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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**In Re: Vizio, Inc., Consumer Privacy  
Litigation**

CASE NO. 8:16-ml-02693-JLS-KES  
**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS (Doc. 116)**

1           **I. INTRODUCTION**

2           Before the Court is a Motion to Dismiss filed by Defendants VIZIO Inc., VIZIO  
3 Holdings, Inc., VIZIO Inscape Technologies, LLC, and VIZIO Inscape Services, LLC  
4 (collectively, “Vizio”). (Mot., Doc. 116.) Plaintiffs Dieisha Hodges, Rory Zufolo, William  
5 DeLaurentis, John Walsh, Chris Rizzitello, and Linda Thomson filed an Opposition, and  
6 Defendants replied. (Opp’n, Doc. 121; Reply, Doc. 123.) For the following reasons, the  
7 Court GRANTS IN PART and DENIES IN PART Defendants’ Motion to Dismiss.

8           **II. BACKGROUND**

9           Vizio is the second-largest manufacturer of “Smart TVs,” cutting-edge televisions  
10 equipped with integrated software that enables consumers to access the Internet and on-  
11 demand services such as Netflix, Hulu, and Pandora. (Compl. ¶¶ 33, 35, 45, Doc. 108.)  
12 Known as the “Vizio Internet Apps,” “Internet Apps Plus,” and “SmartCast,” Vizio’s  
13 content delivery software comes either preinstalled on its Smart TVs or is installed through  
14 software updates. (*Id.* ¶ 45.) Vizio markets its Smart TVs as a “passport to a world of  
15 entertainment, movies, TV shows and more” and charges a premium for them because they  
16 are designed to seamlessly deliver on-demand video content to consumers. (*Id.* ¶¶ 34, 81.)

17           Plaintiffs allege that, unbeknownst to them, Vizio’s Smart TVs use automatic  
18 content recognition software to collect and report consumers’ content viewing histories.  
19 (*Id.* ¶¶ 39, 50, 127.) This software, called “Smart Interactivity,” collects up to 100 billion  
20 content “viewing data points” along with detailed information about a consumer’s digital  
21 identity, such as consumers’ IP addresses, zip codes, MAC addresses, product model  
22 numbers, hardware and software versions, chipset IDs, region and language settings, as  
23 well as similar information about other devices connected to the same network. (*Id.* ¶¶ 39,  
24 42, 54, 62.) The Smart Interactivity software transmits this information to Vizio’s Inscape  
25 data services platform, which identifies the content a consumer has been watching by  
26 comparing the “viewing data points” to a database of existing content. (*Id.* ¶¶ 50, 62.)  
27 Vizio then sells all of this information to advertisers and media content providers so that  
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1 they can deliver highly targeted advertisements to Vizio Smart TVs and any smartphones,  
2 tablets, or computers connected to the same network. (*Id.* ¶¶ 2, 5, 35, 41-42.)

3 Plaintiffs contend that the constellation of information Vizio shares about  
4 consumers' digital identities "provides a 'game plan' to associate individuals with their  
5 viewing habits." (*Id.* ¶ 72.) One digital identifier that Vizio discloses, a MAC address, is a  
6 unique 12-digit identifier assigned to every mobile device, computer, Smart TV, or other  
7 electronic device. (*Id.* ¶ 69.) Because a MAC address is tied to a device's embedded  
8 chipsets, the identifier remains unchanged throughout the life of the electronic device. (*Id.*)  
9 MAC addresses, Plaintiffs allege, are frequently linked to an individual's name and can be  
10 used to acquire highly specific geolocation data. (*Id.* ¶¶ 70-71.) And, even if a MAC  
11 address alone is insufficient to identify a person, the information can readily identify a  
12 person when combined with the other information that Vizio discloses, such as IP  
13 addresses, zip codes, product model numbers, hardware and software versions, chipset IDs,  
14 and region and language settings. (*Id.* ¶¶ 72-79.) To support their argument, Plaintiffs  
15 provide two case studies where researchers were able to identify a significant percentage  
16 of individuals by analyzing several details about them. (*Id.* ¶¶ 74-78.) Plaintiffs also point  
17 to a Vizio prospectus, which highlights how the Inscape data services platform is able to  
18 "provide[] highly specific viewing behavior data on a massive scale with great accuracy."  
19 (*Id.* ¶ 62.)

