

United States District Court
For the Northern District of California

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

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Google Inc. Street View Electronic
Communications Litigation

NO. C 10-MD-02184 JW

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS WITH LEAVE TO
AMEND**

I. INTRODUCTION

Plaintiffs¹ bring this putative class action against Google, Inc. (“Defendant”), alleging three causes of action for violation of the federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.*, violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*, and violation of various state wiretap statutes. Plaintiffs allege that Defendant intentionally intercepted data packets, including payload data, from Plaintiffs’ Wi-Fi networks utilizing specially designed packet sniffer software installed on Defendant’s Google Street View vehicles.

Presently before the Court is Defendant’s Motion to Dismiss.² The Court conducted a hearing on March 21, 2011. Based on the papers submitted to date and oral argument, the Court GRANTS in part and DENIES in part Defendant’s Motion to Dismiss.

¹ Plaintiffs are Patrick Keyes, Matthew Berlage, Aaron Linsky, James Fairbanks, Jeffrey Colman, John Redstone, Karl Schulz, Dean Bastilla, Vicki Van Valin, Stephanie and Russell Carter, Danielle Reyas, Bertha Davis, Jason Taylor, Jennifer Locsin, James Blackwell, Rich Benitti, Benjamin Joffe, Lilla Marigza, Wesley Hartline, David Binkley and Eric Myhre.

² (Defendant Google Inc.’s Motion to Dismiss Plaintiffs’ Consolidated Class Action Complaint, hereafter, “Motion,” Docket Item No. 60.)

1 **II. BACKGROUND**

2 **A. Factual Allegations**

3 In a Consolidated Class Action Complaint filed on November 8, 2011,³ Plaintiffs allege as
4 follows:

5 Plaintiffs are individuals who reside in various states,⁴ and who maintained a Wi-Fi
6 network in their homes that was not readily accessible to the general public and used the Wi-
7 Fi connection to send and receive various types of payload data, including usernames,
8 passwords and personal emails. (CCAC ¶¶ 18-38.) Each of Plaintiffs' homes can be seen
9 depicted on Google Maps and Google Street View. (Id.) Defendant Google develops and
10 hosts a broad range of Internet-based services and is incorporated under the laws of
11 Delaware with its principal place of business in Mountain View, California. (Id. ¶ 39.)

12 Defendant launched Google Street View on May 25, 2007 in several select cities
13 across the United States. (CCAC ¶ 55.) In the last three years, Google Street View has
14 expanded broadly and now includes more cities and rural areas in the United States, and has
15 expanded worldwide into more than 30 countries. (Id.) Google Street View is a feature
16 embedded within Defendant's Google Maps program that offers panoramic views of various
17 positions along streets using photos taken from a fleet of specially adapted vehicles
18 commonly known as Google Street View vehicles. (Id. ¶¶ 54, 55.) Each Google Street View
19 vehicle is equipped with nine directional cameras to capture 360 degree views of the streets
20 and 3G/GSM/Wi-Fi antennas with custom-designed software for the capture and storage of
21 wireless signals and data. (Id. ¶ 55.) Additionally, Defendant used smaller vehicles,
22 commonly known as Google Trikes, also outfitted with the cameras and Wi-Fi equipment, to
23 capture photo and Wi-Fi data from areas inaccessible to cars. (Id. ¶ 58.) While Defendant
24 issued press releases to the public to disclose its intent to utilize the vehicles in order to

25 ³ (Consolidated Class Action Complaint, hereafter, "CCAC," Docket Item No. 54.)

26 ⁴ Plaintiffs are citizens and residents of Washington, D.C.; Ohio; Pennsylvania; Nevada;
27 Tennessee; Washington; California; Illinois; and Oregon. (CCAC ¶¶ 18-38.)

1 capture photo data, Defendant failed to disclose its intent to also capture Wi-Fi data. (Id. ¶
2 56.)

3 In 2006, prior to the launch of the Google Street View vehicles, Defendant's
4 employee engineers intentionally created a data collection system that included code that
5 sampled, collected, decoded and analyzed all types of data broadcast through Wi-Fi
6 connections. (CCAC ¶¶ 60-61.) This data collection system is commonly known as a packet
7 analyzer, wireless sniffer, network analyzer, packet sniffer or protocol analyzer. (Id. ¶ 61.)
8 Defendant authorized inclusion of this wireless sniffer technology into its Google Street
9 View vehicles and even sought to patent the process. (Id. ¶ 65.) The wireless sniffer secretly
10 captures data packets as they stream across Wi-Fi connections and then decodes or decrypts
11 the data packet and analyzes the contents. (Id. ¶ 62.) In order to view the contents of the
12 data packets captured by the wireless sniffer in a readable form, the packets must be stored
13 on digital media and then decoded using crypto-analysis or a similarly complicated
14 technology. (Id. ¶ 63.) As such, the data packets are not readable by the general public
15 absent this sophisticated decoding and processing technology. (Id. ¶ 64.) Defendant has
16 admitted to storing this data on their servers. (Id. ¶ 6.) The content of the data packets
17 collected by Defendant included Plaintiffs' SSID information (the Wi-Fi network name),
18 MAC address (the ID number of the Wi-Fi network's hardware), usernames, passwords and
19 personal emails. (Id. ¶¶ 66, 69.)

20 On April 27, 2010, in response to an inquiry from a European privacy authority,
21 Defendant posted an entry explaining that it had collected SSIDs and MAC addresses.
22 (CCAC ¶ 69.) However, at that time, Defendant claimed to have not collected any payload,
23 or content data from the packets. (Id. ¶ 70.) On May 14, 2010, following a request by the
24 privacy authority to audit packet data collected by Defendant, Defendant admitted to
25 collecting "fragmentary" samples of "publicly broadcast" payload data from open (i.e., non-
26 password-protected) Wi-Fi networks and that, through this conduct, it had collected about
27 600 gigabytes of data from more than 30 countries. (Id. ¶¶ 71-72, 110.) Prior to May 14,
28

1 2010, Plaintiffs were unaware of and could not have discovered the existence of Defendant's
2 unlawful conduct. (Id. ¶¶ 100-10.) On June 9, 2010, Defendant admitted that it had been
3 collecting Wi-Fi data in the United States via Google Street View vehicles since 2007. (Id. ¶
4 80.) On July 9, 2010, Defendant issued an apology on its Official Google Australia Blog
5 where it admitted to intercepting the data in an attempt to improve Defendant's location-
6 based services, e.g., search and maps. (Id. ¶ 100.) In October 2010, Defendant was forced to
7 admit, following continuing investigations, that it had intercepted whole emails, usernames,
8 passwords and other private data. (Id. ¶ 77.)

