 (N.D. Cal. Sept. 25, 2019) ("*Facebook Sec. Litig.*"). Cook County's Complaint fares no better.

III. LEGAL STANDARD

To establish personal jurisdiction, Plaintiff must satisfy the due process requirements of specific personal jurisdiction—sometimes called "case-linked" jurisdiction—which focuses on a foreign defendant's "*suit-related conduct*" in the forum.[1] *Walden v. Fiore*, 571 U.S. 277, 283 n.6, 284 (2014) (emphasis added); *see Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 801 (7th Cir. 2014). In other words, contacts sufficient to establish personal jurisdiction must be those (if any) that give rise to the elements of Plaintiff's ICFA claim. *Khan v. Gramercy Advisors, LLC*, 2016 IL App (4th) 150435, ¶ 196 (in-state contacts must "g[i]ve rise

[1] As Plaintiff conceded previously, Facebook is not subject to general (non-suit related) personal jurisdiction in Illinois because Facebook is neither incorporated nor has its principal place of business here. Pl.'s Opp'n to Mot. to Dismiss 9 n.10 (filed June 24, 2019); FAC ¶ 12; *see, e.g., Daimler*, 571 U.S. at 139 n.20.

to the fraud claim"); *see also Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014); *Wiggen v. Wiggen*, 2011 IL App (2d) 100982, ¶ 29; *Wesly v. Nat'l Hemophilia Found*, 2017 IL App (3d) 160382, ¶ 33. If the forum activities did not give rise to the claim, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers*, 137 S. Ct. at 1781. Plaintiff has the "burden to establish a *prima facie* basis to exercise personal jurisdiction." *Kowal v. Westchester Wheels, Inc.*, 2017 IL App (1st) 152293, ¶ 14.

To establish an ICFA claim, Plaintiff must allege (1) a deceptive act or promise by the defendant; (2) the defendant's intent that the plaintiff rely on that act or promise; and (3) that the deception occurred during a course of conduct involving trade or commerce. *People ex rel. Madigan v. United Constr. of Am., Inc.*, 2012 IL App (1st) 120308, ¶ 16. An ICFA complaint "must be pled with the same particularity and specificity" required for fraud claims. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 501 (1996).

IV. ARGUMENT

A. The FAC must be dismissed pursuant to 735 ILCS 5/2-301 and 2-615 because Facebook is not subject to specific personal jurisdiction in this Court.

Plaintiff has failed to sustain its burden to establish personal jurisdiction—*i.e.* to allege contacts Facebook has with Illinois that "gave rise to the liabilities sued on." *Daimler*, 571 U.S. at 126 (alteration and quotations omitted); *Walden*, 571 U.S. at 283 n.6, 284; *Wiggen*, 2011 IL App (2d) 100982, ¶ 29. Although the FAC sets forth new jurisdictional allegations about Facebook's general Illinois business activities and miscellaneous advertising and lobbying, Cook County fails to explain how any of those activities "gave rise to the fraud claim," *Khan*, 2016 IL App (4th) 150435, ¶ 146. In fact, now that Cook County has attempted to comply with Illinois law requiring particularized identification of the precise statements Cook County claims are misleading, FAC ¶¶ 49-53, it is all the more clear that personal jurisdiction does not exist here—none of the statements Cook County identifies took place in Illinois or were directed at Illinois in particular. To the contrary, the FAC makes clear that Plaintiff's claims arise only from alleged misrepresentations appearing in Facebook's user policies, which were developed and written in

California and are uniform nationwide. Because the FAC does not tie any alleged misrepresentations or omissions to Illinois, this Court should dismiss Cook County's claims with prejudice.

