

1
2
3 **UNITED STATES DISTRICT COURT**
4 **NORTHERN DISTRICT OF CALIFORNIA**
5 **SAN JOSE DIVISION**

6
7 NICHOLE HUBBARD, et al.,

8 Plaintiffs,

9 v.

10 GOOGLE LLC, et al.,

11 Defendants.

Case No. 19-cv-07016-BLF

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS WITH LEAVE
TO AMEND**

[Re: ECF 93]

12
13 In 1998, Congress had the foresight to pass the Children’s Online Privacy Protection Act
14 (“COPPA”), recognizing both the potential and pitfalls to come with the proliferation of the
15 internet. *See* 15 U.S.C. §§ 6501 *et seq.* Now, in 2020, the Court must decide if private citizens
16 have a role in ensuring the law is followed by bringing claims under state laws.

17 Plaintiffs Nicole Hubbard, as parent and guardian of C.H., a minor; Cara Jones, as parent
18 and guardian of E.J., N.J., A.J., and L.J, minors; Justin Efros, as parent and guardian of J.A.E. and
19 J.R.E., minors; Renee Gilmore, as parent and guardian of M.W., a minor; Jay Goodwin, as parent
20 and guardian of A.G., a minor; and Bobbi Dishman, as parent and guardian of C.D., a minor,
21 (“Plaintiffs”) bring this suit against Defendants Google LLC and YouTube LLC (collectively
22 “Google”) and Cartoon Network, Inc., Cartoon Network Studios, Inc., ChuChu TV Studios,
23 CookieSwirlC, DreamWorks Animation LLC, DreamWorks Animation Television, LLC, Hasbro,
24 Inc., Hasbro Studios LLC, Mattel, Inc., Remka, Inc., RTR Production, LLC, RFR Entertainment,
25 Inc., and Pocketwatch, Inc. (collectively “Channel Owners”). Plaintiffs allege Defendants
26 unlawfully violated the right to privacy and reasonable expectation of privacy of their children,
27 who are all under 13 years of age and subject to COPPA’s protections. Plaintiffs have exclusively
28 brought state law claims against Defendants and cite violations of COPPA as the basis for liability

1 in many instances.

2 Defendants have filed a motion to dismiss, primarily arguing that all of Plaintiffs' claims
3 are preempted, and, alternately, that each of Plaintiffs' allegations fail to state a claim. *See* Mot.,
4 ECF 93. Plaintiffs oppose and argue that COPPA does not preempt the common law right to
5 privacy, which has existed for centuries, as well as more modern consumer protection and privacy
6 statutes and the right to privacy embedded in the California Constitution. *See* Opp'n, ECF 95.
7 Defendants filed a reply brief in response. *See* Reply, ECF 98. This Court finds that Plaintiffs'
8 state law claims are expressly preempted by COPPA. The Court will DISMISS the action
9 WITHOUT PREJUDICE, allowing Plaintiffs the opportunity to amend the complaint to allege
10 facts showing that Defendants' conduct amounts to more than solely a violation of COPPA's
11 requirements.

12 I. BACKGROUND

13 Google operates the video sharing-platform YouTube ("YouTube platform"). Second. Am
14 Compl. ("SAC") ¶ 2, ECF 92. The YouTube platform is accessible as a website, mobile
15 application, or via an application on a set-top streaming device that can connect to a television. *Id.*
16 Any individual or organization registered with YouTube, through a Google account, may upload
17 videos they have created. *Id.* ¶ 2, 54. These videos are uploaded to that individual's or
18 organization's "channel." *Id.* ¶ 2. Individuals do not have to register or sign in to view videos
19 uploaded to the YouTube platform. *Id.* ¶ 3. There is no age verification required to view videos.
20 *Id.*

21 The YouTube platform is "the #1 website regularly visited by kids." SAC ¶ 4. Defendants
22 Mattel and Hasbro, classic toy brands, are among the Channel Owners who maintain and create
23 content aimed at children. *Id.* Other Channel Owners do the same: for example, Defendant
24 ChuChuTV's channel features cartoons and nursery rhymes. *Id.* ¶ 96. Defendants Remka, RTR
25 Production, RFR Entertainment, and Pocketwatch together operate a channel, Ryan's World,
26 featuring a nine-year-old boy unboxing toys and other children's products. *Id.* ¶ 98. This is the
27 second-most popular YouTube channel, with approximately 22.5 million subscribers and over 33
28

1 billion views. *Id.* Plaintiffs detail the child-aimed content of the other Channel Owner Defendants
2 as well. *Id.* ¶¶ 100-01; 103-04.

