

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

I.B., by and through his Guardian  
ad Litem BRYAN FIFE, et al.,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

No. C 12-1894 CW

ORDER GRANTING IN  
PART AND DENYING  
PART MOTION TO  
DISMISS; DENYING  
MOTION TO STRIKE

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Defendant Facebook, Inc. moves to dismiss the Second Amended Complaint (2AC). Plaintiffs I.B., by and through his guardian ad litem Bryan Fife, Glynnis Bohannon, J.W., by and through his guardian ad litem Steven Wright, and Julie Wright oppose the motion. The Court held a hearing on Facebook's motions on August 30, 2012. For the reasons discussed below, the Court grants the motion to dismiss the claims brought under California Family Code section 6701(a), the claims by parents Bohannon and Wright to disaffirm the minors' contracts, the CLRA claim, and the UCL claims alleging violations of the CLRA and MTA, without leave to amend; grants the motion to dismiss the EFTA claim and the claims brought under the unlawful and fraudulent prongs of the UCL, with leave to amend; and denies the motion to dismiss the claims brought by the minor Plaintiffs to disaffirm their contracts pursuant to California Family Code sections 6701(c) and 6710, and the claims alleging violation of public policy protecting minors under the unfair prong of the UCL. The Court further denies as premature Facebook's motion to strike the class allegations.

United States District Court  
For the Northern District of California

## BACKGROUND

The following facts are alleged in the 2AC.

Facebook operates the largest online social network in the world and provides a payment system, Facebook Credits, for users to make purchases within the Facebook website. 2AC ¶ 2. Facebook permits minors to register on its website and use its service. Id. ¶ 3.

In October 2011, Plaintiff I.B., a minor, asked his mother, Plaintiff Glynnis Bohannon, for permission to spend twenty dollars on his Facebook account using Bohannon's Wells Fargo Master Card, in exchange for twenty dollars in cash. 2AC ¶ 25. I.B. purchased Facebook Credits from Facebook for use in "Ninja Saga." Id. Subsequently, without any notice that his mother's credit card information had been stored by Facebook and the Facebook Credits system, or that his mother's credit card information was being used again after the initial twenty dollar purchase, I.B. made in-game purchases for which he thought he was spending virtual, in-game currency. Id. As a result, Bohannon's credit card was charged repeatedly and without her consent, and the charges totaled several hundred dollars. Id. Upon discovering the transactions, Bohannon tried to obtain a refund from Facebook by leaving a phone message at a phone number listed for Facebook but received no response. 2AC ¶ 27.

In December 2011, Plaintiff J.W., a minor, began to make a series of charges via Facebook Credits using the debit card of his parents, Plaintiff Julie Wright and Steven Wright, which J.W. had taken from his parents without their permission. 2AC ¶ 29. The total charges exceeded one thousand dollars. Id. On or about

1 February 8, 2012, after learning of these charges, Steven Wright  
2 submitted a complaint to Facebook as to the "20 debits directly to  
3 my bank account," noting that neither he nor his wife (the only  
4 authorized users of the debit card's account) had authorized any  
5 such charges, and requesting a refund. Id. ¶ 31. On February 10,  
6 2012, a Facebook "Payment Operations" representative replied to  
7 Steven Wright to say he "refunded the charges to your [Wright's]  
8 funding instrument." Id. However, on April 13, 2012, Steven  
9 Wright noticed that only \$59.90 had been refunded and contacted  
10 Facebook to request a refund of the full amount at issue. Id. In  
11 the course of further correspondence, Facebook responded that "we  
12 are not able to process your refund request at this time . . .  
13 because it has been more than 90 days since you completed the  
14 stated transaction(s)." Id. As of the date of filing the 2AC,  
15 the Wrights have not been reimbursed \$999.30 charged for  
16 transactions originating from their minor child's Facebook  
17 account. Id.

18 On February 23, 2012, Plaintiff Bohannon filed this action  
19 individually and on behalf of her minor child, I.B., against  
20 Facebook in the Superior Court for the County of Santa Clara.  
21 Plaintiffs amended the complaint on March 8, 2012, to assert  
22 classwide claims against Facebook. Plaintiffs served Facebook on  
23 March 19, 2011, and Facebook removed the putative class action on  
24 April 17, 2012. Notice of Removal (Docket No. 1) at 1-2.

25 Plaintiffs filed the 2AC on May 31, 2012, on behalf of the  
26 proposed class: "All Facebook users who have purchased Facebook  
27 Credits from January 1, 2011 to the date on which a class is  
28 certified ('the MTA Class')." 2AC ¶ 37. The 2AC identifies three

1 proposed subclasses: (a) the "Minor Subclass" of "[a]ll Facebook  
2 users who are or were minor children according to Facebook's own  
3 records, and those children's parents and guardians for the four  
4 years preceding the date on which the original complaint was filed  
5 to the date on which a class is certified; (b) the "Refund  
6 Subclass" of "[a]ll Facebook users who are or were minor children  
7 according to Facebook's own records, and those children's parents  
8 and guardians, who attempted to obtain a refund of a Facebook  
9 Credit transaction originating from a minor child's account for  
10 the four years preceding the date on which the original complaint  
11 was filed to the date on which a class is certified;" and (c) the  
12 "EFTA Subclass" within the Refund Subclass consisting of "[a]ll  
13 members of the Refund Subclass whose payment to Facebook was made  
14 from a debit card or PayPal account linked to a U.S.-based bank  
15 from May 31, 2011 to the date on which a class is certified." 2AC  
16 ¶¶ 39-41. The 2AC asserts the following class claims against  
17 Facebook: (1) Declaratory Judgment; (2) violation of the  
18 California Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et  
19 seq. (CLRA); (3) violation of the Unfair Competition Law, Cal.  
20 Bus. & Prof. Code § 17200 et seq. (UCL); and (4) violation of the  
21 Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq. (EFTA).

22 Facebook moves to dismiss the 2AC for failure to state a  
23 claim and to strike the class allegations. Plaintiffs oppose the  
24 motions.

#### 25 LEGAL STANDARD

##### 26 I. Motion to Dismiss for Failure to State a Claim

27 A complaint must contain a "short and plain statement of the  
28 claim showing that the pleader is entitled to relief." Fed. R.

1 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
2 state a claim, dismissal is appropriate only when the complaint  
3 does not give the defendant fair notice of a legally cognizable  
4 claim and the grounds on which it rests. Bell Atl. Corp. v.  
5 Twombly, 550 U.S. 544, 555 (2007). In considering whether the  
6 complaint is sufficient to state a claim, the court will take all  
7 material allegations as true and construe them in the light most  
8 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
9 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
10 to legal conclusions; "threadbare recitals of the elements of a  
11 cause of action, supported by mere conclusory statements," are not  
12 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
13 (citing Twombly, 550 U.S. at 555).

14 When granting a motion to dismiss, the court is generally  
15 required to grant the plaintiff leave to amend, even if no request  
16 to amend the pleading was made, unless amendment would be futile.  
17 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
18 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
19 amendment would be futile, the court examines whether the  
20 complaint could be amended to cure the defect requiring dismissal  
21 "without contradicting any of the allegations of [the] original  
22 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
23 Cir. 1990).

24 Although the court is generally confined to consideration of  
25 the allegations in the pleadings, when the complaint is  
26 accompanied by attached documents, such documents are deemed part  
27 of the complaint and may be considered in evaluating the merits of  
28

1 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d  
2 1265, 1267 (9th Cir. 1987).

3 II. Motion to Strike

4 Under Federal Rule of Civil Procedure 12(f), a court may  
5 strike from a pleading "any redundant, immaterial, impertinent or  
6 scandalous matter." The purpose of a Rule 12(f) motion is to  
7 avoid spending time and money litigating spurious issues.

8 Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993),

9 reversed on other grounds, 510 U.S. 517 (1994). A matter is

10 immaterial if it has no essential or important relationship to the  
11 claim for relief plead. Id. A matter is impertinent if it does  
12 not pertain and is not necessary to the issues in question in the  
13 case. Id.

