Bobbie J. Wilson, Bar No. 148317
BWilson@perkinscoie.com
Sunita Bali, Bar No. 274108
SBali@perkinscoie.com
PERKINS COIE LLP
505 Howard Street, Suite 1000
San Francisco, California 94105
Telephone: +1.415.344.7000
Facsimile: +1.415.344.7050

Susan D. Fahringer, Bar No. 162978
SFahringer@perkinscoie.com
Lauren J. Tsuji, Bar No. 300155
LTsuji@perkinscoie.com
Anna Mouw Thompson (*pro hac vice*)
AnnaThompson@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101-3099
Telephone: +1.206.359.8000
Facsimile: +1.206.359.9000

Attorneys for Defendant
GOOGLE LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

STEVEN VANCE and TIM JANECYK, for themselves and others similarly situated, Plaintiff v. GOOGLE LLC, a Delaware limited liability company, Defendant.	Case No. 5:20-cv-04696-BLF DEFENDANT GOOGLE LLC'S MOTION TO DISMISS COMPLAINT Date: February 15, 2024 Time: 9:00am Location: Courtroom 3 – 5th Floor Judge: Hon. Beth Labson Freeman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

INTRODUCTION 2
STATEMENT OF ISSUES TO BE DECIDED 3
REQUEST FOR JUDICIAL NOTICE 3
BACKGROUND 4
A. The Illinois Biometric Information Privacy Act 4
B. Summary of Plaintiffs' Allegations 5
C. Procedural History 6
LEGAL STANDARD 7
ARGUMENT 7
I. Plaintiffs' BIPA claims should be dismissed because they attempt to apply BIPA extraterritorially. 7
II. Plaintiffs' claim under BIPA Section 15(c) fails because they do not allege that Google exchanged their Biometric Data for a financial benefit. 11
III. Plaintiffs' unjust enrichment claim fails because it does not identify applicable law and it is duplicative of their BIPA claims. 13
IV. Plaintiffs' claim for injunctive relief should be dismissed because injunctive relief is a remedy, not a cause of action. 15
V. Dismissal should be with prejudice. 15
CONCLUSION 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 13

Avery v. State Farm Mut. Auto. Ins. Co.,
835 N.E.2d 801 (Ill. 2005) 2, 7, 9

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 7, 13

Castellanos v. Countrywide Bank NA,
No. 15-cv-00896, 2015 WL 3988862 (N.D. Cal. June 30, 2015) 15

Cleary v. Philip Morris Inc.,
656 F.3d 511 (7th Cir. 2011) 14

Cloudera, Inc. v. Databricks, Inc.,
No. 21-CV-01217, 2021 WL 3856697 (N.D. Cal. Aug. 30, 2021) 7

Dougherty v. City of Covina,
654 F.3d 892 (9th Cir. 2011) 7

Dumas v. Kipp,
90 F.3d 386 (9th Cir. 1996) 16

Franklin v. Gwinnett Cnty. Pub. Schs.,
503 U.S. 60 (1992) 15

Gardner v. Martino,
563 F.3d 981 (9th Cir. 2009) 16

Guinn v. Hoskins Chevrolet,
836 N.E.2d 681 (Ill. App. Ct. 2005) 15

Gutierrez v. Wemagine.AI LLP,
No. 21 C 5702, 2022 WL 252704 (N.D. Ill. Jan. 26, 2022) 9

Hogan v. Amazon.com, Inc.,
No. 21 C 3169, 2022 WL 952763 (N.D. Ill. Mar. 30, 2022) 14, 15

In re Samsung Galaxy Smartphone Mktg. & Sales Pracs. Litig.,
No. 16-cv-06391, 2018 WL 1576457 (N.D. Cal. Mar. 30, 2018) 13

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) 9

L'Garde, Inc. v. Raytheon Space & Airborne Sys.,
805 F. Supp. 2d 932 (C.D. Cal. 2011) 4

McGoveran v. Amazon Web Servs., Inc.,
C.A. No. 20-1399, 2021 WL 4502089 (D. Del. Sept. 30, 2021) 7, 8, 9

Pooh-Bah Enters., Inc. v. County of Cook,
905 N.E.2d 781 (Ill. 2009) 12

Redd v. Amazon Web Services, Inc.,
No. 22 C 6779, 2023 WL 3505264 (N.D. Ill. May 17, 2023)..10

Reyn's Pasta Bella, LLC v. Visa USA, Inc.,
442 F.3d 741 (9th Cir. 2006)...4

Rivera v. Google Inc.,
238 F. Supp. 3d 1088 (N.D. Ill. 2017) 2, 7, 10, 12

Shaw v. Hyatt Int'l Corp.,
No. 05 C 5022, 2005 WL 3088438 (N.D. Ill. Nov. 15, 2005) 10

