

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

	)	Case No. 5:12-cv-001382-PSG
IN RE GOOGLE, INC. PRIVACY POLICY	)	<b>ORDER GRANTING DEFENDANT’S MOTION TO DISMISS</b>
LITIGATION	)	
_____	)	
	)	<b>(Re: Docket No. 105)</b>

You might think that after three years of complaints, motions to dismiss, orders on motions to dismiss, leave to amend, amended complaints and more, at least the fundamental question of Plaintiffs’ Article III standing to pursue this suit would be settled. You might think that, but you would be wrong.<sup>1</sup>

For no less than the fourth time, Defendant Google, Inc. moves to dismiss Plaintiffs’ complaint. In the wake of the court’s orders on Google’s previous motions to dismiss,<sup>2</sup> only two

<sup>1</sup> Google also moves for summary judgment based on the absence of factual dispute as to the use of bandwidth or electricity for transmission or payments. *See* Docket No. 105 at 13. The court need not reach the parties’ summary judgment arguments to resolve the issue of Plaintiffs’ standing. But even if that were not the case, because Plaintiffs offer no evidence that any personal information was ever transmitted from any Android device to any third-party developer, summary judgment in Google’s favor would be required.

<sup>2</sup> *See* Docket Nos. 45, 67, 85.

1 claims remain: breach of contract and fraudulent unfair competition. Plaintiffs bring both claims  
 2 on behalf of an “app disclosure” subclass. In granting Google’s third motion to dismiss, the court  
 3 previously held that Plaintiffs’ only alleged injury-in-fact was the depletion of battery and  
 4 bandwidth resulting from systemic, repeated transmission of personal information from Android  
 5 devices to third-party developers.<sup>3</sup> But in taking the leave the court granted to amend their claims,  
 6 Plaintiffs managed something somewhat unusual: they pled themselves out of a case. Because  
 7 injury-in-fact is now insufficiently alleged, especially as Plaintiffs claim injury without alleging  
 8 any actual disclosure to third parties from Plaintiffs’ own devices, the court GRANTS Google’s  
 9 motion to dismiss, without further leave to amend.  
 10

11 **I.**

12 “To establish Article III standing, an injury must be ‘concrete, particularized, and actual or  
 13 imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’”<sup>4</sup> The  
 14 injury required by Article III may exist by virtue of “statutes creating legal rights, the invasion of  
 15 which creates standing.”<sup>5</sup> In such cases, the “standing question . . . is whether the constitutional or  
 16 statutory provision on which the claim rests properly can be understood as granting persons in the  
 17 plaintiff’s position a right to judicial relief.”<sup>6</sup> At all times the threshold question of standing “is  
 18 distinct from the merits of [a] claim” and does not require “analysis of the merits.”<sup>7</sup> The “standing  
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22 <sup>3</sup> See Docket No. 85 at 13-14.

23 <sup>4</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson*  
 24 *Seed Farms*, 561 U.S. 139, 149 (2010)).

25 <sup>5</sup> *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S.  
 26 490, 500 (1975)); see also *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014) *cert. granted*,  
 135 S. Ct. 1892 (2015).

27 <sup>6</sup> *Id.*

28 <sup>7</sup> *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

1 inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the  
2 particular plaintiff is entitled to an adjudication of the particular claims asserted.”<sup>8</sup>

3 This is a putative nationwide class action brought by Plaintiffs Michael Goldberg, Robert  
4 DeMars and Scott McCullough against Google on behalf of all persons and entities in the United  
5 States that purchased at least one paid Android application through the Android Market and/or  
6 Google Play Store between February 1, 2009 and May 31, 2014.<sup>9</sup>

7 Google is a technology and advertising company that provides free web-based products to  
8 billions of consumers around the world.<sup>10</sup> Free products are not, however, truly free. Google  
9 requires massive amounts of revenue to sustain itself. To generate revenue from advertising,  
10 Google logs personal identifying information, browsing habits, search queries, responsiveness to  
11 ads, demographic information, declared preferences and other information about each consumer  
12 that uses its products. Google then uses this information to place advertisements tailored to each  
13 consumer while the consumer is using any Google product or browsing third-party sites that have  
14 partnered with Google to serve targeted ads.<sup>11</sup>

15 Google always has maintained a general or default privacy policy purporting to permit  
16 Google to “combine the information you submit under your account with information from other  
17 services.”<sup>12</sup> This would allow Google, for example, to associate a consumer's Gmail account (and  
18 therefore his or her name and identity, his or her private contact list or the contents of his or her  
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<sup>8</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis removed) (quoting *Allen v.*  
22 *Wright*, 468 U.S. 737, 752 (1984)); *see also Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d  
23 1115, 1121-22 (9th Cir. 2010).

