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7
 8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**
 10 **SAN JOSE DIVISION**

12 JASON WEBER, an individual, on behalf
 of himself and all others similarly situated,

13 Plaintiff,

14 v.

15 GOOGLE INC., a Delaware Corporation,

16 Defendant.

Case No. 5:10-cv-05035-EJD

CLASS ACTION

**GOOGLE INC.'S MOTION TO DISMISS
 PLAINTIFF'S FIRST AMENDED
 COMPLAINT PURSUANT TO RULES
 12(b)(1) AND 12(b)(6)**

Hearing Date: September 2, 2011
 Time: 9:00 a.m.
 Place: Courtroom 1, 5th Floor
 Judge: Hon. Edward J. Davila

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on September 2, 2011, at 9:00 a.m., or as soon thereafter as
4 this motion may be heard in the above-entitled court, located at 280 South First Street, San Jose,
5 California, in Courtroom 1, Defendant Google Inc. will, and hereby does, move the Court for an
6 order dismissing the First Amended Complaint filed by Plaintiff Jason Weber. Google's Motion
7 to Dismiss is made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The
8 Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points
9 and Authorities, the Declaration of Brynly R. Llyr and attached Exhibit, and such other matters,
10 both oral and documentary, as may properly come before the Court.

11 Google seeks an order, pursuant to Federal Rule of Civil Procedure 12(b)(1), dismissing
12 Plaintiff's Complaint for lack of subject matter jurisdiction. Google also seeks an order
13 dismissing each of the Complaint's four causes of action for failure to allege facts sufficient to
14 state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure
15 12(b)(6).

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **INTRODUCTION**

18 In his first Complaint, Plaintiff Jason Weber attempted to force-fit his claims regarding
19 Google's Toolbar into an inapplicable framework of statutes intended to cover computer hacking,
20 wiretapping, product sales, and other activities entirely unrelated to his allegations. As shown in
21 Google's initial Motion to Dismiss, these deficiencies were fatal: Plaintiff failed to plead facts
22 sufficient to show he suffered any injury in fact or to establish critical elements of each of his
23 claims. In response to Google's motion, Plaintiff filed his First Amended Complaint ("FAC"),
24 which abandoned his claim under the California Consumers Legal Remedies Act but did nothing
25 to cure the substantive and fatal remaining deficiencies. In short, the FAC remains as deficient as
26 the original.

27 This case is about Google Toolbar, a free browser tool with features including Internet
28 search, spell checking, and web page language translation. Toolbar also offers users the option of

1 enabling enhanced features—features that require sending certain information to Google.
2 Toolbar users were not exposed to the hacking or wiretapping targeted by the statutes Plaintiff
3 cites; to the contrary, the proposed class of users voluntarily downloaded Toolbar, received
4 disclosures regarding the transmission of information associated with its enhanced features, and
5 then affirmatively opted-in to enable those features.

6 The FAC focuses on a specific alleged grievance: that for approximately two months
7 when users purportedly disabled Toolbar through certain Internet Explorer commands, Google
8 purportedly knew that Toolbar continued to transmit information as though enhanced features
9 were enabled until the user exited or restarted his or her browser. But even on his second try,
10 Plaintiff does not plead facts establishing that he was a user affected by the alleged continued
11 collection of information or that he suffered any actual injury. Plaintiff attempts to fabricate
12 standing, notwithstanding the fact that Toolbar is free, by concocting a theory of “value-for-
13 value” exchange, in which users trade purportedly “personal” information—a category he entirely
14 fails to define—for the right to use Toolbar. This theory relies on the legally-unsupported notion
15 that the undefined category of “personal” information has economic value. Furthermore, even if
16 such a theory were legally viable, Plaintiff does not—and cannot—allege facts that establish that
17 he or other users agreed with Google to exchange, or did in fact exchange, “personal” information
18 for the right to use Toolbar. Because Plaintiff does not meet the threshold requirement of
19 Article III standing, the entire FAC should be dismissed.

20 In addition to his standing problems, Plaintiff’s factual allegations fail to satisfy the
21 elements of the claims he asserts. Plaintiff cannot shoehorn his claim into the two federal statutes
22 he claims were violated—the Wiretap Act, 18 U.S.C. §§ 2510 *et seq.*, or the Computer Fraud and
23 Abuse Act (“CFAA”), 18 U.S.C. §§ 1030 *et seq.* Both statutes were designed to address specific
24 unlawful activity: (1) using specially employed devices to surreptitiously intercept
25 communications; and (2) criminal computer hacking. The facts alleged do not fit either statute.
26 Even under Plaintiff’s allegations, users knowingly installed Toolbar, were given notice of the
27 types of information that would be collected, and affirmatively enabled Toolbar’s enhanced
28 features. Plaintiff does not allege the most basic facts necessary to establish the key elements of

1 these two claims: that Google either employed an interception device to intercept Plaintiff's
2 communications or that Google accessed Plaintiff's computer without authorization.

3 Plaintiff's state law claims also fail. As a threshold matter, the Wiretap Act's plain
4 language preempts state-law claims premised on the same conduct. Further, to the extent
5 Plaintiff's state-law claims challenge the adequacy of Google's disclosures surrounding Toolbar
6 and its enhanced features, Plaintiff's factual allegations about his own experience do not state a
7 claim. Plaintiff never alleges that he did not understand what information was collected, and he
8 has not identified what Toolbar disclosures (if any) he actually read. Even assuming Plaintiff
9 reviewed the more recent version of the Toolbar enhanced features dialog box described in the
10 FAC and the 2009 version of the Toolbar Privacy Notice—the only disclosures attacked as
11 inadequate—the plain language of those disclosures refutes any contention that Google failed to
12 disclose the collection of data required by Toolbar's enhanced features.

13 Finally, additional independent grounds exist to dismiss the UCL claim, including
14 Plaintiff's lack of standing under the UCL due to his failure to allege facts showing that he has
15 lost any money or property. Further, Plaintiff's unjust enrichment claim fails because no such
16 cause of action exists under California law.

17 Because these fatal deficiencies were not cured, and cannot be cured by further re-
18 pleading, Plaintiff's FAC should be dismissed with prejudice.

19 **FACTUAL ALLEGATIONS**¹

20 Toolbar is software that users can download from Google and install on their computers to
21 help them search and browse the Internet. (FAC ¶¶ 1, 14.) Once installed on a user's computer,
22 Toolbar appears in the Internet browser (*i.e.*, Internet Explorer or Firefox), and assists users with
23 such tasks as Internet search, spell-checking, and web page language translation. (*Id.* ¶¶ 14, 17.)
24 Plaintiff does not (and cannot) allege that users pay any money to Google for downloading or
25 using Toolbar.

26 Toolbar routinely transmits certain information to Google, including cookie information
27

28 ¹ Google assumes the factual allegations to be true for purposes of this motion only.

1 and IP addresses. (*Id.* ¶ 18.) The FAC does not challenge these routine transmissions. When a
2 user downloads Toolbar, he or she is given the option of enabling Toolbar’s enhanced features.
3 (*Id.* ¶ 35.) For some of Toolbar’s enhanced features such as PageRank and Sidewiki to work
4 properly, Toolbar must collect additional information regarding the sites users visit, including the
5 URL. (*Id.* ¶¶ 37, 38(a).) Google clearly discloses this fact: the dialog box that offers users the
6 choice to enable enhanced features discloses that “[f]or enhanced Toolbar features to work,
7 Toolbar has to tell us what site you’re visiting by sending Google the URL.” (*Id.* ¶ 37; *id.* Fig. 5.)

