JONATHAN SEGAL (State Bar No. 264238)
JonathanSegal@dwt.com
RACHEL R. GOLDBERG (State Bar No. 308852)
RachelGoldberg@dwt.com
SAMANTHA LACHMAN (State Bar No. 331969)
SamLachman@dwt.com
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, 24th Floor
Los Angeles, California 90017-2566
Telephone: (213) 633-6800
Fax: (213) 633-6899

Attorneys for Defendant
NETFLIX, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

AHARON DIHNO, an individual; FERNANDO CORTEZ, an individual; RYAN DIHNO; an individual minor; and IAN DIHNO, an individual minor,

Plaintiffs,

vs.

NETFLIX, INC., a Delaware Corporation; and THE AGENCY IP HOLDCO, LLC, a Delaware Limited Liability Company; and UMRO REALTY CORP d/b/a THE AGENCY, a California Corporation, DOES 1-50,

Defendants.

Case No. **23STCV06215**

DEFENDANT NETFLIX, INC.'S NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF RACHEL R. GOLDBERG IN SUPPORT THEREOF; EXHIBITS

[*Proposed Order lodged concurrently*]

Assigned to the Hon. Barbara M. Scheper
Dept.: 30

Date: July 13, 2023
Time: 8:30 a.m.

Action Filed: March 21, 2023

RESERVATION NO.: 842987658901

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on July 13, 2023, at 8:30 a.m., or as soon thereafter as counsel may be heard in Department 30 of the above-entitled court, located at 111 North Hill Street, Los Angeles, CA, 90012, Defendant Netflix, Inc. will and hereby does demur to the Complaint filed by Plaintiffs Aharon Dihno, Fernando Cortez, Ryan Dihno, and Ian Dihno ("Plaintiffs"). Defendant brings this Demurrer pursuant to California Code of Civil Procedure § 430.10(e) on the following grounds:

1. Plaintiffs' first cause of action, for intrusion upon seclusion, fails because Plaintiffs have not sufficiently alleged a highly offensive, intentional intrusion into a place where they had a reasonable expectation of privacy.

2. Plaintiffs' second cause of action, for violations of the Consumer Legal Remedies Act, fails because Plaintiffs have not sufficiently alleged reliance or causation, and they are not competitors or consumers under the CLRA.

3. Plaintiffs' third cause of action, for violations of the Lanham Act, fails because Plaintiffs have not alleged that they were in competition with Defendant or had a commercial interest in their home.

4. Plaintiffs' fourth cause of action, for violation of the False Advertising Laws, fails because Plaintiffs have not sufficiently alleged reliance, causation, or economic injury.

5. Plaintiffs' sixth cause of action, for violation of the California Unfair Competition Law, Bus. & Prof. Code § 17200, *et seq.*, fails because Plaintiffs have not sufficiently alleged reliance, causation, economic injury or that they are competitors or consumers under the UCL.

6. Plaintiffs' eighth cause of action, for violation of the California Privacy Rights Act, fails because Plaintiffs do not allege the required facts to bring a private cause of action.

7. Plaintiffs' ninth cause of action, for negligent infliction of emotional distress, fails because there is no such tort in California.

8. Plaintiffs' tenth cause of action, for intentional infliction of emotional distress, fails because Plaintiffs have not sufficiently alleged egregious conduct or that any such conduct caused them to suffer severe emotional distress.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

As required by California Code of Civil Procedure Section 430.41, and as described in the concurrently-filed declaration of Rachel R. Goldberg ("Goldberg Decl."), Plaintiffs and counsel for Defendant met and conferred, but were unable to come to agreement regarding the demurrer or withdrawal of the causes of action against Defendant contained in the Complaint. Goldberg Decl. ¶ 6. This Demurrer is based upon this Notice of Demurrer and Demurrer, the attached Memorandum of Points and Authorities, the Goldberg Declaration, all accompanying exhibits, all of the documents, records, and files of this action, and upon such other oral and/or documentary evidence or argument as may be properly presented at or before the hearing.

DATED: June 5, 2023

DAVIS WRIGHT TREMAINE LLP
JONATHAN SEGAL
RACHEL R. GOLDBERG
SAMANTHA LACHMAN

By: */s/ Jonathan Segal*
Jonathan Segal

Attorneys for Defendant

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

DEMURRER

Pursuant to California Code of Civil Procedure section 430.10, defendant Netflix, Inc. hereby demurs as follows:

DEMURRER TO THE FIRST CAUSE OF ACTION

(Intrusion Upon Seclusion)

Plaintiffs' First Cause of Action fails to state facts sufficient to constitute a valid cause of action for intrusion upon seclusion. Cal. Code Civ. Proc. § 430.10(e).

DEMURRER TO THE SECOND CAUSE OF ACTION

(Consumer Legal Remedies Act Violations)

Plaintiffs' Second Cause of Action fails to state facts sufficient to constitute a valid cause of action for violations of the Consumer Legal Remedies Act, California Civil Code § 1750. Cal. Code Civ. Proc. § 430.10(e).

DEMURRER TO THE THIRD CAUSE OF ACTION

(Section 43 of the Lanham Act Violations)

Plaintiffs' Third Cause of Action fails to state facts sufficient to constitute a valid cause of action for violations of Section 43 of the Lanham Act, 15 U.S.C. § 1125. Cal. Code Civ. Proc. § 430.10(e).