3 Google collects personal information from individuals who access the YouTube platform.
4 SAC ¶ 57. Included in this information are what Google calls “unique identifiers.” *Id.* ¶¶ 57-58.
5 “Cookies,” text files containing unique identifiers that are stored on an individual’s browser, track
6 websites a user has visited and the amount of time spent on those websites, among other things. *Id.*
7 ¶ 59. “Persistent identifiers,” data that cannot easily be reset, are additional unique identifiers. *Id.*
8 ¶ 60. Examples of persistent identifiers include a user’s IP address or their device’s International
9 Mobile Equipment Identity (“IMEI”) number, which is a number assigned to every mobile phone
10 and cannot be changed. *Id.* ¶ 61. When another website that uses Google’s advertising services or
11 analytics tools sends Google the same IP address or IMEI number that has previously visited
12 YouTube, Google knows the individual has visited both websites. *Id.* ¶¶ 62, 64. Given the
13 proliferation of Google’s advertising services and analytics, studies indicate that Google can track
14 individuals on over 80% of the internet. *Id.* ¶ 62. Google offers the following example: “if you
15 watch videos about baking on YouTube, you may see more ads which relate to baking as you
16 browse the web.” *Id.* ¶ 65. This information that Google collects to develop an individual’s user
17 profile is extremely valuable to advertisers. *Id.* ¶ 63. In turn, Google can charge advertisers higher
18 rates as it collects more data and improves its user profiles. *Id.*

19 If a YouTube platform channel achieves a certain level of success by passing a viewership
20 threshold set by Google, a channel owner can choose to “monetize” the channel by allowing
21 Google to run advertisements on the channel. *Id.* ¶ 67. Google and the Channel Owners share the
22 advertising revenue, with 55% going to the Channel Owners and 45% remaining with Google. *Id.*
23 Google and the Channel Owners have two types of advertising available to them: behavior
24 targeting or contextual targeting. *Id.* ¶ 68. Behavior targeting, the default and most lucrative
25 method, serves ads to individuals based on that user’s personal information that Google has
26 tracked across the web. *Id.* ¶¶ 68-69. Contextual targeting does not rely on personal information
27 but rather matches ads with what Google determines is a channel’s central theme. *Id.* ¶ 70.
28

1 COPPA, though, limits the amount of data Google is legally able to collect from children
2 without parental consent. SAC ¶ 75. COPPA provides, in pertinent part, that,

3 It is unlawful for an operator of a website or online service directed to children, or any
4 operator that has actual knowledge that it is collecting personal information from a child,
5 to collect personal information from a child in a manner that violates the regulations
prescribed [by the Federal Trade Commission].

6 15 U.S.C. § 6502(a). SAC ¶ 75. COPPA applies to any operator of a commercial website or online
7 service directed to children under thirteen years of age that collects, uses, and/or discloses personal
8 information from children. *Id.* ¶ 76. The Federal Trade Commission (“FTC”) has interpreted
9 COPPA’s definition of “website or online service” to include individual channels on a general
10 audience platform—according to the FTC, “content creators and channel owners” are both
11 “standalone ‘operators’ under COPPA, subject to strict liability for COPPA violations.” *Id.*;
12 Statement of Joseph J. Simons & Christine S. Wilson, Federal Trade Commission, *Regarding FTC*
13 *and People of the State of New York v. Google LLC and YouTube, LLC* (Sept. 4, 2019),
14 [https://www.ftc.gov/system/files/documents/public_statements/1542922/simons_wilson_google_y](https://www.ftc.gov/system/files/documents/public_statements/1542922/simons_wilson_google_youtube_statement.pdf)
15 [outube_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1542922/simons_wilson_google_youtube_statement.pdf). The FTC also considers third parties with actual knowledge that they are
16 collecting personal information from users of a child-directed site or service as operators under
17 COPPA. *Id.* ¶ 76.