Cook County's allegations relating to Facebook's general business activities in Illinois cannot establish specific personal jurisdiction because the claims in this case do not "arise out of" such activities. Likewise, there is no indication that Facebook's alleged misrepresentations or omissions were "targeted at Illinois residents." *Gullen v. Facebook.com, Inc.*, 2016 U.S. Dist. LEXIS 6958, at *5 (N.D. Ill. Jan. 21, 2016). Courts have routinely rejected attempts to pass off generalized contacts with a forum like those alleged in the FAC as "suit-related conduct" to support specific personal jurisdiction. This Court should do the same. None of the activities the FAC identifies "gave rise to" Cook County's ICFA claim. *Khan*, 2016 IL App (4th) 150435, ¶ 196 (quotations omitted). Consequently, none of these contacts is sufficient to establish personal jurisdiction. *See RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997).

Users. While Cook County emphasizes that many Illinois residents use Facebook and that Facebook "communicates constantly" with them, FAC ¶¶ 18, 30, "[h]aving an 'interactive website' . . . [does] not open a defendant up to personal jurisdiction in every spot on the planet where that interactive website is accessible." *Advanced Tactical*, 751 F.3d at 803. That is especially true here because Cook County "does not allege that [Facebook's] website is anything other than uniform nationwide." *AFI Holdings of Ill., Inc. v. Nat'l Broad. Co.*, 239 F. Supp. 3d 1097, 1106-07 (N.D. Ill. 2017); *see Nat'l Gun Victims Action Council v. Schecter*, 2016 IL App (1st) 152694, ¶ 23. Nor is it enough that the conduct alleged in the FAC may have affected Illinois users. That a plaintiff "suffered injury in Illinois . . . is insufficient to demonstrate minimum contacts." *Tower Commc'ns Expert, LLC v. TSC Constr., LLC*, 2018 U.S. Dist. LEXIS 185746, at *22 (N.D. Ill. Oct. 30, 2018); *see Walden*, 571 U.S. at 290.

Registration. As numerous courts have recognized in analogous circumstances, Facebook's registration to do business in Illinois did not give rise to Plaintiff's ICFA claim. *See, e.g., Corley v. Vance*, 365 F. Supp. 3d 407, 434-35 (S.D.N.Y. 2019) (Facebook's New York

business registration and office insufficient to support personal jurisdiction over claims about "voluntary disclosure of [plaintiff's] personal information" claims); *Gullen*, 2016 U.S. Dist. LEXIS 6958, at *5 (Facebook's registration and Chicago office insufficient to support specific personal jurisdiction about biometric technology claims). The Complaint makes no effort at all to tie Facebook's registration to Plaintiff's ICFA claim.

Chicago Office. The same is true of Facebook's Chicago office. The FAC alleges that this office features "'partner management' and 'account management' jobs that support Facebook's core business of marketing user data to advertisers." FAC ¶ 26. In other words, Facebook's Chicago office provides support to advertisers—advertisers who may choose to focus their messages on audiences throughout the United States (if not the world) and seek Facebook's help in doing so. Those alleged activities have nothing to do with the allegations in this case, which are focused on the sharing of user data *with application developers*. *Id.* ¶¶ 49-53. The FAC does not tie the Chicago office or the people who work there to any of the allegedly misleading statements or omissions that constitute the subject of Facebook's ICFA claim. Facebook's Chicago office did not "give rise to" Cook County's claim. *See Bristol-Myers Squibb*, 137 S. Ct. at 1781 (defendant's "research in [the forum] on matters unrelated" to claims did not support specific personal jurisdiction).

Targeted advertising. Cook County alleges that Facebook encourages third-party advertisers to target Illinois residents. FAC ¶¶ 21-22. As an initial matter, that allegation makes no sense—as Plaintiff's own graphic depicts, Facebook does not *encourage* any specific advertising targeting. *Id.* ¶ 21. Rather, these advertisers choose their audience, and Facebook effectuates that selection based on certain demographic characteristics. In any event, Cook County does not allege that any of these third-party advertisers or advertisements have anything to do with the claimed misrepresentations and omissions undergirding Plaintiff's ICFA claim—which is focused on the sharing of user data with application developers. *Georgalis v. Facebook, Inc.*, 324 F. Supp. 3d 955, 960-61 (N.D. Ohio 2018) (Facebook's "advertising directed to Ohio Facebook users" did not support specific jurisdiction over claims that Facebook deleted user content).

