KASSRA P. NASSIRI (215405)
(knassiri@nassiri-jung.com)
CHARLES H. JUNG (217909)
(cjung@nassiri-jung.com)
NASSIRI & JUNG LLP
47 Kearny Street, Suite 700
San Francisco, California 94108
Telephone: (415) 762-3100
Facsimile: (415) 534-3200

MICHAEL J. ASCHENBRENER
(mja@aschenbrenerlaw.com) (277114)
ASCHENBRENER LAW, P.C.
795 Folsom Street, First Floor
San Francisco, CA 94107
Telephone: (415) 813-6245
Facsimile: (415) 813-6246

Attorneys for Plaintiffs and the Putative Class

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

PALOMA GAOS and ANTHONY ITALIANO, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GOOGLE INC., a Delaware Corporation,

Defendant.

Case No. 5:10-cv-04809-EJD

CLASS ACTION

**PLAINTIFFS' OPPOSITION TO GOOGLE'S MOTION TO DISMISS SECOND AMENDED COMPLAINT PURSUANT TO RULES 12(b)(1) AND 12(b)(6)**

Date: September 21, 2012
Time: 9:00 a.m.
Place: Courtroom 1, 5th Floor
Judge: Hon. Edward J. Davila

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**STATUTES**



**TREATISES**

## I. INTRODUCTION

The remaining issues in this case can be summarized as follows:

1. Whether Plaintiffs have standing to pursue their Stored Communications Act ("SCA") claims;
2. Whether Plaintiff Italiano's state law claims are preempted by the SCA;[1] and
3. Whether Plaintiff Italiano has sufficiently alleged breach of contract and unjust enrichment.

Google's lone challenge to Plaintiffs' SCA claims depended on the U.S. Supreme Court overturning the Ninth Circuit's decision in *Edwards v. First Am. Corp*., 610 F.3d 514, 517 (9th Cir. 2010). But the U.S. Supreme Court did not overturn or otherwise disturb the Ninth Circuit's decision in *Edwards*. Accordingly, the Court should find that Plaintiffs have standing to pursue their SCA claims.

Concerning preemption, Plaintiff Italiano contends that the SCA does not preempt his claims for breach of contract and unjust enrichment. The preemption clause of the SCA is designed solely to prevent criminal defendants from suppressing evidence based on electronic communications or customer records obtained in violation of the SCA. Alternatively, at most, the SCA preempts claims under state wiretap statutes and state stored communications statutes, but not other state law claims, such as unjust enrichment.

Google argues that Plaintiff Italiano's allegations of harm resulting from Google's breach of its Privacy Policy are insufficient as a matter of law to support his claim for breach of contract. Google ignores black letter law, which provides that Plaintiff may elect restitution as a remedy for Google's breach. Google cannot reasonably contend that its user search queries, upon which Google's market value is built, are incapable of valuation as a matter of law. Plaintiff Italiano is entitled to pursue his claim for breach of contract.

Finally, Plaintiff Italiano has sufficiently alleged an unjust enrichment claim because: (1) this Court recognizes an independent claim of unjust enrichment; (2) this Court permits alternative

[1] Plaintiffs hereby withdraw Plaintiff Italiano's Cal. Bus. & Prof. Code § 17200 claim with prejudice.

pleading for claims of unjust enrichment; and, (3) Plaintiff has alleged facts sufficient to satisfy both elements of a claim of unjust enrichment.

For these reasons, Plaintiffs request that the Court deny Google's Rule 12(b)(1) motion as to the SCA and deny Google's Rule 12(b)(1) and 12(b)(6) motions as to breach of contract and unjust enrichment.

## II. STATEMENT OF FACTS

The essence and substance of the case remains the same as it did when the Court ruled on Google's prior motion to dismiss. (Dkt. 38.) Google is still the largest search engine in the United States. (Second Amended Complaint "SAC", Dkt. 39, ¶ 2.) Google still earns substantial revenues from advertising programs and exploits its knowledge of its users' search preferences to increase these revenues. (SAC ¶ 16.) And Google still transmits its users' search queries to third parties without authorization in order to generate additional revenue. (SAC ¶¶ 42-67, 137.) Plaintiff Gaos also still alleges Google's conduct violates the SCA. (SAC ¶¶ 110-21.)

