SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

HENRY YEH, individually and on behalf of all others similarly situated, Plaintiff, v. TWITTER, INC., Defendant.	Case No. CGC-23-605100 ORDER ON DEFENDANT'S (1) DEMURRER TO PLAINTIFF'S CLASS ACTION COMPLAINT AND (2) MOTION TO STRIKE

Defendant's Demurrer to Plaintiff's Class Action Complaint and Motion to Strike were noticed for hearing on May 31, 2024. The Court circulated a tentative ruling in advance of the hearing sustaining the demurrer without leave to amend and granting the motion to strike in part, and the parties submitted on the tentative ruling, which is hereby adopted.

BACKGROUND

On March 10, 2023, Plaintiff Henry Yeh ("Plaintiff") filed this putative class action against Defendant Twitter, Inc. ("Defendant" or "Twitter").[1] Plaintiff seeks to state four causes of action: (1) breach of contract; (2) breach of implied contract; (3) violations of Business and Professions Code § 17200 *et seq.* ("UCL"); and (4) unjust enrichment. (Compl. ¶¶ 111-150.) Plaintiff alleges as follows.

Defendant "operates an online communication service" that "allows registered users to

[1] X Corp. is the successor in interest to Defendant. For ease of reference, the Court will refer to Defendant as Twitter, as it is referred to in the Complaint.

communicate with one another by posting 'tweets,' or short messages . . . with which other users may interact." (*Id.* ¶ 1.) "In order to follow other accounts, or post, like, and retweet tweets, users must register for a Twitter account." (*Id.* ¶ 2.) Although Defendant does not charge a fee to users for registering for an account, Defendant's "core business model monetizes user information by using it for advertising." (*Id.* ¶ 24.) Indeed, "of the $3.4 billion in revenue that [Defendant] earned in 2019, $2.99 billion flowed from advertising." (*Id.*) Typically, Defenant provides advertising in the form of promoted tweets, accounts, or trends. (*Id.* ¶ 25.) Defendant also provides two additional advertising services which allow advertisers to link telephone and/or email addresses to Twitter accounts: "Tailored Audience" and "Partner Audience" services. (*Id.* ¶ 26.) The "Tailored Audiences" service allows advertisers to "target specific groups of Twitter users by matching the telephone numbers and email addresses that Twitter collects to the advertisers' existing list of telephone numbers and email addresses." (*Id.*) The "Partner Audiences" service is similar, but rather than linking to the advertisers' own list, advertisers are provided an imported marketing list from a data broker which is then matched against the telephone numbers and email addresses collected by Defendant. (*Id.*) Defendant "has provided advertisers the ability to match against lists of email addresses since January 2014 and lists of telephone numbers since September 2014." (*Id.*)

Twitter's Terms of Service incorporates its Privacy Policy, which is attached as Exhibit 1 to the Complaint. (See *id.* ¶ 112 & Ex. 1 [version eff. May 25, 2018]; see also Bina Decl. Ex. B [same].) The Privacy Policy provides that Defendant will "share or disclose your personal data with your consent or at your direction." (Compl. ¶ 115; see also *id.* Ex. 1, 8.) The Privacy Policy further states that "[s]ubject to your settings, we also provide certain third parties with personal data." (*Id.* Ex. 1, 8.) Since 2013, Defendant has failed to abide by these contractual duties by using email addresses and telephone numbers for marketing purposes when users provided that information only for security and authorization purposes.

Since May 2013, Defendant has allowed users to protect their account using two-factor authentication. (*Id.* ¶ 37.) "Twitter has prompted users to provide a telephone number or email address for the express purpose of securing or authenticating their Twitter accounts." (*Id.* ¶¶ 27, 42.) Defendant "prompts" and "encourages" users to enable two-factor authentication through various means, explaining

that users "should be using login verification" so "that you, and only you, can access your Twitter account." (*Id.* ¶¶ 38, 42.) During the setup process, Defendant explains that "[a]fter you log in, Twitter will ask you for additional information to confirm your identity and protect your account from being compromised." (*Id.* ¶ 37.) "In December 2013, Twitter began requiring users to provide a telephone number or email address for re-authentication" purposes. (*Id.* ¶ 52.) For example, "[i]f Twitter detects suspicious or malicious activity on a user's account," Twitter may lock the account and require the user to provide a phone number or email address in order to regain full access. (*Id.* ¶ 53.) Defendant then began prompting users to add a telephone number or email address to "safeguard" their account and "to help ensure that you can log in to Twitter, even if you lose your password." (*Id.* ¶¶ 46-48.) The phone number prompts began in June 2015, and the email prompts began in April 2018. (*Id.*) Through September 2019, Defendant did not disclose at any point in the two-factor authentication, account recovery, or re-authentication pathways that Defendant was using the telephone numbers or email addresses users provided for these security measures for advertising purposes. (*Id.* ¶¶ 49, 55.)