20 Vizio's data collection and dissemination practices, Plaintiffs contend, are not  
21 adequately disclosed in its marketing or privacy policies. (*Id.* ¶¶ 22, 81-94, 105.) The  
22 packaging for its Smart TVs highlights Vizio's Internet Apps and Internet Apps Plus  
23 without mentioning that, if consumers use these features, Vizio's Smart Interactivity  
24 software will collect and disseminate information about their viewing history and digital  
25 identity. (*Id.* ¶¶ 81-85.) Nowhere during the setup process for a Vizio Smart TV does Vizio  
26 reference its Smart Interactivity software. (*Id.* ¶ 85.) Vizio's Privacy Policy, which  
27 consumers can view in very small font under the "Reset & Admin" submenu, assuages  
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1 consumers that it collects only “non-personal” and “anonymous” information and does not  
2 reveal that Vizio sells the information it collects to third parties. (*Id.* ¶¶ 86, 89-91.)

3         Contrary to the industry’s standard practice, Vizio’s Smart TVs come with Smart  
4 Interactivity automatically enabled. (*Id.* ¶¶ 6, 61.) To turn off Smart Interactivity,  
5 consumers must navigate through the Smart TV’s menu to an obscure settings option that  
6 does not describe what Smart Interactivity does. (*Id.* ¶¶ 7, 85.) If a Smart TV is reset to its  
7 factory default settings—either intentionally or inadvertently—the Smart Interactivity  
8 software reactivates without consumers receiving any notice. (*Id.* ¶ 66.) A 2015 report by  
9 the security software company Avast found that the “off” capability for Smart Interactivity  
10 was not functional “for months, if not years.” (*Id.* ¶¶ 7, 65.) So, even if consumers believed  
11 they had disabled Smart Interactivity (and the feature appeared to be “off”), their Smart  
12 TVs were still transmitting their digital information without their knowledge. (*Id.*)

13         Vizio allegedly has a strong incentive to ensure that consumers do not disable its  
14 Smart Interactivity software. (*Id.* ¶ 44.) Vizio’s business model relies on the profits from  
15 its sales of consumer data to compensate for its relatively slim margins on Smart TVs. (*Id.*  
16 ¶¶ 43-44.) Vizio distinguishes its Inscope data services platform from competitors such as  
17 A.C. Nielson and Rentrak based on its ability to provide highly detailed information about  
18 8 million American consumers in “real time.” (*Id.* ¶¶ 40, 42.) As Vizio noted in an SEC  
19 filing, if consumers objected to or opted out of its Smart Interactivity software, Vizio’s  
20 growth strategy would be jeopardized. (*Id.* ¶¶ 43-44.)

21         Plaintiffs assert they purchased Vizio Smart TVs unaware of Vizio’s data collection  
22 and dissemination practices. (*Id.* ¶¶ 16-21.) They provide details about their Vizio Smart  
23 TVs, such as the model numbers and cities where they purchased them, and describe how  
24 they used their Vizio Smart TVs to watch on-demand video content. (*Id.*) After learning  
25 about Vizio’s Smart Interactivity software, Plaintiffs disconnected their Smart TVs from  
26 the Internet or ceased watching certain on-demand video content on them. (*Id.*) Plaintiffs  
27 allege that, had they known about Vizio’s data collection and disclosure practices, they

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1 would not have purchased their Vizio Smart TVs or would have paid less for them. (*Id.* ¶  
2 22.)

3         Based on these allegations, Plaintiffs bring various privacy and misrepresentation-  
4 based claims under both federal and state law. Plaintiffs allege federal claims under the  
5 Video Privacy Protection Act (VPPA) and the Wiretap Act. (*Id.* ¶¶ 111-32.) Under state  
6 law, Plaintiffs bring common law fraud and negligent misrepresentation claims as well as  
7 consumer protection claims under California’s Consumers Legal Remedies Act,  
8 California’s Unfair Competition Law (“UCL”), California’s False Advertising Law,  
9 Florida’s Deceptive and Unfair Trade Practices Act, New York’s General Business Law  
10 sections 349 and 350, Massachusetts’s Chapter 93A, and Washington’s Consumer  
11 Protection Act. (*Id.* ¶¶ 150-241, 250-53, 263-87, 301-17.) As for their state law privacy  
12 claims, Plaintiffs allege intrusion upon seclusion claims as well as causes of action under  
13 the California Constitution,<sup>1</sup> California’s Invasion of Privacy Act, the Massachusetts  
14 Privacy Act, and state video privacy statutes. (*Id.* ¶¶ 133-49, 242-49, 254-62, 294-300.)  
15 Finally, Plaintiffs allege common law claims for unjust enrichment. (*Id.* ¶¶ 288-93.)

