UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CHASOM BROWN, et al.,

Plaintiffs, v. GOOGLE LLC,

Defendant.

Case No. 20-CV-03664-LHK ORDER DENYING MOTION TO DISMISS Re: Dkt. No. 164

Plaintiffs Chasom Brown, William Byatt, Jeremy Davis, Christopher Castillo, and Monique Trujillo situated, bring the nd Amended Complaint asserts seven claims against Google under federal and California law. ECF No. 136-1 ECF No. 164. 1

law, and the record in this

1 Googles motion to dismiss contains a notice of motion that is separately paginated from the points and authorities in support of the motion. Civil Local Rule 7-2(b) requires that the notice of motion and the points and authorities in support of the motion be contained in one document with the same pagination for a total of no more than 25 pages. See Civ. Loc. R. 7-2(b).

I. BACKGROUND

To access a website on the internet, an individual - a . See SAC ¶¶ 2, 63. Specifically, the user must type the website address bar. Id. ¶ 63. Entering a URL causes the browser to

Id. A GET request tells the serve Id. The browser then displays the requested information for the user. Id.

Google provides services and products both to website publishers and to internet users. Google provides advertising and data analytics services to website publishers. See id. ¶¶ 8, 67 83. More than 70% of website publishers in the United States use at least one of these services. Id. ¶ 8. Google provides internet users with See id. ¶ 51. Chro Id. ¶ 52. private browsing mode Id.

Brown et al v. Google LLC et al

2021 | Cited 0 times | N.D. California | December 22, 2021

The instant case arises from Google of using its advertising and data analytics services to collect data from internet users who visit websites while in See id. ¶¶ 5, 8. Plaintiffs . . . while browsing the internet from a browser in a private browsing mode. Id. ¶ 11.

Specifically, . . and intercepted [their] communications with [those] Website See id. ¶¶ 168 69, 173 74, 178 79, 183 84, 188 89. Plaintif

Id. ¶ 6.

In the following sections, the Court des the data of internet users who visit Google affiliated

A. ion Practices

Plaintiffs provide detailed allegations explaining how Google collects and monetizes

data internet data. The Court then describes how Google monetizes that data.

1. lecting Data Google offers two services that are used by more than 70% of websites: Google Analytics and Google Ad Manager. See SAC ¶ 63. Google Analytics enables a website publisher to collect emographics, frequency, browsing Id. ¶ 67. Although the basic version of Id. ¶ 67 n.17. In turn, Google Ad Manager enables

Google advertisements . . . Id. ¶ 79. isements, and the fees are split between Google and the website publisher. Id. To use Google Analytics and Google Ad Manager, publishers must See id. ¶¶ 68, 79.

According to Plaintiffs, Google collects the data of all internet users who visit websites that use Google Analytics and Google Ad Manager. As discussed, an internet user accesses a

information. Id. ¶ 63. When a browser sends a GET request to a website that uses either Google Analytics or Google Ad Manager, the embedded Google code causes the browser to send a duplicate GET request directly to Google. Id. at information is being reques Id. The duplicate GET request also includes the t the user has been viewing and requesting from websites online Id.

Additionally, every website that uses Google Analytics or Google Ad Manager collects . Id. An IP address is a unique identifier that an the device uses an internet connection provided by the ISP. See id. ¶ 63 n.16. Because most internet users access the internet using one

device and one internet connection, most internet users have one IP address. Id. ¶ 63 n.16. Thus, obtaining an internet user user across the internet.

Google also uses data. As a user browses the internet, the

. Id. ¶ 70 n.19. When a user visits a website that has Google Analytics or Google Ad Manager, the

embedded Google code causes the browser to send Google cookies that contain information about Id. ¶ 70. The embedded Google code also causes the Id. ¶ 102. This function allows Google to differentiate . Id. ¶ . . .

partners are able Id. ¶ 103.

Website publishers - Id. ¶ own unique IDs, consistently assigns IDs to users, and include these IDs wherever [the Websites]

Id. (alterations in original). These IDs are more useful to websites than IP addresses because ID stays the same when the user accesses the website from different devices. Id. Thus -engagement on a tablet that previously looked like three unrelated actions on unrelated devices can now be Id. (alteration in original).

Google can collect additional data if a user accesses the internet with certain Google software applications. Most importantly, when a user installs Chrome on a device, Google assigns the devi -Client-Id. ¶ 95. Then, whenever the user accesses Google affiliated websites with Chrome, Google will receive the user -Client- Id. ¶ 98. Additionally, if a user has a cellular device with Id. ¶ 106.