Plaintiff is one such "Twitter user who between May 2013 and September 2019 provided his telephone number and email address to Twitter for the purposes of login verification and account recovery." (*Id.* ¶ 9.) He seeks to represent a nationwide putative class encompassing all individuals who "provided his or her telephone number(s) and/or email address(es) . . . to Twitter for purposes of two-factor authentication, account recovery, and/or account reauthentication." (*Id.* ¶ 99.) Plaintiff alleges the putative class consists of over 100 million individuals who provided a telephone number or email address to enable two-factor authentication, for account recovery purposes, or in response to a prompt for re-authentication. (*Id.* ¶ 104.)

Defendant now demurs to the complaint on the ground that Plaintiff fails to sufficiently allege a cause of action. (Demurrer, 2-3; Opening Brief ISO Demurrer, 7-21.) Defendant also moves to strike from the complaint two forms of relief which Defendants contends are improper, namely, nonrestitutionary disgorgement and injunctive relief. (Motion, 2; Opening Brief ISO Motion to Strike, 3-6.)[2] Plaintiff opposes both the demurrer and the motion to strike.

[2] Defendant's unopposed Request for Judicial Notice is granted as to Exhibits A, B,C, H and I only. (See Bina Decl.) Defendant's request as to Twitter's Terms of Service is granted because Plaintiff provides a hyperlink to this document in the complaint and its existence and terms are not in dispute. (See *id.* Ex. A;

LEGAL STANDARD

A demurrer lies where "the pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10(e).) A demurrer admits "all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint is given a reasonable interpretation, reading it as a whole and its parts in their context. (*Id.*) The Court accepts as true, and liberally construes, all properly pleaded allegations of material fact, as well as those facts which may be implied or reasonably inferred from those allegations; its sole consideration is whether the plaintiff's complaint is sufficient to state a cause of action under any legal theory. (*O'Grady v. Merchant Exchange Prods., Inc.* (2019) 41 Cal.App.5th 771, 776-777.)

"The court may, upon a motion made pursuant to [Code of Civil Procedure] Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc. § 436.) "The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc. § 437(a).)

DISCUSSION

I. Defendant's Demurrer Must Be Sustained.

A. Plaintiff Fails To State A Claim For Breach Of Contract.

To state a claim for breach of contract, a plaintiff must allege: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) breach; and (4) damages. (See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821; *Wall Street Network, Ltd. v. New York Times Co.*

Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 113 ["A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute."].) Defendant's request as to Twitter's Privacy Policy is granted because the agreement is attached to the Complaint and is thereby incorporated by reference. (See Bina Decl. Ex. B; *County of San Bernardino v. Superior Court* (2022) 77 Cal.App.5th 1100, 1107 ["Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer."].) Defendant's request as to the FTC Complaint is granted "only as to the existence of the complaint, not as to the truth of any of the allegations contained in it." (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 743; see Bina Decl. Ex. C.) Defendant's request as to Exhibits D through G is denied as irrelevant to the issues addressed. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1065, overruled on other grounds, *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.)

(2008) 164 Cal.App.4th 1171, 1178.)

Defendant demurs to the first cause of action on the ground that Plaintiff (1) failed to identify a specific contractual obligation which Defendant allegedly breached and (2) failed to allege any cognizable damages. (Demurrer, 2; Opening Brief ISO Demurrer, 7, 12-16; Reply, 6-10.) The Court agrees with the first ground, and therefore need not reach the second.

Defendant argues that (1) Plaintiff fails to allege that Defendant breached the Privacy Policy and (2) Plaintiff's interpretation of the Privacy Policy is unreasonable given the explicit disclosures in the Privacy Policy, which state that users' contact information will be used for marketing purposes. (Opening Brief ISO Demurrer, 12-14.) The Court agrees.