Sprewell v. Golden State Warriors,
266 F.3d 979 (9th Cir. 2001)...7

Stein v. Clarifai, Inc.,
526 F. Supp. 3d 339 (N.D. Ill. 2021) 10

Vance v. Amazon.com Inc.,
534 F. Supp. 3d 1314 (W.D. Wash. 2021)..12, 13, 14

Vance v. Amazon.com Inc. ("Amazon I"),
525 F. Supp. 3d 1301 (W.D. Wash. 2021)..3, 6, 15

Vance v. Amazon.com, Inc. ("Amazon III"),
No. C20-1084, 2022 WL 12306231 (W.D. Wash. Oct. 17, 2022) .... passim

Vance v. Int'l Bus. Machs. Corp.,
No. 20-cv-00577, 2020 WL 5530134 (N.D. Ill. Sept. 15, 2020) 10

Vance v. Microsoft Corp. ("Microsoft I"),
525 F. Supp. 3d 1287 (W.D. Wash. 2021)..3, 6, 15

Vance v. Microsoft Corp. ("Microsoft II"),
534 F. Supp. 3d 1301 (W.D. Wash. 2021)... passim

Vance v. Microsoft Corp. ("Microsoft III"),
No. C20-1082, 2022 WL 9983979 (W.D. Wash. Oct. 17, 2022) .... passim

Vanzant v. Hill's Pet Nutrition, Inc.,
934 F.3d 730 (7th Cir. 2019)....................14

STATUTES

740 ILCS 14/5....................4, 11

740 ILCS 14/15.................... passim

RULES

Federal Rule of Civil Procedure 9....................14

Federal Rule of Civil Procedure 12.................... passim

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 15, 2024 at 9:00 a.m. or as soon thereafter as this Motion may be heard in the above-entitled court, located at 280 South First Street, San Jose, California, in Courtroom 3 - 5th Floor, defendant Google LLC ("Google"), by and through its counsel of record, will and hereby does, move the Court for an order dismissing Plaintiffs' Class Action Complaint, Dkt. 1, with prejudice for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities herein, the Declaration of Sunita Bali in Support of Defendant Google LLC's Motion to Dismiss Complaint, the pleadings and papers on file in this action and all related cases, any argument and evidence to be presented at the hearing on this Motion, and any other matters that may properly come before the Court.

INTRODUCTION

Plaintiffs are Illinois residents who allegedly uploaded photographs of their faces to the "Flickr" photo-sharing website. Flickr allegedly included these photos in a set of 100 million photos that it made available to third parties so they could improve the accuracy and reliability of facial recognition technology. Compl. ¶ 31. One such third party, IBM, allegedly extracted facial landmarks from these 100 million photos to create the Diversity in Faces Dataset ("DiF Dataset"). *Id.* ¶¶ 29, 42. IBM then allegedly made *that* dataset available to third parties, including Google, for research purposes.

Based on these facts, Plaintiffs have filed suit against *Google* for alleged violations of the Illinois Biometric Information Privacy Act ("BIPA")—an Illinois law that doesn't apply beyond the confines of Illinois—on the theory that Google should not have downloaded the DiF Dataset from IBM without first obtaining written consent from Plaintiffs, with whom Google has no direct relationship. They also claim that Google violated BIPA by allegedly using the DiF Dataset to improve its products.

Plaintiffs should not be permitted to manufacture BIPA claims against Google where none exist. Plaintiffs' claims should be dismissed with prejudice for several reasons.

First, BIPA is an Illinois statute that applies to conduct occurring "primarily and substantially" in Illinois. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 853–54 (Ill. 2005). Plaintiffs have not identified *any* relevant conduct by Google taking place in Illinois. Their Complaint thus makes clear that Plaintiffs seek to unlawfully apply BIPA outside the boundaries of Illinois. Indeed, Plaintiffs' nearly identical cases against Amazon and Microsoft were dismissed on summary judgment for this exact reason. *See Vance v. Amazon.com, Inc. ("Amazon III")*, 2022 WL 12306231 (W.D. Wash. Oct. 17, 2022); *Vance v. Microsoft Corp. ("Microsoft III")*, 2022 WL 9983979 (W.D. Wash. Oct. 17, 2022).

Second, Plaintiffs' claim for unlawful "profiting" under BIPA Section 15(c) fails because they do not and cannot allege that Google exchanged Plaintiffs' "biometric identifiers" or "biometric information" under BIPA (collectively, "Biometric Data") for a financial benefit to Google. Plaintiffs' nearly identical claim against Microsoft was dismissed under Rule 12(b)(6) for

this exact reason. *See Vance v. Microsoft Corp. ("Microsoft II")*, 534 F. Supp. 3d 1301 (W.D. Wash. 2021). Separately, even if an exchange of Biometric Data for financial benefit were not required (and it is), Plaintiffs' Section 15(c) claim would still fail because their allegations that Google *actually* improved its facial recognition technology in a profitable way based on their Biometric Data are wholly conclusory.

