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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA

19
20 DANIEL MATERA, as an individual, and
on behalf of other persons similarly
21 situated,

22 Plaintiff,

23 v.

24 GOOGLE, INC.,

25 Defendant.

Case No. 5:15-cv-04062 LHK

**PLAINTIFF’S RESPONSE TO
DEFENDANT’S SUPPLEMENTAL BRIEF
REGARDING SPOKEO, INC. V. ROBINS**

Date: June 27, 2016
Time: 1:30 p.m.
Courtroom: 8 - 4th Floor
280 S. First Street
San Jose, CA 95113
Judge: The Hon. Lucy H. Koh

ARGUMENT

1
2 Google fundamentally misstates the holding in *Spokeo Inc., v. Robins*, 136 S. Ct. 1540
3 (2016), incorrectly asserting that *Spokeo* requires Plaintiff to allege wrongful conduct
4 “implicat[ing] ‘a legally protected interest that is concrete and particularized’ *independently* of
5 the alleged statutory violations.” (Def. Suppl. Br. at 1) (quoting in part *Spokeo*, 136 S. Ct. at
6 1543) (emphasis in original). Nowhere in the opinion does the Supreme Court state that an injury
7 must be “independent” of a statutory violation. On the contrary, *Spokeo* makes plain that when
8 the legislature enacts a statute to protect against an intangible harm, or when the injury at issue
9 bears a “close relationship” to a right recognized by the common law, violations of that statute
10 cause injuries sufficiently “concrete” to confer Article III standing. 136 S. Ct. at 1549.

11 Google attempts to recast its illegal and unauthorized interception, scanning, analyzing
12 and cataloging of the content of Plaintiff’s and Class Members’ emails as being mere “automated
13 processing.” In fact, Google’s intentional intrusion into Plaintiff’s and Class Members’ private
14 communications, without their consent, is the *core* injury that ECPA and CIPA were enacted to
15 prevent. This now-codified injury also bears more than a “close relationship” to historically-
16 rooted common law guarantees of privacy in one’s communications; indeed, courts recognized
17 common-law causes of action for such privacy intrusions long before ECPA and CIPA were
18 enacted. Thus, Plaintiff’s injury is “concrete” and he has Article III standing.

I. In Enacting ECPA and CIPA, Congress and the California Legislature Specifically Sought to Prevent the Interception of Private Communications.

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20
21 *Spokeo* resolves all doubt that statutory violations—without more—may form the basis of
22 a concrete injury. *Id.* (Congress may “‘elevat[e] to the status of legally cognizable injuries
23 concrete, *de facto* injuries that were previously inadequate in law.’”) (quoting *Lujan v. Defs. of*
24 *Wildlife*, 504 U.S. 555, 578 (1992)). When, as here, a plaintiff has alleged the precise injury that
25 Congress sought to remedy in enacting the statute at issue, a plaintiff “need not allege any
26 *additional* harm beyond the one Congress has identified.” *Id.* (emphasis original).

27 As discussed at greater length in Plaintiff’s Supplemental Brief (Dkt. No. 41), the
28 legislative intent behind ECPA was to provide electronic communications the same long-

1 recognized protections afforded to private letters and telephone calls. S. REP. NO. 99-541, 5,
2 reprinted in 1986 U.S.C.C.A.N. 3555, 3559 (Oct. 17, 1986). Specifically, Congress sought to
3 establish “a high level of protection *against unauthorized opening*” for “communications
4 transmitted by new noncommon carrier communications services [and] new forms of
5 telecommunications and computer technology.” *Id.* (emphasis added). Similarly, CIPA was
6 enacted to guard against “advances in science and technology [that] have led to the development
7 of new devices and techniques for the purpose of eavesdropping upon private communications.”
8 Cal. Pen. Code § 630. The California legislature further clarified that “the invasion of privacy
9 resulting from the continual and increasing use of such devices and techniques has created a
10 serious threat to the free exercise of personal liberties and cannot be tolerated in a free and
11 civilized society.” *Id.*

