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LINKEDIN CORPORATION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

KEVIN LOW, individually and on behalf of all others similarly situated, et al.,

Plaintiffs,

vs.

LINKEDIN CORPORATION, a California Corporation, and Does 1 to 50 inclusive,

Defendants.

Civil Case No.: 5:11-cv-01468 LHK

NOTICE OF MOTION AND MOTION TO DISMISS THE AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES
(Fed. R. Civ. P. 12(b)(1), (b)(6))

Date: March 22, 2012
Time: 1:30 p.m.
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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 22, 2012, at 1:30 p.m., in the courtroom of the Honorable Lucy H. Koh, or at such date and time as the Court may otherwise direct, Defendant LinkedIn Corporation will, and hereby does, move to dismiss the Amended Complaint in *Low et al. v. LinkedIn Corporation*, 5:11-cv-01468 LHK, pursuant to Federal Rule of Civil Procedure 12(b)(1), or in the alternative, pursuant to Federal Rule of Civil Procedure 12(b)(6).

This motion is made on the grounds that (1) plaintiffs lack Article III standing to bring the Amended Complaint; and (2) each of the causes of action in the Amended Complaint fails to state a claim as a matter of law.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities below, and such other submissions presented before or at the Motion's hearing.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Amended Complaint fails to allege "injury-in-fact" or a concrete and particularized harm required to establish standing under Article III of the U.S. Constitution.

2. Whether the Amended Complaint should be dismissed because plaintiffs fail to state a claim upon which relief can be granted for each of the causes of action asserted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Kevin Low's original Complaint failed to allege facts establishing that LinkedIn had done anything to harm him (or really that LinkedIn had done anything wrong at all). As a result, this Court's November 11, 2011 Order dismissed the Complaint for failure to allege Article III standing. *Low v. LinkedIn Corp.*, No. 11-CV-01468-LHK, 2011 WL 5509848 (N.D. Cal. Nov. 11, 2011) ("November 11 Order"). While the Amended Complaint makes minor tweaks to the original Complaint, it suffers from the same fatal flaws and so should be dismissed with prejudice.

The central claim of the Amended Complaint remains that LinkedIn assigns

unique user identification numbers ("User IDs") to users of its website and then transmits certain User IDs and the URL addresses for LinkedIn profile pages to third parties in a way that somehow allows those third parties to match the actual identity of specific LinkedIn users with Internet browsing histories compiled by these third parties through cookies placed and controlled by these third parties (and not by LinkedIn). The net result, plaintiffs contend, is that these third parties could theoretically tie a previously anonymous Internet browsing history to a specific individual. But the Amended Complaint still fails to allege that anyone actually "de-anonymized" the browsing history of any LinkedIn user, let alone one of the named plaintiffs. Also absent from the Amended Complaint is any explanation of how this purported practice harmed plaintiffs or benefited LinkedIn. As a result, plaintiffs cannot have suffered the concrete or particularized injury necessary to establish Article III standing, and the Amended Complaint must be dismissed with prejudice.

The Amended Complaint also fails to state a claim as to any of the causes of action pled, requiring dismissal with prejudice:

1. The Stored Communications Act claim fails for four independent reasons: (a) the Amended Complaint's allegations do not establish that LinkedIn functions as either an electronic communication service or a remote computing service with respect to the alleged conduct; (b) the Amended Complaint does not allege the disclosure of communications of plaintiffs that were held by LinkedIn in electronic storage; (c) the alleged disclosures were made to the intended recipients of the communications; and (d) no communications content is alleged to have been disclosed to non-governmental entities.

2. The false advertising claim fails because plaintiffs do not adequately allege injury-in-fact, do not allege that any purported loss of money or property was in reliance on any false advertising by LinkedIn, and do not allege any misrepresentations with the specificity required by Rule 9(b).

3. The privacy claims under the California Constitution and common law invasion of privacy must be dismissed because the invasion of privacy alleged is not sufficiently invasive or offensive as a matter of law.

4. Plaintiffs' other common law claims must be dismissed because (a) the breach of contract claim does not allege any actual harm or cognizable damages; (b) the conversion claim fails because no tangible property is at issue and no damages are alleged; (c) the negligence claim does not allege that any independent duty is owed by LinkedIn; and (d) the unjust enrichment claim is not an independent cause of action.

The Amended Complaint must be dismissed in its entirety with prejudice.

II. FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

On March 25, 2011, plaintiff Kevin Low filed his original Complaint against LinkedIn, alleging that LinkedIn transmitted its assigned User IDs as a portion of URL referrer headers to third parties in a way that somehow (never explained) allowed those third parties to correlate the identity of LinkedIn users with their Internet browsing histories through third party cookies placed and controlled by these third parties (and not by LinkedIn). Based on this alleged conduct, Low asserted a violation of the Stored Communications Act and numerous state statutory and common law claims. In its November 11 Order, the Court granted LinkedIn's Motion to Dismiss, finding that the plaintiff failed to allege any concrete or particularized injury sufficient to establish Article III standing. November 11 Order. The Court did not reach the Rule 12(b)(6) issues raised by LinkedIn's Motion. *See id.* at *6.

On December 2, 2011, Low filed an Amended Complaint ("AC"), adding Alan Masand as an additional named plaintiff. Dkt. No. 31. While Low is simply alleged to be a "registered user of LinkedIn" (*id.* ¶1), Masand is alleged to be a "paid user" who purchased a "Job Seeker Premium" subscription to LinkedIn in November 2011 (*id.* ¶2).

The central allegation in the Amended Complaint has not changed from that of the original Complaint—that LinkedIn wrongfully transmitted plaintiffs' and the purported class members' unique LinkedIn User IDs and the URLs of pages visited on the LinkedIn website to third parties. *Id.* pg. 1 & ¶¶16, 28. According to the Amended Complaint, by transmitting these User IDs and a "LinkedIn Browsing History" (the URL addresses of profile pages visited on the LinkedIn website) to third parties, this information "gave the Third Parties the ability to correlate Plaintiffs' actual identities with their broader Internet browsing histories." *Id.* ¶5; *see*

also id. ¶¶20, 31. While the Amended Complaint speculates about ways in which transmission of a User ID in connection with the URL of a viewed LinkedIn page *could* render a browsing history collected by third parties (and entirely independent from LinkedIn) non-anonymous, *see id.* ¶¶27, 33-35,[1] it does not allege that any third party actually engaged in such conduct.