Moreover, advertisers' independent decisions to target their ads to Illinois residents cannot subject Facebook to personal jurisdiction in Illinois. *See Sabados v. Planned Parenthood of Greater Ind.*, 378 Ill. App. (3d) 243, 245 (1st Dist. 2007) (no jurisdiction over Indiana-based healthcare providers who treated 1,500 Illinois patients per year and listed Illinois residents on their corporate fund-raising database).

Physical advertising In Illinois. Cook County alleges that Facebook itself engaged in physical advertising in Illinois including: (1) purchasing "ads for the Facebook Messenger service in Chicago's O'Hare airport" in 2015, FAC ¶ 25; (2) a 2016 nationwide advertising campaign about "Facebook Live" that Cook County *speculates* included ads in Chicago, *id.*; and (3) a "blanketing" of ads on "public buses and trains for more than a month between March 19, 2018 and April 29, 2018" "deploy[ed] nationwide to assuage users' privacy concerns" after "the 'Cambridge Analytica scandal' and election of Donald Trump," *id.* ¶ 23.

None of these allegations has anything to do with Cook County's ICFA claim. *See Tile Unlimited, Inc. v. Blanke Corp.*, 47 F. Supp. 3d 750, 761 (N.D. Ill. 2014) (no personal jurisdiction over claim of defective "Uni-Mat" product where forum advertising not for that product); *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 n.6 (2011) ("even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales").[2] Plaintiff identifies no misleading statements or omissions in *any* of these ads, let alone connects any such statements or omissions to Plaintiff's ICFA claim. Further,

[2] Even where courts have held that physical advertising in the forum state is sufficient to support specific personal jurisdiction, they have required the relationship between the advertising and the lawsuit to be "close enough to [be] . . . quid pro quo balanced and reasonable." *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 430-31 (7th Cir. 2010). In *uBID*, the plaintiff challenged advertising and targeting of Illinois residents which *caused*, among other people, two Illinois residents to "cyber-squat on domain names similar to uBID's." *Id.* at 427. That Illinois-based cyber-squatting—which resulted from GoDaddy's Illinois-specific contacts—was sufficiently related to the plaintiff's domain-name Lanham Act claims. *Id.* at 430-31; *see also id.* at 433 ("Now GoDaddy is being called to account for alleged harm to an Illinois resident arising directly from the services GoDaddy provides to its Illinois customers, at least two of whom registered domain names that contributed to the alleged harm.").

the ads Plaintiff identifies ran months or years after the alleged misrepresentations and omissions that are the subject of Cook County's claims, which allegedly occurred between 2010-2015. FAC ¶¶ 42, 49, 50, 53. Contacts with Illinois *after* Facebook's alleged ICFA liability arose hardly constitute fair notice that Facebook could have been sued in Illinois for those alleged prior misdeeds. *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987) ("[T]he fair warning that due process requires arises not at the time of the suit, but when the events that gave rise to the suit occurred."); *see RAR, Inc.*, 107 F.3d at 1278. Not a single one of these advertising campaigns is "litigation-specific conduct"; none gives rise to specific personal jurisdiction. *Advanced Tactical*, 751 F.3d at 801 (emphasis omitted).[3]

Revenue. Facebook's generation of revenue in Illinois, FAC ¶ 19, is also an insufficient basis for specific jurisdiction over Cook County's claims about Facebook's user policies and Cambridge Analytica reaction. A court cannot simply "measur[e] the total amount of business activities that the corporation conducts" in a forum and determine whether it is substantial enough to justify specific jurisdiction. *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010); *see Georgalis*, 324 F. Supp. 3d at 960 (no personal jurisdiction over "ubiquitous" Facebook even where the Complaint alleged "millions [of] Facebook users in Ohio generate significant revenues for [Facebook]").