Several details have changed, though, since the Court ruled on Google's prior motion to dismiss. First, Plaintiff Gaos amended her complaint. (SAC Dkt. 39.) In doing so, she added Anthony Italiano as an additional plaintiff (SAC ¶ 8), and dropped her claims of fraudulent misrepresentation, negligent misrepresentation, public disclosure of private facts, and statutory fraud. In addition, Plaintiff Gaos no longer brings claims for breach of contract or unjust enrichment; rather, Plaintiff Italiano now takes her place in pursuing those claims.[2] (SAC ¶¶ 122-26, 127-35, 136-40.) Plaintiff Italiano also joins Plaintiff Gaos in her claim under the SCA. (SAC ¶¶ 110-21.)

Additionally, the U.S. Supreme Court did not disturb the Ninth Circuit's ruling in *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010).[3] Thus, other than the addition of Plaintiff Italiano, nothing has changed legally or factually in relation to Plaintiffs' SCA claim since this Court determined Plaintiff Gaos had standing to pursue her SCA claim. (Dkt. 38 at 7.)

[2] Plaintiff Italiano withdraws his § 17200 claim with prejudice, though he continues to pursue his claim of breach of contract and unjust enrichment.

[3] *First Am. Financial Corp. v. Edwards*, Case No. 10-708, 567 U.S. _____ (2012).

## III. LEGAL STANDARDS

In reviewing a motion to dismiss, the court "accept[s] all well-pleaded factual allegations in the complaint as true, and determines whether the factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 n.2 (9th Cir. 2009) (internal citations omitted). A motion to dismiss must be denied if the complaint contains factual allegations that, when accepted as true, "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). Moreover, Fed. R. Civ. P. 8(a) requires a plain and short statement of a plaintiff's claim, a standard that "contains a powerful presumption against rejecting pleadings for failure to state a claim." *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003).

To satisfy Article III standing, a plaintiff seeking damages must allege: (1) an injury in fact that is concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and, (3) that it is likely (not merely speculative) that injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). At least one named plaintiff must have suffered an injury in fact. *See Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003).

## IV. ARGUMENT

### A. Google's 12(b)(1) Motion to Dismiss Plaintiffs' SCA Claim Is Effectively Moot.

Google moves to dismiss Plaintiffs' SCA claim for lack of standing—specifically for "lack(ing) any factual allegations of actual or imminent injury." But Google's motion is expressly conditioned on the U.S. Supreme Court overturning the Ninth Circuit's decision regarding standing based on alleged violations of statutory rights in *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010), which did not happen.[4] (Dkt. 44 at 10.) In the absence of *Edwards* getting overturned, Google effectively does not move to dismiss Plaintiffs' SCA claims.

[4] On June 25, 2012, the U.S. Supreme Court dismissed *First Am. Financial Corp. v. Edwards*, Case No. 10-708, 567 U.S. _____ (2012). (The entire opinion is as follows: "The writ of certiorari is dismissed as improvidently granted.").

Accordingly, this Court should continue to follow *Edwards*, as it did when ruling on Google's prior motion to dismiss,[5] and deny Google's Rule 12(b)(1) motion to dismiss Plaintiffs' SCA claim. (Dkt. 38 at 4, 6.)[6]

**B. Plaintiff Italiano Has Standing to Pursue His Breach of Contract Claim Because the Harm He Suffered Is Both Concrete and Imminent.**

Google moves to dismiss Plaintiff's state law claims for lack of standing. Specifically, Google argues that Plaintiff lacks standing only because he has not pled facts demonstrating that he suffered actual injury or imminent harm.

A party has Article III standing if he alleges injury in fact, which requires "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotations omitted). Contrary to Google's arguments, Plaintiff has alleged that he has suffered injuries that are both (a) concrete and particularized and (b) actual or imminent because Google's disclosure of his search queries places him in imminent danger of identity theft.