DEMURRER TO THE FOURTH CAUSE OF ACTION

(Violation of the California False Advertising Law)

Plaintiffs' Fourth Cause of Action fails to state facts sufficient to constitute a valid cause of action for violation of the California False Advertising Law, Cal. Bus. & Prof. Code § 17500. Cal. Code Civ. Proc. § 430.10(e).

DEMURRER TO THE SIXTH CAUSE OF ACTION

(Violation of the California Unfair Competition Law)

Plaintiffs' Sixth Cause of Action fails to state facts sufficient to constitute a valid cause of action for violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. Cal. Code Civ. Proc. § 430.10(e).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

DEMURRER TO THE EIGHTH CAUSE OF ACTION

(Violation of the California Privacy Rights Act)

Plaintiffs' Eighth Cause of Action fails to state facts sufficient to constitute a valid cause of action for violation of the California Privacy Rights Act, Cal. Civ. Code § 1798.100. Cal. Code Civ. Proc. § 430.10(e).

DEMURRER TO THE NINTH CAUSE OF ACTION

(Negligent Infliction of Emotional Distress)

Plaintiffs' Ninth Cause of Action fails to state facts sufficient to constitute a valid cause of action for Negligent Infliction of Emotional Distress. Cal. Code Civ. Proc. § 430.10(e).

DEMURRER TO THE TENTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress)

Plaintiffs' Tenth Cause of Action fails to state facts sufficient to constitute a valid cause of action for Intentional Infliction of Emotional Distress. Cal. Code Civ. Proc. § 430.10(e).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

TABLE OF CONTENTS

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

TABLE OF AUTHORITIES

Page(s)

CASES

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

STATUTES

CONSTITUTIONAL PROVISIONS

TREATISES

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

OTHER AUTHORITIES

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

I. INTRODUCTION

This case is Plaintiffs' attempt convert Netflix's routine use of a publicly available, licensed stock photo into a ten-claim litigation with a $128+ million payday. Plaintiffs' multiple causes of action, however, are meritless.

All of Plaintiffs' claims hinge on the same thin factual allegations: Plaintiffs allege that Netflix licensed a photo from stock photo website Shutterstock (the "Photo"), and used it to create a tile on the Netflix service for the show *Buying Beverly Hills*, an unscripted television series about the exploits of high-end realtors. Plaintiffs opine that the Photo must have been taken with a drone or telephoto lens, because of their home's ridgetop location, and therefore the taking of the Photo was an actionable intrusion on Plaintiffs' seclusion. But Plaintiffs admit that Netflix had nothing to do with taking the Photo, effectively conceding that their intrusion claim is not viable. Plaintiffs further speculate "on information and belief," that somehow, Netflix's use of the Photo on the Netflix service, combined with unspecified customer data allegedly leaked by Netflix at some point in the past, allowed the public to match the stock photo with Plaintiffs' address. But beyond vague and conclusory allegations that do not meet California's fact-pleading standards, Plaintiffs fail to allege that Netflix actually leaked any of their data.

Based on these slim allegations, Plaintiffs bring ten claims: (1) common law claims for intrusion upon seclusion and negligent and intentional infliction of emotional distress; and (2) statutory claims under a host of inapplicable statutory schemes. None of these claims are viable. The claim for intrusion fails for several reasons, including: Plaintiffs do not allege Netflix was involved in taking the Photo, conceding that it was shot by Ashwin Rao, who made it available for licensing on Shutterstock; and even if Netflix were somehow held responsible for shooting the Photo, Plaintiffs cannot have a reasonable expectation of privacy in the view of the outside of their house. *See* Section III.A.1. The intentional infliction of emotional distress claim is equally flawed, as the conduct of publishing a publicly available photo of the outside of someone's house does not rise to the "extreme and outrageous" level of conduct required to support a claim for IIED. Section III.A.2. And California does not even recognize a separate tort for negligent infliction of emotional distress. Section III.A.3.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Plaintiffs' statutory claims are similarly implausible: they do not allege the elements required to bring a claim under California's Consumer Legal Remedies Act, the Lanham Act, California's False Advertising Law, California's Unfair Competition Law, and California's Privacy Rights Act. Additionally, Plaintiffs have not pled basic facts required to satisfy the elements of each of these claims. Because Plaintiffs cannot reasonably cure the deficiencies with an amended pleading, the Court should sustain Defendant's demurrer and dismiss each of the causes of action against Netflix with prejudice.

II. SUMMARY OF RELEVANT ALLEGATIONS

Plaintiffs' claims arise from Netflix's publication of a licensed stock image of their home. Compl. ¶ 3. Plaintiffs allege that in August or September 2022, Netflix published a thumbnail image on its website that included the Photo of Plaintiffs' home, located at 2402 Carman Crest Drive, Los Angeles, California, 90068, as well as the Netflix logo and the name of the Series, *Buying Beverly Hills*. *Id.* ¶¶ 3, 21. The Photo was shot by a third-party photographer named Ashwin Rao. *Id.* ¶ 127. It was made available on the stock photo website Shutterstock, where it continues to be publicly available for licensing. *Id.* ¶ 125, Ex. A.[1] After licensing the Photo from Shutterstock, Williams Creative Associates created the image for use as a tile on the Netflix website. Compl. ¶ 125, Ex. A. Plaintiffs do not allege that Netflix took the Photo, or that the Photo was taken at Netflix's behest.

