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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

REPLY IN SUPPORT OF GOOGLE INC.'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT PURSUANT TO RULES 12(b)(1) AND 12(b)(6)

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

I. INTRODUCTION

Plaintiffs concede in their Opposition that the Court should dismiss their Unfair Competition Law claim with prejudice. Plaintiffs do not fare much better with their other state-law claims, as their Opposition ignores both the controlling law and factual deficiencies that Google identified in its Motion. Accordingly, this Court should dismiss Plaintiff Italiano's state-law claims for each of the three independent reasons Google sets forth in its Motion.

First, Mr. Italiano has not alleged facts establishing any cognizable injury, as Article III of the United States Constitution requires. The Second Amended Complaint's ("SAC") addition of Mr. Italiano and his allegations has not remedied the fundamental defect this Court identified in its March 29, 2012 Order: "[T]he [First Amended Complaint] does not plead facts sufficient to show that the disseminated information is of a nature that places [Plaintiff] in imminent danger of harm." 3/29/2012 Order, ECF No. 38, at 4:3-4. Instead, the SAC rehashes the same flawed theory of speculative and hypothetical harm. Plaintiffs' Opposition does not and cannot distinguish the controlling law that Google has cited, nor does it adequately address the defects this Court recognized in its prior Order.

Second, the Stored Communications Act ("SCA") preempts Mr. Italiano's state-law claims. Despite recent Ninth Circuit precedent reaffirming the paramount importance of statutory language in the interpretation of the SCA, Plaintiffs do not address the preemptive language of the statute, nor do they meaningfully distinguish case law that analyzes that language. Rather, the Opposition misplaces its reliance on legislative history and a few district court cases that do not address the statutory language of the SCA, which explicitly precludes state-law claims premised on the same conduct as the alleged SCA violation.

Third, Mr. Italiano does not allege facts sufficient to establish either of the remaining state-law claims.[1] The Opposition attempts to salvage Mr. Italiano's breach of contract claim by creatively recasting his allegations, but the SAC does not allege facts showing the required breach

[1] Because Plaintiffs withdrew with prejudice their cause of action under Cal. Bus. & Prof. Code § 17200, *see* Opp. at 1 n.1, the only state-law claims that remain are Mr. Italiano's claims for breach of contract and unjust enrichment. Google accordingly submits a revised Proposed Order reflecting Plaintiffs' withdrawal with prejudice.

or damage. Likewise, the Court should dismiss Mr. Italiano's unjust enrichment claim, as it is inconsistent with the prevailing trend in California law of not recognizing unjust enrichment as a separate cause of action.

II. ARGUMENT

A. Plaintiff Italiano Does Not Have Standing To Bring The State-Law Claims.[2]

Mr. Italiano, like Ms. Gaos before him, has failed to "plead facts sufficient to show that the disseminated information is of a nature that places [him] in imminent danger of harm." 3/29/12 Order at 4:3-4. After three opportunities, the only theories of harm that the Opposition can muster are (1) that Mr. Italiano purportedly suffers from an increased risk of identity theft, and (2) that "his online behavior will be traced, tracked, analyzed and sold, and he will suffer harm as a result." *See* Plaintiffs' Opposition, ECF No. 45 ("Opp."), at 4:18-20, 5:7-8. But the SAC itself does not actually allege that Mr. Italiano suffers from an increased risk of identity theft, let alone any risk that is imminent, concrete and particularized. And this Court already has rejected the second theory, finding it insufficient to confer Article III standing. This Court therefore should dismiss Mr. Italiano's state-law claims for the same reason that this Court dismissed the state-law claims brought in the First Amended Complaint ("FAC"): the alleged referrer header disclosures did not cause Mr. Italiano injury in fact under Article III. *See* 3/29/12 Order at 4:1-4.