Also still notably absent from the Amended Complaint is any concrete articulation of how LinkedIn's purported conduct harmed plaintiffs. The only assertions of harm are plaintiffs' passing allegation of "embarrass[ment] and humiliat[ion] by the disclosure of their personally identifiable browsing history" and that as a result of this disclosure, plaintiffs have "relinquished [] valuable personal property without the compensation to which they were each due." *Id.* ¶5. The only additional facts even remotely related to the loss of "valuable personal property" consists of unsubstantiated statements that the purported "market value" of plaintiffs' browsing history increases when correlated with a personal identity (*see id.*), and that the value of this personal information to plaintiffs is "diminished [or] eliminated, if the information is publicly distributed or leaked." *See id.* ¶48. The Amended Complaint again references one U.K.-based service, unconnected to plaintiffs, that purportedly enables users to sell their personal data to others (*see id.* ¶¶47-48) but does not suggest that plaintiffs ever attempted to sell their personal information to any such company, or, if they did, that LinkedIn's conduct negatively impacted any ascertainable value. Although the Amended Complaint points out that LinkedIn earned revenues in 2010 (*id.* ¶47), it does not explain how LinkedIn allegedly benefited from the alleged conduct, other than a conclusory and unsupported statement that

[1] Many of these theories rely on factually incorrect premises. For example, it is false that "[p]rior to the filing of the initial complaint, anyone could insert a LinkedIn ID into a URL and visit the corresponding LinkedIn member's public profile." *See id.* ¶27. Additionally, when a "stranger" visits the profile page associated with a User ID, the third party does *not* receive a "working link to the ID's corresponding profile" (*see id.* ¶33), because the "password-like parameters" in place prevent exactly this. But even accepting such factually incorrect assertions as true under the standards of a motion to dismiss, the Amended Complaint still must be dismissed in its entirety given that, as discussed below, plaintiffs do not allege how third parties reliably *could* connect plaintiffs' identities to previously anonymous browsing histories, that any third party actually *has* done so, or why LinkedIn should be responsible for that conduct, even if it did occur.

personal information has value to companies like LinkedIn "because it can be compiled and sold as demographic data and advertising analytics, or sold on a per-name basis." *Id.* ¶48.

The Amended Complaint alleges a violation of the Stored Communications Act, 18 U.S.C. §§2701 *et seq.* (First Cause of Action), Article 1, Section 1 of the California Constitution (Second Cause of Action), California Business and Professions Code Section 17500 (Third Cause of Action), as well as common law claims for breach of contract (Fourth Cause of Action), invasion of privacy (Fifth Cause of Action), conversion (Sixth Cause of Action), unjust enrichment (Seventh Cause of Action), and negligence (Eighth Cause of Action). *Id.* ¶¶65-125.

III. ARGUMENT

Where the allegations of a complaint do not establish standing under Article III of the U.S. Constitution, a federal court does not have subject matter jurisdiction to hear the case, and the complaint must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1). *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

A court may dismiss a claim under Rule 12(b)(6) when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a Rule 12(b)(6) motion, "all material allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them." *Id.* However, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not" survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff therefore must plead "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

A. The Amended Complaint Must Be Dismissed Because It Still Does Not Allege The Particularized And Concrete Injury-In-Fact Necessary To Support Article III Standing.

To have the requisite Article III standing to maintain an action in federal court, a plaintiff must allege adequate "injury in fact"—meaning that the plaintiff has "suffered . . . an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations and

citation omitted). The injury in fact must be "concrete in both a qualitative and temporal sense," and plaintiff must "allege an injury to himself that is 'distinct and palpable' as opposed to merely 'abstract.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted). Article III standing also requires that the plaintiff allege that the challenged conduct caused the injury and that a favorable decision will redress the injury. *See Lujan*, 504 U.S. at 560-61. Notably, named plaintiffs purporting to represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Gratz v. Bollinger*, 539 U.S. 244, 289 (2003) (internal quotation marks and citations omitted).

While this Court recently explained that "a plaintiff may be able to establish constitutional injury in fact by pleading violation of a right conferred by statute," such a plaintiff still must "allege that the injury she suffered was specific to her"—meaning that the injury was, as the Supreme Court has repeatedly held, "'concrete and particularized'" as to that plaintiff. *Fraley v. Facebook, Inc.*, --- F.Supp.2d---, No. 11-cv-01726-LHK, 2011 WL6303898, at *6 (N.D. Cal. Dec. 16, 2011) (quoting *Lujan*, 504 U.S. at 560-61).[2]

This Court's November 11 Order dismissed plaintiff Low's Complaint because it failed to allege harm specific to Low. Plaintiff Low contended that he was embarrassed and humiliated by third parties being able to deanonymize his browsing history, but he did not actually allege how any third party could do so, let alone that any third party actually connected his identity to a browsing history. *See* November 11 Order, at *3. He also claimed that he was

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[2] As this Court's recent *Fraley* decision made clear, even if Congress can create a category of injury by statute, a plaintiff still must allege "concrete and particularized" injury specific to him or her to satisfy Article III. *See Fraley*, 2011 WL 6303898, at *6. Indeed, *Warth v. Seldin*, 422 U.S. 490 (1975), specifically required the plaintiff there to "allege a distinct and palpable injury to himself" in order to establish Article III standing. *Id.* at 500-01. Nor could it be otherwise, as the Supreme Court repeatedly has held that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1151 (2009); *see Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing"); *see generally Lujan*, 504 U.S. at 578 ("[Statutory] broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning a requirement that the party seeking review must himself have suffered injury.").

somehow deprived of the economic value of his personal information, but failed to allege that any of his personal information actually was obtained by any third party, let alone that he was thereby deprived of cognizable economic value. *See id.* at *4-6.

The Amended Complaint added allegations about how LinkedIn purportedly transmits certain information to third parties—specifically the URL addresses of the pages on LinkedIn that a user viewed and the LinkedIn User ID associated with the viewed profile[3]—and how such information theoretically could allow third parties to deanonymize Internet users' browsing histories. But although plaintiffs' Amended Complaint replaces the concept of a "'HTTP Referrer' header" from the original Complaint with the terms "LinkedIn-related browsing history" and "information regarding the Viewed Page" (*see* AC ¶¶5, 16, 66-68), the Amended Complaint fails to explain how any information purportedly was sent to third parties other than the transmission by a user's web browser of a LinkedIn User ID as a component of a URL address. *See id.* In any event, there still is no allegation that any third party *has* in fact associated the actual identity of a single LinkedIn user (let alone of a named plaintiff) with an independently collected browsing history for that person. Moreover, the Amended Complaint fails to remedy the fatal defects identified in the Court's November 11 Order—the lack of articulation of any *actual* injury that a named plaintiff has suffered.