Finally, Plaintiffs' unjust enrichment claim must be dismissed because Plaintiffs fail to specify the applicable law and because, under Illinois law, it is duplicative of their BIPA claims. And their "claim" for injunctive relief fails because injunctive relief is a remedy and not a cause of action, as Plaintiffs have already conceded. *See Vance v. Microsoft Corp. ("Microsoft I")*, 525 F. Supp. 3d 1287, 1300 (W.D. Wash. 2021) ("Injunctive relief is a remedy, not a cause of action. Plaintiffs do not argue otherwise.") (cleaned up); *Vance v. Amazon.com Inc. ("Amazon I")*, 525 F. Supp. 3d 1301, 1316 (W.D. Wash. 2021) (same).

For these reasons, as further explained below, Google respectfully asks the Court to dismiss Plaintiffs' claims with prejudice.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiffs are seeking to apply BIPA extraterritorially because they have not alleged any conduct by Google that occurred in Illinois.

2. Whether Plaintiffs fail to state a BIPA Section 15(c) claim because they have not alleged any facts showing that Google exchanged their Biometric Data for a financial benefit.

3. Whether Plaintiffs' unjust enrichment claim should be dismissed for failing to specify the applicable law, and whether Plaintiffs fail to state a claim for unjust enrichment under Illinois law because this claim is duplicative of their BIPA claims.

4. Whether Plaintiffs fail to state a claim for injunctive relief because injunctive relief is a remedy, not a cause of action.

REQUEST FOR JUDICIAL NOTICE

Google requests that the Court consider Exhibits A & B to the Declaration of Sunita Bali in Support of its Motion to Dismiss ("Bali Decl."), which represent business entity searches on the California and New York Secretary of State websites showing that both Flickr and IBM

maintain principal offices outside of Illinois (in California and New York, respectively). The Court may take judicial notice of information posted on a state government website because it is "readily verifiable and, therefore, the proper subject of judicial notice." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *L'Garde, Inc. v. Raytheon Space & Airborne Sys.*, 805 F. Supp. 2d 932, 938 (C.D. Cal. 2011) (considering on Motion to Dismiss "Business Entity Detail" search result from Secretary of State website).

BACKGROUND

A. The Illinois Biometric Information Privacy Act

In 2008, the Illinois General Assembly enacted BIPA in response to the growing use of biometric technology in "financial transactions and security screenings" in Illinois. 740 ILCS 14/5(a). BIPA imposes certain requirements for the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." *Id.* § 5(g). BIPA defines "biometric identifier" to mean "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry" and defines "biometric information" to mean "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." *Id.* § 10. For brevity, this brief refers collectively to biometric identifiers and biometric information as "Biometric Data."

As relevant here, Section 15(b) of BIPA provides that a private entity may not "collect, capture, purchase, receive through trade, or otherwise obtain" Biometric Data unless it first obtains a "written release" from the subject or the subject's "legally authorized representative." And Section 15(c) states that a "private entity in possession of" Biometric Data may not "sell, lease, trade, or otherwise profit from a person's" Biometric Data.

BIPA's penalties are harsh. "Any person aggrieved" by a violation of the statute may sue for actual damages or liquidated damages of $1,000 per violation (for negligent violations) or $5,000 per violation (for "intentional[]" or "reckless[]" violations). *Id.* § 20(1), (2). BIPA also provides that prevailing parties may recover "reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses." *Id.* § 20(3). The potential for enormous

statutory damages has inspired a wave of putative class actions in recent years, with over two thousand filed in the last eight years alone.

B. Summary of Plaintiffs' Allegations

Plaintiffs allege that Google obtained a dataset from IBM called the DiF Dataset, which contained their Biometric Data. Compl. ¶ 55. The DiF Dataset was created using a collection of 100 million photographs made publicly available by Flickr. *Id.* ¶¶ 29, 32. Plaintiff Vance alleges that in 2008, he uploaded a photo of himself with two family members to Flickr as well as numerous other photos. *Id.* ¶¶ 59–60. Plaintiff Janecyk also alleges that he has been a Flickr user since 2008, uploading "in excess of a thousand" photographs, including a picture of himself that was uploaded in 2011 from his device in Illinois. *Id.* ¶ 68.

Plaintiffs contend that IBM used the Flickr collection of photographs, including Plaintiffs' photographs, to extract Biometric Data, which it then made available in the DiF Dataset for research use by third parties. *Id.* ¶¶ 40, 44, 50, 62, 70. IBM did so to "improv[e] the ability of facial recognition systems to fairly and accurately identify all individuals," as research had shown that existing facial recognition technology was less accurate in identifying women and individuals with darker skin tones. *Id.* ¶¶ 40, 33–37.

According to Plaintiffs, Google applied for permission from IBM and downloaded the DiF Dataset using a link provided by IBM. *Id.* ¶¶ 48, 49, 56. Plaintiffs further allege that Google then used the DiF Dataset to improve its facial recognition technology, making its products and services that integrate such technology more valuable in the commercial marketplace. *Id.* ¶ 58.

