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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 AMENDED COMPLAINT

Date: October 10, 2024
Time: 9:00am
Location: Courtroom 3 – 5th Floor
Judge: Hon. Beth Labson Freeman

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 10, 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' amended complaint, Dkt. 104, 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 Anna Mouw Thompson in Support of Defendant Google LLC's Motion to Dismiss amended 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

This Court has already dismissed Plaintiffs' claims against Google under the Illinois Biometric Information Privacy Act ("BIPA") for failing to plausibly allege any conduct by Google in Illinois relevant to their claims, which is fatal to those claims under the extraterritoriality doctrine. *See* Dkt. 103 (hereinafter "MTD Order"). Plaintiffs' amended complaint, Dkt 104 ("FAC" or "amended complaint"), suffers from the exact same defects and should be dismissed for the reasons already identified by the Court.

Like the original complaint, the amended complaint alleges that California-based Google obtained Plaintiffs' biometric identifiers and biometric information (collectively, "Biometric Data") by downloading the Diversity in Faces Dataset (the "DiF Dataset") from New York-based IBM, and that the DiF Dataset was composed of photographs uploaded to California-based Flickr's photo management and sharing application. Like the original complaint, the amended complaint does not "allege that Google ever interacted with [Plaintiffs] or any other person or entity in Illinois to obtain the DiF Dataset." MTD Order at 5. And, as last time, the absence of any "direct interaction" between Google and Plaintiffs defeats Plaintiffs' attempt to show conduct by Google in Illinois. MTD Order at 6. And so, Plaintiffs' BIPA claims should once again be dismissed under the extraterritoriality doctrine.

Claim-specific defects infect Plaintiffs' amended complaint as well. Plaintiffs' claim for unlawful "profiting" under BIPA Section 15(c) fails for the additional reason that Plaintiffs have not alleged that Google exchanged their Biometric Data for a financial benefit to Google. This is exactly why Plaintiffs' nearly identical claim against Microsoft was dismissed under Federal Rule of Civil Procedure 12(b)(6). *See Vance v. Microsoft Corp. ("Microsoft II")*, 534 F. Supp. 3d 1301 (W.D. Wash. 2021). Separately, even if an exchange for financial benefit were not required (it is), Plaintiffs' allegations that Google profited because of improvements to its facial recognition technology caused by Plaintiffs' Biometric Data or the DiF Dataset are not plausible.

Finally, Plaintiffs' unjust enrichment claim must be dismissed for the same reasons as their BIPA claims, and because Plaintiffs do not plead the necessary elements. Moreover, damages are sufficient to remedy Plaintiffs' asserted harm—as they necessarily concede by

seeking purely monetary remedies for their unjust enrichment claim—such that Plaintiffs have an adequate remedy at law and this Court lacks equitable jurisdiction over the claim.

Google respectfully asks the Court to dismiss Plaintiffs' claims.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiffs' BIPA claims should be dismissed under the extraterritoriality doctrine because they have not alleged relevant conduct by Google occurring in Illinois.

2. Whether Plaintiffs' Section 15(c) claim should be dismissed because they have not alleged any facts showing that Google exchanged their biometric data for a financial benefit.

3. Whether Plaintiffs' Section 15(c) claim should be dismissed because they do not plausibly allege that their Biometric Data was used to improve Google's products for profit.

4. Whether Plaintiffs' claim for unjust enrichment under Illinois law should be dismissed for the same reasons as their BIPA claims and/or because Plaintiffs do not adequately plead the elements of that claim in the first instance and/or because Plaintiffs have an adequate remedy at law.

REQUEST FOR INCORPORATION BY REFERENCE

Google asks the Court to consider Exhibits A through E to the Declaration of Anna Mouw Thompson in Support of its Motion to Dismiss ("Thompson Decl."), which are true and correct copies of online articles and a blog post cited in Plaintiffs' amended complaint to support the changes made in response to this Court's order dismissing their original complaint. These materials are quoted and "referred to in the FAC, central to Plaintiffs' claims, and not subject to questions of authenticity." *Browning v. Am. Honda Motor Co.*, 549 F. Supp. 3d 996, 1004 (N.D. Cal. 2021) (Freeman, J.) (cleaned up). They should, therefore, be deemed incorporated by reference, such that the Court may consider them on a motion to dismiss. *See id.* (recognizing that courts "routinely consider" website materials "where, as here, a portion of the page is quoted or relied on in the complaint").