Plaintiffs allege that their house "is positioned on a ridgeline above the height of any street or home nearby," and the house "is not visible from any street or vantage point in the immediate vicinity." *Id.* ¶ 3. Plaintiffs claim that no person would be able to view the interior or exterior of the home above or at eye level because there are "no other homes or publicly available vantage points" that would facilitate such a view. *Id.* Accordingly, Plaintiffs conclude that "the only

[1] Because the photograph on Shutterstock is referenced in the Complaint and forms the basis of Plaintiffs' causes of action, it may be considered under the incorporation-by-reference doctrine. *See Circle Star Ctr. Assocs., L.P. v. Liberate Techs.*, 147 Cal. App. 4th 1203, 1206 n.1 (2007) (court may consider documents "incorporated by reference in the complaint"); *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1397 n.1 (1999) (taking judicial notice of book that was subject of claims for defamation and emotional distress); *Hofmann Co. v. E.I. Du Pont de Nemours & Co.*, 202 Cal. App. 3d 390, 395 n.3 (1988) (taking judicial notice of newspaper article in which allegedly defamatory statements appeared).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

possibility to capture the photo used in the advertisement was through use of a drone" (*id*. ¶ 4), though they also acknowledge there is a public vantage point from which to see the house on Mulholland Drive. *Id*. ¶¶ 26-27. Plaintiffs allege, "[o]n information and belief," that the Photo was captured by a drone, *id*. ¶ 31, because it would be "difficult" (but apparently not impossible) to take a photograph of the property from Mulholland Drive. *Id*. ¶ 30.

Mr. Dihno claims that he is a former Netflix subscriber who cancelled the service on an unspecified date. *Id*. ¶ 96. Plaintiffs allege "[o]n information and belief," that Netflix suffered a data breach which "allowed individuals to associate the image published by Netflix as advertisement with The Dihno Family." *Id*. ¶ 97. Beyond conclusory allegations "[o]n information and belief" that a "continuous" data breach affecting them occurred, Plaintiffs do not allege the date of the purported data breach, who or what caused the breach, what, if any, data of theirs was accessed, or how subscriber information leaked in connection with such a data breach would ever be associated with this Photo in a tile for "Buying Beverly Hills." *Id*. ¶¶ 97, 113. As a result of the Photo's publication, and the purported data breach, Plaintiffs allege they have been bothered on numerous occasions by real estate agents ringing their doorbell, calling on the phone, or emailing them seeking to purchase or assist in the sale of their home. *Id.* ¶¶ 48-91.

Based on these allegations – that Netflix used a licensed stock photo of the outside their house on its service – Plaintiffs now seek more than $128 million in damages. *Id.* ¶¶ 137, 152, 161, 193, 198, 203.

III. THE COURT SHOULD SUSTAIN THE DEMURRER IN ITS ENTIRETY WITHOUT LEAVE TO AMEND

A "pleading must contain factual allegations supporting the existence of all the essentials elements of a known cause of action." *Mobley v. L.A. Unified Sch. Dist.*, 90 Cal. App. 4th 1221, 1239 (2001). A demurrer to a complaint is properly sustained where a complaint "does not state facts sufficient to constitute a cause of action." Cal. Code Civ. Proc. § 430.10(e). A plaintiff must show that the complaint alleges facts sufficient to satisfy *every* element of *each* cause of action. *Consumer Cause, Inc. v. Arkopharma, Inc.*, 106 Cal. App. 4th 824, 827 (2003) ("a demurrer tests the legal sufficiency of a complaint"); *see also Balikov v. S. Cal. Gas Co.*, 94 Cal. App. 4th 816,

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

819 (2001). In assessing the demurrer, a court assumes the truth of facts that have been properly pleaded but may not consider "contentions, deductions or conclusions of fact or law." *Young v. Gannon*, 97 Cal. App. 4th 209, 220 (2002). "[A] demurrer may be sustained without leave to amend where it is probable from the nature of the complaint … that the plaintiff cannot state a cause of action. … Where the nature of a plaintiff's claim is clear, but under substantive law no liability exists, leave to amend should be denied, for no amendment could change the result." *Tyco Indus. v. Super. Ct.*, 164 Cal. App. 3d 148, 153 (1985). Here, for the reasons set forth below, the demurrer should be sustained and each of Plaintiffs' causes of action should be dismissed without leave to amend.

A. Plaintiffs' Causes of Action Based In Common Law Fail As A Matter of Law

1. Plaintiffs Fail to Allege Netflix Physically Intruded on Their Seclusion

"The right to be secure from intrusion is not absolute . . . ." *Aisenson v. Am. Broad. Co.*, 220 Cal. App. 3d 146, 161 (1990). To establish a violation of the common law right to privacy, a plaintiff must show that the defendant intentionally intruded into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy and that the intrusion occurred in a manner "highly offensive" to a reasonable person. *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009). Plaintiffs must show that Defendant "penetrated some zone of physical or sensory privacy surrounding" them. *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 232 (1998). *See also Ault v. Hustler Mag., Inc.*, 860 F.2d 877, 882 (9th Cir. 1988) (affirming dismissal of intrusion claim based on the allegedly misleading portrayal of plaintiff in a magazine piece because "the facts do not fit the elements of the tort of intrusion"); *Ritzmann v. Weekly World News, Inc.*, 614 F. Supp. 1336, 1340 (N.D. Tex. 1985) (dismissing intrusion claim based on content of news story; "[t]he gravamen of this tort is the intrusion, physically or by the use of the defendant's senses, not the publicity resulting from the intrusion").

