UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 20-01203-DOC-DFM Date: May 4, 2022

Title: SHADI HAYDEN v. THE RETAIL EQUATION, INC. ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Karlen Dubon	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): JOINT ORDER GRANTING IN PART RETAIL DEFENDANTS' MOTION TO DISMISS [279] AND DEFENDANT TRE'S MOTION TO DISMISS [282]

Before the Court is Defendants Sephora USA, Inc.; Bed Bath & Beyond Inc.; CVS Pharmacy, Inc.; Bath & Body Works, Inc. (f/k/a L Brands, Inc.); The Gap, Inc.; The Home Depot, Inc.; and The TJX Companies, Inc.'s (collectively, the "Retail Defendants") Motion to Dismiss ("Retail Motion" or "Retail Mot.") (Dkt. 279) and Defendant The Retail Equation, Inc.'s ("TRE" or "Defendant TRE") Motion to Dismiss ("TRE Motion" or "TRE Mot.") (Dkt. 282). The Court heard oral argument on the Motions on April 22, 2022. Having reviewed the moving papers submitted by the parties, the Court **GRANTS IN PART** TRE and Retail Defendants' Motions.

I. Background

A. Facts

Defendant TRE is a Delaware corporation and wholly owned subsidiary of Appriss, Inc., which has its principal place of business and headquarters in Irvine,

California. Second Amended Complaint ("SAC") (Dkt. 251) ¶ 19. Retail Defendants include retail corporations with principal places of business, headquarters, and retail locations in various parts of the United States. *Id.* ¶¶ 11-14, 16-18. Plaintiffs were all at one-point consumers at Retail Defendants.

Defendant TRE is a technology company that contracts with retailers to provide its services for detecting retail fraud or criminal activity amongst consumers. *Id.* ¶ 1. Plaintiffs allege Retail Defendants have or continue to be in a contractual relationship with Defendant TRE to utilize such services. *Id.* ¶ 4. To combat retail fraud or criminal activity, Defendant TRE allegedly provides Retail Defendants individualized risk scores at the retailer's request when a consumer attempts a product return or exchange. *Id.* ¶ 1. The risk scores are generated by Defendant TRE through analysis of data, referred to as Consumer Commercial Activity Data and Consumer ID Data. *Id.* ¶ 2. The Consumer Commercial Activity Data is collected by retailers and "includes, but is not limited to, each customers' unique purchase return, and exchange history, i.e., what a consumer buys, when a consumer buys, where a consumer buys, how much a consumer buys, how often a consumer buys, what form of payment a consumer uses, etc." *Id.* ¶ 25. The Consumer ID Data is collected by retailers "includes, but is not limited to, all unique identification information contained on or within a consumer's driver's license, government-issued ID card, or passport, e.g., the consumer's name, date of birth, race, sex, photograph, complete street address, and zip code." *Id.* ¶ 26. Plaintiffs allege Retail Defendants and Defendant TRE's data collection efforts also involve "connecting data"— to create a consumer's individual "risk score," they use personal and transaction data of people thought to be related or associated with the consumer. *Id.* ¶ 29. Plaintiffs further allege that TRE also considers "information about other customers in the merchant location during the time of the requested return transaction" to determine a consumer's risk score. *Id.* ¶ 30.

Plaintiffs contend that the collecting and processing of data to generate the risk scores is done without the authorization or consent of consumers. *Id.* ¶ 2, 24. Moreover, Plaintiffs allege consumers are not given any opportunity to review, correct, or amend their data or risk scores, and not advised on what risk score is needed to ensure their returns or exchanges are accepted. *Id.* ¶ 3. Plaintiffs allege that due to the individual "risk scores" created by Defendant TRE at Retail Defendants' requests, their attempted returns or exchanges at Retail Defendants' various retail locations were rejected. *See Id.* ¶ 41-215.

Based on these allegations, Plaintiffs bring the following claims against Retail Defendants and Defendant TRE: violation of the Fair Credit Reporting Act against Defendant TRE; violation of the California Consumer Privacy Act against Retail Defendants; invasion of privacy against both sets of Defendants; violations of California's Unfair Competition Law against both sets of Defendants; and unjust enrichment against both sets of Defendants.