Lobbying. Cook County alleges that Facebook has engaged in lobbying "[s]ince 2017" in Illinois. FAC ¶ 28. But the alleged lobbying activity post-dates the claim, and therefore cannot give rise to the ICFA claim at issue here, which is grounded in conduct occurring between 2010-2015. Likewise, Cook County makes no allegation that Facebook made any misleading statements while lobbying, and does not allege that Facebook omitted anything about Cambridge Analytica

[3] Nor do *nationwide* advertising campaigns show that Facebook targeted Illinois. *Advanced Tactical*, 751 F.3d at 802-03 (operator of nationwide webpage sending messages to subscribers located around the country not enough); *Boschetto v. Hansing*, 539 F.3d 1011, 1022 (9th Cir. 2008) (internet advertising insufficient for "jurisdiction throughout the United States, even though the advertisement or website at issue may be viewed nationwide"); *Gonzales v. Palo Alto Labs, Inc.*, 2010 U.S. Dist. LEXIS 110295, at *12-13 (N.D. Cal. Oct. 6, 2010) ("[A]dvertisements in national magazines do not rise to the level of purposeful contact with a forum required by the Constitution in order to exercise personal jurisdiction.") (collecting cases).

while lobbying. The lobbying has no connection to Plaintiff's ICFA claim.

Public events. Finally, Cook County alleges that Facebook has "sponsored and attended public events in Chicago" in 2016 and 2017. FAC ¶ 29. How these events relate to alleged misrepresentations and omissions from 2010-2015, Cook County again does not say. Nor does Cook County allege that Facebook made any actionable misstatements or omissions at these public events, meaning this alleged contact with Illinois, too, did not "give rise" to Plaintiff's ICFA claim. *See Morris v. Halsey Enters. Co.*, 379 Ill. App. 3d 574, 583-84 (1st Dist. 2008) (no specific jurisdiction where employee trade show attendance had no connection to lawsuit); *Roiser v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 564 (1st Dist. 2006) (no specific jurisdiction based on solicitation of Illinois residents through trade show booth and other ads).

In sum. Not a single alleged contact between Facebook and Illinois has anything to do with Cook County's ICFA claim. Cook County does not allege that Facebook's allegedly misleading privacy policies or response to the Cambridge Analytica events occurred in, or were specifically targeted at, Illinois residents. Nor could they. Rather, it is clear that these alleged misdeeds all "arise out of [Facebook's] activity in California." *Corley*, 365 F. Supp. 3d at 435. Cook County cannot establish personal jurisdiction here by "simply aggregat[ing] all of a defendant's contacts with a state—no matter how dissimilar in terms of geography, time, or substance—as evidence of the constitutionally-required minimum contacts." *RAR, Inc.*, 107 F.3d at 1277. The amended Complaint should be dismissed.

B. Plaintiff's ICFA claim fails on its merits under 735 ILCS 5/2-615, 2-619.

Cook County advances two theories of wrongdoing for its ICFA claim. *First*, "Facebook [mis]represented to its Illinois users that their personal data would be protected in accordance with its SRR and Data Use Policies." FAC ¶ 123. *Second*, Facebook "conceal[ed] the [Cambridge Analytica] breach from its users." *Id.* ¶ 127. Neither theory states a cognizable ICFA claim.

1. Facebook's agreements disclosed each complained-of practice.

An ICFA claim fails when consumers "kn[o]w the truth." *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 155 (2002) (quotations omitted). That is because a "full and accurate disclosure" cannot

be said to "conceal, suppress, or hide any material facts." *Krause v. GE Capital Mortg. Serv., Inc.*, 314 Ill. App. 3d 376, 388 (1st Dist. 2000); *see also Ringelestein v. Johnson & Johnson*, 2017 U.S. Dist. LEXIS 83047, at *5-6 (N.D. Ill. May 31, 2017) (noting a defendant's accurate statements cannot give rise to an ICFA claim); *Connick*, 174 Ill.2d at 502 (same). Here, the Complaint identifies eight different statements in Facebook's policies that Cook County alleges misled users about Facebook's data privacy policies. FAC ¶¶ 49, 50, 53. But Facebook's policies disclosed each of the practices about which Cook County claims users were misled, as several courts have already found. Plaintiff's ICFA claim is meritless.