16         **III. LEGAL STANDARD**

17         A defendant may move to dismiss an action for lack of subject matter jurisdiction  
18 pursuant to Federal Rule of Civil Procedure 12(b)(1). Fed. R. Civ. P. 12(b)(1). “Dismissal  
19 for lack of subject matter jurisdiction is appropriate if the complaint, considered in its  
20 entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction.”  
21 *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85  
22 (9th Cir. 2008). When considering a Rule 12(b)(1) motion, the Court “is not restricted to  
23 the face of the pleadings, but may review any evidence, such as affidavits and testimony,  
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25         <sup>1</sup> The parties briefed Plaintiffs’ sixteenth cause of action, titled “Privacy Violation Based  
26 on Intrusion” (*see* Compl. ¶¶ 294-300), as a cause of action under both the California Constitution  
27 and state common law (*see* Mem. 34-37 & n.18; Opp’n at 31-35; Reply at 22-24), so the Court  
28 will treat it as such for purposes of this Motion. For clarity, Plaintiffs should specify in any  
amended complaint that they are alleging claims under both the California Constitution and  
common law.

1 to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v. United*  
2 *States*, 850 F.2d 558, 560 (9th Cir. 1988). “The party asserting . . . subject matter  
3 jurisdiction bears the burden of proving its existence.” *Chandler v. State Farm Mut. Auto.*  
4 *Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

5 In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all  
6 “well-pleaded factual allegations” in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679  
7 (2009). A court must draw all reasonable inferences in the light most favorable to the non-  
8 moving party. *See Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010).  
9 Yet, “courts ‘are not bound to accept as true a legal conclusion couched as a factual  
10 allegation.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v.*  
11 *Allain*, 478 U.S. 265, 286 (1986)). “To survive a motion to dismiss, a complaint must  
12 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible  
13 on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “A claim has  
14 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
15 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing  
16 *Twombly*, 550 U.S. at 556).

17 “[W]here a complaint includes allegations of fraud, Federal Rule of Civil Procedure  
18 9(b) requires more specificity including an account of the ‘time, place, and specific content  
19 of the false representations as well as the identities of the parties to the  
20 misrepresentations.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting  
21 *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)). “A pleading is  
22 sufficient under [R]ule 9(b) if it identifies the circumstances constituting fraud so that a  
23 defendant can prepare an adequate answer from the allegations.” *Moore v. Kayport*  
24 *Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

#### 25 **IV. DISCUSSION**

26 In their Motion, Defendants contend that Plaintiffs have not suffered a concrete  
27 injury sufficient to confer Article III standing. (Mem. at 6-13.) Defendants also move to  
28 dismiss all of Plaintiffs’ claims for failure to state a claim. (Mem. at 13-38.) The Court will



1 first examine whether Plaintiffs have Article III and statutory standing before turning to  
2 whether they have adequately pleaded their claims.

3 **A. Article III Standing**

4 For Plaintiffs to have Article III standing, they must (1) have suffered an “injury in  
5 fact” that is “concrete and particularized” and “actual or imminent, not conjectural or  
6 hypothetical,” (2) the harm must be “fairly trace[able]” to the defendants’ conduct, and (3)  
7 the Court must be able to redress the claimed injury. *Lujan v. Defs. of Wildlife*, 504 U.S.  
8 555, 560-61 (1992). At each stage of a suit, the elements of Article III standing must “be  
9 supported in the same way as any other matter on which the plaintiff bears the burden of  
10 proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the  
11 litigation.” *Id.* at 561. Hence, “[a]t the pleading stage, general factual allegations of injury  
12 resulting from the defendant’s conduct may suffice.” *Id.*; *Maya v. Centex Corp.*, 658 F.3d  
13 1060, 1068 (9th Cir. 2011). Here, Defendants contest only whether Plaintiffs’ averred  
14 injuries are sufficiently concrete to confer Article III standing. (Mem. 6-13.)

