

1 LATHAM & WATKINS LLP
Andrew M. Gass (SBN 259694)
2 *andrew.gass@lw.com*
Michael H. Rubin (SBN 214636)
3 *michael.rubin@lw.com*
Brittany N. Lovejoy (SBN 286813)
4 *brittany.lovejoy@lw.com*
505 Montgomery Street, Suite 2000
5 San Francisco, California 94111-6538
Telephone: 415.391.0600

6 *Attorneys for Defendant DeviantArt, Inc.*
7
8

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12
13 SARAH ANDERSEN, et al.,
14 Individual and Representative Plaintiffs,
15 v.
16 STABILITY AI LTD., et al.,
17 Defendants.

CASE NO. 3:23-cv-00201-WHO

**DEFENDANT DEVIANTART, INC.’S
NOTICE OF MOTION, MOTION TO
DISMISS FIRST AMENDED
COMPLAINT, AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS**

Date: May 8, 2024
Time: 2:00 p.m.
Place: Courtroom 2 - 17th Floor
Before: Hon. William H. Orrick

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 8, 2024 at 2:00 p.m., or as soon thereafter as the
3 matter may be heard, in the United States District Court for the Northern District of California,
4 Courtroom 2, 17th Floor, located at 450 Golden Gate Ave., San Francisco, CA 94102, Defendant
5 DeviantArt, Inc. (“DeviantArt”) through its undersigned counsel, will, and hereby does, move to
6 dismiss Counts 15, 16, and 17 of Plaintiffs’ First Amended Class Action Complaint (“FAC”)
7 pursuant to Federal Rule of Civil Procedure 12(b)(6).

8 DeviantArt’s Motion to Dismiss (“Motion”) is based on this Notice, the supporting
9 Memorandum of Points and Authorities (“Memorandum”), the complete files and records in this
10 action, and any additional material and arguments as may be considered in connection with the
11 hearing on the Motion.

12 **STATEMENT OF RELIEF SOUGHT**

13 DeviantArt seeks an order pursuant to FRCP 12(b)(6) dismissing the claims against it for
14 failure to state a claim upon which relief can be granted.

15 **ISSUES TO BE DECIDED**

16 The Motion presents the following issues to be decided: (1) whether Count 15 of the FAC
17 fails to state a claim for direct copyright infringement; (2) whether Count 16 of the FAC fails to
18 state a claim for breach of contract and breach of the implied covenant of good faith and fair
19 dealing; (3) whether Count 17 of the FAC fails to state a claim for unjust enrichment; and
20 (4) whether Plaintiffs’ new claims and class representatives should be dismissed as beyond the
21 scope of permitted amendment.

22 Dated: February 8, 2024

Respectfully submitted,

23

LATHAM & WATKINS LLP

24

By: /s/ Andrew M. Gass

25

Andrew M. Gass (SBN 259694)

26

andrew.gass@lw.com

Michael H. Rubin (SBN 214636)

27

michael.rubin@lw.com

Brittany N. Lovejoy (SBN 286813)

28

brittany.lovejoy@lw.com

505 Montgomery Street, Suite 2000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

San Francisco, California 94111-6538
Telephone: 415.391.0600

Attorneys for Defendant DeviantArt, Inc.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND	3
III. LEGAL STANDARD.....	5
IV. ARGUMENT	5
A. Plaintiffs Fail To Allege A Copyright Claim Against DeviantArt	6
1. This Court’s October 30 Order Resolves The Copyright Claim.....	6
2. The FAC’s Allegations Do Not Plead A Copyright Violation	8
a. Plaintiffs Reframed The Legal Basis of This Claim.....	9
b. DreamUp Is Not A Copy	10
i. Plaintiffs Do Not Allege that DreamUp Reproduces Images	11
ii. Plaintiffs Do Not Allege Stable Diffusion 1.4 Reproduces Images	12
iii. Plaintiffs’ Allegations As To Other Models Do Not Suffice	14
c. DreamUp Is Not A Derivative Work	16
3. DeviantArt’s Creation of DreamUp Was Fair Use	17
B. Plaintiffs Fail To Allege A Breach of Contract Claim	20
1. Plaintiffs Restate The Contract Claim This Court Dismissed	20
2. The FAC Does Not State An Implied Covenant Claim	21
C. Plaintiffs Fail To Allege An Unjust Enrichment Claim.....	23
D. The Court Should Dismiss The Additional Named Plaintiffs	24
V. CONCLUSION.....	25

TABLE OF AUTHORITIES

Page(s)

CASES

1

2

3

4 *Airs Aromatics, LLV v. Victoria’s Secret Stores Brand Mgmt., Inc.*,

5 744 F.3d 595 (9th Cir. 2014)13

6 *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*,

7 143 S. Ct. 1258 (2023).....18

8 *Ashcroft v. Iqbal*,

9 556 U.S. 662 (2009).....5, 15

10 *Authors Guild v. Google, Inc.*,

11 804 F.3d 202 (2d Cir. 2015).....16, 17, 18, 20

12 *Bill Graham Archives v. Dorling Kindersley Ltd.*,

13 448 F.3d 605 (2d Cir. 2006).....19

14 *Bittel Tech., Inc. v. Bittel USA, Inc.*,

15 No. 10-cv-00719, 2010 WL 3221864 (N.D. Cal. Aug. 13, 2010)24

16 *Carrasco v. HSBC Bank USA, N.A.*,

17 No. 11-cv-2711, 2012 WL 685523 (N.D. Cal. Mar. 2, 2012)21

18 *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*,

19 536 F.3d 121 (2d Cir. 2008).....16

20 *DeLeon v. Wells Fargo Bank, N.A.*,

21 No. 10-cv-01390, 2010 WL 4285006 (N.D. Cal. Oct. 22, 2010)5, 23

22 *Doe I. v. Github, Inc.*,

23 No. 22-cv-06823, 2024 WL 235217 (N.D. Cal. Jan. 22, 2024).....23

24 *Durell v. Sharp Healthcare*,

25 183 Cal. App. 4th 1350 (2010)22

26 *ESG Cap. Partners, LP v. Stratos*,

27 828 F.3d 1023 (9th Cir. 2016)24

28 *Feist Publications Inc. v. Rural Tel. Serv. Co.*,

499 U.S. 340 (1991).....18

Firoozye v. Earthlink Network,

153 F. Supp. 2d 1115 (N.D. Cal. 2001)23

Foley v. Interactive Data Corp.,

47 Cal.3d 654 (1988)22

1 *Gallagher v. Chipotle Mexican Grill, Inc.*,
 2 No. 15-cv-03952, 2016 U.S. Dist. LEXIS 45501 (N.D. Cal. Apr. 4, 2016).....24

3 *In re Gilead Scis. Sec. Litig.*,
 4 536 F.3d 1049 (9th Cir. 2008)5, 11

5 *Google LLC v. Oracle Am., Inc.*,
 6 141 S. Ct. 1183 (2021).....18

7 *Greenspan v. Qazi*,
 8 No. 23-cv-03426, 2021 WL 2577526 (N.D. Cal. June 23, 2021).....17

9 *Gulaid v. CH2M Hill, Inc.*,
 10 No. 15-cv-04824, 2016 WL 5673144 (N.D. Cal. Oct. 3, 2016)13

11 *Kadrey, et al. v. Meta Platforms, Inc.*,
 12 No. 23-cv-03417, 2023 WL 8039640 (N.D. Cal. Nov. 20, 2023)17, 23

13 *King v. Facebook, Inc.*,
 14 No. 19-cv-01987, 2019 WL 6493968 (N.D. Cal. Dec. 3, 2019).....21

15 *Litchfield v. Spielberg*,
 16 736 F.2d 1352 (9th Cir. 1984)17

17 *Lovesy v. Armed Forces Ben. Ass’n*,
 18 No. 07-cv-02745, 2009 WL 1574575 (N.D. Cal. June 3, 2009).....4, 9

19 *Martinez v. Wells Fargo Bank, N.A.*,
 20 No. 13-cv-05597, 2014 WL 1572689 (N.D. Cal. Apr. 17, 2014).....4

21 *May v. Semblant, Inc.*,
 22 No. 13-cv-01576, 2013 WL 5423614 (N.D. Cal. Sept. 27, 2013).....21

23 *Pac. Recovery Sols. v. United Behav. Health*,
 24 508 F. Supp. 3d 606 (N.D. Cal. 2020)5, 7

25 *Paracor Finance, Inc. v. General Elec. Capital Corp.*,
 26 96 F.3d 1151 (9th Cir. 1996)24

27 *Perfect 10, Inc. v. Giganews, Inc.*,
 28 847 F.3d 657 (9th Cir. 2017)16

Peter Mayer Publishers Inc. v. Shilovskaya,
 11 F. Supp. 3d 421 (S.D.N.Y. 2014).....16

Ringgold v. Black Entertainment Television, Inc.,
 126 F.3d 70 (2d Cir. 1997).....19

Rockridge Trust v. Wells Fargo, N.A.,
 985 F. Supp. 2d 1110 (N.D. Cal. 2013)22

1 *Rosal v. First Fed. Bank of Cal.*,
 2 671 F. Supp. 2d 1111 (N.D. Cal. 2009)24

3 *Sega Enterprises Ltd v. Accolade, Inc.*,
 4 977 F.2d 1510 (9th Cir. 1992)17, 18, 20

5 *Sony Computer Entm’t, Inc. v. Connectix Corp.*,
 6 203 F.3d 596 (9th Cir. 2000)18, 19

7 *Stewart v. Abend*,
 8 495 U.S. 207 (1990).....18

9 *Thomson Reuters Enter. Centre GmbH v. Ross Intel. Inc.*,
 10 No. 20-cv-613, 2023 WL 6210901 (D. Del. Sept. 23, 2023).....19

11 *Twentieth Century Music Corp. v. Aiken*,
 12 422 U.S. 151 (1975).....18

13 *U.S. v. Ritchie*,
 14 342 F.3d 903 (9th Cir. 2003)12

15 *Vann v. Aurora Loan Servs. LLC*,
 16 No. 10-cv-04736, 2011 WL 2181861 (N.D. Cal. June 3, 2011).....23