B. Procedural History

On July 7, 2020, Plaintiffs filed their Complaint in this Court (Dkt. 1). Plaintiffs filed their First Amended Complaint (Dkt. 15) on August 3, 2020. Plaintiffs then filed their Second Amended Complaint on July 27, 2021. Retail Defendants and Defendant TRE filed their Motions to Dismiss on September 20, 2021. Plaintiffs opposed Retail Defendants' Motion ("Opp'n to Retail Defs.") (Dkt. 299) and Defendant TRE's Motion ("Opp'n to TRE Def.") (Dkt. 300) on October 20, 2021. Retail Defendants replied ("Retail Reply") (Dkt. 315) and Defendant TRE replied ("TRE Reply") (Dkt. 312) on November 10, 2021.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v.*

Richard Feiner & Co., Inc., 896 F.2d 1542, 1555, n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments, and thus leave to amend should be freely granted. *See, e.g.*, *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. *See, e.g.*, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. Discussion

Both Retail Defendants and Defendant TRE move to dismiss all claims brought against them under FRCP 12(b)(6). The Court deals with each cause of action in turn.

A. Fair Credit Reporting Act ("FCRA")

The FCRA, 15 U.S.C. § 1681 *et seq.*, is a consumer protection statute designed to safeguard individuals' credit information. It requires consumer reporting agencies to "adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b).

Plaintiffs allege that TRE has committed four violations of the FCRA. First, Plaintiffs allege that TRE incorrectly identified Plaintiffs as fraudsters or engaged in other criminal activity, in violation of 15 U.S.C. § 1681e(b). Second, Plaintiffs allege that TRE failed to disclose to consumers their own "risk scores" or any information concerning those scores upon request, thereby violating 15 U.S.C. § 1681g(f). Third,

Plaintiffs allege that TRE provides consumers only a limited version of the full data it maintains on them, thereby failing to comply with its obligations under 15 U.S.C. §§ 1681g and 1681j to disclose to consumers "all information in the consumer's file at the time of the request." Fourth, Plaintiffs allege TRE provides no avenue for correcting or reinvestigating disputed information, in violation of 15 U.S.C. § 1681i. SAC ¶¶ 255-57. TRE moves to dismiss all of Plaintiffs' FCRA claims in part because they argue that the risk score is not a "consumer report" subject to the FCRA.

The FCRA defines a "consumer report" as any:

> communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, [or] personal characteristics … used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for –
>
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
> (B) employment purposes; or
> (C) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1). For the purposes of the FCRA, the term "credit" has the same meaning as defined in the Equal Credit Opportunity Act, namely "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. §§ 1681a(r)(5); 1691a(d). Thus, a credit transaction under the FCRA thus necessarily involves a creditor-debtor relationship.

Here, TRE's risk score does not fall within the statutory definition of "consumer report" because it does not bear on Plaintiff's eligibility for credit. As TRE notes, the Retail Defendants are not issuing credit to the Plaintiffs—that is, they are not granting the Plaintiffs the right to defer payment or debt. TRE Mot. at 7-8. The retailers already have the Plaintiffs' money for the goods the Plaintiffs seek to return.

Plaintiffs' arguments in opposition are unpersuasive. Plaintiffs argue that the risk score does relate to credit but that the creditor-debtor relationship is flipped such that Plaintiffs are the "creditor[s]" and Retail Defendants are the "debtor[s]." Opp'n to TRE Def. at 7-8. The FCRA defines consumer reports as information used in establishing "the *consumer's* eligibility for" credit. 15 U.S.C. § 1681a(d)(1) *(*emphasis added). If, as

Plaintiffs argue, Plaintiffs are extending credit to Retail Defendants, then the risk report is not being used to establish the *consumer's* eligibility for credit.[1] Plaintiffs' reliance on *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 45-46 (D.C. Cir. 1984) is similarly misguided. *Koropoulos* pertained to a store credit card, which involved extending to the *consumer* the right "to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. § 1691a(d). As explained above, store credit without an associated credit card does not confer the consumer with such a right. Because TRE's risk report was not used to establish Plaintiffs' eligibility for credit, the Court finds that the risk report is not a "consumer report" subject to the FCRA.