12 Google argues that “Congress did not intend automated processing of emails to constitute
13 a *per se* concrete injury.” (Def. Suppl. Br. at 7). Plaintiff does not challenge “all automated
14 processing of email”¹ but instead challenges a distinct act: Google’s interception of private emails
15 for purposes of acquiring the substance, meaning, or purport of those communications for its own
16 commercial use. This act not only amounts to a violation of ECPA and CIPA, it also causes the
17 *precise* harm that these statutes seek to prevent. Where a party such as Google takes advantage of
18 cutting-edge technology to systematically intercept the emails of private citizens, for purposes of
19 learning the content of those communications and without the authorization of the parties, a
20 concrete injury is established. To accept Google’s position that its alleged unauthorized
21 interception and scanning of private email content is *not* a concrete injury under ECPA or CIPA,
22 this Court would need to find that such privacy intrusions were not the harm that Congress or the
23 California Legislature intended to protect against in enacting those statutes. But Google doesn’t
24 offer, and cannot offer, any alternative harm that ECPA or CIPA were meant to prevent. Because
25 Google’s acts in intercepting and analyzing Plaintiff’s private emails amount to the very privacy

26 ¹ By recasting Plaintiffs’ allegations that Google scans, analyzes, and catalogs non-Gmail users’
27 email content as a challenge to *all* “automated processing” of emails (including creating stored
28 copies of emails for later retrieval by the sender or recipient, or spam filtering), Google appears to
improperly re-litigate the “ordinary course of business” defense that has already been addressed
in Google’s Motion to Dismiss and Plaintiff’s corresponding Opposition.

1 intrusion Congress and the California Legislature intended to prevent, Plaintiff alleges a concrete
2 injury.

3 **II. The Injury Remedied by ECPA and CIPA Bears a “Close Relationship” to**
4 **Historically Recognized Torts.**

5 Google’s position that its interception and cataloging of private email communications
6 bears “no ‘relationship’ to any ‘harm that has traditionally been regarded as providing a basis for
7 a lawsuit’” is equally flawed. *See* Def. Suppl. Br. at 7 (quoting in part *Spokeo*, 136 S. Ct. at 1549).
8 In support, Google relies on this Court’s analysis of a claim brought under the California
9 Constitution by the plaintiffs in *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016 (N.D. Cal. 2014). In
10 doing so, Google again misconstrues *Spokeo*. To show that a statutory violation amounts to a
11 concrete harm, a plaintiff need not show that all of the elements of a claim previously recognized
12 in the common law are met. Instead, a plaintiff need only show that the harm the statute was
13 meant to prevent “has a close relationship” to a harm recognized at common law. *Spokeo*, 136 S.
14 Ct. at 1549. Although the elements of the claims may differ, it cannot be denied that there is a
15 “close relationship” between the harm addressed in ECPA and CIPA—the interception of emails
16 without consent—and the “legally protected privacy interest or reasonable expectation of privacy
17 in any confidential and sensitive content within emails” recognized by the California
18 Constitution. *Yahoo*, 7 F. Supp. 3d at 1040.²

19 Indeed, requiring ECPA or CIPA—or any statute conferring legal rights, for that matter—
20 to contain the exact same elements of existing torts is entirely inconsistent with *Spokeo*’s holding
21 that legislatures can “‘elevat[e] to the status of legally cognizable injuries concrete, *de facto*

22 _____
23 ² The same is true for the harms recognized by common law torts protecting against third-party
24 interception and reading of letters and emails. *See, e.g., Vernars v. Young*, 539 F.2d 966, 968-69
25 (3d Cir. 1976) (properly pled common law privacy claim premised on unauthorized opening of
26 private letters); *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973) (recognizing a common
27 law right of privacy cause of action based on illegal wiretap of plaintiff’s residence); *Fischer v.*
28 *Mt. Olive Lutheran Church, Inc.*, 207 F. Supp. 2d 914, 927 (W.D. Wis. 2002) (denying summary
judgment motion on statutorily-codified intrusion-upon-seclusion claim, premised on
unauthorized access of personal email account); *Steinbach v. Vill. of Forest Park*, No. 06 C 4215,
2009 WL 2605283, at *4-5 (N.D. Ill. Aug. 25, 2009) (cognizable intrusion upon seclusion claim
based on unauthorized reading and forwarding emails of plaintiff’s emails). *See also Shulman v.*
Grp. W Prods., Inc., 18 Cal. 4th 200, 230-31 (1998) (recognizing “invasion of privacy” torts that
make “unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or
photographic spying” actionable because such intrusions are an “affront to individual dignity”).

1 injuries that were previously inadequate in law.” 136 S. Ct. at 1549. (quotation omitted). In
 2 Google’s alternate universe, a legislature would be confined to enacting codifications of existing
 3 common law claims, with no variance in the elements of or how to prove such claims. This would
 4 render legislatures useless in making law.