14 DISCUSSION

15 I. Request for Judicial Notice

16 Facebook asks the Court to take judicial notice of screen  
17 shots of webpages from Facebook's website on the grounds that they  
18 were specifically referred to in the 2AC or illustrate the  
19 allegations in the amended complaint. These include Facebook's  
20 Statement of Rights and Responsibilities, Payment Terms, Help  
21 Center pages and payment screens in the game Ninja Saga.

22 Plaintiffs object to these exhibits. Facebook's manager of  
23 Payment Operations, Bill Richardson, provides a supporting  
24 declaration concerning the public availability of these webpages.  
25 However, Mr. Richardson states that the screen shots were viewed  
26 and printed between April 13, 2012 and May 10, 2012, and his  
27 declaration does not indicate whether these webpages were in  
28 effect or available at the time of the events alleged in the 2AC.

1 Richardson Decl. at 2-4 nn.1-6. In support of Facebook's reply,  
2 Mr. Richardson states that Facebook did not "materially alter" the  
3 Ninja Saga payment pages between October 2011 and May 2012.  
4 Suppl. Richardson Decl. ¶ 3. However, whether the minor  
5 Plaintiffs I.B. and J.W. would have viewed these particular  
6 payment pages is subject to reasonable dispute. Facebook's  
7 request for judicial notice is therefore denied. See In re  
8 Easysaver Rewards Litig., 737 F. Supp. 2d 1159, 1168 (S.D. Cal.  
9 2010) (denying request for judicial notice where "[t]he Court  
10 finds that whether these are the webpages Plaintiffs would have  
11 viewed during their online transactions is subject to 'reasonable  
12 dispute.'" (citing Fed. R. Evid. 201).

13 Plaintiffs request that the Court take judicial notice of  
14 screen shots of webpages from Facebook's website referring to "App  
15 Basics," "What Are Facebook Credits?," "Facebook Developer Payment  
16 Terms," and "Credits Tutorial." Plaintiffs submit these exhibits  
17 as statements made by Facebook in the ordinary course of business.  
18 Pls.' RJN at 2. Facebook does not object to these exhibits, and  
19 these matters can be "accurately and readily determined from  
20 sources whose accuracy cannot reasonably be questioned." Fed. R.  
21 Evid. 201(b).

## 22 II. Sufficiency of Allegations

### 23 A. Disaffirmance of Minors' Contracts

24 In their first claim for declaratory relief, Plaintiffs seek  
25 a determination by the Court that the contracts between Facebook  
26 and the members of the proposed Minor Subclass are void or  
27 voidable. 2AC ¶ 72. Facebook moves to dismiss this claim on the  
28 ground that minors cannot disaffirm contracts when they have

1 already received the expected benefits of the contract.  
2 Plaintiffs contend that under the doctrine of infancy in  
3 California, the minor Plaintiffs I.B. and J.W. have the right to  
4 disaffirm their purchases of Facebook Credits, regardless of  
5 whether they return those Credits.

6 1. Void Contracts Prohibited by Family Code  
7 Section 6701

8 California law defines minors as all persons under eighteen  
9 years of age, Cal. Fam. Code § 6500, and restricts minors from  
10 entering certain contracts:

11 A minor cannot do any of the following:

12 (a) Give a delegation of power.

13 (b) Make a contract relating to real property  
or any interest therein.

14 (c) Make a contract relating to any personal  
15 property not in the immediate possession or control  
of the minor.

16 Cal. Fam. Code § 6701. The contracts enumerated in section 6701  
17 are void and no act of disaffirmance is required to avoid them.  
18 E.K.D. ex rel. Dawes v. Facebook, Inc., 2012 WL 3242392 (S.D.  
19 Ill.) (citing Burnand v. Irigoyen, 30 Cal.2d 861 (1947)).

20 a. Delegation of Power

21 Plaintiffs allege that the minor Plaintiffs purported to  
22 delegate to Facebook the power to withdraw funds from their  
23 parents' credit cards or bank accounts in connection with their  
24 purchases of Facebook Credits. 2AC ¶ 64. Plaintiffs contend that  
25 minors are not authorized to delegate such power and that the  
26 minors' purchases of Facebook Credits were void under section  
27 6701(a). Docket No. 32 at 16-17.

28

1 Facebook argues that Plaintiffs have failed to allege any  
2 facts to support a showing of delegation of power so as to apply  
3 section 6701(a). Mot. at 12. Facebook contends that the "simple  
4 act of making a purchase" does not amount to delegation of power  
5 to Facebook, citing cases applying section 6701(a) to transactions  
6 where the minor granted power to a third party to act as his  
7 agent. Reply at 4-5. For example, in Morgan v. Morgan, 220 Cal.  
8 App. 2d 665, 673-74 (1963), the minor authorized his talent agent  
9 to endorse the minor's paychecks; the agent did so and retained  
10 part of the funds as commission. The court held that this  
11 amounted to a delegation of power and, as such, was void, whereas  
12 the minor had authority to endorse the paychecks himself and could  
13 not disaffirm his own endorsement under the circumstances  
14 presented there. See also Hakes Inv. Co. v. Lyons, 166 Cal. 557,  
15 560 (1913) (legislative intent of the predecessor statute to  
16 section 6701(a) was to establish "the rule that an infant could  
17 not execute contracts through an agent having only a delegated  
18 authority executed by the infant").

19 The 2AC does not support an inference that Facebook was  
20 acting as an agent of the minor Plaintiffs, who purportedly  
21 authorized Facebook to charge a debit against their parents'  
22 credit cards and/or bank accounts. Rather, Plaintiffs allege that  
23 the members of the class engaged in an arms-length transaction  
24 involving offer, acceptance and consideration. 2AC ¶ 63.  
25 Accordingly, the 2AC fails to state a claim for declaratory relief  
26 on the ground that the purchases of Facebook Credits are void  
27 pursuant to section 6701(a) of the Family Code.

28

## 1 b. Contracts Relating to Personal Property

2 Plaintiffs allege that the minor Plaintiffs' purchases of  
3 Facebook Credits are void pursuant to section 6701(c) which  
4 prohibits minors from making a contract "relating to any personal  
5 property not in the immediate possession or control of the minor."  
6 They further allege that the minor Plaintiffs did not have  
7 immediate possession or control of their parents' credit or bank  
8 accounts when they purchased the Facebook Credits, and lacked  
9 authority to delegate to Facebook the power to withdraw funds from  
10 their parents' accounts. Facebook contends that section 6701(c)  
11 is inapplicable because Facebook Credits are not tangible  
12 "personal property," arguing that section 6701(c) only applies  
13 where "subject matter of the contract is beyond the immediate  
14 possession or control of the minor" and "has nothing to do with  
15 the payment method used." Mot. at 13 (emphasis in original).  
16 Facebook relies on cases applying this statute to circumstances  
17 involving tangible property. See Taylor v. Indus. Accident  
18 Comm'n, 216 Cal. App. 2d 466, 473 (1963) (holding that newspaper  
19 delivery boy had capacity to make contract relating to sale of  
20 newspapers that were in his immediate control and possession).  
21 However, Facebook's proposed "subject matter" limitation of the  
22 statute to exclude possession or control of the funds used to pay  
23 for the challenged transaction is inconsistent with the plain  
24 meaning of the statute which voids a minor's contract "relating to  
25 any personal property" that is not in the minor's possession or  
26 control. Cal. Fam. Code § 6701(c) (emphasis added).

27 In the alternative, Facebook urges that the allegations show  
28 that I.B. and J.W. did have immediate possession and control of

1 their parents' funds as demonstrated by the fact that they were  
2 able to use their parents' credit and debit card information to  
3 buy Facebook Credits. Reply at 6. These allegations are not  
4 conclusive as to whether I.B. and J.W. had "immediate possession  
5 and control" of their parents' funds. Plaintiffs have alleged a  
6 plausible claim that the transactions at issue are void contracts  
7 "relating to any personal property not in the immediate possession  
8 or control of [a] minor."