9 On the basis of the allegations outlined above, Plaintiffs allege three causes of action: (1)
10 violation of the federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.*; (2) violation of Cal. Bus. & Prof.
11 Code §§ 17200, *et seq.*; and (3) violation of various state wiretap statutes. (CCAC at 28-31.)

12 **B. Procedural History**

13 On August 17, 2010, the United States Judicial Panel on Multidistrict Litigation transferred
14 eight pending actions to this Court pursuant to 28 U.S.C. § 1407. (See Docket Item No. 1.) On
15 October 18, 2010, the Court appointed Jeffrey Kodoff of Spector Roseman Kodroff & Willis, P.C.
16 and Daniel Small of Cohen Milstein Sellers & Toll, PLLC as Interim Class and Co-Lead Counsel
17 and Elizabeth Cabraser of Lief Cabraser Heimann & Bernstein, LLP as Interim Class and Liaison
18 Counsel. (See Docket Item No. 47.) On November 8, 2010, Plaintiffs filed their Consolidated Class
19 Action Complaint. (See CCAC.)

20 On March 21, 2011, the Court conducted a hearing on Defendant's Motion to Dismiss. That
21 same day, the Court issued an Order directing the parties to submit supplemental briefs addressing
22 three questions: (1) what "radio communication" means within the purview of the Wiretap Act; (2)
23 whether wireless home internet networks are "radio communications" within the purview of the
24 Wiretap Act's usage of that term; and (3) whether cellular telephone calls constitute "radio
25 communications" as intended by Congress when drafting the Wiretap Act and, if so, whether such
26 technology properly fits within any of the five enumerated exceptions to the definition of "readily
27 accessible to the general public" as outlined in Section 2510(16). (See Docket Item No. 73.) On
28

1 April 11, 2011, the parties timely filed their Supplemental Briefs. (See Docket Item Nos. 79, 80.)
2 Also on April 11, 2011, the Electronic Privacy Information Center filed a Brief for Amicus Curiae in
3 support of Plaintiffs. (See Docket Item No. 80.)

4 Presently before the Court is Defendant's Motion to Dismiss.

5 **III. STANDARDS**

6 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against
7 a defendant for failure to state a claim upon which relief may be granted against that defendant.
8 Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient
9 facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
10 (9th Cir. 1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). For
11 purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the
12 complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v.
13 City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved
14 in favor of the pleading. Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973).

15 However, mere conclusions couched in factual allegations are not sufficient to state a cause
16 of action. Papasan v. Allain, 478 U.S. 265, 286 (1986); see also McGlinchy v. Shell Chem. Co., 845
17 F.2d 802, 810 (9th Cir. 1988). The complaint must plead "enough facts to state a claim for relief
18 that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is
19 plausible on its face "when the plaintiff pleads factual content that allows the court to draw the
20 reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129
21 S. Ct. 1937, 1949 (2009). Thus, "for a complaint to survive a motion to dismiss, the non-conclusory
22 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a
23 claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).
24 Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by
25 amendment. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000).

IV. DISCUSSION

1
2 Defendant moves to dismiss Plaintiffs' Complaint on the grounds that: (1) Plaintiffs have
3 failed to plead that their Wi-Fi broadcasts were not "readily accessible" and thus, Defendant is
4 entitled to exemption from liability under 18 U.S.C. § 2511(2)(g)(i), one of the Wiretap Act's
5 exemptions ("exemption G1"); (2) Plaintiffs' claims based on state law wiretap statutes are
6 preempted by the Wiretap Act and, alternatively, fail to state a claim; and (3) Plaintiffs' "unlawful"
7 and "unfair" Cal. Bus. & Prof. Code §§ 17200 claims are also preempted by the Wiretap Act and,
8 alternatively, fail to state a claim or plead standing under Proposition 64. (Motion at 5-19.)
9 Plaintiffs respond that dismissal is improper as: (1) the Wiretap Act's statutory definition of "readily
10 accessible" relied on by Defendant solely applies to "radio communications" under § 2511(2)(g)(ii)
11 ("exemption G2") and is, thus, inapplicable to "electronic communications" under exemption G1
12 and the ordinary meaning of "readily accessible" should be used; (2) additionally, exemption G1
13 only applies to unlawful interception and access, and Plaintiffs allege that Defendant further used
14 and disclosed the intercepted communications; (3) the state wiretap statutes are not preempted by the
15 Wiretap Act either expressly, by field preemption, or by conflict; and (4) claims under Cal. Bus. &
16 Prof. Code §§ 17200, *et seq.*, are not preempted by the Wiretap Act as they are qualitatively
17 different and are properly pleaded. (Opp'n at 3-25.) The Court addresses each ground in turn.

18 **A. Wiretap Act**

19 Defendant contends that Plaintiffs' Wi-Fi broadcasts were "readily accessible to the general
20 public," per the statutory definition provided in Section 2510(16) of the Wiretap Act, such that
21 exemption G1 obviates Defendant's liability for any alleged interceptions. (Motion at 5-12.)
22 Plaintiffs respond that the Section 2510(16) definition of "readily accessible to the general public"
23 applies solely to "radio communications," as specified, and thus would only apply to exemption G2
24 ("radio communications") and not exemption G1 ("electronic communications"). (Opp'n at 2-10.)

25 The Wiretap Act, 18 U.S.C. § 2511(1) provides a private right of action against:

26 (1) Except as otherwise specifically provided in this chapter any person who--
27
28

- 1 (a) intentionally intercepts, endeavors to intercept, or procures any other person
- 2 to intercept or endeavor to intercept, any wire, oral, or electronic
- 3 communication; . . .
- 4 (c) intentionally discloses, or endeavors to disclose, to any other person the
- 5 contents of any wire, oral, or electronic communication, knowing or having
- 6 reason to know that the information was obtained through the interception of
- 7 a wire, oral, or electronic communication in violation of this subsection; [or]
- 8 (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or
- 9 electronic communication, knowing or having reason to know that the
- 10 information was obtained through the interception of a wire, oral, or
- 11 electronic communication in violation of this subsection;

12 However, Section 2511(2) provides exemptions to Section 2511(1)'s private right of action:

- 13 (g) It shall not be unlawful under this chapter or chapter 121 of this title for any person--
- 14 (i) to intercept or access an electronic communication made through an
- 15 electronic communication system that is configured so that such electronic
- 16 communication is readily accessible to the general public;
- 17 (ii) to intercept any radio communication which is transmitted--
- 18 (I) by any station for the use of the general public, or that relates to ships,
- 19 aircraft, vehicles or persons in distress;
- 20 (II) by any governmental, law enforcement, civil defense, private land
- 21 mobile, or public safety communications system, including police and
- 22 fire, readily accessible to the general public;
- 23 (III) by a station operating on an authorized frequency within the bands
- 24 allocated to the amateur, citizens band, or general mobile radio
- 25 services; or
- 26 (IV) by any marine or aeronautical communications system;