24 <sup>9</sup> *See* Docket No. 103 at ¶ 1. Unless otherwise stated, facts cited come from Plaintiffs'  
consolidated third amended complaint.

25 <sup>10</sup> *See id.* at ¶ 2.

26 <sup>11</sup> *See id.* at ¶ 4.

27 <sup>12</sup> *See id.* at ¶ 6.

1 communications) with the consumer’s Google search queries or the consumer’s use of other  
2 Google products like Android, YouTube, Picasa, Voice, Google+, Maps, Docs and Reader.<sup>13</sup> But  
3 before March 1, 2012, this general policy was qualified, limited and alleged to be contradicted in  
4 privacy policies associated with specific Google products, including both Gmail and Android-  
5 powered devices. The privacy policies associated with Android-powered devices, for example,  
6 specified that, although the default terms would generally apply, “[c]ertain applications or features  
7 of your Android-powered phone may cause other information [that is, other than certain delimited  
8 “usage statistics”] to be sent to Google but in a fashion that cannot be identified with you  
9 personally” and that “[y]our device may send us location information (for example, Cell ID or GPS  
10 information) that is not associated with your [Google] Account.”<sup>14</sup> These categories of  
11 information, and certain other discrete categories of Android user information identified by the  
12 terms of the Android-powered device policy in effect prior to March 1, 2012, could not be  
13 “combine[d] . . . with information from other services.”<sup>15</sup> On March 1, 2012, Google replaced  
14 these various policies with a single, unified policy that unequivocally allows Google to comingle  
15 user data across accounts and disclose it to third-parties for advertising purposes.<sup>16</sup>

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18 This brings us to the activity now in dispute. Google Play, formerly known as the Android  
19 Market, is the primary gateway for Android users to acquire, purchase and download apps and  
20 other digital media for their Android devices.<sup>17</sup> The process of purchasing an app requires multiple  
21 components, including the creation of a Wallet account, the request for the app and the creation of  
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23 <sup>13</sup> See *id.* at ¶ 5.

24 <sup>14</sup> *Id.*

25 <sup>15</sup> *Id.*

26 <sup>16</sup> See *id.* at ¶¶ 7-12.

27 <sup>17</sup> See Docket No. 103 at ¶ 64.

28

1 a record of the purchase for the Developer Console.<sup>18</sup> To create a Wallet account, a user must have  
 2 a Google account and provide his or her name, username, country and zip code.<sup>19</sup> The request of an  
 3 app consumes resources including electric power, CPU cycles, main memory and network capacity  
 4 or bandwidth.<sup>20</sup> In the Checkout Merchant Center, operative from February 2009 to early 2013,  
 5 and the Play Developer Console, operative from 2012 to May 2014, a purchase of a paid  
 6 application through the Android Market/Google Play Store allowed the app developer to access the  
 7 purchaser's name, email address and course address, or "the physical or geographical location  
 8 associated with the Play account and/or the Android device used to download the application."<sup>21</sup>  
 9 Google stopped making available purchaser details (including name and email address) to app  
 10 developers in May 2014.<sup>22</sup> But Google has continued to process app purchase transactions, to  
 11 maintain user accounts and otherwise operate normally since May 2014.<sup>23</sup>

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14 <sup>18</sup> See *id.* at ¶ 136. See also Docket No. 108-6, Ex. D at 80-93; *id.* at 83 ("The device calls the DFE  
 15 [Device Frontend] CommitPurchaseAction. The DFE sends a DeliveryInfoRequest to the Mixer,  
 16 which sends it via the VCA to IMAS, which returns the AndroidAppDeliveryData including the  
 17 secure URL for the actual download. In parallel the DFE sends a CompletePurchaseRequest to the  
 18 Blixer. This inserts an Order into Checkout and then waits for status to indicate that the purchase  
 19 has succeeded (or failed). It then sends a PNR [PurchaseNotificationRequest] via the VCA to  
 20 IMAS, which updates the purchase record in the user profile.") (emphasis added); *id.* at 85  
 (/commitPurchase also "[c]opies purchase context data (the details of the order to be created) into a  
 CompletePurchaseRequest and sends it to the Blixer, with skip delivery set true. The data sent  
 includes the 'risk hashed device info,' an obfuscated device identifier (e.g. IMEI) sent by the  
 device, and information about any challenges the user has passed (e.g., providing their Gaia  
 password).").

