SIMON J. FRANKEL (State Bar No. 171552)
E-Mail: sfrankel@cov.com
MALI B. FRIEDMAN (State Bar No. 247514)
E-Mail: mfriedman@cov.com
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Attorneys for Defendant
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,

Plaintiff,

vs.

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

Defendants.

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

DEFENDANT LINKEDIN CORPORATION'S REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Date: March 22, 2012
Time: 1:30 pm
Courtroom: 4, 5th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

At its core, the allegation of the Amended Complaint, like the original complaint, is that LinkedIn transmitted to third parties two types of data: (1) LinkedIn User IDs (a unique number generated by LinkedIn) and (2) URLs of pages on the LinkedIn website, which contained a component of the URL the LinkedIn User ID of the member whose page was being *viewed*. Plaintiffs' primary concern appears to be that third parties somehow are using this data to "de-anonymize" Internet browsing histories that these same third parties previously collected independent of LinkedIn. Yet plaintiffs fail to allege that any third party actually has de-anonymized the browsing history of any LinkedIn user (or even attempted to do so)—let alone of one of the named plaintiffs. Even more significant, and contrary to this Court's November 11, 2011 Order dismissing the original complaint, plaintiffs still fail to offer a coherent theory of how LinkedIn plays a role in this hypothetical de-anonymization process or why LinkedIn should be responsible for this supposed third party conduct.

Although misleading and unsubstantiated assertions in the Opposition attempt to sensationalize LinkedIn's conduct (and suggest that LinkedIn itself has disclosed user's "internet browsing histories"), the actual Amended Complaint is explicitly limited to the purported disclosure of User IDs and LinkedIn URLs and *not* the collection, disclosure, or de-anonymization of broader Internet browsing histories by LinkedIn.[1] To the extent plaintiffs take issue with third parties' collection of Internet browsing histories, those third parties (and not LinkedIn) should be the proper target of plaintiffs' complaint. As it is, the purported disclosure by LinkedIn of User IDs and the particular URLs at issue here, standing alone, is not alleged to

---

[1] *See, e.g.*, Amended Complaint ("AC") ¶3 ("Plaintiffs' LinkedIn Browsing Histories and their LinkedIn user identification numbers ('LinkedIn IDs')—sent in connection with third party cookie identification numbers ('cookie IDs')—were transmitted to Third Parties by LinkedIn."); *id.* ¶5 ("LinkedIn provided Third Parties their LinkedIn IDs . . . and their LinkedIn Browsing History."); *id.* ¶¶16, 66-68; *see also* Opposition ("Opp.") at 13 (acknowledging that "the broader browsing histories are collected by third parties, not LinkedIn"); *id.* at 15 ("LinkedIn discloses two types of 'contents' of communications: a) Linked-In related [sic] browsing histories, b) LinkedIn IDs."). "LinkedIn-related browsing history," referred to as "browsing history among LinkedIn profiles" (*see* AC at 1 & ¶66), appears to mean an aggregation of the Viewed Page information, defined as "the URL of the profile page the user was viewing" (*see* AC ¶¶28, 67).

cause any particularized injury or harm to the named plaintiffs, so Article III standing still is lacking. In addition, plaintiffs still have not properly pled a single cause of action. The Amended Complaint must be dismissed, this time with prejudice.

II. ARGUMENT

A. The Amended Complaint Must Be Dismissed For Lack Of Article III Standing Because Even If The SCA Claim Provides A "Concrete" Injury, Plaintiffs Fail To Plead An Injury That is "Particularized" As To Them.

LinkedIn's Motion explained that under this Court's recent analysis in *Fraley v. Facebook, Inc.*, --- F.Supp.2d ---, 2011 WL 6303898, at *6 (N.D. Cal. Dec. 16, 2011), the Amended Complaint fails to establish standing even though it purports to allege a statutory claim, because there are insufficient allegations that the two named plaintiffs suffered particularized injury. *See* Motion to Dismiss ("Mot.") at 6-7. The Opposition relies on this standard, set out in *Jewel v. Nat'l Sec. Agency*, --- F.3d ---, 2011 WL 6848406, at *3-6 (9th Cir. Dec. 29, 2011), and *Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011), arguing the amended pleading is sufficient.[2]

While *Jewel* and *Edwards*, like the *Fraley* decision, hold that a plaintiff meets Article III's "concrete" injury requirement by alleging violation of a statute, the recent *Jewel* decision is explicit that a plaintiff also must also allege a sufficiently "particularized" grievance. *Jewel*, 2011 WL 6848406, at *4 ("Satisfied that [plaintiff] sufficiently alleged concrete injury, we turn now to the more difficult question, whether the rights asserted are sufficiently particularized."); *see Fraley*, 2011 WL 6303898, at *7-9. *Jewel* found the allegations there sufficient because the plaintiff alleged in detail that the defendant telecommunications company had disclosed communications to the government in violation of the SCA and other statutes *and* that "*her* communications were part of the dragnet." *Jewel*, 2011 WL 6848406, at *5.