27 Section 2510(16) provides the sole definition in the Wiretap Act for "readily accessible to the general public":

- 28 (16) "readily accessible to the general public" means, with respect to a radio
- communication, that such communication is not--
- (A) scrambled or encrypted;
- (B) transmitted using modulation techniques whose essential parameters have
- been withheld from the public with the intention of preserving the privacy of
- such communication;
- (C) carried on a subcarrier or other signal subsidiary to a radio transmission;
- (D) transmitted over a communication system provided by a common carrier,
- unless the communication is a tone only paging system communication; or
- (E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part
- 74, or part 94 of the Rules of the Federal Communications Commission,
- unless, in the case of a communication transmitted on a frequency allocated
- under part 74 that is not exclusively allocated to broadcast auxiliary services,
- the communication is a two-way communication by radio;

18 U.S.C. § 2510.

The matter before the Court presents a case of first impression as to whether the Wiretap Act imposes liability upon a defendant who allegedly intentionally intercepts data packets from a

1 wireless home network. The case also presents a novel question of statutory interpretation as to how
2 the definition in Section 2510(16) of “readily accessible to the general public” modifies exemption
3 G1, if at all.

4 In establishing the standard principles of statutory construction, the Supreme Court has held
5 that the starting point at which courts should discern congressional intent is always the existing
6 statutory text. Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004). Unless a court finds the existing
7 statutory text such that a plain meaning interpretation would lead to absurd results, the court is
8 bound to enforce the existing text according to its terms. Id. (citing Hartford Underwriters Ins. Co.
9 v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)). “In ascertaining the plain meaning of the
10 statute, the court must look to the particular statutory language at issue, as well as the language and
11 design of the statute as a whole.” K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). One
12 measure of ambiguity is that the statutory text at issue is fairly capable of more than one
13 interpretation. Chickasaw Nation v. United States, 534 U.S. 84, 90 (2001). Should a court find the
14 statutory text ambiguous or should a plain text reading fail to yield a definitive interpretation, a court
15 may then turn to the legislative history in order to add context to the statute. SEC v. McCarthy, 322
16 F.3d 650, 655 (9th Cir. 2003).

17 **1. Plain Text Reading**

18 In this case, Congress has not expressly declared its intent as to how Section 2510(16) should
19 apply to exemption G1 in the plain text of the statute, nor has Congress defined “radio
20 communication” anywhere within the Act. As Congress has not provided a definition for “radio
21 communication” within the confines of the Act, the Court first attempts to discern the ordinary and
22 plain meaning of the term from the context of its use, from dictionary references and from Congress’
23 use of similar terms within the Act.

24 **a. Statutory Text**

25 Section 2510(16) defines “readily accessible to the general public” as it pertains specifically
26 to “radio communication” by first establishing a presumption of ready accessibility and then
27 defining five types of radio communications which would be expressly excluded from that
28

1 presumption. Notably, none of the five express exemptions from ready accessibility under Section
 2 2510(16) specifically address wireless internet technologies, as the list predominantly addresses
 3 radio broadcast technologies. See 18 U.S.C. §§ 2510(16)(A)-(E). In addition to Section 2510(16),
 4 the Act uses the term “radio communication” on three other occasions. First, Section 2511(2)(g),
 5 which provides five exceptions to liability for intentional interception of wire, oral or electronic
 6 communications, makes it lawful to intentionally intercept:

7 [A]ny radio communication which is transmitted–

- 8 (I) by any station for the use of the general public, or that relates to ships, aircraft,
 vehicles, or person in distress;
- 9 (II) by any governmental, law enforcement, civil defense, private land mobile, or public
 10 safety communications system, including police and fire, readily accessible to the
 general public;
- 11 (III) by a station operating on an authorized frequency within the bands allocated to the
 amateur, citizens band, or general mobile radio services; or
- 12 (IV) by any marine or aeronautical communications system;

13 18 U.S.C. § 2511(2)(g)(ii). Second, Section 2511(2)(g) also makes it lawful “for other users of the
 14 same frequency to intercept any radio communication made through a system that utilizes
 15 frequencies monitored by individuals engaged in the provision or the use of such system, if such
 16 communication is not scrambled or encrypted.” 18 U.S.C. § 2511(2)(g)(v). Finally, Section
 17 2511(5)(a)(i)(B) makes unlawful and authorizes a right of action for the federal government to bring
 18 suit in federal court for the interception of “a radio communication that is transmitted on frequencies
 19 allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is
 20 not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal
 21 purpose or for purposes of direct or indirect commercial advantage or private commercial gain.” 18
 22 U.S.C. § 2511(5)(a)(i)(B). Title 47, part 74 of the rules of the Federal Communications Commission
 23 pertains to “Experimental Radio, Auxiliary, Special Broadcast and Other Program Distributional
 24 Services.” 47 C.F.R. § 74. Subpart D of part 74 regulates “Remote Pickup Broadcast Stations.” Id.
 25 Remote pickup broadcast stations are defined under the regulations as either a mobile or fixed
 26 “pickup broadcast transmitter, and its associated accessory equipment necessary to the radio
 27 communication function.” 47 C.F.R. § 74.401.

1 The drafting of these provisions predated the spread of wireless internet technologies and,
2 thus, the lack of any explicit reference to wireless internet technologies does not itself preclude an
3 interpretation of “radio communications” that would include these later-developed technologies.
4 However, the usage of “radio communication” throughout the Act does not lend itself to a broad
5 interpretation of the term. In particular, references to “radio communication” throughout the Act
6 predominantly pertain to and are drafted for the particular design of radio broadcast technologies,
7 and do not address other communications technologies that transmit using radio waves. For
8 example, Section 2511(2)(g) makes it lawful to intentionally intercept any radio communication that
9 “that relates to ships, aircraft, vehicles, or person in distress,” without reference to whether such
10 radio communication was readily accessible to the general public and not scrambled or encrypted.
11 Should the Court interpret radio communication so broadly within the Act to include such
12 technologies as wireless internet and cellular phones, this exception could lead to absurd results.
13 Specifically, pursuant to this interpretation, an unauthorized intentional monitoring of a cellular
14 phone call could be lawful should the content of the communication relate to vehicles or persons in
15 distress, but unlawful otherwise. Further, Section 2511(2)(g) makes it lawful to intentionally
16 intercept any radio communication transmitted by “any marine or aeronautical communications
17 system,” which could lead to equally arbitrary results when applying the exception to
18 communications technologies other than radio broadcast technologies, e.g., a Wi-Fi network aboard
19 an airplane.