1. Mr. Italiano Has Not Alleged Facts Sufficient To Establish An Injury Of Increased Risk Of Identity Theft.

The SAC's allegations specific to Mr. Italiano belie the Opposition's assertion that he suffers from an increased risk of identity theft. The Opposition points to the third paragraph of the SAC, which alleges that search queries may contain "real names, street addresses, phone numbers, credit card numbers, social security numbers, financial account numbers and more, all of which increases the risk of identity theft." *See* Opp. at 4:18-20; SAC ¶ 3. But, putting aside

[2] Google withdraws its standing arguments against the SCA claim as moot, given this Court's prior ruling in its 3/29/12 Order and the U.S. Supreme Court's decision in *First American Financial Corp. v. Edwards*, Case No. 10-708, 567 U.S. --- (2012). Google's revised Proposed Order reflects this withdrawal.

whether referrer headers containing such search queries could establish a concrete, particularized risk of imminent injury—a proposition that Plaintiffs' authorities do not establish—Mr. Italiano has not alleged that he submitted any such searches to Google. *Compare* SAC ¶ 92 *with id.*¶ 3. To the contrary, Mr. Italiano alleges only that he searched his name in conjunction with otherwise public facts or non-unique phrases—a glaring deficiency which the Opposition failed to refute. *See* Google's Motion to Dismiss, ECF No. 44 ("Mot."), at 9:15-20 & n.6. Indeed, the Opposition wholly ignores this argument. The SAC's generalized assertions about what content searches can contain, in theory, do not remedy Mr. Italiano's failure to allege a concrete and particularized risk of injury to himself. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 n.1 (1992). Mr. Italiano cannot establish Article III standing by arguing that he suffers from an increased risk of identity theft where he does not, and cannot, cite any allegation in the SAC that relates the risk of identity theft to ***his*** information that was purportedly disclosed.

The factual allegations specific to Mr. Italiano's search queries fall far short of those cases where courts have found an increased risk of identity theft sufficient to establish Article III standing. Despite the Opposition's attempt to align Mr. Italiano's factual allegations with those made in *AOL* and *Krottner*, these cases are easily distinguished because *AOL* and *Krottner* both involved sensitive personal data, such as social security numbers, passwords and bank account information, which were either published on public websites or stolen by criminals. *See* Mot. at 9:21-10:8. In particular, the Opposition fails to respond to Google's argument that the disclosures in *AOL* involved aggregated data that explicitly correlated search queries with account holders, which is not the case here. *See Doe I v. AOL LLC*, 719 F. Supp. 2d 1102, 1105, 1109 (N.D. Cal. 2010). Indeed, the Opposition concedes that Mr. Italiano is not even linked with the searches that Google purportedly disclosed, stating: "Google's disclosures increase the likelihood that third parties ***will*** connect those queries to Plaintiff." Opp. at 5:6-7 (emphasis added); *see* Mot. at 7:23-25. Similarly, the Opposition misstates the facts in *Krottner* and omits the facts that the data included names, addresses and social security numbers and that the data was stolen by criminals, not merely disclosed to a website that the user selected to visit. *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1140 (9th Cir. 2010). Furthermore, the Opposition makes no attempt to respond to the

numerous cases that have held that the mere disclosure of purported personal information does not constitute an injury sufficient to confer Article III standing. *See* Mot. at 8:9-18 (listing cases).

2. Mr. Italiano's Theory That "Other Privacy Harms" Will Occur In The Future Does Not Constitute An Injury In Fact Under Article III.

Likewise, neither the law nor Mr. Italiano's factual allegations support his argument that he has Article III standing because he is in "immediate[] danger of . . . other privacy harms." *See* Opp. at 5:17-18. Mr. Italiano's allegations present, at best, an attenuated theory of hypothetical harm that is neither imminent nor credible, as the Ninth Circuit requires. *See Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002); *Hartman v. Summers*, 120 F.3d 157, 160 (9th Cir. 1997) (threatened harm must be credible, not remote or hypothetical). The "Science of Reidentification," which the SAC repeated verbatim from the already rejected FAC, involves five intermediate steps that must occur between today and Mr. Italiano's potential future injury, and also relies on the independent actions of third parties not before the Court. *See* SAC ¶¶ 68-74; Mot. at 9:7-14. Moreover, the cases that Mr. Italiano cites for the proposition that threatened injury can satisfy Article III requirements merely highlight that his alleged future injury is neither credible, nor imminent. Opp. at 5:15 n.8; *see Friends of Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 158 (4th Cir. 2000) (holding that owner of waterway four miles downstream from toxic chemical discharge showed sufficient injury in fact where those chemicals had already been found in his lake); *Baur v. Veneman*, 352 F.3d 625, 638-40 (2d Cir. 2003) (holding that plaintiff's claim that USDA's regulatory practice permitted exposure to potentially dangerous food product posed credible threat of injury because government studies and statements supported plaintiff's allegations); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 632-33 (7th Cir. 2007) (holding that plaintiffs have standing where hackers stole sensitive personal data and plaintiffs incurred costs for credit monitoring services).[3] Nothing about Mr. Italiano's searches is materially different from Ms. Gaos' searches, which this Court already