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." 740 ILCS 14/10. 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." Under Section 15(c), a "private entity in possession of" Biometric Data may not "sell, lease, trade, or otherwise profit from a person's or a customer'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. FAC ¶ 59. The DiF Dataset was created using a collection of 100 million photographs made publicly available by Flickr. *Id.* ¶ 29. Both Plaintiffs allege that they uploaded photos of themselves and other people to their Flickr accounts since 2008 while located in their home state of Illinois. *Id.* ¶¶ 69–77, 82–91.

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.* ¶¶ 42, 46, 52, 78, 92. 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.* ¶¶ 42, 35–39.

According to Plaintiffs, Google applied for permission from IBM and downloaded the DiF Dataset using a link provided by IBM. *Id.* ¶¶ 50, 51, 60. 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.* ¶ 63.

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.* ¶ 53. 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.* ¶ 60.

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.* ¶¶ 113–126. They also assert a claim for unjust enrichment under Illinois law. *Id.* ¶¶ 127–136. 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.* ¶ 103.

This is not Plaintiffs' first lawsuit based on the DiF Dataset, but it is their last one. Plaintiffs' lawsuits against IBM and FaceFirst were both voluntarily dismissed with prejudice last May and October. *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; Minutes in Chambers – Order Dismissing Action, *Vance v. FaceFirst*, No. 20-cv-06244 (C.D. Cal. Oct. 17, 2023), ECF No. 109. And Plaintiffs' nearly identical lawsuits against Amazon and Microsoft have both been dismissed by the U.S. District Court for the Western District of Washington. *See Vance v. Amazon.com Inc. ("Amazon I")*, 525 F. Supp. 3d 1301, 1316 (W.D. Wash. 2021) (dismissing

injunctive relief claim under Rule 12(b)(6)); *Vance v. Microsoft Corp. ("Microsoft I")*, 525 F. Supp. 3d 1287, 1300 (W.D. Wash. 2021) (same); *Microsoft II*, 534 F. Supp. 3d at 1309 (dismissing Section 15(c) claim under Rule 12(b)(6)); *Vance v. Amazon.com, Inc. ("Amazon III")*, No. C20-1084, 2022 WL 12306231, at *8–9 (W.D. Wash. Oct. 17, 2022) (granting summary judgment to defendant based on extraterritoriality and failure to show unjust retention of a benefit to Plaintiffs' detriment); *Vance v. Microsoft Corp. ("Microsoft III")*, No. C20-1082, 2022 WL 9983979, at *8–9 (W.D. Wash. Oct. 17, 2022) (same).

C. Procedural History

Plaintiffs filed their first complaint against Google on July 14, 2020. *See* Dkt. 1. On February 12, 2021, the Court stayed the case on Google's motion pending the outcome in *Vance v. IBM*. *See* Dkt. 66. The stay was lifted on August 28, 2023, *see* Dkt. 89, after *Vance v. IBM* was voluntarily dismissed, *see* Notification of Docket Entry, 20-cv-00577, ECF No. 210.

On October 12, 2023, Google moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). *See* Dkt. 92. This Court granted that motion on March 15, 2024. *See* MTD Order. The Court dismissed Plaintiffs' BIPA claims without prejudice based on Plaintiffs' failure to plausibly allege any relevant conduct by Google in Illinois, which rendered the claims deficient under the extraterritoriality doctrine. The Court did not reach Google's alternative argument under BIPA Section 15(c). The Court also dismissed with prejudice Plaintiffs' claim for injunctive relief, and it dismissed Plaintiffs' claim for unjust enrichment with leave to file an amended complaint identifying applicable law.

On April 15, 2024, Plaintiffs filed an amended complaint specifying that their unjust enrichment claim is under Illinois law and removing the separate claim for injunctive relief. *See* Dkt. 104-1 (redline version of FAC). Plaintiffs also added an allegation, "on information and belief," that Google obtained the DiF dataset to improve "the fairness and accuracy" of its Pixel smartphones. FAC ¶ 61. In support, Plaintiff cites and thereby incorporates into her amended complaint an article that purportedly describes how Google "paused the use of facial recognition" for unlocking Pixel smartphones "due to questions about its performance on darker skin," but "reintroduced the feature" in 2022 thanks to "advanced machine learning models for

face recognition." FAC ¶ 62. The cited article says no such thing. Instead, the article describes how the unlocking technology used by the Pixel 4 was discontinued "due to challenges on costs and performance;" how it remained discontinued through the pandemic due to widespread face masking; and how a more limited face unlock feature was reintroduced in 2021 given continued concerns about spoofing and low-light performance. *See* Thompson Decl., Ex. A (attaching article cited at FN 23). Nothing in the article suggests that the DiF Dataset—or any other data source—was used to improve "the fairness and accuracy" of Pixel smartphones. FAC ¶ 61.