9 The motion to dismiss the claim for declaratory relief under  
10 section 6701(c) is therefore denied.

11 2. Contracts Voidable Under Family Code Section 6710

12 Family Code section 6700 provides that, except for contracts  
13 that are void under section 6701, "a minor may make a contract in  
14 the same manner as an adult, subject to the power of  
15 disaffirmance" provided by section 6710. California law permits a  
16 minor to disaffirm a contract during minority or within a  
17 reasonable time after reaching majority. Cal. Fam. Code § 6710  
18 ("Except as otherwise provided by statute, a contract of a minor  
19 may be disaffirmed by the minor before majority or within a  
20 reasonable time afterwards or, in case of the minor's death within  
21 that period, by the minor's heirs or personal representative.").  
22 California courts recognize that "sound policy considerations  
23 support this provision." Berg v. Traylor, 148 Cal. App. 4th 809,  
24 818 (2007). "The law shields minors from their lack of judgment  
25 and experience and under certain conditions vests in them the  
26 right to disaffirm their contracts. Although in many instances  
27 such disaffirmance may be a hardship upon those who deal with an  
28 infant, the right to avoid his contracts is conferred by law upon

1 a minor for his protection against his own improvidence and the  
2 designs of others. It is the policy of the law to protect a minor  
3 against himself and his indiscretions and immaturity as well as  
4 against the machinations of other people and to discourage adults  
5 from contracting with an infant. Any loss occasioned by the  
6 disaffirmance of a minor's contract might have been avoided by  
7 declining to enter into the contract.'" Id. (quoting Niemann v.  
8 Deverich, 98 Cal. App. 2d 787, 793 (1950) (internal quotation  
9 marks omitted)).

10 "Simply stated, one who provides a minor with goods and  
11 services does so at her own risk." Id. (citing Goldberg v.  
12 Superior Court, 23 Cal. App. 4th 1378, 1382-1383 (1994)). "A  
13 contract (or conveyance) of a minor may be avoided by any act or  
14 declaration disclosing an unequivocal intent to repudiate its  
15 binding force and effect." Spencer v. Collins, 156 Cal. 298, 303  
16 (Cal. 1909). "Express notice to the other party is unnecessary."  
17 Berg, 148 Cal. App. 4th at 820 (citing Celli v. Sports Car Club of  
18 America, Inc., 29 Cal. App. 3d 511, 517 (1972)). Disaffirmation  
19 by a minor rescinds the entire contract, rendering it a nullity.  
20 Scollan v. Gov't Employees Ins. Co., 222 Cal. App. 2d 181, 183-84  
21 (1963). An action for disaffirmation is one in equity, governed  
22 in many respects by the rules relating to rescission of contracts,  
23 and "the trial court is vested with a broad discretion to see that  
24 equity is done." Le Baron v. Berryessa Cattle Co., 78 Cal. App.  
25 536, 548 (1926).

26 Plaintiffs allege that "minors have the right to disaffirm  
27 contracts such as those at issue here" and that the Facebook  
28

1 Credit transactions are voidable pursuant to section 6710. 2AC  
2 ¶ 68.

3 a. Minors May Disaffirm Contracts Even After  
4 Receiving Benefits

5 Facebook contends that minor Plaintiff I.B. cannot disaffirm  
6 his contract because he has already received the full benefit of  
7 the Facebook Credits that he purchased by using the Credits to  
8 make in-game purchases in "Ninja Saga." 2AC ¶ 25. In support of  
9 its argument, Facebook relies on court decisions enforcing forum  
10 selection or other contract clauses against a minor. Mot. at 9-  
11 11. Facebook relies primarily on E.K.D. v. Facebook, Inc., 2012  
12 WL 3242392, \*4 (S.D. Ill.), where the plaintiffs challenged  
13 Facebook's practice of including its users' names and profile  
14 pictures in advertisements and alleged that users under the age of  
15 eighteen were legally incapable of consenting to commercialization  
16 of their identity. Granting Facebook's motion to transfer venue,  
17 the district court held that the minor plaintiffs could not  
18 disaffirm the forum selection clause in Facebook's Terms of  
19 Service. Relying on the principle that "minors, if they would  
20 disaffirm a contract, must disaffirm the entire contract, not just  
21 the irksome provisions," id. at \*3 (quoting Holland v. Universal  
22 Underwriters Ins. Co., 270 Cal. App. 2d 417 (1969)), the court  
23 found that the plaintiffs "have used and continue to use  
24 facebook.com," and held that minors may not accept the benefits of  
25 a contract and then seek to disaffirm the contract "in an attempt  
26 to escape the consequences of a clause that does not suit them,"  
27 id. at \*4. The court determined that the forum selection clause  
28 was enforceable against the minor plaintiffs and granted

1 Facebook's motion to transfer the action to the Northern District  
2 of California.

3 Facebook contends that the ruling in E.K.D. on the  
4 enforceability of the forum selection clause is directly  
5 applicable here because minor Plaintiff I.B. has already accepted  
6 the benefits of the contract to purchase Facebook Credits, as  
7 demonstrated by his concession that he used the Credits to make  
8 "in-game purchases" in the Ninja Saga game. Mot. at 10-11 (citing  
9 2AC ¶ 25). Although Plaintiffs do not allege what Plaintiff J.W.  
10 did with the Credits that he purchased, Facebook infers that he  
11 also spent the Credits online and argues that allowing the minor  
12 Plaintiffs to disaffirm their contracts would result in "an unfair  
13 windfall to the minor." Reply at 2.

14 Under California law, a minor may "disaffirm all obligations  
15 under a contract, even for services previously rendered, without  
16 restoring consideration or the value of services rendered to the  
17 other party." Deck v. Spartz, Inc., 2011 WL 7775067 (E.D. Cal.)  
18 (citing Berg v. Traylor, 148 Cal. App. 4th 809 (2007)) (emphasis  
19 added). Explaining that "[o]ne deals with infants at his peril,"  
20 the California Supreme Court has held, "Upon disaffirmance the  
21 minor is entitled to recover all benefits paid under the  
22 contract." Burnand v. Irigoyen, 30 Cal. 2d 861, 866 (1947).  
23 There, the court noted that under former section 35 of the Civil  
24 Code, "where the minor was under 18, restoration of benefits  
25 received is not required." Although former Civil Code section 35  
26 required that "restoration must accompany disaffirmance of a  
27 contract made by a minor when over 18 years," Burnand, 30 Cal. 2d  
28 at 865, section 35 was repealed and replaced with section 6710 of

1 the Family Code which "no longer requires restoration of  
2 consideration for any disaffirmed contract." Deck, 2011 WL  
3 7775067 at \*7. See Berg, 148 Cal. App. 4th at 817 (holding that  
4 minor had statutory right to disaffirm agreement with personal  
5 manager and reversing judgment against minor for past commissions  
6 and projected future earnings).

7 In support of its argument that the minor Plaintiffs may not  
8 disaffirm their contracts to purchase Facebook Credits, Facebook  
9 relies on authorities that declined to allow a minor to disaffirm  
10 a particular contract clause where the minor did not disaffirm the  
11 entire contract or continued to benefit from the contract. In  
12 E.K.D., the minor challenged the enforceability of the forum  
13 selection clause contained in the Terms of Service but continued  
14 to use the Facebook networking website. In holding that the minor  
15 plaintiff could not continue using facebook.com and disaffirm the  
16 forum selection provision of the Terms of Service, the court cited  
17 a well-established maxim: "Minors must either accept or repudiate  
18 the entire contract, and they cannot retain the contract's fruits  
19 and at the same time deny its obligations." 2012 WL 3242392 at \*3  
20 (internal quotation marks and citation omitted). The court relied  
21 on decisions "[i]n the specific context of forum-selection  
22 clauses" which declined to allow minors to accept the benefits but  
23 not the burdens of a contract. Id. The E.K.D. court cited Paster  
24 v. Putney Student Travel, Inc., 1999 WL 1074120 (C.D. Cal.), where  
25 the court granted the defendants' motion to dismiss for improper  
26 venue, or to transfer, and determined that Vermont was the proper  
27 venue pursuant to a forum selection clause. There, both the minor  
28 plaintiff and her mother entered into a contract with the

1 defendants for the minor to participate in a travel program.  
2 After smoking a tobacco pipe during a Native American ceremony as  
3 part of the program, the minor allegedly suffered oral yeast  
4 infections and sued the defendants for negligence and for  
5 unlawfully permitting the use of an illegal tobacco product. Id.  
6 at \*1. In opposition to the motion to dismiss, the minor  
7 plaintiff argued that she disaffirmed the contract by filing the  
8 lawsuit in order to avoid the forum selection clause, but it does  
9 not appear that the plaintiff brought a claim to disaffirm the  
10 contract. The Paster court held that the plaintiff "cannot accept  
11 the benefits of a contract and then seek to void it in an attempt  
12 to escape the consequences of a clause that do not suit her." Id.  
13 at \*2. The court held that the minor could not disaffirm the  
14 contract to avoid application of the forum selection clause and  
15 held that the exclusive jurisdiction for the plaintiff's suit was  
16 Vermont. Id. at \*4.

