IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

HENRY YEH, Plaintiff and Appellant, v. TWITTER, INC. Defendant and Respondent.	A170843 (SF Super. Ct. No. CGC23605100 Hon. Ethan P. Shulman)

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF and BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS AMICUS CURIAE SUPPORTING RESPONDENT

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Application for Permission to File Amicus Brief

The Civil Justice Association of California (CJAC) applies for permission to file an amicus brief pursuant to California Rules of Court, rule 8.200(c), supporting Respondent Twitter, Inc.

CJAC is a nonprofit organization whose members are businesses from a broad cross section of industries. CJAC's principal purpose is to educate the public and its governing bodies about how to make laws determining who gets paid, how much, and by whom when the conduct of some causes harm to others – more fair, certain, and economical. Toward this end, CJAC regularly appears as amicus curiae in numerous cases of interest to its members, including those that raise issues of concern to the business community. CJAC and its members are particularly interested in the proper development of clear and consistent rules regarding application of the Unfair Competition Law (UCL). CJAC was an official sponsor of Proposition 64, which limited standing to bring UCL actions. The application of the new standing rule is one of the issues directly raised by this appeal.

CJAC's amicus brief will assist the Court by providing a broader perspective on the issue before the Court than that provided by the parties involved in the pending appeal.

No party to this appeal nor any counsel for a party authored CJAC's proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief.

No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than CJAC and its members.

Amicus Brief

Based on information he seems to have gleaned from filings by the FTC and plaintiffs in other actions, Yeh sought to cash in on his engagement with Twitter by filing this class action in the San Francisco Superior Court in March 2023. [1 AA 7-40] He claimed that Twitter's use of contact information provided by its users damaged him and over 100 million others, and asserted claims for breach of contract, breach of implied contract and violations of the Unfair Competition Law.[1] Yet, the allegations of his complaint showed that his contract with Twitter actually barred his claims and that he had not suffered any compensable damages.

Because "[f]reedom of contract is an important principle . . . [California] courts should not blithely apply public policy reasons to void contract provisions." (*VL Systems, Inc. v. Unisen, Inc.* (2007) 152 Cal.App.4th 708, 713.) Adherence to that principle makes for "predictability of the consequences of actions related to contracts [which] is important to commercial stability." (*Harris v. Atlantic Richfield Co.* (1993) 14 Cal.App.4th 70, 81.)

In asking the Court to allow him to proceed with claims that fly in the face of his contract with Twitter, plaintiff Henry Yeh would have this Court ignore that principle. The Court should affirm the Superior Court's dismissal of the action for failure to allege a factual basis for a viable cause of action and

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[1] Although the complaint included a claim for "unjust enrichment," that is not a separate cause of action and does not provide a basis for a restitution claim, as Twitter has pointed out in its respondent's brief at pages 51 through 53.

make clear that Yeh's pleading gimmicks are not a basis for disregarding clearly stated contract provisions.

A Allowing Yeh to pursue his express contract claim would turn settled principles of contract law upside down.

Yeh argues the Court should allow him to pursue an express contract claim because his "interpretation" of his contract is not a "clearly erroneous construction." In other words, because Yeh has alleged that Twitter's sharing of contact information breaches the contract (see AOB at 27-28), his proposition must be accepted as true.

But that is not the law. In ruling on a demurrer, a court must accept allegations of *fact* as true, "but not mere contentions, deductions, or conclusions of law." (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Where, as here, "there is no conflicting extrinsic evidence on the meaning of this provision, its interpretation is a pure question of law that we review de novo." (*Eucasia Schools Worldwide, Inc. v. DW August Co.* (2013) 218 Cal.App.4th 176, 181.)[2] Where the contract language is "clear and explicit," the language controls. (Civ. Code, § 1638 ("The language of a contract is to govern its interpretation,

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[2] Yeh has not identified any of the sorts of extrinsic evidence courts rely on to assist with contract interpretation. For example, he does not claim he had any input into the wording of the Privacy Policy, nor does he identify any facts bearing upon Twitter's intent in wording of the Privacy Policy. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1167-1168 ("Since there is no evidence of the parties' discussions at the time the release was negotiated, there remain only the surrounding circumstances from which to interpret the language of the contract").)

if the language is clear and explicit, and does not involve an absurdity").)