21 <sup>19</sup> See Docket No. 105-10 at ¶¶ 6-8.

22 <sup>20</sup> See Docket No. 103 at ¶ 68; Docket No. 108-6, Ex. B at 3, 5-6; ("The process of completing a  
 23 purchase in the store now branded as *Google Play* consumes limited resources local to or used by  
 the purchaser's device.").

24 <sup>21</sup> See Docket No. 103 at ¶ 67. Although the complaint makes passing reference to "transmission"  
 25 of this information rather than mere access, Plaintiffs' opposition confirms that the gravamen of its  
 26 complaint is about access alone. See Docket No. 108-4 at 2-4.

27 <sup>22</sup> See Docket No. 108-6, Ex. C at 81:13-19.

28 <sup>23</sup> See Docket No. 108-4 at 5.

1 Plaintiffs' original complaint alleged that Google violated both its prior policies and  
2 consumers' privacy rights, but the court held that Plaintiffs lacked standing because they did not  
3 plead facts sufficient to show concrete economic harm or prima facie statutory or common law  
4 violations.<sup>24</sup> "[N]othing in the precedent of the Ninth Circuit or other appellate courts confers  
5 standing on a party that has brought statutory or common law claims based on nothing more than  
6 the unauthorized disclosure of personal information."<sup>25</sup> Plaintiffs' first consolidated amended  
7 complaint expanded the bounds of the alleged class and the explanations of Plaintiffs' injuries, but  
8 the court dismissed for failure to plead sufficient facts to support any of their claims.<sup>26</sup> Plaintiffs'  
9 second consolidated amended complaint added allegations of Google's Emerald Sea plan, but  
10 effectively alleged the same harms as before.<sup>27</sup>

11  
12 After Google's third motion to dismiss, two claims remained: an "app disclosure subclass"  
13 breach of contract claim and the subclass's fraudulent unfair competition claim. The court ruled  
14 that Plaintiffs could proceed on those two causes of action alone, although it later granted  
15 Plaintiffs' motion to file a consolidated third amended complaint to "trim" their allegations.<sup>28</sup> In  
16 addition to adding Goldberg as a plaintiff, the CTAC (i) dropped any allegations relating to  
17 Google's use of the personal information of Android users that obtained free applications, as  
18 distinguished from paid applications, from Google; and (ii) revised the class period.<sup>29</sup> The class  
19 now is limited to Android users that purchased paid apps through the Android Market/Google Play  
20

21 \_\_\_\_\_  
22 <sup>24</sup> See Docket No. 45 at 8-10.

23 <sup>25</sup> *In re Google, Inc. Privacy Policy Litig.*, Case No. 12-cv-01382-PSG, 2012 WL 6738343, at \*5  
(N.D. Cal. Dec. 28, 2012).

24 <sup>26</sup> See Docket No. 67 at 18-30.

25 <sup>27</sup> See Docket No. 68.

26 <sup>28</sup> See Docket No. 85 at 27-28; Docket No. 97 at 1; Docket No. 101.

27 <sup>29</sup> See Docket No. 97 at 1.  
28

1 Store between February 1, 2009 and May 31, 2014.<sup>30</sup> This class period represents the period of  
 2 time during which Google allegedly and knowingly disclosed to third parties the names, email  
 3 addresses and account location information belonging to each Android user that purchased a paid  
 4 app through the Android Market/Google Play Store, in direct contravention of its express promises  
 5 that it would not do so.<sup>31</sup>

## 6 II.

7 This court has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. §  
 8 1332(d), in part because the aggregated claims of the individual class members exceed the sum or  
 9 value of \$5,000,000.<sup>32</sup> The parties further consented to the jurisdiction of the undersigned  
 10 magistrate judge under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 72(a).<sup>33</sup>