At the hearing, Plaintiffs noted that TRE and L Brands' contract describes TRE as a "consumer reporting agency" producing "consumer reports," Plaintiffs' Ex Parte Brief (Dkt. 363-1) at 3-4; however, this fact does not change the Court's analysis. As detailed above, for the purposes of the FCRA a "consumer report" consists of information used or collected for one of the purposes enumerated in 15 U.S.C. § 1681a(d)(1), and we have established that TRE's risk scores do not involve such a purpose.

As such, the Court DISMISSES WITH PREJUDICE Plaintiffs' FCRA claims against TRE.

B. California Consumer Privacy Act ("CCPA")

The CCPA creates a private right of action for "[a]ny consumer whose nonencrypted and nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information." Cal. Civ. Code § 1798.150(a).

The Retail Defendants make three arguments: (1) CCPA is not applicable to Plaintiffs who made exchanges prior to the statute's operative date; (2) not all sections of the CCPA create private rights of actions; and (3) Plaintiffs have not satisfied the requirements for the private right of action under § 1798.150(a). *See generally* Retail Mot. at 4-13.

[1] Moreover, the statute is clear that a retail store cannot be a consumer. U.S.C. § 1681a(c) ("The term 'consumer' means an individual.").

i. CCPA Retroactivity

Retail Defendants argue that Plaintiffs who allegedly attempted returns or exchanges prior to the operative date of the CCPA must have their claims dismissed because the CCPA was not in effect. Retail Mot at 12-13. Plaintiffs argue that these claims should not be dismissed given Retail Defendants' "pattern and practice of data sharing that continues to present day." Opp'n to Retail Defs. at 19.

This Court agrees. The CCPA does not contain an express retroactivity provision. *See* Cal. Civ. Code § 1798.198; *see also* Cal. Civ. Code § 3 ("[n]o part of [this Code] is retroactive, unless expressly so declared."); *Gardiner v. Walmart Inc.*, 2021 WL 2520103, at *2 (N.D. Cal. March 5, 2021) (holding a plaintiff must allege that the defendant violated "the duty to implement and maintain reasonable security procedures and practices . . . on or after January 1, 2020."). Although Plaintiffs argue that Retail Defendants have a pattern and practice of data sharing, Plaintiffs fail to allege that they are continuing to return or exchange merchandise at these retailers such that their data is disclosed to TRE. As such, Plaintiffs Hayden, Julian-Moye, Lloyd, Naidu, Smith, and White have failed to provide a proper showing to the Court that their personal information has or is subject to such exposure during the operative period of the CCPA and their CCPA claims must be dismissed.

As such, the Court DISMISSES WITH PREJUDICE Plaintiffs Hayden, Julian-Moye, Lloyd, Naidu, Smith, and White's CCPA claims against Retail Defendants.

ii. CCPA Private Right of Action

As Retail Defendants note, the CCPA does not provide for a private right of action for §§ 1798.100(b), 110(c), and 115(d) and as such, Plaintiffs do not state a proper claim as they relate to violations under these sections. The CCPA makes clear that its private right of action "apply[s] only to violations as defined in subdivision (a) and shall not be based on violations of any other section of this title. Nothing in this title shall be interpreted to serve as the basis for a private right of action under any other law." *See* Cal. Civ. Code § 1798(c).

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiffs' CCPA §§ 1798.100(b), 110(c), and 115(d) claims and will only address Plaintiffs' claim that Retail Defendants violated § 1798.150(a).

iii. CCPA § 1798.150(a)

Retail Defendants move to dismiss Plaintiffs' CCPA claim on the grounds that Plaintiffs' claim does not satisfy the allegedly narrow private right of action under § 1798.150(a), which they argued at the hearing is limited to "data breaches." Retail Mot. at 6. Even if the CCPA is not limited to data breaches, Retail Defendants argue that the disclosure of personal information was not unauthorized for purposes of § 1798.150(a) because they had the business's consent. *Id.* at 11. Plaintiffs respond that the disclosure of their non-anonymized information was unauthorized because Retail Defendants failed to disclose the TRE distribution arrangement or receive authorization from Plaintiffs to do so. Opp'n to Retail Defs. at 17-18.

