



FEB 28 2014

CLERK OF THE COURT

BY: Sharon Vintee Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

LUCY RODRIGUEZ,
Plaintiff,
vs.
INSTAGRAM, LLC,
Defendant.

Case No. CGC – 13-532875

ORDER SUSTAINING DEMURRER
WITHOUT LEAVE TO AMEND

Plaintiff Lucy Rodriguez brought this putative class action against Instagram, LLC alleging causes of action for (1) breach of contract predicated on a violation of the covenant of good faith and fair dealing; and (2) violation of California Business and Professions Code § 17200 (UCL).

I heard argument on Instagram’s demurrer this date.

Background

Instagram is a web-based photograph sharing platform. Complaint, ¶ 1. The service is free to users. When Instagram was launched in October 2010, its use was governed by its Original Terms of Use. *Id.* at ¶ 2, Ex. A (Original Terms). The Original Terms governed until January 19, 2013, at which date Instagram’s New Terms of Use went into effect. *Id.* at ¶¶ 1-2, 26, Ex. B (New Terms). On December 18, 2012, a month earlier, Instagram’s users were given

1 notice of the New Terms and their effective date. *Id.* at ¶ 2, 28. The New Terms were modified
2 on December 20, 2012, but the effective date was unchanged. *Id.* at ¶ 26.

3 The New Terms modified the original terms in three allegedly material respects: (1) in
4 the Original Terms, Instagram disclaimed any ownership rights in content users post on
5 Instagram, whereas in the New Terms Instagram disclaimed ownership of content users post on
6 Instagram;¹ (2) in the Original Terms, Instagram was afforded a non-exclusive limited license to
7 use, modify, delete from, add to, publicly perform, publicly display, reproduce, and translate
8 content users posted on Instagram, whereas under the New Terms Instagram has a transferable
9 and sub-licensable license to use the content users post, with the two allegedly material aspects
10 being (1) the addition of sublicensing authority; and (2) removal of any limitations on the scope
11 of the license and (3) the New Terms add a liability waiver. *Id.* at ¶¶ 3, 26.

12 The New Terms provide that a user accepts them by continuing to use Instagram, that is,
13 using the service on or after January 19, 2013. *Id.* at Ex. B. Under the New Terms, a user who
14 does not agree to the terms must stop using Instagram. *Id.*

15 Even if a user does not agree to the New Terms and deletes her account, Instagram does
16 not purge the user's content. *Id.* at ¶¶ 7-8, 27. In its databases, Instagram does not distinguish
17 between content that was uploaded before and after the New Terms went into effect. *Id.* at ¶ 8.
18 Accordingly, Plaintiff concludes that Instagram "de facto" asserts that the New Terms apply to
19 all content users uploaded to Instagram, specifically including content uploaded before notice of
20 the New Terms, regardless of whether a user agrees or not to the New Terms. *Id.*

21 Plaintiff used Instagram under the Original Terms, and uploaded pictures, including
22 pictures of herself. *Id.* at ¶¶ 2, 14. Plaintiff uses the material posted on Instagram for personal,
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27 ¹ Plaintiff suggests that use of the word "in" in the Original Terms disclaimed any ownership right in the content,
whereas use of the word "of" in the New Terms disclaimed only complete ownership of the content.

1 business, and promotional purposes. *Id.* at ¶ 14. As plainly suggested by the Complaint and
2 clarified at today’s hearing on demurrer, Plaintiff continued to use Instagram after the New
3 Terms went into effect. *Id.* She was alerted to the New Terms, opted out of the arbitration
4 provisions in the New Terms (Complaint ¶ 16), filed a complaint in federal court immediately
5 after learning of the New Terms, and thereafter to continued to use Instagram.
6

7 Based on the language in the New Terms and a December 18, 2012 press release in
8 which Instagram described its advertising plan, Plaintiff believes that Instagram is negotiating
9 and/or has executed with contracts with advertisers and/or other third parties to transfer and/or
10 sublicense Plaintiff’s content for the purposes of advertising, or otherwise has imminent plans to
11 enter into such agreements. *Id.* at ¶ 30.
12