Plaintiff Italiano conducted searches that are of the same nature of as those in *Doe I v. AOL, LLC*, 719 F. Supp. 2d 1102 (N.D. Cal. 2010) and *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1140 (9th Cir. 2010), cases in which courts found standing and to which this Court cited in its Order. (Dkt. 38 at 4.) Like the plaintiffs in those cases, the injury Plaintiff Italiano suffered as a result of Google's dissemination of his search queries is the increased risk of identity theft. (SAC ¶ 3.) This injury is sufficient to confer standing. The Ninth Circuit has held that "the possibility of future injury may be sufficient to confer standing on plaintiffs; threatened injury constitutes 'injury in fact.'" *Central Delta Water Agency v. U.S.*, 306 F.3d 938, 947 (9th Cir. 2002).

In *Doe 1 v. AOL*, the court ruled that the plaintiffs had Article III standing after AOL disclosed millions of its members' private search queries to third parties in violation of AOL's privacy policy. 719 F. Supp. 2d at 1111-12. The published data included vanity searches and

---

[5] "The injury required by Article III, however, can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" (Dkt. 38 at 4 (citing *Edwards*).)

[6] Google does not move to dismiss Plaintiffs' SCA claim under Rule 12(b)(6).

other information that could allow third parties to match anonymous search queries to specific individuals. *Id*. at 1105. Given that the parties were at an early stage of the litigation, the court determined that these allegations were "sufficient to allege an ongoing injury." *Id.* at 1109.

Similarly, Plaintiff here alleges that Google transmitted personal searches he conducted that included his name, address, and terms related to his pending divorce, short sale and foreclosure of this home. (SAC ¶ 92.) Plaintiff further alleges that Google's disclosures increase the likelihood that third parties will connect those queries to Plaintiff, his online behavior will be traced, tracked, analyzed and sold, and he will suffer harm as a result.[7] (SAC ¶¶ 28-37, 68-76.) Plaintiff's well-pleaded allegations establish that he is at risk of suffering real and imminent injury, just like the plaintiff in *Doe I v. AOL*.

In *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1140 (9th Cir. 2010), a laptop computer was stolen from Starbucks containing the unencrypted personal information of approximately 97,000 Starbucks employees. The Ninth Circuit found that although there were no allegations that the information in the stolen laptop had actually been misused, the risk of future identity theft constituted an injury-in-fact for purposes of Article III standing. *Id.* at 1143.[8]

Here, Plaintiff Italiano's allegations that Google's systematic disclosure of his search queries places him immediately in danger of increased risk of identity theft and other privacy harms (SAC ¶¶ 3, 96) are sufficient to confer Article III standing, particularly at the pleading stage. *E.g.*, *Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . ").

---

[7] Google itself has admitted that search queries often contain sensitive information and "may reveal personally identifying information," such that Google "will keep private whatever information users communicate absent a compelling reason." (SAC ¶¶ 30-31.) Google has also argued that argued that the risk of privacy harm from disclosure of search queries "is no minor fear because search query content can disclose identities and personally identifiable information." (SAC ¶ 31.) Google's CEO publicly stated that if Google "were to make a mistake to release private information that could be used against somebody . . . it would be a terrible thing . . . I've always worried that the query stream was a fertile ground for governments to randomly snoop on people." (SAC ¶ 37.)

[8] *See also Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160-61 (4th Cir. 2000) (en banc) ("The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements"); *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007; *Doe v. Veterans Admin.*, 474 F. Supp. 2d 1100, 1103 (D. Minn. 2007).

For the foregoing reasons, Plaintiff has Article III standing to assert his remaining state law claims for damages against Google.

**C. Plaintiff's State Law Claims Are Not Preempted by the SCA.**

Google argues that § 2708 of the ECPA expressly preempts any of Plaintiff's state law claims that are premised on the same conduct alleged to have violated the ECPA. Courts examining the ECPA, however, have determined that there is no applicable express preemption language and Congress did not intend for § 2708 to broadly preempt state regulation for conduct touched upon by the ECPA.