User Ability to Control Data. Cook County alleges that Facebook made actionable "promises to users about users' own ability to control the data that they give to third-party application developers." FAC ¶ 47. None supports an ICFA claim.

1. The statement "Your privacy is very important to us." is a "subjective nonquantifiable statement[]" that is "so vague that [it] cannot be proven or disproven," and thus is not actionable under ICFA. *Segerdahl Corp. v. Am. Litho, Inc.*, 2019 U.S. Dist. LEXIS 4634, at *8-9, at *3 (N.D. Ill. Jan. 10, 2019).

2. The statement "You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings," is true, as two courts have already found at the motion to dismiss stage. *Facebook Consumer Litig.*, 2019 U.S. Dist. LEXIS 153505; *Facebook, Sec. Litig.*, 2019 U.S. Dist. LEXIS 166027, at *15-16. Cook County has not alleged otherwise. Nor could it: Users *do* own their content, and their privacy and application settings control how content and information is shared. *Id.*[4] "[T]hese disclosures cannot be interpreted as misleading." *Facebook Consumer Litig.*, 2019 U.S. Dist. LEXIS 153505, at *58.

[4] Further, if users chose not to control how their data was shared, Facebook's default policies applied and stated clearly that app developers could access user data. "[U]sers who did not properly adjust their application settings are deemed to have *agreed that app developers could access their information.*" *Facebook Consumer Litig.*, 2019 U.S. Dist. LEXIS 153505, at *58 (emphasis added).

3. The statement "We require applications to respect your privacy, and your agreement with that application will control how the application can use, store, and transfer that content and information" is likewise accurate. A user's agreement with an application *did* "control" how that user's data was used by that application, subject to the application's compliance with Facebook's policies. As another court recently held, Facebook's Data Use Policy accurately informed users how data-sharing worked, citing in part the following language from the policy:

> Just like when you share information by email or elsewhere on the web, information you share on Facebook can be re-shared. This means that if you share something on Facebook, anyone who can see it can share it with others, including the games, applications, and websites they use. . . . If you have made [particular] information public, then the application can access [that information] just like anyone else.

Facebook Sec. Litig., 2019 U.S. Dist. LEXIS 166027, at *75-76 (quoting in part language from Pl.'s Grp. Ex. 2 at PDF 40). Facebook's policies even provided examples of such sharing:

> For example one of your friends might want to use a music application that allows them to see what their friends are listening to. To get the full benefit of that application, your friend would want to give the application her friend list—which includes your User ID—so the application knows which of her friends is also using it. Your friend might also want to share the music you "like" on Facebook.

Pl.'s Grp. Ex. 2 at PDF 40. Consistent with the representation about user control, Facebook also informed users how to prevent data-sharing by their friends: "The 'Apps' [hyperlinked] setting lets you control the applications you use. . . . If you want to completely block applications from getting your information when your friends and others use them, you will need to turn off all Platform applications." *Id.* at PDF 55. As the court held in *Facebook Securities Litigation*—analyzing this exact same language—Facebook "told users they could decline to allow this third-party consent but would have to actively opt-out, otherwise their data could be shared." 2019 U.S. Dist. LEXIS 166027, at *75. Cook County identifies nothing misleading about Facebook's statements regarding user control over data-sharing with apps.