Generally, Google collects data regardless of whether the . . enter Id. ¶ 84. However, Google does not receive a -Client- the user enters Id. ¶ 98.

2. Google monetizes data by creat[ing] Id. ¶ 116. Website publishers purchase

these profiles from Google to learn about the browsing habits of the users who visit the websites. Id. ¶¶ 116 17. Google also - See id. ¶¶ 118 19. Specifically, the Google Ad Manager service, which

is used by more than 70% of websites, receives the profiles of individuals who visit those websites and uses algorithms to determine which advertisements to show to those individuals. Id. Google - Id.

According to Plaintiffs, the data that Google collects from internet users -Id. ¶ Id. ¶ 127. rs are

willing to pay $52.00/year to keep their browsing histories private. Id. ¶ 128. Similarly, Google internet users browser extension that shares with Google the sites th Id. ¶ 129.

per week Id. ¶ 130 (emphasis in original).

Id. ¶ 135. For example, a company called Brave now offers a web

Id. Several other companies have launched exchange platforms that allow internet users to sell

their data to applications and websites. See id.

B.

Plaintiffs allege that Google made numerous representations that, if Plaintiffs visited t collect their data. Specifically,

Plaintiffs identify three Google documents that contain privacy-related representations: (1) and (3) the Incognito Splash Screen. The Court discusses each document in turn.

1. internet users that they can choose to 45. The following sentence adds: services, you can adjust your privacy settings to control what [Google] collect[s] and how your Id.

To help users adjust their privacy settings, Privacy Policy includes a section Id. ¶ 46. states that users Id.

Additionally, contains links to two pages that encourage users to enter reiterates that users a and states that, to control their

informa , Id. ¶ 48. App informs users d using search-related Id. ¶ Id. Clicking takes Privately page which, as notedenabl[e] Id.

2. Chrome Privacy Notice The purpose of the Chrome Privacy Notice is to inform e d ECF No. 165-22 at 1. vacy Policy

ogle or stored in your Google

See id.

Additionally, the Chrome Privacy Notice lists the ices are different depending on the mode that

Id. at 3. Privacy Notice states: You can limit the information Chrome stores on your system by using

incognito mode or gue Id. has a hyperlink which directs users to a page Id. T page provides instructions on how to open Chrome in Incognito Mode from any device. Id.

The Chrome Privacy Notice further states that, when Chrome is in Incognito Mode,

Basic browsing history information like URLs, cached page text, or IP addresses of

pages linked from the websites you visit; Snapshots of pages that you visit; and Records of your downloads, although the files you download will still be stored

elsewhere on your computer or device. Id. Addi Id.

3. When a user opens Chrome in Incognito Mode, Chrome displays the following message:

SAC ¶ 52. Plaintiffs refer to this display Incognito See ECF No. 192 at 5.

C. Procedural History

On June 2, 2020, Plaintiffs filed a complaint against Alphabet, Inc. and Google alleging that Google had unlawfully collected used ECF No. 1. Plaintiffs asserted four claims: (1) unauthorized interception under the Wiretap Act, 18 U.S.C. § 2510 et seq.; (2) violation of the California Invasion 3) invasion of privacy; and (4) intrusion upon seclusion. Id.

Additionally, the complaint sought class action relief on behalf of two alleged classes: (1) All Android device owners who accessed a website containing Google Analytics or Ad Manager using such a device and who were (a) in private browsing mode

including identifying information and online browsing history, Google nevertheless intercepted, received, or collected from Ju All individuals with a Google account who accessed a website containing Google Analytics or Ad Manager using any non-Android device and who were (a) in private browsing mode were

including identifying information and online browsing history, Google nevertheless intercepted, Id. ¶ 95.

On August 20, 2020, Plaintiffs and Alphabet stipulated to dismiss Alphabet from the case without prejudice. ECF No. 51. On the same day, Google filed a motion to dismiss the complaint. ECF No. 53. On August 24, 2020, the Court granted the parties stipulation to dismiss Alphabet, leaving Google as the only defendant. ECF No. 57.

On September 21, 2020, Plaintiffs filed a first amended complaint in lieu of opposing the motion to dismiss. ECF No. 68 . In addition to the four claims from the original complaint, the FAC asserted a claim for violation of the California Computer Data Access . Id. On October 6, 2020, the Court denied as

moot the August 20, 2020 motion to dismiss. ECF No. 74.

