IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIE HAMMERLING, et al.,

        Plaintiffs,

        v.

GOOGLE LLC,

        Defendant.

Case No. 21-cv-09004-CRB

ORDER GRANTING MOTION TO DISMISS

Defendant Google LLC ("Google") moves to dismiss Plaintiffs Marie Hammerling and Kay Jackson's amended complaint. For the second time, Plaintiffs allege that Google secretly used their Android smartphones to collect data regarding their use of third-party apps. Plaintiffs allege that, through the collection of this data, Google "gains a wealth of highly personal information about consumers" in order to "gain an unfair advantage against its competitors." Am. Compl. (dkt. 51) ¶¶ 3, 5. In its prior order, the Court dismissed all of Plaintiffs' claims against Google. See Hammerling v. Google LLC, No. 21-CV-09004-CRB, 2022 WL 2812188 (N.D. Cal. July 18, 2022). Plaintiffs renew those claims in their amended complaint, alleging that Google breached its contract with its customers and violated California's Unfair Competition Law, the California Constitution, and California fraud and privacy laws. Am. Compl. ¶¶ 119–222. Google again moves to dismiss. Mot. (dkt. 57). Finding this matter suitable for resolution without oral argument pursuant to Civil Local Rule 7-1(b), because Plaintiffs fail to cure the deficiencies outlined in the Court's prior order, the Court GRANTS Google's motion to dismiss.

I.   **BACKGROUND**

1   claims: (1) common law intrusion upon seclusion; (2) invasion of privacy under the

2   California Constitution; (3) violation of California Civil Code section 1709; (4) violations

3   of the fraud, unlawful, and unfair prongs of California Civil Code section 17200 ("Unfair

4   Competition Law" or "UCL"); (5) violation of California Civil Code section 1750

5   ("California Consumers Legal Remedies Act" or "CLRA"); (6) breach of contract; (7)

6   breach of implied contract; (8) unjust enrichment; (9) relief under the Declaratory

7   Judgment Act; and (10) violation of California Penal Code section 631 ("California's

8   Invasion of Privacy Act" or "CIPA"). See Hammerling, 2022 WL 2812188. Despite

9   noting that "many of the problems [outlined in the order would] be difficult to cure," the

10   Court granted Plaintiffs leave to amend. Id. at *18. Plaintiffs amended their complaint,

11   leaving the vast majority of their allegations untouched; those facts are discussed in the

12   Court's prior order. See Hammerling, 2022 WL 2812188, at *1–2. In their amended

13   complaint, Plaintiffs allege the following additional facts:

14   First, Plaintiffs allege that data about their use of third-party apps provided "unique

15   insights" into their lives; for example, through Hammerling's use of the Fidelity

16   Investments and Bank of America apps, Google knew where Hammerling "maintained her

17   financial accounts." Am. Compl. ¶ 18. Through other third-party apps downloaded to her

18   Android smartphone, Google could deduce that Hammerling had a home security system,

19   drove a Mazda, read the New York Times, and was physically active. Id. Similarly,

20   through Jackson's use of the Joel Osteen, YouVersion Bible, and Bible Trivia apps,

21   Google knew Jackson's religious beliefs. Id. ¶ 30.

22   Second, Plaintiffs highlight five pieces of specific information collected from

23   Hammerling's use of third-party apps: (1) she visited the Wish app on March 10, 2021 and

24   viewed a foot massager, and on March 3, 2021 and viewed "womens slippers size 9"; (3)

25   she visited the Groupon app and viewed deals for "78% off Anti-inflammatory Meal

26   subscriptions" on October 13, 2019 and "100% Extra Virgin Coconut Oil" on May 10,

27   2020; and (3) she visited the Picsart Photo & Video Editor app on March 8, 2021. Id. ¶¶

1   Hammerling's Google account, which state that: "This activity was saved to your Google

2   Account because the following settings were on: additional Web & App Activity. You can

3   control these settings here." Id. ¶¶ 19, 21. When Plaintiffs followed the link in that notice,

4   they allege that the Web & App Activity Activity Control only states that Google will

5   "Save[] your activity on Google sites and apps" and Google's collection of Hammerling's

6   third-party app data from Groupon, Wish, and Picsart was in violation of this

7   representation. Id. ¶ 23.[1]

8   Third, Plaintiffs allege that Hammerling read Google's Privacy Policy and that she

9   "did not understand this policy to mean (and did not agree) that Google would collect

10   sensitive data from" third-party apps she downloaded to her Android smartphone. Id. ¶ 25.

11   Plaintiffs do not allege that Jackson ever read the Policy.

12   Fourth and finally, Plaintiffs allege that this information was "not de-identified or

13   anonymized," but that their interactions with third-party apps are "directly associated with

14   [their] Google Account[s]." See, e.g., id. ¶¶ 31, 65.