That is what is missing here: plaintiffs still do not allege their communications actually passed into third party hands as a result of LinkedIn's conduct so as to cause them particularized

[2] Implicit in plaintiffs' argument is the concession that if the statutory claims do not meet Rule 12(b)(6)—and they do not—then plaintiffs have no standing to pursue any common law claims.

injury. They assert that they have alleged "what information was actually disclosed to third parties that would lead [them] to suffer emotional harm." Opp. at 7 (quoting *Low v. LinkedIn Corp.*, WL 5509848, at *3 (N.D. Cal. Nov. 11, 2011) ("*Low*")). They then carelessly contend that LinkedIn "divulged Plaintiffs' browsing histories to third parties . . . . Accordingly, the Amended Complaint does allege that LinkedIn did actually disclose 'potentially sensitive information.'" Opp. at 7; *see id.* at 8. This is false. The Amended Complaint, like the original complaint, never alleges that LinkedIn *possessed*, let alone *disclosed* to anyone, plaintiffs' Internet browsing histories. There is only conjecture that LinkedIn's alleged disclosure of anonymous User IDs, along with URLs containing the address of *LinkedIn* pages that were viewed (but not the identity of the viewers) purportedly allows third parties to de-anonymize the Internet browsing histories that the third parties allegedly *already* possessed. Contrary to this Court's direction, the amended pleading still offers no coherent explanation of "*how* third party advertisers would be able to infer [a plaintiff's] personal identity from LinkedIn's anonymous user ID combined with [that plaintiff's] browsing history." *Low* at *5; *see* Mot. at 4 & n.1. And, of course, the Amended Complaint still does not allege that any third party *actually* linked either named plaintiff's identity with an independently collected (and previously anonymous) Internet browsing history as a result of LinkedIn's alleged conduct. *See Low* at *7.

Accordingly, there is still no particularized injury here—no basis for emotional or economic harm when there is no allegation that third parties actually de-anonymized their Internet browsing histories.[3] Plaintiffs simply repeat their refrain, without authority, that they should be compensated because their personal information is "valuable personal property." *Id.* at 8. They still do not allege that they have lost out on a single "value-for-value exchange" as a result of the conduct alleged. *See Low* at *5 ("Low has failed to allege how he was foreclosed

[3] The Opposition suggests that because plaintiff Masand is alleged to have paid for a LinkedIn subscription, he "did not receive the full value in the 'value-for-value exchange.'" Opp. at 9. But there is no allegation in the pleading (or even suggestion in the Opposition) that Masand's agreement with LinkedIn required he be paid for his personal information. And, as explained in the Motion (at 10 n.5), such alleged 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 v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted).

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.'"). The required "particularized" injury is still absent.

B. The Stored Communication Act ("SCA") Claim Fails On Multiple Grounds.

Several independent grounds require dismissal of the SCA claim. *See* Mot. at 10-19.

1. The Complaint Does Not Properly Allege That LinkedIn Acts As An RCS With Respect To The Conduct Alleged.

The SCA *only* regulates the disclosure of stored electronic communications held by providers of electronic communication service ("ECS") and providers of remote computing service ("RCS").[4] *See* 18 USC §§2701 *et. seq.*; Mot. at 10. Whether an entity acts as an ECS or an RCS is entirely context dependent; a determination of whether the SCA's ECS rules or RCS rules apply must occur based on the particular service or particular piece of an electronic communication at issue at a specific time. *See In re U.S.*, 665 F. Supp. 2d 1210, 1214 (D. Or. 2009); 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, 1215-16 & n.48 (2004) ("Kerr"); Mot. at 12. In other words, a provider such as LinkedIn can act as an ECS with respect to some communications, an RCS with respect to other communications, and neither an ECS nor an RCS with respect to other communications. Kerr at 1215-16 & n.48. Plaintiffs ignore this basic rule and simply argue that LinkedIn must be an RCS, because it "stores profiles and creates a network of users" or uses the words "storage" or "store" in its prospectus. *See* Opp. at 13-15.[5]