On October 21, 2020, Google filed a motion to dismiss the FAC. ECF No. 82. Among other

arguments Id. at 9 13. In connection with its

motion to dismiss, Google filed a request for judicial notice. ECF No. 84. Specifically, Google requested that the Court take notice of twenty- Notice, and nine publicly available Google webpages. Id.

to dismiss the FAC. ECF No. 87. In connection with their opposition, Plaintiffs filed request for judicial notice, ECF No. 88, and filed their own request for judicial notice, ECF No. 89. effect between March 31, 2020 and July 1, 2020. ECF No. 89.

On December 7, 2020, Google filed a reply in support of its motion to dismiss the FAC, filed reply in support of its request for judicial notice, ECF No. 93.

On February 25, 2021, the Court held ismiss the FAC. ECF No. 103. At that hearing website. See Tr. of Feb. 25, 2021 Hearing at 47:13 16, ECF No. 104. On February 26, 2021 and March 1, 2021, Google filed affidavits further e website. ECF Nos. 106, 107. On March 8, 2021, Plaintiffs filed a response addressing the filed an administrative motion for leave to file a reply affidavits. ECF No. 112.

On March 12, 2021, the Court issued an order grant requests for judicial notice, denying tive motion for leave to file a reply in support of the , and denying Brown v. Google LLC, 525 F. Supp. 3d 1049 (N.D. Cal. 2021). Among other holdings, the Court held

that Google failed to show that Plaintiffs consent data collection practices. Id. at

private browsing as a way that users can manage their privacy and omit Google as an entity that Id.

On April 14, 2021, the parties stipulated to allow Plaintiffs to file a second amended In addition to the five claims asserted by the FAC, the SAC asserts two new claims against Google: (1) breach of contract; and (2) violation of the California 17200, et seq. ECF No. 136-1 stipulation. ECF No. 138.

dismiss, Google filed a request for judicial notice. ECF No. 166.

with their opposition, Plaintiffs filed a request for judicial notice. ECF No. 193.

claims for breach of contract and violation of the UCL. ECF No. 208 . II. REQUESTS FOR JUDICIAL NOTICE

Google requests that the Court take judicial notice of twenty-four documents, which le Google webpages.

ECF No. 166. Plaintiffs request that the Court take judicial notice of the current version of

As the Court previously has explained, these documents appear on publicly available websites and are thus proper subjects of judicial notice. See Brown, 525 F. Supp. 3d at 1061

webpages); see also, e.g., In re Google Assistant Privacy Litig., 457 F. Supp. 3d 797, 813 14

(N.D. Google blog post); Matera v. Google, Inc., 2016 WL 5339806, at *7 (N.D. Cal. Sept. 23, 2016)

III. LEGAL STANDARD

A. Motion to Dismiss Under Rule 12(b)(6)

and plain statement of the c 8(a). A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of

Civil Procedure 12(b)(6). Rule 8(a) requires a plaintiff to p e a claim to Bell Atlantic Corp. v. Twombly claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defen Ashcroft v. Iqbal,

it asks for more than a sheer possibility that a defendant has acte Id. (internal

factual allegations in the complaint as true and construe[s] the pleadings in the light most Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008).

The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, see Shwarz v. United States may look beyond the plaint motion into a motion for summary judgment, Shaw v. Hahn, 56 F.3d 1128, 1129 n.1 (9th Cir.

lusions merely because they are cast in Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (quoting W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)). Mere nsufficient to defeat a motion to

Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004).

B. Leave to Amend

If the Court determines that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to of Rule 15

Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted). When dismissing a complaint for failure to state a c'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that Id. at 1130

(internal quotation marks omitted). Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. , 512 F.3d 522, 532 (9th Cir. 2008). IV. DISCUSSION

. See Mot. at 4, 16 and

A. Plaintiffs Have Adequately Stated a Breach of Contract Claim Based on Go Data Collection Practice

contract; (ii) the plai

In re Facebook, Inc., Consumer Priv. User Profile Litig., 402 F. Supp. 3d 767, 801 (N.D. Cal. 2019) (Facebook Consumer Privacy contract w Id. at 789. objectively, from the perspective of a

Id.; see also Williams v. Apple, Inc., No. 19-cv-04700-LHK, 2021 WL

contract seek to effectuate the reasonable expectations of the average member of the public who Contracts § 211(2))).

Plaintiffs allege that their relationship with Google was governed by a contract consisting of 268. Additionally, Plaintiffs allege that this

contract incorporated at least three additional documents such that these additional documents

are part of the contract as well. Id.

According to Plaintiffs, the Chrome Privacy Notice Privacy Policy, & Browse Priva , and the Incognito Splash Screen promised that, if Plaintiffs visited

websites in e Google would not collect . Id. ¶¶ 269 272. when Plaintiffs were using rivate browsing Id. obligations under the rele ceive the benefit of the bargain for which they

Id. ¶¶ 273 75.