Control over third-party app developers. Cook County also alleges that Facebook misrepresented—in policies with *app developers*, not in user policies—"the level of control that it had over developers." FAC ¶ 50. Cook County highlights that Facebook shared with users its

policies that: (1) third-party applications may "not directly or indirectly transfer any data [they] receive from [Facebook] to (or use such data in connection with) any ad network, ad exchange, data broker, or other advertising related toolset, even if a user consents to that transfer or use," and (2) that applications use user information "only in connection with the person that gave the permission [to access the information], and no one else." FAC ¶¶ 50, 53 (quotations omitted).[5] But these statements accurately inform users about the contractual obligations *apps* assume when they use Facebook. Facebook did not (and could not) guarantee apps would never breach these obligations. *Facebook Sec. Litig.*, 2019 U.S. Dist. LEXIS 166027, at *67 (Facebook's policies "make no guarantee that data given to app developers would be protected or that [Facebook] would control app developers use of that data."). As Cook County acknowledges, Kogan and Cambridge Analytica "knowingly and intentionally violated Facebook's policies." FAC ¶ 103.

App Enforcement Mechanisms. Cook County next points to three statements regarding how Facebook *may* monitor third-party applications, providing that Facebook "can" (1) "require [apps] to delete user data if [apps] use it in a way that we determine is inconsistent with users' expectations"; (2) "limit [apps'] access to data"; and (3) "can audit [an app]." FAC ¶ 50 (quotations omitted). These statements were also not misleading: they reflect Facebook's *tools* of enforcement, not a specific commitment to deploy those tools in any specific way. Facebook made "no contention that it *would* control the actions of the[] third-parties" through audits or limitations. *Facebook Sec. Litig.*, 2019 U.S. Dist. LEXIS 166027, at *67; *see id.* at *60 (holding Facebook policy stating Facebook could "requir[e] that [apps] delete data" was not false) (quotations omitted). Nor did Facebook make any "assertion about what [Facebook] will do with developers who do not adhere to [its] polic[ies]." *Id.* at *57. An ICFA claim is not "cognizable . . . in the

[5] It is unclear if Cook County takes issue with third-party apps having the ability to access user information if the user's friend granted permission. To the extent it does, the claim would fail. As the court overseeing the MDL ruled, "allowing [applications] to interact with users and obtain information of the users' friends through those interactions [] was disclosed in the terms agreed to by Facebook users." *Facebook Consumer Litig.*, 2019 U.S. Dist. LEXIS 153505, at *57.

absence of any claimed affirmative misstatement," *Phillips v. DePaul Univ.*, 2014 IL App (1st) 122817, ¶ 40, yet Cook County has not pled that Facebook *lacked the ability to* require applications to delete data, limited applications' access to data, or audited applications. To the contrary, Cook County *concedes* that Facebook *did* avail itself of these tools. FAC ¶ 102 (noting that Facebook required Kogan and Cambridge Analytica to delete user data in its possession).

Facebook's policies made clear "the level of control that it had over developers," FAC ¶ 50, including multiple disclosures cautioning users that "games, applications and websites are created and maintained by other businesses and developers who are not part of, or controlled by, Facebook." Pls.' Grp. Ex. 2 at PDF 54. The SRR even contained an all-caps disclaimer that "FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS … OF THIRD PARTIES." Pls.' Grp. Ex. 1 at PDF 36. No reasonable consumer reading this information would believe Facebook had complete control over third-party conduct. *Conn. Gen. Life Ins. Co. v. Sw. Surgery Ctr., LLC*, 349 F. Supp. 3d 718, 729 (N.D. Ill. 2018); *Krause*, 314 Ill. App. 3d at 388. Facebook's statements about the availability of enforcement mechanisms are accurate.[6]

In sum, the ICFA claim fails as a matter of law because the relevant disclosures contain no "false statements and cannot reasonably be construed as misleading." *Aliano v. Ferriss*, 2013 IL App (1st) 120242, ¶ 28; *Phillips v. DePaul Univ.*, 2014 IL App (1st) 122817, ¶ 34; *Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 333 (7th Cir. 2018) (dismissing ICFA claim where consumer "knew" allegedly misleading information); *Smith v. Facebook, Inc.*, 745 F. App'x 8, 8-9 (9th Cir. 2018) (Facebook's policies "contain numerous disclosures related to information collection on third-party websites"; a "reasonable person" would understand them).