8 Immediately beneath this disclosure in the enhanced features dialog box is a hyperlink to
9 the Google Toolbar Privacy Notice, dated December 9, 2009, which also states explicitly that
10 enhanced features “operate by sending Google the addresses and other information about the sites
11 at the time you visit them.” (*Id.* ¶ 38(a); *see also* Declaration of Brynly R. Llyr, Ex. 1 at 2.)² The
12 Toolbar Privacy Notice further states that the operation of Sidewiki requires Toolbar to collect
13 “the URL of the relevant page, the type of action you performed and the text related to that
14 action” and the operation of PageRank requires “knowing which web page you are viewing.”
15 (Llyr Decl., Ex. 1 at 2.) In the same dialog box, beneath the “Privacy Policy” hyperlink and the
16 explicit disclosure that transmission of URLs is necessary for enhanced features to work, users
17 are given the option to enable enhanced features by clicking a button, labeled “enable enhanced
18 features” in bold type, or pressing the Enter key or space bar when that button is selected. (FAC
19 ¶ 38(d).)

20 Despite these disclosures, the FAC alleges that the “installation disclosures” fail to notify
21 users of what Plaintiff characterizes as “privacy-affecting Toolbar functions.” (*Id.* ¶ 40.)
22 Presumably Plaintiff is attacking the more recent enhanced features dialog box described in the
23 FAC because he states that the notice given by an earlier version of Toolbar’s enhanced features
24 dialog box was conspicuous, clear and robust. (*Id.* ¶¶ 33, 40.) Yet Plaintiff concedes that users
25 consent to the collection of information related to “users’ communications with other websites”

26 ² Under the doctrine of incorporation by reference, the Court may consider on a Rule 12 motion
27 those documents whose contents are referred to or alleged in the complaint and whose
28 authenticity no party questions. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.
2001); *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1997).

1 until users attempt to disable Toolbar (*id.* ¶ 55; *see also id.* ¶ 63), and he does not allege what
2 disclosures (if any) he reviewed when installing Toolbar, even though he alleges that the
3 enhanced features dialog box changed over time (*see id.* ¶ 40), and that he has used Toolbar and
4 PageRank for years (*see id.* ¶ 61).

5 Plaintiff's FAC is premised on alleged improper data collection, which Plaintiff
6 characterizes as "interception" that violates federal statutes. (*See id.* ¶¶ 52, 55.) That claim
7 focuses on one narrow issue: that for a very limited time Toolbar allegedly continued to transmit
8 the same URL information to Google as it routinely transmitted with enhanced features activated
9 after Internet Explorer users used one of three Internet Explorer commands, purportedly intending
10 to disable Toolbar: (1) clicking the "X" button; (2) using Internet Explorer 8's Manage Add-Ons
11 tool; or (3) using Internet Explorer 8's View-Toolbars or right-click options. (*Id.* ¶¶ 46-48.)
12 Plaintiff concedes that, even for this subset of Internet Explorer users, data collection ceased after
13 those users disabled Toolbar and then exited their current Internet browsing session. (*Id.* ¶ 48.)
14 Furthermore, Plaintiff alleges that Google became aware of this data-collection property in
15 approximately November 2009 but that by January 2010 such collection had ceased. Thus, he has
16 not even alleged that Google acted knowingly outside of this limited period. (*Id.* ¶¶ 50, 54.)
17 Plaintiff's allegations as to users generally are therefore only concerned with the purportedly
18 knowing collection of data (1) from Internet Explorer users; (2) who used certain Internet
19 Explorer functions to disable Toolbar during an active browser session; (3) and who then
20 continued browsing without restarting their browser; (4) between approximately November 2009
21 and January 2010.

22 As to himself, Plaintiff's allegations are limited to the following: that he "has used
23 Toolbar for a number of years, with PageRank enabled," and that during the Class Period, he
24 "thought he was disabling Toolbar's data transmission functions by clicking the 'X' symbol on
25 the Toolbar display and selecting the option to disable Toolbar operation in the current browser
26 window." (FAC ¶¶ 61-62.) Plaintiff never alleges that he continued to browse the web after he
27 disabled Toolbar, but before he exited his current browser session, and thus he fails to allege that
28 Toolbar ever collected URL information even when Plaintiff purportedly thought he had disabled

1 Toolbar’s “data transmission functions.” (*See id.* ¶ 62). Furthermore, even assuming he
2 continued to browse the web in the current browser session, Plaintiff does not allege that Google
3 improperly used or disclosed to any third party any of his information that was allegedly
4 collected. Nor does Plaintiff ever allege that he actually tried to uninstall Toolbar—that is, to
5 remove Toolbar from his computer.

6 Where the FAC purports to lay out allegations of harm, it does so as to Toolbar users
7 generally. (*See* FAC ¶¶ 64-81.) Toolbar is free, and Plaintiff cannot allege that he paid any
8 money to Google for the product. To skirt this fact and in response to Google’s initial Motion to
9 Dismiss, Plaintiff developed a novel and unsupported theory that so-called “personal”
10 information—a category of information that Plaintiff does not define—has economic value. (*Id.*
11 ¶¶ 64-74.) Furthermore, Plaintiff’s theories of harm are all factually deficient. Plaintiff never
12 alleges that he ever used Toolbar in a way that resulted in any such “personal” information
13 appearing in the URL or that URLs or search terms themselves constitute “personal” information.
14 Further, the FAC never alleges that Plaintiff or any other user actually entered into an agreement
15 with Google to exchange “personal” information for the right to use Toolbar, or that users
16 believed they were entering into such an agreement—indeed, Plaintiff alleges that he was
17 “unaware of [Toolbar’s] collection properties.” (*Id.* ¶ 63.) Further, the only “support” for
18 Plaintiff’s flawed “value-for-value” theory is a section of Google’s Terms of Service that
19 describes a different exchange altogether: the exchange of Google’s services for Google’s right
20 to place advertising on those services. (*Id.* ¶ 67.) Therefore, Plaintiff offers no facts showing,
21 even if his “personal” information had value that could stand in the place of real money, that he
22 agreed to exchange that information for the use of Toolbar, that he ever actually made such an
23 exchange, or that such information lost any value.

24 The FAC’s other allegations of harm are equally deficient. Plaintiff theorizes that Toolbar
25 users are harmed because they lose the opportunity to enter into similar exchanges with other web
26 publishers and advertisers, and that they lose the ability they would otherwise have had to
27 “exercise[] their rights to utilize the economic value of their information by . . . foregoing online
28 offerings entirely.” (FAC ¶¶ 68-70.) Plaintiff also asserts conclusory allegations that, as a result

1 of Toolbar’s operation, users expended time and money investigating and attempting to mitigate
2 the operation of Toolbar, and suffered the compromised integrity of their computers. (*Id.* ¶¶ 76-
3 77.) But Plaintiff does not allege that he or any other users have ever tried and failed to exchange
4 “personal” information with any “online providers and advertisers.” (*Id.* ¶ 72.) Plaintiff fails
5 even to allege when he learned of Toolbar’s purported undisclosed or inadequately disclosed
6 collection properties, or that he spent a single minute or dollar investigating or attempting to
7 mitigate Toolbar’s operation.

8 ARGUMENT

9 I. PLAINTIFF LACKS STANDING FOR ANY CLAIMS BECAUSE HE DOES NOT 10 ALLEGE INJURY IN FACT, AS REQUIRED UNDER THE U.S. CONSTITUTION.