For a plaintiff to sufficiently plead a violation of § 1798.150(a), the plaintiff is required to show that "nonencrypted and nonredacted personal information" was "subject to an unauthorized access and exfiltration, theft, or disclosure *as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices* appropriate to the nature of the information to protect the personal information." Cal. Civ. Code § 1798(a) (emphasis added). Here, Retail Defendants' disclosure of consumers' non-anonymized data was not a result of a failure to implement and maintain reasonable security measures, but was a business decision to combat retail fraud. As such, the provision is inapplicable because it is not alleged that Retail Defendants violated their duties as they relate to security procedures and practices.

The CCPA claims brought by out-of-state Plaintiffs also fail because the CCPA does not apply to non-California residents. Cal. Civ. Code § 1798.140(g) (defining a "consumer" as "a natural person who is a California resident"). As such, the out-of-state Plaintiffs did not have standing to bring CCPA claims against Retail Defendants.

For the reasons stated, the Court DISMISSES WITH PREJUDICE Plaintiffs' CCPA claims against Retail Defendants.

C. Invasion of Privacy

TRE and the Retail Defendants move to dismiss Plaintiffs' invasion of privacy claims on the basis that Plaintiffs have failed to sufficiently plead each element of their claim. TRE Mot. at 11-19; Retail Mot. at 13-21.

Plaintiffs allege that TRE and the Retail Defendants violated Plaintiffs' right to privacy under both California common law and the California Constitution. To state a claim for intrusion upon privacy under California common law, "a plaintiff must plead that (1) a defendant intentionally intruded into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy, and (2) the intrusion occurred in a matter highly offensive to a reasonable person." *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020) (alterations and internal quotation omitted). A claim for invasion of privacy under the California Constitution requires Plaintiffs to plead that "(1) they possess a legally protected privacy interest, (2) they maintain a reasonable expectation of privacy, and (3) the intrusion is so serious as to constitute an egregious breach of the social norms such that the breach is highly offensive." *Id.* (alteration and internal quotation omitted). "Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy)." *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35 (1994).

Where a plaintiff pleads invasion of privacy under both California common law and the California Constitution, courts "consider the claims together and ask (1) whether there exists a reasonable expectation of privacy, and (2) whether the intrusion was highly offensive. *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020), *cert. denied sub nom. Facebook, Inc. v. Davis*, 141 S. Ct. 1684 (2021) (citing *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009)).

i. Invasion upon Reasonable Expectation of Privacy

To establish an invasion of privacy claim, a plaintiff must demonstrate a reasonable expectation of privacy in the circumstances. *In re Facebook, Inc. Internet Tracking Litigation*, 956 F.3d at 601. A reasonable expectation of privacy is "an objective

entitlement founded on broadly based and widely accepted community norms." *Hill*, 7 Cal. 4th 1 at 37. Thus, a "plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens." *TGB Ins. Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443, 450 (quotation omitted). "[T]he presence or absence of opportunities to consent to activities impairing privacy interests obviously affects the expectations of the participant" and the reasonableness of the expectation. *Hill*, 7 Cal. 4th 1 at 37.

TRE argues that Plaintiffs' SAC still fails to specifically allege what data TRE actually received about each Plaintiff and used to make its return recommendations. TRE Mot. at 11-12. TRE further contends that even if Plaintiffs did adequately specify what data was collected, they failed to establish how collecting and analyzing that data constitutes an intrusion on a person's reasonable expectation of privacy. *Id.* at 18. Retail Defendants argue that Plaintiffs have not sufficiently alleged a reasonable expectation of privacy, in particular due to the voluntary nature of Plaintiffs' engagement with the Retail Defendants. Retail Mot. at 16. Plaintiffs respond that while their engagement was voluntary, "they did not voluntarily interact with TRE and did not know or consent to Retail Defendants' sharing of their information with TRE, or TRE's unlawful subsequent sharing and use of that data." Opp'n to Retail Defs. at 8.

Here, the Court finds that Plaintiffs have adequately specified the data collected by TRE. The SAC alleges that "Consumer Commercial Activity Data" shared with TRE "includes, but is not limited to, each customers' [*sic*] unique purchase, return, and exchange history, i.e., what a consumer buys, when a consumer buys, where a consumer buys, how much a consumer buys, how often a consumer buys, what form of payment a consumer uses, etc." SAC ¶ 25. The SAC further states that the "Consumer ID Data" shared with TRE "includes, but is not limited to, all unique identification information contained on or within a consumer's driver's license, government-issued ID card, or passport, e.g., the consumer's name, date of birth, race, sex, photograph, complete street address, and zip code." *Id.* ¶ 26. Plaintiffs also make allegations about the forms of identification and/or information Retail Defendants transmitted to TRE when individual Plaintiffs attempted their return or exchange. *Id.* ¶¶ 43, 56, 69, 81, 105, 117, 129, 141, 167, 180, 193.