Plaintiffs also added allegations that Google maintains two offices in Chicago; that "employees at Defendant Google's Chicago offices worked in engineering, product, technical infrastructure, finance and sales roles" as of 2019; and that "one of the products engineered in Chicago is the Pixel smartphone." FAC ¶¶ 66–68. The articles cited in support of these allegations offer only highly generalized descriptions of Google's Chicago presence. *See* Thompson Decl. Exs. B (attaching 2022 article cited at FN 26, explaining "Chicago Googlers work on all kinds of products and teams"), Ex. C (attaching 2019 article cited at FN 22, which says nothing about Pixel smartphones, and says that a "new, 132,000-square-foot space will be home to Google's growing Cloud team in Chicago"). Nothing in the articles support the inference that the DiF Dataset—or any other data source—was used by employees in Chicago to improve "the fairness and accuracy" of Pixel smartphones. FAC ¶ 61.

Google now moves to dismiss the amended complaint under Rule 12(b)(6).

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). This demands "more than a sheer possibility that a defendant has acted unlawfully," and "the well-pleaded facts [must] permit the court to infer more than the mere possibility of misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679 (2009); *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (explaining how standard ensures that a defendant is "not unfair[ly] require[d] . . . to be subjected to the expense of discovery and continued litigation."). "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 based solely on "information and belief" are insufficient. *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).

ARGUMENT

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

"BIPA violations must occur in Illinois in order for plaintiffs to obtain any relief." MTD Order at 4. Specifically, the violations' circumstances must "occur primarily and substantially in Illinois." *Id.* at 4 (citing *Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1100 (N.D. Ill. 2017)). This Court has already held that Plaintiffs' original BIPA claims failed to satisfy this test, and their amended complaint fares no better.

Like the original complaint, the amended complaint alleges that California-based Google obtained the DiF Dataset from New York-based IBM, and that the DiF dataset was composed of photographs uploaded to California-based Flickr's photo management and sharing application. *See generally* FAC; *see also* MTD Order at 3–4 (taking judicial notice of IBM's and Flickr's physical locations). It does not "allege that Google ever interacted with [Plaintiffs] or any other person or entity in Illinois to obtain the DiF Dataset." *Id.* at 5. As this Court has already held, the lack of "direct interaction" between Google and Plaintiffs destroys the Illinois connections on which Plaintiffs rely to show conduct by Google in Illinois. *See id.* at 6.

First, because Plaintiffs did not directly interact with Google, their Illinois residency is irrelevant. This is unlike in the typical BIPA case, where a plaintiffs' residency may be relevant because the defendant obtained Biometric Data as the result of their interactions with the plaintiff. *See, e.g.*, *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019); *Monroy v. Shutterfly, Inc.*, No. 16 C 10984, 2017 WL 4099846, at *5 (N.D. Ill. Sept. 15, 2017). The same is true as to the place of Plaintiffs' injuries, which in this case are "little more than a proxy for Plaintiffs'

residency." MTD Order at 6. Finally, Plaintiffs cannot rely on an assertion that they should have received notice or obtained consent in Illinois, because this puts the cart before the horse. BIPA does not apply outside Illinois, and so the obligations under Section 15(b) do not attach absent relevant conduct by the defendant occurring primarily and substantially in Illinois. As summarized by this Court: "A failure to disclose can be tied to a geographic location, but because Plaintiffs have not alleged a direct interaction that would give rise to the alleged BIPA violations, Plaintiffs have not established that Google was ever required to provide Plaintiffs notice. Thus, Plaintiffs have not established a failure to notify, much less that any failure took place in Illinois." MTD Order at 5-6 (cleaned up).