11 The plaintiff always bears the burden of establishing standing.<sup>34</sup> Where the plaintiff lacks  
 12 standing, a complaint must be dismissed for lack of subject matter jurisdiction under Fed. R. Civ.  
 13 P. 12(b)(1).<sup>35</sup> In reviewing such a motion, the court “is not restricted to the face of the pleadings,  
 14 but may review any evidence, such as affidavits and testimony, to resolve factual disputes  
 15 concerning the existence of jurisdiction.”<sup>36</sup> To successfully oppose a Rule 12(b)(1) motion, the  
 16 nonmovant must put forth “the manner and degree of evidence required” by the particular “stage[]  
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20 <sup>30</sup> *See id.*

21 <sup>31</sup> *See id.*

22 <sup>32</sup> *See* Docket No. 103 at ¶ 20.

23 <sup>33</sup> *See* Docket Nos. 10, 12.

24 <sup>34</sup> *See Chandler*, 598 F.3d at 1122.

25 <sup>35</sup> *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Steel Co. v. Citizens for a*  
 26 *Better Env't*, 523 U.S. 83, 109-10 (1998); *White v. Lee*, 227 F.3d 1214, 1242-43 (9th Cir. 2000).

27 <sup>36</sup> *McCarthy v. U.S.*, 850 F.2d 558, 560 (9th Cir. 1988).

1 of the litigation.”<sup>37</sup> “At the pleading stage, general factual allegations of injury resulting from the  
 2 defendant’s conduct may suffice, for on a motion to dismiss,” the court “presumes that general  
 3 allegations embrace those specific facts that are necessary to support the claim.”<sup>38</sup> “At all times  
 4 the threshold question of standing ‘is distinct from the merits of a claim’ and does not require  
 5 ‘analysis of the merits.’”<sup>39</sup> All disputes of fact are resolved in favor of the nonmovant.<sup>40</sup>

### 6 III.

7 To establish Article III standing, it is the plaintiff’s burden<sup>41</sup> to “show (1) it has suffered an  
 8 ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or  
 9 hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is  
 10 likely, as opposed to merely speculative, that the injury will be redressed by a favorable  
 11 decision.”<sup>42</sup> Because Plaintiffs fail to satisfy all three prongs, they lack standing to pursue their  
 12 claims.  
 13

14 *First*, Plaintiffs have no evidence of concrete, particularized and actual or imminent  
 15 “injury-in-fact” because they no longer allege that the battery-and-bandwidth -using transmission  
 16 containing personal information ever occurs from Plaintiffs’ phones.<sup>43</sup> Plaintiffs also do not allege  
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18  
 19 <sup>37</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. at 561.

20 <sup>38</sup> *See id.* (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990)).

21 <sup>39</sup> *In re Google, Inc. Privacy Policy Litig.*, Case No. 12-cv-01382-PSG, 2014 WL 3707508, at \*3  
 22 (N.D. Cal. July 21, 2014) (quoting *Maya*, 658 F.3d at 1068).

23 <sup>40</sup> *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996).

24 <sup>41</sup> *See Chandler*, 598 F.3d at 1122.

25 <sup>42</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

26 <sup>43</sup> *See* Docket No. 108-4 at 16; Docket No. 108-6, Ex. D at 83, 85; Docket No. 108-6, Ex. B at 4  
 27 (affirming that no personal information is transmitted to Google or anyone else in the purchase  
 28 process).



1 that any battery-and-bandwidth-using transmission ever went to a third party.<sup>44</sup> The app purchase  
 2 process involves transmissions only to or from Google.<sup>45</sup> While Plaintiffs allege that for a period  
 3 of time it was possible for developers to look up the record of a particular transaction on a Google  
 4 server and also access the user's email and rough address,<sup>46</sup> mere risk of future disclosure is not an  
 5 Article III injury-in-fact. In *Low v. LinkedIn Corp.*, the court specifically rejected allegations of  
 6 the risk of future disclosures as "insufficient to establish an injury-in-fact that is concrete and  
 7 particularized, as well as actual and imminent."<sup>47</sup> With no allegation of dissemination or improper  
 8 receipt of information, any profit or loss made from any alleged disclosure, let alone a potential  
 9 disclosure, is "conjectural."<sup>48</sup> With no allegation of "appreciable and actual" harm,<sup>49</sup> Plaintiffs  
 10 allege no injury-in-fact.  
 11