Google concedes that the Chrome Privacy Notice governed, and continues to govern, . See Mot. at 13 16. Google also concedes that the Privacy March 31, 2020. See id. at 10 13.

However, Google argues that, because the Incognito Splash Screen was never part of Incognito Splash Screen. See id. at 5 7. Additionally, Google argues that, because

Privacy Policy ceased being , Plaintiffs Id. at 10. Finally, Google argues that tvacy

. See Mot. at 7 15. The Court discusses these arguments in turn.

1. A Reasonable User Could Read Google s Contract with Plaintiffs as

Incorporating the Incognito Splash Screen ice, the Google Chrome Terms of Service,

the Chrome OS Additional Terms of Service, nor the Chrome Privacy Notice refer to or mention contention.

ontract may validly include the provision of a document not Shaw v. Regents of University of California, 58 Cal. App. 4th 44, 54 (1997) (quoting Williams Constr. Co. v. Standard-Pacific Corp., 254 Cal. App. 2d 442, 454 (1967)). Indeed, another court in this District h See In re Facebook, Inc., Consumer Priv. User

Profile Litig., 402 F. Supp. 3d 767, 791 (N.D. Cal. 2019) (Chhabria, J.).

erence into their contract the terms of some is a factual inquiry. Shaw, 58 Cal. App. 4th at 54. of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contr Id. ong as Id. (quoting Bakery v. Aubry, 216 Cal. App. 3d 1259, 1264 (1989)). Accordingly, if a contract

a , the document is part of the contract. See Marchand v. Northrop Grumman, Case No. 16-cv-06825-BLF, 2017 WL 2633132, at *5 (N.D. Cal. Jun 19, 2017).

Under this standard, a reasonable user could conclude that contract with Google incorporated the Incognito Splash Screen. Privacy Policy, which Google concedes was par ld 45. Similarly, the Chrome Privacy Notice, which Google concedes was part of the contract, en incognito mode. See ECF No. 165-22 at 11. The Chrome Privacy Notice also directed Plaintiffs

to a which provided directions on how to open Chrome in Incognito Mode. Id. [ed] whenever a user 52, a reasonable user could read Privacy Policy and the Chrome Privacy Notice as incorporating enter Incognito Mode. See Shaw, 58 Cal. App. 4th at 54. Google itself has described the

Incognit See ECF No. 82 at 10; ECF No. 92 at 4. Judge Facebook Consumer Privacy, which found that the 2012 version of incorporated , is instructive. 402 F. Supp. 3d at 790. The [ed] out the Data Use Policy in the second sentence, provide[d] a link to it, and encourage[d] the user to Id. at 791. Additionally, a different section of the SRR

people may s Id.

Although Privacy Policy and the Chrome Privacy Notice do not use the term those documents guided Plaintiffs to the Incognito Splash Screen in SRR guided Facebook users to the Data Use Policy. Specifically, Privacy Policy and the Chrome Privacy Notice encouraged Plaintiffs to use Incognito Mode and provided express instructions on how to do so. See SAC ¶ 45; ECF No. 165-22 at 11. Because the Incognit combined effect of Case 4:20-cv-03664-YGR Document 363 Filed 12/22/21 Page 15 of 31 to See Facebook Consumer Privacy, 402 F. Supp. 3d at 791. that Id.

g. Google argues that, because Privacy Policy and the Chrome Policy Notice do not Incognito Splash Screen, those documents do not incorporate the Incognito Splash Screen. Mot. at 5. However, California law is clear that the con Shaw, 58 Cal. App. 4th Marchand, 2017 WL 2633132, at *5, the parties to a document in order to incorporate that document. the California Supreme Courts use of those terms means that parties are not required to reference a document by name to incorporate the document. Facebook Consumer Privacy, 402 F. Supp. 3d at 790. Thus, the fact that Privacy Policy and the Chrome Policy Notice do not use the phrase does not alter the Courts conclusion.

Additionally, although Google relies heavily on In re Facebook, Inc. Internet Tracking Litigation Facebook Internet Tracking provide Google with any support. Like the plaintiffs in Facebook Consumer Privacy, the

plaintiffs in Facebook Internet Tracking alleged that Facebooks Statement of Rights and Responsibilities (SRR) incorporated Facebooks Data Use Policy. 956 F.3d at 610. However, unlike the plaintiffs in Facebook Consumer Privacy, 402 F. Supp. 3d at 790, who relied on the 2012 version of the SRR, the plaintiffs in Facebook Internet Tracking, 956 F.3d at 610, relied on the April 2011 version of the SRR. The April 2011 version of the SRR contained no references to the Data Use Policy, and instead referred users to an older document called the Privacy Policy. Facebook Internet Tracking, Indeed, as Judge Chhabria explained in Facebook Consumer Privacy, it was not until

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at 790 n.11. Thus, because the Facebook Internet Tracking plaintiffs relied on the April 2011 version of the SRR, which guided users to the Privacy Policy instead of the Data Use Policy, the Ninth Circuit concluded that the SRR d[id] not reference a Data Use Policy. 956 F.3d at 610. That conclusion has no bearing on the instant case.