The changes to Plaintiffs' amended complaint do not solve their extraterritoriality problem. Plaintiffs now allege that Google maintains offices in Chicago, and that "one of the products engineered in Chicago is the Pixel smartphone." FAC ¶¶ 66–68. But this conduct is irrelevant to Section 15(b) because it has nothing to do with how Google allegedly obtained Plaintiffs' Biometric Data. The fact that Google has an Illinois office does nothing to suggest that Google obtained the DiF Dataset in Illinois, and courts regularly reject plaintiffs' generalized reliance on an Illinois presence as insufficient under the extraterritoriality doctrine. *See*, *e.g.*, *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 187 (2005) (dismissing for lack of connection between plaintiff and defendant even where defendant was headquartered in Illinois); *Shaw v. Hyatt Int'l Corp.*, No. 05 C 5022, 2005 WL 3088438, at *2 (N.D. Ill. Nov. 15, 2005) (same), *aff'd*, 461 F.3d 899 (7th Cir. 2006); *McGoveran v. Amazon Web Servs., Inc.*, C.A. No. 20-1399, 2021 WL 4502089, at *1 (D. Del. Sept. 30, 2021) (dismissing Illinois' resident's claim even where AWS was "registered to do business in Illinois").

The new allegations are insufficient under Section 15(c) as well. The circumstances relevant to a Section 15(c) claim are those related to where a defendant sold, leased, traded, or otherwise profited from an individual's Biometric Data. *See* 740 ILCS 14/15(c). Even assuming for the sake of argument that a product improvement theory could support a Section 15(c) claim—which it cannot, *see infra* § II.A—Plaintiffs would still need to plausibly allege that Google "otherwise profited" from their Biometric Data in Illinois. Plaintiffs have done no such

1 thing. The fact that Google has two Chicago offices with employees who work on Pixel
2 smartphones, *see* FAC ¶¶ 66–68, does not suggest that Google used Plaintiffs' Biometric Data or
3 the DiF Dataset in Illinois, much less that it did so in a way that caused Google to "otherwise
4 profit" from the data in Illinois. The inferences that Plaintiffs ask the Court to draw from the
5 highly generalized facts added to their complaint are simply too many and too speculative. *See*
6 *also infra* § II.B (explaining in more detail why Plaintiffs' allegations do not support inferences
7 necessary for Section 15(c) claim). This is especially so when the very sources cited by Plaintiffs
8 undermine their theory—*e.g.*, by establishing that the face unlocking technology used by the
9 Pixel 4 was discontinued "due to challenges on costs and performance," *see* Thompson Decl.,
10 Ex. A, not by concerns over performance on darker skin, FAC ¶ 62; and that Google collected its
11 own data to address performance concerns instead of relying on the third-party DiF Dataset, *see*
12 *id.* ¶¶ 57-58. For all these reasons, Plaintiffs do not "nudge[] [their] claims . . . across the line
13 from conceivable to plausible." *Iqbal*, 556 U.S. at 680.

14 In short, this case remains on all fours with *Amazon III* and *Microsoft III*, which involved
15 the same plaintiffs, the same DiF Dataset, and the same intermediate third parties (Flickr and
16 IBM). "[A]ny connection between [Google's] conduct and Illinois is too attenuated for a
17 reasonable juror to find that the circumstances underlying [Google's] alleged BIPA violations
18 'occurred primarily and substantially in Illinois.'" *Amazon III*, 2022 WL 12306231, at *8
19 (quoting *Avery*, 216 Ill. 2d at 187); *Microsoft III*, 2022 WL 9983979, at *8 (same conclusion).
20 And it is (still) materially indistinguishable from *McGoveran*, 2021 WL 4502089, where the
21 defendants' Rule 12(b)(6) motions were granted based on the lack of direct interaction between
22 plaintiffs and defendant and because the allegations about the "case's connections to Illinois"
23 were "nothing more than repeated statements . . . about [the plaintiffs'] residency." *Id.* at *4. This
24 Court should once again dismiss Plaintiffs' BIPA claims based on the extraterritoriality doctrine.

25 **II. Plaintiffs' BIPA Section 15(c) claim fails for multiple, additional reasons.**

26 Section 15(c) is not implicated unless a defendant exchanges "a person's" Biometric Data
27 for a financial benefit. Plaintiffs have not made such allegations here, and this missing element
28 defeats their Section 15(c) claim. Moreover, even if it were enough to allege product

improvement without such an exchange, Plaintiffs' allegations do not support the inference that their Biometric Data (or the DiF Dataset generally) led to profit through product improvements.

A. Plaintiffs do not allege that Google exchanged or disclosed their Biometric Data to any third party for a financial benefit.