17 The rulings in Paster and E.K.D. were limited to  
18 enforceability of a forum selection clause and did not rule on the  
19 minor's right to disaffirm the entire agreement. Although the  
20 court in Paster stated that the minor could not disaffirm the  
21 forum selection provision after receiving the benefits of the  
22 contract, that court was not presented with the question whether  
23 the minor could bring a claim for disaffirmance of the entire  
24 contract under California law. Similarly, in E.K.D., the court  
25 did not consider the question whether the minor plaintiffs stated  
26  
27  
28

1 a claim to disaffirm their contract to use Facebook's site.<sup>1</sup>  
2 Rather, the E.K.D. court considered only the arguments presented  
3 on Facebook's motion to transfer venue and rejected the  
4 plaintiffs' argument that the forum selection clause was invalid  
5 because the minors disaffirmed the contract. The E.K.D. court  
6 relied on the fact that the minor plaintiffs continued to use the  
7 Facebook site to hold that the minors could not disaffirm the  
8 forum selection clause of the Terms of Service. 2012 WL 3242392  
9 at \*3-4.

10 Unlike Paster and E.K.D., where the courts limited their  
11 analysis to the voidability of a forum selection clause,  
12 Facebook's motion to dismiss presents the question whether the  
13 minor Plaintiffs may disaffirm their contracts even after  
14 receiving the benefits of purchasing Facebook Credits. If all the  
15 allegations are accepted as true, the minor Plaintiffs allege a  
16 claim for declaratory relief that would "disaffirm the entire  
17 contract, not just the irksome portions." Holland, 270 Cal. App.  
18 2d at 421. Any unfair windfall that would be potentially gained  
19 by the minors "'might have been avoided by declining to enter into  
20 the contract.'" Berg, 148 Cal. App. 4th at 818 (quoting Niemann  
21 v. Deverich, 98 Cal. App. 2d 787, 793 (1950)). See In re Apple  
22

23 \_\_\_\_\_  
24 <sup>1</sup> The original complaint in E.K.D. did not allege a claim  
25 for relief based on disaffirmance. After that case was  
26 transferred to a court in this judicial district, the plaintiffs  
27 filed an amended complaint to assert a claim for declaratory  
28 relief based on the minors' right to disaffirm contracts pursuant  
to sections 6701 and 6702 of the California Family Code. C.M.D.  
v. Facebook, Inc., C 12-1216 RS, Docket No. 107. The amended  
complaint in that action is the subject of a pending motion to  
dismiss.

1 In-App Purchase Litigation, 855 F. Supp. 2d 1030, 1035-36 (N.D.  
2 Cal. 2012) (denying motion to dismiss declaratory relief claim for  
3 determination that minors' sales contracts of in-app game currency  
4 are voidable).

5 b. Recovery of Consideration Paid by Others

6 Facebook contends that the minor Plaintiffs may not disaffirm  
7 purchase contracts to recover consideration paid by their parents.  
8 Mot. at 11-12. Facebook does not cite any authority to support  
9 its argument under California law, which has maintained a policy  
10 "to protect a minor against himself and his indiscretions and  
11 immaturity as well as against the machinations of other people and  
12 to discourage adults from contracting with an infant." Berg, 148  
13 Cal. App. 4th at 818 (citation and quotation marks omitted).

14 Facebook relies primarily on Hines v. Cheshire, 36 Wash. 2d  
15 467, 474 (1950), which applied Washington state law and is  
16 distinguishable from the factual allegations presented here.  
17 There, the court allowed the minor to disaffirm a contract to  
18 purchase a used car after the seller repossessed the car until the  
19 balance due had been paid. The minor's father signed a  
20 refinancing agreement to cover the unpaid balance plus insurance  
21 and financing charges, and made the final three payments on the  
22 refinanced contract. Id. at 471. Upon review of the record, the  
23 court determined that the parents had relinquished their right to  
24 the minor's earnings and that the minor was partially emancipated  
25 based on the facts that the minor had been earning his own salary  
26 for at least three years before buying the car, that he maintained  
27 his own bank account, and that his father knew of the minor's  
28 employment and earnings. Id. at 477-78. "It follows that, where

1 the parent has relinquished his right to the child's earnings, the  
2 property purchased by the child with such earnings belongs to the  
3 child." The court concluded that the minor was entitled to  
4 disaffirm the contract and recover the purchase price that he paid  
5 for the car (without license and filing fees or finance charges),  
6 but was not entitled to recover the amount that was knowingly paid  
7 by his father pursuant to a refinance agreement that he signed.  
8 Id. at 481 ("A minor who disaffirms his contract is, in no event,  
9 entitled to recover any sums paid under the contract by another  
10 person.").

11 Similarly, in McCarty-Greene Motor Co. v. McCluney, 219 Ala.  
12 211, 213 (1929), the court recognized, under Alabama law, the  
13 minor's right to disaffirm a contract to purchase a new car but  
14 did not allow the minor to recover the value of an old car that  
15 his father traded in "by written contract to turn it in as a  
16 credit on the purchase price of the new car." There, the court  
17 held, "Upon the rescission of a contract of a minor, upon becoming  
18 of age, he should recover only what he parted with, and not what  
19 another advanced or paid for his benefit." Id.

20 In each of the cases cited by Facebook, the minor was not  
21 entitled to recover the value of consideration that his parent  
22 willingly and contractually obligated himself to provide. Here,  
23 by contrast, Plaintiffs allege that the minor Plaintiffs used  
24 their parents' funds to purchase Facebook Credits without the  
25 parents' knowledge or authorization.

26 In the absence of controlling authority limiting the minor  
27 Plaintiffs' right to disaffirm their contracts to purchase  
28 Facebook Credits with their parents' funds without their parents'

1 consent, Plaintiffs' allegations, taken as true, are sufficient to  
2 state a claim for disaffirmance.

3 3. Disaffirmance by Parents

4 Facebook contends that Plaintiffs Bohannon and Wright cannot  
5 disaffirm their children's contracts, and that only minors  
6 themselves can disaffirm their own contracts. Docket No. 25 at  
7 19. Plaintiffs Bohannon and Wright appear in this action on their  
8 own behalf, not as guardians ad litem for minor Plaintiffs I.B.  
9 and J.W. Minor Plaintiffs I.B. and J.W. are represented in this  
10 action through their guardians ad litem, Bryan Fife and Steven  
11 Wright, respectively. The plain meaning of section 6710 provides  
12 that only the minor, acting through a legal representative, may  
13 disaffirm his contract, as recently recognized in Pearson v.  
14 Superior Court, 202 Cal. App. 4th 1333 (2012). "It has long been  
15 the rule in California that a minor has limited capacity to enter  
16 into contracts (Fam. Code, §§ 6700, 6701), and that, 'a contract  
17 of a minor may be disaffirmed by the minor before majority. . . .'  
18 (Fam. Code, § 6710, emphasis added.)" Id. at 1334. See  
19 5 Williston on Contracts § 9:10 n.2 (4th ed. 2011) (citing Cal.  
20 Fam. Code § 6710 as one of several state statutes that "expressly  
21 provide that only the infant may void the contract for infancy").  
22 Plaintiffs contend that parents are entitled to disaffirm  
23 contracts entered into by their minor children, citing section  
24 6601 of the Family Code which provides, "A minor may enforce the  
25 minor's rights by civil action or other legal proceedings in the  
26 same manner as an adult, except that a guardian must conduct the  
27 action or proceedings." Docket No. 32 at 18. This statute  
28 provides that a minor must be represented in legal proceedings by

1 a guardian because the minor lacks capacity to sue. Safai v.  
2 Safai, 164 Cal. App. 4th 233, 245 (2008). "Minors lack capacity  
3 to sue in their own names. Instead, litigation must be conducted  
4 'by a guardian or conservator of the estate or by a guardian ad  
5 litem.'" Id. (citing Cal. Code Civ. Proc. § 372(a) and Fam. Code  
6 § 6601). "The guardian or guardian ad litem is not a party to the  
7 action; instead, he or she is a representative of record of a  
8 party who lacks capacity to sue." Id. (citation omitted).