Courts examining the supposed preemption provision of the ECPA have found that "[s]ection 2708 of the SCA serves a limited purpose: to prevent criminal defendants from suppressing evidence based on electronic communications or customer records obtained in violation of [the statute's] provisions." *In re National Security Agency Telecomm. Records Litig.*, 633 F. Supp. 2d 892, 905 (N.D. Cal. 2007) ("In re NSA II"); *see also In re National Security Agency Telecomm. Records Litig.*, 483 F. Supp. 2d 934, 939 (N.D. Cal. 2007) ("In re NSA I") ("the court concludes that the SCA does not completely preempt suits under state law").[9] Section 2708 is the counterpart to 18 U.S.C. § 2518(10)(c), both of which were added by Congress to the ECPA for a very specific and limited purpose: to prevent defendants in a criminal prosecution from suppressing evidence based on electronic communications or customer records obtained in violation of the ECPA's provisions.[10]

As such, Google's reliance on *Quon v. Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116 (C.D. Cal. 2006) and *Bunnell v. Mot. Picture Ass'n of Am.*, 567 F. Supp. 2d 1148 (C.D. Cal. 2007) is misplaced. The district court in *Quon* found that § 2708 of the SCA applied to preempt certain of the plaintiffs' state law claims. 445 F. Supp. 2d at 1138. Contrary to the court's conclusion in

[9] *See also In re Google Inc. Street View Elec. Commun. Litig.*, 794 F. Supp. 2d 1067, 1085-86 (N.D. Cal. 2011) (holding that the ECPA preempts state wiretap statutes but not Cal. Bus. & Prof. Code § 17200).

[10] S*ee In re NSA I*, 483 F. Supp 2d at 939 (discussing the legislative history of the ECPA before determining that Congress intended for §§ 2518(10)(c) and 2708 to prevent criminal defendants from using the ECPA to suppress evidence against them that was gathered in violation of provisions of the ECPA.

*Quon*, Congress did not intend for the SCA to provide blanket preemption for every state law cause of action "arising from *conduct* covered by the SCA," *Id.* As addressed above, it was Congress' intent in drafting § 2708 to prevent criminal defendants from using the provisions of the SCA to suppress evidence brought against them that was obtained in violation of the SCA.

The court in *Bunnell* found that § 2518(10)(c) preempts claims under California's equivalent to the Wiretap Act, *id.* at 1154, but relied on the misinterpretation of § 2518(10)(c) as an express preemption clause.[11] *Bunnell* is further distinguishable from the instant case because Plaintiff does not allege violations of the California equivalent to the Wiretap Act, the very same area regulated by the Wiretap Act. *Id.* Plaintiff alleges breach of contract and unjust enrichment, which allegations are independent of the alleged violations under the ECPA. Because § 2708 of the ECPA does not expressly preempt Plaintiff's breach of contract and unjust enrichment claims, the Court should reject Google's arguments concerning preemption.

**D. Plaintiff Italiano Has Sufficiently Alleged a Breach of Contract.**

Google claims that the Plaintiff has not (1) identified the provisions of the privacy policy that Google violated or (2) alleged any damages stemming from the breach of contract. Regarding Google's first argument, Google plainly ignores many paragraphs of the SAC in which Plaintiff readily identifies the specific provisions violated. Concerning damages, Plaintiff is entitled to elect restitution as a remedy for Google's breach of contract, a possibility which Google fails to acknowledge in its motion to dismiss.

***1. Plaintiff Has Identified with Specificity the Provisions of the Privacy Policy that Google Violated.***

Google contends that Plaintiff Italiano has "failed to identify any provisions of the Terms of Service and Privacy Policy that Google breached." (Dkt. 44 at 14.) In support of this argument,

[11] The *Bunnell* court also found that the Wiretap Act preempted the analogous state law claims on the basis of "field preemption," because the Wiretap Act's scheme of regulation was sufficiently comprehensive for the court to infer that Congress had intended that the Wiretap Act supersede any analogous state regulations. 567 F. Supp. 2d at 1154 (citing *In re Cybernetic Servs., Inc.*, 252 F.3d 1039, 1045–46 (9th Cir. 2001)). Google has made no similar argument that the SCA's scheme of regulation is so broad as to supersede all state regulation of the conduct complained of by Plaintiff and the Class.