The first three verbs listed in Section 15(c)—"sell, lease, [and] trade"—share a common denominator: each "contemplate a transaction in which an item is given or shared in exchange for something of value." *Microsoft II*, 534 F. Supp. 3d at 1306 (collecting dictionary definitions). Under the canon of ejusdem generis, the final "otherwise profit" term must be interpreted as limited in the same way as these predecessors. *Id.*; *see also Pooh-Bah Enters., Inc. v. County of Cook*, 232 Ill. 2d 463, 492 (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). And so, Section 15(c) doesn't prohibit "any" profiting; it prohibits "otherwise" profiting—i.e., profiting as one profits from a sale, lease, or trade of an individual's Biometric Data, which all involve an exchange for a financial benefit.

Limiting Section 15(c) in this way comports with BIPA's legislative purpose. BIPA was not intended to stop private companies from profiting from biometric technologies. To the contrary, BIPA's legislative findings applaud the "promise [of] streamlined financial transactions," 740 ILCS 14/5, which are promising because they allow businesses to cut costs and provide a more efficient consumer experience. And the entire point of BIPA is to regulate the use of Biometric Data by "private entit[ies]," which notably include "corporation[s]." Corporations are, by definition, profit motivated, and so it would be inconsistent with BIPA as a whole to interpret Section 15(c) as barring any form of profiting from Biometric Data. *See also Vance v. Amazon.com Inc. ("Amazon II")*, 534 F. Supp. 3d 1314, 1323 (W.D. Wash. 2021) (rejecting broad reading of Section 15(c) because "[t]aken to its logical end, Plaintiffs' reading of § 15(c) would prohibit the sale of any product containing biometric technology because any such feature had to be developed or built with biometric data").

Nor is such an interpretation necessary for Section 15(c) to satisfy its actual purpose. The point of Section 15(c) is to "prohibit[] the operation of a market in biometric identifiers and information." *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1247 (7th Cir. 2021); *see also* IL

1 H.R. Tran., 2008 Reg. Sess. No. 276 at 249 (Ill. May 30, 2008) (discussing the bankruptcy and
2 subsequent sale of Pay by Touch and its library of shoppers' fingerprints). There is no way
3 around this "flat-out prohibition." *Amazon II*, 534 F. Supp. 3d at 1323. Consumers are unable to
4 consent to the sale of their biometric data; they can only consent to "disclosure." *See* 740 ILCS
5 14/15(d). This means that biometric data is shared in more limited circumstances, which in turn
6 mitigates the "heightened risk for identity theft," 740 ILCS 14/5, that would result if companies
7 could buy and sell individuals' Biometric Data without restriction.

8 Plaintiffs have not alleged that Google sold, leased, or traded their Biometric Data. Nor
9 have they alleged that Google exchanged it to any third party for something of value. They have
10 not even taken the lesser step of alleging that Google disclosed or otherwise made their
11 Biometric Data accessible to any third party—which is a necessary predicate to an exchange. So,
12 their Section 15(c) misses an essential element: like in *Microsoft II* and unlike in *Amazon II*.

13 In *Microsoft II*, Plaintiffs pursued the same Section 15(c) theory as here: they based the
14 claim on allegations that Microsoft used the DiF Dataset "to 'improve . . . facial recognition
15 products and technologies,' which 'improve[d] the effectiveness' of those products and made
16 them 'more valuable in the commercial marketplace.'" *See Microsoft II*, 534 F. Supp. 3d at 1309
17 (quoting complaint). As here, Plaintiffs did not allege that Microsoft made their Biometric Data
18 available to any third party. Judge Robart dismissed the Section 15(c) claim for failure to state a
19 claim after explaining the many problems with Plaintiffs' broad interpretation which, "[t]aken to
20 its logical end . . . would prohibit the sale of any product containing biometric technology
21 because any such feature had to be developed or built with biometric data." *Id.* at 1308. Other
22 courts have followed suit where an exchange for financial benefit is not alleged. *See Delgado v.
23 Meta Platforms, Inc.*, No. 23-cv-04181, 2024 WL 818344, at *9 (N.D. Cal. Feb. 27, 2024)
24 (dismissing Section 15(c) claim where plaintiff did not allege that Meta "marketed a product
25 containing her biometric data or that Meta so incorporated her voiceprint into its technology that
26 selling its products necessarily meant selling access to her data"); *Deyerler v. HireVue, Inc.*, No.
27 22 CV 1284, 2024 WL 774833, at *7 (N.D. Ill. Feb. 26, 2024) (dismissing Section 15(c) claim
28 where "plaintiffs allege that HireVue profited from their biometric information because its

clients paid for use of its software" because "the fact that HireVue profited from the sale of its software does not plausibly indicate that it sold, leased, traded, or otherwise profited from the plaintiffs' biometric data itself").