9 Plaintiffs cite no authority that a parent has an independent  
10 right to disaffirm contracts entered into by their children, when  
11 not acting in a representative capacity on behalf of the minor.  
12 Section 6710 clearly provides that "a contract of a minor may be  
13 disaffirmed by the minor before majority or within a reasonable  
14 time afterwards," reflecting the principle that the power of  
15 avoidance is personal to the minor. "The power to avoid contracts  
16 and conveyances is given to an infant for her protection and  
17 should not be stretched beyond what her needs require. Thus the  
18 right to disaffirm is confined to the infant personally or his or  
19 her legal representatives." 5 Williston on Contracts § 9:10 (4th  
20 ed. 2011) (footnotes omitted). "It is clear that while the infant  
21 may avoid his or her obligations, the adult party to a contract  
22 cannot avoid it on the ground that an infant's promise or  
23 conveyance is voidable." Id.

24 Because Plaintiffs Bohannon and Julie Wright do not bring  
25 their claim for disaffirmance in a representative capacity on  
26 behalf of their minor children, their claims for declaratory  
27 relief are dismissed.

28

## 1 4. Declaratory Relief

2 Facebook contends that Plaintiffs fail to state a claim for  
3 declaratory relief because they have already incurred the alleged  
4 injuries and do not seek to prevent future injuries. Mot. at 21-  
5 22. Facebook cites authority recognizing that “[t]he central  
6 purpose of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202,  
7 is to provide parties with a declaration of their rights prior to  
8 incurring actual injury.” Olagues v. Russoniello, 770 F.2d 791,  
9 803 (9th Cir. 1985) (holding that denial of declaratory relief  
10 with respect to government’s law enforcement activities was not  
11 abuse of discretion). Actions brought under the Declaratory  
12 Judgment Act are not, however, limited to those seeking to prevent  
13 future harm. See Olagues, 770 F.2d at 803 (“Declaratory relief  
14 may be appropriate even when injunctive relief is not.”). The  
15 Declaratory Judgment Act provides that in a case of actual  
16 controversy, “any court of the United States, upon the filing of  
17 an appropriate pleading, may declare the rights and other legal  
18 relations of any interested party seeking such declaration,  
19 whether or not further relief is or could be sought.” 28 U.S.C.  
20 § 2201(a) (emphasis added). Courts recognize that a plaintiff may  
21 seek declaratory relief as to the rights under, and validity of, a  
22 contract, as Plaintiffs do here. See Gov’t Employees Ins. Co. v.  
23 Dizol, 133 F.3d 1220, 1225 (9th Cir. 1998) (en banc) (in deciding  
24 whether to exercise discretionary jurisdiction under the  
25 Declaratory Judgment Act, “when other claims are joined with an  
26 action for declaratory relief (e.g., bad faith, breach of  
27 contract, breach of fiduciary duty, rescission, or claims for  
28 other monetary relief), the district court should not, as a

1 general rule, remand or decline to entertain the claim for  
2 declaratory relief"); In re Easysaver Rewards Litig., 737 F. Supp.  
3 2d 1159, 1175 (denying motion to dismiss claim for declaratory  
4 relief) (citing Cal. Civ. P. Code § 1060; 28 U.S.C. § 2201).

5 In deciding whether declaratory relief is appropriate, the  
6 court first determines whether there is an actual case or  
7 controversy within its jurisdiction. In re Facebook PPC  
8 Advertising. Litig., 709 F. Supp. 2d 762, 772 (N.D. Cal. 2010)  
9 (citing Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669  
10 (9th Cir. 2005)). Here, Plaintiffs present an actual controversy  
11 over the rights of minors to disaffirm their purchases of Facebook  
12 Credits. Plaintiffs seek not only declaratory relief as to the  
13 validity of past contracts between Facebook and the minor  
14 Plaintiffs, but also seek a determination "that Facebook must  
15 either substantially alter its Facebook Credit transactions in  
16 order to comply with the law or not engage in Facebook Credit  
17 transactions with minor accounts at all." 2AC ¶ 72. Facebook  
18 contends that any concern about future purchases of Facebook  
19 Credits by children "can be addressed through normal parental  
20 supervision and hardly require the broad declaratory judgment they  
21 seek." Reply at 12. Nonetheless, Plaintiffs have sufficiently  
22 stated a claim for declaratory relief to determine their rights  
23 under the California Family Code.

24 Facebook also argues that Plaintiffs may not seek declaratory  
25 relief when an adequate remedy exists under another cause of  
26 action. Mot. at 22. However, Federal Rule of Civil Procedure 57  
27 explicitly provides, "The existence of another adequate remedy  
28

1 does not preclude a declaratory judgment that is otherwise  
2 appropriate.”

3 Facebook’s motion to dismiss the claim for declaratory relief  
4 is therefore denied.

5 B. Electronic Fund Transfer Act

6 Plaintiffs allege that Facebook violated the Electronic Fund  
7 Transfer Act, 15 U.S.C. § 1693 et seq. (EFTA), because debiting  
8 the bank accounts of Plaintiff Julie Wright and the EFTA Class  
9 members, constituted “unauthorized electronic funds transfers.”  
10 2AC ¶ 111. Facebook argues that this statute is inapplicable to  
11 the Facebook Credits transactions at issue.

12 The EFTA was enacted “to provide a basic framework  
13 establishing the rights, liabilities, and responsibilities of  
14 participants in electronic fund and remittance transfer systems.”  
15 15 U.S.C. § 1693(b). An “electronic fund transfer” is defined as  
16 “any transfer of funds . . . which is initiated through an  
17 electronic terminal, telephonic instrument, or computer or  
18 magnetic tape so as to order, instruct, or authorize a financial  
19 institution to debit or credit an account.” 15 U.S.C. § 1693a(7).

20 Facebook contends that it is not a “financial institution”  
21 covered by the statute, citing Nordberg v. Trilegiant Corp., 445  
22 F. Supp. 2d 1082, 1094-95 (N.D. Cal. 2006). There, the defendants  
23 allegedly enrolled the plaintiffs in membership programs and  
24 debited amounts from their credit or debit card accounts without  
25 prior approval. The Nordberg court noted that there was no  
26 indication that either defendant was a financial institution, but  
27 recognized that § 1693m provided “an enforcement mechanism”  
28 against non-financial institutions for violations of any

1 provisions of the EFTA. 445 F. Supp. 2d at 1094. The court  
2 recognized that the allegations that the defendants failed to  
3 obtain authorization from the plaintiffs prior to periodic  
4 electronic withdrawals from their financial accounts fell within  
5 the ambit of § 1693e governing preauthorized transfers. Because  
6 the complaint failed to cite the section of the EFTA that was  
7 allegedly violated, the court granted the defendants' motion to  
8 dismiss the EFTA claims with leave to amend to identify the proper  
9 sections of the EFTA and to allege facts in support of the EFTA  
10 claims. Id.