17 *Welgus v. TriNet Grp., Inc.*,
 18 No. 15-cv-03625, 2017 WL 6466264 (N.D. Cal. Dec. 18, 2017), *aff’d*, 765 Fed. App’x 239
 19 (9th Cir. 2019).....5, 7

20 *Wilson v. Frito-Lay North Am., Inc.*,
 21 961 F. Supp. 2d 1134 (N.D. Cal. 2013)14

22 *Zucco Partners, LLC v. Digimarc Corp.*,
 23 552 F.3d 981 (9th Cir. 2009)5

24 **STATUTES**

25 17 U.S.C.
 26 § 101..... *passim*
 27 § 106.....9, 10, 16, 17
 28 § 107.....18
 § 504(c).....8

Cal. Bus. Prof. Code § 172002, 4, 23

OTHER AUTHORITIES

Joe Spisak & Sergey Edunov, *The Llama Ecosystem: Past, Present, and Future*, Meta Blog (Sept. 27, 2023), <https://ai.meta.com/blog/llama-2-updates-connect-2023/>8

1 Nicholas Carlini, et al., Extracting Training Data from Diffusion Models,
2 <https://arxiv.org/pdf/2301.13188.pdf> (Jan. 30, 2023).....12
3 Stable Diffusion XL 1.0 Model Card, Hugging Face, [https://huggingface.co/stabilityai/stable-
5 diffusion-xl-base-1.0](https://huggingface.co/stabilityai/stable-
4 diffusion-xl-base-1.0).....8
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 DeviantArt’s inclusion as a defendant in this lawsuit has never made sense. The claims at
3 issue raise a number of novel questions relating to the cutting-edge field of generative artificial
4 intelligence, including whether copyright law prohibits AI models from learning basic patterns,
5 styles, and concepts from images that are made available for public consumption on the Internet.
6 But none of those questions implicates DeviantArt. Plaintiffs have now filed two complaints in
7 this case, and neither of them makes any attempt to allege that DeviantArt has *ever* directly used
8 Plaintiffs’ images to train an AI model, to use an AI model to create images that look like Plaintiffs’
9 images, to offer third parties an AI model that has ever been used to create images that look like
10 Plaintiffs’ images, or in any other conceivably relevant way.

11 Instead, Plaintiffs included DeviantArt in this suit because they believe that merely
12 *implementing* an AI model created, trained, and distributed by others renders the *implementer*
13 liable for infringement of each of the billions of copyrighted works used to train that model—even
14 if the implementer was completely unaware of and uninvolved in the model’s development. That
15 theory of liability is not only wrong, it would yield absurd results. Endorsing it would mean that
16 tens of millions of programmers, researchers, and businesses who have downloaded and
17 implemented third-party “open-source” AI models are vulnerable to similar class action lawsuits
18 demanding multiple billions of dollars in statutory damages. Put simply, if Plaintiffs can state a
19 claim against DeviantArt, anyone whose work was used to train an AI model can state the same
20 claim against millions of other innocent parties, any of whom might find themselves dragged into
21 court simply because they used this pioneering technology to build a new product whose systems
22 or outputs have nothing whatsoever to do with any given work used in the training process.

23 Of the eight claims Plaintiffs asserted against DeviantArt in the original complaint, only
24 two remain. First, Plaintiffs with registered copyrights reassert a narrowed and reframed claim for
25 copyright infringement, on the theory that DeviantArt directly infringed their reproduction and
26 derivative-work rights by building a service “based on” Stability AI’s Stable Diffusion model. But
27 this Court already rejected Plaintiffs’ attempt to state a copyright claim against DeviantArt for
28 “simply provid[ing] its customers access to Stable Diffusion as a library.” Dkt. 117 (Order) at 10.

1 And while Plaintiffs have changed their theory as to *why* implementing Stable Diffusion renders
2 DeviantArt a copyright infringer—now arguing that DreamUp itself is both a “copy” and a
3 “derivative work,” *see* FAC ¶¶ 412–13—that theory is wholly unsupported by the facts alleged in
4 the FAC. Because that pleading does not plausibly allege that DreamUp has replicated or can
5 replicate Plaintiffs’ registered images, it does not plausibly allege that DreamUp is either a copy
6 or a derivative work. And even if it did, DeviantArt’s service—which, under the facts alleged
7 here, creates only *new*, non-infringing images—is a protected fair use under well-established Ninth
8 Circuit precedent.

9 Second, Plaintiffs who are DeviantArt users reallege the exact same breach of contract
10 claim that this Court dismissed in its October 30 Order. Even after this Court held that Section 16
11 of DeviantArt’s Terms of Service “does not clearly cover the conduct that plaintiffs accuse
12 DeviantArt of in this suit” and dismissed Plaintiffs’ first breach claim, *see* Order at 26, Plaintiffs
13 now reassert precisely the same claim, based on the same contractual provision and an identical
14 set of supporting facts. Plaintiffs also add a claim for breach of the implied covenant of good faith
15 and fair dealing, but support it only with general grievances which have no connection to the
16 contract at issue. FAC ¶ 422(b). Neither of these claims comes close to stating a claim for relief.

17 Finally, the same Plaintiffs add another claim for “unjust enrichment under Cal. Bus. Prof.
18 Code § 17200 and California Common Law.” FAC at 92. This claim appears nowhere in the
19 original complaint and thus falls outside the scope of the amendment permitted by the Court. But
20 it also fails on its face for several reasons—including because it is preempted by the Copyright
21 Act and because these Plaintiffs admit to having an enforceable contract with DeviantArt, which
22 precludes any quasi-contract claim. And in any case, unjust enrichment is not a “catch-all” claim
23 for plaintiffs to throw at any perceived injustice. It is a long-established doctrine with particular
24 elements that have no application to the facts alleged in the FAC.

25 Plaintiffs have now had two opportunities to advance a coherent legal theory for why
26 DeviantArt should be a defendant in this case, and have twice failed to do so. This Court should
27 dismiss the claims against DeviantArt with prejudice and dismiss DeviantArt from this case.

28

1 II. BACKGROUND

2 Plaintiffs Sarah Andersen, Kelly McKernan, and Karla Ortiz commenced this putative class
3 action on January 13, 2023 against Stability AI Ltd., Stability AI, Inc. (together, “Stability AI”),
4 Midjourney, Inc. (“Midjourney”), and DeviantArt, Inc. (together, “Defendants”). *See* Dkt. 1. The
5 initial pleadings focused on Stability AI’s alleged use of Plaintiffs’ “copyrighted images without
6 permission to create Stable Diffusion,” a series of machine learning models allegedly capable of
7 generating images “in the style” of individual artists. *Id.* ¶¶ 2–5. Plaintiffs included Midjourney
8 and DeviantArt as defendants in the suit based on allegations that those entities created image
9 generation services that “rel[y] on Stable Diffusion to produce images.” *Id.* ¶¶ 34–35. The original
10 complaint asserted seven causes of action against all Defendants: (1) direct copyright infringement,
11 (2) vicarious copyright infringement, (3) violation of Section 1202 of the DMCA, (4) violation of
12 the statutory right of publicity, (5) violation of the common law right of publicity, (6) violation of
13 California’s unfair competition law (UCL), and (7) declaratory relief. *Id.* ¶¶ 153–239. Plaintiffs
14 also alleged a breach of contract claim against DeviantArt alone. *Id.* ¶¶ 227–36.

15 On October 30, 2023, the Court granted Defendants’ motions to dismiss as to all claims
16 except the direct copyright infringement claim against Stability AI. *See generally* Order. The
17 Court then granted Plaintiffs leave to amend to “cure the deficiencies identified” in the Court’s
18 Order. *Id.* at 28. On November 29, 2023, Plaintiffs filed a 96-page amended complaint with
19 seventeen separate claims for relief, which went far beyond attempting to “cure the deficiencies
20 identified” by the Court. *See* FAC ¶¶ 214–439. Instead, Plaintiffs added seven new named class
21 representatives, *id.* ¶¶ 17–23, joined a number of new causes of action, *see, e.g., id.* at Count 17
22 (alleging “unjust enrichment” against DeviantArt), and named a new defendant against whom
23 Plaintiffs alleged four separate claims, *id.* ¶¶ 342–79 (claims against Runway AI, Inc.).

24 Only three of the FAC’s claims implicate DeviantArt. First, the Plaintiffs who registered
25 copyrights in works allegedly included in one of the datasets used to train the models at issue—
26 Sarah Andersen, along with newly-added Plaintiffs Zhang, Brom, Manchess, Kaye, and Ellis, *id.*
27 ¶ 213 (defining “LAION-5B Registered Plaintiffs”)—reassert direct copyright infringement
28 claims targeted at DeviantArt’s AI image generation service called “DreamUp.” *Id.* ¶¶ 411–16

1 (Count 15). These Plaintiffs do not allege that DeviantArt created or trained the “diffusion” model
2 on which DreamUp allegedly relies, namely “Stable Diffusion version 1.4.” *Id.* ¶ 388. Instead,
3 they contend that, by creating an AI service “based on” that model, DeviantArt must have created
4 a “Statutory Copy” and a “Statutory Derivative Work” of each of the billions of images used to
5 train it. *Id.* ¶¶ 388, 412–13. To be clear, Plaintiffs’ only surviving copyright claim against
6 DeviantArt is one for *direct* infringement, *id.* ¶¶ 411–16; they have abandoned any claim under
7 the doctrine of secondary infringement, including their prior “vicarious” liability theory.

