

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-01382-PSG

IN RE GOOGLE, INC. PRIVACY POLICY
LITIGATION

**ORDER GRANTING-IN-PART MOTION
TO DISMISS AND GRANTING
MOTION TO STRIKE**

(Re: Docket Nos. 71, 77)

Over two years ago, Plaintiffs¹ filed this lawsuit against Defendant Google, Inc. for commingling user data across different Google products and disclosing such data to third parties.² Since then, the court has twice dismissed Plaintiffs' claims. Google now moves for a third dismissal.

¹ Originally, the complaint named only two Plaintiffs: Robert DeMars and Lorena Barrios. See Docket No. 1 at ¶¶ 27-28. The second amended complaint names five more: Pedro Marti, David Nisenbaum, Nicholas Anderson, Matthew Villani, and Scott McCullough. See Docket No. 68 at ¶¶ 25-31.

² See Docket No. 1.

1 Like Rocky rising from Apollo's uppercut in the 14th round, Plaintiffs' complaint has
 2 sustained much damage but just manages to stand. The court GRANTS the motion, but only IN-
 3 PART.

4 I. BACKGROUND³

5 This is a nationwide, putative class action against Google on behalf of all persons and
 6 entities in the United States that acquired a Google account between August 19, 2004 and February
 7 29, 2012, and continued to maintain that Google account on or after March 1, 2012, when a new
 8 Google privacy policy went into effect. Plaintiffs also bring nationwide class claims against
 9 Google on behalf of (a) all persons and entities in the United States that acquired an Android-
 10 powered device between May 1, 2010 and February 29, 2012 and switched to a non-Android
 11 device on or after March 1, 2012 (the "Android Device Switch Subclass"); and (b) all persons and
 12 entities in the United States that acquired an Android-powered device between August 19, 2004
 13 and the present, and downloaded at least one Android application through the Android Market
 14 and/or Google Play (the "Android App Disclosure Subclass").⁴

15 Google is a technology and advertising company that provides free web-based products to
 16 billions of consumers around the world. Google can offer its products free of charge due to its
 17 primary business model – advertising. In 2011, Google's revenues were \$37.91 billion,
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 23 ³ Unless otherwise noted, all facts are drawn from the operative complaint and the docket records
 24 in this case. Plaintiffs' motion to strike the declaration of Silva Reyes is GRANTED, as a court is
 25 to decide a motion to dismiss based only on the complaint, and documents properly subject to
 26 judicial notice. *See Lee v. Cty. Of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Plaintiffs
 dispute the authenticity of the 2009 Mobile Privacy Policy, *see* Docket No. 77 at 2, rendering
 judicial notice of the document unsuitable. *See* Fed. R. Evid. 203. Because Plaintiffs do not
 contest the authenticity of the 2008 Mobile Privacy Policy submitted as Exhibit A to the Request
 for Judicial Notice, *see* Docket No. 76 at 2, the court will consider that document.

27 ⁴ *See* Docket No. 68 at ¶ 1.

1 approximately 95% of which (\$36.53 billion) came from advertising. In 2012, Google's revenues
2 increased to \$46.04 billion, approximately 95% of which (\$43.69 billion) came from advertising.⁵

3 In order to accomplish this, Google logs personal identifying information, browsing habits,
4 search queries, responsiveness to ads, demographic information, declared preferences and other
5 information about each consumer that uses its products. Google's Gmail service also scans and
6 discloses to other Google services the contents of Gmail communications. Google uses this
7 information, including the contents of Gmail communications, to place advertisements that are
8 tailored to each consumer while the consumer is using any Google product or browsing third-party
9 sites that have partnered with Google to serve targeted ads.⁶

10
11 Before March 1, 2012, information collected in one Google product was not automatically
12 commingled with information collected during the consumer's use of other Google products.
13 Google did not, for instance, ordinarily and automatically associate a consumer's Gmail account
14 (and therefore his or her name and identity, his or her private contact list, or the contents of his or
15 her communications) with the consumer's Google search queries or the consumer's use of other
16 Google products like Android, YouTube, Picasa, Voice, Google+, Maps, Docs, and Reader.⁷

17
18 Google has always maintained a general or default privacy policy purporting to permit
19 Google to "combine the information you submit under your account with information from other
20 services."⁸ However, before the introduction of the new privacy policy on March 1, 2012, this
21 statement was qualified, limited, and contradicted in privacy policies associated with specific
22 Google products, including both Gmail and Android-powered devices. The privacy policies
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24 ⁵ See *id.* at ¶ 4.

25 ⁶ See *id.* at ¶ 5.

26 ⁷ See *id.* at ¶ 6

27 ⁸ *Id.* at ¶ 7.

1 associated with Android-powered devices, for example, specified that, although the default terms
2 would generally apply, “[c]ertain applications or features of your Android-powered phone may
3 cause other information [that is, other than certain delimited “usage statistics”] to be sent to Google
4 but in a fashion that cannot be identified with you personally” and that “[y]our device may send us
5 location information (for example, Cell ID or GPS information) that is not associated with your
6 [Google] Account.” These categories of information, and certain other discrete categories of
7 Android user information, identified by the terms of the Android-powered device policy in effect
8 prior to March 1, 2012, could affirmatively not be “combine[d] ... with information from other
9 services.”⁹

11 On March 1, 2012, however, Google replaced those policies with a single, unified policy
12 that allows Google to comingle user data across accounts and disclose it to third-parties for
13 advertising purposes.¹⁰ Plaintiffs, who each either acquired a Google account or purchased an
14 Android-powered device before or on February 29, 2012, were not pleased and filed this suit.

16 Plaintiffs brought their original complaint on March 20, 2012 and consolidated it with
17 related actions on June 8, 2012.¹¹ The complaint presented a bare-bones theory that, by switching
18 to the less-restrictive privacy policy without user consent, Google violated both its prior policies
19 and consumers’ privacy rights.¹² However, Plaintiffs did not plead facts sufficient to show
20 concrete economic harm or prima facie statutory or common law violations, so the court dismissed
21 the complaint for lack of standing.¹³ Because the court was without jurisdiction to consider
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23 ⁹ *See id.* at ¶ 7.

24 ¹⁰ *See id.* at ¶¶ 5-14.

25 ¹¹ *See* Docket No. 1; Docket No. 14.

26 ¹² *See* Docket No. 14 at ¶¶ 9-10.

27 ¹³ *See* Docket No. 45 at 8-12.

1 Plaintiffs' substantive allegations, the dismissal provided Plaintiffs leave to amend their
2 complaint.¹⁴

3 Plaintiffs' first amended complaint, filed on March 7, 2013, expanded the bounds of the
4 alleged classes, as well as the explanations of Plaintiffs' injuries.¹⁵ After Google again moved to
5 dismiss, the court held that Plaintiffs have sufficiently plead standing,¹⁶ but nonetheless granted the
6 motion because Plaintiffs did not plead sufficient facts to support any of their claims.¹⁷ Although
7 Plaintiffs were granted leave to amend, the court warned "that any further dismissal [would] likely
8 be with prejudice."¹⁸ The most significant allegations added concern Google's plan entitled
9 "Emerald Sea."¹⁹ Unveiled within Google as early as May, 2010,²⁰ Emerald Sea's apparent
10 objective was "to reinvent [Google] as a social-media advertising company."²¹ The plan's
11 execution involves creating cross-platform dossiers of user data that would allow third-parties to
12 better tailor advertisements to specific consumers.²² Plaintiffs allege that despite this objective,
13 Google left in place the prior policies in order to avoid tipping-off consumers.²³ They cast Emerald
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17 ¹⁴ *See id.* at 12.