1. The Amended Complaint's Fleeting References To Emotional Harm Are Insufficient To Create Article III Standing.

Just as in the original Complaint, the Amended Complaint makes one fleeting reference to alleged emotional distress experienced by plaintiffs, asserting that "Plaintiffs were embarrassed and humiliated by the disclosure of their personally identifiable browsing history" (AC ¶5), but still fails to provide any detail or basis for any kind of emotional harm plaintiffs purportedly suffered. As before, nowhere does either plaintiff allege "what information was actually disclosed to third parties that would lead Plaintiff to suffer emotional harm."

[3] Plaintiffs appear to acknowledge in the Amended Complaint that the User ID present in each LinkedIn profile URL actually is that of the user whose page is viewed, not (as the original Complaint asserted) that of the user who is doing the viewing. *See* AC ¶16.

November 11 Order at *3. Indeed, the only allegations that LinkedIn actually transmitted information concerning either named plaintiff make no reference at all to any potentially embarrassing information, simply asserting that in "test transmissions" LinkedIn somehow provided the "personal identity" of Mr. Low and Mr. Masand to third parties (as to Mr. Low, Scorecard Research, Quantcast, and Nielsen Netratings; as to Mr. Masand, Doubleclick), allowing those third parties to correlate plaintiffs' identities with the browsing histories the third parties already had collected. *See* AC ¶3 & Ex. A (Low); *id.* ¶36 (Masand).

There is no suggestion that LinkedIn actually passed any potentially sensitive information to anyone, no indication that any sensitive or embarrassing information related to either plaintiff actually came into any third party hands as a result of conduct of LinkedIn, and nothing more about any embarrassment or humiliation either plaintiff actually suffered. In short, it is all still too hypothetical to support Article III standing. *See Lujan*, 504 U.S. at 561 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."); November 11 Order, at *4 (suggestion that sensitive information concerning plaintiff *may* fall into third party hands as a result of LinkedIn's conduct "is too theoretical to support injury-in-fact for the purposes of Article III standing").

2. The Theoretical Claims Of Economic Harm Are Insufficient As A Matter Of Law And Are Neither Concrete Nor Particularized As To Either Named Plaintiff.

As in the original Complaint, plaintiffs reference a second category of purported injury under a theory that plaintiffs' browsing history is "valuable personal property" and plaintiffs "relinquished this valuable personal property without the compensation to which they were each due." AC ¶5. But as the Court's November 11 Order observed, courts repeatedly have held that "unauthorized collection of personal information does not create an economic loss," because the claim of lost value is "too abstract and hypothetical to support Article III standing." November 11 Order, at *4.[4] Hence, the original Complaint failed because it did not

[4] *See LaCourt, et al. v. Specific Media, Inc.*, No. SACV 10-1256-GW (JCGx), 2011 WL 1661532, at *3-6 (C.D. Cal. Apr. 28, 2011) (allegation that an online third party ad network had installed cookies on plaintiffs' computers and tracked their Internet use insufficient where no (continued…)

allege "how [Low] was foreclosed from capitalizing on the value of his personal data or how he was 'deprived of the economic value of [his] personal information simply because [his] unspecified personal information was purportedly collected by a third party.'" *Id.* at *5.

The Amended Complaint does nothing to correct this defect. As noted, there is still no allegation that any third party actually connected a previously anonymous browsing history to a particular person (let alone to a named plaintiff) through use of a LinkedIn User ID or cookie data. *Cf. Reilly v. Ceridian Corp.*, --- F.3d ---, 2011 WL 6144191, at *5 (3d Cir. Dec. 12, 2011) (in data security breach case, "no identifiable taking occurred; all that is known is that a firewall was penetrated. Appellants' string of hypothetical injuries do not meet the requirement of an 'actual or imminent' injury"). But even if plaintiffs could make this critical factual claim, they still offer no basis for concluding they were actually deprived of economic value, simply asserting that "[p]ersonal information is property" and that the "value of such information is diminished, if not eliminated, if that information is publicly distributed or leaked." AC ¶48. But they do not and cannot allege that the asserted value of *their* personal information has been diminished. There is no suggestion that either plaintiff sought to sell his personal information but could not, or otherwise lost out on any kind of "value-for-value exchange," as a result of any of the conduct alleged in the Amended Complaint. *See Specific Media*, 2011 WL 1661532, at *5. There is certainly no allegation of a "direct, linear relationship" between any value plaintiffs purportedly lost and any commercial gain to

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"particularized example" of harm and no allegation of "a single individual who was foreclosed from entering into a 'value-for-value exchange' as a result of [defendant's] alleged conduct"); *In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2011 WL 4403963, at *5-6 (N.D. Cal. Sept. 20, 2011) (general allegations of "lost opportunity costs" and "value-for-value exchanges" insufficient to establish concrete injury); *Robins v. Spokeo, Inc.*, No. CV10-05306 ODW (AGRx), 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011) (plaintiff's concern that defendant's website would adversely affect him in future failed to confer Article III standing); *see also In re Doubleclick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 525 (S.D.N.Y. 2001) (court rejected web consumers' argument that because "companies pay DoubleClick for plaintiffs' attention (to advertisements) and demographic information," the value of these services rightfully belonged to plaintiffs: "although demographic information is valued highly . . . the value of its collection has never been considered an economic loss to the subject"); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005) ("no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large").

LinkedIn. *Cf. Fraley*, 2011 WL 6303898, at *10. Plaintiffs allegations all are far too hypothetical to support Article III standing, and so the entire Amended Complaint must be dismissed pursuant to Rule 12(b)(1).[5]

B. Each Cause Of Action In The Amended Complaint Fails To State A Claim.

Even if plaintiffs could sufficiently allege Article III standing, the Amended Complaint still must be dismissed with prejudice pursuant to Rule 12(b)(6) because each cause of action is defective as a matter of law.