15 “For an injury to be ‘concrete,’ it must be ‘real,’ and not ‘abstract.’” *Rodriguez v. El*  
16 *Toro Med. Inv’rs Ltd. P’ship*, No. SACV 16-59 (JLS) (KES), 2016 WL 6804394, at \*3  
17 (C.D. Cal. Nov. 16, 2016) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)).  
18 But an injury need not be tangible—some injuries, though unquantifiable, are sufficiently  
19 concrete to establish Article III standing. *Spokeo*, 136 S. Ct. at 1549; *Rodriguez*, 2016 WL  
20 6804394, at \*3. In determining whether an intangible injury satisfies Article III’s case-or-  
21 controversy requirement, “both history and the judgment of Congress play important  
22 roles.” *Spokeo*, 136 S. Ct. at 1549. Although its discretion is not absolute, Congress may  
23 properly “elevat[e] to the status of legally cognizable injuries concrete, de facto injuries  
24 that were previously inadequate in law.” *Id.* (quoting *Lujan*, 504 U.S. at 578).

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1                                    **i. The Video Privacy Protection Act and Wiretap Act Claims**

2                                    1. The Common Law History of the Right to Privacy

3                    Plaintiffs' federal claims under the Wiretap Act bear a "close relationship" to the  
4 tort of invasion of privacy. *See Spokeo*, 136 S. Ct. at 1549. The invasion of person's  
5 privacy was first identified as an independent "legal *injuria*" in Samuel D. Warren and  
6 future-Justice Louis Brandeis's seminal article *The Right to Privacy*. *See* Samuel D.  
7 Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); William  
8 L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 384-85 (1960). Warren and Brandeis argued that  
9 certain lines of cases, although ostensibly sounding in intellectual property, contract, or  
10 fiduciary obligations are fundamentally irreconcilable with principles of those areas of the  
11 law and instead suggest a broader right "of the individual to be let alone." *See* Warren &  
12 Brandeis, *supra*, at 197-213. A natural development of the common law, Warren and  
13 Brandeis asserted, would be the recognition of a separate tort for invasion of privacy. *Id.* at  
14 213-14. After some initial judicial trepidation, *see, e.g., Roberson v. Rochester Folding*  
15 *Box Co.*, 64 N.E. 442 (N.Y. 1902), the tort quickly gained currency, such that the  
16 American Law Institute incorporated it in the First Restatement. *See* Restatement (First) of  
17 Torts § 867 (1939). As articulated in the First Restatement, an invasion of privacy is an  
18 "unreasonabl[e] and serious[] interfere[nce] with another's interest in not having his affairs  
19 known to others or his likeness exhibited to the public . . ." *Id.*

20                    Seventy years after the publication of Warren and Brandeis's original article,  
21 William Prosser added clarity to the field by identifying four distinct torts that fell under  
22 the general term "invasion of privacy": intrusion upon seclusion, public disclosure of  
23 private facts, false light, and appropriation of a person's name or likeness. *See* Prosser,  
24 *supra*, at 389-407. Of particular relevance here, Prosser found that intrusion upon  
25 seclusion covered a broad range of "offensive or objectionable" meddling, such as  
26 eavesdropping, harassing someone through incessant telephone calls, and prying into a  
27 person's private records. *See id.* at 389-91.





1 conclusion is “instructive and important.” *Spokeo, Inc.*, 136 S. Ct. at 1549. Defendants  
2 counter that the information they disclose is not personally identifiable, so Congress’s  
3 creation of a private right of action for violations of the VPPA does not support Plaintiffs’  
4 claim of standing. (Reply at 3 n.1.) But this argument improperly conflates the merits of  
5 Plaintiffs’ claims with their standing to bring suit. Taken to its logical conclusion,  
6 Defendants’ argument absurdly implies that a court could never enter judgment against a  
7 plaintiff on a VPPA claim if it found that the disclosed information was not within the  
8 statutory definition of personally identifiable information; instead, it would have to remand  
9 or dismiss the action for lack of jurisdiction.<sup>2</sup> *Cf. Thornhill Pub. Co. v. Gen. Tel. & Elecs.*  
10 *Corp.*, 594 F.2d 730, 734 (9th Cir. 1979) (“[W]hen a statute provides the basis for both the  
11 subject matter jurisdiction of the federal court and the plaintiffs’ substantive claim for  
12 relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to  
13 state a claim is proper only when the allegations of the complaint are frivolous”).

14 In sum, both history and Congress’s judgment demonstrate that Plaintiffs’ claimed  
15 injuries are sufficiently concrete for Plaintiffs to have standing to bring suit under the  
16 Video Privacy Protection Act and Wiretap Act.