12 Pointing to the Ninth Circuit's recent unpublished opinion in *In re Facebook Privacy*  
 13 *Litigation*,<sup>50</sup> Plaintiffs argue they have standing under two theories of injury-in-fact in addition to  
 14 battery and bandwidth use: economic injury resulting from Google's providing access to  
 15

16 <sup>44</sup> See Docket No. 103 at ¶¶ 136, 147; 170-171; see also Docket No. 105-10 at ¶ 10.

17 <sup>45</sup> See Docket No. 103 at ¶¶ 136, 147; 170-171; see also Docket No. 105-10 at ¶ 10.

18 <sup>46</sup> See Docket No. 103 at ¶¶ 136, 141, 144, 166, 168, 172.

19 <sup>47</sup> See *Low v. LinkedIn Corp.*, Case No. 11-cv-01468-LHK, 2011 WL 5509848, at \*4 (N.D. Cal.  
 20 Nov. 11, 2011) (citing *Birdsong v. Apple, Inc.*, 590 F. 3d 955, 960–61 (9th Cir. 2009)) (finding  
 21 lack of standing because of the "conjectural and hypothetical nature" of the alleged injury).

22 <sup>48</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. at 560.

23 <sup>49</sup> *Ruiz v. Gap, Inc.*, 380 F. App'x 689, 691–92 (9th Cir. 2010).

24 <sup>50</sup> See *In re Facebook Privacy Litig.*, 572 F. App'x, 494 (9th Cir. 2014) (unpublished). Under 9th  
 25 Cir. R. 36-3, this decision is not binding precedent. See also *In re Google Android Consumer*  
 26 *Privacy Litig.*, Case No. 11-md-02264-JSW, 2013 WL 1283236, at \*4 (N.D. Cal. March 26, 2013)  
 27 (finding no Article III standing, notwithstanding allegations of improper access to and use of  
 28 personal information, where plaintiffs "do not allege they attempted to sell their personal  
 information, that they would do so in the future, or that they were foreclosed from entering into a  
 value for value transaction relating to their [personally identifying information], as a result of the  
 Google Defendants' conduct.").

1 Plaintiffs’ personal information to third parties, and the non-economic harm associated with the  
 2 very fact of this access.<sup>51</sup> In *Facebook*, the complaint alleged that Facebook transmitted to  
 3 advertisers both the user’s Facebook user id and the page the user was viewing at the time, which  
 4 advertisers could then combine with the information on the user’s Facebook page to assemble a  
 5 comprehensive dossier.<sup>52</sup> The plaintiffs affirmatively pled both that there was a “robust” market  
 6 for that information and that plaintiffs had been financially harmed by Facebook usurping their  
 7 ability to sell that information themselves.<sup>53</sup> Judge Ware dismissed the claim on a Rule 12(b)(6)  
 8 motion based on Facebook’s argument that it had in fact not interfered with the plaintiffs’ ability to  
 9 sell their own personal information.<sup>54</sup> The Ninth Circuit reversed because the plaintiffs had indeed  
 10 alleged that they were harmed “by the dissemination of their personal information and by losing  
 11 the sales value of that information.”<sup>55</sup>

12  
 13 Plaintiffs cite their expert Fernando Torres’s report to show an analysis of what third parties  
 14 would pay for a consumer database containing identifying information for mass marketing  
 15 purposes.<sup>56</sup> Torres analyzed the value of the information made available by Google to app  
 16 developers from several perspectives. First, Torres concludes that the information disclosed by  
 17 Google has economic value, which class members have lost.<sup>57</sup> To estimate this, he analyzed and  
 18 quantified what third parties would pay for a consumer data base containing this information, for  
 19  
 20

21 <sup>51</sup> See Docket No. 108-4 at 9.

22 <sup>52</sup> See *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 708 (N.D. Cal. 2011).

23 <sup>53</sup> *Id.* at 708-09.

24 <sup>54</sup> See *id.* at 718.

25 <sup>55</sup> *In re Facebook Litig.*, 572 F. App’x at 494.