18 ¹⁵ *See* Docket No. 50 at ¶¶ 19-22, 35-7, 128-91.

19 ¹⁶ In finding standing, the court relied on Plaintiffs' allegations of (a) economic harm in the forms
20 of involuntary battery and bandwidth consumption, expenditures on replacement devices in order
21 to avoid Google's privacy policy, and overpayment for devices in reliance on fraudulent privacy
22 statements; and (b) violations of statutory rights. *See* Docket No. 67 at 11-17.

23 ¹⁷ *See id.* at 18-30.

24 ¹⁸ *Id.* at 30.

25 ¹⁹ Docket No. 68 at ¶ 9.

26 ²⁰ *See id.* at ¶¶ 9-10.

27 ²¹ *Id.* at ¶ 9.

28 ²² *See id.* at ¶¶ 10, 12-13, 16, 49, 51, 57, 75.

²³ *See id.* at ¶¶ 11, 126-27, 146.

1 Sea as evidence of Google’s intent to deceive consumers by disregarding existing privacy policies
2 in pursuit of ad revenue.²⁴

3 With these new allegations in place, Plaintiffs allege effectively the same harms as before.
4 The class as a whole complains that commingling and disseminating user data violates Google’s
5 prior privacy policies and constitutes an unreasonable invasion of consumer privacy.²⁵ The
6 Android Device Switch Subclass further complains that in order to avoid such an invasive policy,
7 the class members replaced their Android devices and incurred costs in doing so.²⁶ Additionally,
8 the Android Application Disclosure Subclass claims Google’s disclosures to third parties caused
9 increased battery and bandwidth consumption as well as invasions of Plaintiffs’ statutory and
10 common law privacy rights.²⁷ Plaintiffs frame these complaints within six legal theories:
11 violations of the California Consumers Legal Remedies Act (“CLRA”), Federal Wiretap Act,
12 Stored Electronic Communications Act, California’s Unfair Competition Law (“UCL”), and
13 common law theories of breach of contract and intrusion upon seclusion.²⁸
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15 Google now moves to dismiss this case once and for all, again arguing that Plaintiffs’ lack
16 standing and have failed to plead facts sufficient to substantiate their claims.
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19 ²⁴ See *id.* at ¶¶ 7, 15, 39, 76, 114, 124-27, 156, 159, 271, 292-93, 300.

20 ²⁵ See *id.* at ¶¶ 149, 150, 151.

21 ²⁶ See *id.* at ¶¶ 17, 146, 160.

22 ²⁷ See *id.* at ¶¶ 18, 19, 147-48, 161-193.

23 ²⁸ See *id.* at ¶¶ 250-343. Because the court previously dismissed them, Plaintiffs bring their claims
24 for breach of contract and those under the Federal Wiretap Act and Stored Electronic
25 Communications Act for appellate preservation purposes only. See *id.* at 75, 77, 80 nn.1-3. These
26 claims would have been preserved for appeal, regardless of whether they were re-plead. See *Lacey*
27 *v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir.2012) (overruling prior rule that claims not re-
alleged are waived and holding that “[f]or claims dismissed with prejudice and without leave to
amend, we will not require that they be replead in a subsequent amended complaint to preserve them
for appeal”).

II. LEGAL STANDARDS

A. Article III Standing

To satisfy Article III, a plaintiff “must show that (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”²⁹ A suit brought by a plaintiff without Article III standing is not a “case or controversy,” and an Article III court lacks subject matter jurisdiction over the suit.³⁰ In that event, the suit should be dismissed under Fed. R. Civ. Pro. 12(b)(1).³¹

The injury required by Article III may exist by virtue of “statutes creating legal rights, the invasion of which creates standing.”³² In such cases, the “standing question . . . is whether the constitutional or standing provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.”³³ At all times the threshold question of standing “is distinct from the merits of [a] claim” and does not require “analysis of the merits.”³⁴ The Supreme Court also has instructed that the “standing inquiry requires careful

²⁹ See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Sys. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000).

³⁰ *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

³¹ See *Steel Co.*, 523 U.S. at 109-110; *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

³² See *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

³³ See *id.* (quoting *Warth*, 422 U.S. at 500).

³⁴ *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

1 judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is
2 entitled to an adjudication of the particular claims asserted."³⁵

3 **B. Rule 12(b)(6)**

4 A complaint must contain "a short and plain statement of the claim showing that the pleader
5 is entitled to relief."³⁶ If a plaintiff fails to proffer "enough facts to state a claim to relief that is
6 plausible on its face," the complaint may be dismissed for failure to state a claim upon which relief
7 may be granted.³⁷ A claim is facially plausible "when the pleaded factual content allows the court
8 to draw the reasonable inference that the defendant is liable for the misconduct alleged."³⁸
9 Accordingly, under Fed. R. Civ. P. 12(b)(6), which tests the legal sufficiency of the claims alleged
10 in the complaint, "[d]ismissal can be based on the lack of a cognizable legal theory or the absence
11 of sufficient facts alleged under a cognizable legal theory."³⁹ "A formulaic recitation of the
12 elements of a cause of action will not do."⁴⁰

14 On a motion to dismiss, the court must accept all material allegations in the complaint as
15 true and construe them in the light most favorable to the non-moving party.⁴¹ The court's review is
16 limited to the face of the complaint, materials incorporated into the complaint by reference, and
17 matters of which the court may take judicial notice.⁴² However, the court need not accept as true

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20 ³⁵ *DaimlerChrysler*, 547 U.S. at 352 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)); *see also*
Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1121-22 (9th Cir. 2010).

21 ³⁶ Fed. R. Civ. P. 8(a)(2).

22 ³⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

23 ³⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

24 ³⁹ *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

25 ⁴⁰ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

26 ⁴¹ *See Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

27 ⁴² *See id.* at 1061.

1 allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences.⁴³

2 “Dismissal with prejudice and without leave to amend is not appropriate unless it is
3 clear . . . that the complaint could not be saved by amendment.”⁴⁴

4 III. DISCUSSION

5 As in prior motions, Google attacks Plaintiffs’ operative complaint on two fronts. First, it
6 argues that Plaintiffs lack standing to bring their claims at all. Second, it argues that even if they
7 have standing, Plaintiffs have once again failed to plead their claims in more than a conclusory
8 manner, such that they must be dismissed under *Iqbal* and *Twombly*.