Plaintiffs contend that any company that obtained the DiF Dataset could "identify the Flickr user who uploaded the photograph," view the user's homepage, and view each photograph's metadata, including any available geo-tags relating to where the photograph was taken or uploaded. *Id.* ¶ 51. Plaintiffs further allege upon "information and belief," and without any factual support, that Google associated Biometric Data "with the actual photographs to which the biometric data related." *Id.* ¶ 56.

Plaintiffs assert two claims against Google under BIPA: (1) violation of BIPA Section 15(b), which requires notice and consent prior to collecting a person's Biometric Data,

and (2) violation of Section 15(c), which prohibits a private entity from selling, leasing, trading or otherwise profiting from a person's Biometric Data. *Id.* ¶¶ 92–105. They also allege claims for unjust enrichment and injunctive relief. *Id.* ¶¶ 106–21. Plaintiffs purport to bring these claims on behalf of themselves, as well as a putative class of "[a]ll Illinois residents whose faces appear in the [DiF] Dataset obtained by Defendant Google." *Id.* ¶ 82.

This is not Plaintiffs' first lawsuit based on the DiF Dataset. Notably, Plaintiffs filed a lawsuit against IBM, which was voluntarily dismissed with prejudice on May 12, 2023. *See* Notification of Docket Entry, *Vance v. Int'l Bus. Machs. Corp.* ("*IBM*"), No. 20-cv-00577 (N.D. Ill. May 11, 2023), ECF No. 210. Plaintiffs filed lawsuits nearly identical to this one against Amazon and Microsoft, which have both been dismissed. *See Amazon I*, 525 F. Supp. 3d at 1316 (dismissing injunctive relief claim); *Microsoft I*, 525 F. Supp. 3d at 1300 (same); *Microsoft II*, 534 F. Supp. 3d at 1309 (dismissing Section 15(c) claim); *Amazon III*, 2022 WL 12306231, at *8–9 (granting summary judgment to defendant based on extraterritoriality and failure to show unjust retention of a benefit to Plaintiffs' detriment); *Microsoft III*, 2022 WL 9983979 at *8–9 (same). This case, and Plaintiffs' lawsuit against FaceFirst (both of which were stayed by the respective Courts until recently) are Plaintiffs' only remaining cases. *See* Civil Minutes—General, *Vance v. FaceFirst*, No. 20-cv-06244 (C.D. Cal. July 19, 2023), ECF No. 102 (order lifting stay as of July 21, 2023).

C. Procedural History

Plaintiffs filed their Complaint on July 14, 2020. *See* Dkt. 1. On September 23, 2020, Google filed (1) a motion to stay the case pending the outcome in *Vance v. IBM*, *see* Dkt. 33, and (2) a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), *see* Dkt. 34. The Court granted the first motion and denied the second motion as moot without prejudice to refiling. *See* Dkt. 66. Accordingly, the case was stayed starting on February 12, 2021.

The stay was lifted on August 28, 2023, after *Vance v. IBM* was voluntarily dismissed on May 12. *See* Notification of Docket Entry, 20-cv-00577, ECF No. 210. The Court ordered Google to answer or otherwise plead in response to the Complaint by October 12, 2023, consistent with the parties' agreement. *See* Dkt. 89.

LEGAL STANDARD

To survive a motion under Rule 12(b)(6), a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level" and have "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). "Mere legal conclusions are not entitled to the assumption of truth," and the complaint must contain more than "a formulaic recitation of the elements of a cause of action." *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (cleaned up). Conclusory allegations that are based solely on "information and belief" are insufficient to state a claim. *Cloudera, Inc. v. Databricks, Inc.*, No. 21-CV-01217, 2021 WL 3856697, at *6 (N.D. Cal. Aug. 30, 2021). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Id.*

ARGUMENT

I. Plaintiffs' BIPA claims should be dismissed because they attempt to apply BIPA extraterritorially.

Plaintiffs' BIPA claims fail because they have not alleged, and cannot allege, that Google engaged in *any* conduct in Illinois.

There is no dispute that "BIPA violations must occur in Illinois in order for plaintiffs to obtain any relief." *McGoveran v. Amazon Web Servs., Inc.*, C.A. No. 20-1399, 2021 WL 4502089, at *3 (D. Del. Sept. 30, 2021); *see also Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1100 (N.D. Ill. 2017) ("If the Act cannot apply extraterritorially, then . . . asserted violations of the Act must have taken place in Illinois in order for them to win."). And under Illinois extraterritoriality principles, BIPA violations only occur in Illinois where the relevant circumstances "occur[ed] primarily and substantially in Illinois." *Avery*, 835 N.E.2d at 854. Here, Plaintiffs have not identified *any* conduct by Google in Illinois, much less any misconduct implicating BIPA. They do not allege that Google "applied for and obtained the [DiF] Dataset from IBM" in Illinois. Compl. ¶¶ 55–56. Nor do they allege that Google used the DiF data set in

Illinois, including to "improve its facial recognition products and technologies." Compl. ¶¶ 57–58. The reason for this is obvious: Plaintiffs *cannot* plausibly make such allegations given that the photographs were uploaded to Flickr, which is headquartered in California, and Google, which is also headquartered in California, Compl. ¶ 8, obtained the DiF Dataset via online download link from an intervening third party headquartered in New York (IBM), *see id.* ¶ 49; Bali Decl. Ex. A.