---

[4] Although the Amended Complaint alleges that LinkedIn is both an ECS and an RCS (*see* AC ¶¶69, 70), the Opposition concedes that LinkedIn does not act as an ECS here. *See* Opp. at 13-15 (only arguing LinkedIn is an RCS). In any event, LinkedIn does not act as an ECS with respect to the communications at issue for the reasons set out in the Motion, including because LinkedIn did not divulge information held in "electronic storage." *See* Mot. at 12.

[5] In fact, a service provider must meet four strict requirements to act as an RCS. First, it must offer "computer storage or processing services" to the public through an electronic communications system. *See* William, Jeremy Robison, *Free At What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195, 1207 (2010) (citing 18 U.S.C. §§2510(14), 2711(2)). Second, the data must be received electronically from the customer. *Id.* (citing 18 U.S.C. §§2702(a)(2)(A), 2703(b)(2)(A)). Third, the content must be "carried or maintained" by the provider "*solely* for the purpose of providing storage or computer processing services" to the customer. *Id.* (citing 18 U.S.C. §§2702(a)(2)(B), 2703(b)(2)(B)) (emphasis added). Fourth, the provider cannot be "authorized to access the [customer's] content (continued…)

But the profile data purportedly collected during the LinkedIn sign-up process (*see* AC ¶24, Opp. at 13) is entirely unrelated to the conduct complained of in the Amended Complaint. Rather, it is *only* the LinkedIn User IDs and LinkedIn URLs—what plaintiffs allege were improperly disclosed (*see* AC ¶¶3, 16, 67-68; Opp at 13)—that must be examined in considering whether LinkedIn acted as an RCS here.

An RCS is defined as "the provision to the public of *computer storage or processing services* by means of an electronic communications system." 18 U.S.C. §2711(2) (emphasis added); *see* Mot. at 11-12.[6] As the SCA's legislative history explains, the ECS and RCS dichotomy was intended to differentiate two services that third party providers performed in 1986: (1) data communication and (2) data storage and processing. *See Quon*, 529 F.3d at 901 (citing S. Rep. 99-541, 1986 U.S.C.C.A.N. 3555). The Senate report demonstrates what is meant by "computer storage and processing services," given as an example of remote "storage" that "physicians and hospitals maintain medical files in offsite data banks." S. Rep. 99-541, at 2-3. As such, it appears that Congress viewed "storage" as a virtual filing cabinet for information. *See Quon*, 529 F.3d at 901. The Senate Report illustrates the "processing of information" with a statement that "businesses of all sizes transmit their records to remote computers to obtain sophisticated processing services." S. Rep. 99-541, at 2-3. This was necessary because, as the Ninth Circuit noted in *Quon*, "before the advent of advanced computer processing programs such as Microsoft Excel, businesses had to farm out sophisticated processing to a service that would process the information." *Quon*, 529 F.3d at 901 (citation omitted).

---

for purposes of providing any services other than storage or computer processing." *Id*. (citing 18 U.S.C. §§2702(a)(2)(B), 2703(b)(2)(B)). LinkedIn does not meet these requirements with respect to the data at issue and so cannot act as an RCS.

Plaintiffs assert that LinkedIn "admits that it is an RCS." *See* Opp. at 14, 21 n.17. This is inaccurate. LinkedIn noted that it *potentially* acts as an ECS in some capacities and as an RCS in other capacities but that the "allegations in the Amended Complaint do not concern conduct of LinkedIn as *either* an ECS or RCS." Mot. at 12.

[6] An "electronic communications system" is simply the mechanism by which an RCS provides computer storage or processing services. *See* 18 U.S.C. §2510(14).