9 A. Standing

10 In its earlier order, the court explained that Plaintiffs had standing to raise their claims
11 based on: (1) the greater discharge of battery power and system resources due to unauthorized
12 activity; (2) the costs incurred by each named plaintiff when he bought a new phone after the
13 policy change, since his initial phone choice was substantially driven by privacy concerns; (3) the
14 injury incurred overpaying for Android devices based on Google’s misrepresentation about certain
15 features; (4) violation of statutory rights bestowed by the Wiretap Act; (5) violations of statutory
16 rights bestowed by the Stored Communications Act and (6) violations of statutory rights bestowed
17 by Cal. Civ. Code § 3344.⁴⁵ In light of the claims Plaintiffs now pursue, only the first two reasons
18 remain pertinent. Google argues that those two do not give rise to Article III standing and that all
19 of Plaintiffs’ other injury theories “fail anew for the same reasons they failed last time.”⁴⁶ Google
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23 ⁴³ See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see also *Twombly*,
24 550 U.S. at 561 (“a wholly conclusory statement of [a] claim” will not survive a motion to
dismiss).

25 ⁴⁴ *Eminence Capital, LLC v. Asopon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

26 ⁴⁵ See Docket No. 67 at 13-17.

27 ⁴⁶ Docket No. 71 at 6.

1 separately argues Plaintiffs' standing based on an alleged risk of future harm from data
 2 commingling and disclosure to third parties is insufficient. As explained below, while the latter
 3 argument is persuasive, the former arguments are not.

4 **1. Alleged Heightened Risks of Future Harms Do Not Confer Standing**

5 Google initially challenges the Application Disclosure subclass' standing to bring its claims
 6 for unfair competition and intrusion upon seclusion.⁴⁷ Google argues that the heightened security
 7 risk Plaintiffs allege as a result of their data being disclosed to app developers does not amount to
 8 Article III injury-in-fact.⁴⁸ Indeed, this court's prior order held that unauthorized disclosure in and
 9 of itself did not confer standing.⁴⁹ In response to that order, however, Plaintiffs have expanded
 10 their allegations to explain that the relevant injury is not the mere unauthorized disclosure of user
 11 data, but rather the fact that such disclosure exposes users "to a substantially increased,
 12 unexpected, and unreasonable risk of further interception or dissemination of their personal
 13 information as well as of other adverse consequences, including harassment, receipt of unwelcome
 14 communications, and identity theft."⁵⁰

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 17 The Ninth Circuit has recognized that the improper disclosure of personal information can
 18 give rise to standing based on the threat of future harm so long as that harm is credible, real, and
 19 immediate, and not merely conjectural or hypothetical.⁵¹ But establishing such a credible, real, and

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 21 ⁴⁷ See Docket No. 68 at ¶¶ 287, 302.

22 ⁴⁸ See Docket No. 71 at 8-9.

23 ⁴⁹ See *id.* at 9 (citing Docket No. 45 at 10).

24 ⁵⁰ Docket No. 68 at 42.

25 ⁵¹ See *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (finding standing where
 26 plaintiffs alleged that employer's negligence and breach of implied contract under state law
 27 resulted in theft of a laptop containing sensitive employee data and thus an increased risk of
 identity theft although such theft had not yet occurred); see also *Lujan v. Defenders of Wildlife*,
 504 U.S. 555, 560 (1992) ("injury in fact [must be] concrete and particularized, and actual or
 imminent, not conjectural or hypothetical.") (internal citations and quotations omitted).

1 immediate harm is no small feat. For example, in *Low v. LinkedIn*, the court found no such harm,
 2 even where a digital service provider was alleged to have disclosed information to (un)authorized
 3 third-parties.⁵² Similarly, in *Yunker v. Pandora*, the court found insufficient harm to confer
 4 standing where the defendant, a music service provider, shared personal information without
 5 anonymizing it.⁵³ Each of these courts concluded that the alleged risk of future harm posed by the
 6 defendant's conduct was too conjectural and hypothetical to fall within the scope of the
 7 Ninth Circuit's standard.⁵⁴

8
 9 The alleged threat of future harm in this case is similarly conjectural. The information
 10 disclosure is markedly distinguishable from that in *Krottner*: there, disclosure was a result of laptop
 11 theft containing sensitive personal information of almost 100,000 Starbucks employees.⁵⁵ Here, no

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 14 ⁵² See *Low v. LinkedIn Corp.*, Case No. 5:11-cv-01468-LHK, 2011 WL 5509848, at *3-4
 15 (N.D. Cal. Nov. 11, 2011) (holding that plaintiff did not have standing based on defendant's
 16 practice of transmitting user ID's to third parties to track and aggregate browser history); see also
 17 *Opperman v. Path, Inc.*, Case No. 4:13-cv-00453-JST, 2014 WL 1973378, at *24 ("Plaintiffs assert
 18 a common law claim for invasion of privacy. Regardless of the merits of that claim, the Court
 19 finds Plaintiffs' allegations sufficient on [the] point [of standing]. The essence of the standing
 20 inquiry is to determine whether the plaintiff has 'alleged such a personal stake in the outcome of
 21 the controversy as to assure that concrete adverseness which sharpens the presentation of issues
 22 upon which the court so largely depends.' It is beyond meaningful dispute that a plaintiff alleging
 23 invasion of privacy as Plaintiffs do here presents a dispute the Court is permitted to adjudicate."
 24 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); cf. *In re iPhone Application Litig.*,
 25 844 F. Supp. 2d 1040, 1054 (N.D. Cal. 2012) (finding standing where Plaintiffs specifically alleged
 26 devices used, defendants and apps that accessed or tracked personal information and resulting
 27 harm).

28 ⁵³ See *Yunker v. Pandora Media, Inc.*, Case No. 4:11 cv-03113-JSW, 2013 WL 1282980, at *5
 (N.D. Cal. Mar. 26, 2013) (finding risk of future harm insufficient to establish standing where
 plaintiff alleged that online music provider failed to anonymize his personal information).

⁵⁴ See also *Frezza v. Google Inc.*, Case No. 5:12-cv-00237-RMW, 2013 WL 1736788, at *6 (N.D.
 Cal. Apr. 22, 2013) (dismissing claim for failure to plead injury-in-fact where plaintiff alleged that
 defendant retained, but did not disclose, credit card information); *Whitaker v. Health Net of
 California, Inc.*, Case No. 11-0910-KJM, 2012 WL 174961, at *4 (E.D. Cal. Jan. 20, 2012)
 (dismissing claims for lack of injury-in-fact where Plaintiff alleged loss, but not theft or
 publication, of plaintiff's information).

⁵⁵ See *Krottner*, 628 F.3d at 1140.

1 criminal activity is alleged to have been involved.⁵⁶ Google’s authorized third-party disclosure not
2 only differentiates this case from *Krottner*, but also brings it in line with *Low* and *Yunker*.⁵⁷

3 **2. Plaintiff Nisenbaum’s Phone Replacement Still Confers Standing**

4 Google’s second argument against standing targets the injury that Nisenbaum asserts in
5 bringing the Device Switch Subclass’ UCL and CLRA claims. Google argues that Nisenbaum has
6 not suffered an actual harm that would confer standing because (a) based on his purchase date, he
7 was a party to a 2009 privacy policy—not the 2008 privacy policy upon which his claim is based—
8 that expressly allows data commingling, and (b) the court’s prior holding that phone replacement
9 conferred standing no longer applies because he now alleges that Google’s failure to disclose its
10 intention to disregard its policy, rather than fear of data commingling, was the cause of
11 replacement.⁵⁸ The court previously found standing based on Nisenbaum’s allegation that he
12 would not have replaced his Android but for Google’s change in policy.⁵⁹

13 Google’s arguments are not persuasive. First, the court’s granting Plaintiffs’ motion to
14 strike Google’s submission of the 2009 privacy policy renders the first half of Google’s argument
15 moot. Accepting Plaintiffs’ allegations as true, Nisenbaum was a party to the 2008 privacy policy
16 giving rise to his claim. Second, and of more substantive import, the court’s prior ruling that the
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21 ⁵⁶ See *Krottner*, 628 F.3d at 1143 (“Were Plaintiffs-Appellants’ allegations more conjectural or
22 hypothetical—for example, if no laptop had been stolen, and Plaintiffs had sued based on the risk
that it would be stolen at some point in the future—we would find the threat far less credible.”).