For all these reasons, ract with Plaintiffs as incorporating the Incognito Splash Screen. alternative argument that, even if the Incognito Splash Screen was not part of the contract, the Screen should be used to interpret the contact. See Opp. at 7.

2. A Reasonable User Could Read Google s Contract with Plaintiffs as

Incorporating After March 30, 2020 Although Google concedes that tiffs incorporated Googles

Privacy Policy bef part of the contract on March 31, 2020. Mot. at 10. Accordingly, Google contends that Plaintiffs

Policy after March 31, Id. For the reasons below, the Court disagrees.

SAC ¶ t two versions stated See ECF No. 165-17 at 3; ECF No. 165-18 at 2. The current version, which has des these terms, we also publish a Privacy not part of these terms, we encourage you to read it to better understand how -19 at 1.

Relying on this Courts decision in Calhoun v. Google LLC, 526 F. Supp. 3d 605 (N.D. Cal. 2021), Google contends that, because the current version of the Terms of Service states that Googl In Calhoun, the plaintiffs

Id. at 613. The Calhoun plaintiffs brought

browsers with their Google Accounts. See id. at 613 615. In its motion to dismiss, Google

argued that the Calhoun Id. at 621.

The Court rejected Googles consent argument in Calhoun because, among other reasons, a concluded that she wa Id. In the instant case,

Google argues that, because the Court concluded that the Calhoun plaintiffs were not bound by ude that s Privacy Policy after March 2020. Mot. at 10.

However, the Chrome Privacy Notice, which Google concedes is part of the contract, independently references Googles Privacy Policy. Specifically, each version of the Chrome Privacy Notice that has been in effect since March 30, 2020 has stated information that is provided to Google or stored in your Google Account will be used and See ECF Nos. 165-21, 165-22, 192-2.

Moreover, Googles Terms of Service instruct Chromes users to follow the Chrome Privacy Notice in the event that the Terms of Service and the Chrome Privacy Notice conflict with each other. Specifically, the that has been in effect since March 30, 2020 states that users must follow - [Terms of Service] conflict with the service-specific additional terms, the additional terms will

-19 at 3, 13.

Thus, a reasonable Chrome user continued to be part of Googles contract with Plaintiffs after March 30, 2020. Because the Chrome Privacy Notice call[ed] out Googles Privacy Policy, provide[d] a link to it, and encourage[d] the

user to read it, a reasonable user could conclude that the Chrome Privacy Notice incorporates Googles Privacy Policy. Facebook Consumer Privacy, 402 F. Supp. 3d at 791. In turn, because the Terms of Service direct users to follow service-specific additional terms in the event of a conflict, a reasonable user could conclude that the Chrome Privacy Notice, not the Terms of Service, is binding with respect to Googles Privacy Policy. ECF No. 165-19.

This conclusion is not inconsistent with Calhoun.

susceptibl See Facebook Consumer Privacy, 402 F. Supp. 3d at 789. In Calhoun, the Court held on or after March 31, 2020 might have concluded that Calhoun, 526 F. Supp. 3d at 621 (emphasis added). Accordingly, Calhoun does not

preclude Plaintiffs interpretation, which is that a reasonable user might have concluded that Googles Privacy Policy continued to be part of the contract after March 31, 2020. Indeed, the fact that a contract is reasonably susceptible to one interpretation does not mean that the contract is not reasonably susceptible to a competing interpretation.

support their breach of contract claim.

3. A Reasonable User Coul from Collecting Data

. For the reasons below, the Court rejects this contention.

U tract interpretation is that the

practicable, each clause helping to interpret the other. International Brotherhood of Teamsters v. NASA Services, Inc., 957 F.3d 1038, 1042 (9th Cir. 2020). Indeed, California courts have ollected from the entire

instrument and not detached portions thereof, it being necessary to consider all of the parts to Id. (quoting Ajax Magnolia One Corp. v. S. Cal. Edison Co., 1 [I]ndividual clauses and particular words must be considered in connection with the rest of the agreement, and Id. (quoting Ajax, 167 Cal. App. 2d at 748).

