EXHIBIT D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 11-2808-BLS1

DEBRA L. MARQUIS

v.

GOOGLE INC.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT GOOGLE INC.'S MOTION TO DISMISS

This action arises from the alleged monitoring of emails by defendant Google Inc. ("Google") in order to sell advertisements based on keywords that appear in those emails. Google operates Gmail, which is an electronic communications or email service. The plaintiff, Debra L. Marquis, represents a putative class of Massachusetts residents who have non-Gmail email accounts, but who exchange emails with Gmail users. Marquis alleges that Google's monitoring of emails sent from non-Gmail email accounts violates the Massachusetts wiretap statute, G.L. c. 272, § 99.

Google has now moved to dismiss this action on the grounds that the wiretap statute does not apply to email communications or to its conduct. For the reasons discussed below, Google's motion to dismiss is denied.

BACKGROUND

The court takes as true all well-pled factual allegation set forth in Marquis's Complaint, see *Marshall* v. *Stratus Pharms., Inc.*, 51 Mass. App. Ct. 667, 670-71 (2001). Marquis is a Massachusetts resident who has a non-Gmail email account.

Compl. ¶ 3. Google is a Delaware corporation with its principal place of business in California. Compl. ¶ 4. It operates Gmail, which is an electronic communication service that is free to its users. Compl. ¶¶ 6-8. While Google does not charge Gmail account holders for using its service, Google generates revenue through advertisements that it presents to Gmail users. Compl. ¶ 8. Google intercepts and scans emails sent from non-Gmail users, such as Marquis, in order to find keywords or content in the emails that will enable it to target advertisements specifically at Gmail users. Compl. ¶ 9. Once targeting individual emails, Google now focuses on numerous emails to find keywords. Compl. ¶ 11. This system is known as "interest-based advertising." Compl. ¶ 11.

Marquis has an America-On-Line ("AOL") email account that she has used since the late 1990s. Compl. ¶ 13. While she routinely exchanged emails with Gmail users, Marquis did not consent to Google's secret interception, disclosure, or scanning of her emails. Compl. ¶¶ 12, 14. Marquis seeks to represent a class of Massachusetts residents who have non-Gmail email accounts and who exchange emails with Gmail users, and who have their emails intercepted and/or scanned without their consent. Compl. ¶ 15.

Marquis alleges that Google's conduct violates the Massachusetts Wiretap statute, G.L. c. 272, § 99. The statute "was enacted to give due protection to the privacy of individuals by barring the secret use of electronic surveillance devices for

eavesdropping purpose . . . ." *Dillon* v. *Massachusetts Bay Transp. Auth.*, 49 Mass. App. Ct. 309, 310 (2000). It prohibits any person from intercepting or attempting to intercept "any wire or oral communication." G. L. c. 272, § 99(C)(1). A wire communication is defined as "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception." *Id.* at § 99(B)(1). An intercepting device does not include "any telephone or telegraph instrument, equipment facility, or a component thereof . . . being used by a communications common carrier in the ordinary course of business." *Id.* at § 99(B)(3).

Google has now moved to dismiss the Complaint. First, it contends that the Massachusetts wiretap statute does not apply to electronic communications, and if it does, then it is preempted by the federal wiretap statute. Second, it argues that Marquis was aware that Google intercepted and scanned her emails, and the statute requires that the interception be done secretly. Third, Google's alleged interception occurred in the ordinary course of business and is therefore exempted from the statute.

DISCUSSION

In order to withstand a motion to dismiss, a plaintiff's complaint must contain "allegations plausibly suggesting (not merely consistent with) an entitlement to relief,

in order to reflect [a] threshold requirement . . . that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1966 (2007) (internal quotations omitted). While a complaint need not set forth detailed factual allegations, the plaintiff is required to present more than labels and conclusions, and must raise a right to relief "above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* See also *Harvard Crimson, Inc.* v. *President & Fellows of Harvard Coll.*, 445 Mass. 745, 749 (2006). The court will examine the Complaint under this standard.

Google's first argument is that the Massachusetts wiretap statute does not include a prohibition against monitoring emails. In essence, it contents that had the Legislature desired to include such electronic communications in the statute, then it would have done so expressly.[1] The Massachusetts wiretap statute was originally intended to mirror its federal counterpart. See *O'Sullivan* v. *NYNEX Corp.*, 426 Mass. 261, 264 (n.5) (1997). In 1986, the federal statute was "recognized to be hopelessly out of date," and it was amended by the Electronic Communications Privacy Act ("ECPA") in order to cover "electronic communication," which encompasses email. *Dillon*, 49 Mass. App. Ct. at 314-15 (citations omitted); 18

---

[1] Google presents G.L. c. 276, § 1B, which expressly defines "electronic communication services" and "remote computing services,"as one such example. In contrast, the Massachusetts wiretap statute does not define these terms.

U.S.C. § 2510(12). The Massachusetts Legislature did not provide for a similar amendment. However, "the fact that there has been no amendment of the Massachusetts statute comparable to the Congressional action of 1986 does not bar us from reading [an exception] so as to preserve it in its intrinsic intended scope and maintain its viability in the broad run of cases." *Dillon*, 49 Mass. App. Ct. at 315.