18 In order to determine whether a website or online service is “directed to children” the FTC
19 is to:

20 [C]onsider [the website’s or online service’s] subject matter, visual content, use of
21 animated characters or child-oriented activities and incentives, music or other audio
22 content, age of models, presence of child celebrities or celebrities who appeal to children,
23 language or other characteristics of the Web site or online service, as well as whether
24 advertising promoting or appearing on the Web site or online service is directed to
children.

25 16 CFR § 312.2. SAC ¶ 77. COPPA defines a “child” as an individual under the age of thirteen. 15
26 U.S.C. § 6501(a). SAC ¶ 79. The FTC regulations require an operator to disclose information
27 collection practices and “obtain verifiable parental consent for [any] collection, use, or disclosure
28 of personal information from children.” 15 U.S.C. § 6502(b)(1)(A); 16 C.F.R. § 312.5(a).; SAC ¶

1 79. Among the types of personal information under COPPA that may only be collected from
2 children with parental consent are “persistent identifier[s] that can be used to recognize a user over
3 time and across different sites, including a cookie number, an IP address, a processor or device
4 serial number, or a unique device identifier.” SAC ¶ 80.

5 Google has been subject to COPPA enforcement previously. On September 4, 2019, the
6 FTC and New York Attorney General filed a complaint against Google concerning Google’s
7 collection and use of minors’ personal information. SAC ¶ 81. The parties entered into a stipulated
8 order for permanent injunction and civil penalty judgment on the same day. *Id.* Google agreed to
9 pay a \$170 million civil penalty. *Id.* As for the injunction, Plaintiffs state that Google did not agree
10 to immediately cease its misconduct, as it had four months to comply with the terms of the
11 injunction (and continued its user tracking practices during that time). *Id.* Plaintiffs also note that
12 the injunction did not require that Google permanently delete, destroy, or otherwise sequester the
13 information obtained regarding minor children. *Id.*

14 Here, in this case, Plaintiffs allege that Google, together with the Channel Owners,
15 knowingly and purposely tracked, profiled, and targeted minors on the YouTube platform for
16 advertising revenue through deceptive collection of personal information. SAC ¶¶ 84-85. They
17 allege Google did this while feigning compliance with the law. *Id.* ¶ 84. With this information,
18 Google was able to develop user profiles of these children and serve them targeted advertisements
19 aimed at influencing their behavior. *Id.* ¶ 110. Google did not disclose the full extent of the
20 information it collected from the children. *Id.* ¶ 112. Google used this information to manipulate
21 and exploit children by extending their time on the YouTube platform, which increased the
22 number of targeted advertisements shown to them, which increased the revenue earned by Google
23 and the Channel Owners. *Id.* ¶ 113.

24 Plaintiffs have been deprived of the economic value of their personal information. SAC ¶
25 118. Plaintiffs allege that Google’s advertising revenue of \$116 billion in 2018 demonstrates that
26 this information has tremendous value. *Id.* Valuations of the type of personal information used by
27 Google range from \$200 to \$2,733, the amount an individual sold his data for on the platform
28 Kickstarter. *Id.* Plaintiffs allege that the personal information of children has equal or greater value

1 than that from an adult because Google may be able to utilize children’s personal information to
 2 show them behavior-targeted advertising for the rest of their lives. *Id.* Because Google, which
 3 operates the first- and second-most visited websites in the world, already has the personal
 4 information of Plaintiffs, this “first mover” advantage cannot be outdone, and the lost value cannot
 5 be recaptured at a later date. *Id.* ¶ 119. The Defendants conduct, according to Plaintiffs, violates
 6 both their reasonable expectation of privacy and their privacy rights. *Id.* ¶ 120.

7 In this lawsuit, Plaintiffs allege violations of the following claims: intrusion upon
 8 seclusion; California’s Unfair Competition Law; unjust enrichment under the laws of California,
 9 Colorado, Indiana, New Jersey, Massachusetts and Tennessee; the consumer protection acts of
 10 Massachusetts, Colorado, Indiana, New Jersey, and Tennessee; and the California constitutional
 11 right to privacy. SAC ¶¶ 204-356. Defendants bring this motion to dismiss on several grounds,
 12 with preemption as a threshold issue. *See Mot.*

13 II. LEGAL STANDARD

14 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 15 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
 16 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When
 17 considering such a motion, the Court “accept[s] factual allegations in the complaint as true and
 18 construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St.*
 19 *Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, the Court need not
 20 “accept as true allegations that contradict matters properly subject to judicial notice” or
 21 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 22 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation
 23 marks and citations omitted). “Threadbare recitals of the elements of a cause of action, supported
 24 by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S.
 25 at 555).