Plaintiffs have also pleaded sufficient facts to plausibly allege Retail Defendants collection of consumers' data and use of TRE's data collection and analysis violated

community norms. It is true that only collecting and sharing Consumer Commercial Activity Data, Consumer ID Data, and transaction information pales in comparison to the collection of highly sensitive information that other courts have deemed "routine commercial behavior." *See Fogelstrom*, 195 Cal. App. 4th at 992; *see also Low*, 900 F. Supp. 2d at 1025 (finding that disclosure of social security numbers did not constitute an invasion of privacy). However, Plaintiffs have not merely alleged that Retail Defendants and TRE collected this basic information. Plaintiffs also allege that TRE's risk scores are calculated by using "transaction data collected at points of return from other customers thought to be related to this customer by home address, family name, or other connecting data," including customers' social media networks. SAC ¶¶ 29, 257. Plaintiffs further contend that TRE considers "information about other customers in the merchant location during the time of the requested return transaction" in determining whether a return should be rejected. *Id.* ¶ 30.

Moreover, "various factors … affect societal expectations of privacy," including "the identity of the intruder," whether the intruder "deliberately misled" the plaintiff into granting access, and "the nature of the intrusion," including its "means." *Hernandez*, 47 Cal. 4th at 289. Here, Plaintiffs allege that the "intruder," TRE, is "a technology company in the business of issuing reports on consumers in the form of 'risk scores'" that gained access to consumers' personal information when those consumers provided their information to a Retail Defendant at the point of sale, the point of exchange and return, and through interactions with a Retail Defendant's website. *Id*. ¶¶ 1, 21-22, 24. Plaintiffs allege that TRE then combines this data with information on the customer collected from other sources, including social media, data from other individuals "thought to be related to the customer," and data about "other customers in the merchant location during the time of the requested transaction" in order to determine the risk score. *Id*. ¶¶ 29-30. Plaintiffs allege that "consumers are entirely unaware that they are submitting to this surreptitious process of judgment based on TRE's analysis of all the information that its massive data mining effort has yielded." *Id*. ¶ 36. Given the wide discrepancy between Plaintiffs' alleged expectations for Retail Defendants' use of their data and its actual alleged use, Plaintiffs have plausibly alleged a reasonable expectation of privacy against Retail Defendants and TRE's practices.

ii. Highly Offensive Intrusion

Defendants argue that even if Plaintiffs had a reasonable expectation of privacy under the circumstances, the alleged violation is not an egregious breach of social norms. TRE Mot. At 19; Retail Mot. At 18-21. "In order to maintain a California common law privacy action, [p]laintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy must also be highly offensive to a reasonable person, and sufficiently serious and unwarranted to constitute an egregious breach of the social norms."

The California Constitution and the common law set a "high bar" for what constitutes an egregious violation of social norms for purposes of intrusion. *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012). Courts have recognized that businesses' collection and disclosure of personal information for business purposes do not constitute a violation of social norms but are rather "routine commercial behavior." *Folgestrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 992 (2011) (dismissing invasion of privacy claims where business obtained customer's address without permission and used it to mail advertisements). Even collection of highly personal information, such as social security numbers, has been deemed to not rise to the level of an "egregious breach of the social norms." *Low*, 900 F. Supp. 2d at 1025 (quotation omitted); *see also Ruiz v. Gap, Inc.,* 540 F. Supp. 2d 1121, 1127–28 (N.D. Cal. 2008) *aff'd,* 380 Fed. Appx. 689 (9th Cir. 2010) (theft of a retail store's laptop containing job applicants' personal information, including the social security numbers, did not constitute an egregious breach of privacy); *Folgelstrom,* 195 Cal. App. 4th at 992 (defendant's obtaining of plaintiff's address without his knowledge or permission did not constitute invasion of privacy). Moreover, disclosure of consumer data to third parties, even when the collection and sharing of the data is surreptitious, has been found not to meet the "high bar" required. *See In re Iphone Application Litig.*, 844 F. Supp 2d 1040, 1063 (N.D. Cal. 2012) (disclosure of phone users' personal data, including address, gender, age, and zip code, to third parties without consent was not an egregious breach of privacy); *In re Google, Inc. Privacy Policy Litig.*, 58 F. Supp. 39 968, 987-88 (N.D. Cal. 2014) (no egregious violation of norms when Google tracked users' browsing data surreptitiously).