The Amended Complaint alleges that LinkedIn disclosed LinkedIn User IDs and LinkedIn URLs (*see* AC ¶¶3, 16, 67-68; Opp at 13), but there is no suggestion that either was sent to LinkedIn by plaintiffs for remote storage or processing services. LinkedIn IDs are numbers generated by LinkedIn and so they cannot have been sent to LinkedIn by plaintiffs for offsite storage or for processing. *See* 18 U.S.C. §§2702(a)(2)(A) (requiring that communications be sent electronically *by the user*); *see also* Mot. at 12-14. The URL addresses at issue in the Amended Complaint (*i.e.*, the "Viewed Page" information or "LinkedIn-related browsing history") similarly were not sent to LinkedIn by plaintiffs for storage or processing and such storage or processing is not even alleged. *See* AC ¶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). And certainly the URLs are not "carried or maintained . . . *solely* for the purpose of providing storage or computer processing services," as is required to trigger protection under the statute's RCS rules, because, by definition, the URLs are the functional mechanism by which pages on the LinkedIn website are viewed. *See* 18 U.S.C. §2702(a)(2)(B) (emphasis added).

Because the User IDs and URLs at issue in the Amended Complaint were not sent to LinkedIn by plaintiffs for the provision of remote storage and processing services or carried or maintained solely for the purpose of providing these services, LinkedIn is not functioning as an RCS. As such, no liability can attach to LinkedIn's purported conduct under the SCA.

2. LinkedIn's Conduct Was Authorized Under The SCA Because The Disclosures Alleged Were Made To Or By The Intended Recipient Of The Communications Under The Plain Terms Of The Statute.

As set out in LinkedIn's Motion, the SCA claim also fails as a matter of law because a provider can divulge the contents of a communication to, or with the lawful consent of, "an addressee or intended recipient" of the communication. 18 U.S.C. §§2702(b)(1), (b)(3); Mot. at 14-15. Plaintiffs contend that the intended recipient exception under Section 2702(b)(3) does not apply to an RCS by citing a footnote in one non-binding district court opinion. *See* Opp. at 20 (citing *Crispin v. Audigier*, 717 F. Supp. 2d 965, 973 n.17 (C.D. Cal. 2010). However, plaintiffs' position is contradicted by the plain language of the statute:

> A provider described in subsection (a) [that is, an ECS or RCS] may divulge the contents of a communication—(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient; . . . (3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.

18 U.S.C. §2702(b)(1), (3). Plaintiffs' contention is that the first clause of Section 2702(b)(3)—"with the lawful consent of the originator or an intended recipient of such communication"—applies only to an ECS. But it is nonsensical that Congress would have drafted the statute in this manner, with all of sub-section (b) pertaining to *both* ECS and RCS providers, if the first clause of (b)(3) was not intended to apply to both providers. Indeed, it is precisely because the first clause of Section 2702(b)(3), by the statute's terms, applies to *both* an ECS and an RCS, that the second clause of that provision must be qualified ("in the case of remote computing service") in order to apply only to an RCS. And, the Ninth Circuit has explicitly held that the statute means what it says: "[B]oth an ECS and RCS can release private information to, or with the lawful consent of, 'an addressee or intended recipient of such communication,' §2702(b)(1), (b)(3), whereas only an RCS can release such information 'with the lawful consent of . . . the subscriber.'" *Quon*, 529 F.3d at 900.

As noted in the Motion, the court in *In re Facebook Privacy Litigation* relied on the exception in Section 2702(b)(3) to dismiss an SCA claim predicated on the same underlying facts—alleged transmittal of User IDs to third parties. *See In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 714 (N.D. Cal. 2011); *In re Facebook Privacy Litig.*, 2011 WL 6176208, at *2-4 (N.D. Cal. Nov. 22, 2011); Mot. at 14-15. Plaintiffs attempt to distinguish Judge Ware's holding in that case by claiming that the plaintiffs there "fail[ed] to allege that the defendant was an RCS." Opp. at 21. That assertion is contradicted by both the Opposition (which two sentences earlier states that the *Facebook* plaintiffs asserted "that the defendant was an RCS" (*id.*)) and by the pleadings in *Facebook*, of which this Court may take judicial notice. *See In re Facebook Privacy Litig.*, No. C 10-02389 JW, Dkt. No. 92 (First Amended Consolidated Class Action Compliant) ¶91 (alleging Facebook is a "'remote computing service' provider pursuant to 18 U.S.C. §2711(2)"). Here, just as in *Facebook*, either the third parties at issue are the

"addressee or intended recipient" of the purported communications sent *by LinkedIn* (*see* AC ¶¶3, 5, 17; Mot. at 15) or the transmitted URLs reflect a communication by plaintiffs *to LinkedIn* (*see* Mot. at 15). In either case, any disclosure by LinkedIn was permissible under the SCA's intended recipient exception. *See In re Facebook Privacy Litig.*, 2011 WL 6176208, at *2-4 (dismissing SCA claim with prejudice based on intended recipient exception).