[3] Plaintiffs also cite *Doe v. Department of Veterans Affairs of United States* for this proposition, but that case addresses neither Article III standing nor its injury-in-fact requirement. *See* 474 F. Supp. 2d 1100, 1105 (D. Minn. 2007) (granting defendant's motion for summary judgment against plaintiff's Privacy Act claim).

found inadequate to state a claim. This Court has already considered and rejected Plaintiffs' so-called "Science of Reidentification" and should do so again. *See* 3/29/12 Order at 4:3-4.

Because Mr. Italiano identifies no allegations showing injury in fact to him, this Court should dismiss the state-law claims.

B. Plaintiff Cannot Avoid The Clear Preemptive Language Of The Stored Communications Act By Arguing About Legislative History.

Plaintiffs' Opposition does not deny that the state-law claims are premised on the exact conduct alleged to violate the SCA, and it ignores the SCA's express language preempting state-law claims: "[t]he remedies and sanctions described in this chapter are the ***only*** judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708 (emphasis added). Instead, Plaintiffs attempt to read narrowly the legislative history of the federal Wiretap Act to advance a theory that would directly conflict with the SCA's own express preemptive language. *See* Opp. at 6:9-19 & n.10. As the Ninth Circuit has made clear, however, arguments gleaned from legislative history will not trump a statute's plain language. *See Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 729 (9th Cir. 2011) (rejecting attempt to use legislative history to interpret the SCA where the plain language of the provision was clear).

The cases that Plaintiffs cite to support their contrary interpretation predate the Ninth Circuit's decision in *Suzlon Energy*. *See In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 892, 905 (N.D. Cal. 2007) (finding lack of express preemption but only considering legislative history); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 483 F. Supp. 2d 934, 940 (N.D. Cal. 2007) (discussing complete preemption rather than express preemption). Indeed, one case that Plaintiffs cite held that field preemption would bar state-law claims based on conduct governed by the Wiretap Act—even in the absence of express preemption—because that act "was intended to comprehensively regulate the interception of electronic communications such that the scheme leaves no room in which the states may further regulate." *See In re Google Inc. St. View Elec. Commc'ns Litig.*, 794 F. Supp. 2d 1067, 1085-86 (N.D. Cal. 2011).

The Opposition also makes no real attempt to distinguish the cases Google cited in its Motion that found express preemption based on the language of Section 2708. *See Quon v. Arch*

Wireless Operating Co., 445 F. Supp. 2d 1116, 1138 (C.D. Cal. 2006)[4]; *Bunnell v. Motion Picture Ass'n of Am.*, 567 F. Supp. 2d 1148, 1154 (C.D. Cal. 2007) (holding that analogous provision of the federal Wiretap Act, 18 U.S.C. § 2518(1), expressly preempts state-law claims). Instead, Plaintiffs rely on their interpretation of Congress' intent—despite the intent manifest from the plain language of Section 2708 itself and the Ninth Circuit's directive in *Suzlon*—to assert summarily that those cases were wrongly decided. *See* Opp. at 6:23-7:2, 7:5-7. They also read a nonexistent distinction between state-law wiretap claims and other causes of action into *Bunnell*. *See* Opp. at 7:7-10. While *Bunnell* happened to include a claim under California's wiretap act, the court's holding was not so limited. *See Bunnell*, 567 F. Supp. 2d at 1154. Instead, the court reiterated the *Quon* holding that the SCA is the exclusive remedy "for ***conduct*** covered by the statute." *See id.* (quotations omitted).

Because Congress has unequivocally stated that the SCA provides the exclusive conduit for relief for such conduct, the SCA expressly preempts Plaintiffs' state-law claims arising from the same alleged conduct giving rise to the SCA claim. This Court should therefore apply the plain language of Section 2708 to dismiss those claims.