Plaintiffs instead point repeatedly to their own conduct in Illinois or to conduct of third parties to try to show an Illinois connection, but that cannot remedy their extraterritoriality problem. Plaintiffs allege that they are residents of Illinois. Compl. ¶¶ 6–7. But a "plaintiff's residency is not enough to establish an Illinois connection in order to survive a motion to dismiss based on extraterritoriality." *McGoveran*, 2021 WL 4502089, at *4 (collecting cases). Plaintiffs further allege that they each "uploaded [photos] to Flickr from [their] computers in Illinois," Compl. ¶¶ 59, 68, but that is again nothing but unilateral conduct by Plaintiffs in Illinois. Google is also two steps removed from that conduct: (1) it was California-based Flickr, *see* Bali Decl. Ex. B, which Plaintiffs used to upload their photos to the Internet, and which combined Plaintiffs' photos with about 100 million other photos, Compl. ¶ 29; and (2) it was New York-based IBM, *see* Bali Decl. Ex. A, which allegedly created the DiF Dataset and extracted Plaintiffs' Biometric Data in the process, Compl. ¶¶ 29, 42. Such attenuated conduct does nothing to show misconduct by Google occurring primarily and substantially in Illinois.

This is ultimately why Plaintiffs' complaints against Microsoft and Amazon were dismissed at summary judgment (and presumably why Plaintiffs' lawsuit against IBM was voluntarily dismissed after years of contentious litigation). As the Amazon court observed: "the facts upon which Plaintiffs rely show that the only connection this case has to Illinois is through Plaintiffs' residence and actions in Illinois." *Amazon III*, 2022 WL 12306231, at *7. The same is true here, as shown by Plaintiffs' own allegations. "[T]here is no dispute that other entities—rather than [Google]—were responsible for the collection of the photographs, the scanning of the photographs, and the generation of facial measurements or templates." *Microsoft III*, 2022 WL 9983979, at *8 (citing summary judgment briefing describing conduct of Flickr and IBM); 2022 WL 12306231, at *8 (same). Plaintiffs only allege that California-headquartered Google received

and used the dataset, so there can be no doubt that Plaintiffs are seeking to apply BIPA extraterritorially, warranting dismissal under Rule 12(b)(6).

Indeed, as already observed by Judge Robart, "this case is close[] in nature to *McGoveran*," because Plaintiffs' allegations are "nothing more than repeated statements (phrased three different ways) about Plaintiffs' residency." *Microsoft III*, 2022 WL 9983979, at *8; *Amazon III*, 2022 WL 12306231, at *8. In *McGoveran*, the plaintiffs allegedly made phone calls from Illinois; their voices were recorded by third-party Pindrop Security, which was registered in Delaware and based in Georgia; and that third party created and saved voiceprints to AWS's servers. But the *McGoveran* court held that none of these allegations showed any conduct by AWS in Illinois, and the same is true here. Uploading photographs to Flickr in Illinois is unilateral conduct by Plaintiffs, Compl. ¶¶ 59, 68, just as the calls placed from Illinois in *McGoveran*. It was IBM, not Google, that allegedly collected Biometric Data from the Flickr Dataset, Compl. ¶¶ 41–43; just as it was Pindrop Security that allegedly collected voiceprints in *McGoveran*, not AWS. And Plaintiffs do not and cannot plausibly allege that California-headquartered Google used or stored the DiF dataset in Illinois, Compl. ¶ 10; just as the *McGoveran* plaintiffs could not show that AWS did so.

Cases dismissing BIPA claims for lack of specific personal jurisdiction under the federal Constitution further illustrate the extraterritoriality issue here. It is difficult, if not impossible, to pass the *more* exacting extraterritoriality test (demanding conduct taking place "primarily and substantially" in Illinois, *Avery*, 835 N.E.2d at 853) but fail the lesser test for constitutional jurisdiction (demanding only some suit-related activities that were "purposefully directed" at the forum state by the defendant, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); *see also McGoveran*, 2021 WL 4502089, at *5 (recognizing how an earlier dismissal for lack of personal jurisdiction by the Southern District of Illinois "underscores the weak connection between Plaintiffs' allegations and Illinois"). And so, cases dismissing BIPA claims for lack of specific personal jurisdiction further support dismissal based on extraterritoriality here. *See Gutierrez v. Wemagine.AI LLP*, No. 21 C 5702, 2022 WL 252704, at *3 (N.D. Ill. Jan. 26, 2022) (dismissing where the only Illinois contact was the unilateral choice of 5,0000 Illinois users to