3. The SCA Claim Fails Because The Complaint Only Alleges Disclosure Of Non-Content Information.

As detailed in LinkedIn's Motion, the SCA permits the disclosure of non-content records to non-government entities without restriction. 18 U.S.C. §2702(c)(6); Mot at 15. Thus, because neither the LinkedIn User IDs nor the URLs at issue constitute communication contents and because the alleged disclosures were made to non-governmental entities (*see* AC at 1), the SCA claim must be dismissed for this reason as well.[7]

Ignoring both the SCA's legislative history and clear judicial precedent, plaintiffs argue that LinkedIn User IDs—a string of numbers generated by LinkedIn—are communication contents. This is plainly incorrect. Congress made clear in amending ECPA in 1986 that even revealing a person's *identity* is not "communication contents" under the SCA. *See* Mot. at 16. Accordingly, in *Jessup-Morgan v. Am. Online, Inc.*, the disclosure of basic identity information revealing an account holder's name in connection with a published message was held not to constitute the "contents of an electronic communication." 20 F. Supp. 2d 1105, 1108 (E.D. Mich. 1998).[8] Plaintiffs assert that *Jessup-Morgan* is inapplicable because of a "particularly egregious set of facts" (*see* Opp. at 20 n.15), but they are incorrect that the SCA contemplates any subjective evaluation of the circumstances surrounding a disclosure. If an identity or a name does not constitute communications contents under the SCA, as in *Jessup-Morgan*, a User

[7] The Opposition carelessly suggests for the first time that information could have been divulged to the government. *See* Opp at 18 n.12. However, there is no such allegation in either the Amended Complaint or original complaint, nor is there any factual basis for this suggestion.

[8] *See also Sams v. Yahoo!, Inc.*, 2011 WL 1884633, at *6-7 (N.D. Cal. May 18, 2011); *Hill v. MCI WorldCom Commcn's, Inc.*, 120 F. Supp. 2d 1194, 1195 (S.D. Iowa 2000); Mot. at 15-18.

ID assigned by LinkedIn cannot possibly qualify as contents.[9]

The only other type of data purportedly disclosed by LinkedIn is URL addresses from pages on the LinkedIn website, which contain as a parameter the LinkedIn User ID of the user whose page is being *viewed*. *See* AC ¶¶ 5, 16. These URLs are precisely the type of transactional, routing information that has been deemed non-content information under the SCA. *See* Mot. at 17. In fact, as both complaints acknowledge (*see* Dkt. No. 1 ¶16; AC ¶15), referrer URLs of this nature are a basis feature of Internet architecture, and a finding that these supposed communications transmitted by a user's web browser somehow constitutes contents would undermine the basic functionality of the Internet. *See* Mot. at 17-18 & n.9.

Plaintiffs are incorrect that *U.S. v. Forrester*, 512 F.3d 500 (9th Cir. 2008), or *In re Application of U.S. for an Order Authorizing use of A Pen Register*, 396 F. Supp. 2d 45 (D. Mass. 2005), suggest that LinkedIn User IDs or the URLs at issue here are communication contents. *See* Opp. at 16-17. The *Pen Register* court considered circumstances under which application of a pen register or trap and trace device in an Internet context *could* capture communication contents. *See Pen Register*, 396 F. Supp. 2d at 48 (recognizing that information revealing the email addresses to whom an email is sent, from whom the email is sent, and any persons who are "cc'd" on the email is not communication contents but that the "subject" line of an email would reveal contents). Both the *Pen Register* and *Forrester* courts consider in dicta the idea that certain types of URLs—for example those that contain a search phrase entered by a

---

[9] Plaintiffs contend that even if LinkedIn User IDs are records, their disclosure violated the SCA by revealing them *with* contents. *See* Opp at 18-20. This argument is misplaced, because the URLs at issue—the only other information LinkedIn is alleged to have disclosed—also do not constitute communication contents, as discussed in the text. *O'Grady v. Super. Ct.* addressed a different factual scenario in which a subpoena sought to "discover [] the contents of private messages stored on [companies'] facilities" by seeking the authors of emails regarding a specific subject matter. 139 Cal. App. 4th 1423, 1449 (2006) (emphasis omitted). Moreover, as the *O'Grady* court noted, the subpoena issuer sought "much more" than the identity of the author(s) of specified emails, including "all communications from or to any Disclosing Person(s) relating to the Product." *Id.* at 1448-49 (emphasis omitted).