23 ⁵⁷ See *Low*, 2011 WL 5509848 at *6 (Plaintiff “has not yet articulated . . . a particularized and
24 concrete harm as the plaintiffs did in *Krottner* . . . [Plaintiff] has not alleged that his credit card
25 number, address, and social security number have been stolen or published or that he is a likely
target of identity theft as a result of [defendant]’s practices. Nor has [Plaintiff] alleged that his
sensitive personal information has been exposed to the public.”).

26 ⁵⁸ See Docket No. 71 at 6-7; Docket No. 78 at 3-4.

27 ⁵⁹ See Docket No. 67 at 13-14.

1 economic injury resulting from Nisenbaum's phone replacement still applies.⁶⁰ Nisenbaum still
2 alleges that but for the policy switch he would not have otherwise bought a new phone⁶¹ and this
3 injury is still fairly traceable to Google's (now allegedly fraudulent) prior policies.⁶² In sum,
4 although Nisenbaum's ostensible motivation for switching phones has changed from the first to the
5 second amended complaint, his injury remains the same and Google's privacy policy is alleged to
6 be the source of that injury. Nisenbaum's phone replacement therefore continues to bestow
7 standing allowing him to bring UCL and CLRA claims on behalf of the Android Device Switch
8 Subclass.
9

10 **3. Battery Depletion Confers Standing**

11 Google's third substantive argument against standing attacks the alleged injury to Plaintiffs'
12 battery life caused by Google Play's unauthorized transmission of their information when they
13 download an app.⁶³ As in previous complaints, the App Disclosure subclass has asserted breach of
14 contract and unfair competition, based on the injury caused by decreased battery life.⁶⁴ Google
15 argues that the claims giving rise to that injury are "now gone," and that there is now "no nexus
16 between the claimed violation (Google Play disclosing account information to developers) and the
17 claimed injury (battery use)."⁶⁵ Google's reasoning is that app developers access user data from
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21 ⁶⁰ See Docket No. 67 at 14 ("Nisenbaum specifically alleges that but for the policy switch he would
22 not have otherwise have bought a new phone. The alleged injury is fairly traceable to Google
based on Mr. Nisenbaum's allegation that he relied on Google's previous policies in purchasing the
Android phone in the first place.").

23 ⁶¹ See Docket No. 68 at ¶ 262.

24 ⁶² See *id.* at ¶ 259-62.

25 ⁶³ See Docket No. 71 at 8.

26 ⁶⁴ See *id.* at 69-73.

27 ⁶⁵ *Id.*

1 Google Play’s servers, not the user’s individual phones, and therefore such optional access does not
2 implicate phone battery consumption.⁶⁶

3 Google’s argument here—challenging the causal nexus between its alleged conduct and the
4 Plaintiffs’ alleged injury—requires a heavily and inherently fact-bound inquiry that the court may
5 not reach at this stage in the litigation.⁶⁷ Google also concedes that its disclosure of user data
6 causes the phones to send at least “a few bytes of name, email address, and zip code
7 information.”⁶⁸ Moreover, the court has already ruled that allegations of resource depletion,
8 including battery power, gives rise to standing,⁶⁹ and the App Disclosure subclass has alleged
9 resource depletion stemming from Google’s breach of contract and the UCL.⁷⁰ Whatever their
10 ultimate merits, the subclass plainly has standing to raise those claims.
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12 **B. Sufficiency of the Pleadings**

13 With the standing question resolved, the court next turns to the legal sufficiency of the
14 claims alleged. At the outset, it is worth noting that this court’s prior order found that Google is
15 immune from the claims alleged under the Wiretap Act because of its status as a provider of
16 electronic communication services,⁷¹ and Plaintiffs have not amended or altered their claim to
17 avoid that immunity in this iteration. Similarly, the court’s prior order determined that Google is
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⁶⁶ See Docket No. 78 at 5.

21 ⁶⁷ See *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*,
22 422 U.S. 490, 501 (1975)) (“For purposes of ruling on a motion to dismiss for want of standing,
23 both the trial and reviewing court must accept as true all material allegations of the complaint and
must construe the complaint in favor of the complaining party.”).

24 ⁶⁸ Docket No. 78 at 5.

25 ⁶⁹ See Docket No. 67 at 12-13.

26 ⁷⁰ See Docket No. 71 at 70- 74.

27 ⁷¹ See Docket No. 67 at 18.

1 not subject to liability under the Stored Communications Act based on the conduct alleged,⁷² and
2 again, Plaintiffs have not amended their claim to suggest a different result. The breach of contract
3 claim on behalf of the entire class falls for the same reason.⁷³ While Plaintiffs have successfully
4 preserved these issues for appellate review, they are once again dismissed for failure to state a
5 claim in the current proceeding.

6 **1. CLRA Claim on Behalf of Device Switch Subclass**

7 Plaintiffs' first cause of action seeks recovery under Sections (a)(5),(7), (9), (14) and (16)
8 of the CLRA on behalf of the Device Switch Subclass. It is based on the theory that Google
9 drafted its 2008 Android Policy with the intent of deceiving potential purchasers of Android
10 devices into buying them based on the promise that Google would not associated device-related
11 information (such as the device's IMEI) with a user's account, that Google had a secret plan to
12 change that policy, and that "[h]ad Google disclosed in June 2010 that it did not intend to honor the
13 terms of the 'Android-powered device privacy policy' at that time, Plaintiff Nisenbaum would not
14 have purchased his Android device."⁷⁴ The CLRA proscribes representations that goods or
15 services have characteristics that they do not have, representations that goods or services are of a
16 particular standard when they are not, advertisement of goods with the intent not to sell them in the
17 manner advertised, representations that a transaction conveys rights that it does not, and
18 representations that the subject of a transaction has been conveyed in accordance with terms of a
19 previous transaction, when it has not. In order to recover, Plaintiffs also must allege facts to
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25 ⁷² See *id.* at 23.

26 ⁷³ See *id.* at 25.

27 ⁷⁴ See Docket No. 68 at ¶ 66.