sign up for a Canadian company's application with biometric features); *Stein v. Clarifai, Inc.*, 526 F. Supp. 3d 339, 344, 346 (N.D. Ill. 2021) (dismissing where New York-based Clarifai allegedly acquired photographs through a "Chicago-based venture capital fund, and its principals," because the jurisdictional test, like the extraterritoriality test, demands that "contacts with Illinois must come from [the defendant's] suit-related activity in the forum state, not from the activity of a third party"); *Redd v. Amazon Web Services, Inc.*, No. 22 C 6779, 2023 WL 3505264, at *3 (N.D. Ill. May 17, 2023) (dismissing where "[a]side from registering to do business in Illinois, the only alleged link between AWS and Illinois runs through [third party] Wonolo," which allegedly used Amazon's Rekognition product in its own App).

Finally, to the extent Plaintiffs contend that resolution of the extraterritoriality issue is premature at the motion to dismiss stage, they are incorrect. Dismissal is appropriate on extraterritoriality grounds where Plaintiffs fail to plead the requisite facts. *See Shaw v. Hyatt Int'l Corp.*, No. 05 C 5022, 2005 WL 3088438, at *2 (N.D. Ill. Nov. 15, 2005), *aff'd*, 461 F.3d 899 (7th Cir. 2006) (dismissing claims based on extraterritoriality at Rule 12(b)(6) where "allegations have virtually no connection to Illinois"). This case is readily distinguishable from those where courts have treated extraterritoriality as an inherently factual question that is better suited for resolution at a later stage in the case because the alleged Illinois conduct in those cases was not unilateral conduct by the plaintiffs many steps removed from the defendant. *See, e.g.*, *Rivera*, 238 F. Supp. 3d at 1100 (requiring discovery to resolve extraterritoriality question where plaintiffs alleged that Google scanned photos uploaded to Google Photos from devices in Illinois); *Vance v. Int'l Bus. Machs. Corp.*, No. 20-cv-00577, 2020 WL 5530134, at *3 (N.D. Ill. Sept. 15, 2020) (requiring discovery to resolve extraterritoriality question where there was uncertainty as to "where IBM performed the face scans and where the [DiF] Dataset was created."). And although the court in the *Microsoft* and *Amazon* cases allowed Plaintiffs to proceed to discovery, before ultimately dismissing the cases at summary judgment on extraterritoriality grounds, there is no need to waste the Court and the parties' resources here given Plaintiffs' utter failure to allege any conduct by Google in Illinois.

Plaintiffs seek to extend BIPA well beyond its geographic boundaries. As Plaintiffs would have it, a company headquartered in California (Google) can be held liable under an Illinois statute (BIPA) for receiving a dataset from a New York company (IBM) based on photos uploaded to a website hosted by a California company (Flickr), simply because it happens to include information associated with Illinois residents (Plaintiffs). That position plainly violates Illinois' prohibition against the extraterritorial application of its laws. Plaintiffs' Complaint should be dismissed.

II. Plaintiffs' claim under BIPA Section 15(c) fails because they do not allege that Google exchanged their Biometric Data for a financial benefit.

BIPA provides that an entity may not "sell, lease, trade, or otherwise profit" from a person's Biometric Data. 740 ILCS 14/15(c). Plaintiffs do not allege facts showing that Google did any of these things, and so their Section 15(c) claim fails for this independent reason.

Plaintiffs do not allege that Google sold, leased, or traded their Biometric Data. They instead argue that Google "otherwise profit[ed]" from their Biometric Data because, on information and belief, Google used the DiF database to "improve its facial recognition products and technologies" and make them "more valuable in the commercial marketplace." Compl. ¶ 58. Aside from the fact that Plaintiffs do not plead facts regarding the products that were allegedly improved, or how they were made more valuable, *see infra* at pp. 12–13, Plaintiffs' interpretation stretches Section 15(c) too far. The phrase "otherwise profit" does not—as Plaintiffs contend—ban outright the use of Biometric Data to improve for-profit technology.

In enacting BIPA, the General Assembly sought to encourage the "growing" use of biometric technologies, including those that promised "streamlined financial transactions and security screenings." 740 ILCS 14/5(a); *see also Microsoft II*, 534 F. Supp. 3d at 1307 (recognizing that BIPA was meant to "'promote, not inhibit,' the use of biometric technology") (quoting *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 512 n.9 (S.D.N.Y. 2017)). Section 15(c) cannot, therefore, be interpreted to bar any use of Biometric Data in a transaction that may generate profit. Instead, that section is designed to remedy a *specific* concern that led the public to be weary of biometric technologies: the "heightened risk for identity theft"