1. The Stored Communication Act Claim Fails On Multiple Grounds.

The Stored Communications Act ("SCA"), 18 U.S.C. §§2701 *et seq.*, Title II of the Electronic Communications Privacy Act ("ECPA"), regulates the disclosure of stored electronic communications held by two specific types of entities—providers of electronic communication service ("ECS") and providers of remote computing service ("RCS"). Subject to certain exceptions, the SCA prohibits the person or entity providing an ECS or RCS to the public from "knowingly divul[ging] to any person or entity the contents of a communication" while in electronic storage by the ECS or which is carried or maintained on the RCS. *Id.* §§2702(a)(1), (2).[6]

The SCA was enacted because "the advent of the Internet presented a host of potential privacy breaches that the Fourth Amendment [did] not address." *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 900 (9th Cir. 2008), *reversed on other grounds by*

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[5] While plaintiff Masand alleges that he is a "paid user" to LinkedIn since November 2011 (AC ¶2), whatever money he paid to LinkedIn (the Amended Complaint does not specify) cannot constitute injury-in-fact for Article III purposes. This is because such payment is not injury "fairly traceable to the challenged action of the defendant," nor is it injury that "will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotations omitted); *see Birdsong v. Apple, Inc.*, 590 F.3d 955, 960-61 (9th Cir. 2009) (purchasers of iPods lacked standing to claim product posed unreasonable risk of hearing loss where they did not allege "that they suffered or imminently will suffer hearing loss from their iPod use").

[6] The SCA also contains certain prohibitions on accessing (as opposed to disclosing) stored communications. Although the original Complaint alleged both that LinkedIn improperly accessed and improperly disclosed plaintiff's stored data (*see* Dkt. No. 1 ¶¶46-52), the Amended Complaint does not allege any improper access. To the extent any access was claimed, it would be exempted under the SCA's service provider exception. 18 U.S.C. §2701(c)(1); *see Fraser*, 352 F.3d at 114-15.

City of Ontario v. Quon, 130 S. Ct. 2619 (2010). The SCA generally sought to address this gap "by offering network account holders a range of statutory privacy rights against access to stored account information held by network service providers," creating "a set of Fourth Amendment-like privacy protections by statute, regulating . . . service providers in possession of users' private information." Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO WASH L. REV. 1208, 1212 (2004). The resulting statute is complex, creating an intricate matrix of protections and non-protections for information in "electronic storage" (as that term is defined by the SCA), depending on distinctions such as the type of communication (content or non-content), to whom disclosure is made (governmental or non-governmental entity), and whether disclosure is to or by an intended recipient. *See id.* at 1223, 1231-1233. These technical distinctions are critical to assessing plaintiffs' failure to plead a proper SCA claim. *See id.* at 1214, 1224.

The Amended Complaint does not cure any of the fatal deficiencies with respect to an SCA claim that existed in the original Complaint, and that claim must be dismissed with prejudice for four independent reasons.

a) The SCA Claim Fails Because LinkedIn Does Not Act As Either An ECS Or An RCS With Respect To The Conduct At Issue.

As an initial matter, as noted, the SCA's disclosure prohibitions *only* apply to communications held in storage by an ECS or an RCS. 18 U.S.C. §§2701(a); 2702(a); *see In re Michaels Stores Pin Pad Litigation*, No. 11 C 3350, --- F.Supp.2d ---, 2011 WL 5878373, at *4 (N.D. Ill. Nov. 23, 2011) (dismissing SCA claim because complaint's allegations did not establish that defendant was either an ECS or an RCS). An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. §2510(15). An RCS is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system," *id.* § 2711(2), and an "electronic communications system" means "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic

communications, and any computer facilities or related electronic equipment for the electronic storage of such communications." *Id.* §2510(14).

Although LinkedIn potentially acts as an ECS in some capacities (for example allowing one user to message another user through the LinkedIn website) and as an RCS in other capacities (for example in storing the information users submit to the site for their own personal profiles), the allegations in the Amended Complaint do not concern conduct of LinkedIn as *either* an ECS or RCS. *See In re U.S.*, 665 F. Supp. 2d 1210, 1214 (D.Or. 2009) ("Today, most ISPs provide both ECS and RCS; thus, the distinction serves to define the service that is being provided at a particular time (or as to a particular piece of electronic communication at a particular time), rather than to define the service provider itself. The distinction is still essential, however, because different services have different protections."); Kerr, 72 GEO. WASH. L. REV. at 1215-16 & n. 48 ("The classifications of ECS and RCS are context sensitive: the key is the provider's role with respect to a particular copy of a particular communication, rather than the provider's status in the abstract. A provider can act as an RCS with respect to some communications, an ECS with respect to other communications, and neither an RCS nor an ECS with respect to other communications.").

Because plaintiffs' Amended Complaint concerns the alleged viewing of LinkedIn user profiles and the alleged transmission of URLs to third parties (*see e.g.*, AC pg. 1 & ¶16), *not* the provision of an electronic communications system or provision of computer storage or processing services, the SCA does not apply at all to LinkedIn's alleged conduct. As such, the SCA claim fails as a matter of law.

b) The SCA Claim Fails Because The Amended Complaint Does Not Allege That LinkedIn Disclosed Communications Of Plaintiffs That Were Held In Electronic Storage By LinkedIn.

As its name suggests, the *Stored* Communication Act's disclosure prohibitions only apply where *plaintiffs' communications* are held *in* "*electronic storage*" by an ECS or RCS. 18 U.S.C. §§2701(a); 2702(a); 2711(2); 2510(14). As explained above, the Amended Complaint alleges that LinkedIn improperly disclosed three specific types of information: (1) LinkedIn User IDs (*see* AC ¶68); (2) plaintiffs' "LinkedIn-related browsing history," defined as

"browsing history among LinkedIn profiles" (*see* AC pg. 1 & ¶66); and (3)"information regarding the Viewed Page," defined as "the URL of the profile page the user was viewing" (*see* AC ¶¶28, 67). But there is no allegation in the Amended Complaint suggesting that any of these categories are communications *of plaintiffs* that were *held in electronic storage* by LinkedIn.

First, as the Amended Complaint recognizes, LinkedIn User IDs are assigned and controlled by LinkedIn, and so are not communications *of plaintiffs*. *See* AC ¶25 ("LinkedIn assigned each Plaintiff a unique user identification number"). Accordingly, there cannot be any improper disclosure of a LinkedIn User ID under the SCA. *See Kerr*, 72 GEO WASH L. REV. at 1214 & n.47 (SCA pertains only where a "*user's communications* [are] in the possession of the provider") (emphasis added).