Plaintiffs are also incorrect that Section 2702(c) is intended "to restrict record information from being correlated or divulged with records." *See* Opp. at 18 n.13. Section 2702(a) prohibits the disclosure of communications contents; Section 2702(c) permits disclosure of customer records under certain circumstances—for example, to a non-governmental entity without restriction.

user following the forward slash in a URL address—*may* constitute contents by revealing that a user conducted a search for information on a particular topic. The Amended Complaint does not allege, however, that URLs of the nature contemplated in *Pen Register* or *Forrester—i.e.*, indicating searches on a particular topic—were disclosed.[10] *See Pen Register*, 396 F. Supp. 2d at 48-49; *Forrester*, 512 F.3d at 510 & n.6. Rather, the fact that one person viewed another person's LinkedIn page is no different from the fact that one person emailed with another person—precisely the non-contents information the *Pen Register* court held would "certainly be obtainable" under the SCA. *Pen Register*, 396 F. Supp. 2d at 48; *see Forrester*, 512 F.3d at 510 ("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").

For all these reasons, plaintiffs' SCA claim still fails.

C. The State Law Claims All Fail As A Matter Of Law.

1. The California Privacy Claims Are Deficient As A Matter Of Law.

The Amended Complaint does not even approach the standard required for an invasion of privacy claim under the California Constitution or common law, because the conduct alleged was not an "egregious breach of social norms." *See* Mot. at 19-21 (discussing cases). Plaintiffs appeal to the history of the constitutional privacy provision (Opp. at 9), but the California Supreme Court has held that, "[n]otwithstanding the broad descriptions of the privacy right in the ballot arguments and legislative findings . . . the right of privacy protects the individual's *reasonable* expectation of privacy against a *serious* invasion." *Pioneer Electronics (USA), Inc. v. Super. Ct.*, 40 Cal. 4th 360, 370 (2007).

Plaintiffs attempt to distinguish cases such as *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121 (N.D. Cal. 2008), and *Fogelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 992 (2011), by arguing that "[t]hose cases involved disclosure of a single piece of unlinked information (social

[10] It cannot be that *all* URLs constitute communication contents because IP addresses of web sites visited, which are universally recognized as non-content information, provide exactly the same information as some website URLs (for example, www.google.com). *See e.g.*, *Pen Register*, 396 F. Supp. 2d at 48 (stating that disclosure of IP address showing the websites that a user visited would be "no problem").

security numbers or ZIP codes)." *See* Opp. at 12 n.7. But that is just what is alleged here, as plaintiffs do not allege that any third party *has linked* their User IDs to a previously anonymous browsing history or to any other information.[11] And, of course, the information LinkedIn is alleged to have disclosed—User IDs and URLs of LinkedIn webpages viewed—is even *less* sensitive than the social security numbers at issue in *Ruiz*. As the *Fogelstrom* court explained, the use of information collected from consumers for purposes of delivering advertising, even "without [consumers'] knowledge or permission," "is not an egregious breach of social norms, but routine commercial behavior." 195 Cal. App. 4th at 992.

Here, plaintiffs only allege LinkedIn engaged in analogous routine commercial activity when users' web browsers supposedly transmitted referrer URLs—a standard feature of Internet functionality. This is a far cry from the types of activities that have been held to constitute a sufficiently egregious invasion or which could cause a reasonable person to be highly offended. *See Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 40-41 (1994) (direct observation of urination by a monitor was sufficiently egregious invasion); *Egan v. Schmock*, 93 F. Supp. 2d 1090 (N.D. Cal. 2000); (stalking and filming of neighbors in their home sufficiently egregious invasion). Accordingly, each of the privacy claims should be dismissed with prejudice.

1. The False Advertising Law ("FAL") Claim Fails.

LinkedIn's Motion explained that the FAL claim both because Low's allegations do not meet Proposition 64's threshold requirement ("lost money or property") and because neither plaintiff has pled that he relied on particular representations of LinkedIn. *See* Mot. at 19-20.