11 Plaintiff has not pled an injury in fact sufficient to confer Article III standing. Article III,
12 Section 2 of the United States Constitution limits federal jurisdiction to actual cases and
13 controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiff bears the
14 burden of establishing that he suffered an “injury in fact”—that is, an invasion of a legally
15 protected interest that is (a) concrete and particularized, not merely abstract, and (b) actual and
16 imminent, not conjectural or hypothetical. *Id.* (citations omitted). That he attempts to bring a
17 class action makes no difference. The named plaintiff must establish that he “personally, ha[s]
18 been injured” and thus has standing to bring the cause of action. *Lierboe v. State Farm Mut.*
19 *Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (citation omitted); *see generally Lujan*, 504
20 U.S. at 561 n.1 (“[T]he injury must affect the plaintiff in a personal and individual way.”).

21 The FAC’s conclusory assertions of harm are factually and legally deficient even as to the
22 putative class, but especially as to Plaintiff. Toolbar is free, and Plaintiff never alleges that he or
23 any other user paid money to use it. Instead, he casts about for some proxy to compensate for the
24 fact that no money ever changed hands. His first attempt is to allege that users engage in a
25 “value-for-value exchange” with Google, trading their “personal” information for the right to use
26 Toolbar. (*See* FAC ¶¶ 64-65.) Relying on this theory, Plaintiff alleges that Toolbar users did
27 “not receive the full value of their exchange” when Toolbar allegedly “engage[d] in undisclosed
28 [or] inadequately disclosed data collection.” (FAC ¶ 68.) However, Plaintiff’s attempt to

1 substitute “personal” information for money fails as a matter of law. Google is unaware of any
2 case that has allowed Article III’s injury in fact requirement to be satisfied by this type of so-
3 called “value-for-value” exchange. *Cf. In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp.
4 2d 299, 327 (E.D.N.Y. 2005) (“There is . . . no support for the proposition that an [individual’s]
5 personal information has or had any compensable value in the economy at large.”).

6 Moreover, Plaintiff’s “value-for-value” theory assumes that users agree to exchange some
7 set amount of “personal” information for the use of Toolbar, so that the collection of additional
8 information constitutes a “raise[d] ticket price for Toolbar.” (FAC ¶ 68.) This assumption is
9 flawed in at least two respects. First, as noted in the Factual Allegations section above, the FAC
10 merely alleges that Google’s Terms of Service contain a section that never mentions personal
11 information, but instead conditions use of Toolbar on Google’s right to show advertising. (*Id.* at
12 ¶ 67.) Moreover, Plaintiff’s theory is based on flawed logic: the collection of more or less
13 information cannot constitute a change in “price” because users do not promise to provide any
14 particular amount of information by searching and browsing, and thus there is no set “price” to
15 begin with.

16 In addition to this flawed “value-for-value” theory, the FAC contains conclusory
17 allegations that users suffer injury in the form of opportunity costs, costs associated with
18 investigation and mitigation, and diminished value of their computers and personal information,
19 and further speculates upon possible harms associated with disclosure of personal information to
20 third parties. (*Id.* ¶¶ 26-27, 69-77.) But the FAC contains no factual allegations that Plaintiff
21 himself has suffered any actual injury or faces a risk of imminent, palpable injury. *See, e.g.*,
22 *Birdsong v. Apple, Inc.*, 590 F.3d 955, 960 n.4 (9th Cir. 2009) (affirming dismissal of action
23 where plaintiff alleged only a hypothetical injury and failed to allege any actual injury); *Whitson*
24 *v. Bumbo*, No. C 07-05597, 2009 WL 1515597, at *5-6 (N.D. Cal. Apr. 16, 2009) (dismissing
25 claim for lack of Article III standing). Plaintiff’s only allegations as to himself are that he “used
26 Toolbar for a number of years” and “thought he [disabled] Toolbar’s data transmission
27 functions.” (FAC ¶¶ 61-62.) Thus, even assuming that any of the FAC’s alleged injuries are
28 legally viable as to users, Plaintiff fails to establish that he himself has been injured in any of

1 those ways. *See Gaos v. Google Inc.*, No. C 10-04809 (JW) (N.D. Cal. April 7, 2011) (dismissing
2 claims for failure to allege injury consistent with Article III standing requirements). Plaintiff
3 never alleges that he understood that he was providing “personal” information in exchange for the
4 use of Toolbar or its enhanced features. Nor does Plaintiff allege that he (1) entered any
5 “personal” searches into Toolbar; (2) visited any URLs containing “personal” information while
6 using Toolbar; or (3) ever continued to browse online after using Internet Explorer’s functions to
7 disable Toolbar but before restarting his browser. Finally, Plaintiff never alleges that he
8 personally took any action to investigate or mitigate Toolbar’s operation, that his own personal
9 information was disclosed to third parties, or that he was unable to use other parties’ products or
10 directly market his own personal information as a result of his use of Toolbar. Plaintiff thus
11 offers no facts to show that the operation of Toolbar caused any injury “that is ‘distinct and
12 palpable’ as opposed to merely ‘abstract,’ and . . . actual or imminent, nor ‘conjectural’ or
13 ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990) (internal citations omitted).
14 Because Plaintiff fails to allege injury in fact sufficient to confer Article III standing, the FAC
15 should be dismissed in its entirety.

16 **II. PLAINTIFF FAILS TO STATE A CLAIM FOR ANY OF HIS CAUSES OF ACTION.**

17 The FAC also should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for
18 failure to state a claim. Although factual allegations in Plaintiff’s FAC are assumed to be true for
19 purposes of this motion, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment]’ to
20 relief requires more than labels and conclusions.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
21 (2007). An unadorned recitation of the elements of the claims will not suffice, and the court need
22 not assume the truth of conclusory allegations unsupported by facts. *Ashcroft v. Iqbal*, 129 S. Ct.
23 1937, 1950 (2009). Rather, the FAC must allege a factual basis for each element of each cause of
24 action. *Moss v. U.S. Secret Serv.*, 572 F. 3d 962, 969 (9th Cir. 2009).

25 **A. Plaintiff’s Claim Under The Wiretap Act Fails As A Matter Of Law.**

26 Plaintiff’s Wiretap Act claim fails because he does not plead adequate facts to establish an
27 unlawful “interception” under the terms of the Act. The Wiretap Act is primarily a criminal
28 statute, although it provides for a private right of action in certain limited circumstances. 18

1 U.S.C. § 2520(a). Plaintiff alleges Google violated two sections of the Wiretap Act: (1) Section
2 2511(1)(a), which provides for liability, subject to exceptions, for “any person who . . .
3 intentionally intercepts [or] endeavors to intercept . . . any . . . electronic communication” (FAC
4 ¶ 95); and (2) Section 2511(1)(d), which provides for liability, subject to exceptions, for “any
5 person who . . . intentionally uses, or endeavors to use, the contents of any . . . electronic
6 communication, knowing or having reason to know that the information was obtained through the
7 interception of a[n] . . . electronic communication in violation of [Subsection 2511(1)]” (*Id.*
8 ¶ 96). Plaintiff does not claim that users’ initial download of Toolbar or the election to enable
9 Toolbar’s enhanced features violate the Wiretap Act. Rather, his claim appears to focus solely on
10 data transmissions that allegedly occurred after users utilized certain Internet Explorer functions
11 “purporting to disable Toolbar.” (*Id.* ¶ 55.)

12 The FAC fails to state a claim under either Section 2511(1)(a) or Section 2511(1)(d). An
13 “interception” requires the use of a defined device. 18 U.S.C. § 2510(4). Neither Toolbar nor
14 “Google’s system,” (*see* FAC ¶ 53), is a “device” for purposes of the Wiretap Act. According to
15 the allegations of the FAC, Toolbar and “Google’s system” are equipment used by Google in the
16 ordinary course of its business. (*Id.* ¶¶ 1, 16, 19, 37-38). But the Wiretap Act expressly excludes
17 from its definition of “device” any equipment used by a provider of an “electronic
18 communication service” in the ordinary course of business, and without identification of a
19 “device” that was used to acquire the contents of a communication, no interception occurred in
20 violation of the Act. 18 U.S.C. § 2510(5).