8 Second, the Plaintiffs who are allegedly DeviantArt users—McKernan, along with newly-
9 added plaintiffs Southworth, Zhang, and Rutkowski, *id.* ¶ 381 (defining “DeviantArt Plaintiffs”)—
10 reallege a claim for breach of contract based on Section 16 of the DeviantArt Terms of Service.
11 FAC ¶¶ 417–31. Ignoring the Court’s prior holding that the operative provision “does not clearly
12 cover the conduct that plaintiffs accuse DeviantArt of in this suit,” Order at 26, Plaintiffs again
13 insist that “by releasing DreamUp,” DeviantArt “breached” the same provision, FAC ¶ 422(a).
14 Plaintiffs also add a new claim asserting that “DeviantArt breached the implied covenant of good
15 faith and fair dealing” by releasing an AI image generation service that allowed users to create
16 “AI-generated images” and “compet[e] with the DeviantArt Plaintiffs.” *Id.* ¶ 422(b).

17 Third, without seeking the Court’s leave, the DeviantArt Plaintiffs add a new claim for
18 unjust enrichment. FAC at Count 17. In support, they nod to violations of unspecified “legal
19 rights.” FAC ¶¶ 433–39. Plaintiffs do not explain the FAC’s reference to California’s unfair
20 competition statute, *see* FAC at 92 (referring to “Cal. Bus. & Prof. Code § 17200”), nor do they
21 plead the elements of a UCL claim, *see Martinez v. Wells Fargo Bank, N.A.*, No. 13-cv-05597,
22 2014 WL 1572689, at *1 n.3 (N.D. Cal. Apr. 17, 2014) (ignoring “reference[.]” to UCL because
23 the complaint “does not actually assert a cause of action under that statute”).

24 The FAC does not reallege claims against DeviantArt for vicarious copyright infringement,
25 *see* Dkt. 1 ¶¶ 169–77, violation of Section 1202 of the DMCA, *see id.* ¶¶ 178–200, violation of the
26 statutory or common law rights of publicity, *see id.* ¶¶ 201–22, unfair competition, *see id.* ¶¶ 223–
27 26, or declaratory relief, *see id.* ¶¶ 237–39. Those claims are therefore waived. *See, e.g., Lovesy*
28 *v. Armed Forces Ben. Ass’n*, No. 07-cv-02745, 2009 WL 1574575, at *6 (N.D. Cal. June 3, 2009)

1 (“It has long been the rule in the Ninth Circuit that a plaintiff waives all causes of action alleged
2 in the original complaint which are not alleged in the amended complaint.” (cleaned up)).

3 **III. LEGAL STANDARD**

4 “[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to
5 relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up).
6 Conclusory allegations, unreasonable inferences, and unwarranted factual deductions do not
7 suffice. *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Where a court grants
8 leave to amend for a specific purpose—e.g., to “cure the deficiencies identified” in the court’s
9 order, *see* Order at 28—a plaintiff may not add claims or parties absent leave of court. *DeLeon v.*
10 *Wells Fargo Bank, N.A.*, No. 10-cv-01390, 2010 WL 4285006, at *7 (N.D. Cal. Oct. 22, 2010).
11 Reassertion of the “same theor[ies]” and allegations the court previously rejected will result in
12 dismissal with prejudice. *Welgus v. TriNet Grp., Inc.*, No. 15-cv-03625, 2017 WL 6466264, at *6
13 (N.D. Cal. Dec. 18, 2017), *aff’d*, 765 Fed. App’x 239 (9th Cir. 2019); *see also Pac. Recovery Sols.*
14 *v. United Behav. Health*, 508 F. Supp. 3d 606, 622 (N.D. Cal. 2020). And “where the plaintiff has
15 previously been granted leave to amend and has subsequently failed to add the requisite
16 particularity to its claims, the district court’s discretion to deny [further] leave to amend is
17 particularly broad.” *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009).

18 **IV. ARGUMENT**

19 The FAC does not state a claim for relief against DeviantArt. Plaintiffs’ realleged direct
20 copyright claim is foreclosed by this Court’s Order, *infra* Section IV(A)(1), and in any case does
21 not allege that DeviantArt’s DreamUp service or the model underlying it is a “copy” or a
22 “derivative work,” *infra* Section IV(A)(2). Even if it did, DeviantArt’s creation of that “copy” or
23 “derivative work” would be a protected fair use. *Infra* Section IV(A)(3). Plaintiffs’ breach of
24 contract claim is a carbon copy of the breach of contract claim this Court already dismissed, *infra*
25 Section IV(B)(1), and their new claim for breach of the implied covenant of good faith and fair
26 dealing is beyond the scope of the amendment permitted by the Court and fails separately on the
27 merits, *infra* Section IV(B)(2). Plaintiffs’ new claim for unjust enrichment is similarly beyond the
28 scope of the amendment permitted by the Court, preempted by the Copyright Act, and facially

1 insufficient as a matter of law. *Infra* Section IV(C). Finally, the Court should strike the new
 2 named Plaintiffs from the FAC as beyond the scope of permitted amendment. *Infra* Section IV(D).

3 **A. Plaintiffs Fail To Allege A Copyright Claim Against DeviantArt**

4 **1. This Court’s October 30 Order Resolves The Copyright Claim**

5 None of the facts alleged in Plaintiffs’ first complaint suggested that DeviantArt itself had
 6 unlawfully copied or otherwise used their registered works, whether to train an AI model or
 7 otherwise. Order at 7. Rather, the factual basis underlying the copyright claim against DeviantArt
 8 was Plaintiffs’ allegation that DeviantArt “download[ed]” Stable Diffusion and “incorporate[ed]”
 9 it into [its] website via the DreamUp app.” Dkt. 1 ¶¶ 52, 123; *see also id.* ¶ 64 (“DreamUp relies
 10 on Stability’s Stable Diffusion software as its underlying software engine.”). The Court rejected
 11 that expansive theory in its Order, questioning how DeviantArt could possibly be “liable for direct
 12 copyright infringement” when it “simply provides its customers access to Stable Diffusion as a
 13 library.” Order at 10.

14 The copyright claim against DeviantArt alleged in the FAC relies on the same core
 15 allegations. Plaintiffs allege no new facts that, consistent with the Court’s directive, “plausibly
 16 show” how DeviantArt’s implementation of Stable Diffusion could support a claim for copyright
 17 infringement. Order at 10.¹ Plaintiffs *still* do not allege that DeviantArt directly copied or
 18 otherwise used their works, to train Stable Diffusion or otherwise. Instead, Plaintiffs continue to
 19 claim that DeviantArt is a copyright infringer because it implemented an AI model that it had no
 20 role in creating, developing, or training. *See, e.g.*, FAC ¶ 387 (DeviantArt “incorporates” and
 21 “relies on Stable Diffusion to produce images”).

22 To be sure, Plaintiffs have now reframed the legal theory for their claim against
 23 DeviantArt—we address the futility of that reframing below, *see infra* Section IV(A)(2). But while
 24 Plaintiffs have adorned the FAC with new ancillary factual allegations and citations, the
 25 overwhelming majority of those newly-asserted facts have nothing to do with DeviantArt.

26 _____
 27 ¹ The Court suggested that Plaintiffs might bolster their claims by alleging that DreamUp “allows
 28 users to create new works by expressly referencing Anders[e]n’s works by name,” which might
 suggest that “Anders[e]n’s protected content remains in Stable Diffusion.” Order at 10. The FAC
 contains no allegations regarding the use of Plaintiffs’ names in DreamUp. *See* FAC ¶¶ 380–431.

1 Plaintiffs, for example, have supplemented their allegations regarding the sourcing and creation of
 2 the “LAION” datasets—which DeviantArt is not alleged to have ever used, and which DeviantArt
 3 is not alleged to have helped create. *See* FAC ¶¶ 57–80. Plaintiffs also amended their description
 4 of the technical process behind the creation and training of diffusion models—which DeviantArt
 5 is not alleged to have implemented. *See* FAC ¶¶ 82–150. And Plaintiffs added a number of
 6 examples of outputs generated by diffusion models, but none of the outputs is alleged to have been
 7 created by DeviantArt or DreamUp. FAC ¶¶ 151–200 (referencing example outputs from Stable
 8 Diffusion XL 1.0, Midjourney, and Runway’s “AI Magic Tools” service).

9 Plaintiffs also now distinguish between the different models released under the “Stable
 10 Diffusion” name. FAC ¶ 388 (addressing “Stable Diffusion [] 1.4”); ¶ 342 (addressing “Stable
 11 Diffusion 1.5”); ¶ 139 (addressing “Stable Diffusion XL 1.0”). They allege that the “model inside
 12 DreamUp”—which they call the “DreamUp–CompVis Model”—is “based on” a model called
 13 “Stable Diffusion version 1.4.” FAC ¶ 388. But Plaintiffs still do not allege that DeviantArt played
 14 any role in creating or training that model. Instead, they allege it was independently created by a
 15 group of researchers called “CompVis” with no alleged connection to DeviantArt. *Id.* ¶¶ 388–92.
 16 And they admit that “DeviantArt did not ‘add’ images to the training sets” or “do any fine-tuning
 17 of the weights included in the Stable Diffusion model.” *Id.* ¶¶ 396–97; *see also id.* ¶ 395.

18 As such, the factual basis of Plaintiffs’ claim of direct copyright infringement against
 19 DeviantArt remains unchanged: that DeviantArt violated the Copyright Act by creating an app
 20 “based on Stable Diffusion” that “relies on [that model] to produce images.” *Id.* ¶¶ 387–88. The
 21 Court rightly rejected that theory in its October 30 Order and may thus dismiss Plaintiffs’ claim
 22 with prejudice for the simple reason that it has already decided the issue. *Welgus*, 2017 WL
 23 6466264, at *6 (dismissing with prejudice because plaintiff “trie[d] to reargue the same theory
 24 rejected in the Court’s Prior Order”); *see also Pac. Recovery*, 508 F. Supp. 3d at 622 (“In any
 25 amended complaint, plaintiffs may not . . . assert theories that the Court has rejected.”).