15   **II.   LEGAL STANDARD**

16   Under Federal Rule of Civil Procedure 12(b)(6), the Court may dismiss a complaint

17   for failure to state a claim upon which relief may be granted. Dismissal may be based on

18   either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under

19   a cognizable legal theory." Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th

20   Cir. 2019) (cleaned up). A complaint must plead "sufficient factual matter, accepted as

21   true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662,

22   678 (2009) (cleaned up). A claim is plausible "when the plaintiff pleads factual content

23   that allows the court to draw the reasonable inference that the defendant is liable for the

24   misconduct alleged." Id. When evaluating a motion to dismiss, the Court "must presume

25   all factual allegations of the complaint to be true and draw all reasonable inferences in

26

27   [1] While Plaintiffs do not allege that any specific data of this kind was collected from Jackson, they
     do allege that Google generally collected "highly specific data relating to" Jackson and that it also

1   favor of the nonmoving party." <u>Usher v. City of Los Angeles</u>, 828 F.2d 556, 561 (9th Cir.

2   1987). "Courts must consider the complaint in its entirety, as well as other sources courts

3   ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular,

4   documents incorporated into the complaint by reference, and matters of which a court may

5   take judicial notice." <u>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</u>, 551 U.S. 308, 322

6   (2007).

7   Claims for fraud must meet the pleading standard of Federal Rule of Civil

8   Procedure 9(b), which requires a party "alleging fraud or mistake [to] state with

9   particularity the circumstances constituting fraud or mistake." Rule 9(b) "requires . . . an

10   account of the time, place, and specific content of the false representations as well as the

11   identities of the parties to the misrepresentations." <u>Swartz v. KPMG LLP</u>, 476 F.3d 756,

12   764 (9th Cir. 2007) (cleaned up). "This means that averments of fraud must be

13   accompanied by the who, what, when, where, and how of the misconduct charged." <u>In re</u>

14   <u>Google Assistant Priv. Litig.</u>, 546 F. Supp. 3d 945, 955 (N.D. Cal. 2021) (internal

15   quotation marks omitted).

16   If a court dismisses a complaint for failure to state a claim, it should "freely give

17   leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). A court has

18   discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on the

19   part of the movant, repeated failure to cure deficiencies by amendment previously allowed,

20   undue prejudice to the opposing party by virtue of allowance of the amendment, [and]

21   futility of amendment." <u>Leadsinger, Inc. v. BMG Music Pub.</u>, 512 F.3d 522, 532 (9th Cir.

22   2008).

23   **III.   DISCUSSION**

24   This order first considers Google's request for incorporation by reference and

25   judicial notice. <u>See</u> Request for Judicial Notice ("RJN") (dkt. 58). It next considers

26   Google's argument that Plaintiffs consented to the data collection they allege in their

27   amended complaint. <u>See</u> Mot. at 5–8. It then addresses Google's motion to dismiss in the

1 privacy claims (common law intrusion upon seclusion, invasion of privacy under the

2 California Constitution, and CIPA); (3) contract claims (breach of contract, implied

3 contract, and unjust enrichment); (4) UCL's unlawful and unfair prongs; and (5)

4 declaratory judgment claim.

5   **A.   Incorporation by Reference (Exs. A–E, G–I)**

6   Google seeks incorporation by reference of eight documents: two versions of its

7 Privacy Policy, RJN Exs. A & B; and the website and Android versions of its "Activity

8 Controls," RJN Exs. C–E; G–I. See RJN at 3. Plaintiffs do not oppose this request. See

9 RJN Opp'n (dkt. 59).

10   The incorporation-by-reference doctrine "treats certain documents as though they

11 are part of the complaint itself." Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1002

12 (9th Cir. 2018). Documents are subject to incorporation by reference if a plaintiff refers to

13 them "extensively" or they form the basis of the complaint. Id. Courts may properly

14 assume the truth of documents incorporated by reference. Id. at 1003. But "it is improper

15 to assume the truth of an incorporated document if such assumptions only serve to dispute

16 facts stated in a well-pleaded complaint." Id.

17   The Court's prior order on Google's first motion to dismiss found that both versions

18 of Google's Privacy Policy were incorporated by reference. They remain so for the same

19 reasons, based on Plaintiffs' many references to them in their amended complaint. See

20 Hammerling, 2022 WL 2812188, at *3; see also, e.g., Am. Compl. ¶¶ 24, 33, 62–63, 73–

21 74.

22   The amended complaint, additionally, both quotes directly and references Google's

23 "Activity Controls," or webpages through which Plaintiffs were able to choose what types

24 of their data Google may retain. RJN Exs. C–E; G–I. Plaintiffs provide two notices from

25 Hammerling's Google account, both of which state that: "This activity was saved to your

26 Google Account because the following settings were on: additional Web & App Activity.

27 You can control these settings here." Am. Compl. ¶¶ 19 fig. 1, 21 fig. 2. Plaintiffs then

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