11 Plaintiffs do not contend that Facebook is a financial  
12 institution but rather assert a claim under 15 U.S.C. § 1693m,  
13 which provides for civil liability against persons other than  
14 financial institutions. 2AC ¶ 112. See Friedman v. 24 Hour  
15 Fitness USA, Inc., 580 F. Supp. 2d 985, 996 (C.D. Cal. 2008)  
16 (denying motion to dismiss EFTA claim and rejecting fitness center  
17 chain's argument that it was a financial institution and that the  
18 plaintiffs failed to provide the notice required for actions  
19 against financial institutions under § 1693g). See also In re  
20 Easysaver Rewards Litig., 737 F. Supp. 2d 1159, 1182-83 (S.D. Cal.  
21 2010) (recognizing that "electronic transfer of funds by consumers  
22 to purchase goods [ ] falls within the plain language of the  
23 statute" and permitting plaintiffs to plead alternative theories  
24 for violation of § 1693e).

25 Plaintiffs do not sufficiently allege which provision of the  
26 EFTA has been violated. As Nordberg recognized, § 1693m "is not a  
27 basis of liability under the statute" but provides "simply an  
28 enforcement mechanism for other provisions." 445 F. Supp. 2d at

1 1094. "Pursuant to section 1693m 'any person who fails to comply  
2 with any provision of this title with respect to any consumer . .  
3 . is liable to such consumer . . . .'" Id. (quoting § 1693m)  
4 (emphasis added in original). Plaintiffs cite the statutory  
5 definition of "unauthorized electronic funds transfer" but do not  
6 identify a particular provision of the EFTA that has allegedly  
7 been violated. 2AC ¶ 111; Opp. at 12-13 (citing 15 U.S.C.  
8 § 1693a(12)). Because the 2AC fails to allege a violation of any  
9 specific provision of the EFTA, and amendment does not appear to  
10 be futile, the motion to dismiss the EFTA claim is granted with  
11 leave to amend.

12 C. Consumer Legal Remedies Act Claim

13 The CLRA prohibits "unfair methods of competition and unfair  
14 or deceptive acts or practices undertaken by any person in a  
15 transaction intended to result or which results in the sale or  
16 lease of goods or services to any consumer." Cal. Civ. Code  
17 § 1770(a). Claims under the CLRA are governed by the "reasonable  
18 consumer" test. Williams v. Gerber Prods. Co., 552 F.3d 934, 938  
19 (9th Cir. 2008) (citing Freeman v. Time, Inc., 68 F.3d 285, 289  
20 (9th Cir. 1995)).

21 Plaintiffs allege that Facebook Credits are "certificates or  
22 coupons exchangeable for goods" and thereby constitute goods under  
23 the CLRA, which defines "goods" as "tangible chattels bought or  
24 leased for use primarily for personal, family, or household  
25 purposes, including certificates or coupons exchangeable for these  
26 goods." Cal. Civ. Code § 1761(a). Plaintiffs further allege that  
27 they used Facebook Credits as services, which are defined as  
28 "work, labor, and services for other than a commercial or business

1 use, including services furnished in connection with the sale or  
2 repair of goods." Cal. Civ. Code § 1761(b). Plaintiffs allege  
3 that Facebook violated the CLRA by "actively marketing and  
4 promoting its in-App purchases and virtual goods with the  
5 statement that purportedly 'all sales are final'" when the  
6 transactions with minors were actually void or voidable, and by  
7 operating Facebook Credit transactions in violation of the MTA and  
8 EFTA. 2AC ¶ 78.

9 Facebook contends that Plaintiffs' CLRA claim fails because  
10 Facebook Credits are not "goods and services" covered by the  
11 statute. Mot. at 19-20. Facebook relies on Berry v. American  
12 Express Publishing, Inc., 147 Cal. App. 4th 224 (2007), in support  
13 of its argument that California courts have consistently held that  
14 intangible interests do not qualify as "goods" under the CLRA. In  
15 Berry, the court analyzed whether the defendant's issuance of  
16 credit to the plaintiff constituted a "good" or "service," as  
17 defined by the CLRA. 147 Cal. App. 4th at 229. The court held  
18 that the American Express credit card was not a "good" because  
19 "the card has no intrinsic value and exists only as indicia of the  
20 credit extended to the card holder." Berry, 147 Cal. App. 4th at  
21 229. The Berry court also held that the credit card was not a  
22 "service," relying heavily on legislative history to find that  
23 extending a line of credit "separate and apart from the sale or  
24 lease of any specific good or service falls outside the scope of  
25 section 1770." Id. at 232. Facebook argues that Facebook  
26 Credits, like the extension of credit in Berry, are not "tangible  
27 chattel" and exist "only as indicia" of digital currency that is  
28 available to the user. Mot. at 20.

1 As in Berry, Plaintiffs here argue for liberal construction  
2 of the CLRA to promote its underlying purposes of protecting  
3 consumers against unfair and deceptive business practices. Opp.  
4 at 18. See Berry, 147 Cal. App. 4th at 232 (“‘This title shall be  
5 liberally construed and applied to promote its underlying  
6 purposes, which are to protect consumers against unfair and  
7 deceptive business practices and to provide efficient and  
8 economical procedures to secure such protection.’”) (quoting Cal.  
9 Civ. Code § 1760). The Berry court cautioned, however, that  
10 courts may not “rewrite a statute under the guise of a liberal  
11 interpretation. Although CLRA has been interpreted broadly,  
12 courts have not expanded it beyond its express terms.” Id.

13 Plaintiffs cite authorities applying the CLRA to electronic  
14 goods and services in support of their argument that Facebook  
15 Credits are goods and services, but those decisions do not address  
16 the type of digital currency at issue here. See Doe 1 v. AOL LLC,  
17 719 F. Supp. 2d 1102, 1112 (N.D. Cal. 2010) (holding that CLRA  
18 claim against internet service provider sufficiently alleged  
19 injury resulting from AOL’s public disclosure of confidential  
20 member information); Morgan v. AT & T Wireless Services, Inc., 177  
21 Cal. App. 4th 1235, 1260 (2009) (reversing dismissal, based on  
22 CLRA notice requirement, of claim alleging that wireless telephone  
23 service provider violated CLRA by representing that goods or  
24 services have characteristics, uses, or benefits which they do not  
25 have); America Online, Inc. v. Sup. Ct., 90 Cal. App. 4th 1 (2001)  
26 (affirming denial of AOL’s motion to stay or dismiss action for  
27 inconvenient forum in putative consumer class action alleging that  
28 charging monthly service fees after plaintiffs terminated AOL

1 subscriptions violated CLRA). Facebook makes the more persuasive  
2 argument that Facebook Credits, "separate and apart from a  
3 specific purchase or lease of a good or service," are not covered  
4 by the CLRA. Berry, 147 Cal. App. 4th at 229. See Ferrington v.  
5 McAfee, Inc., 2010 WL 3910169, \*18-19 (N.D. Cal.) (holding that  
6 computer software is not a good or service covered by the CLRA).

7 Because amendment of the pleadings would not cure this  
8 defect, the CLRA claim is dismissed without leave to amend.

9 D. Unfair Competition Law Claims

10 California's Unfair Competition Law (UCL) prohibits any  
11 "unlawful, unfair or fraudulent business act or practice." Cal.  
12 Bus. & Prof. Code § 17200. The UCL incorporates other laws and  
13 treats violations of those laws as unlawful business practices  
14 independently actionable under state law. Chabner v. United of  
15 Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).  
16 Violation of almost any federal, state or local law may serve as  
17 the basis for a UCL claim. Saunders v. Superior Court, 27 Cal.  
18 App. 4th 832, 838-39 (1994). In addition, a business practice may  
19 be "unfair or fraudulent in violation of the UCL even if the  
20 practice does not violate any law." Olszewski v. Scripps Health,  
21 30 Cal. 4th 798, 827 (2003). Claims under the UCL must be brought  
22 "within four years after the cause of action accrued." Cal. Bus.  
23 & Prof. Code § 17208.