The Court already has determined that a reasonable user could read statements from the Incognito Splash Screen, P Chrome Privacy Notice as promising that collecting data. argued that

Brown, 525 F. Supp. 3d at 1063. Specifically, Google argued that Plaintiffs -party

Id.; see also ECF No. 82 at 10 11. In rejecting this argument, the Court stated that the

data from users in Brown, 525 F. Supp. 3d at 1064. By contrast, other portions of Googl Privacy Policy, as well as other Google documents, private browsing as a way that users can manage their privacy and omit Google as a Id. at 1064.

Specifically, in the C the Court highlighted the following portions of the Incognito Screen, the Privacy Policy, :

private browsing mode, which omits Google and instead lists: Websites you visit[;] Your employer or school[;] Your internet service provider.

. . [y]our

browsing history [or] [c]ookies and site data.

what information you share with Google when you search. To browse the web privately, you can use pri The Ch

Chrome stores on your system by using incognito mode or guest mode. In . . Basic browsing history information like URLs, cached paged text, or IP addresses of pages linked from the websites you visit [and] Snapshots of pages that you

. . choose to browse the

web privately using Chrome in Incognito mode. And across our services, you can adjust your privacy settings to control what we collect and how your

Id. at 1065 66 (internal quotations and citations omitted). The Court concluded that a reasonable internet user could reach each of these statements as representing prevents Google from collecting data. Id.

regarding each of these individual statements, a reasonable user, reading Googles contract with Plaintiffs as a whole, could easily conclude that Google promised Plaintiffs that using would prevent Google from collecting Plaintiffs data. Indeed, even if some of the individual statements in the contract are ambiguous, reading the contract as a whole, clarifies any ambiguities. International Brotherhood of Teamster, 957 F.3d at 1042. A reasonable user could conclude that

provides internet users with privacy and control were meant to emphasize to users that Google would provide users with the maximum amount of data privacy.

Google does not attempt to read the contract as a whole. Instead, Google isolates each provision and attempts to explain why that provision See Mot. at 7 15. However, because the intention of the

parties is to be collected from the entire instrument and not detached portions thereof, it being necessary to consider all of the parts to determine the meaning of any particular part as well as of the whole, Google method is misguided. International Brotherhood of Teamster, 957 F.3d at 1042 (internal citations omitted).

Regardless, the Court previously has rejected almost all individual provisions of the contract. For example, Google highlights a statement from Privacy Policy collect and how you eralized to

Mot. at 11 (internal citations omitted). However, Google omits the preceding sentence of Privacy Policy, which states that users can 45. As the Court previously concluded, a reasonable user could read these two sentences as promising that]s a way that users can control the inf Brown, 525 F. Supp. 3d at 1066. Google provides no reason for the Court to revisit this conclusion, or its conclusions regarding Googles other representations.

Additionally, although Google argues that contract interpretation principles compel a different interpretation of the Chrome Privacy Notice than the Court previously reached, this argument is unconvincing. The Chrome Privacy Notice states: You can limit the information Chrome stores on your system by using incognito mode or guest mode. In these modes, Chrome . . [b]asic browsing history information like URLs, cached page text, or IP addresses of pages linked from the websites you visit [and] Snapshots of pages that you visit 165-22 at 11. The Court previously concluded

Brown, 525 F. Supp. 3d at 1065 66. Google acknowledges this conclusion. Mot. at 14 n.8. However, Id. Specifically, Go d contract

separate definitions, citations omitted). This argument ignores that, although synonymous, Google obtains internet causing Chrome to send Google the data. Accordingly, a reasonable user designed Chrome not to

Finally, the Court rejects argument that Plaintiffs improperly relies on subjective intent. Plaintiffs 51), Google cont .

id. (citing Block v. eBay, Inc., 747 F.3d 1135, 1138 (9th Cir. 2014)). Although Google is correct that the contract must be interpreted objectively, the objective meaning of a contract is See Facebook Consumer Privacy, 402 F. Supp. 3d at 789. By offering an interpretation

provide that perspective. SAC ¶ 51.

Thus, the Court DENIES Googles motion to dismiss Plaintiffs breach of contract claim. B. Plaintiffs Have Adequately Stated a UCL Claim Practice

The provides a cause of action against s business practices that are (1)

Backhaut v. Apple, Inc., 74 F. Supp. 3d 1033, 1050 (N.D. Cal. 2014) (citing Cal. Bus. & Prof. Code § 17200). This cause of action is available to any has lost money or property as a result of the unfair 17204.

business because it constituted

a violation of the Federal Wiretap Act, 18 U.S.C. § 2510, et seq.; the California Invasion of Privacy Act, Cal. Penal Code §§ 631 and 632; the California Computer Data Access and Fraud Act, Cal. Penal Code § 502, eq seq.; Invasion of Privacy; Intrusion Upon Seclusion; Breach of Contract; and California Business & Professions Code § ¶ 279, 281. Plaintiffs -in-fact, including the loss of money and/or property as a result of . . . the unauthorized disclosure and taking of their personal information which has value as deId. ¶ suffered harm in the form of diminution of the value of their private and personally identifiable

Id.