"The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract." (*Gilkyson v. Disney Enterprises, Inc.* (2021) 66 Cal.App.5th 900, 916.) "When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement." (*Id.*) "The words are to be understood 'in their ordinary and popular sense' and the 'whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.'" (*Id.*, quoting Civ. Code §§ 1644, 1641.) Where a contract provides both a specific promise and a much broader general statement, "the specific promise . . . takes precedence over its general statement." (*Kashmiri v. Regents of Univ. of Cal.* (2007) 156 Cal.App.4th 809, 834.)

On demurrer, "[w]hen reviewing whether a plaintiff has properly stated a cause of action for breach of contract, a court must determine whether the alleged agreement is reasonably susceptible to the meaning ascribed to it in the complaint." (*Aluma Sys. Concrete Constr. of Cal. v. Nibbi Bros. Inc.* (2016) 2 Cal.App.5th 620, 624.) "So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing on the sufficiency of the complaint, a court must accept as correct the plaintiff's allegations as to the meaning of the agreement." (*Id.*; *Hervey v. Mercury Casualty Co.* (2010) 185 Cal.App.4th 954, 963-968 [demurrer properly sustained where plain language of the contract was not ambiguous and not susceptible to the meaning plaintiff ascribed to it].) At the pleading stage, a court will construe the language on its face to determine whether, as a matter of law, the contract is reasonably subject to a construction sufficient to sustain a cause of action for breach. (*Hayter Trucking,*

Inc. v. Shell Western E&P, Inc. (1993) 18 Cal.App.4th 1, 17-18.)

Plaintiff alleges that Defendant's Privacy Policy promised that users would have "control" over their personal information and this information would only be shared or used with a user's consent. (Compl. ¶¶ 113-127.) Plaintiff further alleges that Defendant breached this alleged promise because (1) users did not know what data Defendant collected and how Defendant used that data; (2) Defendant did not give users meaningful control through its security settings to limit the data Defendant collected and how that data could be used; and (3) Defendant shared or disclosed personal data without users' knowledge or consent through the "Tailored Audiences" and "Partner Audiences" marketing programs. (*Id.* ¶¶ 71, 116-117.) None of Plaintiff's claims can survive scrutiny.

The preamble to the Privacy Policy broadly states that Defendant "give[s] you control through your settings to limit the data we collect from you and how we use it . . ." (Compl. Ex. 1, 1; Bina Decl. Ex. B, 26.) The preamble further provides that,

> You can choose to share additional information with us like your email address, phone number, address book contacts, and a public profile. *We use this information for things like* keeping your account secure and *showing you more relevant* Tweets, people to follow, events, and *ads.*

(Compl. Ex. 1, 1; Bina Decl. Ex. B, 25 (emphases added).) Section 1.1 of the Privacy Policy, entitled "Basic Account Information," provides that a user who chooses to create an account "must provide us with some personal data so that we can provide our services to you . . . [including] an email address or phone number." (Compl. Ex. 1, 2; Bina Decl. Ex. B, 26.) Section 1.3, entitled "Contact Information and Address Books," addresses Defendant's use of contact information, such as users' email address or phone number, for security and authentication purposes, and states, "Twitter also uses your contact information to market to you as your country's laws allow . . . ." (Compl. Ex. 1, 3; Bina Ex. B, 28.) Section 2.6, "Advertisers and Other Ad Partners," similarly states, "We use the information described in this Privacy Policy to help make our advertising more relevant to you . . . ." (Compl. Ex. 1, 6; Bina Decl. Ex. B, 32.) Section 3.1, entitled "Information We Share and Disclose," provides that "[i]n the limited circumstances where we disclose your private personal data, we do so subject to your control, because it's necessary to operate our services, or because it's required by law." (Compl. Ex. 1, 8; Bina Decl. Ex. B, 34.) Section 3.1 further provides,

Subject to your settings, we also provide certain third parties with personal data to help us offer or

> operate our services. . . . For example . . . [w]e also share device identifiers, along with the interests or other characteristics of a device or the person using it, to help partners decide whether to serve an ad to that device or to enable them to conduct marketing, brand analysis, interest-based advertising, or similar activities. You can learn more about these partnerships in our Help Center, and you can control whether Twitter shares your personal data in this way by using the "Share your data with Twitter's business partners" option in your Personalization and Data settings. . . . The information we share with these partners does not include your name, email address, phone number, or Twitter username, but some of these partnerships allow the information we share to be linked to other personal information if the partner gets your consent first.