26 III. DISCUSSION

27 Defendants argue that Plaintiffs claims are preempted by COPPA. Mot. 7-12. COPPA
 28 contains the following clause:

1
2 No State or local government may impose any liability for commercial activities or actions
3 by operators in interstate or foreign commerce in connection with an activity or action
4 described in this chapter that is *inconsistent with the treatment of those activities or actions*
5 *under this section.*

6 15 U.S.C. § 6502(d). (emphasis added).

7 The Supremacy Clause of the Constitution establishes that federal law is “the supreme law
8 of the land.” U.S. Const. art. VI, cl. 2. “A fundamental principle of the Constitution is that
9 Congress has the power to preempt state law.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S.
10 363, 372 (2000). (citing U.S. Const. art. VI, cl. 2; *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824).
11 “Pre-emption may be either expressed or implied, and ‘is compelled whether Congress’ command
12 is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”
13 *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (quoting *Jones v. Rath Packing*
14 *Co.*, 430 U.S. 519, 525 (1977)).

15 The Supreme Court has identified the two “cornerstones” of its preemption jurisprudence:
16 1) “the purpose of Congress is the ultimate touchstone in every pre-emption case;” and 2) where
17 Congress has legislated in a field traditionally occupied by the States, “we ‘start with the
18 assumption that the historic police powers of the States were not to be superseded by the Federal
19 Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 555 U.S. 555,
20 565 (2009) (quoting *Medtronic*, 518 U.S. at 485). However, the Ninth Circuit and Supreme Court
21 have more recently instructed, “Where the intent of a statutory provision that speaks expressly to
22 the question of preemption is at issue, ‘we do not invoke any presumption against pre-emption but
23 instead focus on the plain wording of the clause, which necessarily contains the best evidence of
24 Congress’ pre-emptive intent.” *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016)
25 (quoting *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016)).

26 Here, the parties agree that all of Plaintiffs claims are premised on violations of COPPA,
27 Mot. 8-9, although Plaintiffs argue that their claims allege independent state law violations fully
28 consistent with but not identical to COPPA. Opp’n 8-9. Defendants argue that Plaintiff’s claims

1 are expressly and impliedly preempted. Mot. 7-12. Plaintiffs argue that neither type of preemption
 2 applies because COPPA’s statutory text only preempts state laws that are “inconsistent” with
 3 COPPA, the application of the state laws invoked by Plaintiffs aren’t “obstacles” to the
 4 enforcement of COPPA, and the state laws do not make it “impossible” for Defendants to comply
 5 both with COPPA and the state laws. Opp’n 5-13. The Court finds that COPPA’s preemption
 6 clause preempts Plaintiffs’ claims.

7 **A. Express Preemption**

8 Defendants argue that COPPA expressly preempts all of Plaintiffs’ state law claims by the
 9 terms of its preemption clause: “No State or local government may impose any liability for
 10 commercial activities or actions by operators in interstate or foreign commerce in connection with
 11 an activity or action described in this chapter that is *inconsistent with the treatment of those*
 12 *activities or actions under this section.*” 15 U.S.C. § 6502(d). Mot. 8-12 (emphasis added).

13 Defendants argue that COPPA provides for a specific enforcement and regulatory scheme and
 14 “purposefully” omits a private right of action. *Id.* 8. Congress specified the FTC would have
 15 enforcement authority, 15 U.S.C. §§ 6502(c), 6505(d), with certain other federal agencies
 16 retaining authority over entities they oversee, *id.* §§ 6505(a), (b). Mot. 3. Congress also gave an
 17 enforcement role to states via *parens patriae* actions brought by their attorneys general, 15 U.S.C.
 18 § 6504(a)(1). Mot. 3. Before proceeding with any such lawsuits, a state attorney general must give
 19 the FTC notice, 15 U.S.C. § 6504(a)(2), and the FTC has a statutory right to intervene, *id.* §
 20 6504(b). Mot. 3. If the FTC has already instituted an action, no State may institute a second action
 21 against the same Defendants while the first action is pending, 15 U.S.C. § 6504(d). Mot. 3.
 22 Congress did not include a private right of action in the statute.