Google argues that ld be dismissed for two reasons and argues

injunctive relief. First, Google contends that the UCL claim should be dismissed because 17204). Second, Google contends that

the UCL claim should be dismissed because Plaintiffs have not adequately alleged that they relied

at 23. The Court addresses each contention in turn.

1. Data Collection Practice Caused

As noted, Plaintiffs must show th

money or property as a result of the unfair co 17204. Google argues that, because data is not because Plaintiffs did not pay to ivate browsing mode, practice of collecting data when Plaintiffs used

Th [A]rticle III, section 2 of the United States Constitution. Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322 (2011). Id. (quoting

Lujan v. Defenders of Wildlife Id.

T of economic injury, o Id. at 323. Thus, because the effect of the is to [] standing under [the UCL] substantially narrower than federal stan Id. at 324.

However, the California Supreme Court has held that Id. at 323. For example, a

uire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costi Id.

Plaintiffs allege that the the data which Google collected and that there is an active market for such data. See SAC ¶¶ 123, 127. For example, a

recent study found that internet users are willing to pay up to $52.00/year to keep their browsing histories private. Id. ¶ Case 4:20-cv-03664-YGR Document 363 Filed 12/22/21 Page 25 of 31 which pays internet users browser extension that shares with Google Id. ¶ 129 Id. ¶ 135. For example,

a company called Brav Id. Several other companies, including a company called Killi, have launched exchange platforms that allow individuals to sell their data to third- party applications and websites. See id.

These detailed allegations establish at least two cognizable theories of economic injury. First, because Google previously has paid individuals for browsing histories, it is plausible that, had Plaintif their data. Thus, by inducing Plaintiffs to give Google their data without payment, Google caused [] than [they] otherwise would ha Kwikset, 51 Cal. 4th at 324. Second, because there are several browsers and platforms willing to pay individuals for data, it is plausible that Plaintiffs will decide to sell their data at some point. Indeed, each named Plaintiff has alleged that he or she is aware of these browsers and platforms. See SAC ¶¶ 170, 175, 180, 185, 190. Accordingly Google Kwikset, 51 Cal. 4th at 324.

Indeed, in Calhoun, this Court found economic injury in almost identical circumstances. As discussed, the Calhoun g the w Id. at 613. The plaintiffs brought a UCL claim against Google based on an allegation that Google had browsers. See id. at 613 615, 636.

The Court rejected Google argument that the Calhoun

Id. (internal citations omitted). The Court explained number of district courts, including this Court, have concluded that plaintiffs who suffered a loss

See id.; see also In re growing trend across courts that have considered this issue is to recognize the lost property value

In re Yahoo! Inc. Cust. Data Sec. Breach Litig., 2017 WL 3727318, at *13 (N.D. Cal. Aug. 30, 2017) (holding that plaintiffs had adequately alleged injury in fact based on the loss of value of their personal information); In re Anthem Inc. Data Breach Litig., 2016 WL 3029783, at *14 (N.D. Cal. May 17, 2016) (concluding that the plaintiffs had plausibly alleged injury from the loss of value of their personal information).

Although Google acknowledges Calhoun, Google asks the Court to reconsider that decision. Mot. at 16. Specifically Calhoun improperly relied on cases addressing Article III standing, and that

Calhoun improperly relied on cases in which the plaintiffs had paid money to the defendants. See Mot. at 17 21. The Court sees no reason to revisit Calhoun. Regardless, the Court addresses primary arguments below.

As an initial matter, guidance that a UCL claim may be based on any kind of Google cites the Ninth Circu three-part test for determining

definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have est Mot. at 17 (quoting Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003)). Google contends that data does Id. However, the California Supreme Court has explained that the UCL only requires a plaintiff

there are innumerable ways in which economic injury from unfair competition may be shown. Kwikset, 51 Cal. 4th at 323. As re in a Id. at 324. These injuries fall well within the categories of economic injury recognized by the California Supreme Court. Id. Thus, the Court need not determine whether data constitutes property under the UCL.