24 Plaintiffs allege that Facebook violated the UCL under all  
25 three prongs identified in the statute.

26 1. Unlawful Business Practices

27 In support of their UCL claim for unlawful business  
28 practices, Plaintiffs allege that Facebook violated the Money

1 Transmission Act, Cal. Fin. Code § 2000 et seq. (MTA), the EFTA  
2 and the CLRA.

3 a. Money Transmission Act

4 The California MTA, effective January 1, 2012, states as  
5 follows:

6 The Legislature finds and declares all of the  
7 following:

8 (a) Money transmission businesses conduct a  
9 significant amount of business in this state and  
10 technological advances are occurring in the provision  
11 of money transmission services.

12 (b) Persons who use money transmission  
13 businesses in this state use those businesses for,  
14 among other purposes, paying for the necessities of  
15 life and transmitting money to family members.

16 (c) The failure of money transmission businesses  
17 to fulfill their obligations would cause loss to  
18 consumers, disrupt the payments mechanism in this  
19 state, undermine public confidence in financial  
20 institutions doing business in this state, and  
21 adversely affect the health, safety, and general  
22 welfare of persons in this state.

23 (d) To protect the interests of consumers of  
24 money transmission businesses in this state, to  
25 maintain public confidence in financial institutions  
26 doing business in this state, and to preserve the  
27 health, safety, and general welfare of the people of  
28 this state, it is necessary to regulate money  
transmission businesses in this state.

Cal. Fin. Code § 2001. Facebook contends that its Facebook  
Credits are not covered by the statute which defines "money  
transmission" as (1) selling or issuing payment instruments;  
(2) selling or issuing stored value; and/or (3) receiving money  
for transmission. Cal. Fin. Code § 2003(o). "Payment instrument"  
is defined as follows:

a check, draft, money order, traveler's check, or  
other instrument for the transmission or payment of  
money or monetary value, whether or not negotiable.  
The term does not include a credit card voucher,

1                   letter of credit, or any instrument that is  
2                   redeemable by the issuer for goods or services  
3                   provided by the issuer or its affiliate.

4 Cal. Fin. Code § 2003(q) (emphasis added). “Stored value,” in  
5 turn, is defined as

6                   monetary value representing a claim against the  
7                   issuer that is stored on an electronic or digital  
8                   medium and evidenced by an electronic or digital  
9                   record, and that is intended and accepted for use as  
10                  a means of redemption for money or monetary value or  
11                  payment for goods or services. The term does not  
12                  include a credit card voucher, letter of credit, or  
13                  any stored value that is only redeemable by the  
14                  issuer for goods or services provided by the issuer  
15                  or its affiliate, except to the extent required by  
16                  applicable law to be redeemable in cash for its cash  
17                  value.

18 Cal. Fin. Code § 2003(v) (emphasis added).

19                  The 2AC alleges that Facebook Credits are a payment system  
20                  provided by Facebook “for users to make purchases within Facebook”  
21                  and to “acquire points, coins, or virtual currency within Facebook  
22                  Applications.” 2AC ¶ 2. Facebook contends that this description  
23                  of Facebook Credits fit squarely within the statutory exclusions  
24                  for a “closed loop” payment instrument or stored value that is  
25                  “only redeemable by the issuer for goods or services provided by  
26                  the issuer or its affiliate.” Mot. at 15 (citing Cal. Fin. Code  
27                  § 2003(q), (v)). Facebook also cites legislative history to  
28                  demonstrate that the MTA was intended to regulate “open loop,  
29                  stored value cards by non-bank entities” that are “redeemable for  
30                  goods and services at multiple vendors; e.g., a Visa check card,”  
31                  as opposed to “closed loop” cards that are only “redeemable by the  
32                  issuer for goods or services provided by the issuer or its  
33                  affiliate; e.g., a Starbucks card.” Mot. at 14 (citing Bill  
34                  Analysis: AB 2789 by S. Comm. on Banking, Fin. and Ins., 2009-2010

1 Sess. (June 30, 2010 hearing), available at  
2 <http://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml>).

3 Plaintiffs respond that Facebook Credits constitute an "open  
4 loop" payment system because they provide a method of transmitting  
5 funds from Facebook users to application developers. Plaintiffs  
6 cite Facebook's Help Center description of Facebook Credits:

7 Facebook Credits are a virtual currency you can use  
8 to buy virtual goods in any games or apps of the  
9 Facebook platform that accept payments. You can  
10 purchase Facebook Credits directly from within an app  
11 using your credit card, PayPal, mobile phone and many  
12 other local payment methods.

13 Pls.' RJN, Ex. 2. Plaintiffs argue that Facebook also has a  
14 payment system to pay developers of applications, and thereby  
15 creates a system of transmitting funds from consumers to  
16 application developers. Opp. at 11 and Pls.' RJN, Ex. 3.  
17 However, Plaintiffs allege that Facebook Credits are used to "make  
18 purchases within Facebook," 2AC ¶ 2, and fail to claim that  
19 Facebook Credits are redeemable for goods and services outside the  
20 Facebook site. Based on the allegations of the operative  
21 complaint, Facebook has sufficiently shown that Facebook Credits  
22 are "redeemable by the issuer for goods and services provided by  
23 the issuer or its affiliate," and are excluded from the definition  
24 of "payment instruments" or "stored value" regulated by the MTA.  
25 Cal. Fin. Code § 2003(q), (v). Plaintiffs therefore fail to state  
26 a claim for relief based on the MTA.

27 Because Plaintiffs have not demonstrated that Facebook  
28 Credits are covered by the MTA and amendment appears futile, the  
motion to dismiss the UCL claims based on allegations of MTA  
violations is granted without leave to amend.

b. Other Grounds for Claims Under the  
Unlawful Prong of the UCL

1  
2 Plaintiffs also allege that Facebook's business practices  
3 violate the CLRA and the EFTA. As discussed above, the CLRA is  
4 not applicable to the Facebook Credits at issue here and the CLRA  
5 claim, as well as the UCL claim based on it, are dismissed without  
6 leave to amend. Plaintiffs also fail to state a claim under the  
7 EFTA, but that claim is being dismissed with leave to amend.  
8 Accordingly, the UCL claim for unlawful business practices is  
9 dismissed without leave to amend as to the alleged violations of  
10 the CLRA and with leave to amend as to the alleged violations of  
11 the EFTA.

12 2. Unfair Business Practices

13 The California Supreme Court has not established a definitive  
14 test to determine whether a business practice is unfair under the  
15 UCL. See Cel-Tech Communications, Inc. v. Los Angeles Cellular  
16 Telephone Co., 20 Cal. 4th 163, 187 n.12 (1999) (stating that the  
17 test for unfairness in cases involving business competitors is  
18 "limited to that context" and does not "relate[] to actions by  
19 consumers."). California courts of appeal have applied three  
20 different tests to evaluate claims by consumers under the UCL's  
21 unfair practices prong. See, e.g., Lozano v. AT&T Wireless  
22 Servs., Inc., 504 F.3d 718, 735-736 (9th Cir. 2007); Drum v. San  
23 Fernando Valley Bar Ass'n, 182 Cal. App. 4th 247, 256 (2010).

24 Under one test, a consumer must allege a "violation or  
25 incipient violation of any statutory or regulatory provision, or  
26 any significant harm to competition." Drum, 182 Cal. App. 4th at  
27 256. The "public policy which is a predicate to a consumer unfair  
28 competition action under the 'unfair prong' of the UCL must be

1 tethered to specific constitutional, statutory, or regulatory  
2 provisions." Id. Under the second test, the "unfair prong"  
3 requires a consumer to plead that (1) a defendant's conduct "is  
4 immoral, unethical, oppressive, unscrupulous or substantially  
5 injurious to consumers" and (2) "the utility of the defendant's  
6 conduct" is outweighed by "the gravity of the harm to the alleged  
7 victim." Id. at 257 (citation and internal quotation marks  
8 omitted).