As an initial matter, Plaintiffs do not (and cannot) allege that Netflix intruded into their home or any place where they have an expectation of privacy because they do not allege that Netflix took the Photo. Plaintiffs allege (and Netflix does not dispute) that the Photo was shot by a third party named Ashwin Rao, and was licensed by Williams Creative Associates from

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Shutterstock for use on Netflix's website. Compl. ¶¶ 125, Ex. A, 127. Plaintiffs do not, and cannot, allege that Mr. Rao was Netflix's agent when he shot the Photo, or that the Photo was shot at Netflix's behest (it was not). There is simply no action attributable to Netflix that intrudes into Plaintiffs' space, whether physical or otherwise.

Even if Plaintiffs somehow alleged that Netflix itself shot the Photo, which they do not, their claim for intrusion would still fail. People generally do not have a reasonable expectation of privacy in the exterior of their homes. For example, in *Aisenson*, the California Court of Appeal held that there was no invasion of privacy where the plaintiff claimed a television camera crew staked out his home to record videotape of him leaving his house, even where it was alleged the defendants used "an enhanced lens." 220 Cal. App. 3d at 161-63. The court further held that any invasion of privacy was "extremely de minimis" because the camera crew "did not physically encroach on" the property. *Id.* at 183.[2] Here, there is no allegation that the third-party photographer, Mr. Rao, physically encroached on Plaintiffs' property at all, nor is there any allegation that Plaintiffs were photographed inside (or outside) their house, so Plaintiffs' claim fails for this reason, as well.[3]

2. Plaintiffs' Claim for Intentional Infliction of Emotional Distress Fails Because Netflix's Conduct Was Neither Extreme Nor Outrageous

A claim for IIED requires: 1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; 2) severe or extreme emotional distress; and 3) actual and proximate causation of the emotional

[2] Plaintiffs speculate "[o]n information and belief" to allege that the Photo had to have been taken with a drone, so it must be actionable. Compl. ¶ 31, 35. Not so. In the Fourth Amendment context, courts have repeatedly held that use of aerial or drone photography does not constitute an invasion of privacy. *See California v. Ciraolo*, 476 U.S. 207 (1986) (Powell, J., dissenting) (finding no Fourth Amendment violation where law enforcement recorded, from the air, images of cannabis plants being grown in fenced backyard); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (finding use of aerial mapping camera did not require a warrant under the Fourth Amendment); *Ohio v. Stevens*, -- N.E.3d. --, 2023 WL 2567637, at *6 (Ohio Ct. App. Mar. 17, 2023) ("While the use of drones as a tool for criminal investigations is currently an undeveloped area of the law, we find no reason to distinguish the use of the drone in this case from other air surveillance.").

[3] Netflix's use of the Photo is protected by the First Amendment even if Mr. Rao were to have taken it using some kind of illegal means. *See Bartnicki v. Vopper*, 532 U.S. 514, 533-34 (2001) (media defendant could not be held liable for use of a private conversation about a labor dispute that a third party illegally recorded).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

distress by the defendant's outrageous conduct. *Cochran v. Cochran*, 65 Cal. App. 4th 488, 494 (1998). Conduct is considered outrageous when it is "*so extreme as to exceed all bounds of that usually tolerated in a civilized community*." *Id*. (emphasis added) (citation omitted). Moreover, the alleged extreme and outrageous conduct must be "directed at the plaintiff, or occur in the presence of a plaintiff. . ." *Christensen v. Super. Ct.*, 54 Cal. 3d 868, 903 (1991).

Plaintiffs' IIED claim fails because Netflix's conduct – using a licensed stock photo of their house as a tile on its service – does not qualify as extreme and outrageous. "[T]he complained-of conduct must be outrageous, that is, beyond all bounds of reasonable decency." *Comstock v. Aber*, 212 Cal. App. 4th 931, 954 (2012). The tort provides "no occasion for the law to intervene in every case where some one's feelings are hurt." *Id.* (quoting Restatement 2d Torts § 46); *see also Hughes v. Pair*, 46 Cal. 4th 1035, 1050-51 (2009) ("defendant's conduct must be intended to inflict injury or engaged in with the realization that injury will result.") (citation and quotation marks omitted). And the defendant "must have engaged in conduct intended to inflict injury or engaged in with the realization that injury will result." *Christensen*, 54 Cal. 3d at 903 (internal quotation marks omitted).

Much more offensive behavior does not meet this strict standard as a matter of law. For example, in *Hughes*, defendant's offer to provide plaintiff with financial rewards in exchange for sexual favors was not sufficiently egregious for an IIED claim. 46 Cal. 4th at 1040, 1051. "[V]icious slur[s]" and threatening messages have been held insufficient to support a claim for IIED. *See, e.g., Koch v. Goldway*, 817 F.2d 507, 510 (9th Cir. 1987) (defendant's "reprehensible" "vicious slur" about the plaintiff likening him to a Nazi war criminal failed to reach the "level of conduct necessary to state a claim for intentional infliction of emotional distress"); *Cochran*, 65 Cal. App. 4th at 499 (father's threatening messages to his son were insufficiently "extreme and outrageous" as a matter of law).