#### 17 ii. State Law Privacy Claims

18 For similar reasons, Plaintiffs have Article III standing to pursue their state law  
19 claims for invasion of privacy and intrusion upon seclusion. *See Opperman v. Path, Inc.*,  
20 87 F. Supp. 3d 1018, 1057 (N.D. Cal. 2014) (“It is beyond meaningful dispute that a  
21 plaintiff alleging invasion of privacy as Plaintiffs do here presents a dispute the Court is  
22 permitted to adjudicate.”); 13A Charles Alan Wright & Arthur R. Miller et al., *Federal*

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25 <sup>2</sup> The only case Defendants cite in which a district court dismissed a VPPA claim for lack  
26 of standing involved a complaint so inadequately pleaded that there was no support for the  
27 plaintiffs’ claimed injury. *See Mendoza v. Microsoft Inc.*, No. C14-316-MJP, 2014 WL 4540213,  
28 at \*3 (W.D. Wash. Sept. 11, 2014) (“Plaintiffs do not allege a single fact to support their  
allegation that Microsoft allegedly retained and disclosed personally identifiable information.”).  
By contrast, Plaintiffs’ 61-page complaint is well pleaded.

1 Practice & Procedure § 3531.4 (3d ed. 2017). As noted earlier, the tort of invasion of  
2 privacy has been firmly established in the American common law for approximately a  
3 century. Regardless of whether the alleged conduct ultimately states a claim, “the events  
4 that the complaint describes are concrete, particularized, and actual as to the plaintiffs.” *In*  
5 *re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 134-35 (3d Cir.  
6 2015).

7 **iii. Consumer Protection Claims**

8 As for their state consumer protection claims, Plaintiffs’ allege that they “would not  
9 have purchased, or would have paid less for, their Vizio Smart TVs had Defendants not  
10 concealed their collection and disclosure of Plaintiffs’ personal information. (Compl. ¶¶  
11 14, 22, 180, 188, 192, 200, 212, 214, 219, 225, 235, 237, 273, 278, 286.) Such “palpable  
12 economic injuries have long been recognized as sufficient to lay the basis for standing.”  
13 *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). Indeed, in *Hinojos v. Kohl’s Corp.*, the  
14 Ninth Circuit found “no difficulty” in concluding that the plaintiffs had Article III standing  
15 based on their assertion that they “paid more for [a product] than they otherwise would  
16 have paid, or bought it when they otherwise would not have done so.” 718 F.3d 1098, 1104  
17 n.3 (9th Cir. 2013) (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir.  
18 2012)). Defendants unpersuasively attempt to distinguish *Hinojos* by arguing that Plaintiffs  
19 do not allege that Vizio misrepresented its “product’s quality or ability to perform an  
20 intrinsic function.” (Mem. at 11 n.5.) In other words, Defendants argue that the only  
21 factors material to a consumer’s purchasing decision are whether the Smart TV performs  
22 its “television-related functions” and is not “defective” (*see id.*), terms that Defendants do  
23 not define. The Court cannot conclude that materiality should be so narrowly defined for  
24 the purpose of determining subject matter jurisdiction. Accordingly, Plaintiffs have Article  
25 III standing to bring their consumer protection claims.

26 **iv. Scope of Named Plaintiffs’ Article III Standing**

27 Defendants finally contend that Plaintiffs lack Article III standing to bring claims  
28 on behalf of consumers who purchased Smart TVs with SmartCast because Plaintiffs did

1 not purchase Smart TVs with this software. (Mem. at 12-13; Reply at 4.) Plaintiffs respond  
2 that the products and operative facts at issue are sufficiently similar to give them standing  
3 to bring claims on behalf of purchasers of Vizio TVs with SmartCast as well. (Opp'n at  
4 10.)

5 Courts have taken three broad positions on how related the product purchased by  
6 the named plaintiff and putative class members must be. Some courts find that the named  
7 plaintiff can represent only those who purchased the exact same product. *See, e.g., Kisting*  
8 *v. Gregg Appliances, Inc.*, No. 16-CV-141, 2016 WL 5875007, at \*5 (E.D. Wis. Oct. 7,  
9 2016). These courts often rely heavily on language from the Supreme Court's decision in  
10 *Lewis v. Casey*, 518 U.S. 343 (1996). *See, e.g., Kisting*, 2016 WL 5875007, at \*4-5;  
11 *Ferrari v. Best Buy Co.*, No. CIV. 14-2956 MJD/FLN, 2015 WL 2242128, at \*7 (D. Minn.  
12 May 12, 2015). Other courts hold that the relatedness of the putative class representative's  
13 and proposed class members' claims implicates only Rule 23's adequacy and typicality  
14 requirements—not Article III standing—and accordingly reserve judgment until a class  
15 certification motion. *See, e.g., Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 291  
16 (S.D.N.Y. 2015); *Cardenas v. NBTY, Inc.*, 870 F. Supp. 2d 984, 992 (E.D. Cal. 2012). Still  
17 others allow a named plaintiff to assert claims on behalf of absent class members if the  
18 products that the putative class members bought are “substantially similar” to the product  
19 the named plaintiff purchased. *Coleman-Anacleto v. Samsung Elecs. Am., Inc.*, No. 16-CV-  
20 02941-LHK, 2016 WL 4729302, at \*10 (N.D. Cal. Sept. 12, 2016).