Here, Yeh's allegation that his contract with Twitter included a promise not to use contact information for advertising runs head on into the clear and explicit statement that Twitter "uses personal data, specifically including contact information such as emails and telephone numbers, for marketing purposes." [2 AA 323] The Court should not allow Yeh to pursue a claim based on his interpretation, when that interpretation is belied by the words of the very contract that he relies on.

B Allowing Yeh to pursue his implied contract claim would violate the rule that an implied contract may not create obligations that are inconsistent with the terms of an express contract.

In apparent recognition of the weakness of his express contract claim, Yeh falls back on an argument that he adequately pleaded an *implied* contract claim that "alleges something different" than his express contract claim. He faults the Superior Court for sustaining the demurrer to that cause of action because case law allows a plaintiff to plead both implied and express contract theories. His argument misses the point. Yes, a plaintiff may plead implied and express contract theories in the alternative. But he cannot make up an implied contract that may be more to his liking than the express contract he agreed to.

It is well settled that "the law does not recognize implied *contract terms* that are *at variance* with the terms of the contract as expressly agreed or as prescribed by statute" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 412. See also *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55, fn.

9 ("However, the law does not imply any promise or duty that is contrary to the express terms of the written agreement between the parties"); CACI 325 ("the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract").)

Yeh claims there was an implied promise by Twitter that it would only use information collected from users for the purpose of two-factor authentication, account recovery, and account reauthentication. (AOB at 34.) But the Privacy Policy expressly stated that Twitter would use his contact information for "keeping your account secure and showing you more relevant … ads." [1 AA 42] From that, the Superior Court properly concluded that the policy "specifically provides that users' email addresses and telephone numbers may be used for marketing and advertising as well as for security purposes." [2 AA 325]

The cases that Yeh relies on are consistent with the Superior Court's ruling. In *Santa Clara Waste Water Co. v. Allied World National Assurance Co.* (2017) 18 Cal.App.5th 881, 889, the Court of Appeal recognized that relief is only available under an implied contract "if the material terms do not conflict with the express contract." Similarly, in *Tollefson v. Roman Catholic Bishop* (1990) 219 Cal.App.3d 843, 854, the Court of Appeal rejected an employee's claim that she could only be fired for good cause under a written contract that limited the term of employment to one year and made renewal optional. "Consequently, by express language, the contract precludes the existence of any contrary implied agreement to employ Tollefson

for more than a year or require renewal in the absence of good cause for not doing so."

The Court should not allow Yeh to sue on an implied contract that contradicts the express terms he agreed to.

C The Court should not allow Yeh to pursue his UCL claim as a means of circumventing the terms of his agreement with Twitter.

In order to limit the opportunities for shakedown lawsuits, the voters of California imposed the limitation now found in the UCL that only a plaintiff "who has suffered injury in fact and has lost money or property" has standing to pursue a UCL claim. (Bus. & Prof. Code, § 17204.) As the Supreme Court has explained, "the electorate has materially curtailed the universe of those who may enforce [those enactments]. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320.) In other words, "in sharp contrast to the state of the law before passage of Proposition 64, a private plaintiff filing suit now must establish that he or she has personally suffered such harm." (51 Cal.4th at p. 323.)