Furthermore, LinkedIn User IDs are not held in "electronic storage" by LinkedIn. Congress defined "electronic storage" in the SCA precisely to include only "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof;" or "(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. §2510(17); *see id.* § 2711(1). Hence, prong A of this definition means that the SCA "only protects electronic communications stored 'for a limited time' in the 'middle' of a transmission, *i.e.* when an electronic communication service *temporarily stores a communication while waiting to deliver it*." *In re DoubleClick*, 154 F. Supp. 2d at 512 (emphasis added); *see Fraser v. Nationwide Mut. Ins. Co.*, 135 F. Supp. 2d 623, 636 (E.D. Pa. 2001) ("the definition [of electronic storage] . . . covers a message that is stored in intermediate storage temporarily, *after the message is sent by the sender, but before it is retrieved by the intended recipient.*") (emphasis added), *aff'd in part, vacated in part on other grounds*, 352 F.3d 107 (3d Cir. 2004). With respect to prong B of the definition, although some courts disagree about whether "backup protection" includes only temporary backup storage pending delivery or also includes "post-transmission storage" (*compare Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir. 2004), *with Fraser*, 135 F.Supp.2d at 633-34, 636), even the broadest interpretation of "backup protection" limits the term to a temporary copy pending delivery of a message or a second copy

in case a user needs to re-download. *See Fraser*, 135 F.Supp.2d at 633-34, 636; *Theofel*, 359 F.3d at 1070. LinkedIn User IDs could not come within even this broader interpretation, as there is no allegation that such information is stored electronically by LinkedIn either temporarily following transmittal of a message but pending delivery or for purposes of backup protection. Hence, the SCA does not protect this data.

The other type of information plaintiffs allege that LinkedIn disclosed is the URL of the profile page the user was viewing, (*see* AC ¶¶28, 67), and a user's "browsing history among LinkedIn profiles" (*see id.* pg. 1 & ¶66), which, although never explained, presumably is made up of multiple disclosures of the URLs of the LinkedIn profile page a user was viewing. However, the Amended Complaint does not allege (nor could it) that these URLs are held in "electronic storage." *See id*. ¶72 (alleging only that "Defendant holds their users' personal identification number and personal information in electronic storage within the meaning of 18 U.S.C. §2510(17)" but not making any such allegation with respect to URLs (*i.e.*, the "Viewed Page" information or "LinkedIn-related browsing history").

Because plaintiffs do not allege that any supposedly disclosed communications were held in "*electronic storage*" by LinkedIn, the SCA does not apply.[7]

c) LinkedIn's Conduct Was Authorized Under The SCA Because The Disclosures Alleged Were Made To Or By The Intended Recipient Of The Communications.

Even if the SCA claim could overcome the two threshold defects just discussed, it still would fail as a matter of law because a provider can divulge the contents of a communication to "an addressee or intended recipient of such communication." 18 U.S.C. §2702(b)(1); *Quon*, 529 F.3d at 900 ("both an ECS and RCS can release private information to, or with the lawful consent of, 'an addressee or intended recipient of such communication'").

[7] Plaintiffs naturally do not allege that "third party cookie identification numbers ('cookie IDs') (AC ¶3) or plaintiffs' "broader Internet browsing histories," (*id.* ¶5), which purportedly are held in third party tracking cookies or otherwise compiled and retained by third parties, are stored on LinkedIn' servers or networks. Accordingly, such data cannot provide the basis for an SCA claim against LinkedIn.

Plaintiffs allege that LinkedIn violated the SCA by disclosing their "LinkedIn Browsing Histories and their LinkedIn user identification numbers" to third parties. *See* AC ¶3; *see id.* ¶¶5, 17. Accordingly, by plaintiffs' own admission, these third parties are the "addressee or intended recipient" of the purported communications sent *by LinkedIn*. As Judge Ware recently held, such disclosure is permissible under the SCA. *See In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 714 (N.D. Cal. 2011) (dismissing SCA claim based on similar allegations of transmission of User IDs because "if the communications were sent to advertisers, then the advertisers were their addressees or intended recipients, and Defendant was permitted to divulge the communications to them" under section 2702(b)(1)); *see In re Facebook Privacy Litig.*, No. C 10-02389 JW, 2011 WL 6176208, at *2-4 (N.D. Cal. Nov. 22, 2011).

Furthermore, to the extent plaintiffs assert that the browsing history or Viewed Page information (*i.e.* the transmitted URLs) reflects a communication *by plaintiffs*, it must be a communication *with someone*—here presumably a communication to LinkedIn as to what page plaintiffs had viewed (or wished to view). But if the communication allegedly disclosed was one *to LinkedIn*, then LinkedIn, as the "intended recipient" of the communication, could disclose it to third parties under the SCA. *See* 18 U.S.C. §2702(b)(3); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d at 714 & n.8. This is true even if plaintiffs were to claim that LinkedIn contractually agreed not to disclose such communications to third parties. *See In re Am. Airlines, Inc. Privacy Litig.*, 370 F. Supp. 2d 552, 560-61 (N.D. Tex. 2005).

d) The SCA Claim Fails Because The Amended Complaint Still Only Alleges Disclosure Of Non-Content Information.

Finally, the SCA claim fails because no communications content is at issue. The statute specifically permits the disclosure of non-content *records* to non-government entities without restriction. 18 U.S.C. §2702(c)(6) (ECS or RCS may "divulge a record or other information pertaining to a subscriber to or customer of [the] service (not including the contents of communications . . .) . . . to any person other than a governmental entity"). Here, the alleged recipients—"advertisers, Internet marketing companies, data brokers, web tracking companies,

and other third parties" (AC pg. 1)—are non-governmental entities, so the SCA only applies if the allegedly disclosures by LinkedIn include the "contents" of plaintiffs' communications.

Although ECPA does not explicitly define the terms "record" or "other information," the statute's legislative history explains that the term "contents" "distinguishes between the substance, purport or meaning of the communication and the existence of the communication or transactional records about it." S. Rep. 99-541, 1986 U.S.C.C.A.N. 3555, 3567.[8] Notably, prior to the 1986 amendment to ECPA, "contents" was defined as "any information concerning the *identity of the parties to such communication or the existence*, substance, purport, or meaning of that communication." 18 U.S.C. §2510(8) (1968) (emphasis added). The removal of the italicized language in the 1986 amendment to ECPA demonstrates that basic identification information no longer constitutes "contents" under the statute. *See also id.* §2703(c)(2) (classifying name, address, and subscriber number or identity as non-content information for purposes of required disclosures by an ECS or RCS in response to proper process by governmental entities).