26 Any other result would have absurd consequences.² The models referenced in the FAC

27 _____
 28 ² Of the numerous pending lawsuits challenging generative artificial intelligence services, this is
 the only one to suggest that a defendant might incur direct copyright liability merely by

1 have been downloaded and implemented by tens of millions of programmers, businesses, and
 2 researchers.³ So too for other popular “open source” AI models, which have already become the
 3 “foundation” for “[t]ens of thousands of startups,” “[m]ajor hardware platforms,” and development
 4 projects.⁴ Under Plaintiffs’ theory, every single one of these businesses is liable for copyright
 5 infringement as to each and every one of the billions of individual works used to train the models—
 6 even if those businesses are completely unaware of how those models were created or what works
 7 were used to train them; and irrespective of whether anyone ever uses the model to generate a
 8 single infringing output. *See* FAC ¶ 234 (“[A]nyone who in fact downloads, uses, or deploys
 9 Stable Diffusion 2.0 or Stable Diffusion XL 1.0 is engaged in infringing activity.”). That would
 10 leave millions of otherwise innocent parties not only vulnerable to copyright infringement claims,
 11 but to class action lawsuits demanding many billions of dollars in statutory damages under Section
 12 504 of the Copyright Act. *See* 17 U.S.C. § 504(c) (requiring for statutory damages “not less than
 13 \$200” with respect to each work infringed, even if the infringer “was not aware and had no reason
 14 to believe that his or her acts constituted an infringement”). The aggregate liability could easily
 15 exceed the gross domestic product of the United States.

16 2. The FAC’s Allegations Do Not Plead A Copyright Violation

17 Even if the Court were to disregard its prior Order, it should nonetheless dismiss Plaintiffs’
 18

19 implementing a third-party model it did not develop or train. *See* Operative Complaints in *Getty*
 20 *Images (US), Inc. v. Stability AI, Inc.*, No. 23-cv-00135, Dkt. 13 (D. Del., filed Mar. 29, 2023);
 21 *Tremblay v. OpenAI, Inc.*, No. 23-cv-03223, Dkt. 1 (N.D. Cal., filed June 28, 2023); *Silverman v.*
 22 *OpenAI, Inc.*, No. 23-cv-03416, Dkt. 1 (N.D. Cal., filed July 7, 2023); *J.L. v. Alphabet Inc.*, No.
 23 23-cv-03440, Dkt. 1 (N.D. Cal., filed July 11, 2023); *Doe 1 v. Github, Inc.*, No. 22-cv-06823, Dkt.
 24 200 (N.D. Cal., filed Jan. 25, 2024); *Chabon v. OpenAI, Inc.*, No. 23-cv-04625, Dkt. 1 (N.D. Cal.,
 25 filed Sept. 8, 2023); *Chabon v. Meta Platforms, Inc.*, No. 23-cv-04663, Dkt. 16 (N.D. Cal., filed
 26 Oct. 5, 2023); *Huckabee v. Meta Platforms, Inc.*, No. 23-cv-09152, Dkt. 74 (S.D.N.Y., filed Jan.
 27 24, 2024); *Concord Music Group, Inc. v. Anthropic PBC*, No. 23-cv-01092, Dkt. 1 (M.D. Tenn.,
 28 filed Oct. 18, 2023); *Authors Guild v. OpenAI, Inc.*, No. 23-cv-08292, Dkt. 69 (S.D.N.Y., filed
 Feb. 5, 2024); *Kadrey v. Meta Platforms, Inc.*, No. 23-cv-03417, Dkt. 69 (N.D. Cal., filed Dec. 22,
 2023); *Alter v. OpenAI, Inc.*, No. 23-cv-10211, Dkt. 47 (S.D.N.Y., filed Feb. 6, 2024); *New York*
Times v. Microsoft Corp., et al., No. 23-cv-11195, Dkt. 1 (S.D.N.Y., filed Dec. 27, 2023).

³ Stable Diffusion XL 1.0 Model Card, Hugging Face, <https://huggingface.co/stabilityai/stable-diffusion-xl-base-1.0> (over 9 million downloads in November 2023 alone).

⁴ *See, e.g.*, Joe Spisak & Sergey Edunov, The Llama Ecosystem: Past, Present, and Future, Meta Blog (Sept. 27, 2023), <https://ai.meta.com/blog/llama-2-updates-connect-2023/> (reporting “more than 30 million downloads of Llama-based models through Hugging Face and over 10 million of these in the last 30 days alone”).

1 direct copyright infringement claim against DeviantArt because that claim, as newly framed, is not
 2 supported by the facts alleged. As described above, Plaintiffs assert no new facts concerning
 3 DreamUp or DeviantArt’s relationship to DreamUp’s development that cure the legal deficiencies
 4 identified in the Court’s Order. Instead, Plaintiffs have changed their *theory* as to *why* the
 5 underlying facts support a copyright claim against DeviantArt. But that new theory—that the
 6 DreamUp service is itself both a “copy” and a “derivative work”—fails because Plaintiffs do not
 7 and cannot allege that DreamUp is capable of reproducing protected expression from their works.

8 a. Plaintiffs Reframed The Legal Basis of This Claim

9 Plaintiffs’ initial copyright claim turned on the “assertions—made throughout the
 10 Complaint—that ‘embedded and stored copies of the Training Images’ are contained within Stable
 11 Diffusion.” Order at 8 (citing Dkt. 1 ¶¶ 3, 19, 58). Plaintiffs, in other words, claimed that Stable
 12 Diffusion is little more than a “directory” of “JPEG image files,” Dkt. 1 ¶ 75(c), and that because
 13 DreamUp “relies on [] Stable Diffusion [] as its underlying software engine,” *id.* ¶ 64, DreamUp
 14 must also “contain compressed copies of the[ir] copyrighted works.” *Id.* ¶ 18; *see also id.* ¶ 166
 15 (DreamUp “contain[s] copies of every image in the set of Training Images”).

16 On that basis, Plaintiffs asserted a number of somewhat muddled theories of copyright
 17 infringement (albeit, for the first time, in their opposition papers). Order at 8. Plaintiffs, for
 18 example, argued that by making its DreamUp service available on the Internet, DeviantArt
 19 “distribut[ed] Stable Diffusion” and thereby violated Plaintiffs’ rights under Section 106(3) of the
 20 Act. Dkt. 65 at 12; 17 U.S.C. § 106(3) (securing the exclusive right to “distribute copies . . .to the
 21 public by sale or other transfer of ownership”).⁵ The Court rejected each of these arguments,
 22 acknowledging doubt about the plausibility of Plaintiffs’ “theory with respect to compressed
 23 copies,” and instructing them to “clarify” it with plausible facts in support. Order at 8–9 (doubt
 24 that “five billion images could [] be compressed into an active program”).

25
 26 ⁵ Plaintiffs also claimed that each of DreamUp’s outputs “necessarily” constituted a derivative
 27 work that violated Plaintiffs’ exclusive right under Section 106(2) of the Copyright Act. *See* 17
 28 U.S.C. § 106(2); Dkt. 1 ¶ 90; Dkt. 65 at 14. In its October 30 Order, the Court rejected that theory,
 holding that “it is simply not plausible” that “*all* Output images are derivative images.” Order at
 12. Plaintiffs do not reallege this “output” theory against DeviantArt in the FAC, *see generally*
 FAC ¶¶ 380–439, and have therefore waived it, *Lovesy*, 2009 WL 1574575, at *6.

1 Rather than doing so, Plaintiffs abandoned the “compressed copies” theory in the FAC.⁶
 2 The FAC includes extensive discussion about the concept of “compression” generally. *See, e.g.*,
 3 FAC ¶ 118 (explaining that “a machine-learning model[] [] treats its data as sitting on a continuous
 4 geometric surface, called a *manifold*,” and that by creating “representations of the training data on
 5 the manifold,” the models “essentially . . . accomplish compression”). But the initial complaint’s
 6 repeated assertions that each of the Defendants’ services “contain[s] compressed copies of the
 7 copyrighted works they were trained on,” *see* Dkt. 1 ¶ 18; *see also id.* ¶¶ 3, 58–59, 164, 166, have
 8 now been removed from the FAC—and, most notably, from the paragraphs laying out the basis of
 9 the operative copyright claim, *see* FAC ¶¶ 412–16 (Count 15).

10 Now, Plaintiffs assert that the models violate the Copyright Act solely because they are
 11 “capable of reproducing protected expression from each of the [works]” used to train them. *See*
 12 FAC ¶ 223 (emphasis added); *see also id.* ¶ 288 (same); ¶ 350 (same); ¶ 393 (same). On that basis,
 13 Plaintiffs assert two direct copyright claims against DeviantArt. FAC ¶¶ 412–16 (alleging direct
 14 copyright infringement). First, they claim that the model underlying the DreamUp service
 15 qualifies as a “cop[y]” of their images because the Copyright Act defines that term to include any
 16 “material object . . . from which [a] work can be perceived, reproduced, or otherwise
 17 communicated.” FAC ¶ 209; *see also* 17 U.S.C. § 101. Second, Plaintiffs claim that because the
 18 DreamUp service can reproduce “protected expression” from their images, it must “represent[] a
 19 transformation” of those images “into an alternative form,” *see* FAC ¶¶ 393–94, which supposedly
 20 qualifies DreamUp as a “derivative work,” *see id.* ¶ 413; *see also* 17 U.S.C. § 101 (defining
 21 “derivative work”). Neither of these theories states a claim for relief, as explained below.

22 **b. DreamUp Is Not A Copy**

23 To support their claim for violation of Section 106(1)’s reproduction right, Plaintiffs must
 24 allege facts to support the conclusion that the DreamUp service—or some element of it—is a
 25 “cop[y]” as defined by the Copyright Act. FAC ¶ 412; 17 U.S.C. § 106(1) (securing the exclusive
 26 right to “reproduce the copyrighted work in copies”). Plaintiffs, in other words, must *plausibly*
 27

28 ⁶ Plaintiffs also abandoned any attempt to claim that DeviantArt infringed their exclusive right to
 “distribute copies . . . of the copyrighted work to the public.” 17 U.S.C. § 106(3).

1 allege that DreamUp is a “material object . . . from which [Plaintiffs’ images] can be perceived,
2 reproduced, or otherwise communicated.” 17 U.S.C. § 101 (defining “copies”).