21 Nor can Plaintiff establish an “interception” in violation of the Wiretap Act by alleging
22 legal conclusions to meet the required elements: that Toolbar and “Google’s system”—a vague
23 term he fails to define—are “devices and apparatuses used to intercept, retain, and transcribe in-
24 transit electronic communications” (FAC ¶ 53); that Toolbar “intercept[ed] and transmit[ted]
25 users’ activities” after those users employed certain Internet Explorer functions “purporting to
26 disable Toolbar” (*id.* ¶ 55); and that “Google’s interception and eavesdropping was not in its
27 normal course of business” (*id.* ¶ 56). These conclusory assertions fail to meet the minimum
28 pleading requirements established in *Twombly* and *Iqbal*, and they directly contradict the factual

1 allegations that show Plaintiff has not pled a “device” covered by the Wiretap Act because
2 Google is alleged to be an electronic communications service provider (*id.* ¶ 51), and Toolbar and
3 “Google’s system” are used in the ordinary course of Google’s business (*id.* ¶¶ 1, 19, 37-38, 53).

4 The “ordinary course” exclusion applies to devices that are routinely used for a legitimate
5 business purpose. *See, e.g., Hall v. Earthlink Inc.*, 396 F.3d 500, 504-05 (2d Cir. 2005); *United*
6 *States v. Friedman*, 300 F.3d 111, 122 (2d Cir. 2002). Plaintiff’s own allegations establish that
7 the exclusion applies here. The collection of user data is routine. Plaintiff admits that Toolbar
8 “routinely transmits to Google certain information,” including cookie information and IP address
9 (FAC ¶ 18), and that Toolbar’s enhanced features require the transmission of certain user
10 information, including the URL of each web page the user requests (*id.* ¶¶ 1, 19, 37-38). Plaintiff
11 also acknowledges that the collection of user data is for a legitimate business purpose, as
12 Toolbar’s collection and transmission of users’ URLs is necessary to provide the enhanced
13 features that some users choose to install. (*Id.* ¶¶ 1, 37-38.) Indeed, Plaintiff’s allegations
14 establish that data transmission via Toolbar is not only within the ordinary course of Google’s
15 business, it is essential for Toolbar to function. (*Id.*)

16 The Second Circuit’s decision in *Hall* is especially instructive as to why the ordinary
17 course exclusion applies here. In *Hall*, plaintiff opened an account with defendant Earthlink
18 Network Inc., an Internet Service Provider, for Internet services, including a personal email
19 account. 396 F.3d at 502. Suspicious that the email account was being used to send “spam”
20 emails, defendant terminated plaintiff’s access to the account, but continued to receive emails sent
21 to plaintiff’s account. *Id.* Plaintiff alleged that defendant’s continued receipt of emails
22 constituted illegal “interceptions” under the Wiretap Act. *Id.* The court, however, held that the
23 Wiretap Act did not apply because the alleged “devices”—routers, servers, and other
24 equipment—were used “as part of [defendant’s] e-mail service to all customers . . . in the
25 ordinary course of its business.” *Id.* at 505. The continued receipt of emails after termination of
26 Plaintiff’s account access did not transform the equipment at issue into an “electronic,
27 mechanical, or other device,” for purposes of the Wiretap Act. *Id.* at 504.

28 This case closely parallels *Hall*. Despite alleging facts that establish that Toolbar and

1 “Google’s system” are used in the ordinary course of Google’s business, Plaintiff argues that the
2 intervening act of disabling Toolbar by using Internet Explorer’s features somehow transformed
3 Toolbar into a “device” under the Wiretap Act whenever user information continued to be
4 collected in the current browser session. Like the plaintiff in *Hall*, Plaintiff is wrong. The case
5 law does not support such an expansive interpretation of “device.” *See id.* at 505 (termination of
6 single user’s access to account did not transform servers, routers, and other equipment into
7 “devices” covered by Wiretap Act). Further, any such interpretation would be the type of
8 “surprising and novel” interpretation of a criminal statute that is strongly discouraged under the
9 rule of lenity. *See LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1134 (9th Cir. 2001)
10 (cautioning against interpreting criminal statutes in a civil context in ways that would “impose
11 unexpected burdens” on defendants). Plaintiff’s Wiretap Act claim must be dismissed because he
12 does not and cannot allege facts establishing that Toolbar or “Google’s system” are intercept
13 “devices” outside the ordinary course exclusion.

14 B. Plaintiff Fails To State A Claim For Violation Of The CFAA.

15 The CFAA does not fit Plaintiff’s allegations at all. The CFAA was enacted to prevent
16 computer hackers from accessing computers to steal information or to disrupt or destroy computer
17 functionality. *See LVRC Holdings*, 581 F.3d at 1130-31. Although the CFAA is primarily a
18 criminal statute, it creates a limited civil right of action. *Id.* at 1131; *see also* 18 U.S.C.
19 § 1030(g). The FAC does not identify the provisions specifically, but Plaintiff appears to
20 predicate his CFAA claim on three types of offenses: (1) unauthorized access to a protected
21 computer and thereby obtaining information, § 1030(a)(2)(C); (2) unauthorized access with intent
22 to defraud, § 1030(a)(4); and (3) unauthorized transmission of a program or code,
23 § 1030(a)(5)(A). Plaintiff’s CFAA claim fails because he lacks standing to bring a civil claim
24 and because the facts as alleged show that Google did not violate the statute.

25 1. Plaintiff Cannot Meet The Jurisdictional Threshold Required For A Civil
26 Claim Under The CFAA.

27 To have standing under the CFAA, Plaintiff must allege actual “loss,” as that term is
28 defined by the statute. 18 U.S.C. § 1030(e)(11). The loss suffered by reason of the CFAA

1 offense must involve the conduct set forth at 18 U.S.C. § 1030(c)(4)(A)(i)(I)-(V). The only
2 subclause of the statute alleged by Plaintiff covers conduct resulting in “loss to 1 or more persons
3 during any 1-year period . . . aggregating at least \$5,000 in value.” 18 U.S.C.

4 § 1030(c)(4)(A)(i)(I). (*See also* FAC ¶ 103.) The statute defines “loss” as “any reasonable cost
5 to any victim, including the cost of responding to an offense, conducting a damage assessment,
6 and restoring the data, program, system, or information to its condition prior to the offense, and
7 any revenue lost, cost incurred, or other consequential damages incurred because of interruption
8 of service.” 18 U.S.C. § 1030(e)(11).

9 Plaintiff does not allege that he spent any money responding to the alleged violations,
10 spent any money conducting a damage assessment, spent any money restoring the data, program,
11 system or information to its condition before the offense, or that he incurred any other economic
12 damages due to Google’s alleged conduct. Although Plaintiff does make the conclusory
13 allegation that he and the proposed class sustained an aggregated loss of \$5,000, there are no
14 alleged facts that Plaintiff himself incurred any loss at all. (*See* FAC ¶¶ 78, 103.) Likewise, the
15 allegation that Google’s conduct caused “users to expend money, time, and resources” fails to
16 allege that Plaintiff himself expended money or resources. (*See id.* ¶ 76.) Plaintiff cannot state a
17 claim without alleging individual loss. 18 U.S.C. § 1030(g) (providing right of action for persons
18 who suffer “damage or loss”). The assertion of a class claim does not change this: “[n]amed
19 plaintiffs who represent a class ‘must allege and show that they personally have been injured, not
20 that injury has been suffered by other, unidentified members of the class to which they belong and
21 which they purport to represent.’” *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Plaintiff’s
22 admission that he “would have” taken remedial measures, “had he known” of Google’s alleged
23 conduct (FAC ¶ 63), is inconsistent with any claim that he was among the “users” who allegedly
24 were injured because of “their efforts investigating and attempting to mitigate” the data
25 transmissions that occurred after users disabled Toolbar through Internet Explorer but before they
26 closed their current browsing sessions (*id.* ¶ 76).