20 **b. Dictionary Reference**

21 Gleaning a plain meaning reading of “radio communication” from dictionary references is
22 equally as inconclusive. The Oxford Dictionaries Online (“ODO”) defines “radio” as “[t]he
23 transmission and reception of electromagnetic waves of radio frequency, especially those carrying
24 sound messages.” Further, the ODO lists a number of more specific definitions for “radio”: (1) “the
25 activity or industry of broadcasting sound programs”; (2) “radio programs”; (3) “an apparatus for
26 receiving radio programs”; (4) “an apparatus capable of both receiving and transmitting radio
27 messages between individuals, ships, planes, etc.”; (5) “. . . a broadcasting station or channel.” The
28 ODO defines “communication,” in pertinent part, as “the imparting or exchanging of information or

1 news.” However, the ODO, Merriam-Websters and the Oxford English Dictionary do not contain
2 any definition for “radio communication” and, thus, fail to provide an authoritative interpretation for
3 the compound formulation of the two words. On one hand, Congress could have intended “radio
4 communication” to simply combine the definition of “radio” with the definition of
5 “communication,” thereby creating a compound that incorporates all communications transmitted
6 using radio waves. Yet, on the other hand, Congress could have intended the compound of “radio”
7 and “communication” to denote communications that involved a radio apparatus or a communication
8 that solely involved the transmission of sound over radio waves. Moreover, should Congress have
9 intended the compound term “radio communication” to mean simply “communication by radio
10 waves,” it could have so specified. Rather, Congress chose to use the compound term, “radio
11 communication,” a term that shares a likeness with other compound terms used throughout the Act
12 that prefix “communication” with reference to a particular form of media; each of which are
13 provided specialized definitions within the Act. The Court now examines the statutory text to
14 discern how Congress intended compound terms to modify the independent meaning of each word,
15 if at all.

16 c. Compound Terms

17 While the ECPA does not define the compound term “radio communication,” the Act does
18 provide definitions for three other compound terms that combine a form of media with the term
19 “communication”: “wire communication,”⁵ “oral communication”⁶ and “electronic
20 communication.”⁷ A “wire communication,” as defined by the Act, means:

21 [A]ny aural transfer made in whole or in part through the use of facilities for the
22 transmission of communications by the aid of wire, cable, or other like connection between
23 the point of origin and the point of reception (including the use of such connection in a
24 switching station) furnished or operated by any person engaged in providing or operating
25 such facilities for the transmission of interstate or foreign communications or
26 communications affecting interstate or foreign commerce.

26 ⁵ See 18 U.S.C. § 2510(1).

27 ⁶ See 18 U.S.C. § 2510(2).

28 ⁷ See 18 U.S.C. § 2510(12).

1 18 U.S.C. § 1210(1). The Act defines “oral communication” as “any oral communication uttered by
 2 a person exhibiting an expectation that such communication is not subject to interception under
 3 circumstances justifying such expectation, but such term does not include any electronic
 4 communication.” 18 U.S.C. § 1210(2). Finally, an “electronic communication” is defined as:

6 [A]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any
 7 nature transmitted in whole or in part by wire, radio, electromagnetic, photoelectronic or
 8 photooptical system that affects interstate or foreign commerce, but does not include—

- 8 (A) any wire or oral communication;
- 9 (B) any communication made through a tone-only paging device;
- 9 (C) any communication from a tracking device (as defined in section 3117 of this title);

10 or

- 10 (D) electronic funds transfer information stored by a financial institution in a
 11 communication system used for the electronic storage and transfer of funds

12 18 U.S.C. § 1210(12).

13 In defining these compound terms, Congress intended more refined definitions than simply
 14 combining the independent meanings of each word into a unified whole, e.g., electronic
 15 communication is not defined as any communication transmitted by electronic means. Rather,
 16 Congress provided nuanced definitions of each compound term; in part, to mitigate confusion in
 17 light of the inevitable overlap between terms. For example, electronic communication expressly
 18 includes electronic communications transmitted in whole or in part by wire, but excludes wire
 19 communications. Moreover, Congress did not define “wire communication” as any communication
 20 transmitted by wire, but limited the definition to incorporate solely “aural communications”
 21 transmitted by wire. Congress also expressly included communications transmitted in whole or in
 22 part by radio as a form of electronic communication, such that an interpretation of the compound
 23 “radio communication” as all communications by radio would render all communications
 24 technologies that transmit using radio waves electronic communications. An interpretation of “radio
 25 communication” that presumptively included all technologies that transmit over radio waves, such as
 26 cellular phones, under the purview of electronic communications and held that technology bound by
 27 Section 2510(16)’s definition of “readily accessible to the general public,” would contravene Ninth
 28 Circuit precedent holding that cellular phone communications are wire communications for purposes

1 of the Wiretap Act.⁸ The Ninth Circuit based its holding on the legislative history of the Act, finding
2 that, despite the apparent wireless nature of cellular telephones, Congress intended cellular phone
3 technology to fall into the meaning of wire communication based on the fact that cellular phones
4 transmit the communications over wire at some point during the course of the transmission. *Id.* at
5 1138, n.12. Rather than a simply interpret “wire communications” as all communications by wire,
6 the Ninth Circuit found that Congress intended compound terms that prefixed “communication” with
7 a type of media to have specialized and, at times, counter-intuitive definitions. In this case,
8 Congress did not provide a specialized definition of “radio communication,” unlike wire, oral and
9 electronic communication. However, such an omission does not preclude a finding that Congress
10 intended a more sophisticated compound meaning and, as consequence, the meaning of “radio
11 communication” remains open to multiple interpretations.

12 Thus, the Court finds that a plain reading of “radio communication” from the statutory text,
13 as well as reading the text in the context of the structure and purpose of the Act, fails to yield a
14 definitive and unambiguous result. The Court now turns to the legislative history for clarification.

15 2. Legislative History

16 The ECPA was passed by Congress in 1986 to amend the Omnibus Crime Control and Safe
17 Streets Action of 1968, commonly known as the Wiretap Act, in order to “update and clarify Federal
18 privacy protections and standards in light of dramatic changes in new computer and
19 telecommunications technologies.” S. Rep. No. 99-541, at 1 (1986). Prior to the amendment, Title
20 III of the Omnibus Crime Control and Safe Streets Act provided a private right of action for
21 interception of communications, however, the statute was expressly limited to unauthorized aural
22 interception of wire or oral communications. *Id.* at 2. In 1986, the statute was, in the words of
23 Senator Leahy, one of the senators who introduced the amendment, “hopelessly out of date.” *Id.*

24 In particular, Congress intended the 1986 amendment to bring the statute in line with
25 “technological developments and changes in the structure of the telecommunications industry.” S.
26 Rep. No. 99-541, at 2 (1986). Congress explicitly acknowledged the new privacy concerns faced by

27
28 ⁸ In the Matter of the Application of the United States for an Order Authorizing the Roving
Interception of Oral Communications, 349 F.3d 1132 (9th Cir. 2003).