(Compl. Ex 1, 8; Bina Decl. Ex. B, 35.)

Plaintiff's allegations are not sufficient to state a claim for breach of the Privacy Policy. Plaintiff first points to various statements throughout the Privacy Policy, asserting that Defendant promised users broad control over their personal data. However, as Defendant argues, these statements are not promissory and therefore not binding on Defendant. For example, the first sentence of the preamble states: "We believe you should always know what data we collect from you and how we use it." (Compl. Ex. 1, 1; Bina Decl. Ex. B, 25.) This general aspirational statement cannot override the repeated unambiguous statements in the Privacy Policy that Defendant may utilize users' contact information for marketing purposes. Nor does it broaden Defendant's duties beyond the specific statements in the Privacy Policy that Defendant will abide by users' data sharing preferences in their account settings. (See, e.g., *Kashmiri*, 156 Cal.App.4th at 834 [explaining that, typically, specific promises take precedence over general statements in a contract].)

Plaintiff's argument that Defendant was permitted to use his email address and phone number "only" for security purposes is directly contradicted by the unambiguous language of the Privacy Policy, which specifically states that Defendant *may* utilize contact information for marketing purposes. Section 3.1 does not impose a duty on Defendant to only share or disclose users' personal data by first seeking a user's consent, as Plaintiff alleges. (Compl. ¶ 70.) Rather, Section 3.1 provides that, through Twitter's settings, users may limit Defendant's use of their personal data and Defendant will abide by the choices made therein. Section 3.1 reiterates that Defendant shares personal data with Tailored and Partner Audiences "[s]ubject to your settings . . . and you can control whether Twitter shares your information in this way." (Compl. Ex. 1, 8; Bina Decl. Ex. B § 3.1.)[3] Indeed, Defendant repeats throughout the Privacy

[3] Plaintiff also alleges that Defendant breached Section 3.1 because users were unaware of what data Defendant was using or sharing. (Compl. ¶¶ 71, 116-117.) This allegation is similarly contradicted by the express terms of the Privacy Policy, which provides that users may review "[a]dvertisers who have

Policy that users may control the data shared through their settings. (See, e.g., Bina Decl. Ex. B, 26, ["We give you control through your settings]; § 1.3 ["Twitter also uses your contact information to market to you as your country's laws allow, and to help others find your account if your settings permit, including through third-party services and client applications."].) The Privacy Policy unambiguously provides only one mechanism for users to control their personal data: Twitter's settings. (*Id.*) Moreover, Section 2.10, entitled "How You Control Additional Information We Receive," explains in part that Twitter's "data settings let you decide . . . whether we show you interest-based ads on and off Twitter." (Bina Decl. Ex. B § 2.10.) Thus, in order to share Plaintiff's data "without his consent," Defendant would have had to share personal data by disregarding Plaintiff's Twitter settings. However, at no point does Plaintiff allege that Defendant did so.

Defendant correctly observes, moreover, that Section 3.1 cannot be read in isolation from the remainder of the contract. (Opening Brief ISO Demurrer, 12-13; Reply, 6-8.) As Defendant correctly observes, reading the contract as a whole, "instead of promising *not* to use contact information for advertising, Twitter expressly disclosed . . . that it *would* do so." (Opening Brief ISO Demurrer, 12: Reply, 6-9.) Thus, the preamble states that if users choose to share their telephone number or email address, Defendant will "use this information for things like . . . showing you more relevant . . . ads." (Compl. Ex. 1, 1; Bina Decl. Ex. B, 25.) Similarly, Section 1.3 states, "Twitter also uses your contact information to market to you as your country's laws allow." (Compl. Ex. 1, 3; Bina Decl. Ex. B, 28.) Thus, users are made aware throughout the Privacy Policy that Defendant uses personal data, specifically including contact information such as emails and telephone numbers, for marketing purposes.[4]

In short, as Judge Kim observed in the prior federal litigation, which involved substantially identical allegations and claims,

> [T]he "promise" or language which Plaintiff alleges Twitter breached is in Twitter's Privacy Policy. However, the same Privacy Policy also discloses that Twitter would use Plaintiff's email address and phone number, as well as other information, to show Plaintiff more relevant advertisements and would provide Plaintiff an opportunity to opt out of Twitter's use of [his] personal information.