3 The FAC fails to do so on several counts. First, while Plaintiffs state that DreamUp is a
4 copy because it can output “potentially infringing works,” FAC ¶ 398, the FAC does not allege
5 that DreamUp has ever been used to create any images that look anything like their artworks. *Infra*
6 Section IV(A)(2)(b)(i). Second, Plaintiffs argue that DreamUp must be a copy because the model
7 on which it is allegedly “based” (Stable Diffusion version 1.4) is capable of reproducing their
8 works. But the sole basis of that contention is a study whose results suggest that Stable Diffusion
9 version 1.4 is decidedly *not* capable of doing so. *Infra* Section IV(A)(2)(b)(ii). Third, Plaintiffs
10 point to the fact that they were able to manipulate *other* diffusion models to create outputs that
11 mimic their works. But those models have nothing to do with DreamUp, and the outputs Plaintiffs
12 cite do not in any way suggest that these models are “copies.” *Infra* Section IV(A)(2)(b)(iii).

13 *i. Plaintiffs Do Not Allege that DreamUp Reproduces Images*

14 As noted above, Plaintiffs’ claim of direct copyright infringement against DeviantArt
15 hinges entirely on the assertion that DreamUp is “capable of reproducing protected expression”
16 from Plaintiffs’ works. FAC ¶ 393. But the FAC does not allege that DreamUp has *ever* displayed,
17 reproduced, or otherwise communicated those works or anything that looks like them. *Id.* ¶¶ 380–
18 410. Plaintiffs do not include any DreamUp outputs in the FAC or its exhibits.

19 Plaintiffs do state in their FAC that “DreamUp can be used . . . to create potentially
20 infringing works based on artists’ underlying work.” FAC ¶ 398. But such “conclusory” assertions
21 or “unwarranted deductions of fact” do not state a claim for relief. *Gilead*, 536 F.3d at 1055. They
22 are particularly insufficient in light of this Court’s instruction that Plaintiffs provide “specific
23 plausible facts” in support of their claim, *see* Order at 7; *see also id.* at 10 (requiring “more facts
24 that plausibly show how DeviantArt is liable for direct copyright infringement”), and Plaintiffs’
25 prior admission that there are no visually apparent similarities between their works and any
26 DreamUp outputs, Dkt. 1 ¶¶ 93, 192. Plaintiffs make no attempt to explain why they were unable
27 to use DreamUp—a publicly available service, FAC ¶ 382—to investigate whether it can “create
28

1 potentially infringing works,” as they allegedly attempted to do for the other services at issue here.⁷

2 *ii. Plaintiffs Do Not Allege Stable Diffusion 1.4 Reproduces Images*

3 Instead, Plaintiffs ask the Court to assume that DreamUp is a “copy” based on their
4 assertion that the model on which it is “based”—which they allege is “Stable Diffusion version
5 1.4”—is “capable of reproducing protected expression from each of [their works].” FAC ¶ 393;
6 *see also* ¶¶ 388, 396–97. But that allegation is also entirely conclusory and insufficient to state a
7 claim. Notably, there are no references to images generated by Stable Diffusion version 1.4 in
8 Plaintiffs’ 96-page FAC or any of its fourteen exhibits. FAC ¶ 176 (Exhibits D–F show outputs
9 from Stable Diffusion XL 1.0, Runway’s “AI Magic Tools” service, and Midjourney); *see also id.*
10 ¶ 191 (same as to Exhibits G–I). The only relevant allegation is a citation to a paper by a
11 “prominent machine-learning researcher” reporting on a test performed on the Stable Diffusion
12 version 1.4 model. *Id.* ¶ 393(a); *see* Nicholas Carlini, et al., Extracting Training Data from
13 Diffusion Models, <https://arxiv.org/pdf/2301.13188.pdf> (Jan. 30, 2023) (the “Carlini Study”).⁸

14 But the Carlini Study does not in any way suggest that Stable Diffusion version 1.4 is
15 “capable” of reproducing Plaintiffs’ works. That paper discussed a “data extraction attack”
16 conducted by nine computer scientists whose goal was to extract “near-identical replicas of
17 training images” from Stable Diffusion version 1.4. Carlini Study at 1. The attack focused on
18 “duplicated training examples”—*i.e.*, identical images that appear multiple times in the training
19 dataset—“because these are orders of magnitude more likely to be memorized than non-duplicated
20 examples.” *Id.* at 4; *see also id.* at 6 (Figure 5) (showing that many images were “duplicated at
21 least [] 100 times” in the dataset). After choosing “the “350,000 most-duplicated [images],” the
22 researchers chose “prompts” designed to coax replicas of each image from the model, and
23 “generate[d] 500 candidate images for each of these prompts.” *Id.* at 5. Out of the “175 million

24 _____
25 ⁷ The only specific allegation as to DreamUp outputs is a citation to an FAQ page suggesting that
26 DreamUp can create outputs “inspired by the style of [a] particular artist.” FAC ¶ 398. But “art
27 styles” are not protected by copyright. *See* Dkt. 50 at 20–21. So the allegation that DreamUp can
28 mimic style is not sufficient to allege that DreamUp is a “material object . . . from which
[Plaintiffs’ images] can be perceived, reproduced, or otherwise communicated.” 17 U.S.C. § 101.

⁸ Plaintiffs rely extensively on the Carlini Study and therefore incorporate it by reference into the
FAC. *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (document is “incorporated by reference
into a complaint if the plaintiff refers extensively to [it]”); *see* FAC ¶¶ 90, 130–37, 145.

1 generated images,” only 109 were “near-copies of training examples”—representing a roughly
 2 one-in-a-million hit rate. *Id.* at 5–6.⁹ Moreover, the researchers reported that “[t]he majority” of
 3 these extracted images are “photographs [of] a recognizable person.” *Id.* at 6; *see also* FAC ¶ 133
 4 (Carlini’s duplicated images include photographs of Daft Punk, Robin Williams in *Mrs. Doubtfire*,
 5 Aretha Franklin, the cast of *Its Always Sunny in Philadelphia*, George R.R. Martin, and Prince).

6 For that reason, the Carlini Study does not in any way support the proposition that Stable
 7 Diffusion version 1.4 is “capable of reproducing protected expression from” Plaintiffs’ registered
 8 works. FAC ¶ 393. Plaintiffs do not allege that any of their works appeared multiple times in the
 9 training dataset, which means that their works are “orders of magnitude [less] likely to be
 10 memorized.” Carlini Study at 4.¹⁰ In fact, Plaintiffs’ allegations suggest that each of their works
 11 appears (at best) once in the dataset. FAC ¶ 77 (Plaintiffs’ works included because they “stored
 12 [their] images on DeviantArt”). And Plaintiffs’ registered works are drawings or stylized
 13 illustrations, which are far afield from the category of works Carlini found most likely to be
 14 extracted from the model—*i.e.*, photographs of celebrities. *See* Carlini Study at 6; FAC Ex. A.

15 In any case, the Carlini Study demonstrates that even a team of expert researchers, focusing
 16 on highly duplicated training images, were unable to coax more than 109 duplicates out of the
 17 model, even after generating 175 million images. Carlini Study at 5–6. Contrary to Plaintiffs’
 18 suggestion, the Carlini Study demonstrates that Stable Diffusion version 1.4 is decidedly *not*
 19 “capable of reproducing” Plaintiffs’ particular works. That, in turn, suggests that Stable Diffusion
 20 version 1.4 and the models and services allegedly “based on” it are not “copies” within the meaning
 21 of the Copyright Act. 17 U.S.C. § 101.

22 Regardless, the allegation that Stable Diffusion version 1.4 is capable of reproducing
 23 Plaintiffs’ images does not establish that DreamUp is capable of the same. Notably, Plaintiffs do

24 ⁹ This confirms Plaintiffs’ original allegation that “none of the Stable Diffusion output images
 25 provided in response to a particular Text Prompt is likely to be a close match for any specific image
 26 in the training data.” Dkt. 1 ¶ 93. To the extent that allegations in Plaintiffs’ FAC contradict these
 27 concessions, those allegations are inoperative. *Airs Aromatics, LLV v. Victoria’s Secret Stores*
 28 *Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014) (“A party cannot amend pleadings to directly
 contradict an earlier assertion made in the same proceeding.” (cleaned up)).

¹⁰ *See Gulaid v. CH2M Hill, Inc.*, No. 15-cv-04824, 2016 WL 5673144, at *2 (N.D. Cal. Oct. 3,
 2016) (“Where a document is incorporated by reference . . . the court [] assumes the truth of its
 contents for the purposes of ruling on a motion to dismiss.” (cleaned up)).

1 not allege that DreamUp and Stable Diffusion version 1.4 are identical in their capabilities and
 2 features. Instead, they allege only that “DreamUp must be *based on* Stable Diffusion version 1.4,”
 3 FAC ¶ 388 (emphasis added), and that DeviantArt altered the model with “additional guidance at
 4 generation time” through techniques “akin to prompt tuning,” *id.* ¶ 397. That leaves the FAC
 5 devoid of allegations as to whether DreamUp can display, reproduce, or otherwise communicate
 6 any protected material from Plaintiffs’ registered works—which, in turn, means that the FAC does
 7 not allege that DreamUp is a “copy” of Plaintiffs’ works. *Cf. Wilson v. Frito-Lay North Am., Inc.*,
 8 961 F. Supp. 2d 1134, 1142–43 (N.D. Cal. 2013) (“The Court will not assume that each of these
 9 subtly different Products is like all the others. To meet the plausibility standard of Rule 8, Plaintiffs
 10 have to say more . . . otherwise their pleadings amount to unacceptably bare legal conclusions.”)

11 *iii. Plaintiffs’ Allegations As To Other Models Do Not Suffice*

12 Plaintiffs also attempt to establish that DreamUp is “capable of reproducing” their images
 13 by pointing to two exhibits that (they claim) suggest that a *different* model—“Stable Diffusion
 14 1.5”—is “capable of emitting stored copies of protected expression.” FAC ¶ 393(b) (citing FAC
 15 Exs. E and H). But these allegations do not support their claim for two independent reasons.