13 Instagram demurs, arguing (1) it acted within the scope of its contractual authority by
14 modifying the terms; (2) the face of the New Terms demonstrates that Plaintiff could have
15 declined to be bound by them by deleting her Instagram account after receiving notice of the
16 New Terms but before they went into effect; and (3) Plaintiff has not adequately alleged harm.
17

18 **Discussion**

19 **The Covenant of Good Faith and Fair Dealing**

20 **1. Background Law**

21 “Every contract imposes upon each party a duty of good faith and fair dealing in its
22 performance and its enforcement.” *Carma Developers (Cal.), Inc. v. Marathon Development*
23 *California, Inc.*, 2 Cal.4th 342, 371 (1992). “The covenant of good faith finds particular
24 application in situations where one party is invested with a discretionary power affecting the
25 rights of another. Such power must be exercised in good faith.” *Carma*, 2 Cal.4th at 372.
26 “[T]he scope of conduct prohibited by the [T]he covenant of good faith is circumscribed by the
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1 purposes and express terms of the contract.” *Id.* at 373. The covenant is read into contracts to
2 protect the express promises of the contract. *Id.* In general, implied terms should never be read
3 to vary express terms. *Id.* at 374. No covenant of good faith and fair dealing can be implied to
4 forbid acts and conduct authorized by the express provisions of the contract. *Id.* The question of
5 whether the implied covenant has been breached is ordinarily a question of fact unless only one
6 inference can be drawn from the evidence. *Hicks v. E.T. Legg & Associates*, 89 Cal.App.4th
7 496, 509 (2001).

9 2. *Badie*

10 Plaintiff apparently contends that Instagram breached the covenant of good faith and fair
11 dealing applicable to the Original Terms. Complaint, ¶¶ 40-41 (Plaintiff is allegedly subject to
12 Original Terms). These terms include this:

14 We reserve the right to alter these Terms of Use at any time. If the alterations constitute
15 a material change to the Terms of Use, we will notify you via internet mail according to
16 the preference expressed on your account. What constitutes a ‘material change’ will be
17 determined at our sole discretion, in good faith and using common sense and reasonable
18 judgment.

19 *Id.* at Ex. A (General Conditions, ¶ 2).

20 The parties focus on *Badie v. Bank of America*, 67 Cal.App.4th 779 (1998). In *Badie*, the
21 defendant Bank added an alternate dispute resolution clause to existing account agreements
22 between itself and credit card customers through bill stuffers accompanying the monthly account
23 statements pursuant to a change of terms provision in the original account agreements. 67
24 Cal.App.4th at 783-84. The Bank argued that it could modify the contract without contractual
25 formalities so long as it did so in accordance with the change of terms provision. *Id.* at 781.

26 The Court rejected the argument, holding one may not exercise a unilateral right to
27 modify a contract when it actually “attempts to recapture a foregone opportunity by adding an

1 entirely new term which has no bearing on any subject, issue, right, or obligation addressed in
2 the original contract and was not within the reasonable contemplation of the parties when the
3 contract was entered into.” *Id.* at 796. The Bank’s attempt to modify the contract thus breached
4 the covenant of good faith and fair dealing.
5

6 The Court also concluded that the customers did not unambiguously waive their right to a
7 jury trial by failing to stop or close the account immediately after receiving the notice, because
8 the notice there was not designed to achieve knowing consent to the new provision in that they
9 did not contain the type of clear language necessary to alert the recipient that she was waiving an
10 important constitutional right. *Id.* at 805.
11