Plaintiffs' allegation that Defendant "acted with reckless disregard of the probability that Plaintiffs would suffer emotional distress knowing that Plaintiffs would be harmed by the publishing of the image of Plaintiffs' family home as advertisement," Compl. ¶ 201, fails to meet this rigorous standard. The conduct alleged here is hardly "beyond all bounds of reasonable

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

decency." As alleged, Netflix licensed a publicly-available Photo of the exterior of Plaintiffs' house for use on its service. Indeed, Plaintiffs do not plead that Defendant *intended* to inflict injury or "engaged in with the realization that injury will result," as is required to sustain an IIED claim. *Christensen*, 54 Cal. 3d at 903.

In addition, the "California Supreme Court has set a 'high bar' for what can constitute severe distress." *Wong v. Jing*, 189 Cal. App. 4th 1354, 1376-77 (2010) (striking IIED claim because plaintiff's allegations of emotional harm did "not constitute the sort of severe emotional distress of such lasting and enduring quality that no reasonable person should be expected to endure"). "Severe emotional distress" is emotional distress of such substantial or enduring quality "that no reasonable [person] in civilized society should be expected to endure it." *Hughes*, 46 Cal. 4th at 1051 (holding "plaintiff's assertions that she has suffered discomfort, worry, anxiety, upset stomach, concern, and agitation" did not meet the "high bar" for what constitutes "severe emotional distress") (internal quotation marks omitted). Plaintiffs' boilerplate assertion that they suffered "mental anguish and suffering, as well as emotional distress," does not meet this pleading requirement. Compl. ¶ 92. Plaintiffs also claim they have sought "medical attention by way of psychologists and psychiatrists" with no allegations connecting this to the image itself. *Id.*

3. California Does Not Recognize an Independent Cause of Action for NIED

In California "there is no independent tort of negligent infliction of emotional distress." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 984 (1993). *See also Lawson v. Mgmt. Activities, Inc.*, 69 Cal. App. 4th 652, 656 (1999) ("[A]s our Supreme Court *has* made abundantly clear, there is no such thing as the independent tort of [NIED].") For this reason, Plaintiffs' NIED claim should be dismissed without leave to amend. *Belen v. Ryan Seacrest Prods., LLC*, 65 Cal. App. 5th 1145, 1165 (2021) (striking NIED claim "because no such independent tort exists").

B. Plaintiffs' Statutory Causes of Action Fail As A Matter of Law

Plaintiffs' statutory causes of action similarly fail. Stretching to characterize the use of the Photo as an "advertisement," Plaintiffs attempt to shove their factual allegations into inapplicable statutory schemes aimed at protecting consumers and competitors. But Plaintiffs cannot allege that they were misled into making purchases as consumers, or that they suffered competitive

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

injuries in their unidentified businesses. Specifically, California's Unfair Competition Law ("UCL"), which prohibits "unlawful, unfair, or fraudulent business act[s] or practice[s]," Bus. & Prof. Code § 17200, is inapplicable. The same is true of the California's Consumer Legal Remedies Act ("CLRA"), which prohibits specific "unfair methods of competition and unfair or deceptive acts or practices" (Cal. Civ. Code § 1770(a)), California's False Advertising Law ("FAL"), which prohibits advertising "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading" (Cal. Bus. & Prof. Code § 17500), and California's Consumer Privacy Act ("CCPA") which protects consumers. Cal. Civ. Code § 1798.150(a)(1). Likewise, the Lanham Act, which protects against harm from commercial competitors, due to trademark infringement or false advertising, is inapplicable. As explained below, these statutes simply do not protect individuals from the harm alleged here, so Plaintiffs claims fail.

1. Plaintiffs' Causes of Action Against Netflix Based on Violations of the UCL, CLRA, and Lanham Act Fail Because Plaintiffs Are Not Netflix Competitors or Consumers

The UCL was enacted to protect "*consumers* and *competitors* by promoting fair competition in commercial markets for goods and services." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1359 (2010) (emphases added) (citation omitted). It does not apply to private disputes that have no impact on fair competition or the public more generally. *See, e.g., Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 135 (2007) (affirming dismissal of UCL claim because it was based on a private business dispute in which "the alleged victims [were] neither competitors nor powerless, unwary consumers"); *Marsh v. Anesthesia Servs. Med. Grp.*, 200 Cal. App. 4th 480, 502 (2011) (holding that plaintiff failed to state a claim under the UCL because the defendant's alleged conduct "affected [plaintiff] specifically"); *In re Firearm Cases*, 126 Cal. App. 4th 959, 978 (2005) (explaining that plaintiffs must "show some connection between conduct by defendants and the alleged harm to the public"); *Rosenbluth Int'l v. Super. Ct.*, 101 Cal. App. 4th 1073, 1077 (2002), *as modified* (Sept. 11, 2002) (holding that "a UCL action based on a contract is not appropriate where the public in general is not harmed by the

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

defendant's alleged unlawful practices"). Likewise, a claim under the CLRA "may be brought '*only by a consumer* who suffers any damage *as a result of the use or employment* of proscribed method, act, or practice.'" *Durell*, 183 Cal. App. at 1366 (citing Cal. Civ. Code § 1780(a)) (internal quotation marks omitted).