Courts also have interpreted "records" (as distinguished from contents) to include transactional information such as a User ID or URL—*i.e.*, information that only reveals that a communication occurred (and between or among whom), without revealing what was said or communicated. *See Sams v. Yahoo!, Inc.*, No. CV-10-5897-JF (HRL), 2011 WL 1884633, at *6-7 (N.D. Cal. May 18, 2011) (all records regarding "the Yahoo! ID 'lynnsams' or 'lynnsams@yahoo.com' . . . includ[ing] name and address, date account created, account status, Yahoo! E-mail [sic] address, alternative e-mail address, registration from IP, date IP registered

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[8] The essential distinction between content and non-content transactional records (often referred to as "envelope" information) remains constant across different technologies. *See* Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607, 611 (2003). With respect to postal mail, the non-content, envelope information is the information derived from the outside of the envelope—mailing and return addresses, stamp and postmark, size and weight, etc. *See id.* (citing 39 C.F.R. §233.3(c)(1)). For telephone calls, the non-content, envelope information includes the number the caller dials, the number from which the caller dials, and the time and duration of the call. *See id.* For emails, the non-content information includes the "to" and "from" email addresses, the date and time sent, and how the email was processed by the network from its origin to its destination. *Id.*

and login IP addresses associated with session time and dates" were "user identification information" not "content-based" data); *Hill v. MCI WorldCom Commcn's, Inc.*, 120 F. Supp. 2d 1194, 1195 (S.D. Iowa 2000) (invoice/billing information and names, addresses, and phone numbers of parties called by a subscriber were not "contents" of the communication); *see generally U.S. v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) ("e-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information.").

The only types of information that the Amended Complaint alleges to have been disclosed *by LinkedIn* are plaintiffs' LinkedIn User IDs (as a portion of a URL), the URL of the LinkedIn page a user is viewing, and a user's "browsing history among LinkedIn profiles" (presumably multiple URLs of viewed LinkedIn pages). *See* AC pg. 1 & ¶¶16, 66. None can properly be considered communications "contents" for purposes of the SCA.

A LinkedIn User ID is a generic number assigned by LinkedIn and unrelated to any communications by plaintiffs. AC ¶25. Courts have held that a person's *name*, as party to a communication, cannot constitute the contents of that communication for purposes of the SCA. *See, e.g., Jessup-Morgan v. Am. Online, Inc.*, 20 F. Supp. 2d 1105, 1108 (E.D. Mich. 1998) (disclosure of basic identity information revealing account holder's name in connection with published message was not the "content of an electronic communication" under 18 U.S.C. §2702). If a person's name, which reveals his identity, is not content, then certainly a User ID assigned by LinkedIn cannot be either.

The alleged disclosure of a LinkedIn URL address within a URL or multiple LinkedIn URL addresses also does not constitute communications contents, as this is precisely the type of transactional, routing information that has been deemed non-content information across all technological mediums.[9]

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[9] As both complaints have acknowledged, referrer URLs (the "Viewed Page" information or "LinkedIn-related browsing history" at issue in the Amended Complaint) are "a standard piece of information" routinely transmitted in connection with web page requests and simply identify (continued…)

Plaintiffs allege that the purported transmission of the URL of the profile page a user was viewing and LinkedIn ID associated with that profile page "enabled Third Parties to identify Plaintiff by name and determine which LinkedIn profiles Plaintiffs had viewed (the 'LinkedIn Browsing History')." AC ¶28. But a URL is simply an address where a particular webpage can be found. This does not reveal anything more than the email to/from addresses, IP addresses, or telephone numbers the Ninth Circuit deemed to be non-content information in *Forrester*. *See* 512 F.3d at 503 (telephone numbers are not content, even though "when an individual dials a pre-recorded information or subject-specific line, such as sports scores, lottery results or phone sex lines, the phone number may even show that the caller had access to specific content information").[10]

Without factual elaboration or support, the Amended Complaint asserts that LinkedIn's purported divulgence of "information about its users and their LinkedIn Browsing Histories" allows third parties to "place a LinkedIn user's actual identity with his/her personal, Private Browsing History." *See* AC ¶20 (emphasis omitted). As explained above, however, the Amended Complaint actually alleges only that LinkedIn divulged User IDs within URLs of pages on the LinkedIn website, none of which constitutes "contents." While plaintiffs seeks to

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the URL being viewed—much like a postal address or telephone number. Dkt. No. 1 ¶16; *see* AC ¶15 (suggesting that referrer URLs are a basic feature of Internet architecture actually transmitted by a user's web browser (not the site visited)). Indeed, plaintiffs' recognition that any communications actually are between a user's browser and third parties hints at the problematic implications of the Amended Complaint: Plaintiffs' contention that these purported communications—transmitted by web browsers whenever a browser user views a particular webpage—somehow constitute communications content of users under the SCA would mean that web browsers would be violating the SCA billions of times a day, calling into question the basic functionality of the Internet.

[10] In *Forrester*, a Fourth Amendment decision considering government surveillance techniques, the Ninth Circuit suggested in a footnote that while IP addresses of websites would not be content information, the surveillance of URLs "of the pages visited *might be more constitutionally problematic*" under the Fourth Amendment. 512 F.3d at 510 & n.6 (emphasis added). But the Ninth Circuit's suggestion that some URLs could constitute content certainly does not mean that *all* URL transmissions would be content under the SCA. As alleged by plaintiffs here, the transmitted URLs contained URL addresses of the profile pages *on LinkedIn* that plaintiffs viewed. *See* AC ¶¶16, 28. The fact that one person viewed another person's LinkedIn page is no different from the fact that one person communicated with another specific person—precisely the "envelope" information that does not constitute contents under the SCA.

hold LinkedIn responsible for third parties' alleged aggregation of anonymous browsing histories (*see e.g.*, AC ¶5), no case has suggested, let alone held, that a service provider could be liable under the SCA for providing non-content information about a user to a third party that already has *other* information about that user. *See Jessup-Morgan*, 20 F. Supp. 2d at 1108 (disclosure of name associated with message account not content under ECPA even where it allowed third party to learn identity of author of otherwise anonymous postings). Indeed, the suggestion that LinkedIn could be held responsible for third parties' collection of web browsing histories contravenes the prohibition on secondary liability under the SCA. *See Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004-09 (9th Cir. 2006).

2. Plaintiffs' Claims Under California's False Advertising Law Fails As A Matter Of Law.

The Amended Complaint dropped the prior claim under California Business and Professions Code Section 17200 (California's Unfair Competition Law or "UCL"), but retained (essentially unchanged) a claim under Section 17500 (California's False Advertising Law or "FAL"). Proposition 64, approved by California voters in 2004, amended provisions of both the UCL and FAL to require that a person bringing an action under either statute has "suffered injury in fact *and* has lost money or property *as a result of* the violation" of the FAL. Cal. Bus. & Prof. Code §17535 (emphasis added) (FAL); *see id.* §17204 (UCL). Even if plaintiffs had adequately alleged "injury in fact" (and, as discussed above, they have not), their FAL claim still fails as a matter of law because there is no allegation that such loss was "as a result of" any false advertising by LinkedIn.[11]

Where a plaintiff asserting a UCL or FAL claim contends that the defendant's statements harmed him, courts have repeatedly interpreted Proposition 64's "as a result of" language to require an allegation of *reliance* on the alleged unfair competition or false advertising. *See Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005)

[11] Plaintiff Low, of course, does not allege that he paid any money to LinkedIn, so his FAL claim must also be dismissed for failure to meet that threshold requirement of Section 17535. *See In re iPhone Application Litig.*, 2011 WL 4403963, at *14 (personal information does not constitute property under Proposition 64).