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included you in tailored audiences to serve you ads." (Compl. Ex. 1, 7; Bina Decl. Ex. B § 2.10.)

[4] Significantly, Plaintiff concedes he does not allege that Defendant "externally 'disclosed' raw user contact information to third parties," but only that it "effectively 'shared' such information by 'aiding advertisers in reaching their preferred audiences.'" (Opposition, 4.)

(Bina Decl. Ex. H, 9-10.)[5] Thus, Plaintiff has not alleged that Defendant breached the Privacy Policy. Because that issue is dispositive of Defendant's demurrer to the breach of contract cause of action, the Court need not reach Defendant's second argument: that Plaintiff fails to allege damages. (Opening Brief ISO Demurrer, 14-15; Reply, 9-10.)

B. Plaintiff Fails To State A Claim For Breach Of An Implied Contract.

Defendant demurs to the second cause of action on the grounds that (1) the claim is barred both by the parties' express contract and the two-year statute of limitations; (2) Plaintiff "cannot allege any implied promise not to use his contact information for advertising" purposes in any of the security screens Plaintiff references; and (3) Plaintiff fails to allege damages. (Demurrer, 2; Opening Brief ISO Demurrer, 7-8, 16-18; Reply, 10-13.) The Court agrees with the second ground.

A contract may be express or implied. (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1178, citing Civ. Code § 1619.) The terms of an express contract are stated in words within a formal agreement, while the existence and terms of an implied contract are manifested by conduct. (*Retired Employees Assn.*, 52 Cal.4th at 1178, citing Civ. Code §§ 1620, 1621.) An implied contract claim "does not lie where . . . express binding agreements exist and define the parties' rights." (*Cal. Medical Assn., Inc. v. Aetna U.S. Healthcare of Cal., Inc.* (2001) 94 Cal.App.4th 151, 172-173 [upholding lower court's sustaining of demurrer as to cause of action for breach of implied contract where physicians' right to compensation "was governed by express contracts"].)

"[I]f a plaintiff was uncertain as to whether the parties had entered into an enforceable agreement, the plaintiff would be entitled to plead inconsistent claims predicated on both the existence and absence of such an agreement. . . . [¶] A plaintiff may not, however, pursue or recover on a quasi-contract claim if the parties have an enforceable agreement regarding a particular subject matter." (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1389.) Here, in his breach of contract claim, Plaintiff alleges the Privacy Policy is a binding contract which governs Defendant's use of Plaintiff's private information. (Compl. ¶¶ 115-117.) Plaintiff fails to plead how the Privacy Policy might be unenforceable or otherwise not qualify as a contract in his breach of implied contract claim. He therefore may not bring an implied

[5] Unpublished federal decisions can be cited as persuasive authority. (*Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276, 1283 fn. 8.)

contract claim. (See *Klein*, 202 Cal.App.4th at 1389-1390 ["plaintiffs' breach of contract pleaded the existence of an enforceable agreement and their unjust enrichment claim did not deny the existence or enforceability of that agreement. Plaintiffs are therefore precluded from asserting a quasi-contract claim under the theory of unjust enrichment."].)

Further, Plaintiff's breach of implied contract claim is inconsistent with the terms of the Privacy Policy. Plaintiff alleges that he and the putative class "entered into implied contracts with Defendant by which Defendant agreed to utilize the Personal Information *solely* for the purposes expressed: two-factor authentication, account recovery, and/or account re-authentication, and *for no other purposes such as marketing and/or advertising*." (Compl. ¶ 130 (emphases added).) As discussed above, however, the Privacy Policy contains no such promise; to the contrary, it specifically provides that users' email addresses and telephone numbers *may* be used for marketing and advertising as well as for security purposes. As Plaintiff acknowledges, "parties cannot use the terms of an implied contract to contradict the terms of an express contract." (Opposition, 12; see also *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, 944-945; *Cal. Medical Assn.*, 94 Cal.App.4th at 172-173.)

C. Plaintiff Lacks Standing To Bring A UCL Claim.

Defendant demurs to the third cause of action on the grounds that Plaintiff fails to allege: (1) any loss of money or property; (2) an unlawful, unfair or fraudulent business practice; and (3) actual reliance on the purported misrepresentation. (Demurrer, 2; Opening Brief ISO Demurrer, 18-20; Reply, 13-15.) The Court agrees that Plaintiff has failed to allege standing under the UCL.