that would result if companies were permitted to buy and sell Biometric Data. When BIPA was passed, the Illinois legislature was particularly concerned with the bankruptcy and subsequent sale of Pay by Touch, a company that operated a fingerprint scan system used by Illinois grocery stores, which left "thousands of customers" from those stores wondering "what will become of their biometric and financial data." *Rivera*, 238 F. Supp. 3d at 1098 (quoting IL H.R. Tran. 2008 Reg. Sess. No. 276 at 249 (May 30, 2008)). The concern was not that Pay by Touch had developed for-profit biometric technologies; rather, the concern was that the sale of Pay by Touch resulted in an indirect *sale* of shoppers' fingerprints. Section 15(c) was designed to prevent similar scenarios by prohibiting the exchange of Biometric Data for money or something else of value. This is made clear by the use of the terms "sell," "lease," and "trade," which each "contemplate a transaction in which an item is given or shared in exchange for something of value," such that the final, "otherwise profit" term must be interpreted to be limited in the same way. *Microsoft II*, 534 F. Supp. 3d at 1306; *see Pooh-Bah Enters., Inc. v. County of Cook*, 905 N.E.2d 781, 799 (Ill. 2009) ("[W]hen a statutory clause specifically describes several classes of . . . things and then includes 'other . . . things,' the word 'other' is interpreted to mean 'other such like.'") (cleaned up).

Here, Plaintiffs do not allege that Google exchanged their Biometric Data for anything of value. Thus, this Court should dismiss this claim as the court did in Plaintiffs' lawsuit against Microsoft. There, as here, Plaintiffs' Section 15(c) claim was based on allegations that the DiF dataset was used "to 'improve . . . facial recognition products and technologies,' which 'improve[d] the effectiveness' of those products and made them 'more valuable in the commercial marketplace.'" *Microsoft II*, 534 F. Supp. 3d at 1309 (quoting identical allegations as in Compl. ¶ 58). But such improvement does nothing to show that Google shared access to Plaintiffs' Biometric Data or received something of value in return. That is *unlike* in Plaintiffs' lawsuit against Amazon, where they alleged that Amazon's Rekognition product provided law enforcement with access to a repository of Biometric Data that allowed law enforcement to compare known faces against the faces of criminal suspects. *See Vance v. Amazon.com Inc.* ("*Amazon II*"), 534 F. Supp. 3d 1314, 1324 (W.D. Wash. 2021). Here, by contrast, "Plaintiffs'

factual allegations [do not] allow for the reasonable inference that selling [Google's] products necessarily shares access to the underlying biometric data [from the DiF dataset] in exchange for some [financial] benefit to [Google]." *Id.*

Even putting aside the (dispositive) Plaintiffs' failure to allege the exchange of Biometric Data for a financial benefit here, Plaintiffs' profiting theory fails for an independent reason: Plaintiffs do not allege *facts* to support their (defective) improvement-based theory. They merely allege, in a conclusory manner, that the DiF Dataset "allowed Google to improve its facial recognition products and technologies . . . thereby making those products and technologies more valuable in the commercial marketplace." Compl. ¶ 58. But Plaintiffs do not plausibly allege that their Biometric Data (which was allegedly derived from one photo out of the millions of photos included in the DiF Dataset) caused any measurable improvement in Google's facial recognition technology generally, or any product specifically. Plaintiffs do not even allege that measurable improvement resulted from Google's use of the DiF Dataset as a whole, as opposed to the other efforts made by Google to improve its technology or products. *See id.* ¶ 54. Nor do they allege facts showing that any such improvement in Google's technology or products resulted in increased profits to Google, particularly given that many of Google's products are free. *See id.* ¶ 53. Plaintiffs' conclusory allegations do not state a claim for violations of Section 15(c) simply because they use the word "profit." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) ("legal conclusions" and "conclusory statements" are insufficient to state a claim); *Twombly*, 550 U.S. at 555–57, 566–67, 570–71 (allegations must rise above the level of "speculative," "conceivable" and "possible" to state a claim "that is plausible on its face"). Plaintiffs' claim for violations of Section 15(c) should be dismissed for this reason, too.

III. Plaintiffs' unjust enrichment claim fails because it does not identify applicable law and it is duplicative of their BIPA claims.

Plaintiffs' claim for unjust enrichment is "deficient because Plaintiffs do not identify the applicable law. As this Court and other courts in this district have recognized, 'due to variances among state laws, failure to allege which state law governs a common law claim is grounds for dismissal.'" *In re Samsung Galaxy Smartphone Mktg. & Sales Pracs. Litig.*, No. 16-cv-06391,

2018 WL 1576457, at *4 (N.D. Cal. Mar. 30, 2018) (Freeman, J.) (collecting cases); *see* also Compl. ¶¶ 106–15 (not specifying state law as to unjust enrichment claim).