12 To invoke *Badie*, Plaintiff notes that Instagram imposed the New Terms pursuant to its
13 authority under the Original Terms. But as some federal courts (applying California law) have
14 noted, *Badie* is distinguishable where there is an opportunity to opt out before new terms go into
15 effect.² In this case, the New Terms expressly provide that use of Instagram after the effective
16 date, January 19, 2013, constitutes acceptance of the New Terms. Complaint, Ex. B. The New
17 Terms explain: “If you do not agree to be bound by all of these Terms of Use, do not access or
18 use the Service.” *Id.*
19

20 *Badie* is distinguishable here too. As the Complaint and argument today made clear,
21 Plaintiff had a full and perfectly reasonable opportunity to read, and did read, the New Terms;
22 she could have declined the revised agreement. She could have, under the plain language of the
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24 ² *Ackerberg v Citicorp USA, Inc.*, 898 F.Supp.2d 1172, 1176 (N.D. Cal. 2012) (Illston, J.) (plaintiff was given an
25 opportunity to walk away from her credit card agreement when it was modified to include an arbitration clause in
26 2003 but continued to use the card until 2011, evidencing her acceptance of the terms; distinguishing *Badie* because
27 in *Badie* there was no realistic opportunity to exit the account); *Cayanan v. Citi Holdings, Inc.*, 928 F.Supp.2d 1182,
1199-1200 (S.D. Cal. 2013) (reasoning that bill stuffer notices are not inherently invalid method of obtaining assent
to changes in credit card contracts and finding that the credit card user had assented to an arbitration agreement
contained in a bill stuffer where the bill stuffer notified the user that the agreement was binding unless the user
closed his account within 30 days and refrained from using and authorizing the card and the user continued to use
the card; following *Ackerberg* in distinguishing *Badie*).

1 New Terms, avoided the New Terms if she stopped using the service, but she continued to use it:
2 Plaintiff alleged that she used Instagram at all relevant times, including after the New Terms
3 went into effect. Complaint, ¶ 14. Thus Plaintiff must have consented to the New Terms. Thus
4 there is no *Badie* issue, because the allegation in the Complaint demonstrate that Plaintiff entered
5 into a new agreement.
6

7 At argument, Plaintiff’s counsel both agreed that Plaintiff agreed to the New Terms, and
8 that by filing the federal complaint, she had not. No other basis was provided on which one
9 might conclude that Plaintiff had not agreed to the New Terms. But there is also no basis to
10 conclude that the filing of a complaint is sufficient to reject the New Terms—most especially
11 after Plaintiff continues to use and presumably benefit from the Instagram site.
12

13 It does not help to say, as Plaintiff does, that Instagram treats content uploaded under the
14 Original Terms as if it were uploaded under the New Terms anyway. Complaint, ¶¶ 7-8, 42;
15 Opposition, 9. Perhaps Instagram *might* breach the Original Terms (e.g. if it sub-licenses content
16 of users who never agreed to the New Terms). But Plaintiff does not allege *that* breach of the
17 Original Terms. The question here is whether Instagram breached the Original Terms *by*
18 *imposing the New Terms*. See Complaint, ¶¶ 40-43.
19

20 True, Plaintiff does suggest that because the formerly uploaded content “persists” on
21 Instagram’s systems (or is not “purged,” Complaint ¶ 27), the content of necessity will be
22 exploited pursuant to the New Terms. But as Plaintiff’s counsel agreed at today’s hearing, such
23 ‘persistence’ is both consistent with treatment under the Old Terms (which do not promise not to
24 keep the content) and of course is consistent with the New Terms, to which Plaintiff agreed.
25 Allegations of such persistence do not support an allegation of breach of any terms.
26
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1 **3. Harm**

2 Instagram contends that Plaintiff's breach of the implied covenant theory is also barred
3 because she has not alleged harm arising out of the breach. Plaintiff argues that she has alleged
4 diminished property rights, and that in any event actual damages are not necessary to state a
5 claim for breach of contract. Opposition, 7-8.
6