27 In addition, Plaintiff cannot satisfy the \$5,000 loss requirement by trying to aggregate
28 alleged loss by him related to his computer with alleged loss by other users, presumably related to

1 their own computers. *See Lyons v. Coxcom, Inc.*, No. 08-CV-02047, 2009 WL 347285, at *8
2 (S.D. Cal. Feb. 6, 2009) (“Plaintiff attempts to aggregate losses of the entire class in order to meet
3 the \$5000 requirement; however, under the language of the statute, only federal prosecutors may
4 aggregate losses across multiple protected computers from a related course of conduct.”), *vacated*
5 *on other grounds by Lyons v. Coxcom, Inc.*, 718 F. Supp. 2d 1232 (S.D. Cal. 2009); *In re*
6 *Pharmatrak, Inc. Privacy Litig.*, 220 F. Supp. 2d 4, 15 (D. Mass. 2002), *rev’d on other grounds*
7 *by In re Pharmatrak, Inc.*, 329 F.3d 9 (1st Cir. 2003); *In re DoubleClick Inc. Privacy Litig.*, 154
8 F. Supp. 2d 497, 523 (S.D.N.Y. 2001); *Creative Computing v. Getloaded.com LLC*, 386 F.3d 930,
9 934 (9th Cir. 2004) (noting in non-class case that statute looks at “how much damage or loss there
10 is to the victim”); *but see In re Apple & ATTM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1308 (N.D.
11 Cal. 2008). Because Plaintiff lacks standing to bring a CFAA claim, Plaintiff’s claim under the
12 CFAA must be dismissed.

13 2. Google Has Not Acted Without Authorization, Or In A Manner That
14 Exceeded Authorization.

15 As a matter of law, Plaintiff cannot stretch the scope of the CFAA to encompass Google’s
16 alleged collection of information following Plaintiff’s voluntary decision to download Toolbar
17 and to opt-in to Toolbar’s enhanced features. The Ninth Circuit has narrowly construed the
18 CFAA to apply only when a defendant has not been authorized *at all* to obtain access to a
19 protected computer or certain types of information, but nevertheless obtains access to such
20 computer or information. *LVRC Holdings*, 581 F.3d at 1133-35; *AtPac, Inc. v. Aptitude*
21 *Solutions, Inc.*, 730 F. Supp. 2d 1174, 1180 (E.D. Cal. 2010) (recognizing Ninth Circuit’s
22 guidance that the CFAA should be read narrowly). Plaintiff’s voluntary installation of Google
23 Toolbar (FAC ¶ 14), and voluntary enabling of the enhanced features (*see id.* ¶ 61), shows that his
24 claims are counter to the CFAA’s intended scope of addressing criminal computer hacking. *See*
25 *LVRC Holdings*, 581 F.3d at 1134 (stating that the CFAA cannot be interpreted in surprising or
26 novel ways because it is primarily a criminal statute). Google did not access or transmit program
27 or codes to Plaintiff’s computer without authorization, nor did Google covertly install or operate
28 Toolbar on Plaintiff’s computer; Google did so openly at Plaintiff’s prompting.

1 A CFAA violation for accessing or transmitting information “without authorization”
2 occurs only where “the person has not received the permission to use the computer for any
3 purpose.” *Id.* at 1135. Because Plaintiff admitted to voluntarily downloading Toolbar and opting
4 into Toolbar’s enhanced features, Plaintiff cannot maintain a claim that Google acted “without
5 authorization.” *See id.* at 1133; *see also In re Apple & ATTM Antitrust Litig.*, No. C-07-05152,
6 2010 WL 3521965, at *7 (N.D. Cal. July 8, 2010) (voluntary installation of program negates
7 “without authorization” element). The “without authorization” provision applies to outsiders,
8 such as third-party computer hackers, who do not have permission to access the computer *at all*.
9 *See, e.g., Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 964 (D. Ariz. 2008); *AtPac*, 730 F.
10 Supp. 2d at 1180 (“Simply put, a person cannot access a computer ‘without authorization’ if the
11 gatekeeper has given them permission to use it.”). To maintain such a claim, Plaintiff would have
12 had to allege that Google had “no rights, limited or otherwise,” to access or transmit to his
13 personal computer. *LVRC Holdings*, 581 F.3d at 1133. But Plaintiff repeatedly has conceded that
14 he granted Google access to his computer with respect to Toolbar, and even its enhanced features.
15 (FAC ¶¶ 14, 61). Because Plaintiff’s allegations show that Google did not act “without
16 authorization,” he cannot maintain claim for either unauthorized transmission under 18 U.S.C.
17 § 1030(a)(5)(A) or “access without authorization” under §§ 1030(a)(2)(c) and (a)(4).³

18 Likewise, Plaintiff does not and cannot allege facts sufficient to show that Google violated
19 §§ 1030(a)(2)(c) or (a)(4) by “exceed[ing] authorized access,” as defined by the CFAA. *See* 18
20 U.S.C. § 1030(e)(6). The Ninth Circuit has interpreted “exceed[ed] authorized access” to cover
21 “a person who . . . has permission to access the computer, but accesses information on the
22 computer that the person is not entitled to access.” *LVRC Holdings*, 581 F.3d at 1133. This
23 requires the violator to access information or data *beyond* the information or data for which
24 access was granted. “[T]he plainest and common-sense understanding of the definition of the
25 term ‘exceeds authorized access’ is one that simply examines whether the accessor was entitled to

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27 ³ Whereas sections 1030(a)(2)(c) and (a)(4) of the CFAA require that the defendant either act
28 “without authorization” or “exceed authorized access,” section 1030(a)(5)(A) requires that the
defendant act “without authorization,” and does not prohibit actions that exceed authorized
access.

1 access the information for any purpose.” *AtPac*, 730 F. Supp. 2d at 1181. In *LVRC Holdings*, the
2 Ninth Circuit held that an employee who accessed his employer’s documents for the purpose of
3 stealing those documents, did not “exceed authorized access” because the employee was
4 permitted access to the documents at issue albeit for a different purpose. 581 F.3d at 1135 n.7.
5 This is because the CFAA, a criminal statute designed to deter computer hacking, is concerned
6 solely with the rights of access, not the misuse of access to the information. *See Lewis-Burke*
7 *Assoc. LLC v. Widder*, 725 F. Supp. 2d 187, 194 (D.D.C. 2010); *Bell Aerospace Servs., Inc. v.*
8 *U.S. Aero Servs., Inc.*, 690 F. Supp. 2d 1267, 1272-73 (M.D. Ala. 2010).

9 In this case, Google had been granted permission to access information or data on
10 Plaintiff’s computer regarding Plaintiff’s Internet browsing activities. By using Toolbar and its
11 enhanced features, Plaintiff permitted Google to access “the addresses and other information
12 about sites at the time you visit them.” (FAC ¶ 38(a).) While Plaintiff never alleges facts
13 sufficient to show that Google obtained any of his communications after he disabled Toolbar,
14 Plaintiff maintains that Google exceeded its authorized access by “obtaining users’ confidential
15 Internet communications” at times after users disabled Toolbar but before they exited the current
16 browsing session. (*Id.* ¶¶ 48, 59.) Even if Plaintiff had alleged that his own information was
17 collected after he disabled Toolbar, those “confidential Internet communications”—that is, the
18 URLs and other information related to websites visited by Plaintiff—are the very type of
19 information that Plaintiff granted Google access to when he opted-in to enhanced features. There
20 is no allegation that Google used its authorized access to obtain other types of information that it
21 was not entitled to access. *See Univ. Sports Publ’ns Co. v. Playmakers Media Co.*, 725 F. Supp.
22 2d 378, 384 (S.D.N.Y. 2010) (limiting “exceeds authorized access” to require allegation that
23 violator accessed information to which it had no access rights at all).