Google cites solely to ¶ 125 of the SAC but ignores ¶¶ 22-28, in which Plaintiff identifies the specific provisions violated by Google. Google promised that search queries would be disclosed only in the "*aggregate*." (SAC ¶¶ 24, 27.) (Emphasis in original.) But Google breached that promise by systematically disclosing Plaintiff's individual search queries each time he used Google Search.[12] To make matters worse, because the disclosed search queries were bundled with other data identifying Plaintiff, such as cookies and his IP address, there was a substantial likelihood that his search queries would be associated with him individually and become "personally-identifiable."

Google also promised not to disclose search queries containing personal information (SAC ¶ 24), but breached that promise as well. Plaintiff alleges that Google systematically disclosed ***all*** of his search queries, including those containing personal information such as his name, home address, foreclosure proceedings, and soon-to-be ex-wife. (SAC ¶ 92.) Consequently, Google breached both of its privacy promises related to search queries—it disclosed search queries on an individual basis rather than aggregated, and it disclosed individual search queries containing Plaintiff's personal information.

***2. Plaintiff Elects Restitutionary Damages to Remedy Google's Breach of the Privacy Policy.***

Google argues that Plaintiff fails to allege any consequential damages from Google's breach. But Google ignores that Plaintiff may elect restitutionary damages in lieu of consequential damages. "'It is well settled in this state that one who has been injured by a breach of contract has an election to pursue any of three remedies,'" including rescission and recovery in quantum meruit. *Chodos v. West Publishing Co.*, 292 F.3d 992, 1001 (9th Cir. 2002) (quoting *Alder v. Drudis*, 30 Cal. 2d 372, 281-82 (1947)). The "remedy of restitution in money" is available to a

[12] Google's promise not to disclose individual search queries applies to *all* search queries, irrespective of whether those queries contain personal or sensitive information. Google ignores this provision of the Privacy Policy (SAC ¶ 24) and advances the straw man argument that because Plaintiff cannot allege disclosure of "personal information," he cannot allege breach of the Privacy Policy. As demonstrated herein, Google's argument does not comport with its Privacy Policy or the allegations in the SAC.

plaintiff who has completed performance provided that which the defendant owes him is something other than a liquidated debt. *Chodos*, 292 F.3d at 1001.

Plaintiff Italiano, who completed his performance by performing Google searches (SAC ¶¶ 90-96), is not owed a liquidated debt. Thus, he is entitled to elect the remedy of restitution in money for Google's breach.

According to the Restatement (Second) of Contracts, § 344(c), Plaintiff is entitled to pursue "his interest in having restored to him any benefit that he has conferred on the other party." There are two primary ways to measure the value of restitution: (a) "the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in claimant's position, or (b) the extent to which the other party's property has been increased in value or his other interests advanced." Restatement (Second) of Contracts, § 371; *Landmark Land Co. Inc. v. Fed. Deposit Ins. Corp.*, 256 F.3d 1365, 1372 (Fed. Cir. 2001).

Plaintiff alleges that he conferred a benefit on Google by performing searches, and as a result of sharing those searches with third parties without Plaintiff's consent, Google enjoyed increased revenues from advertisers. (SAC ¶¶ 16, 19, 45, 137.) Plaintiff further alleges that Google breached its privacy agreement by sharing Plaintiff's searches with third parties. (SAC ¶¶ 1, 3, 20-28, 45, 93-96, 122-26.) Accordingly, Plaintiff is entitled to choose his remedy for Google's breach, which includes restitutionary damages. (SAC at 41, ¶¶ F, G.)

**E. Plaintiff has Sufficiently Alleged a Claim for Unjust Enrichment.**

Google offers two arguments as to why Plaintiff Italiano's unjust enrichment claim should be dismissed. Both arguments fail.

First, Google argues that Plaintiff Italiano's unjust enrichment claim fails because "the majority view is that there is no distinct cause of action for unjust enrichment under California law." (Dkt. 44 at 19.) Google's argument is irrelevant, though, because this Court recognizes unjust enrichment claims. *Noll v. eBay, Inc.*, Case No. 5:11-cv-4585-EJD, 2012 WL 1413442, at *7 (N.D. Cal. April 23, 2012) ("There is a split between federal courts regarding the viability of unjust enrichment as an independent claim. This district has recognized that a claim for unjust

enrichment exists under California law when there is no contractual relationship between the parties." (citation omitted)).