16 First, Plaintiffs do not allege that Stable Diffusion 1.5 has anything to do with DreamUp,
 17 which (they allege) is “based on” an entirely different model. *Compare id.* ¶ 388 (model “inside”
 18 DreamUp was “trained by CompVis and released on August 22, 2022”), *with id.* ¶¶ 342, 352
 19 (Stable Diffusion 1.5 “trained” by “Runway” and released in October 2022). In fact, Plaintiffs
 20 elsewhere suggest that Stable Diffusion 1.5 is unique in its ability to “mimic artists,” implying that
 21 it is different from other versions of Stable Diffusion. *Id.* ¶ 343 (alleging that version 1.5 “is still
 22 sought out by many users” for this reason). That Plaintiffs may have manipulated Stable Diffusion
 23 1.5 to generate outputs that are similar to their registered works does not mean that Plaintiffs could
 24 manipulate DreamUp to do the same. *Cf. Wilson*, 961 F. Supp. 2d at 1143.

25 Second, the cited exhibits (Exhibits E and H) do not actually demonstrate that the Stable
 26 Diffusion 1.5 model can “reproduce[] or otherwise communicate” protected material from its
 27 training data. 17 U.S.C. § 101. The first exhibit (Exhibit E) consists entirely of outputs from a
 28 service called “AI Magic Tools” provided by Defendant Runway AI, Inc. (“Runway”), which

1 Plaintiffs allege relies on “Stable Diffusion 1.5.” FAC ¶ 163.¹¹ Plaintiffs generated these outputs
 2 by combining simple prompts (“chef” and “teacher”) with Plaintiffs’ names. *Id.* ¶ 167–68. The
 3 resulting images allegedly reflect those Plaintiffs’ artistic styles, *e.g.*, Plaintiff Manchess’s
 4 “calligraphic brushwork.” *Id.* ¶ 167; *see also id.* Ex. E. But these stylistic attributes are not
 5 “protected expression,” *contra* FAC ¶ 393(b), because copyright does not protect art styles, *see*
 6 Dkt. 50 at 20–21; Order at 20 n.15 (suggesting that claims based on “artistic ‘styles’” are
 7 impermissible). Tellingly, Plaintiffs do not allege that these output images are “substantially
 8 similar” to their registered works. FAC ¶¶ 167–68; Order at 12 (“substantial similarity” required).
 9 That Stable Diffusion 1.5 may be able to create images that are *stylistically* similar to Plaintiffs’
 10 registered works does not establish that the model is a “material object . . . from which [Plaintiffs’
 11 works] can be perceived, reproduced, or otherwise communicated.” 17 U.S.C. § 101.

12 The second exhibit (Exhibit H) contains outputs from Runway’s “Image Variation”
 13 service. FAC ¶ 185. Plaintiffs created these images by uploading their own registered images into
 14 the “Image Variation” service as “image prompts.” *Id.* ¶ 186. Each page of Exhibit H shows (in
 15 the top left corner) the image that Plaintiffs uploaded into the “Image Variation” service, and (in
 16 the remaining places) the resulting outputs. *Id.* ¶ 187; *see also id.* Ex. H. Unsurprisingly, the
 17 output images are “[v]ariation[s]” of the input images. *Id.* ¶¶ 185, 187. But the only plausible
 18 inference to be drawn from Exhibit H is that Runway’s “Image Variation” feature does exactly as
 19 its name suggests: it mimics the image that the user feeds into the model. Plaintiffs’ assertion that
 20 Exhibit H demonstrates that the underlying model *already* had “stored copies” of the images
 21 simply does not follow from the facts they have pleaded. *Iqbal*, 556 U.S. at 679 (courts should
 22 “draw on . . . common sense” when evaluating the sufficiency of complaints).

23 Put differently, the fact that Plaintiffs were able to generate “Image Variation[s]” from an
 24 “Image Variation” service does not prove that the underlying model is a “copy” of those images—
 25 any more than a photocopier’s ability to duplicate a photograph proves that the photocopier itself
 26 is a “copy” of that photograph. Instead, even assuming the images in Exhibit H are substantially
 27

28 ¹¹ Plaintiffs allege that “AI Magic Tools” “uses Stable Diffusion 1.5” on “information and belief,”
 based on the fact that “Runway trained that version of Stable Diffusion.” FAC ¶ 163.

1 similar to Plaintiffs’ works, Plaintiffs’ creation of those images does not mean that the parties who
 2 implement the models Plaintiffs used are somehow directly liable for copyright infringement.
 3 *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131–32 (2d Cir. 2008) (provider
 4 of a “system[] which automatically obeys commands” cannot be held directly liable). If anything,
 5 it suggests that *Plaintiffs* just “reproduce[d]” “copies” of their own works. 17 U.S.C. § 106(1);
 6 *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017) (direct infringement attaches
 7 only to party who is the “proximate caus[e]” of the challenged work’s creation).

8 c. DreamUp Is Not A Derivative Work

9 Plaintiffs have similarly failed to allege that DreamUp is an “infringing Statutory
 10 Derivative Work.” FAC ¶¶ 388, 413. The Copyright Act defines a “derivative work” as a work
 11 that “recast[s], transform[s], or adapt[s]” an original, “such as a translation, musical arrangement,
 12 dramatization, fictionalization, [etc.]” 17 U.S.C. § 101. The statute’s examples delineate the
 13 term’s boundaries. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015) (Act
 14 “defines derivative works largely by example”); *Peter Mayer Publishers Inc. v. Shilovskaya*, 11 F.
 15 Supp. 3d 421, 426–27 (S.D.N.Y. 2014) (applying ejusdem generis to “derivative work” definition).

16 Consistent with those examples, courts have consistently held that to be a derivative work,
 17 a work must “re-present the protected aspects of the original work, *i.e.* its expressive content,
 18 converted into an altered form.” *Authors Guild*, 804 F.3d at 225; Order at 12 (same, quoting
 19 *Authors Guild*). A derivative work, in other words, must somehow “recast, transform, or adapt” a
 20 work’s “expressive content” into a new format that is nonetheless “substantially similar” to the
 21 original. As this Court explained in its October 30 Order, “copyright claims based on a derivative
 22 theory” cannot survive “absent ‘substantial similarity’ type allegations.” Order at 12.

23 Attempts to stretch the term “derivative work” beyond these limitations have uniformly
 24 failed. This Court, for example, rejected Plaintiffs’ assertion that the term “derivative work”
 25 includes any follow-on work based on an original, even if the follow-on work does not re-present
 26 “protected elements of the original.” *Id.* In *Authors Guild v. Google*, the Second Circuit held that
 27 a service that contained “digitized copies” of copyrighted books was not a “derivative work”
 28 because it “does not allow access in any substantial way to [the] book[s]’ expressive content.” 804

1 F.3d at 225–26. And, most recently, in *Kadrey, et al. v. Meta Platforms, Inc.*, Judge Chhabria
 2 dismissed as “nonsensical” the notion that AI models “are themselves infringing derivative works”
 3 of the works on which they were trained. No. 23-cv-03417, 2023 WL 8039640, at *1 (N.D. Cal.
 4 Nov. 20, 2023). As Judge Chhabria explained: “[t]here is no way to understand the LLaMA
 5 models themselves as a recasting or adaptation of any of the plaintiffs’ books.” *Id.*¹²

6 Plaintiffs’ suggestion that DeviantArt violated the Section 106(2) derivative-work right by
 7 launching DreamUp fails for precisely the same reason. Plaintiffs make no attempt to explain how
 8 DreamUp, a piece of software, could be “substantially similar” to their registered visual works.
 9 *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984) (“[T]o prove infringement [of the
 10 derivative-work right], one must show substantial similarity.”). Rather, the basis for Plaintiffs’
 11 Section 106(2) claim against DeviantArt is the conclusory assertion that the model on which
 12 DreamUp is allegedly “based”—*i.e.*, Stable Diffusion version 1.4—“represents a transformation
 13 of the LAION-5B Registered Works into an alternative form.” FAC ¶¶ 388, 394. But even taking
 14 that statement as true, it fails to state a claim for relief absent plausible allegations that the service
 15 “allow[s] access in [a] substantial way” to the original images’ “expressive content.” *Authors*
 16 *Guild*, 804 F.3d at 226. As explained above, the FAC contains no such allegations. *See supra* 10.

17 3. DeviantArt’s Creation of DreamUp Was Fair Use

18 Assuming that the Plaintiffs had alleged that DeviantArt’s conduct implicates Sections
 19 106(1) or 106(2) of the Copyright Act, DeviantArt’s creation of DreamUp would be protected by
 20 the doctrine of fair use. 17 U.S.C. § 106 (fair use is “not an infringement of copyright”); *see*
 21 *Greenspan v. Qazi*, No. 23-cv-03426, 2021 WL 2577526, at *10–12 (N.D. Cal. June 23, 2021)
 22 (granting motion to dismiss copyright claim on the basis of fair use).

23 The Ninth Circuit has twice held that the use of a copyrighted work to create a new and
 24 non-infringing product is a protected fair use. *See Sega Enterprises Ltd v. Accolade, Inc.*, 977 F.2d
 25 1510, 1522–23 (9th Cir. 1992) (copying video game code to create new, console-compatible games

26 ¹² The allegations supporting the derivative-work claim in *Kadrey* were materially identical to the
 27 allegations supporting the derivative-work claim in the FAC. *See* Compl. ¶ 41, *Kadrey, et al. v.*
 28 *Meta Platforms, Inc.*, No. 23-cv-03417 (N.D. Cal., filed July 7, 2023) (alleging that “language
 models are themselves infringing derivative works” because they “retain[]” “expressive
 information extracted from Plaintiffs’ [] Works”).