21 The first approach, which holds that a putative class member has standing to  
22 represent only those who purchased the exact same model, is irreconcilable with the  
23 Supreme Court's decision in *Gratz v. Bollinger*, 539 U.S. 244 (2003). In *Gratz*, Justice  
24 Stevens argued in dissent that the University of Michigan's treatment of race in transfer  
25 admissions differed from its treatment of race in freshmen admissions, so the class  
26 representative—who intended to submit a transfer application—lacked standing to seek an  
27 injunction on behalf of the freshmen applicants. 539 U.S. at 286-87 (Stevens, J.,  
28 dissenting). The *Gratz* majority acknowledged that “there is tension in our prior cases”

1 over whether this is properly considered a question of standing or the propriety of class  
2 certification under Rule 23(a). *Id.* at 263 & n.15. Either way, the class representative could  
3 represent the freshman applicants because the freshman admissions process “[did] not  
4 implicate a *significantly different* set of concerns.” *Id.* at 265 (emphasis added).

5         The second approach, which characterizes the question as one solely of adequacy  
6 and typicality under Rule 23(a), is also difficult to square with Supreme Court precedent.  
7 In *Blum v. Yaretsky*, the Supreme Court held that nursing home patients, though having  
8 standing to represent a class of patients threatened with discharges or transfers to lower  
9 levels of care, did not have standing to represent those threatened with transfers to higher  
10 levels of care. 457 U.S. 991, 1001 (1982). The Supreme Court held that “the conditions  
11 under which such transfers occur are sufficiently different from” those faced by the named  
12 plaintiffs “that any judicial assessment of their procedural adequacy would be wholly  
13 gratuitous and advisory.” *Id.* Similarly, in *Lewis*, the Supreme Court held that an illiterate  
14 prisoner lacked standing to challenge other prisoners’ lack of access to courts where the  
15 other class members’ claims were unrelated to the inability to read legal materials. 518  
16 U.S. at 358. Specifically, the Supreme Court held that the class representative could not  
17 represent non-English speakers, prisoners in lockdown, or the inmate population at large.  
18 *Id.* *Blum* and *Lewis* thus treated the relatedness of a named plaintiff’s claims to those of the  
19 class as implicating standing as well as the propriety of class certification. *See Blum*, 457  
20 U.S. at 1001; *Lewis*, 518 U.S. at 358; *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158-59  
21 n.13 (1982) (evaluating the question under Rule 23(a)’s adequacy, typicality, and  
22 commonality requirements). *Lewis* further suggests—albeit in dicta—that, although a  
23 motion to dismiss typically addresses only a named plaintiff’s individual claims, a named  
24 plaintiff’s standing to seek relief on behalf of putative class members can be raised on a  
25 motion to dismiss. *See Lewis*, 518 U.S. at 357.

26         The Court, therefore, finds that the third approach most closely accords with *Blum*,  
27 *Lewis*, and *Gratz*. Using the “substantially similar” standard, the overarching question is  
28 whether the plaintiff’s averred injury is substantially similar to the claims of those she



1 seeks to represent.<sup>3</sup> At the motion to dismiss stage, however, the Court’s review of the  
2 scope of a named plaintiff’s Article III standing is necessarily limited. Like any other  
3 question of standing resolved at the pleading stage, “general factual allegations” that raise  
4 a reasonable inference that the products are substantially similar “may suffice.” *Lujan*, 504  
5 U.S. at 561. The Supreme Court observed as much in *Lewis*, stating, “[t]he general  
6 allegations of the complaint in the present case may well have sufficed to claim injury by  
7 named plaintiffs, and hence standing to demand remediation” on behalf of the various  
8 putative class members. 518 U.S. at 357. And, by the class certification stage, this standing  
9 question becomes effectively subsumed into Rule 23(a)’s “rigorous” typicality and  
10 adequacy requirements. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011);  
11 *Falcon*, 457 U.S. at 158-59 n.13.