23 All of Plaintiffs’ claims, according to Defendants, are premised “entirely on alleged
 24 violations of a very specific set of requirements that are found only in COPPA concerning
 25 ‘persistent identifiers.’” Mot. 8. Defendants argue that although the claims are styled as arising
 26 under state law, the claims are predicated on violations of COPPA, not activity that independently
 27 violates state law. *Id.* The Court agrees with Defendants’ characterization of Plaintiffs’ claims. As
 28 Defendants note, the harm asserted by Plaintiffs mirrors the harm proscribed by COPPA: the

1 collection of data from children under thirteen without parental consent by operators of child-
 2 directed websites. *See* SAC ¶¶ 10, 55, 83, 127-28. All of the claims incorporate these allegations.
 3 *Id.* ¶¶ 204, 211, 219, 228, 237, 246, 255, 264, 273, 281, 295, 304, 324, 338. Specifically, the
 4 intrusion upon seclusion claim is based on the collection of the children Plaintiffs’ data. *Id.* ¶ 206.
 5 The California Unfair Competition Law claim specifically mentions the Defendants targeting,
 6 tracking, and profiling the children Plaintiffs “without obtaining parental consent in violation of
 7 COPPA.” *Id.* ¶ 212. The claims under the consumer protection statutes of Massachusetts,
 8 Colorado, and New Jersey each specifically mention a violation of COPPA as the basis for the
 9 claim. *Id.* ¶¶ 286, 298, 329. The claims under the consumer protection statutes of Indiana and
 10 Tennessee specifically mention practices targeted to children under thirteen, which is the exact
 11 group covered by COPPA. *Id.* ¶¶ 307, 342. Likewise, the California constitutional claim and the
 12 unjust enrichment claims are not predicated on behavior that is outside the scope of COPPA. *Id.* ¶¶
 13 220, 229, 238, 247, 256, 265, 275. For these reasons the Court agrees with Defendants that
 14 Plaintiffs’ claims are based on violations of COPPA.

15 The Court finds that the plain text of the statute clearly indicates Congress’s desire to
 16 expressly preempt Plaintiffs’ state law claims. “No State or local government may impose any
 17 liability for commercial activities or actions by operators ... in connection with an activity or
 18 action described in this chapter that is *inconsistent with the treatment of those activities or actions*
 19 *under this section.*” 15 U.S.C. § 6502(d). Congress was clear when it decided how violations of
 20 COPPA should be treated. The FTC has enforcement authority, 15 U.S.C. §§ 6502(c), 6505(d),
 21 with certain other federal agencies retaining authority over entities they oversee, *id.* §§ 6505(a),
 22 (b). State attorneys general may bring *parens patriae* actions only after giving the FTC notice, 15
 23 U.S.C. § 6504(a)(2), and the FTC has a statutory right to intervene, *id.* § 6504(b). This scheme is
 24 clear, detailed, and does not leave room for state laws to impose additional liability.

25 Plaintiffs argue that only “inconsistent” state laws are preempted. Opp’n 7. The Court
 26 disagrees and finds this to be an incomplete reading of the preemption clause in 15 U.S.C. §
 27 6502(d). The Court must read the rest of the sentence beyond the word “inconsistent”: “No State
 28 or local government may impose any liability for commercial activities or actions by operators in

1 interstate or foreign commerce in connection with an activity or action described in this chapter
 2 that is inconsistent with the treatment of those activities or actions under this section.” 15 U.S.C. §
 3 6502(d). The Court agrees with the Defendants that there is a detailed remedial scheme in that
 4 section, as referenced by the preemption clause, giving enforcement authority primarily to the
 5 FTC and carving out a cooperative role for state attorneys general. The Court finds that allowing
 6 private plaintiffs to bring suits for violations of conducted regulated by COPPA, even styled in the
 7 form of state law claims, with no obligation to cooperate with the FTC inconsistent with the
 8 treatment of COPPA violations as outlined in the COPPA statute. *See Howard v. Blue Ridge Bank*,
 9 371 F. Supp. 2d 1139, 1143-44 (N.D. Cal. 2005) (rejecting argument that state law claim is not
 10 inconsistent with the Fair Credit Reporting Act (“FCRA”) and simply provides an additional state
 11 remedy for the unlawful conduct giving rise to the FCRA claim).