Next, in arguing that cases discussing Article III standing are irrelevant, Google misreads governing precedent. Citing Cottle v. Plaid Inc., Case No. 20-cv-3056-DMR, 2021 WL 1721177 (N.D. Cal. Apr. 30, 2021), which disagreed with Calhoun, Google contends that Calhoun was wrongly decided be Calhoun s on four cases that address Article III standing, which is different Cottle, 2021 WL 1721177, at *14 n.8). g is Id. at 20 21 (citing Kwikset, 51 Cal. 4th at 324). Both Google and Cottle As discussed, UCL standing is narrower than Article III standing because Article III standing Kwikset, 51 Cal. 4th at 324. under Article III and ther meaning in the UCL context than it does in the Article III context. Id. at 323. Indeed, the Ninth -in-fact requirement . . . demands no more Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015) (emphasis added). Thus, cases discussing economic UCL standing.

Finally, although Google points out that the cases cited in Calhoun involved plaintiffs that had paid the defendants money, Google fails to explain why this difference is significant. For example, Google points out that the plaintiffs in Marriott ased products or services at a Marriott Property, and/or would have paid Marriott, 440 F. Supp. 3d at 492). Similarly, Google highlights that, in Anthem, [d] they paid money for health insurance premiums, which were used to pay Id.

at 22 (quoting Anthem, 2016 WL 3029783, at *30 (emphasis added)). Google contends that, because Plaintiffs do not allege that they paid , Marriott and Anthem are not relevant to the instant case. Mot. at 21. However, as discussed, the California Supreme Court has stated that a plaintiff has acquire[d] in a transaction less . . . than he or she otherwise wKwikset, 51 Cal. 4th at 324. Under this standard, a party who has provided goods or services in a transaction and has not been paid the fair value of

those goods or services has suffered an economic injury even though the party has received money instead of paying money. Id. The same logic would apply to parties like Plaintiffs, who have provided valuable data to Google and have received no money in return. Thus, the fact that Marriott and Anthem involved plaintiffs who paid too much money for goods and services does not diminish their general conclusion plaintiffs who suffered a loss of their personal information suffered economic injury Calhoun, 526 F. Supp. 3d at 636.

Thus, Plaintiffs have or property as a result of the 17204.

2. Google Fails to Explain Why Plaintiffs Were Required to Allege Reliance failed to allege reliance. Mot. at 24. For the reasons below, the Court rejects this argument.

of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or

misleading statements, in accordance with well-settled principles regarding the element of reliance Kwikset, 51 Cal. 4th at 326 (quoting In re Tobacco II Cases, 46 Cal. 4th 298, 306 (2009)). Accordingly, plaintiffs that bring UCL claims based on alleged Ahern v. Apple Inc., 411 F. Supp. 3d 541, 564 (N.D. Cal. 2019).

Plaintiffs have not alleged that their UCL claim relies on misrepresentations or omissions. Plaintiffs allege only that their Act, 18 U.S.C. § 2510, et seq.; the California Invasion of Privacy Act, Cal. Penal Code §§ 631 and

632; the California Computer Data Access and Fraud Act, Cal. Penal Code § 502, eq seq.; Invasion of Privacy; Intrusion Upon Seclusion; Breach of Contract; and California Business & Professions Code § 279, 281.

Moreover, Google provides no legal or factual support for its conclusory argument that an allegation of reliance is required for Plaintiffs UCL claim. Indeed, t on this issue y are

Reply at 15.

However, as one example, the Wiretap Act, as amended by the Electronic Communications Privacy A , generally communications makes no mention of fraud, misrepresentation, or reliance. 18 U.S.C.

§ 2511(1). Thus, on this record, the Court cannot conclude that Plaintiffs were required to allege reliance. Kwikset, 51 Cal. 4th at 326. Accordingly, the Court DENIES Googles motion to dismiss Plaintiffs UCL claim.

3. Plaintiffs May Seek Restitution Google contends that Plaintiffs may not seek damages for their UCL claim because

Id. (quoting Madrid v. Perot Sys. Corp., 130 Cal. App. 4th 440, 460 62 (2005)).

The Court agrees with Google that Plaintiffs may not seek disgorgement as a remedy. See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1148 (2003) (holding that . However, the Court cannot conclude at this stage that Plaintiff does not have a cognizable theory of restitution. I ion of the 282. Google fails to explain why, if Plaintiffs can quantify this diminution in value, Plaintiffs would not be

entitled to restitution.

Thus, as in Calhoun, Calhoun, 526 F. Supp. 3d at 637. V. CONCLUSION

For the foregoing reasons IT IS SO ORDERED.

Dated: December 22, 2021

_____ LUCY H. KOH United States District Judge