Plaintiffs' unjust enrichment claim still fails even assuming that Plaintiffs seek application of Illinois law—consistent with their position in other cases, *see Amazon II*, 534 F. Supp. 3d at 1328; *Microsoft II*, 534 F. Supp. 3d at 1313. "In Illinois unjust enrichment is not a separate cause of action but is a condition brought about by fraud or other unlawful conduct." *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730, 735 (7th Cir. 2019). Plaintiffs do not and cannot allege that Google engaged in fraud here, nor have they "state[d] with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b). Instead, Plaintiffs base their unjust enrichment claim on the same allegedly "unlawful conduct" as their BIPA claims. *See* Compl. ¶ 111 ("Google obtained Plaintiffs' and Class Members' biometric identifiers and information through inequitable means in that it obtained Biometric Data from Plaintiffs' and Class Members' online photographs without permission and in violation of Illinois law."). And under Illinois law, "if an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim." *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 517 (7th Cir. 2011). Plaintiffs' unjust enrichment claim thus fails due to the same failure to allege conduct by Google in Illinois, and the same failure to allege the exchange of biometric data for a financial benefit, discussed above.

In addition, Plaintiffs' unjust enrichment claim fails because Plaintiffs have not plausibly alleged that Google received a financial benefit to Plaintiffs' detriment, as required by Illinois law. *See Cleary*, 656 F.3d at 518. As explained above, *see supra* at pp. 11–13, Plaintiffs have not plausibly alleged that the DiF Dataset in general, much less their Biometric Data in particular, resulted in a measurable improvement to Google's technology or increased profits to Google. As the Court concluded in *Hogan v. Amazon.com, Inc.*, No. 21 C 3169, 2022 WL 952763 (N.D. Ill. Mar. 30, 2022), "[e]ven if Amazon was using Plaintiffs' images to train Rekognition, Plaintiffs fail[ed] to allege how their specific images made Rekognition more valuable or profitable to

1 Amazon. As a result, Plaintiffs have not sufficiently pled a claim of unjust enrichment." *Id.* at *8.
2 The same is true here.
3 Even if Plaintiffs had successfully stated a claim under BIPA (they have not), their unjust
4 enrichment claim would still fail because BIPA's significant statutory damages provide an
5 adequate remedy at law. *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75–76 (1992)
6 ("[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting
7 to equitable relief."); *Guinn v. Hoskins Chevrolet*, 836 N.E.2d 681, 704 (Ill. App. Ct. 2005)
8 ("Because it is an equitable remedy, unjust enrichment is only available when there is no
9 adequate remedy at law.") (citation omitted).
10 **IV. Plaintiffs' claim for injunctive relief should be dismissed because injunctive relief is a**
11 **remedy, not a cause of action.**
12 Plaintiffs' injunctive relief claim should also be dismissed for the simple reason that
13 "[i]njunctive relief is a remedy, not a cause of action." *Castellanos v. Countrywide Bank NA*, No.
14 15-cv-00896, 2015 WL 3988862, at *4 (N.D. Cal. June 30, 2015) (Freeman, J.) (citing *McDowell*
15 *v. Watson*, 59 Cal. App. 4th 1155, 1159 (1997)). Plaintiffs conceded as much in their other
16 lawsuits. *See Amazon I*, 525 F. Supp. 3d at 1316 ("Injunctive relief is . . . not a cause of action.
17 Plaintiffs do not argue otherwise.") (cleaned up); *Microsoft I*, 525 F. Supp. 3d at 1300 (same).
18 **V. Dismissal should be with prejudice.**
19 Plaintiffs have already had the opportunity to amend their Complaint. *See* Dkt. 66 (Court
20 order granting motion to stay and denying motion to dismiss as moot because "It appears likely
21 that . . . Plaintiffs will choose to amend the Complaint in this action"); Dkt. 88 (not seeking leave
22 to amend and instead seeking a deadline for Google to move to dismiss original complaint).
23 Plaintiffs' failure to seek leave to amend proves that they cannot plausibly allege any BIPA-
24 violative conduct in Illinois (as held in *Amazon III* and *Microsoft III*), or that Google disclosed
25 their Biometric Data in exchange for a financial benefit (as held in *Microsoft II*). The Court
26 should therefore dismiss their claims with prejudice, because "[w]hen a proposed amendment
27 would be futile, there is no need to prolong the litigation by permitting further amendment."
28

Gardner v. Martino, 563 F.3d 981, 990 (9th Cir. 2009) (cleaned up); *Dumas v. Kipp*, 90 F.3d 386, 389 (9th Cir. 1996).

CONCLUSION

Google respectfully asks that Plaintiffs' Complaint be dismissed with prejudice.

Dated: October 12, 2023

PERKINS COIE LLP

By: */s/ Sunita Bali*

Bobbie J. Wilson, Bar No. 148317
Sunita Bali, Bar No. 274108
Mara Boundy, Cal. Bar No. 287109
Susan D. Fahringer, Bar No. 162978
Lauren J. Tsuji, Bar No. 300155
Anna Mouw Thompson, Bar No. 52418

Attorneys for Defendant
GOOGLE LLC