9 The third test, which is based on the Federal Trade  
10 Commission's definition of unfair business practices, requires  
11 that "(1) the consumer injury must be substantial; (2) the injury  
12 must not be outweighed by any countervailing benefits to consumers  
13 or competition; and (3) it must be an injury that consumers  
14 themselves could not reasonably have avoided." Id. (citation and  
15 internal quotation marks omitted). In Lozano, the Ninth Circuit  
16 endorsed the tethering test or balancing test and declined "to  
17 apply the FTC standard in the absence of a clear holding from the  
18 California Supreme Court." 504 F.3d at 736. See Ferrington v.  
19 McAfee, Inc., 2010 WL 3910169, \*12 (N.D. Cal. Oct. 5, 2010)  
20 ("[p]ending resolution of this issue by the California Supreme  
21 Court, the Ninth Circuit has approved the use of either the  
22 balancing or the tethering tests in consumer actions, but has  
23 rejected the FTC test" (citing Lozano, 504 F.3d at 736, and  
24 applying the tethering test first, then the balancing test to find  
25 that a claim was sufficiently plead under the unfair prong of the  
26 UCL). Here, Plaintiffs allege that the unfair practices  
27 "specifically violate public policy of protecting consumers in  
28 online transactions and protecting minors from abusive and

1 predatory practices . . . as set forth specifically in statutory  
2 provisions, namely, California's MTA, the EFTA, and California  
3 Family Code secs. 6701 and 6710." 2AC ¶ 96. Because the unfair  
4 practices claims are based on alleged violations of specific  
5 statutory provisions, the Court applies the tethering test to  
6 determine the sufficiency of Plaintiffs' unfair practices  
7 allegations.

8 Plaintiffs allege that Facebook engaged in unfair business  
9 acts and practices by "actively advertising, marketing and  
10 promoting Facebook Credits with the statement that 'all sales are  
11 final' when Facebook knew that minors were making such purchases  
12 and that minors had the right to void such contracts if they so  
13 chose." 2AC ¶ 92. Facebook contends that these UCL claims are  
14 based on a meritless theory of disaffirmance. As discussed above,  
15 however, the minor Plaintiffs sufficiently plead claims of  
16 disaffirmance and Plaintiffs have sufficiently stated a claim for  
17 unfair business practices under the UCL based on the well-  
18 established doctrine of infancy underlying the minors' right to  
19 disaffirm contract. The Court denies the motion to dismiss the  
20 claim under the unfair prong of the UCL because it is tethered to  
21 the relevant provisions of the California Family Code.

22 The claims under the unfair prong of the UCL based on  
23 violations of the EFTA are dismissed with leave to amend the  
24 predicate allegations supporting the EFTA claims. However,  
25 Plaintiffs cannot allege a claim under the unfair prong of the UCL  
26 based on violations of the MTA, and the motion to dismiss such  
27 claims is granted without leave to amend.

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## 3. Fraudulent Prong

Conduct is "fraudulent" under the UCL if the conduct is "likely to deceive." Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1254 (2009). A claim under the fraudulent prong of the UCL is governed by the "reasonable consumer" standard, which requires the plaintiff to "show that members of the public are likely to be deceived." Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) (citation and internal quotation marks omitted).

It is well-settled that the heightened pleading standard of Federal Rule of Civil Procedure 9(b) applies to state law claims sounding in fraud that are brought in a federal action. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102-03 (9th Cir. 2003). When the claim is "grounded in fraud," the pleading of that claim as a whole is subject to Rule 9(b)'s particularity requirement. Marolda v. Symantec Corp., 672 F. Supp. 2d 992, 997 (N.D. Cal. 2009) (citing Vess, 317 F.3d at 1104). The fraudulent conduct must be alleged with particularity under Rule 9(b). Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) requires the plaintiff to allege "the who, what, when, where, and how" of the alleged fraudulent conduct, Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997), and "set forth an explanation as to why [a] statement or omission complained of was false and misleading," In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc).

Plaintiffs argue that a claim under the fraudulent prong of the UCL does not require pleading actual reliance and the other elements of fraud, but only the elements of a UCL claim. Opp. at

1 15-16. California courts recognize that a claim brought under the  
2 fraudulent business practice prong of the UCL is "distinct from  
3 common law fraud" and that a UCL claim need not plead all the  
4 elements of a common law fraudulent deception, e.g., that it was  
5 reasonably relied upon by a victim who incurs damages. Morgan,  
6 177 Cal. App. 4th at 1255. California law does, however, require  
7 a UCL claim to allege actual reliance, In re Tobacco II Cases, 46  
8 Cal. 4th 298, 328 (2009), as well as the existence of a duty to  
9 disclose, Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th  
10 1544, 1557 (2007) ("Absent a duty to disclose, the failure to do  
11 so does not support a claim under the fraudulent prong of the  
12 UCL."). "Reliance is proved by showing that the defendant's  
13 misrepresentation or nondisclosure was 'an immediate cause' of the  
14 plaintiff's injury-producing conduct. A plaintiff may establish  
15 that the defendant's misrepresentation is an 'immediate cause' of  
16 the plaintiff's conduct by showing that in its absence the  
17 plaintiff 'in all reasonable probability' would not have engaged  
18 in the injury-producing conduct." In re Tobacco II, 46 Cal. 4th  
19 at 326 (citations omitted).

20 Plaintiffs contend that they and reasonable Facebook users  
21 were "deceived or likely to be deceived by Facebook's false  
22 representations about Facebook Credit transactions being 'final.'" 2AC 93. As Facebook correctly points out, the 2AC fails to plead  
23 actual reliance with the specificity required by Rule 9(b). Thus,  
24 the motion to dismiss the claim under the fraudulent prong of the  
25 UCL is dismissed with leave to amend.  
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1 III. Motion to Strike Class Allegations

2 Facebook moves to strike the class allegations because  
3 Plaintiffs lack Article III standing and the class allegations  
4 present highly individualized facts. Mot. at 22-25. The motion  
5 to strike class allegations is denied as premature. Facebook must  
6 present its challenges to class certification in opposition to  
7 Plaintiffs' motion for class certification. See Clerkin v.  
8 MyLife.com, 2011 WL 3809912, \*3 and n.4 (N.D. Cal.) (denying Rule  
9 12(b)(6) motion to dismiss class allegations and noting that even  
10 if the defendants had brought a Rule 12(f) motion, the motion to  
11 strike would fail because defendants did not show that the class  
12 allegations were "redundant, immaterial, impertinent, or  
13 scandalous.").

14 CONCLUSION

15 For the reasons set forth above, the Court ORDERS as follows:

- 16 1. The motion to dismiss the following claims is GRANTED  
17 without leave to amend:
- 18 a. claim for declaratory relief under California  
19 Family Code section 6701(a);
  - 20 b. claim to disaffirm the minors' contracts brought by  
21 parents who are not acting in a representative capacity  
22 on behalf of the minors, i.e., parent Plaintiffs  
23 Bohannon and Wright;
  - 24 c. CLRA claim;
  - 25 d. claims under the unlawful and unfair prongs of the  
26 UCL alleging violations of the CLRA and MTA.
- 27 2. The motion to dismiss the following claims is GRANTED  
28 with leave to amend:

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- a. the EFTA claim;
- b. claims brought under the unlawful and unfair prongs of the UCL based on violations of the EFTA; and
- c. claim brought under the fraudulent prong of the UCL.

3. The motion to dismiss the following claims is DENIED:

- a. declaratory relief claims brought by the minor Plaintiffs to disaffirm their contracts pursuant to California Family Code sections 6701(c) and 6710 and
- b. claim alleging violation of public policy protecting minors under the unfair prong of the UCL.

4. Facebook's motion to strike the class allegations is DENIED.

If Plaintiffs assert claims on behalf of a class, they must amend the class definitions to reflect the rulings on the motion to dismiss, particularly the "Minor Subclass" which is defined to include both minor children who are Facebook users and their parents and guardians. Plaintiffs must amend their complaint to separate the minors Plaintiffs' disaffirmance claim from the independent claims brought by their parents or guardians.

Plaintiffs must file a third amended class action complaint within twenty-one days of the date of this order. Facebook must file its answer, or otherwise respond to the amended complaint, no

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1 later than twenty-one days after Plaintiffs file their amended  
2 complaint.

3 IT IS SO ORDERED.

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5 Dated: October 25, 2012

  
6 CLAUDIA WILKEN  
7 United States District Judge  
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