1 establish that they relied on the misrepresentations in question, and that in so relying, they suffered
2 damage.⁷⁵ These allegations are subject to Rule 9(b)'s heightened pleading standards.⁷⁶

3 Google first argues that Plaintiffs' CLRA claim should fail because software is neither a
4 good nor a service as required for liability under Cal. Civ. Code § 1770. However, Plaintiffs'
5 allegations are not premised on the sale of the apps, but the sale of the Android device itself.⁷⁷
6 Plaintiffs allege that the same hardware that was the subject of the relevant sale was also subject to
7 the privacy policy at issue.⁷⁸ The Android-powered device is the "tangible chattel" that makes
8 Google the proper target of a CLRA claim.⁷⁹ Additionally, under the CLRA, the stream of
9 commerce does not vitiate liability for alleged affirmative misrepresentations made by
10 manufacturers that do not sell directly to customers.⁸⁰ Plaintiff's CLRA claim is not based upon an

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13 ⁷⁵ See *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1003 (N.D. Cal. 2009).

14 ⁷⁶ See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003)).

15 ⁷⁷ Cf. *In re iPhone Application Litig.* Case No. 5:11-md-02250-LHK, 2011 WL 4403963, at *10
16 (N.D. Cal. Sept. 20, 2011) ("Thus, to the extent Plaintiffs' allegations are based solely on software,
17 Plaintiffs do not have a claim under the CLRA.").

18 ⁷⁸ See Docket No. 68 at ¶ 255.

19 The Android-powered device policy provided that Google "would not associate the
20 following discrete categories of Android user information with that user's Google profile or
21 account: (i) the hardware model of a user's Android-powered phone or device; (ii) the
22 version of Android software used by a user; (iii) information about crashes or other phone-
level events experienced by an Android-user; (iv) information generated by the use of third-
party applications or features, such as mobile browsers, social networking software, address
books, and reference applications, used by an Android user; and (v) an Android user's
location information, including Cell ID and GPS information."

23 ⁷⁹ See *Perrine v. Sega of America, Inc.*, Case No. 3:13-cv-01962-JSW, 2013 WL 6328489, at *3
24 (N.D. Cal Oct. 3, 2013) ("The CLRA defines 'goods to mean 'tangible chattels bought or leased
for use primarily for personal, family, or household purposes'" (quoting Cal. Civ. Code
§ 1761(a)).

25 ⁸⁰ See *Oestreicher v. Alienware Corp.*, 322 Fed. Appx. 489, 493 (9th Cir. 2009) (Unpub. Disp.) ("A
26 manufacturer's duty to consumers is limited to its warranty obligations absent either an
affirmative misrepresentation or a safety issue.") (citation omitted); *Tietsworth v. Sears*,
27 720 F. Supp. 2d 1123, 1138 (N.D. Cal. 2010) (holding that, despite the lack of an alleged
agreement or transaction between plaintiff and defendant manufacturer, "when a plaintiff can

1 omission, rather, Plaintiffs allege that through its privacy policy, Google “intentionally
2 misrepresented the ability of Nisenbaum and other members of the Android Device Switch
3 Subclass to prevent the association and commingling of their personal information.”⁸¹ Therefore,
4 Plaintiffs need not allege a direct sale between Google and themselves to establish their
5 CLRA claim.⁸²

6 In its prior order, the court dismissed all of Plaintiffs’ theories of recovery under the CLRA
7 because Plaintiffs did not allege that Google intended to use their information in a manner other
8 than was advertised at the time that Plaintiffs purchased devices and registered for accounts.⁸³
9

10 That omission has been remedied in the current version of the complaint.⁸⁴ However, the CSAC
11 suffers from another, equally fatal omission: it never alleges that Nisenbaum or any other member
12 of the subclass read, heard, saw or were in any way aware of Google’s operative privacy policy.⁸⁵
13 If Nisenbaum and the other members of his subclass did not see, read, hear or consider the terms of
14 Google’s then-active privacy policy before creating their account, they could not have relied on
15 any representation it contained in making their decisions to purchase Android phones, and without
16 affirmatively alleging reliance on Google’s misrepresentations, the CLRA claim cannot survive.
17

18 demonstrate that the manufacturer had exclusive knowledge of a defect and the consumer relied
19 upon that defect, the CLRA’s protection extends to the manufacturer as well, regardless of whether
20 the consumer dealt directly with the manufacturer.”) (citing *Chamberlan v. Ford*, 369 F. Supp. 2d
21 1138, 1144 (N.D. Cal. 2005)); see also *McAdams v. Monier, Inc.* 182 Cal. App. 4th 174, 184
(2010) (“We also pause here to note that a cause of action under the CLRA may be established
independent of any contractual relationship between the parties.”) (citation omitted).

22 ⁸¹ Docket No. 68 at ¶ 260.

23 ⁸² See *Oestreicher*, 322 Fed. Appx. at 493.

24 ⁸³ See Docket No. 67 at 29.

25 ⁸⁴ See Docket No. 68 at ¶ 257 (“Google’s assurances in its Android-powered device privacy policy
26 . . . were false when made because Google already decided, no later than May 2010, not to honor
these terms.”).

27 ⁸⁵ See Docket No. 71 at 9.

1 Plaintiffs try to dodge this flaw in their claim with three arguments. First, they argue that
 2 “CLRA jurisprudence is abundantly clear that the reliance element is satisfied with allegations that
 3 ‘the plaintiff ‘in all reasonable probability’ would not have engaged in the injury-producing
 4 conduct’ absent the misrepresentation or omission.”⁸⁶ This argument is problematic for several
 5 reasons, but the most glaring is that every case Plaintiffs cite in its support concerns the UCL, not
 6 the CLRA.⁸⁷ Furthermore, in two of those three cases, the plaintiff had clearly alleged that he or
 7 she was exposed to the misrepresentation,⁸⁸ and the parties were simply fighting about whether the
 8 complaint spelled out that the plaintiff had relied on it in deciding to pursue the injury-inducing
 9 conduct.⁸⁹ This complaint lacks the predicate allegation (exposure), which precludes the court
 10 from considering reliance. Second, Plaintiffs argue that reliance may be presumed from a material
 11 omission.⁹⁰ That is certainly true in a case based on a theory of non-disclosure, but here, Plaintiffs
 12 theory is that they made their purchasing decision based on affirmative, fraudulent
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 16 ⁸⁶ See Docket No. 74 at 18.

17 ⁸⁷ See *In re Tobacco II Cases*, 46 Cal. 4th 298, 324-25 (2009) (“The second question before us is
 18 the meaning of the phrase ‘as a result of’ in section 17204’s requirement that a private enforcement
 19 action under the UCL can only be brought by “‘a person who has suffered injury in fact and has
 20 lost money or property as a result of the unfair competition.’”); *Lanovaz v. Twinings N. Am., Inc.*
 21 Case No. 5:12-cv-02646-RMW, 2014 WL 46822, at *3 (N.D. Cal. Jan. 6, 2014) (“Lanovaz’s
 claims under all three prongs of the UCL are based on fraud or misrepresentation. [] Therefore,
 Lanovaz must prove reliance to be successful on those claims.”); *In re Google AdWords Litig.*,
 Case No. 5:08-cv-03369-EJD, Docket No. 166 (only UCL and FAL claims present in the Third
 Amended Complaint).