24 Plaintiff maintains that by clicking the “X” symbol, Plaintiff “did not consent to data
25 collection” after he disabled Toolbar but before he restarted his browser. (*See* FAC ¶¶ 62-63.)
26 Nowhere does Plaintiff allege he permanently uninstalled, or attempted to uninstall, Google
27 Toolbar from his computer. At most, he complains of Google’s access to data for a limited time
28 until the browser was closed after disabling Toolbar. Again, Plaintiff does not allege that he

1 continued to browse before exiting or restarting his browser. Regardless, the collection of data
2 during the user’s current browsing session is not remotely similar to the hacking that is the focus
3 of the CFAA. Any limits Plaintiff attempted to place as to when Toolbar could collect or
4 somehow use that information cannot transform the claim to one under the CFAA; any allegation
5 that he did not consent to Toolbar “collecting” information after he clicked the “X” (*id.* ¶¶ 62-63),
6 is irrelevant. *See AtPac*, 730 F. Supp. 2d at 1181 (“Plaintiff admits that . . . Nevada County had
7 permission to access the AtPac directories and source code . . . What Nevada County chose to do
8 once it accessed the AtPac directors . . . is irrelevant.”); *Univ. Sports Publ’ns*, 725 F. Supp. 2d at
9 385 (holding that defendant does not “exceed authorized access” by collecting information that he
10 was entitled to access but not collect). Plaintiff’s complaint that Toolbar purportedly failed to
11 stop collecting users’ information at the precise moment users believed it had stopped does not
12 transform the operation of Toolbar into computer hacking.

13 Moreover, any purported deficiency in Google’s disclosures regarding the operation of
14 Toolbar’s enhanced features also cannot provide a basis for CFAA liability under any section of
15 that statute. (FAC ¶¶ 59, 99-100.) As noted above, the CFAA is solely concerned with access to
16 the information at issue, not the parameters or limits parties may place on the time, manner or
17 intent of access. Thus, the CFAA does not encompass or incorporate the alleged exploitation or
18 breach of private agreements between parties. *AtPac*, 730 F. Supp. 2d at 1182 (finding that
19 liability under the CFAA will not reach alleged violation of licensing agreement); *United States v.*
20 *Zhang*, No. CR-05-00812-RMW, 2010 WL 4807098, at *4 (N.D. Cal. Nov. 19, 2010) (finding
21 that breach of private contract cannot be construed to constitute a violation of the CFAA); *Univ.*
22 *Sports Publ’ns*, 725 F. Supp. 2d at 385 (finding that violation of confidentiality agreements does
23 not support a CFAA claim). Under the CFAA, the relevant inquiry is whether Plaintiff allowed
24 Google access to the computer system or information at issue, irrespective of whether Plaintiff
25 would have revoked permission if he understood Google’s alleged intent or knew about Google’s
26 alleged conduct. *See Accenture, LLP v. Sidhu*, No. C 10-2977, 2010 WL 4691944, at *4 (N.D.
27 Cal. Nov. 9, 2010) (dismissing with prejudice claim that employee acted “without authorization”
28 or “exceeded authorized access” where employer would have terminated employee or revoked

1 permission had it known employee’s intent in accessing documents).

2 The CFAA’s plain language, and the cases interpreting the CFAA, do not support
3 Plaintiff’s attempt to stretch the CFAA to cover the facts alleged. This statute was designed to
4 address third-party computer hackers. It does not apply to the facts Plaintiff alleged, and thus the
5 Plaintiff’s claim under the CFAA must be dismissed.

6 C. Plaintiff’s State-Law Claims Are Preempted By The Wiretap Act.

7 The federal Wiretap Act contains an express preemption clause: “The remedies and
8 sanctions described in this chapter with respect to the interception of electronic communications
9 are the *only* judicial remedies and sanctions for nonconstitutional violations of this chapter
10 involving such communications.” 18 U.S.C. § 2518(10)(c) (emphasis added). Federal law may,
11 of course, expressly preempt state-law claims. *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001,
12 1004 (9th Cir. 2008). Thus, under the Act, only “those remedies outlined in the [statute] are the
13 exclusive ones a party may pursue in court for conduct covered by the statute.” *Bunnell v. Mot.*
14 *Picture Ass’n of Am.*, 567 F. Supp. 2d 1148, 1154 (C.D. Cal. 2007) (holding that the Wiretap Act
15 preempts state law claims; *citing Quon v. Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116,
16 1138 (C.D. Cal. 2006), *rev’d on other grounds by Quon v. Arch Wireless Operating Co.*, 529 F.3d
17 892 (9th Cir. 2008)).⁴

18 All the state-law claims asserted here are preempted to the extent that they seek to impose
19 liability based on the same conduct alleged with respect to the Wiretap Act. Plaintiff alleges that
20 Google violated the Wiretap Act through its alleged “interception of electronic communications.”
21 (*See* FAC ¶¶ 51-57, 93-97.) The state-law claims incorporate the same allegations as the Wiretap
22 Act claim. (*Id.* ¶¶ 105, 120.) For the UCL claim, Plaintiff alleges that Google violated Plaintiff’s
23 privacy by allegedly intercepting his communications and that Google misled the public and
24 failed to disclose its alleged interceptions. (*Id.* ¶¶ 108, 111, 118.) Plaintiff’s unjust enrichment
25 claim is also based on the same conduct. (*Id.* ¶ 120.) Thus, at the core of all the claims are the
26 allegations that Google purportedly intercepted Plaintiff’s communications. Because federal law

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28 ⁴ Furthermore, the detailed regulatory scheme set forth in the Wiretap Act leaves no room for
supplementary state regulation. *See Bunnell*, 567 F. Supp. at 1154-55.

1 is the exclusive avenue for any claims regarding such conduct, the state-law claims are
2 preempted.⁵ See *Bunnell*, 567 F. Supp. 2d at 1154 (holding that Wiretap Act expressly preempted
3 claim under California Privacy Act). Even if Plaintiff ultimately is unable to state a claim under
4 the Wiretap Act, the state claims still are preempted. *Id.* (holding that state-law claim was
5 preempted by Wiretap Act despite finding no violation of Act).

6 Although one court in this District recently found that § 2518(10) did not expressly
7 preempt two claims under the California Penal Code, that case should not control here. See
8 *Valentine v. NebuAd, Inc.*, No. C08-05113-TEH, 2011 WL 1296111 (N.D. Cal. Apr. 4, 2011). In
9 *NebuAd*, the court found that § 2518(10) “does not explicitly provide for the preemption of state
10 law, which is the bar that must be met before express preemption may be found.” *Id.* at *6.
11 However, the standard he uses for express preemption misapplies the Supreme Court language on
12 that issue. An express preemption analysis “begin[s] with the language employed by Congress
13 and the assumption that the ordinary meaning of that language accurately expresses the legislative
14 purpose.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp.*
15 *v. Holliday*, 498 U.S. 52, 57 (1990)). In this case, the statutory language is clear: for any
16 nonconstitutional violation of the Wiretap Act, the remedies and sanctions described in the
17 Wiretap Act provide “the **only** judicial remedies and sanctions.” 18 U.S.C. § 2518(10) (emphasis
18 added); see also *Bunnell*, 567 F. Supp. 2d at 1154 and *Quon*, 445 F. Supp. 2d at 1138 (holding
19 that analogous section of the Stored Communications Act, 18 U.S.C. § 2708, expressly preempts
20 state law claims).