[6] Cook County blames Facebook for not "exercis[ing]" its *ability* to impose "audits or limitations on data" with respect to the Cambridge Analytica events. FAC ¶ 105. But declining to use available tools is not fraud. *Facebook Sec. Litig.*, 2019 U.S. Dist. LEXIS 166027, at *59-60. And Cook County's assertion that Facebook is liable under ICFA for accepting Cambridge Analytica's written verification that it deleted the data is nonactionable: Facebook's policies "make[] no guarantees about verifying data deletion." *Id*. at *60. Further, "and more damning, [Cook County] cannot escape the fact that [Facebook] *did* require Kogan to destroy the data, and received confirmation from Kogan that this was done." *Id.* at *53 (citation omitted); FAC ¶¶ 50, 103.

This Court should dismiss.

2. Failing to inform users of the Cambridge Analytica events does not state an ICFA claim.

Plaintiff alleges Facebook violated ICFA because it "conceal[ed]" Cambridge Analytica's actions. FAC ¶¶ 127-28. This assertion fails to state an ICFA omission claim for two reasons. *First*, failing to inform consumers that Kogan had sold data to Cambridge Analytica did not constitute failure to disclose a material fact—because the relevant facts were already public. *See* FAC ¶ 59 n.18 (incorporating article noting Cambridge Analytica events were made public as of 2015). In other words, no one was "actually deceived" by the alleged "omission," *De Bouse v. Bayer*, 235 Ill.2d 544, 559 (Ill. 2009), and the FAC does not allege that any users "acted differently" after the information about Cambridge Analytica was disclosed. *Connick*, 174 Ill.2d at 505.

Second, ICFA provides no cause of action for the failure to disclose this alleged data "breach," FAC ¶¶ 6, 104, 127, absent a violation of the separate, more specific statute—the Personal Information Protection Act, 815 ILCS 530/1, 10 (the "Protection Act")—which governs the circumstances under which a company must disclose a breach to its users.[7] When both a general and specific statutory provision "exist and relate to the same subject . . . the specific statutory provision controls and should be applied." *People v. Nuccio*, 263 Ill. App. 3d 315, 317 (2d Dist. 1994); *see In re Org. of Greater Algonquin Park Dist.*, 103 Ill. App. 3d 1056, 1063 (2d Dist. 1982) (specific statute governing park-related petitions applied over a more general election-law provision); *Walsh v. Barry–Harlem Corp.*, 272 Ill. App. 3d 418, 422-23 (1st Dist. 1995) (statute of limitations from more specific malpractice statute governs over statute of limitations from more general ICFA). The Protection Act is a more specific statute: it controls when a purported data breach must be disclosed. 815 ILCS 530/10. In fact, a violation of the Protection Act expressly constitutes an ICFA violation on its own right. 815 ILCS 530/20; *see also* Pub. Act

[7] Cook County does not allege Facebook violated the Protection Act, nor could it: (1) there was no "breach" of Facebook's security system; and (2) the data is not "personal information," like social security numbers or driver's licenses. 815 ILCS 530/5; *see* FAC ¶ 44.

94-36, eff. Jan. 1, 2006 (amending 815 ILCS 505/2Z). Allowing a Plaintiff to bring a free-standing data "breach" concealment case where no Protection Act violation is alleged or exists would render both the Protection Act and the incorporation of its provisions into ICFA "superfluous or meaningless." *In re Jarquan B.*, 2017 IL 121483, ¶ 22; *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Cook County has not even attempted to allege a Protection Act violation for a data breach; it should not be able to advance a data breach claim under the more generalized provisions of ICFA.

3. Plaintiff fails to allege scienter (735 ILCS 5/2-615).

An ICFA claim requires allegations that the defendant intended to induce consumers to rely on deceptive information. *Elson v. State Farm Fire & Cas. Co.*, 295 Ill. App. 3d 1, 14 (1st Dist. 1998). A plaintiff must provide "specific evidence in [the] complaint detailing [the defendant's] allegedly fraudulent intent," including "particularized information regarding [the defendant's] state of mind." *Chaikin v. Fid. & Guar. Life. Ins. Co.*, 2003 U.S. Dist. Lexis 7262, at *10 (N.D. Ill. May 1, 2003). The FAC does not even come close to meeting this high bar.