1 individuals and businesses in light of developments in the personal and commercial computing
2 industries. Id. Developments of particular interest to the Senate Committee included the protection
3 of privacy rights in offsite data storage, the computer-to-computer transmission of this data, and
4 electronic mail. Id. In fact, the initial development of the amendment came on the heels of a 1984
5 interaction between Senator Leahy and the Attorney General where the Senator asked the Attorney
6 General if electronic mail and computer-to-computer communications were covered by the Wiretap
7 Act. Id. In response, the Department of Justice expressed concern that in areas of rapid
8 technological development, “distinctions such as [whether or not a reasonable expectation of privacy
9 exists] are not always clear or obvious.” Id. at 3. To this end, Congress amended the Wiretap Act in
10 order to provide statutory privacy protection and a civil right of action for interceptions of electronic
11 communications, including, *inter alia*, computer-to-computer transmissions and electronic mail;
12 contexts in which Congress suspected the Fourth Amendment may only dubiously apply. Id.

13 Another matter of importance to Congress in the drafting of the amendment was to address
14 concerns expressed by radio hobbyists and users of radio scanners that the amendment would
15 impose liability upon the innocent act of scanning radio broadcast frequencies in order to reach
16 public communications, should the hobbyist inadvertently encroach upon protected communication
17 that shares the same spectrum, for instance a cellular phone. S. Rep. No. 99-541, at 4-5 (1986). An
18 earlier version of the amendment, the Electronic Communications Privacy Act of 1985, S. 1667, did
19 not include the Section 2510(16) definition of “readily accessible to the general public” and applied
20 both exemptions G1 and G2 to “electronic communication,” without any use of the term “radio
21 communication.” 131 Cong. Rec. S. 11795, at 4. Following a year of hearings, at which concerns
22 were raised by radio hobbyists, Senator Leahy, joined by Senator Mathias, introduced a superseding
23 version of the bill that incorporated explicit mention of “radio communication,” including Section
24 2510(6) and reference in exemption G2, as well as a heightened mens rea requirement from “willful”
25 to “intentional” to find criminal liability for interception. S. Rep. No. 99-541, at 3, 5 (1986); 132
26 Cong. Rec. S7987-04, at 18 (“In order to address radio hobbyists’ concerns, we modified the
27 original language of S. 1667 to clarify that intercepting traditional radio services is not unlawful.”).
28

1 It was in light of these dual considerations that Congress drafted the text that became
2 Sections 2510 and 2511. Section 2510(12) defines “electronic communication” as a broad category
3 that includes “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any
4 nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or
5 photooptical system” 18 U.S.C. § 2510(12). As defined in the statute, a communication
6 transmitted by radio is a specific type of electronic communication, such that exemption G1—which
7 exempts from liability any interception of an electronic communication that is readily accessible to
8 the general public—would exempt communications transmitted by radio as well, should those
9 communications be “readily accessible to the general public.” 18 U.S.C. § 2511(2).

10 However, to clarify that “intercepting traditional radio services” was not a violation of the
11 Act in order to quiet the concerns raised by radio hobbyists, Congress added, *inter alia*, Section
12 2510(16). See, e.g., 132 Cong. Rec. S7987-04, at 18. Section 2510(16) provides a definition for
13 “readily accessible to the general public” with respect to “radio communication” that establishes a
14 presumption of accessibility, should the communication not fit within one of five delineated
15 exceptions. 18 U.S.C. § 2510(16). Notably, each of the five exceptions, as well as the presumption
16 of accessibility, are drafted for the particular technology of traditional radio broadcast mediums and
17 do not address any broader radio-based communications technology of the time, including cellular
18 phones. The first exception to the Section 2510(16) is for “scrambled or encrypted”
19 communications, which the Senate Report describes as “to convert the signal into unintelligible form
20 by means intended to protect the contents of a communication from unintended recipients.” 18
21 U.S.C. § 2510(16)(A); S. Rep. No. 99-541, at 11 (1986). The second exception is for
22 communications that have been “transmitted using modulation techniques whose essential
23 parameters have been withheld from the public with the intention of preserving the privacy of such
24 communication.” 18 U.S.C. § 2510(16)(B). The Senate Report clarified that “paragraph (B) refers
25 to spread spectrum radio communications,” which was a technology that allowed for the
26 transmission of a signal on “different frequencies where the receiving station must possess the
27 necessary algorithm [sic] in order to reassemble the signal.” S. Rep. No. 99-541, at 11 (1986). The
28 third exception is for communications “carried on a subcarrier or other signal subsidiary to a radio

1 transmission,” which, according to the Senate Report, included “data and background music services
2 carried on FM subcarriers.” Id. at 11-12. The fourth exception is for communications that are
3 “transmitted over a communication system provided by a common carrier,” excluding “tone only
4 paging system communication.” 18 U.S.C. § 2510(16)(D). The fifth exception was for
5 communications that were transmitted on frequencies allocated under the Rules of the Federal
6 Communications Commission for: (1) Part 25 (“Satellite Communications”); (2) subparts of Part 74
7 (“Experimental Radio, Auxiliary, Special Broadcast and Other Program Distributional Services”);
8 and (3) Part 94 (“Microwave Services”). 18 U.S.C. § 2510(16)(E); 47 C.F.R. § 47(24), (74), (94).

9 Although the ECPA never explicitly defines “radio communication,” what the legislative
10 history and the context of the term’s use in Section 2510(16) make clear is that Congress intended
11 “radio communication” to include “traditional radio services,” such that public-directed radio
12 broadcast communication, as the technology was understood at the time, would be clearly excluded
13 from liability under the Act. What the legislative history also reveals, however, is that Congress did
14 not intend “radio communications” to be defined so broadly such that it would encompass all
15 communications transmitted over radio waves. This was made explicit in the Senate Report’s
16 consideration of cellular phone technology, which also uses radio waves to transmit
17 communications, and the clear intent to include such technology under the protections of the Act as
18 a “wire communication” without any express limitation by Section 2510(16). S. Rep. No. 99-541, at
19 6, 11 (1986) (“Thus, a wire communication encompasses the whole of a voice telephone
20 transmission even if part of the transmission is carried by fiber optic cable or by radio—as in the case
21 of cellular telephones . . .”).

22 As the legislative history demonstrates, despite the insistence of radio scanning enthusiasts,
23 Congress stopped short of including a full exception to liability under the Act for the willful
24 monitoring of cellular telephone calls.⁹ S. Rep. No. 99-541, at 6 (1986). According to the Senate
25 Report, this hesitation was based on two considerations. Id. First, Congress had made willful

26
27 ⁹ 132 Cong. Rec. S7987-04, 1986 WL 776264, at *18 (“Under this revised Electronic
28 Communications Privacy bill, cellular phones, private and public microwave services and voice or
display pagers are protected against interception.”).