A private plaintiff has standing to bring a UCL claim if the plaintiff "has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code § 17204.) In other words, the plaintiff must have suffered a "loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320-321.)

Here, Plaintiff alleges UCL violations under the unlawful and unfair prongs. (Compl. ¶¶ 135-143.) Plaintiff alleges he and putative class members lost "money and/or property" as a result of Twitter's unfair, unlawful, and/or fraudulent practices." (*Id.* ¶ 140.) Plaintiff bases this loss on the purported diminished value of his and putative class members' personal information. (*Id.*)

Plaintiff's allegations are insufficient to assert a UCL claim because Plaintiff fails to allege he

suffered any cognizable economic harm. *Moore v. Centrelake Medical Group, Inc.* (2022) 83 Cal.App.5th 515 is squarely on point. There, plaintiffs alleged that defendant's data breach "deprived them of some portion of the value of their PII [personally identifiable information]." (*Id.* at 538.) Plaintiffs alleged only that their PII was stolen and disseminated, and that a market for it existed. "They did not allege they ever attempted to intended to participate in this market, or otherwise to derive economic value from their PII. Nor did they allege that any prospective purchaser of their PII might learn that their PII had been stole in this data breach and, as a result, refuse to enter into a transaction with them, or insist on less favorable terms." (*Id.* at 538.) The court concluded that in the absence of any such allegation, plaintiffs "failed to adequately plead that they lost money or property in the form of the value of their PII." (*Id.*;[6] see also, e.g., *Fogelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, 989, 994 [plaintiff failed to adequately plead UCL standing, where plaintiff alleged retailer obtained plaintiff's zip code under false pretenses and, using zip code, paid third party for license to use plaintiff's address: "The fact that the address had value to [the retailer], such that the retailer paid [the third party] a license fee for its use, does not mean that its value to plaintiff was diminished in any way"]; *Archer v. United Rentals, Inc.* (2011) 195 Cal.App.4th 807, 816 [same, where plaintiffs claimed retailers unlawfully collected and recorded their PII as condition to accepting credit card payments].)

A host of federal cases, many in the Northern District of California, have reached the same conclusion in cases involving essentially indistinguishable allegations. For example, in *Lau v. Gen Digital Inc.* (N.D. Cal. Apr. 3, 2024) 2024 WL 1880161, plaintiffs alleged that defendants marketed their browser extension to consumers as a way to stop third parties from tracking and collecting their data, but also alleged that defendants collected that same data from users and then used it for their own financial benefit by transmitting it to third-party advertisers. The court granted defendant's motion to dismiss plaintiff's UCL claim, holding that plaintiffs failed to allege economic injury as required to bring a claim

[6] Although the Court need not reach the issue, the court also concluded that plaintiffs' "lost-value-of-PII theory" was "insufficient to support an award of contract damages." (83 Cal.App.5th at 539, citing *In re Jetblue Airways Corp. Privacy Litigation* (E.D.N.Y. 2005) 379 F.Supp.2d 299, 327 ["Plaintiffs may well have expected that in return for providing their personal information to JetBlue and paying the purchase price, they would obtain a ticket for air travel and the promise that their personal information would be safeguarded consistent with the terms of the privacy policy. They had no reason to expect that they would be compensated for the 'value' of their personal information. In addition, there is absolutely no support for the proposition that the personal information of an individual JetBlue passenger had any value for which that passenger could have expected to be compensated."].)