By adopting Proposition 64,

> the voters found and declared that the UCL's broad grant of standing had encouraged "[f]rivolous unfair competition lawsuits [that] clog our courts[,] cost taxpayers" and "threaten[] the survival of small businesses … ." (Prop. 64, § 1, subd. (c) ["Findings and Declarations of Purpose"].) The former law, the voters determined, had been "misused by some private attorneys who" "[f]ile frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit," "[f]ile lawsuits where no client has been injured in fact," "[f]ile lawsuits for clients who have not used the defendant's product or

> service, viewed the defendant's advertising, or had any other business dealing with the defendant," and "[f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." (Prop. 64, § 1, subd. (b)(1)–(4).) "[T]he intent of California voters in enacting" Proposition 64 was to limit such abuses by "prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact" (id., § 1, subd. (e)) and by providing "that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public" (id., § 1, subd. (f)).

(*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.)

Recent Court of Appeal decisions have confirmed that the standing requirement is a rigorous one. For example, in *Lagrisola v. North American Financial Corp.* (2023) 96 Cal.App.5th 1178, the plaintiffs obtained a loan from the defendant. Three years later they learned from public information that the defendant did not have a license to make loans in California, and filed a lawsuit claiming that they would not have entered into the loan if they had known about the defendant's unlicensed status. The Court of Appeal affirmed the dismissal of the claim following the sustaining of a demurrer. The allegations did not support a claim of economic loss, because the plaintiffs "do not allege that they did not want a loan in the first instance, that they paid any more for their loan than they otherwise would have, or that they could have obtained the loan at the same or lower price from another lender that was licensed." (96 Cal.App.5th at p. 1189.)

In *Murphy v. Twitter, Inc.* (2021) 60 Cal.App.5th 12, a Twitter user asserted that Twitter had unfairly suspended her account permanently for posting several messages critical of transgender women. The user had 25,000 followers and had received a blue verification badge by Twitter. Although she alleged that she had lost a tangible property interest in her Twitter account and that her livelihood as a freelance journalist and writer depended upon maintenance of a Twitter account, she did not allege any actual economic loss. (60 Cal.App.5th at pp. 39-40.)

Yeh's allegations that he intended to derive economic value from his contact information and that he would not have provided that information unless he was paid do not satisfy that rigorous standard. The facts he has alleged are far different from those alleged by the plaintiffs in the *Kwikset* case that Yeh relies on. Those plaintiffs alleged that they purchased the defendant's products because they had "Made in U.S.A." labels and would not have purchased them without those labels. Yeh did not allege that he purchased anything from Twitter.

His allegation that he suffered economic loss because he might at some point participate in the market for contact information fails for the reasons stated in *Moore v. Centrelake Medical Group, Inc.* (2022) 83 Cal.App.5th 515. In that case, patients of a medical group alleged that they relied on the group's allegedly false representations that it employed reasonable safeguards for patients' personal identifying information, that their information was taken because of the lack of reasonable

safeguards, and that some legitimate businesses pay users for such information. They did not allege they ever had received payment for their information or expected to do so in the future. Their claim lacked merit, because they "failed to adequately plead that they lost money or property in the form of the value of their [information]." (83 Cal.App.5th at p. 522.)

The fact that Yeh claims in this case that he "intended" to derive economic value from his information does not require a different result. In *Folgelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, the plaintiff alleged that the retailer obtained his ZIP code and other personal information under false pretenses and then paid a third party to derive his address from the information provided. He claimed to have suffered economic loss because the retailer paid for the address. That did not confer standing. "The fact that the address had value to Lamps Plus, such that the retailer paid [the third party] a license fee for its use, does not mean that its value to plaintiff was diminished in any way." (195 Cal.App.4th at p. 994.)

Because Yeh did not allege that he lost any money or property, the Court should affirm the dismissal of his UCL claim.

Conclusion

Yeh heard about claims by others that Twitter was utilizing contact information from its users to direct marketing information at them. He thought he would cash in, even though he had never attempted to sell his contact information and had acknowledged that Twitter would be using information he provided for that very purpose. This Court should affirm the Superior Court's dismissal of his action for failure to allege the essential elements of any of his causes of action.

May 27, 2025

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Certificate of Compliance

Counsel of Record hereby certifies that, pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Respondents' brief is produced using 13-point Roman type including footnotes and contains approximately 2,900 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

s/ Calvin House