This court declines to accept Google's contention that the Massachusetts wiretap statute does not prohibit the secret interception of emails. First, the statute's definition of "wire communications" is sufficiently broad to include electronic communications, as it includes "the aid of wire, cable, or *other like connection* between the point of origin and the point of reception." G.L. c. 272, § 99(B)(1) (emphasis supplied). Permitting the interception of private emails, while prohibiting the same conduct for oral telephone conversations, is an inconsistency that contravenes the purpose of the statute. Second, a Massachusetts court has recently held that the Massachusetts wiretap statute cover email, and the court finds its reasoning persuasive. See *Rich* v. *Rich*, 2011 WL 3672059, *5 (Mass. Super. July 8, 2011) (McGuire, J.).

At this stage of the litigation, the court must accept the factual allegations of the Complaint. Marquis alleges that Google intercepts and scans private emails that she sends from her AOL account to Gmail account users, and that she did not consent to Google's interception. Compl. ¶¶ 9, 13-14. This alleged conduct violates

the Massachusetts wiretap statute.

Google's second argument is that federal law preempts the Massachusetts wiretap statute. Federal law may preempt state law "when it explicitly or by implication defines such an intent, or when a State statute actually conflicts with Federal law or stands as an obstacle to the accomplishment of Federal objectives. Whether a Federal statute preempts State law is ultimately a question of Congress's intent." *City of Boston* v. *Commonwealth Employment Relations Bd.*, 453 Mass. 389, 396 (2009) (internal citations omitted). A court should be hesitant to find preemption, as "[u]nless Congress's intent to do so is clearly manifested, a court does not presume that Congress intended to displace State law on a particular subject. . . ." *Id.*

Prior to the 1986 amendments to the federal wiretap statute, the Supreme Judicial Court determined that the federal statute did not preempt the Massachusetts wiretap statute. See *Commonwealth* v. *Vitello*, 367 Mass. 224, 249-53 (1975). Google maintains that the ECPA's comprehensive regulatory scheme indicates Congress's intent to occupy the field. However, this is insufficient to warrant a finding that the federal wiretap statute preempts the Massachusetts wiretap statute. The ECPA does not contain language expressly, or by implication, preempting state law. See 18 U.S.C. §§ 2510-2522. In addition, the ECPA does not occupy the entire field of interception of electronic surveillance, as Google contends. As long as the Massachusetts wiretap statute does not conflict with the federal wiretap statute, then

it is a valid law under principles of federalism. *Vitello*, 367 Mass at 247 ("[A] State statute may adopt standards more stringent than the requirements of Federal law."). As Google itself notes, the federal wiretap statute prohibits the secret interception of electronic communications, just like the Massachusetts wiretap statute, see *supra*. In the absence of manifest Congressional intent to preempt state law, the ECPA does not preempt the Massachusetts wiretap statute.

Google's next contention is that while the Massachusetts wiretap statute prohibits "secret" interceptions, its advertisement policy is publicly disclosed and transparent. As a result, Google argues that its conduct does not violate the Massachusetts wiretap statute. Under the statute, an interception "means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication. . . ." G.L. c. 272, § 99(B)(4). Marquis alleges that Google "secretly" intercepts her electronic communications with Gmail users. Compl. ¶¶ 14, 27. To rebut that allegation, Google has submitted an affidavit that includes Google's Terms of Service and Privacy Center screen. See Burhans Affidavit at Tabs 1 and 2. These documents illustrate that Google's "interest-based advertising" is fully disclosed.

The Burhans Affidavit does not rebut the Complaint's allegations. First, Google's attempt to introduce documents outside the pleadings is improper at the

motion to dismiss stage.[2] Second, the court accepts as true Marquis's allegation that Google secretly intercepted her electronic communications with Gmail users. Additionally, Marquis is entitled to the reasonable inference that she, as an AOL account holder, would not be privy to or have notice of Google's Terms of Use and Privacy Center policy for Gmail users. The Complaint alleges sufficient facts that Google secretly intercepted electronic communications between non-Gmail users and Gmail users.

Google's final argument is that it is exempt from liability because it is a communications common carrier, and that it conducted the alleged interceptions "in the ordinary course of its business." G.L. c. 272, § 99(B)(3). In support of this contention, Google presents two cases that involve employers who secretly intercepted communications between their employees and third-parties. Google's reliance on these cases is misplaced, as it does not have an employer-employee relationship with Gmail users. While Gmail is a free service, Google generates revenue through selling advertising. Compl. ¶ 8. It intercepts and scans emails sent to Gmail users by non-Gmail users such as Marquis in order to find keywords so that

---

[2] "In evaluating a rule 12(b)(6) motion, we take into consideration the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000) (quotation omitted). Google's Terms of Use and Privacy Center policy, external to the Complaint, are not appropriate for consideration at this stage.

it can target Gmail users with relevant advertisements. Compl. ¶¶ 9, 11. At this preliminary stage, the court cannot conclude as a matter of law that intercepting and scanning emails for purposes of "interest-based advertising" is "in the ordinary course of [Google's] business" under the Massachusetts wiretap statute.

ORDER

For the foregoing reasons, Defendant Google Inc.'s Motion to Dismiss is DENIED.

Peter M. Lauriat
Justice of the Superior Court

Dated: January 17, 2012