C. Plaintiff Italiano Cannot State A Claim For Breach Of Contract.

The Opposition attempts to recast Mr. Italiano's allegations to construct the missing support for two of the required elements of a breach of contract claim: (1) damages to the plaintiff as a result of the breach, and (2) the breach of a contractual obligation. But Mr. Italiano fails to overcome Google's showing regarding the deficiencies in the pleading of these two elements, and therefore the Court must dismiss his breach of contract claim.

1. Mr. Italiano Has Failed To Plead Facts Showing Any Appreciable And Actual Damage From The Alleged Breach.

The Opposition attempts to sidestep the SAC's failure to plead facts establishing the element of damage by arguing that a plaintiff has a right to elect restitution as an alternative

[4] *Quon* was reversed on other grounds by *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008), which was itself reversed and remanded by *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010).

remedy. This invocation of the election of remedies doctrine puts the cart before the horse. While accurate that the prevailing party in a breach of contract action may elect one of three remedy theories, it is a prerequisite that such party be, in fact, damaged by the alleged breach. *See Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir. 2000) (applying California law) (holding that a contract claim requires a showing of "appreciable and actual damage" beyond the mere breach of contract). Indeed, the sole case that Mr. Italiano cites in support of his contention highlights this distinction between the requirement of damage resulting from the alleged breach and the subsequent ability to make an election of remedies if the breach of contract claim prevails: "[A] party ***who has been injured*** by a breach of contract may generally elect what remedy to seek." *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1001 (9th Cir. 2002) (emphasis added). It is fatal to his contract claim that Mr. Italiano has not identified any damage that he purportedly suffered as a result of the breach of contract, which the Opposition has failed to refute. *See* Mot. at 14:4-12.

Even assuming *arguendo* that Mr. Italiano need not allege any facts showing damage resulting from the breach, Mr. Italiano has not pled facts sufficient to establish that he conferred any benefit to Google. He does not allege that Google acquired money from him or that Google caused him any economic or compensatory loss. Rather, the Opposition merely argues that "as a result of sharing those searches with third parties without Plaintiff's consent, Google enjoyed increased revenues from advertisers." *See* Opp. at 9:13-15. But the paragraphs of the SAC the Opposition cites in support of this argument do not allege that Google's alleged referrer header practices generate revenues for Google. *See* SAC ¶ 16 (generic allegations regarding Google's annual revenues, but no link alleged to referrer header practices); *id.* ¶ 19 (description of SEO industry, but no link alleged to referrer header practices); *id.* ¶ 45 (same); *id.* ¶ 137 (conclusory and bare assertion that Mr. Italiano conferred benefit to Google). Moreover, the Opposition does not respond to the controlling case law that Google cites stating that the purported disclosure of personal information does not satisfy the "appreciable and actual damages" element required for stating a breach of contract claim. *See* Mot. at 13:18-14:1 (listing cases).

2. Mr. Italiano's Has Failed To Allege Facts Showing The Breach Of Any Contractual Obligation.

The Opposition's muddled attempt to identify specific provisions of Google's Terms of Service and Privacy Policy that Google purportedly breached only makes it all the more clear that Mr. Italiano has not adequately pled a breach of contract. Mr. Italiano has no response to the explicit statement in Google's Privacy Policy Key Terms that Google's server logs embed search terms in the URL. *See* Mot. at 14:20-21. Instead, the Opposition points to SAC paragraphs 22 through 28, which amount to almost five pages of quotations from the Terms of Service, Privacy Policy and other sources, and then accuses Google of "ignor[ing]" these paragraphs in its Motion, without explaining which specific provisions were violated by the referrer header practice challenged in the SAC. *See* Opp. at 8:1-2. To the contrary, this broad net cast by the Opposition simply reinforces Google's argument that Mr. Italiano has failed to identify any specific contractual obligations that were breached. *See* Mot. at 14:21-15:1.