In *Amazon II*, by contrast, Plaintiffs 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 Amazon II*, 534 F. Supp. 3d at 1324. The DiF Dataset was allegedly integrated into Rekognition such that law enforcement could obtain access to Plaintiffs' Biometric Data—i.e., law enforcement allegedly had access to the Biometric Data of Steven Vance and Tim Janecyk. Judge Robart allowed that claim to proceed past the motion to dismiss stage; though he acknowledged that discovery could reveal that Amazon never did integrate faces appearing in the DiF Dataset into its Rekognition library. *See id.* Similar allegations are missing here. Plaintiffs do not allege that Google made available to third parties anyone's Biometric Data—much less their Biometric Data. Plaintiffs only allege the sort of product improvement alleged in *Microsoft II*, and so their Section 15(c) claim fails here as there. That makes Plaintiffs' case distinctly unlike *Amazon II* and other cases where Section 15(c) claims were allowed to proceed. *See Flores v. Motorola Sols., Inc.*, No. 20-cv-01128, 2021 WL 232627, at *3 (N.D. Ill. Jan. 8, 2021) (finding well-pleaded Section 15(c) claim where defendant allegedly "offer[ed] access to [a biometric] database for a fee to law enforcement," such that activity might "constitute selling or profiting from biometric information"); *Melzer v. Johnson & Johnson Consumer Inc.*, C.A. No. 22-3149, 2023 WL 3098633, at *5 (D.N.J. Apr. 26, 2023) (denying motion to dismiss Section 15(c) claim where "Melzer alleges, on information and belief, that JJCI commercially disseminates her and the class members' biometric identifiers and biometric information to JJCI's affiliates and other third parties for its own benefit."); *In re Clearview AI, Inc., Consumer Priv. Litig.*, 585 F. Supp. 3d 1111, 1126 (N.D. Ill. 2022) (denying motion to dismiss Section 15(c) claim because "at its core, plaintiffs' claim concerns the sale of biometric data" through customers' payment "to search the database containing plaintiffs' biometric information to find a potential match").

An exchange of a person's Biometric Data for financial benefit is essential to a Section

15(c) claim. Product improvement through internal use of Biometric Data is not enough. Plaintiffs' Section 15(c) claim fails because they have not alleged any such exchange.

B. Plaintiffs' allegations do not support the inference that their Biometric Data was used to improve Google's products for profit.

Even putting aside Plaintiffs' (dispositive) failure to allege an exchange for financial benefit, their Section 15(c) fails for another independent reason: Plaintiffs do not allege facts sufficient to support their (defective) improvement-based theory.

A private entity may not otherwise profit from "a person's or a customer's" Biometric Data. 740 ILCS 14/15(c). This means that, even if Plaintiffs' interpretation of "otherwise profit" were correct (and it isn't), Plaintiffs' theory would require them to show that their Biometric Data was used to improve Google's product for profit. Plaintiffs do not allege any facts to support such an inference—i.e., that Google used the Biometric Data of Steven Vance and Tim Janecyk to improve its Pixel smartphone or other products in a profitable way. This defeats their claim under the plain text of Section 15(c).

Plaintiffs have not plausibly alleged that the DiF Dataset, as a whole, allowed Google to improve its products either. In response to this Court's admonition that their first complaint "allege[d] little about how Google makes use of the DiF Dataset," MTD Order at 7, Plaintiffs added allegations to describe how the Pixel smartphone purportedly had trouble recognizing certain faces, *see* FAC ¶¶ 58, 61, 62, 64, 65. But the amended complaint is still devoid of facts to plausibly suggest that the DiF Dataset resolved any such issues. In fact, by describing an effort by Google to collect Biometric Data directly from the public "in exchange for $5 gift cards," FAC ¶¶ 57-58; *see also* Exs. D (attaching article cited at FN 15), E (attaching article cited at FN 16), the complaint suggests that Google did not rely on the DiF Dataset from IBM and instead relied on its own research and development efforts.