22 ⁸⁸ See *In re Tobacco II*, 46 Cal. 4th at 324 (“[W]here, as here, a plaintiff alleges exposure to a
 23 long-term advertising campaign . . .”); *Lanovaz v. Twinings N. Am., Inc.* Case No. 5:12-cv-02646-
 24 RMW, Docket No. 67 at ¶ 14 (“Plaintiff reviewed the website at various times during the Class
 25 Period and read the health claims and antioxidant related nutrient content claims appearing on
 Defendant’s website as specified above prior to purchasing said products and relied on this
 information in making her decisions to purchase Defendant’s tea products.”);

26 ⁸⁹ There was no allegation of misrepresentation in the *In re Google AdWords* case; the case was
 based entirely on Google’s omission of a material fact. See Docket No. 166.

27 ⁹⁰ See Docket No. 74 at 18.

1 representations.⁹¹ Third, Plaintiffs argues that the court can and should reasonably infer that
 2 “Nisenbaum was exposed to the 2008 Android Policy or 2009 Mobile Policy terms during the
 3 registration process” for his Android account.⁹² However, that exposure would not have occurred
 4 until “after [Nisenbaum purchased] his Android device,”⁹³ at which point, it would not be
 5 reasonable to infer that Nisenbaum relied on the policy in deciding to purchase the device.

6 In short, although it was properly directed at Google, the Device Switch Subclass’ CLRA
 7 claim must be dismissed once again based on deficient pleadings.⁹⁴
 8

9 **2. UCL Claim on Behalf of Device Switch Subclass**

10 California’s UCL provides a private cause of action for users who are harmed by unfair,
 11 unlawful, or fraudulent business practices.⁹⁵ Plaintiffs plead their UCL claim under all three
 12 prongs. To sustain a claim under the unlawful prong, Plaintiffs must allege facts that, if proven,
 13 would demonstrate that Defendant’s conduct violated another, underlying law.⁹⁶ If the unlawful
 14 conduct is part of a uniform course of fraudulent conduct, it must meet Rule 9(b)’s heightened
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 17 ⁹¹ *Cf. Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 256 (2011) (addressing allegations of
 18 active concealment of a material defect in a product).

19 ⁹² Docket No. 74 at 19. With respect to the 2009 Mobile Policy, it is mentioned nowhere in the
 20 CSAC and thus is irrelevant.

21 ⁹³ *See id.*

22 ⁹⁴ Google also argues that the CLRA claim is also deficient under Fed. R. Civ. P. Rule 9(b),
 23 providing yet another ground for dismissal. *See* Docket No. 71 at 9. However, most of the
 24 particular deficiencies raised (where Nisenbaum’s phone was purchased, from whom it was
 25 purchased, etc.) would do little to provide Google with the necessary notice to defend itself on
 26 these claims. In addition, under Nisenbaum’s theory, he would not have purchased his phone if he
 27 had known that Google simply had the authority to associate device numbers with Google
 28 accounts, regardless of whether or not it ever actually did so.

⁹⁵ *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007).

⁹⁶ *See Trazo v. Nestle USA, Inc.*, Case No. 5:12-cv-2272-PSG, 2013 WL 4083218, at *9 (N.D. Cal.
 Aug. 9, 2013).

1 pleading standards.⁹⁷ Under the fraudulent prong, Plaintiffs must allege specific facts to show that
 2 the members of the public are likely to be deceived by the actions of the defendant.⁹⁸ The Ninth
 3 Circuit has established that this prong always is subject to Fed. Rule Civ. P. 9(b)'s heightened
 4 pleading requirements.⁹⁹ With respect to Plaintiffs' claim under the UCL's unfair prong, "[t]he
 5 standard for determining what business acts or practices are 'unfair' in user actions under the UCL
 6 is currently unsettled."¹⁰⁰ Generally speaking, "[a]n unfair business practice under the UCL is
 7 "one that either offends an established public policy or is immoral, unethical, oppressive,
 8 unscrupulous, or substantially injurious to users."¹⁰¹ To determine whether a business practice is
 9 unfair, a court should consider "the impact of the practice or act on its victim, balanced against the
 10 reasons, justifications and motives of the alleged wrongdoer;" this prong of the UCL should be
 11 used to "enjoin deceptive or sharp practices."¹⁰²

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 15 ⁹⁷ See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

16 ⁹⁸ See *Finuliar v. BAC Home Loans Servicing, L.P.*, Case No. 3:11-cv-02629-JCS,
 17 2011 WL 4405659, at *9 (N.D. Cal. Sept. 21, 2011) ("'Fraudulent,' as used in the statute, does not
 18 refer to the common law tort of fraud but only requires a showing members of the public 'are likely
 to be deceived.'").

19 ⁹⁹ See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009).

20 ¹⁰⁰ *Yanting Zhang v. Superior Court*, 57 Cal. 4th 364, 380 n.9 (2013). One test holds that "an
 21 'unfair' business practice occurs when it offends an established public policy or when the practice
 is immoral, unethical, oppressive, unscrupulous or substantially injurious to users." *People v. Casa*
 22 *Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 530 (1984). Another test requires that a
 plaintiff prove "that the defendant's "conduct is tethered to an . . . underlying constitutional,
 23 statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or
 violates the policy or spirit of an antitrust law." *Byars v. SCME Mortgage Bankers, Inc.*,
 24 109 Cal. App. 4th 1134, 1147 (2003). A third test requires that "(1) the user injury must be
 substantial; (2) the injury must not be outweighed by any countervailing benefits to users or
 25 competition; and (3) it must be an injury that users themselves could not reasonably have avoided."
Drum v. San Fernando Valley Bar Ass'n, 182 Cal. App. 4th 247, 257 (2010).

26 ¹⁰¹ *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008).

27 ¹⁰² *Wilson v. Hynek*, 207 Cal. App. 4th 999, 1008 (2012).

1 Plaintiffs' claim under the unlawful prong of the UCL is based entirely on their CLRA
 2 claim.¹⁰³ As the CLRA claim fails, so does the derivative UCL claim. Plaintiffs' claim under the
 3 fraudulent prong of the UCL also fails for the same reason that the CLRA claim failed: the
 4 complaint does not allege reliance.¹⁰⁴

5 Plaintiffs' claim under the unfair prong of the UCL fails as well, but for a different reason.
 6 Their unfairness theory is best understood in a three-step syllogism: (1) Plaintiffs have a right to
 7 privacy under the California Constitution; (2) Google's conduct "resulted in a violation of" that
 8 right to privacy, therefore (3) Google's conduct ran afoul of the UCL.¹⁰⁵ Contrary to Google's
 9 suggestion that the harms alleged in this claim are the same as they were in the previous iterations,
 10 this framework offers a new and different theory of recovery.¹⁰⁶ Unfortunately for Plaintiffs, it is
 11 no more successful. A necessary piece of the theory is that Google's conduct violated Plaintiffs'
 12 right to privacy under the California Constitution, yet they have not alleged facts to support that
 13 assertion. To prove a claim under the California Constitutional right to privacy, a plaintiff must
 14 plead three elements: (1) a legally protected privacy interest; (2) a reasonable expectation of
 15 privacy under the circumstances; and (3) conduct by the defendant that amounts to a serious,
 16 egregious invasion of the protected privacy interest.¹⁰⁷ Even if Plaintiffs have sufficiently alleged
 17 the first two elements, they have not met the third. Courts in this district have consistently refused
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 20 ¹⁰³ See Docket No. 68 at ¶ 268.