12 Further, the cases Plaintiffs cite to support the idea that only “inconsistent” state laws are
 13 preempted are distinguishable. Opp’n 9. In *Metrophones Telecomm. Inc. v. Global Crossing*
 14 *Telecomm., Inc.*, 423 F.3d 1056 (9th Cir. 2005) and *Ishikawa v. Delta Airlines, Inc.*, 343 F.3d
 15 1129, 1133 (9th Cir. 2003), *amended by* 350 F.3d 915 (9th Cir. 2003), the preemption clauses at
 16 issue only refer to conflicting state “requirements,” and do not also reach inconsistent treatment
 17 under the structure of the federal law. Reply 4. And Plaintiffs’ arguments advocating this Court to
 18 apply a presumption against preemption are contrary to the Supreme Court’s instruction in
 19 *Franklin*: “[W]e do not invoke any presumption against pre-emption but instead focus on the plain
 20 wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive
 21 intent.” 136 S. Ct. at 1946. The Ninth Circuit applied *Franklin* in *Atay* and focused on the text of
 22 the statute to find a local ordinance preempted. *Atay*, 842 F.3d at 701-03. In *Atay*, the express
 23 preemption provision in the Plant Protection Act (PPA) stated, in relevant part:

24
 25 no State or political subdivision of a State may regulate the movement in interstate
 26 commerce of any ... plant, ... plant pest, noxious weed, or plant product in order to control
 27 ..., eradicate ..., or prevent the introduction or dissemination of a ... plant pest, or noxious
 28 weed, if the Secretary has issued a regulation or order to prevent the dissemination of the ...
 plant pest, or noxious weed within the United States.

1 *Id.* at 701 (quoting 7 U.S.C. § 7756(b)(1)). Focusing on the text of the statute, the court
2 determined that three conditions needed to be met for a local law to be preempted and found all
3 three conditions satisfied: “(1) the local law must regulate ‘movement in interstate commerce,’ (2)
4 it must be intended to ‘control ..., eradicate ..., or prevent the introduction or dissemination of a ...
5 plant pest, or noxious weed,’ and (3) APHIS must regulate the plant at issue as a plant pest or
6 noxious weed.” *Atay*, 842 F.3d at 701. The Court does the same here: the text of COPPA’s
7 preemption clause forbids states from imposing liability for activities regulated under COPPA
8 “inconsistent with the treatment of those activities or actions under this section.” 15 U.S.C. §
9 6502(d). Here, there can be no doubt that, by the text of the preemption clause, state law claims
10 predicted on COPPA violations are preempted because of the treatment inconsistent with
11 COPPA’s remedial scheme involving the FTC and state attorneys general.

12 Defendants also cite two recent cases involving COPPA to support their preemption claim:
13 *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016) and *Manigault-Johnson*
14 *v. Google, LLC*, No. 2:18-CV-1032-BHH, 2019 WL 3006646 (D.S.C. Mar. 31, 2019). The Court
15 finds both cases to be instructive. In *Nickelodeon*, Defendants’ website included the message,
16 “HEY GROWN-UPS: We don’t collect ANY personal information about your kids. Which means
17 we couldn’t share it even if we wanted to!” and this apparently was not true. *Nickelodeon*, 827
18 F.3d at 269, 291. The court applied a presumption against preemption under Third Circuit law and
19 found that the plaintiffs’ intrusion upon seclusion claim was not preempted by COPPA, and the
20 court rested its finding on the fact that “the wrong at the heart of the plaintiffs’ intrusion claim is
21 not that Viacom and Google *collected* children’s personal information, or even that they *disclosed*
22 it. Rather, it is that Viacom created an expectation of privacy on its websites and then obtained the
23 plaintiffs’ personal information under false pretenses.” *Nickelodeon*, 827 F.3d at 292. “Understood
24 this way,” the Third Circuit stated, “there is no conflict between the plaintiffs’ intrusion claim and
25 COPPA. In this case, however, Plaintiffs do not allege that Defendants created an expectation of
26 privacy through deceitful conduct. *See* Opp’n 10-11. Regarding COPPA preemption, Third Circuit
27 stated, “COPPA certainly regulates whether personal information can be collected from children
28 in the first instance,” *Nickelodeon*, 827 F.3d at 292. To this Court, it is clear that the Third Circuit