("Because Plaintiffs fail to allege they actually relied on false or misleading advertisements, they fail to adequately allege causation as required by Proposition 64. Thus, . . . Plaintiffs lack standing to bring their UCL and FAL claims."); *Doe v. Texaco*, No. C 06-02820 WHA, 2006 WL 2053504, at *3 (N.D. Cal. July 21, 2006) (similar); *see generally Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326 (2011) ("'"as a result of" in its plain and ordinary sense means "caused by" and requires a showing of a causal connection or reliance on the alleged misrepresentation.'") (citation omitted); *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009) (outside of unusual circumstances, Proposition 64 requires that named plaintiffs in a class action alleging deception plead reliance on particular misrepresentations of defendant).

Here, neither named plaintiff alleges that he actually relied on *any* representation or advertising in registering for or using the LinkedIn website. In fact, the *only* LinkedIn statements that the Amended Complaint identifies are excerpts of LinkedIn's privacy policy. *See* AC ¶¶49-55. But there is no allegation that either plaintiff read, much less relied on, the privacy policy, or that any such reliance caused his injury. For this reason too, the FAL claim must be dismissed.[12]

3. Plaintiff's Privacy Claims Should Be Dismissed.

Plaintiffs allege that LinkedIn violated their privacy rights under Article 1, Section 1 of the California Constitution and common law by disclosing "their LinkedIn-related browsing history" and "their LinkedIn IDs." *See* AC ¶¶80-81, 102-03. There is, of course, no

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[12] In addition, where a FAL claim is premised on knowing deception by the defendant, the complaint must meet the requirements of Rule 9(b) (regardless of whether fraud is an essential element of the underlying cause of action). *Vess v. Ciba-Geiby Corp. USA*, 317 F.3d 1097, 1103-05 (9th Cir. 2003). This means that the plaintiff must allege with the appropriate specificity "'the who, what, when, where and how' of the misconduct charged" and "set forth what is false or misleading about a statement, and why it is false." *Id.* at 1106 (citation omitted). Here, the gravamen of the FAL claim is knowing or negligent misrepresentation by LinkedIn, as the cause of action vaguely alleges that LinkedIn engaged in a misleading promotional scheme that "misrepresented the extent to which Defendant would share valuable personal information with third parties." AC ¶89; *see also Lorenz v. Sauer*, 807 F.2d 1509, 1511-12 (9th Cir. 1987) ("Under California law, negligent misrepresentation is a species of actual fraud . . ."). But the plaintiffs here do not allege with particularity (or even at all) if and when *they* were exposed to, let alone read and relied on, any specific false statements by LinkedIn. So Rule 9(b) also requires dismissal of the FAL claim.

allegation that their general Internet browsing histories were disclosed to anyone as a result of conduct of LinkedIn. Nor is there any suggestion as to what specific information about plaintiffs caused (or could cause) them embarrassment.

Under the Constitution, "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 37, 39-40 (1994). Applying this standard, courts have found no violation of a constitutionally protected privacy interest even where a plaintiff's social security number was disclosed (creating a risk of identity theft), where a plaintiff's name and address were obtained without knowledge or permission (to mail advertisements and coupons to him), or even where a plaintiff was forced to urinate under observation for athletic drug testing purposes. *See Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1128 (N.D. Cal 2008) (social security number disclosure "d[id] not approach th[e] standard"); *Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 992 (Cal. Ct. App. 2011) (obtaining plaintiff's address without knowledge or permission "not an egregious breach of social norms, but routine commercial behavior."); *Hill*, 7 Cal. 4th at 40. If such conduct does not implicate the constitutional privacy right, disclosure of plaintiffs' LinkedIn User IDs or even the pages on LinkedIn that they viewed from the LinkedIn website are insufficient as a matter of law.

Plaintiff's common law "invasion of privacy" claim appears to be an attempt to plead the tort of either "intrusion into private places, conversations, or other matters" or "public disclosure of private facts." *See* AC ¶¶102-107. To state a claim under an "intrusion" theory, a plaintiff must allege intrusion into a private place, conversation or matter in a manner highly offensive to a reasonable person. *Shulman v. Group W Prods, Inc*., 18 Cal. 4th 200, 231 (1998). A claim of "public disclosure of private facts" requires public disclosure of a private fact "which would be offensive and objectionable to the reasonable person." *Id.* at 214. To state a claim under either tort, the invasion must be "highly offensive" to a reasonable person and "sufficiently serious" and unwarranted as to constitute an "egregious breach of the social norms." *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 295 (2009) (internal citations omitted).

Plaintiffs have not alleged any actual disclosure, let alone one that could be sufficiently egregious. A LinkedIn User ID is not a "private matter" or "private fact" as this was a number assigned by LinkedIn, and the alleged disclosure of user's "LinkedIn-related browsing history" would not rise to the level of "highly offensive" given the ubiquity of cookies and targeted online advertising. *See Ruiz*, 540 F. Supp. 2d at 1128; *Folgelstrom*, 195 Cal. App. 4th at 993. And as the *Fogelstrom* court observed, no court has found potential liability based on a defendant obtaining unwanted *access* to a plaintiff's private information, in the absence of an allegation that the *use* of plaintiff's information was highly offensive. *Id.* at 993. There is no allegation here that any User ID or LinkedIn browsing history was *used* at all, let alone in a highly offensive way.

In addition, as with plaintiffs' other claims, the privacy causes of action fail to allege sufficient damages, merely asserting plaintiffs "suffered injury-in-fact *and/or* were harmed and are entitled to damages." AC ¶¶81, 102-03 (emphasis added); *see id.* ¶80.

4. The Contract Claim Fails To Allege Recoverable Contract Damages.

California law requires a showing of "appreciable and actual damage" to assert a breach of contract claim. *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir. 2000); *Ruiz v. Gap, Inc.*, 622 F. Supp. 2d 908, 917 (N.D. Cal. 2009). Here, the breach of contract claim only alleges that plaintiffs and the class "have been damaged" (AC ¶100), without any further explanation, which is a conclusory statement insufficient to state a claim for breach of contract. *In re Facebook Privacy Litig.*, 791 F. Supp. 2d at 717.

