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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 MARIE HAMMERLING, et al.,

Case No. [21-cv-09004-CRB](#)

9 Plaintiffs,

10 v.

**ORDER GRANTING MOTION TO
DISMISS**

11 GOOGLE LLC,

12 Defendant.

13 Defendant Google LLC (“Google”) moves to dismiss Plaintiffs Marie Hammerling
14 and Kay Jackson’s amended complaint. For the second time, Plaintiffs allege that Google
15 secretly used their Android smartphones to collect data regarding their use of third-party
16 apps. Plaintiffs allege that, through the collection of this data, Google “gains a wealth of
17 highly personal information about consumers” in order to “gain an unfair advantage
18 against its competitors.” Am. Compl. (dkt. 51) ¶¶ 3, 5. In its prior order, the Court
19 dismissed all of Plaintiffs’ claims against Google. See Hammerling v. Google LLC, No.
20 21-CV-09004-CRB, 2022 WL 2812188 (N.D. Cal. July 18, 2022). Plaintiffs renew those
21 claims in their amended complaint, alleging that Google breached its contract with its
22 customers and violated California’s Unfair Competition Law, the California Constitution,
23 and California fraud and privacy laws. Am. Compl. ¶¶ 119–222. Google again moves to
24 dismiss. Mot. (dkt. 57). Finding this matter suitable for resolution without oral argument
25 pursuant to Civil Local Rule 7-1(b), because Plaintiffs fail to cure the deficiencies outlined
26 in the Court’s prior order, the Court GRANTS Google’s motion to dismiss.

27 **I. BACKGROUND**

28 In its prior order, the Court found that Plaintiffs had failed to state each of its top

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. ¶¶

28 10. 21. For two of these pieces of data, Plaintiffs included data notices from

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
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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.” Usher v. City of Los Angeles, 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.” Tellabs, Inc. v. Makor Issues & Rights, Ltd., 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.” Swartz v. KPMG LLP, 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.” In re
14 Google Assistant Priv. Litig., 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.” Leadsinger, Inc. v. BMG Music Pub., 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. See 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. See Mot. at 5–8. It then addresses Google’s motion to dismiss in the
28 following order: (1) fraud claims (Section 1700, UCL’s fraud prong, and CLRA); (2)

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
28 provide direct quotes from the page linked in both notices, but do not provide the full

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