21 ¹⁰⁴ See *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009) (holding that plaintiff must allege
 22 reliance on defendant's misrepresentation in order to seek recovery under the fraudulent prong of
 23 the UCL).

24 ¹⁰⁵ See *id.* at ¶ 269-70.

25 ¹⁰⁶ Compare Docket No. 50 at ¶¶ 270-72, 314 (claiming violation of the unfair prong of the UCL
 26 based on luring Plaintiffs into becoming accustomed to "indispensable" services with promises of
 privacy protection then making it incredibly difficult to "opt out" of undesirable policies in the
 future), *with* Docket No. 68 at ¶ 268.

27 ¹⁰⁷ *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 35-37 (1994).

1 to characterize the disclosure of common, basic digital information to third parties as serious or
 2 egregious violations of social norms.¹⁰⁸ The conduct at issue in this case is neither sufficiently
 3 different from prior cases nor sufficiently beyond the pale of social norms to justify such a
 4 characterization here.

5 As the theories of harm fail under all three prongs of the UCL, the Device Switch Subclass'
 6 claim under the UCL is dismissed.

7 **3. Breach of Contract Claim on Behalf of App Disclosure Subclass**

8 Plaintiffs' third through fifth causes of action are brought on behalf of the App Disclosure
 9 subclass. The first is the breach of contract claim, which underlies this subclass' other claims.
 10

11 "Under California law, the elements of a breach of contract claim are: (1) the existence of a
 12 contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and
 13 (4) resulting damage to plaintiff."¹⁰⁹ The court's prior order dismissed Plaintiffs' breach of
 14 contract claim because an express provision in the contract at issue allowed data commingling.¹¹⁰

15 The complaint now adequately states a claim for breach of contract solely on behalf of the Android
 16 App Disclosure Subclass.¹¹¹ The complaint alleges: (1) that the subclass "entered into a contract
 17 with Google by registering for an Android Market/Google Play account, the key terms of which
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 20 ¹⁰⁸ See *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) (declining to
 21 find that defendant violated constitutional right to privacy in releasing unique device identifier
 22 number, personal data, and geolocation information from cell phones to third parties); *Low v.*
 23 *LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012) (declining to find that defendant
 violated constitutional right to privacy in releasing digital identification information to third
 parties).

24 ¹⁰⁹ *EPIS, Inc. v. Fid. & Guar. Life Ins. Co.*, 156 F. Supp. 2d 1116, 1124 (N.D. Cal.2001)
 (modifying punctuation) (citing *Reichert v. General Ins. Co.*, 68 Cal. 2d 822, 830 (1968)).

25 ¹¹⁰ See Docket No. 67 at 25.

26 ¹¹¹ See Docket No. 68 at ¶¶ 273-280. Plaintiff includes a breach of contract claim on behalf of the
 27 entire class only for purposes of appellate preservation. *Id.* at 75 n.1.

1 were provided in the relevant terms of service and privacy policies,”¹¹² (2) the specific terms at
 2 issue;¹¹³ (3) that Google breached those terms by disclosing user data to third parties following
 3 every download or purchase of an app¹¹⁴ and (4) resulting damages in the form of resource
 4 consumption.¹¹⁵

5 Google argues that the complaint fails to state a breach of contract claim for three
 6 reasons.¹¹⁶ First, it argues that the claim fails because the complaint fails to identify when the class
 7 members made their App purchases via Google Play, making it impossible to determine what
 8 privacy policy governed those transactions.¹¹⁷ This argument misstates the complaint and is thus
 9 unpersuasive. The complaint alleges that Google used an ever-changing array of privacy policies
 10 that varied by device, platform and service, including “the Google Wallet privacy policy, the
 11 Google Play terms of service, the Android-powered device privacy policy, and the general or
 12 default Google privacy policy,” that one of these policies was in place at the time of each
 13 transaction¹¹⁸ and what provisions of the policies were allegedly violated.¹¹⁹ Although these
 14 allegations may not be sufficient to sustain a fraud claim subject to Rule 9(b), this is a simple
 15 breach of contract claim subject to Rule 8. Under these laxer standards, the allegations will suffice.
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 19 ¹¹² Docket No. 68 at ¶ 278.

20 ¹¹³ *See id.* at ¶¶ 130 (quoting Android-powered device policy), 131 (“The Google Play terms of
 21 service simply refer to the Google Wallet privacy policy”), 132-34 (discussing and quoting Google
 22 Wallet Privacy Policy), 135 (discussing and quoting Google’s general privacy policy).

23 ¹¹⁴ *See id.* at ¶ 278.

24 ¹¹⁵ *See id.* at ¶ 279.

25 ¹¹⁶ *See* Docket No. 71 at 15-16.

26 ¹¹⁷ *Id.* at 15.

27 ¹¹⁸ Docket No. 68 at ¶ 277.

28 ¹¹⁹ *See id.* at ¶¶ 130-35.

1 Google’s second and third arguments also are unpersuasive. The second—that Plaintiffs are
2 not parties to the general privacy policy on which they base their claims¹²⁰—fails for the same
3 reason that it did when posed against Nisenbaum’s standing: Google’s 2009 policy is not properly
4 before the court. The third—that Plaintiffs fail to point to any explicit terms in the contracts they
5 allegedly breached¹²¹ — is simply false. Paragraph 130 points to a term in the Android device
6 policy that assures consumers that although Google “may share non-personal, aggregated
7 information with certain third parties . . . such information will not identify you personally.”¹²²
8 Paragraph 132 spells out that “[t]he November 16, 2011 Google Wallet Privacy Policy states that
9 Google may share personal information outside Google only in certain defined circumstances. For
10 example, that policy states that Google may share personal information with third parties ‘[a]s
11 necessary to process your transaction and maintain your account. As with any credit card payment,
12 if you process a credit card transaction through the Processing Service, we need to share some
13 information (for example, your name and credit card number) with the banks and other entities in
14 the financial system that process credit card transactions.’”¹²³ However, that same provision
15 allegedly assures consumers that when additional information, such as a telephone number, is
16 required, “you will be notified before you complete your transaction.”¹²⁴ Finally, the complaint
17 alleges that Google’s general privacy policy specifically provides that it “restrict[s] access to
18 personal information to Google employees, contractors and agents who need to know that
19 information in order to process it on our behalf. These individuals are bound by confidentiality
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23 ¹²⁰ Docket No.71 at 15.

24 ¹²¹ See Docket No. 71 at 15.

25 ¹²² Docket No. 68 at ¶ 130.

26 ¹²³ *Id* at ¶ 132.

27 ¹²⁴ *Id*.