In addition, as discussed above, the only other vague references to harm in the Amended Complaint are for "embarrass[ment] and humiliat[ion]" and the purported loss of the value of plaintiff's "personally identifiable browsing history." *See* AC ¶5. However, emotional distress damages generally are not recoverable on a contract claim. *Gibson v. Office of the Attorney Gen.*, 561 F.3d 920, 929 (9th Cir. 2009); *Applied Equip. Corp. v. Litton Saudia Arabia Ltd.*, 7 Cal. 4th 503, 516 (1994). And the purported loss of the value of personally identifiable information is not a cognizable form of *contract* damages, as it does not correspond to any benefit of the bargain theory—because the purpose of contract damages is to place a plaintiff in

the position "he would have occupied had the contract been performed." *Ajaxo Inc. v. E*Trade Group, Inc.*, 135 Cal. App. 4th 21, 56 (2005); *see* Cal. Civ. Code §3358. Here, plaintiffs had no contractual expectation that they would be paid for their personal information if LinkedIn performed its alleged obligations under the privacy policy, so they cannot recover the purported value of that information as a measure of contract damages. *See, e.g., In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d at 327 ("[p]laintiffs . . . had no reason to expect that they would be compensated for the 'value' of their personal information"). Because plaintiffs have not pled cognizable contract damages, the breach of contract claim necessarily fails as a matter of law. *See In re Facebook Privacy Litig.*, 791 F. Supp. 2d at 717.

5. Plaintiffs' Conversion Claim Fails As A Matter of Law.

As in the original Complaint, the conversion claim is specifically premised on the assertion that their "personal browsing history and other personally identifiable information" is "valuable property owned by Plaintiffs" and that LinkedIn converted such property "by providing it to third parties." AC ¶¶110-11.[13] But California requires that a party asserting conversion allege "ownership or right to possession of *personal property*" (*Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 119 (2007) (emphasis added), and an intangible interest can be the subject of a conversion claim only where that interest is "merged with, or reflected in, something tangible." *Boon Rawd Trading Int'l Co. v. Paleewong Trading Co.*, 688 F. Supp. 2d 940, 954 (N.D. Cal. 2010) (citation and internal quotations omitted). In addition, for an intangible item to be subject to a conversion claim, it must be capable of *exclusive* possession or control, and the putative owner must have established a legitimate claim to exclusivity. *G.S. Rasmussen & Assoc. Inc. v. Kalitta Flying Serv.*, Inc., 958 F.2d 896, 903 (9th Cir. 1992). Here, the "property" alleged is not tangible, is not "merged with, or reflected in, something tangible," and cannot be exclusively possessed, by plaintiff or anyone else. *Cf. Ruiz*,

[13] Oddly, the Amended Complaint, like the original Complaint, refers to "other personally identifiable information as "including . . . mailing address, zip code, telephone number, and credit card number" (AC ¶110), even though neither complaint contains a single allegation anywhere that any of these pieces of information (as to the named plaintiffs or anyone else) were ever transmitted by LinkedIn or obtained by third parties.

540 F. Supp. 2d at 1126 (social security number not personal property that could support bailment claim). Accordingly, the purported disclosure of personal information cannot support a conversion claim.

In addition, conversion requires resulting damages. *See Fremont Indem. Co.*, 148 Cal. App. 4th at 119. But there is no proper allegation as to how the alleged conversion caused damage to plaintiffs. *See* AC ¶112 ("Plaintiff and the Class were damaged thereby").

6. The Newly-Minted "Negligence" Claim Fails As A Matter of Law.

The Amended Complaint adds a claim for "negligence," but it fails as a matter of law. The elements of negligence under California law are "(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury." *Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828, 834 (1992) (emphasis in original); *accord*, *Ladd v. County of San Mateo*, 12 Cal. 4th 913, 917 (1996).

Here, plaintiffs have not identified a legal duty on the part of LinkedIn to protect users' information from disclosure to third parties. Instead, the Amended Complaint only alleges that LinkedIn owed plaintiffs "a duty . . . to comply with its stated privacy policy and terms of service." AC ¶123. But tort law may not be used to supplant private contractual arrangements, and the failure to perform a contractual duty is not a tort, unless that failure involves an independent legal duty. *See Applied Equip. Corp.*, 7 Cal. 4th at 514-15; *In re iPhone Application Litig.*, 2011 WL 4403963, at *9. No independent legal duty is or could be pled here.

Moreover, the Amended Complaint does not allege breach. As discussed above, there is no allegation that any third party *actually* obtained, let alone used, either plaintiffs' personal information. Nor does the Amended Complaint establish causation of harm. An "appreciable, nonspeculative, present injury is an essential element of a tort cause of action." *Aas v. Super. Ct.*, 24 Cal. 4th 627, 646 (2000), *superseded by statute on other grounds as stated in Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070, 1079-80 (2003); *see Duarte v. Zachariah*, 22 Cal. App. 4th 1652, 1661-62 (1994) (actual damage in "the sense of 'harm' is necessary to a cause of action in negligence"). But the negligence claim merely asserts that

"LinkedIn's negligent actions directly and proximately caused Plaintiffs and Class members harm" (AC ¶125), a formulaic recitation that is insufficient as a matter of law under *Twombly*, *see* 550 U.S. at 555.

7. Unjust Enrichment Is Not An Independent Cause Of Action.

Plaintiffs' Seventh Cause of Action, for unjust enrichment, must be dismissed as a matter of law. Although a few earlier cases had suggested that unjust enrichment could exist as a separate cause of action, the California Court of Appeals has clarified that "[u]njust enrichment is not a cause of action, just a restitution claim." *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1307 (2011); *accord Levine v. Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1138 (2010); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010); *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003). Accordingly, this Court recently held "there is no cause of action for unjust enrichment under California law." *In re iPhone Application Litigation*, 2011 WL 4403963, at *15 (internal quotation marks and citations omitted); *accord Fraley*, 2011 WL6303898, at *23; *Ferrington v. McAfee, Inc.*, No. 10-cv-01455-LHK, 2010 WL 3910169, at *17 (N.D. Cal. 2010). "Thus, Plaintiffs' unjust enrichment claim does not properly state an independent cause of action and must be dismissed." *Fraley*, 2011 WL6303898, at *23 (slip op. at 37) (citation omitted).

IV. CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed in its entirety. Because there has already been an opportunity to amend and because further amendment would be futile, dismissal should be with prejudice. *See Allen v. City of Beverly Hills*, 911 F.2d 367, 373-74 (9th Cir. 1990).

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