12 Here, Plaintiffs allege that their Smart TVs and those with SmartCast collect and  
13 disclose the same information through Vizio’s Smart Interactivity software. (Compl. ¶¶ 55,  
14 58.) While Plaintiffs’ Complaint includes a few paragraphs alleging additional information  
15 collected by Vizio’s SmartCast software (*id.* ¶¶ 48, 55, 57), none of Plaintiffs’ alleged  
16 injuries hinge on the collection of this additional information. Plaintiffs, therefore, have  
17 adequately alleged that Vizio’s SmartCast-enabled Smart TVs and their Smart TVs are  
18 “sufficiently similar” for Plaintiffs to have Article III standing to represent a class  
19 encompassing purchasers of both types of televisions.

20 In sum, because Plaintiffs have adequately pleaded Article III standing, the Court  
21 DENIES Defendants’ Motion to Dismiss for lack of subject matter jurisdiction.

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27 <sup>3</sup> While the similarity of the products at issue is one important factor to consider, the  
28 similarity of the operative facts that give rise to the putative class representative and putative  
class’s claims is equally important. *See In re L’Oreal Wrinkle Cream Mktg. & Sales Practices*  
*Litig.*, No. CIV. 2:12-03571 WJM, 2013 WL 6450701, at \*4 (D.N.J. Dec. 9, 2013).



1                    **B. Statutory Standing**

2                    Unlike Article III standing, statutory standing is not a question of subject matter  
3 jurisdiction but rather an element of a plaintiff's cause of action. As such, statutory  
4 standing is properly scrutinized under Rule 12(b)(6). *See Maya*, 658 F.3d at 1067. In this  
5 case, Plaintiffs plausibly allege that they would not have purchased or would have paid  
6 less for their Vizio Smart TVs had Vizio properly disclosed its consumer data collection  
7 and disclosure practices. (Compl. ¶¶ 22, 161, 164-69, 180, 182-88, 192-93, 200-01, 212-  
8 15, 219, 225, 233-38, 272-74, 278, 286.) This price premium theory is cognizable under  
9 California's UCL, CLRA, and FAL; Florida's FDUTPA; and Massachusetts's Chapter  
10 93A. *See Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 881 (Cal. 2011) ("[P]laintiffs who can  
11 truthfully allege they were deceived by a product's label into spending money to purchase  
12 the product, and would not have purchased it otherwise, have 'lost money or property'  
13 within the meaning of [the UCL.]"); *Smith v. Wm. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336,  
14 1339 (S.D. Fla. 2009) ("Florida courts have allowed diminished value to serve as 'actual  
15 damages' recoverable in a FDUTPA claim."); *Ferreira v. Sterling Jewelers, Inc.*, 130 F.  
16 Supp. 3d 471, 479 (D. Mass. 2015) ("Overpayment can constitute an economic loss that is  
17 cognizable under [Massachusetts's] chapter 93A where the consumer continues to own the  
18 misrepresented product 'whose value was artificially inflated by a deceptive act or practice  
19 at the time of purchase.'" (citation omitted)).

20                    While the viability of a price premium theory may be less settled under New York's  
21 General Business Law sections 349 and 350, *see In re: Lenovo Adware Litigation*, No. 15-  
22 MD-02624-RMW, 2016 WL 6277245, at \*10-11 (N.D. Cal. Oct. 27, 2016), the case law  
23 on balance recognizes that a plaintiff has statutory standing if she paid a premium due to  
24 the defendant's deceptive practice. In *Koenig v. Boulder Brands, Inc.*, the district court  
25 found plaintiffs' allegations that they paid a premium for a product based on its "fat free"  
26 label sufficient to establish statutory standing under General Business Law sections 349  
27 and 350. 995 F. Supp. 2d 274, 288 (S.D.N.Y. 2014). Citing *Koenig* with approval, the  
28 Second Circuit subsequently held in *Orlander v. Staples, Inc.* that plaintiffs have statutory

1 standing under New York’s General Business Law sections 349 and 350 if they “paid more  
2 than they would have for the good but for the deceptive practices of the defendant-sellers.”  
3 802 F.3d 289, 302 (2d Cir. 2015); *see also Small v. Lorillard Tobacco Co.*, 720 N.E.2d  
4 892, 898 & n.5 (N.Y. 1999). New York Plaintiff Chris Rizzitello indicates that, after  
5 purchasing his Vizio Smart TV at a Walmart in Catskill, New York, he used the Smart  
6 TV’s features to stream videos from YouTube and other content providers. (Compl. ¶ 20.)  
7 After learning about Vizio’s data collection and disclosure practices, he stopped streaming  
8 content, disconnected his Smart TV from the Internet, and, after learning how to turn off  
9 the Smart Interactivity feature, did so. (*Id.* ¶ 20.) Thus, like the other named Plaintiffs,  
10 Rizzitello plausibly alleges that, had he been informed about Vizio’s data collection and  
11 disclosure practices, he would have paid less for the Smart TV or not purchased the  
12 product at all. (*Id.* ¶¶ 14, 20, 22, 235.)