26 <sup>56</sup> See Docket No. 108-4 at 13; Docket No. 108-6, Ex. A at ¶¶ 16(a), 17, 29(b)(i).

27 <sup>57</sup> See Docket No. 108-6, Ex. A at ¶¶ 12, 16(a), 17, 29(b)(i).  
 28

1 mass marketing purposes.<sup>58</sup> He also analyzed and quantified the amount of revenue that third  
 2 parties could realize from the use of this information.<sup>59</sup> Torres further explained that “[b]ecause  
 3 Google has disclosed this information to the application developers, the members of the Subclass  
 4 have lost the sales value of that information that they otherwise would have had.”<sup>60</sup> In addition,  
 5 Torres concludes that the class members are injured because they have a quantifiable interest in  
 6 protecting the privacy of the information that Google discloses to app developers.<sup>61</sup>  
 7

8 There is just one problem with Torres’s various conclusions: they are not reflected  
 9 anywhere in the CTAC. Plaintiffs do not allege economic injury from any dissemination—or any  
 10 dissemination at all<sup>62</sup>—or any injury in the form of loss of the Plaintiffs’ ability to sell their own  
 11 information or its market value.<sup>63</sup> Plaintiffs plead neither the existence of a market for their email  
 12 addresses and names nor any impairment of their ability to participate in that market. Indeed, the  
 13

14 <sup>58</sup> See *id.* at ¶¶ 16(a), 17, 29(b)(i).

15 <sup>59</sup> See *id.* at ¶¶ 22-24, 29(b)(iii).

16 <sup>60</sup> *Id.* at ¶ 14.

17 <sup>61</sup> See *id.* at ¶¶ 19-21, 29(b)(ii).

18 <sup>62</sup> See, e.g., Docket No. 103 at ¶¶ 148; 173-174; 318.

19 <sup>63</sup> See, e.g., *id.* at ¶¶ 146-151. The mere misappropriation of personal information, without a  
 20 resultant economic harm—for example in the form of being deprived of the ability to monetize that  
 21 information—is neither damage nor injury-in-fact. See *LaCourt v. Specific Media, Inc.*, Case No.  
 22 10-cv-1256-GW, 2011 WL 1661532, at \*5 (C.D. Cal. Apr. 28, 2011) (“[T]he Complaint does not  
 23 identify a single individual who was foreclosed from entering into a ‘value-for-value exchange’ . . .  
 24 . Plaintiffs do not explain how they were ‘deprived’ of the economic value of their personal  
 25 information”); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 328-29 (E.D.N.Y.  
 26 2005) (“[E]ven if [plaintiffs’] privacy interests were indeed infringed by the data transfer, such a  
 27 harm does not amount to a diminishment of the quality or value of a materially valuable interest in  
 28 their personal information.”); *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 525  
 (S.D.N.Y. 2001) (“Demographic information is constantly collected on all consumers . . . [W]e  
 are unaware of any court that has held the value of this collected information constitutes damage to  
 consumers”); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1356 (Ill. App. Ct. 1995)  
 (“[D]efendants’ practices do not deprive any of the [plaintiffs] of any value their individual names  
 may possess.”).

1 named Plaintiffs freely publish their names and email addresses through their work websites.<sup>64</sup> If  
2 disclosure did occur, then, it would not constitute injury. Even if Plaintiffs' complaint need not  
3 show any proof of deprivation of the opportunity to sell their personal information to anyone,<sup>65</sup>  
4 Plaintiffs still need to make a pleading, and they do not.

5 **Second**, Plaintiffs' claim of battery and bandwidth depletion has no nexus to Google's  
6 alleged breach or unfair competition. It is certainly alleged that each time a user purchases an app  
7 from Google Play, there are transmissions back and forth between the user's device and Google's  
8 servers.<sup>66</sup> Those transmissions may include the process of browsing the Play catalog to select an  
9 App, sending a request to purchase an App and downloading the App once purchased.<sup>67</sup> But  
10 Plaintiffs do not allege those transmissions contain *any* personal information.<sup>68</sup> And while the  
11 parties do not dispute that a record of sale is logged in the user's Google Wallet records, the  
12 identifying information at issue is already a part of Google Wallet, provided by the user in the  
13 process of opening the account.<sup>69</sup> Plaintiffs concede that the transmission of data "consists not of  
14 the user's actual name and email address in human-readable form but, instead, [application  
15 program interface] calls or messages providing certain computer-readable device- and user-specific  
16  
17

18 <sup>64</sup> See Docket No. 108-4 at 110-111.