And even if Plaintiffs had shown product improvement, they haven't shown profits resulting from such improvements. The sources cited in Plaintiffs' complaint further undermine their theory that improvements to face unlocking increased profits for Google, much less that it did so specifically in Illinois. To start, the Pixel smartphone did not discontinue use of face unlocking "due to questions about its performance on darker skin." FAC ¶ 62. The very article

cited in support of that assertion by Plaintiffs instead says that Google discontinued use of the technology "due to challenges on costs and performance." Thompson Decl., Ex. A. Moreover, according to Plaintiffs' sources, when face unlocking was reinstated, it was used in a more limited setting due to ongoing concerns about spoofing and low-light performance. *Id.* Nothing about this suggests that Google profited from product improvement that can be traced back to Plaintiffs' Biometric Data, the DiF Dataset, or the state of Illinois. Once again, Plaintiffs' claims do not move "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 547.

III. Plaintiffs' unjust enrichment claim fails for the same reasons as their BIPA claims and because they do not plead the necessary elements.

Plaintiffs base their unjust enrichment claim on the same allegedly "unlawful conduct" as their BIPA claims. *See* FAC ¶ 132 ("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."); FAC ¶ 121 ("Google violated BIPA by unlawfully profiting from individuals' biometric identifiers and biometric information, including the biometric identifiers and information of Plaintiffs and Class Members."). 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). Here, Plaintiffs' BIPA claims fail for a variety of reasons already discussed, and so Plaintiffs' unjust enrichment claim fails for the same reasons.

Separately, Plaintiffs do not adequately plead the elements of their unjust enrichment claim in the first place. To state a claim for unjust enrichment under Illinois law, Plaintiffs must plausibly allege "that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *Cleary*, 656 F.3d at 516 (quoting *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 160 (1989)).

First, Plaintiffs have not shown any "unjust conduct" by Google. Unjust enrichment is "brought about by unlawful or improper conduct as defined by law, such as fraud, duress, or

1 undue influence[.]" *Id.* (citation omitted). As this Court already recognized, Plaintiffs were not
2 entitled to the notice they seek unless BIPA applies to Google here, which it does not. *See* MTD
3 Order at 6; *supra* at § I. And even if Plaintiffs plausibly alleged that Google used their Biometric
4 Data or the DiF dataset to improve its products, Plaintiffs have not shown any such use to be in
5 violation of BIPA. *See supra* at § II.A. Nor have Plaintiffs alleged anything independent of BIPA
6 that would make Google's alleged conduct inequitable or unlawful. To the contrary, the
7 complaint alleges that Google downloaded the DiF Dataset from IBM through established
8 channels for the very purpose the dataset was created: "to improve the fairness and accuracy of
9 its facial recognition products and technologies, including, on information and belief, its Pixel
10 smartphones." FAC ¶ 61. Building fairness into a product to improve its functioning for more
11 consumers is far from inequitable, let alone unlawful, conduct.

12 Second, Plaintiffs have not plausibly alleged that Google received a financial benefit. *See*
13 *Cleary*, 656 F.3d at 518. As explained above, *see supra* at § II.B, Plaintiffs have not plausibly
14 alleged that their Biometric Data in particular, or even the DiF Dataset in general, resulted in a
15 measurable improvement to Google's technology or increased profits to Google. As the Court
16 concluded in *Hogan v. Amazon.com, Inc.*, No. 21 C 3169, 2022 WL 952763 (N.D. Ill. Mar. 30,
17 2022), "[e]ven if Amazon was using Plaintiffs' images to train Rekognition, Plaintiffs fail[ed] to
18 allege how their specific images made Rekognition more valuable or profitable to Amazon. As a
19 result, Plaintiffs have not sufficiently pled a claim of unjust enrichment." *Id.* at *8. The same is
20 true here. Plaintiffs offer no more than conclusory statements that Google "obtained a monetary
21 benefit[.]" FAC ¶ 128.