1 monitoring of telephone calls illegal in the original 1968 Wiretap Act should at least part of the call
2 pass through a wire. Id. Second, the design of the cellular phone technology made intentional
3 monitoring of the communication more difficult than other signals commonly scanned. Id. Rather
4 than exclude cellular phone communications from the protections of the act, the Senate Committee
5 highlighted the possibility that the Federal Communications Commission should consider labeling
6 cellular phone and radio scanning equipment to alert the user that such technologies are “radio-based
7 communications” and, as such, intentional interception of the communication could violate the
8 Wiretap Act. Id.

9 The presumption of accessibility established in Section 2510(16) for traditional radio
10 broadcast technology was an appropriate response to the balance being struck between particular
11 electronic forms of communication that were designed to be public, like traditional radio broadcast,
12 and others that were designed to be private, like cellular phone technology. Id. However, to apply
13 the presumption to all communications transmitted using radio technology by interpreting “radio
14 communication” broadly would contravene congressional intent to provide protection for technology
15 like cellular phones, which use radio waves to transmit communications, but are architected in such
16 a way as to be private.

17 Thus, the Court finds that the legislative history and text of the statute demonstrate
18 congressional intent to apply Section 2510(16)’s definition of “readily accessible to the general
19 public” to exemption G1, and not merely to limit the application of Section 2510(16) to “radio
20 communications” in exemption G2. However, in light of the legislative history and text of the
21 statute, the Court also finds that Section 2510(16)’s presumption of accessibility and the requirement
22 that a communications technology must fit within one of five exceptions were solely intended to
23 apply to “traditional radio services.” To interpret Section 2510(16) so broadly as to apply its strict
24 presumption of accessibility to all communications technology that uses radio waves, regardless of
25 the technology’s design, would disregard explicit congressional intent to include cellular phone
26 technology within the protections of the Act and clear Ninth Circuit precedent, holding that cellular
27
28

1 phone technologies are, in fact, “wire communications.”¹⁰ Rather, for all electronic communications
 2 that could not be fairly classified as “traditional radio services,” or radio broadcast technology,
 3 regardless of the technology’s use of radio waves as the medium of transmission, the Court finds
 4 that Congress did not intend Section 2510(16)’s narrow definition of “readily accessible to the
 5 general public” to apply for purposes of exemption G1. The Court now turns to examine the
 6 sufficiency of the pleadings in light of these findings.

7 3. Sufficiency of the Pleadings

8 Here, Plaintiffs allege in pertinent part:

9 Defendant intentionally intercepted electronic communications sent or received on
 10 wireless internet connections (“WiFi connections”) by the Class from at least May 25, 2007
 11 through the present (CCAC ¶ 1.) Defendant intercepted the Class members’ electronic
 12 communications with its Google Street View vehicles. (*Id.* ¶ 2.) When Defendant’s
 13 engineers created the data collection system for its Google Street View vehicles, most
 14 commonly known as a packet analyzer or wireless sniffer, they intentionally included
 15 computer code in the system that was designed to and did sample, collect, decode, and
 16 analyze all types of data sent and received over the WiFi connections of class members. (*Id.*
 17 ¶ 4.)

18 This data included Class members’ unique, secret WiFi network identifiers (known as
 19 Service Set Identifier or SSID) and unique WiFi router numbers (Media Access Control or
 20 MAC addresses). (CCAC ¶ 4.) The data also included all or part of any personal emails,
 21 passwords, videos, audio, documents, and Voice Over Internet Protocol (“VOIP”)
 22 information (collectively, “payload data”) transmitted over Class members’ WiFi networks
 23 in which plaintiffs had a reasonable expectation of privacy. (*Id.*) The WiFi networks from
 24 which the Google Street View vehicles collected payload data were not configured so that
 25 such data were reasonably accessible by the general public. (*Id.* ¶ 5.) Indeed, the data, as
 26 captured by the wireless sniffer, are not even readable by members of the public absent use
 27 of sophisticated decoding and processing technology. (*Id.*)

28 Based on the allegations above, the Court finds that Plaintiffs plead facts sufficient to state a
 claim for violation of the Wiretap Act. In particular, Plaintiffs plead that Defendant intentionally
 created, approved of, and installed specially-designed software and technology into its Google Street
 View vehicles and used this technology to intercept Plaintiffs’ data packets, arguably electronic
 communications, from Plaintiffs’ personal Wi-Fi networks. Further, Plaintiffs plead that the data
 packets were transmitted over Wi-Fi networks that were configured such that the packets were not
 readable by the general public without the use of sophisticated packet sniffer technology. Although
 Plaintiffs fail to plead that the wireless networks fall into at least one of the five enumerated

¹⁰ In the Matter of the Application of the United States for an Order Authorizing the Roving
 Interception of Oral Communications, 349 F.3d at 1138, n.12.

1 exceptions to Section 2510(16)'s definition of "readily accessible to the general public" for radio
2 communications, the Court finds that the wireless networks were not readily accessible to the
3 general public as defined by the particular communication system at issue, wireless internet
4 networks, which are not "radio communications," as the term was intended by Congress in drafting
5 Section 2510(16).

6 Rather, application of the Section 2510(16) definition of "readily accessible to the general
7 public" as narrowly defined for traditional radio broadcast technology, would be inapplicable to the
8 determination of whether Plaintiffs' allegedly intercepted data packets from their Wi-Fi networks
9 are readily accessible to the general public for purposes of exemption G1, despite the fact that
10 wireless networks transmit data using radio waves. As the Court has found, Congress intended
11 Section 2510(16)'s definition to resolve the issue of radio scanning devices used to intercept radio
12 broadcasts by establishing a presumption that traditional radio services were "readily accessible to
13 the general public," in accord with the design of the medium as one where most communications
14 over that medium are intended to be public. Unlike in the traditional radio services context,
15 communications sent via Wi-Fi technology, as pleaded by Plaintiffs, are not designed or intended to
16 be public. Rather, as alleged, Wi-Fi technology shares a common design with cellular phone
17 technology, in that they both use radio waves to transmit communications, however they are both
18 designed to send communications privately, as in solely to select recipients, and both types of
19 technology are architected in order to make intentional monitoring by third parties difficult. S. Rep.
20 No. 99-541, at 6 (1986).