As discussed above, Plaintiffs are alleging facts more nefarious than the mere collection of routine information. Plaintiffs, as they argued at the hearing, have alleged that Defendants are also classifying consumers' risk scores based on their relationships with people they may or may not choose to associate with. *Id*. ¶¶ 29-30. Moreover, as the

Ninth Circuit recently concluded, "[t]he ultimate question" of whether a defendant's alleged practices "could highly offend a reasonable person is an issue that cannot be resolved at the pleading stage." *In re Facebook, Inc. Internet Tracking Litigation*, 956 F.3d at 606. The Court finds dismissing this claim at the pleading stage particularly inappropriate where, as is the case here, Defendants are the only party privy to the true extent of the intrusion on Plaintiffs' privacy. Reading the Complaint in a light most favorable to Plaintiffs, Plaintiffs sufficiently allege that TRE and Retail Defendants' intrusion into Plaintiffs' privacy was highly offensive.

Accordingly, the Court DENIES TRE and Retail Defendants' Motions to Dismiss with respect to Plaintiffs' invasion of privacy claim.

D. Unfair Competition Law ("UCL") and Unjust Enrichment

Retail Defendants and TRE argue for dismissal of Plaintiffs' UCL and unjust enrichment claims because there is an adequate remedy at law. TRE Mot. at 22-24; Retail Mot. at 21-23, 35-38.

"[A] federal court's equitable authority remains cabined to the traditional powers exercised by English courts of equity, even for claims arising under state law." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 840 (9th Cir. 2020). That is, Plaintiffs are not entitled to equitable relief where there is an adequate remedy at law. Schroeder v. United States, 569 F.3d 956, 963 (9th Cir. 2009). Both UCL and unjust enrichment are equitable claims. *See In re Facebook PPC Advertising Litig.*, 709 F. Supp. 2d 762, 770 (N.D. Cal. 2010) (citing *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996)); Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda Cty., 462 P.3d 461, 488 (Cal. 2020) ("civil causes of action authorized by the UCL and FAL must properly be considered equitable, rather than legal, in nature.").

Because this Court has found that Plaintiffs have adequately pled their invasion of privacy claim, there is an adequate legal remedy and thus Plaintiffs are not entitled to equitable relief. This is particularly true when Plaintiffs have not pled in the alternative but have alleged the same underlying facts for their invasion of privacy claim as their claims for equitable relief. *Compare* SAC ¶¶ 229-237, 268-273, *with id.* ¶¶ 238-247, 261-267.

As such, the Court DISMISSES WITH PREJUDICE Plaintiffs' UCL claim, unjust enrichment claim, and any associated claims for injunctive relief against TRE and Retail Defendants.

IV. Disposition

For the reasons set forth above, the Court GRANTS IN PART Retail Defendants' Motion to Dismiss and GRANTS Defendant TRE's Motion to Dismiss.

The Court:

1. DISMISSES WITH PREJUDICE Plaintiffs' FCRA claims against TRE;
2. DISMISSES WITH PREJUDICE Plaintiffs' CCPA claims against Retail Defendants;
3. DENIES TRE and Retail Defendants' Motions to Dismiss with respect to Plaintiffs' invasion of privacy claim;
4. DISMISSES WITH PREJUDICE Plaintiffs' UCL claim against TRE and Retail Defendants; and
5. DISMISSES WITH PREJUDICE Plaintiffs' claim for unjust enrichment against TRE and Retail Defendants.

Plaintiffs have 30 days from the filing of this order to submit an amended complaint if they choose to do so. Parties should submit by May 10, 2022 a joint report listing, by priority, any pending motions for the Court to address.

The Clerk shall serve this minute order on the parties.