1 was copying for a “legitimate, essentially non-exploitive purpose,” *i.e.* to “produce a competing
2 product”); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 603–08 (9th Cir. 2000)
3 (same, even though defendant’s product would cause Sony to “lose console sales and profits”).
4 The Supreme Court has since endorsed those holdings, *see Google LLC v. Oracle Am., Inc.*, 141
5 S. Ct. 1183, 1198–99 (2021) (citing *Accolade* and *Connectix* with approval), along with the Second
6 Circuit’s holding that copying protected works to “derive information” and “patterns” for a new
7 service is fair use, as long as the service does not “reveal[] so much [of the work’s content] as to
8 threaten the author’s copyright interests.” *Authors Guild*, 804 F.3d at 209, 218; *Andy Warhol*
9 *Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1284 (2023) (citing *Authors Guild*
10 with approval); *see also* Dkt. 1 ¶ 21 (diffusion models “find patterns” in “training data”).

11 These cases reflect the principle that the Copyright Act “does not give a copyright holder
12 control over all uses of his copyrighted work.” *See Twentieth Century Music Corp. v. Aiken*, 422
13 U.S. 151, 154–55 (1975). Instead, it confers a “statutory monopoly” of “limited scope,” *id.* at 156,
14 which “assures authors the right to their original expression, but encourages others to build freely
15 upon the . . . information conveyed by a work,” *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499
16 U.S. 340, 349–50 (1991). The role of fair use is to “keep [this] copyright monopoly within its
17 lawful bounds,” *see Oracle*, 141 S. Ct. at 1198–99, including by “avoid[ing] rigid application[s]
18 of the copyright statute” that would “stifle the very creativity which that law is designed to foster,”
19 *Stewart v. Abend*, 495 U.S. 207, 236 (1990). For that reason, every court to consider the question
20 has held that copying a work for the purpose of “discover[ing]” or extracting unprotectable
21 information—like patterns and styles—is fair use because it does not “exploit[]” the expressive
22 subject matter covered by the owner’s copyright monopoly. *Accolade*, 977 F.2d at 1522–23.

23 The Copyright Act provides four non-exclusive factors to consider when evaluating fair
24 use. 17 U.S.C. § 107. The first factor—“purpose and character of the use”—favors fair use
25 because, to the extent DeviantArt used Plaintiffs’ images at all, that use was “for a legitimate,
26 essentially non-exploitative purpose,” *Accolade*, 977 F.2d at 1522–23, *i.e.*, to create an “entirely
27 new” platform, *Connectix*, 203 F.3d at 606, that does not in any way “display to the user any
28 [protected expression] from the underlying [training images],” *Authors Guild*, 804 F.3d at 217.

1 The second and third factors—the “nature of the copyrighted work” and the “amount and
2 substantiality of the portion used”—favor fair use for the same reason. *Id.* at 220–23 (factors favor
3 fair use because Google Books does not “replicat[e] protected expression”). The fourth factor—
4 the “effect of the use upon the potential market”—points in the same direction. Even if the Court
5 were to assume the existence of a market for licensing works as training data, *see Ringgold v.*
6 *Black Entertainment Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997) (market must be “traditional,
7 reasonable, or likely to be developed”), a finding that the use was transformative forecloses any
8 cognizable market harm, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d
9 Cir. 2006) (copyright “may not preempt exploitation of transformative markets”) (citation
10 omitted).¹³

11 Judge Bibas (sitting by designation on the District of Delaware) recently applied these
12 principles to a related case implicating similar technology. *See Thomson Reuters Enter. Centre*
13 *GmbH v. Ross Intel. Inc.*, No. 20-cv-613, 2023 WL 6210901 (D. Del. Sept. 23, 2023). That case
14 concerned a copyright claim brought by Thomson Reuters against Ross Intelligence—a “legal-
15 research industry upstart”—who used copyrighted headnotes from Thomson Reuters’ Westlaw
16 platform to train an AI system for legal research. *Id.* at *1. After discussing the Ninth Circuit
17 authorities cited above, Judge Bibas explained that the question whether Ross’s copying of those
18 headnotes was fair use depended on whether Ross’s AI system simply “replicate[s] and
19 reproduce[s] the creative drafting done by Westlaw’s attorney-editors.” *Id.* at *8. If the system
20 did not, and merely used those “intermediate cop[ies]” to create “a wholly new, albeit competing,
21 product,” the copying would be “transformative” and protected by fair use. *Id.* (copying would be
22 fair use if Ross’s “AI studied the headnotes . . . only to analyze language patterns, not to replicate
23 Westlaw’s expression”).

24 These authorities leave no room for doubt: Even if simply implementing an AI system
25 trained on copyrighted material implicates the rights protected by Section 106 of the Act, that
26 implementation is a fair use—particularly absent any allegation that that implementation

27 ¹³ That Plaintiffs may have to “compet[e]” with “AI-generated images,” *see* FAC ¶ 422(b), is
28 irrelevant here because “economic loss . . . as a result of [] competition” with non-infringing works
“does not compel a finding of no fair use,” *Connectix*, 203 F.3d at 607–08.

1 regurgitates protected expression from the training data. Plaintiffs here have not alleged that
 2 DreamUp “replicate[s] [or] reproduce[s]” their expressive content. *See supra* 10; *Thomson*
 3 *Reuters*, 2023 WL 6210901, at *8.¹⁴ That is because DreamUp’s sole purpose is to create *new*
 4 images—not to replicate expression from pre-existing ones. Indeed, Plaintiffs themselves
 5 admitted in their original pleadings that the relationship between any individual output and any
 6 individual training image is *unrecognizable*, even to the creators of the training images. *See, e.g.*,
 7 Dkt. 1 ¶ 192 (conceding that, without copyright management information, creators of training
 8 images cannot “know[] or learn[] that the Ouptut is based upon one or more of their works”).
 9 Accordingly, to the extent DeviantArt’s creation of DreamUp implicated Plaintiffs’ reproduction
 10 or derivative-work rights, that creation was a protected fair use because it was “essentially non-
 11 exploitive,” *Accolade*, 977 F.2d at 1522–23, and in no way “threaten[ed] the [Plaintiffs’] copyright
 12 interests” by republishing their protected expression, *Authors Guild*, 804 F.3d at 218.

13 **B. Plaintiffs Fail To Allege A Breach of Contract Claim**

14 Plaintiffs also fail to state a claim for breach of contract. First, Plaintiffs simply restate the
 15 breach claim based on Section 16 of DeviantArt’s Terms of Service (the “Terms”) that this Court
 16 already dismissed. Second, Plaintiffs’ new claim for breach of the implied covenant is beyond the
 17 scope of the Court’s permitted amendment, and in any case fails on the merits.

18 **1. Plaintiffs Restate The Contract Claim This Court Dismissed**

19 Plaintiffs’ original breach claim “focus[ed] on § 16 of the [DeviantArt Terms of Service],”
 20 under which DeviantArt’s users “grant to DeviantArt a non-exclusive, royalty-free license to
 21 reproduce, distribute, re-format, store, prepare derivative works based on, and publicly display and
 22 perform [their] Content” “[f]or the sole purpose of enabling [DeviantArt] to make [that] Content
 23 available through the Service.” Order at 26; *see also* Dkt. 65 at 28. Plaintiffs asserted that
 24 DeviantArt breached that provision by “incorporat[ing] Stable Diffusion into” DreamUp. Dkt. 65
 25 at 28. The Court dismissed the claim, noting that Section 16’s sole function is to license
 26 DeviantArt to make certain uses of its users’ content and to “warn[] [users] that third parties may
 27

28 ¹⁴ Indeed, Plaintiffs have now abandoned their claim that DreamUp’s “output images are infringing
 derivative works under the Copyright Act.” Dkt. 65 at 14; *see also supra* 3.

1 be able to copy and violate content-owners’ rights.” Order at 26. As the Court explained, Section
 2 16 does not prohibit DeviantArt from “offering for use a product [*i.e.*, Stable Diffusion] that a third
 3 party may have created in part by using material posted on DeviantArt’s own site.” *Id.*

4 Plaintiffs make no attempt to cure these problems. Instead, Plaintiffs simply allege the
 5 same claim again. FAC ¶¶ 418–22(a). The sole basis for their realleged claim is that “by releasing
 6 DreamUp . . . [DeviantArt] breached its explicit Terms of Service.” FAC ¶ 422(a) (citing Section
 7 16 of the Terms). That is indistinguishable from the asserted grounds for Plaintiffs’ now-dismissed
 8 breach claim. *See* Dkt. 65 at 22 (“DeviantArt [] breached the [Section 16 of] the contract between
 9 Plaintiffs and DeviantArt by creating DreamUp.”). The Court need look no further than its October
 10 30 Order for grounds to dismiss this claim with prejudice. Order at 25–27; *see also Carrasco v.*
 11 *HSBC Bank USA, N.A.*, No. 11-cv-2711, 2012 WL 685523, at *4 (N.D. Cal. Mar. 2, 2012)
 12 (dismissing claims with prejudice where the plaintiffs had “repeat[ed] the same allegations from
 13 the original Complaint, without any new factual or legal basis”).

14 2. The FAC Does Not State An Implied Covenant Claim

15 In addition to their breach-of-contract claim, Plaintiffs now add a new claim against
 16 DeviantArt for “breach[] [of] the implied covenant of good faith and fair dealing.” FAC ¶ 422(b).
 17 The factual basis of this claim is difficult to discern: Plaintiffs allege that DeviantArt “unleashed
 18 a flood of AI-generated images” that “drown[ed] out the work of human artists” and “put itself
 19 into competition with the DeviantArt Plaintiffs.” FAC ¶ 422(b). Plaintiffs then claim that
 20 DeviantArt acted in “bad faith” by amending its Terms to add a new provision addressing
 21 “Machine Learning Activities.” *Id.* This claim fails for two reasons.

22 First, this claim appears nowhere in the original Complaint. *See generally* Dkt. 1.
 23 “[B]reach of contract and breach of the implied covenant of good faith and fair dealing are two
 24 distinct claims” under California law. *May v. Semblant, Inc.*, No. 13-cv-01576, 2013 WL
 25 5423614, at *6 (N.D. Cal. Sept. 27, 2013). Because Plaintiffs’ original complaint did not include
 26 an implied covenant claim, Plaintiffs inclusion of that “distinct” claim in the FAC falls beyond the
 27 scope of the amendment permitted by the Court. Order at 28 (granting leave to amend “to cure
 28 the deficiencies identified above”). The claim should be dismissed for that reason alone. *See King*

1 *v. Facebook, Inc.*, No. 19-cv-01987, 2019 WL 6493968, at *1–2 (N.D. Cal. Dec. 3, 2019) (where
 2 court granted “leave to amend” a claim for “breach of contract,” finding that plaintiff “was not
 3 given leave to plead a claim based on the implied covenant,” and dismissing claim with prejudice).