Here, Plaintiffs do not allege they are in competition with Netflix. And, while Plaintiffs allege they once were Netflix consumers, they fail to allege that they were harmed *as consumers*, or even that they were Netflix subscribers during the time the alleged injury occurred. Thus, the UCL and CLRA causes of action fail as a matter of law.

Similarly, the California Court of Appeal has observed that "a plaintiff bringing a false advertising claim under the Lanham Act must establish that the injury suffered as a result of the alleged false advertising 'was "*competitive,*" i.e., harmful to the plaintiff's ability to compete with the defendant.'" *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP*, 184 Cal. App. 4th 313, 349, quoting *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995) (emphasis added). In *Halicki v. United Artists Communications, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987), the Ninth Circuit explained that a plaintiff must show *injury caused by a competitor* in order to state a cause of action under Section 43(a). It is insufficient for a plaintiff to "show that the defendants made a false representation about his [product] and that he was injured by the representation." *Id*. Furthermore, the Lanham Act, enacted through Congress' authority under the Constitution's *Commerce Clause*, is not a substitute for a privacy tort. To be actionable, "conduct must not only be unfair but must in some discernible way be competitive." *Id*. The California Court of Appeal has noted that to have standing to bring a Lanham Act "false endorsement" or "false advertising" claim, like what it appears Plaintiffs assert here, "the plaintiff must possess *a commercial interest* in the misused mark, name or device or in the good or service that is allegedly being misrepresented." *Two Jinn, Inc. v. Gov't Payment Serv., Inc.*, 233 Cal. App. 4th 1321, 1345 (2015) (emphasis added).

Here, while Plaintiffs plead various facts regarding the alleged "advertisement" (*e.g.*, that Netflix "published a false or misleading statement of fact when they published the advertisement at issue containing an image of Plaintiffs' home," Compl. ¶ 155, the image "was used in a

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

commercial advertisement or promotion," *id*. ¶ 156, the image was deceptive or "likely to deceive in a material way," *id*. ¶ 157, it was "published in interstate commerce," *id*. ¶ 158, and it caused or is likely to cause Plaintiffs injury, *id*. ¶ 159), they make *no allegation* that Plaintiffs were in competition with Defendant or had a commercial interest in their home addressable through these statutory schemes. Accordingly, Plaintiffs have failed to plead a violation of the Lanham Act.

2. Plaintiffs' Lanham Act, UCL and FAL Claims Fail Because They Do Not Allege They Suffered Competitive or Economic Injury

Plaintiffs have failed to allege that they have incurred injury in fact caused by the unfair competition, a requirement to state claims under the Lanham Act. *See generally* 15 U.S.C. § 1125(a)(1); *see also Jarrow Formulas, Inc. v. Nutrition Now, Inc*., 304 F.3d 829, 835 n.4 (9th Cir. 2002) ("A prima facie case requires a showing that . . . the plaintiff has been or is likely to be *injured* as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product." (emphasis added). Likewise, Plaintiffs fail to plausible allege they "suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition," Cal. Bus. & Prof. Code § 17204, and their UCL[4] and FAL claims therefore fail too. As the California Supreme Court has explained, to bring a claim under the UCL, "a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 322 (2011) (emphases in original). The same is true of the FAL. *See Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788 (2010) (the UCL and FAL provide a private right of action only if Plaintiffs have "suffered injury in fact and [have] lost money or property as a result of the unfair *competition*.") (quoting Cal. Bus. & Prof. Code § 17204) (emphasis added); *Buckland v. Threshold Enterprises*,

[4] Where, as here, Plaintiffs suffered no economic injury as a result of any conduct by Netflix, Plaintiffs do not have standing to bring a UCL cause of action. Cal. Bus. & Prof. Code § 17204 (to have standing under the UCL, a plaintiff must show that he "has suffered injury in fact and … lost money or property as the result of the unfair competition"); *Boorstein v. CBS Interactive, Inc.*, 222 Cal. App. 4th 456, 473-74 (2013) (same).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

155 Cal. App. 4th 798, 819 (2007) ("[A]n individual [may] assert a claim under the FAL only if he or she 'has suffered injury in fact and has lost money or property as a result of such unfair competition'".).

Plaintiffs' complaint contains no allegation that their business has suffered competitive harm from Netflix's use of the Photo. Indeed, the Complaint does not allege a single detail about Plaintiffs' business except that it is operated out of Mr. Dihno's house and that it has been harmed by "the annoyance and anxiety caused by the constant intrusion of ringing of the doorbell, emails, and telephone calls" causing him to suffer lost income. Compl. ¶¶ 94, 166. This allegation is insufficient to satisfy the injury-in-fact requirement of these statutes.