21 D. Plaintiff Fails To State A Claim Under The UCL.

22 Plaintiffs’ UCL claim fails not only because it is preempted, but also because Plaintiff
23 does not allege adequately the loss of “money or property” to demonstrate UCL standing and fails
24 to plead facts stating a substantive violation of the law.

25
26
27 ⁵ As argued in Section II.E, below, Plaintiff’s claim for unjust enrichment fails because unjust
28 enrichment is not a cause of action in California. Even if such a cause of action existed,
Plaintiff’s unjust enrichment claim would also be preempted.

1 1. Plaintiff Lacks UCL Standing Because He Has Not Lost Money or
2 Property.

3 Plaintiff lacks standing to bring a claim under the UCL because he fails to allege that he
4 “suffered injury in fact and . . . lost money or property as a result of the unfair competition.” Cal.
5 Bus. & Prof. Code § 17204. Recently, in *Kwikset Corp. v. Superior Court*, the California
6 Supreme Court held that standing requires actual harm in the form of economic injury. *See*
7 *Kwikset Corp. v. Superior Court*, --- Cal 4th ----, 2011 WL 240278, at *5 (Jan. 27, 2011)
8 (requireing “loss or deprivation of money or property”). As discussed in more detail in Section I,
9 above, Plaintiff has not established that he has suffered an injury in fact.

10 Unlike the plaintiff who paid money for the challenged product in *Kwikset*, Plaintiff in this
11 case did not pay any money for Toolbar and has failed to allege facts supporting his concocted
12 “value-for-value” theory, based on only his conclusory allegation that Toolbar users “paid”
13 “personal” information in exchange for the use of Toolbar, as discussed in Section I, above.
14 Furthermore, as explained in Section I, “personal” information is not automatically
15 interchangeable with money, for the purpose of alleging an economic injury. The allegations that
16 Plaintiff and the putative Class incurred “opportunity costs of [their] choosing to do business with
17 Google and use Toolbar” (FAC ¶ 76), or “costs in the form of information taken” (*id.* ¶ 73), also
18 do not establish an economic injury under *Kwikset*, because they identify no deprivation of money
19 or property or any diminished interest in property. *See* 2011 WL 240278 at *6-7 (listing cases
20 where plaintiffs adequately alleged loss of money or property, which contain specific allegations
21 of loss, *e.g.*, loss of money due to overcharge or loss of property due to wrongful repossession);
22 *Thompson v. Home Depot, Inc.*, No. 07-cv-1058-IEG, 2007 WL 2746603, at *3 (S.D. Cal.
23 Sep. 18, 2007) (“Plaintiff’s . . . argument . . . that his personal information constitutes property
24 under the UCL, is . . . unpersuasive and also rejected.”); *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121,
25 1127 (N.D. Cal. 2008) (unauthorized release of personal information is not a “loss of property”
26 under the UCL). Moreover, Plaintiff never alleges that *he* spent any money or resources
27 investigating or attempting to mitigate the operation of Toolbar on his own computer. (*Compare*
28 FAC ¶ 76 (alleging generically that users suffered such harms) *with Kwikset*, 2011 WL 240278 at

1 *19 (“[A] private plaintiff filing suit now must establish that he or she has personally suffered
2 much harm.”).) Likewise, the FAC relies exclusively on assertions of harm to users generally
3 (FAC ¶¶ 107, 64-81), and even those are mere recitations of legal conclusions rather than factual
4 allegations showing actual harm. These do not satisfy the requirements of *Twombly* and *Iqbal* to
5 plead facts demonstrating economic injury to Plaintiff, even if the Court were to find those types
6 of expenses to be “lost money or property” within the meaning of the UCL. Because Plaintiff has
7 not alleged facts sufficient to show lost money or property as a result of the alleged violation, his
8 UCL claim must be dismissed.

9 2. Google Did Not Engage In Any Unlawful, Unfair or Fraudulent Practices.

10 Plaintiff also fails to state a claim under the UCL because he has not pled facts sufficient
11 to establish that Toolbar’s alleged practice of collecting users’ information is not an “unlawful,”
12 “unfair,” or “fraudulent” business practice, as those terms have been defined.

13 a. Plaintiff’s Allegations Do Not Establish That Google Has Acted
14 “Unlawfully” In Violation of the UCL.

15 Under the “unlawful” prong, Plaintiff alleges four predicate violations by Google: the
16 CFAA, the Wiretap Act, Cal. Civ. Code § 17500 (False Advertising Law, or “FAL”) and the
17 California Privacy Act, Cal. Const. art. I, § 1. To the extent that Plaintiff bases his “unlawful”
18 claim on violations of the Wiretap Act and CFAA, those claims fail for the reasons provided in
19 Sections II.A and II.B. *See, e.g., Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d
20 1177, 1191 (N.D. Cal. 2009) (rejecting claim under “unlawful” prong of UCL where court
21 dismissed plaintiff’s predicate violations); *Stearns v. Select Comfort Retail Corp.*, No. 08-2746
22 JF, 2009 WL 1635931, at *16 (N.D. Cal. June 5, 2009) (same).

23 Additionally, a Wiretap Act violation cannot serve as a predicate for a UCL violation
24 because, as discussed in Section III.C, the Wiretap Act provides “the only judicial remedies and
25 sanctions” for violations of that statute. *See* 18 U.S.C. § 2518(10)(c). Thus, the Wiretap Act
26 preempts any other recovery for alleged violations of that statute, and Plaintiff should not be
27 permitted to make an end-run on the plain language by bootstrapping a Wiretap Act claim into
28 predicate violation for a UCL claim.

1 To the extent Plaintiff purports to base his “unlawful” claim on violations of the FAL or
2 California Privacy Act, as discussed below, those claims fail to “state with reasonable
3 particularity the facts supporting the statutory elements” of any of the alleged predicate statutory
4 violations. *See Stearns*, 2009 WL 1635931, at *16 (citing *Silicon Knights, Inc. v. Crystal*
5 *Dynamics, Inc.*, 983 F. Supp. 1303, 1316 (N.D. Cal. 1997)). Claims under each of these laws fail
6 for this and other reasons, as explained below.

7 The FAL claim cannot serve as a predicate violation because the FAL requires the “intent
8 not to sell” the subject property or services “so advertised at the price stated therein, or as so
9 advertised.” Cal. Bus. & Prof. Code § 17500. An intent not to sell something as advertised
10 requires, of course, an intent to sell the thing in the first instance. Toolbar is not, and is not
11 alleged to be, for sale. Moreover, Plaintiff lacks standing under the FAL and has failed to allege
12 that he read or relied on any alleged misrepresentations or omissions.⁶ (*See* FAC ¶ 118 (no
13 allegation of reliance).) *Buckland*, 155 Cal. App. 4th at 819 (holding that the UCL and FAL have
14 identical standing requirements); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D.
15 Cal. 2005) (dismissing plaintiffs’ FAL claim because of their “fail[ure] to allege that they actually
16 relied on false or misleading advertisements”).