Second, Google argues that Plaintiff Italiano's unjust enrichment claim must fail because Plaintiff Italiano "cannot simultaneously allege a claim for breach of contract and unjust enrichment." (Dkt. 44 at 20.) Google is simply incorrect. As this Court stated in *Noll*, it "will not dismiss Plaintiff's claim for unjust enrichment, even if such a claim is in conflict with Plaintiff's claim for breach of contract." 2012 WL 1413442, at *7. Contrary to Google's argument, this Court allows pleading in the alternative and should do so here.

Moreover, Plaintiff Italiano's allegations satisfy the required elements for a claim of unjust enrichment. "'To plead a claim for unjust enrichment, a plaintiff must allege a receipt of a benefit and unjust retention of the benefit at the expense of another.'" *Id*. (quoting *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 989 (N.D. Cal. 2009)). Plaintiff Italiano has alleged both elements:

> Plaintiff Italiano and members of the State Law Class have conferred a benefit upon Google. Google has received and retained valuable information belonging to Plaintiff Italiano and members of the State Law Class, and as a result of sharing its users' search queries with third parties without their consent, Google has improved the quality of its search engine and enjoyed increased revenues from advertisers.

(SAC ¶ 137.) Thus, Plaintiff has alleged that Google has received a benefit in the form of increased revenues from advertisers, and that Google has retained that benefit unjustly at Plaintiff's expense because Google did not obtain consent from Plaintiff to share his valuable search queries with third parties.

Additionally, it is not necessary for Plaintiff's loss to correspond to Google's gain. Where "a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust . . . [t]he defendant may be under a duty to give to the plaintiff the amount by which [the defendant] has been enriched." *County of San Bernardino v. Wash*, 158 Cal. App. 4th 533, 541 (2008) (citing Restatement Restitution, § 1, com. e.) The "principle of unjust enrichment,

however, is broader than mere 'restoration' of what the plaintiff lost. Many instances of 'liability based on unjust enrichment . . . do not involve the restoration of anything the claimant previously possessed . . . includ[ing] cases involving the disgorgement of profits . . . wrongfully obtained." *County of San Bernardino*, 158 Cal. App. 4th at 541.

Furthermore, an aggrieved party may maintain a claim for unjust enrichment without suffering actual damages. *Id.* ("the public policy of [California] does not permit one to 'take advantage of his own wrong' regardless of whether the other party suffers actual damage."). In other words, the "emphasis is on the wrongdoer's enrichment, not the victim's loss." *Id.; see also Ward v. Taggart*, 51 Cal. 2d 736, 741-742 (1959); *California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 472 (1986).

Because Plaintiff Italiano's allegations meet the requirements for a claim of unjust enrichment, Plaintiff Italiano respectfully requests that this Court deny Google's motion to dismiss Plaintiff's unjust enrichment claim.

## V. CONCLUSION

For the foregoing reasons, this Court should deny Google's Motion to Dismiss under Rule 12(b)(1) as to Plaintiffs' SCA claim, and under Rules 12(b)(1) and 12(b)(6) as to Plaintiff's breach of contract and unjust enrichment claims. Alternatively, Plaintiffs request leave to amend their complaint in order to remedy any pleading deficiencies, as necessary.

Dated: July 19, 2012

Respectfully submitted,
NASSIRI & JUNG LLP

/s/ Kassra P. Nassiri
Kassra P. Nassiri
Attorneys for Plaintiffs and the Putative Class

Dated: July 19, 2012

Respectfully submitted,
ASCHENBRENER LAW, P.C.

/s/ Michael J. Aschenbrener
Michael J. Aschenbrener
Attorneys for Plaintiffs and the Putative Class

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on July 19, 2012, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: July 19, 2012

NASSIRI & JUNG LLP

By: /s/ Kassra P. Nassiri
Kassra P. Nassiri