21 Further, applying Section 2510(16)'s narrow definition of "readily accessible to the general
22 public" to wireless networks, a technology unknown to the 99th Congress who drafted and passed
23 the ECPA, would contravene the primary stated purpose of the amendment, which was to update the
24 Wiretap Act to include within the Act specific protections against intentional interceptions of
25 computer-to-computer communications and so-called "electronic mail" or email; data Plaintiffs
26 plead was included in the data packets intercepted by Defendant. Interpreting the ECPA such that
27 the statute provides obscure limitations on the protection of emails and other computer-to-computer
28 communications based on the particular medium that transmitted the electronic communication

1 would render the Wiretap Act, and the efforts of the 99th Congress to provide such protections,
2 absurd. Under such an interpretation, the Act would provide a private civil right of action, and even
3 impose criminal liability, for the interception of emails transmitted over an ethernet cable through a
4 wired network, but would stop short at protecting those very same emails should they pass
5 momentarily over radio waves through a Wi-Fi network established to transmit data within a home.
6 Such an interpretation cannot pass muster in the face of an explicit limitation that Section 2510(16)'s
7 specialized definition of "readily accessible to the general public" solely apply to "radio
8 communications," a term undefined within the statutory text, and where the legislative history of the
9 Act makes plain that Congress intended "radio communications" to mean traditional radio services
10 or broadcast radio.

11 Defendant's contention that Plaintiffs fail to state a claim for violation of the Wiretap Act, as
12 Plaintiffs plead that their networks were "open" and "unencrypted," is misplaced. (Motion at 8-11.)
13 While Plaintiffs plead that their networks, or electronic communications systems, were configured
14 such that the general public may join the network and readily transmit electronic communications
15 across that network to the Internet, Plaintiffs plead that the networks were themselves configured to
16 render the data packets, or electronic communications, unreadable and inaccessible without the use
17 of rare packet sniffing software; technology allegedly outside the purview of the general public.
18 Thus, the Court finds that Plaintiffs plead facts sufficient to support a claim that the Wi-Fi networks
19 were not "readily accessible to the general public," such that exemption G1 would not apply.

20 Defendant's interpretation of United States v. Ahrndt¹¹ as standing for the principle that all
21 unencrypted wireless networks are readily accessible to the general public and, thus, any
22 interceptions from those networks are obviated from liability under exemption G1, unduly extends
23 the doctrine. (Motion at 10-11.) In Ahrndt, a neighbor was connected to the Internet via her own
24 wireless network when her network malfunctioned and her computer automatically logged in to
25 another open wireless network operated by the defendant. Id. at *1. The defendant had
26 administered his iTunes software as set to "share," such that other users on the same network would

27
28 ¹¹ No. 08-468, 2010 WL 373994 (D. Or. Jan. 28, 2010).

1 be able to access all files that the defendant had stored in his iTunes libraries. Id. After being
2 automatically logged into the defendant's wireless network, the plaintiff in Ahrndt began using her
3 own iTunes program and noticed that the defendant's iTunes library was accessible. Id. In
4 accessing the defendant's iTunes library, the plaintiff located a number of files containing child
5 pornography in a subfolder within the shared directory. Id. Based on these facts, Judge King held
6 that the plaintiff's interception was not illegal and was, in fact, "expressly lawful" under the Wiretap
7 Act as the defendant's network and iTunes software were configured to be readily accessible to the
8 general public. Id. at *8. However, the court did not base its holding merely on the fact the
9 defendant's network was unencrypted. Id. Rather, Judge King found that "defendant's conduct in
10 operating his iTunes software with the preferences set to share, in conjunction with maintaining an
11 unsecured wireless network router, diminished his reasonable expectation of privacy to the point that
12 society would not recognize it as reasonable." Id. at *8. Unlike in Ahrndt, here, Plaintiffs plead
13 that, although the networks themselves were unencrypted, the networks were configured to prevent
14 the general public from gaining access to the data packets without the assistance of sophisticated
15 technology. (CCAC ¶ 5.) Thus, the Court finds that, without more, merely pleading that a network
16 is unencrypted does not render that network readily accessible to the general public and serve to
17 remove the intentional interception of electronic communications from that network from liability
18 under the ECPA.

19 Accordingly, the Court DENIES Defendant's Motion to Dismiss Plaintiffs' First Cause of
20 Action for violation of the Federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.*

21 **B. State Wiretap Statutes**

22 Defendant moves to dismiss Plaintiffs' Third Cause of Action for violation of various state
23 wiretap statutes on the grounds that claims under state wiretap statutes are preempted by the Federal
24 Wiretap Act on express, field and conflict preemption grounds. (Motion at 12-16.)

25 "Pursuant to the Supremacy Clause of the United States Constitution, federal law can
26 preempt and displace state law through: (1) express preemption; (2) field preemption (sometimes
27 referred to as complete preemption); and (3) conflict preemption." Ting v. AT&T, 319 F.3d 1126,
28 1135 (9th Cir. 2003) (citations omitted). "Express preemption exists where Congress enacts an

1 explicit statutory command that state law be displaced.” Id. (citations omitted). “Absent explicit
2 preemptive text, we may still infer preemption based on field or conflict preemption” Id. A
3 court may find that federal law displaces state law on field preemption grounds “when the federal
4 statutory scheme is sufficiently comprehensive to infer that Congress left no room for supplementary
5 regulation by the states.” Public Utility Dist. No. 1 of Grays Harbor Cty. Washington v. Idacorp,
6 Inc., 379 F.3d 641, 647 (9th Cir. 2004) (citations and quotations omitted). “When the federal
7 government completely occupies a given field or an identifiable portion of it . . . , the test of
8 preemption is whether ‘the matter on which the state asserts the right to act is in any way regulated
9 by the federal government.’” Id. (citations and quotations omitted). However, “[i]n all cases,
10 congressional intent to preempt state law must be clear and manifest.” In re Cybernetic Services,
11 Inc., 252 F.3d 1039, 1046 (9th Cir. 2001).

12 Here, the Court finds that, while the ECPA contains no express preemptive statement on the
13 part of Congress,¹² the ECPA was intended to comprehensively regulate the interception of
14 electronic communications such that the scheme leaves no room in which the states may further
15 regulate. See Bunnell v. Motion Picture Ass’n of America, 567 F. Supp. 2d 1148, 1154-55 (C.D.
16 Cal. 2007). In particular, the ECPA was enacted, in part, to provide legal certainty to users and
17 developers of innovative communications technologies with bright line rules for liability. S. Rep.
18 99-541 at 4. In so regulating, Congress struck a balance between the right to the privacy of one’s
19 electronic communications against the ability of users to access communications technologies
20 without fear of liability for inadvertent interception. S. Rep. 99-541 at 5-6. State regulation acting
21 in addition to the ECPA might serve to obscure the legislative scheme surrounding innovative
22 communications technologies that Congress intended to clarify through the Act, or could serve to
23 upset the fragile balance considered by Congress between those who transmit electronic

24
25 ¹² The Court finds that Defendant’s interpretation of Section 2518(10)(c) as an express
26 preemption clause misinterprets the provision. (Motion at 13.) The legislative history supports the
27 proposition that the provision was appended to the ECPA solely to address suppression of evidence by
28 criminal defendants. In re NSA Telecomms. Records Order Litigation, 483 F. Supp. 2d 934, 939 (N.D.
Cal. 2007) (Walker, J.) (holding that Section 2518(10)(c) was drafted with the limited intent to prevent
“criminal defendants from suppressing evidence based on electronic communications or customer
records obtained in violation of ECPA’s provisions”). Accordingly, the Court declines to adopt
Defendant’s position.

