UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION

Case No. 10-cv-04809-EJD

ORDER DENYING MOTION TO DISMISS

Re: Dkt. No. 107

This is a class action concerning Defendant Google, LLC's alleged disclosure of users' search terms to third party servers; it was originally settled in 2013. The case now returns to the Court upon remand from the U.S. Supreme Court, which vacated the settlement and instructed this Court to evaluate the plaintiffs' Article III standing in light of its decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). *See Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019). The Court has now done so, aided by the parties' briefing and a hearing conducted on June 4, 2020. The Court finds that Plaintiffs have standing to bring their claims and DENIES Defendant's motion to dismiss.

I. BACKGROUND

This suit's path to the present motion is a long and circuitous one; accordingly, a brief review of how we got here is in order.

Defendant Google, LLC ("Google") operates an Internet search engine, which allows users to search for websites based on a query of keywords or phrases. Dkt. No. 51, Ex. A ("Consol. Compl.") ¶¶ 15-16. Upon a search, Google displays the search results as a list of hyperlinks to the relevant websites; the user may click on a link to travel to the desired site. *Id.* ¶¶ 56-57. Plaintiffs

allege that when a user clicks on a search result, Google transmits the user's search terms to the third-party server that hosts the website the user seeks to view. *Id*. That is because the "Uniform Resource Locator" ("URL") used to direct the user to the requested website contains the URL of the last site the user visited—i.e., the page that "referred" them to the requested website; this information is known is as the "referrer header." *Id.* ¶¶ 50-57; *see generally In re Zynga Privacy Litig.*, 750 F.3d 1098, 1101 (9th Cir. 2014) (explaining URLs and referrer headers).

Believing that the disclosure of search terms to third parties violates users' statutory and contractual privacy rights, Named Plaintiff Paloma Gaos filed the original Complaint in October 2010. Dkt. No. 1 ("Compl."). The case was assigned to the undersigned judge in April 2011, Dkt. No. 25, and Plaintiff Gaos filed the First Amended Complaint ("FAC") in May 2011, Dkt. No. 26 ("FAC"). The FAC contains one federal claim for violation of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2702(a), and six state law claims for fraudulent misrepresentation, negligent misrepresentation, public disclosure of private facts, actual and constructive fraud under Cal. Civ. Code §§ 1572, 1573, breach of contract, and unjust enrichment. FAC ¶¶ 93-137. In May 2011, Defendant moved to dismiss the FAC pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Dkt. No. 29. As relevant to the instant dispute, Defendant argued that Plaintiff Gaos lacked standing to bring any of the claims in the FAC. *Gaos v. Google Inc.*, No. 5:10-CV-4809 EJD, 2012 WL 1094646, at *1 (N.D. Cal. Mar. 29, 2012).

This Court granted the motion in part and denied it in part. *Id.*; Dkt. No. 38. First, the Court found that Plaintiff Gaos had failed to adequately plead standing to bring her six state law claims and dismissed those claims with leave to amend. *Gaos v. Google Inc.*, 2012 WL 1094646 at *2. On the other hand, Gaos's federal claim alleged a violation of her rights under Title II of the ECPA, which is the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701 *et seq.* This Court rejected Defendant's contention that Plaintiff Gaos had not adequately alleged an injury in fact, as necessary for Article III standing. *Gaos v. Google Inc.*, 2012 WL 1094646 at *3-*4; *see* Dkt. No. 29 at 7-10. Citing *Edwards v. First American Corporation*, 610 F.3d 514 (9th Cir. 2010), the Court observed that "[t]he injury required by Article III . . . can exist solely by virtue of 'statutes

creating legal rights, the invasion of which creates standing.'" 2012 WL 1094646 at *3 (quoting *Edwards*, 510 F. 3d at 517). The Court then recognized that "a violation of one's statutory rights under the SCA" is, by itself, "a concrete injury" and found that Plaintiff Gaos had standing to assert the SCA claim. *Id.* (citing *Jewel v. National Security Agency*, 673 F.3d 902, 908 (9th Cir. 2011)).

In an effort to cure the standing deficiencies as to the state law claims, Gaos and an additional named plaintiff (Anthony Italiano) filed the Second Amended Complaint ("SAC"). Dkt. No. 39 ("SAC"). The SAC also contained new factual allegations that in October 2011, Google changed its practice regarding referrer headers. According to the SAC, Google's new practice was to "scrub" search terms from the referrer headers on "regular, organic search results" when users are logged into a Google service; however, Google would continue to include search terms in referrer headers when users click on "paid links or advertisements." SAC ¶¶ 6, 64-66. Thus, in Plaintiffs' view, Google "is now effectively selling search queries to paying advertisers." *Id.* ¶ 67.