4 Second, Plaintiffs’ implied covenant claim does not state a claim for relief under California
 5 law. The implied covenant does not “protect some general public policy interest not directly tied
 6 to the contract’s purposes,” *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 690 (1988), nor does
 7 it “impose substantive duties or limits . . . beyond those incorporated in the specific terms of the[]
 8 [parties’] agreement,” *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1369 (2010). Instead,
 9 its purpose is to “prevent a contracting party from . . . frustrat[ing] the other party’s rights to the
 10 benefits of the agreement.” *Id.* As such, “to state a claim for breach of the implied covenant of
 11 good faith and fair dealing, a plaintiff must identify the specific contractual provision that was
 12 frustrated.” *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1156 (N.D. Cal. 2013).

13 Plaintiffs identify no provision that implies that DeviantArt would protect Plaintiffs from
 14 “competition” or refrain from offering tools to help others create new works. FAC ¶ 422(b). And
 15 this Court already held that the Terms do not preclude DeviantArt from “offering” an image-
 16 generation service. Order at 26. Nor do Plaintiffs explain why the inclusion of the new “Machine
 17 Learning” provision—which implemented a mechanism that “prohibit[s]” the use of uploaded
 18 images for AI training “unless you actively give your consent,” *see id.* Ex. M at 13—somehow
 19 “frustrates” their ability to enjoy the benefit of DeviantArt’s service or the Terms, *Durell*, 183 Cal.
 20 App. 4th at 1369.¹⁵ And DeviantArt “reserve[d] the right to amend the[] Terms from time to time
 21 in our sole discretion.” FAC Ex. L at 6 (users’ “sole remedy shall be to discontinue using the
 22 Service”); *cf. Rockridge*, 985 F. Supp. 2d at 1156 (“An implied covenant . . . cannot contradict the

23 ¹⁵ Plaintiffs wholly misconstrue the newly-added “Machine Learning” provision DeviantArt added
 24 to its Terms in January 2023. FAC ¶ 422(b) (alleging that this provision “exemplifie[s]” “bad
 25 faith”). That provision (1) informs users that, “[u]nless [they] actively give [] consent” to the use
 26 of their images for AI training, DeviantArt will include a “noai” metatag on all content to *prevent*
 27 the use of uploaded images for such training, *id.* Ex. M at 13; (2) “prohibit[s]” other users from
 28 using images so-tagged for AI training, *id.*; (3) warns that “third-parties may [nonetheless] scrape
 or otherwise use their works without permission,” including for AI training, *id.* at 14; and
 (4) clarifies that “DeviantArt provides no guarantees” that third parties will not do so, *id.*
 Plaintiffs’ allegation that this new provision “explicitly permits” the use of uploaded content for
 AI training “so that Stable Diffusion and future generative AI services can continue to scrape
 DeviantArt for images” is simply wrong. FAC ¶ 404.

1 express terms of a contract.”). Because Plaintiffs have not “point[ed] to an express contractual
 2 provision and plead[ed] facts plausibly showing that Defendant injured or frustrated [their] right
 3 to receive the benefits of that provision,” their implied covenant claim fails. *Vann v. Aurora Loan*
 4 *Servs. LLC*, No. 10-cv-04736, 2011 WL 2181861, at *5 (N.D. Cal. June 3, 2011).

5 **C. Plaintiffs Fail To Allege An Unjust Enrichment Claim**

6 Plaintiffs also add to their FAC a wholly new claim for “unjust enrichment under Cal. Bus.
 7 & Prof. Code § 17200 and California Common Law.” FAC ¶¶ 432–39.¹⁶ The alleged factual basis
 8 for the claim is DeviantArt’s alleged “us[e] [of] the works hosted on DeviantArt to develop and
 9 promoted DreamUp,” which (Plaintiffs say) “violate[s]” their unspecified “legal rights.” *Id.* ¶ 433.

10 As a preliminary matter, this claim appears nowhere in the original pleading and thus falls
 11 outside the scope of the amendment permitted by the Court. Order at 28 (granting leave to amend
 12 “to cure the deficiencies identified above”); *DeLeon*, 2010 WL 4285006, at *3 (“[W]here leave to
 13 amend is given to cure deficiencies in certain specified claims, courts have agreed that new claims
 14 alleged for the first time in the amended pleading should be dismissed or stricken.”).

15 Moreover, Plaintiffs’ unjust enrichment claim fails three times over on the merits. First, it
 16 is preempted because it is based on precisely the same allegations as Plaintiffs’ claim for copyright
 17 infringement. *Compare* FAC ¶ 415 (“[T]he DreamUp app infringes copyrights owned by the
 18 LAION-5B Registered Plaintiffs”), *with id.* ¶ 433 (unjust enrichment claim based on DeviantArt’s
 19 “develop[ment] and promot[ion] [of] DreamUp”). As this Court already explained, state law
 20 claims “tie[d]” to “purported copyright violations” are “preempted.” Order at 23; *see also Kadrey*,
 21 2023 WL 8039640, at *2 (Chhabria, J.) (unjust enrichment claim based on “use of the plaintiffs’
 22 [works] to train [an AI model]” preempted because it “relies on the same rights contained in the
 23 Copyright Act”); *Doe I. v. Github, Inc.*, No. 22-cv-06823, 2024 WL 235217, at *7 (N.D. Cal. Jan.
 24 22, 2024) (Tigar, J.) (unjust enrichment claim based on use of materials to “train [AI models]”
 25 preempted); *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1128 (N.D. Cal. 2001) (unjust
 26 enrichment claim, which “at its core alleges that the defendants unfairly benefitted from their
 27 unauthorized use” of plaintiff’s work, was “equivalent” to copyright claim and preempted).

28 ¹⁶ As noted, Plaintiffs do not explain their reference to the UCL, which appears to be a typo.

1 Second, “unjust enrichment is an action in quasi-contract, which does not lie when an
2 enforceable, binding agreement exists defining the rights of the parties.” *Paracor Finance, Inc. v.*
3 *General Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996). The FAC’s unjust enrichment
4 claim against DeviantArt is brought on behalf of the “DeviantArt Plaintiffs,” FAC at 92, each of
5 whom are “DeviantArt users,” *id.* ¶ 381, and each of whom concede that DeviantArt’s Terms are
6 an “enforceable, binding agreement” that “defin[es] the rights of the parties,” *Paracor*, 96 F.3d at
7 1167; FAC ¶¶ 418 (“[T]he DeviantArt Plaintiffs have formed a contract with DeviantArt.”). The
8 claims for that reason alone.

9 Third, Plaintiffs fail to allege facts to support a claim for unjust enrichment. To plead this
10 claim, Plaintiffs must allege that DeviantArt “received and unjustly retained a benefit at plaintiff’s
11 expense,” *ESG Cap. Partners, LP v. Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016), and that the
12 benefit was voluntarily “conferred on the defendant through mistake, fraud, or coercion,” *Bittel*
13 *Tech., Inc. v. Bittel USA, Inc.*, No. 10-cv-00719, 2010 WL 3221864, at *5 (N.D. Cal. Aug. 13,
14 2010) (citation omitted). Well-pleaded unjust enrichment claims allege that the plaintiffs have
15 been misled or coerced into conferring some benefit, which the defendant unjustly retained. *See*
16 *Stratos*, 828 F.3d at 1029–31, 1039 (discussing allegation that firm owners “paid themselves” with
17 funds that plaintiffs voluntarily conferred into a “client trust account”). Plaintiffs allege no such
18 facts here, which is an independent reason to dismiss the claim. *See Rosal v. First Fed. Bank of*
19 *Cal.*, 671 F. Supp. 2d 1111, 1122, 1133 (N.D. Cal. 2009) (“conclusory allegation” that defendants
20 “retain[ed] profits, income and ill-gotten gains at the expense of plaintiff” was “insufficient”).

21 **D. The Court Should Dismiss The Additional Named Plaintiffs**

22 As noted above, this Court’s October 30 Order granted Plaintiffs leave to amend only to
23 “cure the deficiencies identified” in that Order. Order at 28. Plaintiffs’ addition of seven additional
24 class representatives does not in any way address the pleading issues the Court identified or affect
25 the claims or legal theories asserted in the FAC. For that reason, the Court should strike these
26 Plaintiffs—*i.e.* Southworth, Rutkowski, Manchess, Brom, Zhang, Kaye, and Ellis—from the FAC.
27 *See Gallagher v. Chipotle Mexican Grill, Inc.*, No. 15-cv-03952, 2016 U.S. Dist. LEXIS 45501,
28 at *1 (N.D. Cal. Apr. 4, 2016) (striking “the additional class representatives . . . from the FAC”

1 because those parties were added “beyond the scope of the Court’s leave” to amend).

2 **V. CONCLUSION**

3 For these reasons, the Court should strike the additional class representatives from the
4 FAC; dismiss Counts 15–17 of the FAC with prejudice; and dismiss DeviantArt from this case.

5

6 Dated: February 8, 2024

Respectfully submitted,

7

LATHAM & WATKINS LLP

8

By: /s/ Andrew M. Gass

9

Andrew M. Gass (SBN 259694)

andrew.gass@lw.com

10

Michael H. Rubin (SBN 214636)

michael.rubin@lw.com

11

Brittany N. Lovejoy (SBN 286813)

brittany.lovejoy@lw.com

12

505 Montgomery Street, Suite 2000

San Francisco, California 94111-6538

13

Telephone: 415.391.0600

14

Attorneys for Defendant DeviantArt, Inc.

15

16

17

18

19

20

21

22

23

24

25

26

27

28