1 communications and those who may inadvertently intercept those communications. Further, the
 2 statute provides for criminal penalties, as well as a civil right of action for violation of its provisions,
 3 such that the statute provides broad protections for interceptions under the Act. Thus, the Court
 4 finds that the federal Wiretap Act preempts state wiretap statutory schemes.

5 Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Third Cause of
 6 Action for violation of various state wiretap statutes with prejudice.

7 **C. Cal. Bus. & Prof. Code §§ 17200, et seq.**

8 Defendant moves to dismiss Plaintiff's Second Cause of Action for violation of Cal. Bus. &
 9 Prof. Code §§ 17200, *et seq.*, on the grounds that claim is preempted by the Federal Wiretap Act on
 10 express, field and conflict preemption grounds; and (2) assuming *arguendo* that the claim is not
 11 preempted, Plaintiffs fail to state a claim and fail to plead Proposition 64 standing. (Motion at 17-
 12 19.) The Court addresses each ground in turn.

13 **1. Preemption**

14 At issue is whether Plaintiffs' claims for violation of Cal. Bus. & Prof. Code §§ 17200, *et*
 15 *seq.*, is preempted by the federal Wiretap Act.

16 Here, unlike in the context of the state wiretap statutes, Cal. Bus. & Prof. Code §§ 17200, *et*
 17 *seq.*, does not seek to regulate the same field as the federal Wiretap Act. Rather, the statute was
 18 intended to broadly enable "tribunals to enjoin wrongful business conduct in whatever context such
 19 activity might occur." Barquis v. Merchants Collection Ass'n., 7 Cal. 3d 94, 111 (Cal. 1972). To
 20 this end, Section 17200's prohibition of "unlawful" acts does not proscribe specified conduct; rather,
 21 the statute incorporates violations of other substantive law as the basis for imposing liability in order
 22 to address the added harm to the marketplace of undertaking such violations in a business context.
 23 Cal-Tech Comm'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (Cal. 1999).

24 Further, the Federal Wiretap Act provides no additional protection or particular civil right of action
 25 for interceptions that result in anticompetitive conduct or harm to the market, nor do such additional
 26 protections conflict with the stated purpose of the ECPA.

27 Thus, the Court finds that Plaintiffs' Second Cause of Action for violation of Cal. Bus. &
 28 Prof. Code §§ 17200, *et seq.*, is not preempted by the federal Wiretap Act.

1 **2. Proposition 64 Standing**

2 At issue is whether Plaintiffs have properly pleaded Proposition 64 standing sufficient to
3 support their Second Cause of Action for violations of Cal. Bus. & Prof. Code §§ 17200, *et seq.*

4 To have standing to state a claim for violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*, as
5 amended by the 2004 passage of Proposition 64, a plaintiff must establish that he has suffered an
6 “injury in fact” and has “lost money or property as a result of such unfair competition.” Hall v.
7 Time Inc., 158 Cal. App. 4th 847, 852 (Cal. Ct. App. 2008). Further, allegations of an invasion of
8 privacy are insufficient to invoke Proposition 64 standing. Ruiz v. Gap, 540 F. Supp. 2d 1121, 1127
9 (N.D. Cal. 2008).

10 Here, Plaintiffs allege in pertinent part:

11 Plaintiffs and National Class members have suffered injury in fact and lost property as a
12 result of the unfair and unlawful business practices.

13 (CCAC ¶ 138.)

14 Based on the allegations above, the Court finds that Plaintiffs fail to plead facts sufficient to
15 support Proposition 64 standing. In particular, interception of data packets that a plaintiff has sent
16 over a wireless network are not lost property for purposes of determining Proposition 64 standing.
17 Such an indefinite claim of lost property would circumvent the intent of voters, when passing the
18 amendment, to increase the pleading requirements to state a claim for Section 17200 violation.
19 Further, Plaintiffs contentions that merely incurring attorney fees and expenses as a result of
20 bringing a Section 17200 claim are equally inapposite,¹³ and would effectively eviscerate the
21 heightened standing requirements of Proposition 64.

22 Accordingly, the Court GRANTS Defendant’s Motion to Dismiss Plaintiffs’ Second Cause
23 of Action for violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*, without prejudice to Plaintiffs to
24 amend their pleadings to add facts sufficient to support Proposition 64 standing, if so desired.¹⁴

25 ¹³ (Opp’n at 25.)

26 ¹⁴ In amending its UCL claim, Plaintiffs must also allege more than a loss of personal
27 information. A plaintiff’s “personal information” does not constitute property under the UCL.
28 Thompson v. Home Depot, Inc., No. 07cv1058 IEG, 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18,
2007).

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


V. CONCLUSION

The Court GRANTS in part and DENIES in part Defendant's Motion to Dismiss as follows:

- (1) The Court DENIES Defendant's Motion as to Plaintiffs' First Cause of Action for violation of the Federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.*;
- (2) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Third Cause of Action for violation of various state wiretap statutes with prejudice; and
- (3) The Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Second Cause of Action for violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*, with leave to amend.

On or before **August 1, 2011**, Plaintiffs shall file an Amended Complaint consistent with the terms of this Order.

Dated: June 29, 2011



JAMES WARE
United States District Chief Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

- 2 John A. Macoretta jmacoretta@srkw-law.com
- David H. Kramer dkramer@wsgr.com
- 3 Bart Edward Volkmer bvolkmer@wsgr.com
- Bobbie Jean Wilson BWilson@perkinscoie.com
- 4 Caroline Elizabeth Wilson cwilson@wsgr.com
- Michael H. Rubin mrubin@wsgr.com
- 5 Susan D. Fahringer sfahringer@perkinscoie.com
- Aaron Michael Zigler azigler@koreintillery.com
- 6 Robert A. Curtis rcurtis@foleybezek.com
- Michael James Aschenbrener maschenbrener@edelson.com
- 7 Jay Edelson jedelson@edelson.com
- Eric H. Gibbs ehg@girardgibbs.com
- 8 Reginald Von Terrell reggiet2@aol.com

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: June 29, 2011

Richard W. Wieking, Clerk

By: /s/ JW Chambers

Susan Imbriani
Courtroom Deputy

United States District Court
For the Northern District of California