As to the alleged misrepresentations, the FAC fails to allege scienter for two reasons. *First*, Facebook disclosed everything to users in clear language, *see supra* 9-13, so it "defies logic to argue" that Facebook intended to deceive users. *Stern v. Great W. Bank*, 959 F. Supp. 478, 486 (N.D. Ill. 1997). Further, Plaintiff alleges no facts to suggest that Facebook "knew at the time" it created its policies that third-party apps would violate those policies, belying any notion that Facebook intended to deceive its users. *See id.* (dismissing ICFA claim for lack of intent). *Second*, Cook County admits that *Facebook itself* was deceived by Kogan and Cambridge Analytica at the same time Facebook made these representations. FAC ¶ 103 (alleging that Cambridge Analytica "knowingly and intentionally *violated Facebook's policies*." (emphasis added)). Facebook could not have intended to defraud users about conduct being perpetrated by third parties who were themselves defrauding Facebook.

As for the alleged omissions about the Cambridge Analytica events, Facebook could not have intended to mislead users because those activities were already public. The *Guardian* and

other contemporaneous articles reported publicly in 2015—the same time that Facebook itself "learned the truth" about Cambridge Analytica (FAC ¶ 102)—all of the conduct alleged in Plaintiff's Complaint about the Cambridge Analytica events. *See id.* ¶ 59 n.18 (incorporating article) (discussing the same). Those public reports put reasonable Illinois consumers on notice of the facts. Facebook could not have concealed information that consumers already knew.

In sum, the ICFA claim fails on multiple grounds. It identifies no cognizable misleading statements or omissions, and it identifies no facts demonstrating Facebook's scienter. This Court should dismiss.

C. Alternatively, the Court should dismiss (735 ILCS 2-619) or stay this case in light of actions elsewhere.

If this Court does not dismiss for the reasons set forth above, it should dismiss or stay the action because other forums are resolving the exact issues raised here on a national scale. Specifically, this Court should dismiss or stay in favor of the MDL under Section 2-619(a)(3), because this action and the more-advanced MDL are parallel proceedings between litigants with "sufficiently similar" interests, *Katherine M. v. Ryder*, 254 Ill. App. 3d 479, 487 (1st Dist. 1993) (quotations omitted), and dismissal or a stay can "avoid duplicative litigation," *Kellerman v. MCI Telecomms. Corp.*, 112 Ill.2d 428, 447 (1986). The MDL overlaps with this case substantially, both factually and legally (including with respect to Illinois law). First Am. Compl., Pt. IV, *In re: Facebook, Inc. Consumer Privacy User Profile Litig.*, No. 18-MD-2843-VC (N.D. Cal. Feb. 22, 2019), Dkt. 257; *id.* ¶¶ 1077-1091. Indeed, prior to remand, the Judicial Panel on Multidistrict Litigation consolidated this case into the MDL in light of these similarities. *See In re: Facebook, Inc., Consumer Privacy User Profile Litig.*, MDL No. 2843 (J.P.M.L. Oct. 5, 2018), Dkt. 165.

Particularly in view of this action's tenuous (at best) connection to Illinois, *see supra* 4-9, this Court should dismiss or stay the litigation pending the resolution of the MDL in Northern California.

V. CONCLUSION

For the reasons stated above, the Court should dismiss the Complaint with prejudice.

DATED: October 31, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Debra R. Bernard, an attorney, hereby certify that on this 31st day of October, 2019, I caused to be submitted a true and correct copy of the *Defendant Facebook, Inc.'s Motion to Dismiss First Amended Complaint or, in the Alternative, Stay Proceedings* to the court's electronic filing system. I have also caused a true and correct copy of the same to be delivered by email to:

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Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

By: */s/ Debra R. Bernard*
Debra R. Bernard