7 Damages are an essential element for a breach of contract claim. *See Troyk v. Farmers*
8 *Group, Inc.*, 171 Cal.App.4th 1305, 1352 (2009); *Acoustics Inc. v. Trepte Construction Co.*, 14
9 Cal.App.3d 887, 913 (1971); CACI No. 303 (2013). A breach of the implied covenant is
10 necessarily a breach of contract. *Digerati Holdings, LLC v. Young Money Entertainment, LLC*,
11 194 Cal.App.4th 873, 885 (2011). The damages element is the same. *Compare* CACI No. 303
12 (breach of contract element 5: "That [name of plaintiff] was harmed by that failure"); CACI No.
13 325 (breach of covenant of good faith and fair dealing element 5: "That [name of plaintiff] was
14 harmed by [name of defendant]'s conduct").
15

16 The alleged harm arises from Instagram's asserted "imminent plans" to sublicense
17 Plaintiff's pictures or other content she posted. Complaint, ¶ 30. This is not harm if Plaintiff
18 agreed to the New Terms. And under the allegations of the Complaint, she did.
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20 **C. UCL**

21 A UCL claim may be brought "by a person who has suffered injury in fact and lost
22 money or property as a result of the unfair competition." Bus. & Prof. Code § 17204. Therefore,
23 to establish standing, a UCL plaintiff must "(1) establish a loss or deprivation of money or
24 property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the
25 economic injury was the result of, i.e., *caused by*, the unfair business practice ... that is the
26 gravamen of the claim." *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 322 (2011).
27

1 The UCL prohibits “unfair competition,” which is defined as any “unlawful, unfair or
2 fraudulent business act or practice.” Bus. & Prof. Code § 17200.

3 An “unlawful” business act or practice may be established by alleging facts sufficient to
4 show a violation of some underlying law. *See Cel-Tech Communications, Inc. v. Los Angeles*
5 *Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999) (UCL extends to anything that can properly
6 be called a business practice that at the same time is forbidden by law). A “fraudulent
7 that (1) Instagram began operating its service under the Original Terms stating that it did not
8 claim any ownership rights in content users post using its service, taking for itself only a
9 “limited” license to use, etc., the content; and (2) Instagram unilaterally expanded the scope of its
10 license, and granted itself sub-licensing power, with respect to photographs uploaded under the
11 Original Terms when it imposed the New Terms. *Id.*; Complaint, ¶¶ 48-50, 52.

12 The legal theory here is no better than that under the contract claim. Effective January
13 19, 2013, use of Instagram constituted acceptance of the New Terms by express provision of the
14 New Terms. Complaint, Ex. B. Accordingly, Instagram did not unilaterally grant itself sub-
15 licensing power; rather, it required Plaintiff to consent to sub-licensing power, a liability waiver,
16 and other terms, under a new agreement, if she wished to continue using Instagram’s service.³
17 She did not have to agree to these terms, but the Complaint makes it clear that she did.

18 As to her unlawful claim, it should be rejected because it relies on the covenant of good
19 faith and fair dealing, for reasons discussed above. *See* Complaint, ¶ 48. Plaintiff also alleged
20 that Instagram should be estopped from changing its terms of use in the way it did. *Id.* (Plaintiff
21 did not argue estoppel in her Opposition.) But, as Instagram notes, Plaintiff could not possibly


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26 ³ As with the implied covenant claim, Plaintiff alleges that application of the New Terms was unavoidable because
27 Instagram would treat content posted by users who rejected the New Terms as if they had agreed to the New Terms.
Complaint, ¶ 53. If Plaintiff had rejected the New Terms, she may well have grounds to complain about such
conduct in violation of the Original Terms. But she agreed to the New Terms.

1 have had a reasonable expectation of perpetual use of Instagram's service under the Original
2 Terms, in which Instagram expressly claimed the right to modify the terms on notice or terminate
3 service for any reason without notice. *See* Complaint, Ex. A.
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6 **Conclusion**

7 For the foregoing reasons, the demurrer is sustained without leave to amend.
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10 Dated: February 28, 2014



Curtis E.A. Karnow
Judge Of The Superior Court

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