Mr. Italiano nonetheless gleans from these paragraphs that Google made two promises in its Terms of Service and Privacy Policy: (1) that Google would only disclose search queries on an aggregated basis; and (2) that Google would not disclose search queries containing personal information—as Mr. Italiano defines the term, even if his definition does not fall within the Privacy Policy's definition of "Personal Information." *See* Opp. at 8:2-3, 8:9-10. The first promise apparently emanates from the following statement in the Privacy Policy: "We may share with third parties certain pieces of aggregated, non-personal information, such as the number of users who searched for a particular term, for example, or how many users clicked on a particular advertisement. Such information does not identify you individually." Opp. at 8:2-3; SAC ¶ 24. But this provision of the Privacy Policy simply does not state that Google will disclose search queries only on an aggregated basis; nor does it state that Google will not disclose search queries as part of referrer headers to a destination website.[5]

[5] The Opposition also finds support for this alleged promise by Google in certain videos posted on Google's Privacy Channel. *See* Opp. at 8:3; SAC ¶ 27. Plaintiffs' reliance is misplaced not only because the SAC does not allege that the Privacy Policy incorporates such videos by reference, but also because unilateral, public statements of policy cannot form the basis of a breach of contract claim. *See, e.g., Jurin v. Google Inc.*, 768 F. Supp. 2d 1064, 1073 (E.D. Cal.

As to the second alleged promise, Google's Privacy Policy does state that Google will not disclose to third parties "Personal Information," as the Privacy Policy Key Terms define that term. *See* SAC ¶ 23. But Mr. Italiano's search queries, as alleged in the SAC, do not constitute "Personal Information" under the Privacy Policy, which it defines as information "which personally identifies you." *See* Mot. at 15:2-19. The Opposition makes no effort to show how Mr. Italiano's searches fit within the Privacy Policy's definition of "Personal Information" and, to the contrary, implicitly concedes that Mr. Italiano's alleged search queries are not "Personal Information," when it acknowledges that those search queries, at some unknown time in the future, may "become 'personally-identifiable.'" *See* Opp. at 8:7-8. Mr. Italiano also has no response to Google's arguments that search terms are not linked to the identity of the user who entered them, and that the SAC makes no allegation of any instance where a search term entered by Mr. Italiano enabled (or even could enable) a third party to identify him. Mot. at 15:7-19. This is because the search terms that Mr. Italiano purportedly entered reflect facts in the public domain, which Mr. Italiano has not disputed. Mot. at 15:16-19.

Mr. Italiano's repeated failure to articulate a theory by which Google's purported conduct breached any particular provision of its Privacy Policy or Terms of Service requires dismissal of his breach of contract claim.

D. Plaintiffs Cannot State A Claim For Unjust Enrichment.

Google has acknowledged that, in the past, this Court has permitted an unjust enrichment claim to proceed. But Google maintains that an increasing number of both federal and state courts have found that, under California law, unjust enrichment is not an independent cause of action. *See, e.g.*, *Smith v. Ford Motor Co.*, No. 10-17321, 2011 WL 6322200, at *3 (9th Cir. Dec. 19, 2011) (unjust enrichment claims cannot stand alone); *Nuvo Research Inc. v. McGrath*, No. C 11-4006-SBA, 2012 WL 1965870, at *7 (N.D. Cal. May 31, 2012) ("[T]here is no independent claim for unjust enrichment."); *Dahon N. Am., Inc. v. Hon*, No. 2:11-cv-05835-ODW, 2012 WL

2011) ("A broadly stated promise to abide by its own policy does not hold [Google] to a contract."); *Beverage Distribs., Inc. v. Olympia Brewing Co.*, 440 F.2d 21, 29 (9th Cir. 1971) (statement of policy does not constitute a contract).

1413681, at *12 (C.D. Cal. Apr. 24, 2012) ("[U]njust enrichment is not a separate cause of action."); *Albizo v. Wachovia Mortg.*, No. 2:11-cv-02991-KJN, 2012 WL 1413996, at *13 (E.D. Cal. Apr. 20, 2012) ("[W]hile California courts disagree as to whether unjust enrichment may be brought as a separate cause of action or instead merely provides a remedy for another claim courts in this district have adopted the latter view."); *Stanley v. Bayer Healthcare LLC*, No. 11-cv-862-IEG, 2012 WL 1132920, at *11 (S.D. Cal. Apr. 3, 2012) ("Unjust enrichment, however, is a general principle underlying various legal doctrines and remedies; it is not an independent cause of action.") (internal citations and quotations omitted); *Castillo v. Toll Bros.*, 197 Cal. App. 4th 1172, 1209 (2011) (upholding trial court's decision that "California does not recognize unjust enrichment as a separate cause of action"); *Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911 (2008) ("[U]njust enrichment is not a cause of action."). Indeed, this Court held the same earlier this year. *See Feimster v. Wright*, No. 5:10-cv-03330-EJD, 2012 WL 993619, at *3 (N.D. Cal. Mar. 23, 2012) ("The bank's cross-claim . . . is dismissed because there is no independent action for unjust enrichment in California.").