17 Plaintiff cannot predicate a UCL claim on a right to privacy under the California
18 Constitution, which requires (1) the existence of a legally protected privacy interest; (2) a
19 reasonable expectation of privacy under the circumstances; and (3) a serious violation of that
20 privacy interest. *See Sheehan v. S.F. 49ers, Ltd.*, 45 Cal. 4th 992, 999 (2009). Plaintiff fails to
21 identify with particularity any legally protected privacy interest, or whether Plaintiff’s expectation
22 of privacy in that unidentified interest was reasonable, or whether Google committed a serious
23 violation of that interest. *See, e.g., Botello v. Morgan Hill Unified Sch. Dist.*, No. C09-02121
24 HRL, 2009 WL 3918930, at *5 (N.D. Cal. Nov. 18, 2009) (dismissing California Constitution
25 right to privacy claim where plaintiff failed to allege that defendants disseminated or misused
26 plaintiff’s private personal information); *Bush v. Klein*, No. C 08-3456 JF, 2008 WL 4614438, at
27

28 ⁶ Plaintiff’s failure to establish actual reliance is discussed further in Section II.D.2.c, below.

1 *3 (N.D. Cal. Oct. 16, 2008) (dismissing California right to privacy claim where plaintiff failed to
2 allege he had a reasonable expectation of privacy and failed to allege facts showing a serious
3 violation of his privacy). Plaintiff’s conclusory assertion that Google “obstructed users’ rights
4 and actual attempts to pursue and obtain the privacy promised by [Google]” does not allege facts
5 sufficient to state a cognizable claim under the California Constitution. (*See* FAC ¶ 110.)⁷

6 Accordingly, this Court should dismiss Plaintiff’s claim under the UCL’s unlawful prong.

7 b. Plaintiff’s Allegations Do Not Establish That Google Has Acted
8 “Unfairly” In Violation of the UCL.

9 None of the tests for “unfair” practices under the UCL support liability based on the
10 allegation that “Plaintiff and the Class Members have been misled as to the nature and integrity of
11 [Google’s] products and services” through Toolbar’s “undisclosed functions.” (FAC ¶ 114.) To
12 determine whether conduct is “unfair” under the statute, several recent court decisions have
13 applied the three-part test set forth in Section 5 of the Federal Trade Commission Act, which asks
14 whether the alleged consumer injury is substantial, not outweighed by any countervailing benefit
15 to consumers or competition, and one that consumers could not reasonably have avoided; other
16 courts have applied a “tethering” test, which requires that the underlying offense violates a public
17 policy that is “tethered to specific constitutional, statutory, or regulatory provisions,” while still
18 others have applied the older, more amorphous “balancing” test, which “weigh[s] the utility of the
19 defendant’s conduct against the gravity of the harm to the alleged victim.” *See Drum v. San*
20 *Fernando Valley Bar Ass’n*, 182 Cal. App. 4th 247, 256-57 (2010) (describing tests). Plaintiff
21 revised the FAC to include inadequate conclusory allegations that the elements of these tests are
22 met. (*See* FAC ¶¶ 112-114.) But these allegations fail.

23 For purposes of this motion, the Court need not determine which of these tests is
24 appropriate because regardless of the applicable test, the California Supreme Court has cautioned
25 that, in construing a claim under the unfair prong of the UCL, “[c]ourts may not simply impose
26

27 ⁷ Nor can Plaintiff overcome the deficiencies of his original Complaint by adding paragraphs 115
28 *Iqbal*. 129 S. Ct. at 1950.

1 their own notions of the day as to what is fair or unfair.” *Cel-Tech Commc’ns, Inc. v. L.A.*
2 *Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999). Likewise, a court in this District cautioned against
3 allowing the “unfairness” prong of the UCL to be used to invite courts to “roam across the
4 landscape of consumer transactions picking and choosing which they like and which they
5 dislike.” *Van Slyke v. Capital One Bank*, No. C 07-00671 WHA, 2007 WL 3343943, at *11
6 (N.D. Cal. Nov. 7, 2007). Yet that is precisely what Plaintiff asks this Court to do. Google
7 disclosed the functions of Toolbar’s enhanced features. The more recent version of Toolbar’s
8 enhanced features dialog box described in the FAC advises that “[f]or enhanced Toolbar features
9 to work, Toolbar has to tell us what site you’re visiting by sending Google the URL.” (FAC
10 Fig. 5.) Further, the Toolbar Privacy Notice states that “Toolbar’s enhanced features, such as
11 PageRank and Sidewiki, operate by sending Google the address and other information about sites
12 at the time you visit them.” (FAC ¶ 38(a); Llyr Decl., Ex. 1 at 2.) Despite these clear statements,
13 Plaintiff alleges that he “and the Class Members have been misled as to the nature and integrity of
14 Defendant’s products and services” (FAC ¶ 114), and that Toolbar’s “undisclosed functions”
15 prevented Plaintiff from “detect[ing] the means by which Defendant was conducting itself in a
16 manner adverse to its commitments and its users’ interests” (*id.* ¶ 117). But Plaintiff does not
17 identify any undisclosed capabilities of Toolbar. Instead, Plaintiff concedes that users consented
18 to Toolbar’s collection of data. (*Id.* ¶¶ 55, 63.) Given the disclosure of Toolbar’s features, user
19 consent, and the lack of any specificity as to his speculative assertion of harm, Plaintiff’s factual
20 allegations do not meet any of the tests because there is no substantial injury that outweighs the
21 benefits associated with Toolbar (and that could not be reasonably avoided), nor is there any
22 violation of a specifically-enunciated public policy “tethered to specific constitutional, statutory,
23 or regulatory provisions.” *Drum*, 182 Cal. App. 4th at 250. In Plaintiff’s opinion, Google should
24 have given users even more detailed disclosures. He is entitled to his opinion, but his desire for
25 even greater disclosures fails, as a matter of law, to render the current disclosures inadequate and
26 Google’s alleged practices actionable under the “unfair” prong.

1 c. Plaintiff's Allegations Do Not Establish That Google Has Acted
2 "Fraudulently" In Violation of the UCL.

3 Plaintiff also fails to state a claim under the "fraudulent" prong of the UCL. Claims
4 brought under this prong must be pled with particularity under Federal Rule of Civil Procedure
5 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003); *Fortaleza v. PNC*
6 *Fin. Servs. Group, Inc.*, 642 F. Supp. 2d 1012, 1020 (N.D. Cal. 2009). Plaintiff's allegations do
7 not satisfy the heightened particularity standard. Plaintiff never alleges with any particularity if
8 and when he read the relevant disclosures regarding Toolbar, nor does he allege that he relied on
9 any alleged representations by Google. These failures are fatal to his claim. *Pfizer, Inc. v.*
10 *Superior Court*, 182 Cal. App. 4th 622, 630 (2010) (Putative class representatives "must
11 demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance
12 with well-settled principles regarding the element of reliance in ordinary fraud actions."
13 (emphasis in original)). Therefore, this Court should dismiss Plaintiff's claim under the
14 "fraudulent" prong of the UCL.

15 E. Plaintiff's Unjust Enrichment Claim Fails As A Matter Of Law.

16 Plaintiff's unjust enrichment claim fails because there is no distinct cause of action for
17 unjust enrichment under California law. *See Melchior v. New Line Prods., Inc.*, 106 Cal. App.
18 4th 779, 793 (2003) ("[T]here is no cause of action in California for unjust enrichment."); *Jogani*
19 *v. Superior Court*, 165 Cal. App. 4th 901, 911 (2008) ("[U]njust enrichment is not a cause of
20 action."); *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1490 (2006) (same). "Unjust
21 enrichment is not a cause of action . . . or even a remedy, but rather a general principle,
22 underlying various legal doctrines and remedies." *McBride v. Boughton*, 123 Cal. App. 4th 379,
23 387 (2004) (quoting *Melchior*, 106 Cal. App. 4th at 793). Accordingly, the Court should dismiss
24 Plaintiff's claim for unjust enrichment because such a claim is not viable under California law

25 **CONCLUSION**

26 For the foregoing reasons, Google respectfully requests that the Court dismiss Plaintiff's
27 FAC in its entirety with prejudice.