Defendant again moved to dismiss the SAC for lack of Article III standing. As to the state law claims, Defendant argued that Plaintiffs had not cured the deficiencies in the FAC. In addition, Defendant renewed its standing challenge to the SCA claim. Although Defendant recognized that this Court had already rejected its argument on this front, the U.S. Supreme Court had granted certiorari in *Edwards*, 510 F.3d 514; because this Court had relied in part on *Edwards* in finding standing, Defendant urged the Court to reconsider its decision in the event *Edwards* was reversed. Dkt. No. 44 at 3. When the Supreme Court dismissed *Edwards* as improvidently granted, 567 U.S. 756 (2012), however, Defendant withdrew its standing argument against the SCA claim. Dkt. No. 46 at 2 n.2.

Then, before this Court made its ruling on Defendant's motion to dismiss the SAC, the parties stipulated to the consolidation of Gaos and Italiano's case with another class action, and Plaintiffs filed the now-operative Consolidated Complaint. Dkt. Nos. 50, 51. The motion to dismiss the SAC was therefore terminated as moot. Dkt. No. 51.

Shortly thereafter, in July 2013, the parties reached a classwide settlement. The settlement agreement provided, among other things, that Defendant would pay a settlement amount of $8.5 million, none of which would be distributed to absent class members; rather, any funds not used for costs, attorney's fees, and incentive payments would be distributed to six *cy pres* recipients. This Court granted preliminary and then final approval of the settlement, over the objections of five class members. Dkt. Nos. 63, 85; *see Frank v. Gaos*, 139 S. Ct. 1041, 1045 (2019). Two of the objectors appealed the settlement to the Ninth Circuit, challenging the propriety of *cy pres* relief as well as the selection of the *cy pres* recipients. The Ninth Circuit affirmed this Court's approval of the settlement. *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737 (9th Cir. 2017).

Undeterred, the objectors petitioned for certiorari before the U.S. Supreme Court, and their petition was granted. *Frank v. Gaos*, 138 S. Ct. 1697 (2018). Instead of reaching the merits of the *cy pres* issues, however, the Supreme Court identified a potential threshold obstacle: In 2016, while the objectors' Ninth Circuit appeal was pending, the Supreme Court had issued its opinion in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The Supreme Court explained that *Spokeo* "abrogated the ruling in *Edwards* that the violation of a statutory right automatically satisfies the injury-in-fact requirement whenever a statute authorizes a person to sue to vindicate that right." *Frank v. Gaos*, 139 S. Ct. at 1046. But "[b]ecause Google withdrew its standing challenge after we dismissed *Edwards* as improvidently granted, neither the District Court nor the Ninth Circuit ever opined on whether any named plaintiff sufficiently alleged standing in the operative complaint." *Id.* As this Court lacked power to approve the proposed class settlement if no named plaintiff had standing, the Supreme Court concluded that this Court should "address the plaintiffs' standing in light of *Spokeo*" in order to assure its jurisdiction. *Id.* The Supreme Court therefore vacated the judgment and remanded the case to the Ninth Circuit, *id.*, which remanded the case to this Court, Dkt. No. 99.

In accordance with the Supreme Court's order, Defendant filed a motion to dismiss the operative Consolidated Complaint for lack of standing on March 20, 2020; that motion is now ripe

for this Court's review. Dkt. Nos. 107, 108, 109, 110.

II. LEGAL STANDARD

The Court begins by reviewing the basic legal standards applicable to Defendant's motion to dismiss, which is brought under Federal Rule of Civil Procedure 12(b)(1). A Rule 12(b)(1) motion tests whether the court has subject matter jurisdiction to hear the claims alleged in the complaint. Here, Defendant contends that Plaintiffs lack Article III standing, which "is a necessary component of subject matter jurisdiction." *In re Palmdale Hills Prop.*, LLC, 654 F.3d 868, 873 (9th Cir. 2011).

The Supreme Court has repeatedly stated that the "irreducible constitutional minimum of standing" consists of three elements, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992): "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). These elements are typically referred to as injury in fact, causation, and redressability. *See, e.g.*, *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020). Plaintiffs, as the parties invoking federal jurisdiction, bear the burden of establishing the existence of Article III standing and, at the pleading stage, "must clearly allege facts demonstrating each element." *Spokeo*, 136 S. Ct. at 1547 (internal quotations omitted); *see also Baker v. United States*, 722 F.2d 517, 518 (9th Cir. 1983) ("The facts to show standing must be clearly apparent on the face of the complaint.").

"In a class action, this standing inquiry focuses on the class representatives." *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019). The named plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Standing for the putative class "is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). But if none of the named plaintiffs

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