5 **III. Google’s Authorities are Inapposite.**

6 As addressed in greater detail in Plaintiff’s Supplemental Brief, Google’s authorities are
 7 inapposite. Those cases addressed either whether those plaintiffs had pled particular injuries, such
 8 as economic harm, required by the claims alleged, or whether those plaintiffs had met other
 9 Article III requirements not at issue here, such as the “actual and imminent” harm requirement.³

10 In fact, the cases upon which Google relies actually *support* Plaintiff’s position that
 11 violations of statutes such as ECPA or CIPA, in and of themselves, amount to “concrete” harm.
 12 *See, e.g., In re Facebook Internet Tracking Litig.*, No. 5:12-md-02314-EJD, 2015 U.S. Dist.
 13 LEXIS 145142, at *37 (N.D. Cal. Oct. 23, 2015) (holding that, even without a showing of
 14 economic harm, “[p]laintiffs have established statutory standing for claims under the Wiretap
 15 Act, SCA and CIPA.”); *Burton v. Time Warner Cable Inc.*, No. CV 12-06764 JGB (AJWx), 2013
 16 U.S. Dist. LEXIS 94310, at *18-19 (C.D. Cal. Mar. 20, 2013) (“[T]he Article III requirement that
 17 the injury be ‘concrete’ can exist solely by virtue of statutes creating legal rights.”) (citations

18 ³ *See, e.g., In re iPhone Application Litig.*, No. 11-md-2250-LHK, 2011 U.S. Dist. LEXIS
 19 106865, at *17 (N.D. Cal. Sept. 20, 2011) (Koh, J.) (addressing a claim under the Computer
 20 Fraud and Abuse Act, 18 U.S.C. § 1030 (“CFAA”), which requires a showing of economic loss);
 21 *In re Google Privacy Policy Litig.*, No. C 12-01382 PSG, 2012 U.S. Dist. LEXIS 183041, at *14-
 22 15 (N.D. Cal. Dec. 28, 2012) (same, regarding California’s Unfair Competition Law, Cal. Bus. &
 23 Prof. Code § 17200 (“UCL”)); *LaCourt v. Specific Media, Inc.*, No. SACV 10-1256-GW (JCGx),
 24 2011 U.S. Dist. LEXIS 50543, at *12 (C.D. Cal. Apr. 28, 2011) (same, regarding the UCL and
 25 the CFAA); *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 846-47 (N.D. Cal. 2012) (the plaintiff
 26 failed to allege a “particularized” or “actual or imminent” injury, in that she failed to allege which
 27 Apple devices she used and which tracked her information); *In re JetBlue Airways Corp. Privacy*
 28 *Litig.*, 379 F. Supp. 2d 299, 326-27 (E.D.N.Y. 2005) (not addressing Article III standing, but
 instead finding that actual injury is required to show trespass to an intangible property right
 arising under contract); *Low v. LinkedIn Corp.*, No. 11-CV-01468-LHK, 2011 U.S. Dist. LEXIS
 130840, at *9 (N.D. Cal. Nov. 11, 2011) (finding plaintiff’s unique theories of harm, such as
 “emotional” harm, to be too abstract, conjectural, and hypothetical for the purposes of Article III
 standing). Google’s reliance on *Murray v. Time Inc.*, No. C 12-00431 JSW, 2012 U.S. Dist.
 LEXIS 120150, at *17 (N.D. Cal. Aug. 24, 2012) is also misplaced, because the plaintiff there
 alleged only a mere procedural violation of California’s “Shine the Light” law—that the
 defendant failed to provide him with its contact information—which had not necessarily resulted
 in the harm the statute was meant to protect against, because the plaintiff failed to allege that he
 would have requested from defendant the information he was entitled to under the law.

1 omitted). In sum, Google’s authorities do not undermine, and in fact support, Plaintiff’s position
2 that Google’s violations of ECPA and CIPA—through its intercepting, analyzing, and cataloging
3 Plaintiff’s private emails—constitute concrete harm.

4 **CONCLUSION**

5 Google’s violations of ECPA and CIPA caused the core injuries that Congress and the
6 California Legislature sought to remedy. These injuries have long been recognized in the
7 common law as the types of intangible harms that create a cognizable legal claim. *Spokeo* thus
8 makes clear that by pleading violations of these statutes, Plaintiff has Article III standing.

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Dated: June 13, 2016

Respectfully Submitted,

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