1 obligations and may be subject to discipline, including termination and criminal prosecution, if
2 they fail to meet these obligations.”¹²⁵

3 **4. Intrusion Upon Seclusion Claim on Behalf of App Disclosure Subclass**

4 As the court previously admonished Plaintiffs, to assert an intrusion upon seclusion claim, a
5 plaintiff must plead facts in support of two elements: “1) intrusion into a private place,
6 conversation or matter, and 2) in a manner highly offensive to a reasonable person. . . . To show
7 intrusion, a plaintiff must have ‘an objectively reasonable expectation of seclusion or solitude in
8 the place, conversation or data source,’ and the defendant must have ‘penetrated some zone of
9 physical or sensory privacy surrounding, or obtained unwanted access to data about, the
10 plaintiff.”¹²⁶ In this context, “the concept of ‘seclusion’ is relative. The mere fact that a person
11 [or their information] can be seen by someone does not automatically mean that he or she can
12 legally be forced to be subject to being seen by everyone.”¹²⁷ Courts have recognized facts
13 sufficient to support these elements in the context of repeated phone calls,¹²⁸ eavesdropping on
14 workplace conversations,¹²⁹ and unauthorized email review.¹³⁰

15 Google argues that the court should simply stick with its prior holding that commingling of
16 user data is an inadequate allegation for an intrusion claim.¹³¹ But to so rule would fail to

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20 ¹²⁵ *Id.* at ¶ 135.

21 ¹²⁶ *Thompson v. Chase Bank N.A.*, Case No. 4:09-cv-2153-DMS, 2010 WL 1329061, at *4
(S.D. Cal. Mar. 30, 2010) (citing *Shulman v. Group W Productions*, 18 Cal.4th 200, 232 (1998)).

22 ¹²⁷ *Joseph v. J.J. Mac Intyre Companies, L.L.C.*, 281 F. Supp. 2d 1156, 1165 (N.D. Cal. 2003).

23 ¹²⁸ *See Panahiasl v. Gurney*, Case No. 5:04-cv-04479-JF, 2007 WL 738642, at *3 (N.D. Cal. Mar.
24 8, 2007).

25 ¹²⁹ *See Sanders v. Am. Broad. Companies, Inc.*, 20 Cal. 4th 907, 916 (1999).

26 ¹³⁰ *See Yee v. Lin*, Case No. 5:12-cv-02474-WHA, 2012 WL 4343778, at*4
(N.D. Cal. Sept. 20, 2012).

27 ¹³¹ *See* Docket No. 71 at 16 (citing Docket No. 67 at 29).

1 recognize Plaintiffs' new theory: that the intrusion at issue is disclosure to third-party developers
 2 contrary to Google's own policies.¹³² The court nonetheless cannot find that Plaintiffs have stated
 3 a claim under their revised theory either. This district "set[s] a high bar" for the requisite
 4 "intrusion [that is] highly offensive to a reasonable person."¹³³ Just as *In re iPhone Application*
 5 *Litig.*'s analogous facts were informative on the issue of standing, they also teach here that
 6 Plaintiffs' allegations do not plausibly rise to the level of intrusion necessary to establish an
 7 intrusion claim.¹³⁴ Plaintiffs' intrusion claims are therefore dismissed.

9 **5. UCL Claim on Behalf of App Disclosure Subclass**

10 Plaintiffs' fifth cause of action is another UCL claim, this time on behalf of the App
 11 Disclosure subclass. The App Disclosure subclass seeks recovery under two of the three prongs of
 12 the UCL, one of which is easily disposed of by this court's prior order. Their theory under the
 13 unfair prong of the UCL is that members of the App Disclosure subclass were lured into believing
 14 that their personal information would be closely guarded while Google encouraged them to "make
 15 Android devices and applications indispensable to their lives;" they were therefore trapped when
 16 Google implemented policies "from which they cannot effectively opt out."¹³⁵ In its last order, the
 17 court found that the "benefit to users in receiving free, 'indispensable services' offsets much of the
 18 harm they may suffer" as a result of being subjected to the changed policies. Plaintiff presents no
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 21 ¹³² See Docket No. 68 at ¶¶ 281-88 (alleging intrusion on behalf of App Disclosure subclass),
 303-09 (alleging intrusion on behalf of entire class).

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 23 ¹³³ *Belluomini v. Citigroup Inc.*, Case No. 3:13-cv-01743, 2013 WL 5645168, at *3
 (N.D. Cal. Oct. 16, 2013); see also *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1127-28
 24 (N.D. Cal. 2008) (dismissing invasion of privacy claim where Plaintiff's stolen laptop contained
 personal information including social security number).

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 26 ¹³⁴ See 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) (dismissing invasion of privacy claim where
 "information allegedly disclosed to third parties included the unique device identifier number,
 personal data, and geolocation information from Plaintiffs' iDevices").

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 28 ¹³⁵ See Docket No. 68 at ¶ 299.

1 persuasive reason to alter that holding here. As such the unfair prong of the App Disclosure
2 subclass' UCL claim fails.

3 The App Disclosure subclass' claim under the fraudulent prong of the UCL, however,
4 carries weight. As described above, under the fraudulent prong of the UCL, Plaintiffs must plead
5 specific facts to show that the members of the public are likely to be deceived by the actions of the
6 defendant and that Plaintiffs both relied on and were harmed by those actions.¹³⁶ Here, they allege
7 that Google left a privacy policy in place which led consumers to believe that access to their data
8 would be limited to certain groups,¹³⁷ even though it knew that it planned to distribute the data
9 outside of those groups.¹³⁸ These allegations fill ten pages with extensive detail about the plan and
10 its concealment, such that they clear the bar of Rule 9(b). Plaintiffs also successfully plead that
11 they relied on these policies in making the decision to use Google Play and download Android
12 applications.¹³⁹ Finally, Plaintiffs plead that they have suffered the loss of battery power and other
13 system resources as a result of Google's fraudulent and surreptitious conduct. Once again,
14 whatever the ultimate merits of this claim, the App Disclosure Subclass has stated a claim for relief
15 that may go forward.
16
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18 IV. CONCLUSION

19 After running each claim (and subclaim) of each class (and subclass) through the gauntlet
20 of constitutional and procedural hurdles, two claims remain: the App Disclosure Subclass' breach
21 of contract claim, and the fraudulent prong of the App Disclosure Subclass' UCL claim. Plaintiffs
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23 ¹³⁶ See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); see also *Finuliar v. BAC*
24 *Home Loans Servicing, L.P.*, Case No. 3:11-cv-02629-JCS, 2011 WL 4405659, at *10
(N.D. Cal. Sept. 21, 2011) (“‘Fraudulent,’ as used in the statute, does not refer to the common law
tort of fraud but only requires a showing members of the public ‘are likely to be deceived.’”).

25 ¹³⁷ See Docket No. 68 at ¶¶ 128-44, 295.

26 ¹³⁸ See *id.* at ¶110-27.

27 ¹³⁹ See *id.* at ¶ 296.

1 may proceed on these two causes of action alone. Because the court warned Plaintiffs in its last
2 order that any future dismissal would likely be with prejudice,¹⁴⁰ and because the thorough nature
3 of the allegations presented persuades the court that any and all omissions were intentional, all
4 other causes of action dismissed in this order are dismissed with prejudice and without leave to
5 amend. It is time for this case to move forward.

6 **IT IS SO ORDERED.**

7 Dated: July 21, 2014

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9 PAUL S. GREWAL
United States Magistrate Judge

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United States District Court
For the Northern District of California

¹⁴⁰ See Docket No. 67 at 30.