Plaintiff first responds, without citation to any decisions, that the loss of personal information equates to "lost money or property," as required by the FAL after Proposition 64. Opp. at 22. This is whistling past the graveyard. "Numerous courts have held that a plaintiff's

---

[11] To the extent plaintiffs argue it is the de-anonymization of a third party browsing history that constitutes violation of a privacy right (*see* Opp. at 10 n.5), the third parties who collect, maintain, and, hypothetically de-anonymize such a browsing history would be the proper defendants. Justice Sotomayor's concurrence in *United States v. Jones*, 132 S. Ct. 945, 954-55 (2012) (Opp. at 11) is not relevant here, as LinkedIn is not alleged to have disclosed a list of websites visited to the government or to anyone else. *See* n.7, *supra*.

'personal information' does not constitute money or property under" Proposition 64. *See In re iPhone Application Litig.*, 2011 WL 4403963, at *14 (N.D. Cal. Sept. 20, 2011) (citing cases); *Low* at *4 (citing cases). So Low's FAL claim fails.

Both named plaintiffs' FAL claims fail because they have not pled reliance on particular alleged misrepresentations, as required after Proposition 64. Mot. at 19-20; *Kwikset Corp. v Super. Ct.*, 51 Cal. 4th 310, 326 (2011) (plaintiff must allege "reliance on the alleged misrepresentation"); *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009). Plaintiffs respond by pointing to an allegation in the Amended Complaint that they "provid[ed]" their personal information to LinkedIn "not only [in exchange] for [LinkedIn's] services, but also in exchange for Defendant's promises that it would not make" such information available to third parties. AC ¶57; *see* Opp. at 22.[12] This confirms that the only allegedly false representations are portions of LinkedIn's privacy policy. *See* Mot. at 20; AC ¶¶47-55. But as pointed out in the Motion (at 20), there is *no* allegation in the pleading that either plaintiff read, let alone relied on, any statement in the privacy policy. This dooms the FAL claim. *See Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1363 (2010) ("the [complaint] does not allege Durell ever visited Sharp's Web site or even that he ever read the Agreement for Services").

Plaintiffs then contend that they need not plead reliance because they are "entitled to an inference of reliance 'wherever there is a showing that a misrepresentation was material.'" Opp. at 23 (quoting *Tobacco II*, 46 Cal. 4th at 327). However, *Tobacco II* was explicit that the plaintiff "must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct"—that is, that the plaintiff was *exposed* to the alleged misrepresentations. 46 Cal. 4th at 328. No authority supports the odd notion that a plaintiff is entitled to an inference of reliance on a representation he is never alleged to have read or heard.

---

[12] Plaintiffs also cite paragraph 117 of the Amended Complaint, alleging that "[i]f Plaintiffs had known Defendant was not keeping their personal information from third parties, they would not have consented." AC ¶117; *see* Opp. at 22-23. This allegation (part of the unjust enrichment claim plaintiffs agree must be dismissed (*see* Opp. at 2 n.2)) is *not* incorporated in the FAL cause of action, so it cannot support that claim. *See* AC ¶87. In any event, paragraph 117 still does not allege that plaintiffs read and relied on any statements by LinkedIn.

Plaintiffs next make the throwaway assertion that their "theory of harm is, in part, premised on omissions" and suggest in passing that it is sufficient for an FAL claim if they "believed[] that Defendant would not share their personally identifiable information." Opp. at 23. But plaintiffs cite no authority to support the notion that a plaintiff's mere belief obviates the need for reliance, and such a rule would, of course, entirely eviscerate the reliance requirement of Proposition 64. A claim under the False Advertising Law requires reliance on *false advertising*. *See Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005) (plaintiffs asserting an FAL claim after Proposition 64 must "allege they actually relied on false or misleading advertisements"); Mot. at 19-20 (citing cases).

LinkedIn's Motion also explained that a FAL claim that, as here, is premised on knowing deception must meet the specificity requirements of Rule 9(b), and that this pleading did not. Mot. at 20 n.12. Plaintiffs' Opposition does not address Rule 9(b) at all, thereby conceding the issue and independently requiring dismissal of the FAL claim.

For all these reasons, the FAL claim fails as a matter of law and must be dismissed.

2. Plaintiffs Have Not Alleged Cognizable Contract Damages.

The breach of contract claim requires—but lacks—cognizable contract damages. *See* Mot. at 22-23. Plaintiffs do not address this defect except to assert in passing that "their personal information is valuable property" that they "exchange[d] for LinkedIn's services," that LinkedIn "breached the contract," and that plaintiffs therefore are "entitled to contractual damages." Opp. at 23. But the only courts to have considered this argument have rejected it because "[p]laintiffs . . . had no reason to expect that they would be compensated for the 'value' of their personal information." *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 326-27 (E.D.N.Y. 2005); *see Dyer v. Nw. Airlines Corp.*, 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004). This makes perfect sense, because the damages claimed by plaintiffs do not correspond to any benefit of the bargain theory cognizable under contract law. *See* Mot. at 22-23.