In the alternative, even where this Court has permitted unjust enrichment to be pled as an alternative to a breach of contract claim, the circumstances were readily distinguishable from the claims in this case. Unlike in this action, in each of those cases the parties bringing the unjust enrichment claims disputed the validity or scope of the contract. For example, the *Apple In-App Purchase Litigation* plaintiffs alleged that they had the option to void the relevant contracts and claim entitlement to restitution under an unjust enrichment theory "***if*** the class members elect[ed] to void the contracts." *In re Apple In-App. Purchase Litig.*, --- F. Supp. 2d ---, 2012 WL 1123548, at *3, *9 (N.D. Cal. Mar. 31, 2012) (emphasis added). Likewise, in *Noll v. eBay*, the parties disputed the scope of the contract between the parties and the extent to which the complained of conduct was subject to that agreement. *Noll v. eBay, Inc.*, --- F.R.D. ---, 2012 WL 1413442, at *5-6 (N.D. Cal. Apr. 23, 2012). In each of these cases, the existence of a valid contract covering the conduct at issue was disputed.

Here, in contrast, Plaintiffs have alleged—and no party has disputed—that an express contract governed the parties' relationship. *See* SAC ¶¶ 123-26. Plaintiffs have not pled a set of

facts, in the alternative or otherwise, under which no valid contract would exist. Thus, this is not one of the limited circumstances where a minority of courts have recognized an unjust enrichment claim. *See In re Bank of N.Y. Mellon Corp. False Claims Act Foreign Exch. Litig.*, --- F. Supp. 2d ---, 2012 WL 1071132, at *11 (N.D. Cal. Mar. 30, 2012) (granting motion to dismiss because claim did "not allege[] that the parties' rights were not squarely set out in a binding agreement, or that the express contracts were ineffective"); *Blennis v. Hewlett-Packard Co.*, No. C-07-00333-JF, 2008 WL 818526, at *4 (N.D. Cal. Mar. 25, 2008) ("'A plaintiff can recover for unjust enrichment only where there is no contractual relationship between the parties.'") (quoting *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004)).

Finally, Plaintiffs' allegations do not state a claim for unjust enrichment, even under their own view of what is required. Plaintiffs do not plead facts establishing that Google received an improper benefit at plaintiffs' expense such that plaintiffs are entitled to restitution. *See Chavez v. Bank of Am. Corp.*, No. C-10-0653-JCS, 2012 WL 1594272, at *10 (N.D. Cal. May 4, 2012) ("[E]ven though California law may not recognize unjust enrichment as an independent claim, such a claim may be understood as one for restitution."); *Vicuna v. Alexia Foods, Inc.*, No. C-11-6119-PJH, --- F. Supp. 2d ---, 2012 WL 1497507, at *3 (N.D. Cal. Apr. 27, 2012) ("This court agrees with those courts that have found that unjust enrichment is 'not a cause of action . . . or even a remedy . . . . [i]t is synonymous with restitution."); *see McNeary-Calloway v. J.P. Morgan Chase Bank, N.A.*, --- F. Supp. 2d ---, 2012 WL 1029502, at *31 (N.D. Cal. Mar. 26, 2012); *Cross v. Wells Fargo Bank, N.A.*, No. CV11-00447-AHM, 2011 WL 6136734, at *3 (C.D. Cal. Dec. 9, 2011); *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862, 885 (N.D. Cal. 2010). As Google has repeatedly pointed out, Plaintiffs cannot make this showing, because the SAC yet again fails to allege any harm to the Plaintiffs, let alone any benefit ***at Plaintiffs' expense***. This Court should therefore, once again, dismiss Plaintiffs' claim for unjust enrichment.

III. CONCLUSION

Google respectfully requests that the Court dismiss the causes of action for breach of contract and unjust enrichment.

Dated: August 2, 2012

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