3. Plaintiffs' Claims under the UCL, CLRA, and FAL Fail Because They Do Not Allege Reliance or Causation

A claim brought under the UCL, CLRA, or FAL necessarily fails where, as here, a plaintiff fails to allege reliance or causation. *Durell*, 183 Cal. App. 4th at 1367 (affirming demurrer on UCL and CLRA claim where plaintiff failed to show reliance and causation and because, a plaintiff must show "not only that the defendant's conduct was deceptive, but that the deception caused them harm" (internal quotation marks omitted)); *Stewart v. Kodiak Cakes, LLC*, 537 F. Supp. 3d 1103, 1135 (S.D. Cal. 2021) ("A plaintiff alleging claims under the CLRA, FAL, or UCL, must allege actual reliance."). *See also Hall v. Time Inc.*, 158 Cal. App. 4th 847, 856 n.3 (2008) (citing *In re Firearm Cases*, 126 Cal. App. 4th at 978) (explaining a UCL claim cannot be established without a link between a defendant's business practice and the alleged harm); *Viggiano v. Hansen Nat'l Corp.*, 944 F. Supp. 2d 877, 886 n.30 (C.D. Cal. 2013) ("Where UCL and FAL claims are premised on allegedly misleading communications, California courts require evidence of reliance before they will find that causation and 'injury in fact' have been proved.").

Here, Plaintiffs have not, and cannot, claim that they themselves were deceived by the use of the Photo, or that they relied on the Photo in deciding to purchase a Netflix subscription. This is because Plaintiffs knew their house was not on the Series and was not for sale. A plaintiff cannot plausibly allege reliance or causation where he suspects the truth, let alone knows the

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

truth, about the representation of which he complains.[5] *See, e.g.*, *Buckland*, 155 Cal. App. 4th at 815-17 (dismissing fraud, UCL, and FAL claims for lack of reliance where plaintiff purchased product even though she concededly had reason to suspect that the defendant's advertising contained deceptive statements), disapproved of on other grounds by *Kwikset Corp.*, 51 Cal. 4th 310; *Oppenheimer v. Clunie*, 142 Cal. 313, 319 (1904) ("If after a representation of fact . . . the party to whom it was made . . . actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue." (quoting Pomeroy, Equity Juris. § 893)).

In light of this knowledge, Plaintiffs cannot claim *they* relied on any alleged misrepresentation by Netflix, as is necessary to bring causes of action under the UCL, CLRA, and FAL. *See, e.g.*, *Wang v. OCZ Tech Grp., Inc.*, 276 F.R.D. 618, 628 (N.D. Cal. 2011) (under UCL, CLRA, and FAL, plaintiff "must plead his own exposure to and reliance upon the alleged misrepresentation"). This knowledge also negates causation, another required element of these claims. *See Kruse v. Bank of Am.*, 202 Cal. App. 3d 38, 60-61 (1988) ("Assuming, arguendo, a claimant's reliance on the actionable misrepresentation, no liability attaches if the damages sustained were . . . . not the product of [Defendants'] false promise but w[ere] the direct result of [Plaintiff's] self-created [injury]."); *Buckland*, 155 Cal. App. 4th at 815-17 (plaintiffs cannot satisfy elements of reliance or causation after willingly injuring themselves in expectation of litigation).

Because Plaintiffs fail to plead reliance or causation, their UCL, CLRA, and FAL causes of action must be dismissed. *See Durell*, 183 Cal. App. 4th at 1367 (affirming demurrer on UCL and CLRA claim where plaintiff failed to show reliance and causation and because, under the CLRA, a plaintiff must show "not only that the defendant's conduct was deceptive, but that the deception caused them harm" (internal quotation marks omitted)).

[5] Plaintiffs also fail to allege a misrepresentation: they do not explain how merely showing the Photo on a tile gives rise to a reasonable inference that their house was necessarily for sale. *E.g.*, *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496 (2003) (explaining reasonable consumer standard).

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

4. The Cause of Action for Violation of the California Privacy Rights Act Fails for Additional Reasons

The California Consumer Privacy Act ("CCPA") provides relief to "any consumer whose nonencrypted and nonredacted personal information ... is subject to an unauthorized access ... or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security measures." Cal. Civ. Code § 1798.150(a)(1). The gist of Plaintiffs' allegations is that a data breach or breaches suffered by Netflix resulted in third parties accessing Plaintiffs' personal information. Compl. ¶¶ 189-90. Plaintiffs imply that Netflix's alleged failure to implement and maintain security procedures caused this theft and distribution. *Id.* ¶¶ 111, 191.

There are a number of reasons why Plaintiffs' CCPA claim is unavailing. As a preliminary matter, the statute specifically explains that "personal information does not include publicly available information." Cal. Civ. Code § 1798.140(v)(2). Thus, the alleged information, all of which is publicly available (*see supra* at 11-13), is not protected by the CCPA. And relevant here, the CCPA "does not apply retroactively." *Gardiner v. Walmart, Inc.*, 2021 WL 4992539, at *2 (N.D. Cal. July 28, 2021). Accordingly, Plaintiffs' CCPA claim fails "unless the alleged breach occurred on or after January 1, 2020." *Id.* While Plaintiffs allege a laundry list of data breaches that Netflix at large has purportedly suffered, Plaintiffs fail to specify when their data was leaked (if at all), opting instead to allege "[o]n information and belief" that their data leaked in an unspecified "continuous data breach." Compl. ¶ 113. Notably, Plaintiffs do not allege that they received a breach notification letter, that their information was at issue, or that they were still Netflix subscribers at the time of the supposed breach in February of 2021.