22 Third, Plaintiffs have not suffered any detriment from Google's access or use of IBM's
23 DiF Dataset. Illinois law requires the plaintiff to plead "a detriment—and, significantly, a
24 connection between the detriment and the defendant's retention of the benefit." *Lipton v.*
25 *Chattem, Inc.*, 289 F.R.D. 456, 460 (N.D. Ill. 2013) (quoting *Cleary*, 656 F.3d at 519); *see also*
26 *Santiago v. City of Chicago*, 446 F. Supp. 3d 348, 368 (N.D. Ill. 2020) (Plaintiff "alleges that the
27 City 'assessed' her 'a towing fee and ever-increasing storage fees.' But [Plaintiff] alleges no
28 facts suggesting that she ever paid a fee . . . ."). But Plaintiffs have not explained how Google

1 caused them detriment when all Google allegedly did was use the DiF Dataset—which had
2 already been created and disseminated by IBM—internally to improve its products. A "mere
3 violation of a consumer's [purported] legal right. . . , without anything more, cannot support a
4 claim" for unjust enrichment. *Cleary*, 656 F.3d at 520 (dismissing unjust enrichment claim where
5 defendant allegedly violated consumer's legal right to know about risk of cigarettes).

6 Finally, Plaintiffs' unjust enrichment claim is subject to dismissal because Plaintiffs have
7 an adequate remedy at law. "For a district court to have equitable jurisdiction, and thus entertain
8 a request for equitable relief, the plaintiff must have no adequate legal remedy." *Sidhu v. Bayer*
9 *Healthcare Pharms. Inc.*, No. 22-cv-01603, 2022 WL 17170159, at *11 (N.D. Cal. Nov. 22,
10 2022) (Freeman, J.) (citing *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir.
11 2020)). That test is unmet here because monetary damages are sufficient to remedy Plaintiffs'
12 purported harm. Indeed, Plaintiffs concede as much by seeking purely monetary remedies for
13 their unjust enrichment claim, *see* FAC ¶ 136 (seeking disgorgement of proceeds), which has led
14 this Court to dismiss under *Sonner* in similar circumstances, *see Rabin v. Google LLC*, No. 22-
15 cv-04547, 2023 WL 4053804, at *13 (N.D. Cal. June 15, 2023) ("[I]t is not apparent . . . that
16 damages would provide an inadequate remedy[]" given that plaintiffs seek "restitution of,
17 disgorgement of, and/or the imposition of a constructive trust upon all profits, benefits, and other
18 compensation obtained by Google."). Lastly, the mere fact that Plaintiffs' claims for damages
19 under BIPA fail (*see supra* §§ I-II) does not save their unjust enrichment claim; otherwise, every
20 losing damage case would automatically become a case for equitable relief. *See Huynh v. Quora,*
21 *Inc.*, 508 F. Supp. 3d 633, 662 (N.D. Cal. 2020) (Freeman, J.) ("[W]here the claims pleaded by a
22 plaintiff may entitle her to an adequate remedy at law, equitable relief is unavailable . . . .")
23 (quoting *Rhynes v. Stryker Corp.*, No. 10-5619, 2011 WL 2149095, at *4 (N.D. Cal. May 31,
24 2011)); *Munning v. Gap, Inc.*, 238 F. Supp. 3d 1195, 1203 (N.D. Cal. 2017) ("It matters not that
25 a plaintiff may have no remedy if her other claims fail.").

26 Plaintiffs' unjust enrichment claim should be dismissed for all of these reasons.

27 **IV. Dismissal should be with prejudice.**

28 Plaintiffs have already had the opportunity to amend their complaint to include all of the

allegations they could muster to address the problems identified in this Court's order dismissing their original complaint. *See* MTD Order at 7 ("Plaintiffs candidly stated at the hearing that it would be difficult to allege additional facts tying Google's conduct to Illinois without discovery, but nonetheless requested leave to amend."). The Court should therefore dismiss their claims with prejudice. "When a proposed amendment would be futile, there is no need to prolong the litigation by permitting further amendment." *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009) (cleaned up); *Dumas v. Kipp*, 90 F.3d 386, 389 (9th Cir. 1996).

The one exception is that, if the Court dismisses Plaintiffs' unjust enrichment claim for lack of equitable jurisdiction, then that claim should be dismissed without prejudice. *See Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1313 (9th Cir. 2022) ("Because the district court lacked equitable jurisdiction . . . it should have denied Polaris' motion for summary judgment and dismissed Albright's UCL claim without prejudice for lack of equitable jurisdiction.").

CONCLUSION

Google respectfully asks that Plaintiffs' amended complaint be dismissed with prejudice, provided that Plaintiffs' unjust enrichment claim be dismissed without prejudice if the Court finds that it lacks equitable jurisdiction over that claim.

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