under the UCL. The court explained that "the misappropriation of private information alone does not constitute economic injury." (*Id.* at *4, citing *Moore*, 83 Cal.App.5th at 540-541 & n.13.) Further, the court rejected the diminution-in-value theory, observing that plaintiffs were "still able to participate in a market for their personal information; the allegations regarding the diminished value of their information are entirely conclusory, as the complaint does not allege facts supporting that the plaintiffs have not been able to capture the full value of their information as a result of the defendants' alleged conduct." (*Id.*) Last, the plaintiffs' benefit-of-the bargain theory failed because the browser extension was free "and, to the extent that the plaintiffs gave their information to [defendants] in exchange for use of the browser extension, there is no plausible allegation that this transmission caused their information to diminish in value." (*Id.*; see also, e.g., *Tanner v. Acushnet Company* (C.D. Cal. Nov. 20, 2023) 2023 WL 8152104, *7-9 [dismissing UCL claim by plaintiff who alleged that defendant's website recorded, saved, and replayed his interactions with the website without his consent: "alleging that data and information has value generally does not establish that the specific communications captured here are Plaintiff's 'property.' . . . . Plaintiff must show—not just that data is valuable in the abstract or in the aggregate—but that the information had actual economic value to Plaintiff, which was lost."]; *Doe v. Meta Platforms, Inc.* (N.D. Cal. Sept. 7, 2023), --- F.Supp.3d ---, 2023 WL 5837443, *15 [dismissing UCL claim where plaintiffs alleged that defendant used proprietary computer code to intercept personally identifiable medical information of Facebook users and then monetized it for its own financial gain: "Courts in this district have dismissed cases where, like here, the injury is based on 'the loss of the inherent value of their personal data,' as well as where it was undisputed that plaintiffs paid no money to the defendant."]; *Katz-Lacabe v. Oracle America, Inc.* (N.D. Cal. 2023) 668 F.Supp.3d 928, 935, 943-944 [dismissing UCL claim where plaintiffs alleged defendant's data brokering business collects personal information from internet users, "synchronizes that data to create individual profiles, and ultimately sells that data—bolstered by data made available by its partners—on its Data Marketplace": "Plaintiffs have not alleged a specific monetary or economic loss," and therefore lack standing to maintain their UCL claim (cleaned up)].)

Citing *Moore* and a number of federal authorities to the same effect, Judge Kim dismissed plaintiffs' UCL claim in the earlier *Price v. Twitter* litigation, reasoning that "Plaintiff has not alleged that

she could sell her phone number and email address or that it otherwise has economic value to her, as opposed to the value that Twitter gained by aggregating that data." (See Bina Decl., Ex. H at 5-8.) The same conclusion follows here.

D. Plaintiff Does Not State A Claim For Unjust Enrichment.

Defendant demurs to the fourth cause of action on the ground that (1) unjust enrichment is not a cause of action in California; (2) Plaintiff fails to allege any unjust conduct; and (3) the claim is barred by the parties' contract. (Demurrer, 2-3; Opening Brief ISO Demurrer, 20-21; Reply, 15.) The Court agrees that unjust enrichment is not a cause of action in California.

"Unjust enrichment is not a cause of action. It is just a restitution claim." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 870, quoting *Hill v. Roll Int'l Corp.* (2011) 195 Cal.App.4th 1295, 1307; accord, *Hooked Media Group, Inc. v. Apple Inc.* (2020) 55 Cal.App.5th 323, 336 ["summary adjudication of [an unjust enrichment] claim was proper because California does not recognize a cause of action for unjust enrichment."]; *Bank of New York Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th 935, 955 [same]; *Everett v. Mountains Recreation & Conservation Authority* (2015) 239 Cal.App.4th 541, 533 [demurrer sustained because "there is no cause of action in California for unjust enrichment"]; *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387 ["Unjust enrichment is not a cause of action . . . or even a remedy, but rather a general principle, underlying various legal doctrines and remedies"].) Further, "as a matter of law, a quasi-contract action for unjust enrichment does not lie where, as here, express binding agreements exist and define the parties' rights." (*California Medical Assn., Inc.*, 94 Cal.App.4th at 172.)

Here, Plaintiff "alleges, in the alternative [to the first and second causes of action], that if the conduct alleged is not covered by either an express or implied contract, then Plaintiff is entitled to unjust enrichment as a remedy because Twitter knowingly retained a benefit obtained through misrepresentation." (Opposition, 13; see Compl. ¶¶ 144-150.) Plaintiff's claim for unjust enrichment is not a stand alone cause of action. Further, because Plaintiff did not pay anything for Defendant's service, there is no basis for restitution. The Court having sustained Defendant's demurrer to the first cause of action, Plaintiff cannot assert a claim for unjust enrichment.

E. The Demurrer Is Sustained Without Leave To Amend.

Upon sustaining a demurrer, the Court ordinarily would afford a plaintiff at least one opportunity

to amend. Here, however, Plaintiff previously filed a substantially identical complaint in federal court, suffered an adverse ruling, amended the complaint and then, in a transparent effort at judge-shopping, voluntarily dismissed the federal action with a second motion to dismiss pending and refiled in this Court, without any effort to cure the defects that caused the federal court to dismiss the prior complaint. Under the circumstances, and given the grounds for the Court's ruling including the unambiguous language of the Privacy Policy, the Court does not believe that Plaintiff can meet his burden to show a reasonable possibility that he could cure the defects with an amendment.[7] Accordingly, the demurrer is sustained without leave to amend. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145.)