19 <sup>65</sup> See *Svenson v. Google Inc.*, Case No. 13-cv-04080-BLF, Docket. No. 118, at 2, 8-9 (N.D. Cal.  
20 Apr. 1, 2015) (alleging a market for personal information she alleged to be transmitted, and  
21 alleging loss of the opportunity to participate in that market. Concerning Google Wallet and  
22 Google Play, Svenson alleged that each App purchase involves the transmission of "Packets  
23 Contents" that are transmitted "in packets sent by Plaintiff and the class to Defendants," and  
24 contain "personal information about Buyers, including credit card information, purchase  
25 authorization, addresses, zip codes, names, phone numbers, email addresses, and/or other  
26 information.") (quoting complaint).

27 <sup>66</sup> See Docket No. 115 at 7.

28 <sup>67</sup> See *id.*

<sup>68</sup> See Docket No. 103 at ¶ 136.

<sup>69</sup> See, e.g., Docket No. 108-6, Ex. B at 4.

1 data.”<sup>70</sup> Put another way, the loss of battery life or use of bandwidth is not “fairly traceable to the  
2 challenged action” as the downloading of the app occurs before any record of the transaction or  
3 making available of information for look-up.

4 **Third**, any injury is not redressable by a favorable decision. No past or future change to  
5 merchant queries or receipt of information would alter the battery or bandwidth consumed in  
6 purchasing an app. Google no longer makes names and email addresses visible in response to  
7 Wallet or Play merchant queries, nor could there be any claim that the amount of battery power  
8 used in purchasing an App changed one iota as a result. Even if tomorrow this court ordered  
9 Google to cease making any transaction data whatsoever available to the developers from whom  
10 users purchase apps, it would not change the battery and bandwidth use of the purchase process at  
11 all.<sup>71</sup>

#### 12 IV.

13 Google’s fourth motion to dismiss is GRANTED, without further leave to amend.  
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15 Plaintiffs have amended their complaint no less than four times,<sup>72</sup> and given that discovery is now  
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18 <sup>70</sup> See Docket No. 108-4 at 16; See Docket No. 108-6, Ex. D at 85, 83; Docket No. 108-6, Ex. B. at 4.

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20 <sup>71</sup> To the extent that Plaintiffs’ most recent complaint also seeks tort damages for invasion of  
21 privacy in relation to their contract damages, the court has already dismissed Plaintiffs’ intrusion  
22 upon seclusion claim with prejudice. See Docket No. 85. This district sets a high bar for the  
23 requisite intrusion that is highly offensive to a reasonable person. See *In re iPhone Application*  
24 *Litig.*, 844 F. Supp. 2d 1040, 1054 (N.D. Cal. 2012). Intrusion upon seclusion, just like any other  
25 invasion of privacy tort, requires conduct that would be “highly offensive to a reasonable person.”  
26 *Hernandez v. Hillsides, Inc.*, 48 Cal. Rptr. 3d 780, 786 (2006), *rev’d on other grounds*, 47 Cal. 4th  
27 272 (2009); see also *Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal. 4th 1, 36-37 (1994) (holding  
28 invasion of privacy rights must be “sufficiently serious in their nature, scope, and actual or  
potential impact to constitute an egregious breach of the social norms underlying the privacy  
right.”). Plaintiffs have pled no such conduct, and in any event, their claims are based on the  
allegedly improper sharing of basic address information that each of them freely shared with  
Google in the first place.

<sup>72</sup> See Docket Nos. 45, 67, 85, 101.

1 closed, any further amendment introducing yet another theory of injury at this late date would be  
2 unfairly prejudicial to Google.<sup>73</sup>

3 **SO ORDERED.**

4 Dated: July 15, 2015

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6 PAUL S. GREWAL  
7 United States Magistrate Judge

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United States District Court  
For the Northern District of California

25 <sup>73</sup> See Docket No. 92; *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)  
26 (*quoting Foman v. Davis*, 371 U.S. 178, 182 (1962)) (listing grounds for dismissing with  
27 prejudice).  
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