Despite these pleading gaps, Plaintiffs assert the following hypothesis: "the picture of Plaintiff's [sic] home, which constitutes geolocation data, allowed individuals to connect the geolocation data, that is already grouped with Plaintiffs' name, geolocation data, plaintext passwords, IP address, emails, and other personally identifiable information . . . allowed individuals to learn the address of the house in the advertisement, as well as, Plaintiff's [sic] emails, phone numbers, and other personal information." *Id.* ¶ 113. Individuals "seeking

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

information on Plaintiffs were able to find that information, which was not otherwise publicly available but for Netflix's data breach." *Id.* ¶ 114.

The Complaint contains no plausible allegation regarding how any alleged data leak caused people to visit Plaintiffs' house or call them regarding a sale. But a plaintiff claiming injury from a data breach must plead a "logical connection between the two incidents[,]" *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1327 (11th Cir. 2012), and "purely temporal connections are often insufficient . . . ." *Stollenwerk v. Tri-West Health Care All.*, 254 F. App'x 664, 668 (9th Cir. 2007). Although Plaintiffs allege that Mr. Dihno was at one point a Netflix subscriber, there is no plausible allegation that his data was involved in any breach. *See In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 31 (D.D.C. 2014) (finding lack of causation between data breach and fraudulent charges where plaintiff failed to allege that "credit-card, debit-card, or bank account information" was stolen); *Leonard v. McMenamins, Inc.*, 2022 WL 4017674, at *3 (W.D. Wash. Sept. 2, 2022) (unauthorized charges on credit card not traceable to data breach as plaintiffs never alleged "that their credit card information was ever provided to [defendant]"). As a further indication that Plaintiffs have no factual support for their data breach allegations, the demand letter they sent to Netflix in February, which was referenced in, but not attached to, their Complaint did not make a single mention of the supposed leak of their data. Goldberg Decl. ¶ 7, Ex. 3.[6]

Further, the CCPA only provides a private right of action under limited circumstances. *See* Cal. Civ. Code § 1798.150(a), (c); *see also* § 1798.81.5(d)(1) (defining personal information as an individual's first name or first initial and last name along with the specific data enumerated in (d)(2)). Here, Plaintiffs have not alleged the disclosure of their personal information as defined in the CCPA. As such, Plaintiffs fail to plead facts sufficient to allege a cause of action under the CCPA.

[6] The letter may be considered under the incorporation-by-reference doctrine. *See Circle Star Ctr. Assocs., L.P. v. Liberate Techs.*, 147 Cal. App. 4th 1203, 1206 n.1 (2007) (court may consider documents "incorporated by reference in the complaint").

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Even if the statute applied to Plaintiffs (it does not), Plaintiffs do not adequately allege that Netflix failed to "implement and maintain reasonable security procedures and practices." Cal. Civ. Code § 1798.150(a). The Complaint alleges no facts beyond conclusory allegations "[o]n information and belief" (Compl. ¶ 111) regarding reasonable security measures and does not plausibly show that Netflix failed to implement such measures. *See Anderson v. Kimpton Hotel & Rest. Group, LLC*, 2019 WL 3753308, at *4 (N.D. Cal. Aug. 8, 2019) (no standing in data breach case where plaintiffs did not allege "any . . . action Kimpton failed to take"). These conclusory and speculative allegations do not suffice for Plaintiffs' claim. *Maag v. U.S. Bank, Nat'l Assoc.*, 2021 WL 5605278, at *2 (S.D. Cal. April 8, 2021) (dismissing CCPA claim where plaintiff relied on "conclusory allegations" concerning defendant's data security practices). *See also Griffey v. Magellan Health Inc.*, 562 F. Supp. 3d 34, 57 (D. Ariz. 2021) (same).

IV. CONCLUSION

Plaintiffs' complaint takes Netflix's routine use of a publicly available stock photo and attempts to turn it into a $128 million litigation by spinning out numerous causes of action ridden with legal flaws and factual holes. As discussed above, none of the causes of action alleged are legally sound, nor can they be rescued by amendment. Accordingly, Netflix respectfully asks the Court to sustain this demurrer with prejudice.

DATED: June 5, 2023

DAVIS WRIGHT TREMAINE LLP
JONATHAN SEGAL
RACHEL R. GOLDBERG
SAMANTHA LACHMAN

By: */s/ Jonathan Segal*
Jonathan Segal

Attorneys for Defendant
NETFLIX, INC.

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST, SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
(213) 633-6800
Fax: (213) 633-6899

Make a Reservation

AHARON DIHNO, et al. vs NETFLIX, INC., et al.

Case Number: 23STCV06215 Case Type: Civil Unlimited Category: Tortious Interference
Date Filed: 2023-03-21 Location: Stanley Mosk Courthouse - Department 30

Reservation

Case Name: AHARON DIHNO, et al. vs NETFLIX, INC., et al.	Case Number: 23STCV06215
Type: Demurrer - without Motion to Strike	Status: RESERVED
Filing Party: Netflix, Inc. (Defendant)	Location: Stanley Mosk Courthouse - Department 30
Date/Time: 07/13/2023 8:30 AM	Number of Motions: 1
Reservation ID: 842987658901	Confirmation Code: CR-OV9RUCZ83O4XQ3INK

Fees

Description	Fee	Qty	Amount
Demurrer - without Motion to Strike	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			**$61.65**

Payment

Amount: $61.65	Type: Visa
Account Number: XXXX7701	Authorization: 068680
Payment Date: 1969-12-31	

Print Receipt + Reserve Another Hearing