II. The Motion to Strike Is Well-Founded.

Defendant seeks to strike from the complaint all references to "non-restitutionary disgorgement" (Compl. ¶¶ 127:5, 142:25, p. 33:9-12 [Prayer for Relief]) and references to "injunctive relief" (*id.* ¶ 143:32, p. 33:13 [Prayer for Relief]). (Motion, 2; Opening Brief ISO Motion to Strike, 4-6.) The Court finds that the motion is well-founded, and grants it in part.

As Plaintiff acknowledges, "as a matter of law, nonrestitutionary disgorgement is not an available remedy under the UCL." (Opposition, 2; see *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1152 ["nonrestitutionary disgorgement of profits is not an available remedy in an individual action under the UCL."]; *Madrid v. Perot Sys. Corp.* (2005) 130 Cal.App.4th 440, 460 [nor is it "an available remedy in a UCL class action."].) Plaintiff insists that it is nevertheless available as a remedy for his UCL claim because "he seeks benefits in which he had an ownership interest," specifically, his personal information. (Opposition, 2-4.) The Court is unpersuaded.

Plaintiff's prayer in his UCL cause of action for "restitution and disgorgement" of Defendant's "profits and revenues from its targeted-advertising services" (Compl. ¶ 142), by definition, is *non*restitutionary. It is undisputed that Plaintiff paid nothing to use Twitter's services. Further, as discussed above, he does not allege, nor can he, that he lost his email address and phone number, or that they are worth any less to him than before he became a Twitter user. It follows that any disgorgement of

[7] The Court also notes that after it circulated its tentative ruling sustaining the demurrer without leave to amend, Plaintiff did not contest the tentative or offer to amend the complaint.

Twitter's profits and revenues would "not be restitutionary as it would not replace any money or property that defendants took directly from plaintiff." (*Korea Supply Co.*, 29 Cal.4th at 1149; see also *Madrid*, 130 Cal.App.4th at 455 [rejecting argument that profits derived from sale of confidential information "would qualify as money taken from plaintiff or money in which plaintiff had a vested ownership interest, so as to be recoverable as restitution in this UCL action."].)[8]

The Court grants Defendant's motion to strike Plaintiff's request for injunctive relief. Plaintiff alleges that the conduct at issue occurred from 2013 through 2019. (Compl. ¶¶ 9, 27, 28, 43, 49.) Plaintiff does not allege that there is an ongoing risk of continued harm from Defendant's past conduct. (See, e.g., *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 800 [injunctive relief is only an appropriate remedy for a contract dispute where plaintiff suffers "irreparable and continuing harm" and there is no adequate remedy at law].) Rather, Plaintiff alleges that equitable relief is necessary because certain of Defendant's *other* "cybersecurity and privacy practices [have been] woefully insufficient." (Compl. ¶ 89; see generally *id.* ¶¶ 82-91.) However, Plaintiff's Complaint does not take issue with Defendant's cybersecurity practices. Therefore, Defendant's motion to strike Plaintiff's request for injunctive relief is granted.

CONCLUSION

For the foregoing reasons, Defendant's demurrer to the complaint is sustained without leave to amend. Defendant's motion to strike is granted as to Plaintiff's request for nonrestitutionary disgorgement in his UCL claim and as to the request for injunctive relief.

IT IS SO ORDERED.

Dated: May 31, 2024

Ethan P. Schulman
Judge of the Superior Court

[8] Plaintiff also argues that nonrestitutionary disgorgement is available for his breach of contract and unjust enrichment claims. (*Id.* at 4-6.) Defendant disagrees. Because the Court has sustained Defendant's demurrer to both of those causes of action, it need not reach that question.

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, Felicia Green, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On May 31, 2024, I electronically served ORDER ON DEFENDANT'S (1) DEMURRER TO PLAINTIFF'S CLASS ACTION COMPLAINT AND (2) MOTION TO STRIKE via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: MAY 31 2024

Brandon E. Riley, Court Executive Officer

By: Felicia Green

Felicia Green, Deputy Clerk