3. Plaintiffs' Conversion Claim Must Be Dismissed.

As set out in LinkedIn's Motion, the conversion claim fails because the "property" at issue is not tangible, is not "merged with, or reflected in, something tangible," and cannot be

exclusively possessed. *See* Mot. at 23 (citing cases). The Opposition insists that the requisite property interest for a conversion claim has been satisfied (*see* Opp. at 24-25), but ignores the substantial body of authority from this Court and within this District holding that "a plaintiff's 'personal information' does not constitute money or property." *In re iPhone Application Litig.*, 2011 WL 4403963, at *14; *see In re Facebook Privacy Litig.*, 791 F. Supp. 2d at 714-15; *Ruiz*, 540 F. Supp. 2d at 1127. Because personal information does not constitute money or property or anything else tangible and, by extension, is not capable of exclusive possession, the purported disclosure of this data cannot support a conversion claim.[13]

Additionally, plaintiffs do not even attempt to contend that the resulting damages required to state a conversion claim have been properly alleged. *See* Mot. at 24. Nor could plaintiffs so contend, as the Amended Complaint does not remedy the fatal deficiencies the Court previously identified. *See Low* at *7 ("Low has failed to allege how he 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.'") (citation omitted).

4. Plaintiff's Negligence Claim Fails As A Matter of Law.

The negligence claim must be dismissed because, as detailed in LinkedIn's Motion, plaintiffs' have not alleged "(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 original); Mot. at 24-25. As to existence of a legal duty, plaintiffs contend that "the common law creates a duty

---

[13] Inexplicably, plaintiffs repeatedly cite an invasion of privacy decision for the proposition that their "informational privacy interest" somehow equates to a "property interest" that can be exclusively possessed. *See* Opp. at 24-25 (citing *Hill*, 7 Cal. 4th at 35). This is nonsensical. A privacy claim, where properly pled, asserts that the defendant's distribution of information has caused the plaintiff reputational harm and embarrassment *because other people know that information*. This is not the same as a conversion claim, which is predicated on the notion that the defendant's possession of tangible property belonging to the plaintiff harms the plaintiff *because the plaintiff can no longer possess and use the property*. There is, of course, no allegation here that the plaintiffs have been prevented from doing anything with their personal information as a result of LinkedIn's alleged conduct. The essence of conversion is absent.

for private parties to protect others' private information in an objectively reasonable manner." Opp. at 25 & n.21. But the only case cited to support this remarkable statement says nothing about a *negligence* claim (that word does not even appear in the opinion); instead, it concerns a common law invasion of privacy claim. *See Hill v. NCAA*, 7 Cal. 4th 1 (1994). This court has already rejected plaintiffs' implicit notion that every privacy claim gives rise to a negligence claim. *See iPhone Application Litig.*, 2011 WL 4403963, at *9. With no independent legal duty, the negligence claim fails.[14]

The Amended Complaint also does not allege breach, because 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 in the form of a "appreciable, non-speculative, present injury." *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 iPhone Application Litig.*, 2011 WL 4403963, at *9; *see also* pp. 2-5 *supra*. For these reasons as well, the negligence claim must be dismissed.[15]

III. CONCLUSION

The Amended Complaint should be dismissed with prejudice. Because the Court has already given an opportunity to amend, and also because the amended pleading did not address the deficiencies identified in the Court's November 11 Order, no further leave to amend should be granted. *See Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

DATED: February 17, 2012

COVINGTON & BURLING LLP

By: /s/
Simon J. Frankel
Attorneys for Defendant
LINKEDIN CORPORATION

[14] The Opposition does not dispute that, as set out in the Motion, the privacy policy of LinkedIn cannot support the negligence claim. *See* Mot. at 24; *Applied Equip. Corp. v. Litton Saudi Arabia, Ltd.*, 7 Cal. 4th 503, 514-15 (1994); *In re iPhone App. Litig.*, 2011 WL 4403963, at *9.

[15] The Opposition concedes that the Seventh Cause of Action, for "unjust enrichment," cannot survive as an independent cause of action. *See* Opp at 2 n.2. So that claim must be dismissed.