1 would not have reached the same conclusion absent the allegations of deceit, which it expressly
2 found to go beyond the provisions of COPPA. *See id.*

3 In *Manigault-Johnson*, which was litigated by the same Google defense counsel that
4 appear here, the court found that the plaintiffs lacked standing for their California constitutional
5 claim and that they failed to state a claim for intrusion upon seclusion under California or South
6 Carolina law. 2019 WL 3006646, at *6. The court decided the case on grounds other than
7 preemption but then addressed preemption in dicta:

8
9 Plaintiffs' complaint does not accuse Defendants of conduct beyond that regulated by
10 COPPA. Thus, it appears to the Court that Plaintiffs seek to use the vehicle of state law to
11 privately enforce the provisions of COPPA, which Congress clearly intended to preclude
12 when it included an express preemption clause in COPPA and assigned exclusive
13 enforcement of COPPA to the Federal Trade Commission and state attorneys general.

14 2019 WL 3006646, at *6. This Court agrees that allowing Plaintiffs to sue for violations of
15 COPPA under state law runs afoul of COPPA's express preemption clause due to the
16 inconsistency with the remedial scheme that assigns enforcement of COPPA to the FTC and state
17 attorneys general.

18 Plaintiffs cite to a case from earlier this year involving the New Mexico Attorney General
19 suing defendants for a violation of COPPA, New Mexico's Unfair Practices Act, and intrusion
20 upon seclusion, and the court found no preemption of the state law claims. *New Mexico ex rel.*
21 *Balderas v. Tiny Lab Prods.*, 457 F. Supp. 3d 1103, 1121 (D.N.M. 2020) ("Accordingly, to allow
22 Plaintiff's state law claims against Google to proceed would result in the imposition of liability
23 only for conduct that violates COPPA, and thus would not run afoul of COPPA's express
24 preemption provision."). The Court finds *Tiny Lab* distinguishable from this case because *Tiny*
25 *Lab* was brought by the New Mexico Attorney General, who can enforce violations of COPPA
26 under the statute's remedial scheme. Further, while not the basis of the preemption decision, it
27 appears there was deception alleged on the part of the *Tiny Lab* defendants, who marketed the
28 subject applications as "suitable and safe for children." *Id.* at 1127. For these reasons, the Court
finds that *Tiny Lab* is distinguishable and does not inform the decision in this case.

1 Accordingly, the Court finds that express preemption applies.

2 **B. Leave to Amend**

3 Dismissal without leave to amend is proper only if it is clear that “the complaint could not
4 be saved by any amendment.” *Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1056
5 (9th Cir. 2007) (internal citations and quotations omitted). Here, the Court finds leave to amend
6 appropriate.

7 To the extent that Plaintiffs attempt to analogize to *Nickelodeon*, where the Third Circuit
8 found no preemption because the defendants’ conduct included deception that went beyond the
9 behavior regulated by COPPA, the current complaint does not support such a claim. Plaintiffs
10 state in conclusory fashion that “the Google Defendants make a serial practice of the deceptive
11 collecting and use of user activity on its platform(s).” SAC ¶ 85. But the complaint does not
12 explain what is deceptive about Google’s collecting of data or grapple with whether Google’s data
13 collection policies have been properly disclosed, notwithstanding whether the Plaintiffs agree with
14 them or not. And finally, as the Court noted at the hearing, Plaintiffs have not alleged the Channel
15 Owners collected any data at all. Plaintiffs allege that the Channel Owners are “operators” under
16 COPPA, *id.* ¶ 76, and they’ve alleged that the Channel Owners share profit from the advertising
17 revenue, *id.* ¶ 67. But Plaintiffs have not alleged any data collection or deception on the part of the
18 Channel Owners. For the complaint to go forward against the Channel Owners, these deficiencies
19 must be addressed.

20 **IV. ORDER**

21 For the foregoing reasons, IT IS HEREBY ORDERED that Defendants’ motion to dismiss
22 is GRANTED with leave to amend. Plaintiffs shall file an amended complaint no later than 30
23 days after the filing of this order.

24
25 Dated: December 21, 2020



26
27 **BETH LABSON FREEMAN**
United States District Judge