13 Accordingly, Defendants’ Motion to Dismiss Plaintiffs’ state consumer protection  
14 claims for lack of statutory standing is DENIED.

15 **C. Video Privacy Protection Act (VPPA) Claims**

16 Enacted in 1988, the Video Privacy Protection Act provides that “[a] *video tape*  
17 *service provider* who knowingly discloses, to any person, *personally identifiable*  
18 *information* concerning any *consumer* of such provider shall be liable to the aggrieved  
19 person . . . .” 18 U.S.C. § 2710(b)(1) (emphasis added); *see* Video Privacy Protection Act  
20 of 1988, S. 2361, 100th Cong., 102 Stat. 3195 (1988). Defendants seek to dismiss  
21 Plaintiffs’ VPPA claims, arguing that they are not “video tape service provider[s],” that  
22 Plaintiffs are not “consumer[s]” as defined by the statute, and that Defendants do not  
23 disclose “personally identifiable information.” (Mem. at 12-21.)

24 “[W]hen [a] statute’s language is plain, the sole function of the courts—at least  
25 where the disposition required by the text is not absurd—is to enforce it according to its  
26 terms.” *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins.*  
27 *Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)). “The plainness or ambiguity of  
28 statutory language is determined by reference to the language itself, the specific context in

1 which that language is used, and the broader context of the statute as a whole.” *Robinson v.*  
2 *Shell Oil Co.*, 519 U.S. 337, 341 (1997). A statute is not ambiguous merely because it is  
3 awkward or even ungrammatical. *Lamie*, 540 U.S. at 534. By striving to interpret a statute  
4 based on its text, a court “avoid[s] the pitfalls that plague too quick a turn to the more  
5 controversial realm of legislative history.” *Id.* at 536.

6 **i. “Video Tape Service Provider”**

7 The VPPA provides that a “‘video tape service provider’ means any person,  
8 engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or  
9 delivery of prerecorded video cassette tapes or similar audio visual materials . . .” 18  
10 U.S.C. § 2710(a)(4). Defendants contend that they are not “engaged in the business . . . of  
11 . . . delivery of . . . similar audio visual materials.” (Mem. at 13-16.)

12 The plain text of the statute provides otherwise. As an initial matter, Congress’s use  
13 of a disjunctive list (*i.e.*, “engaged in the business . . . of . . . rental, sale, *or* delivery”)   
14 unmistakably indicates that Congress intended to cover more than just the local video  
15 rental store. Indeed, lest the word “delivery” be superfluous, a person need not be in the  
16 business of either renting or selling video content for the statute to apply. Further,  
17 Congress’s use of the phrase “similar audiovisual materials” indicates that the definition is  
18 medium-neutral; the defendant must be in the business of delivering video content, but that  
19 content need not be in a particular format. *See, e.g., In re Hulu Privacy Litig.*, No. C 11-  
20 03764 LB, 2012 WL 3282960, at \*5 (N.D. Cal. Aug. 10, 2012).

21 Finally, to be a “video tape service provider,” a defendant must be “*engaged in the*  
22 *business . . . of . . . delivery of*” video content. 18 U.S.C. § 2710(a)(4) (emphasis added).  
23 When used in this context, “business” connotes “a particular field of endeavor,” *i.e.*, a  
24 focus of the defendant’s work. *See Webster’s Third New International Dictionary* 302  
25 (1981) (def. 1d); *see also The American Heritage Dictionary: Second College Edition* 220  
26 (1991) (defs. 1a, 1b); *2 Oxford English Dictionary* 695 (1989) (def. 14b); *Webster’s New*  
27 *World Dictionary: Third College Edition* 189 (1988) (def. 1). Under this definition, a  
28 defendant can be “engaged in the business” of delivering video content even if other actors

1 *also* take part in the delivery of the same video content. But, for the defendant to be  
2 engaged in the business of delivering video content, the defendant’s product must not only  
3 be substantially involved in the conveyance of video content to consumers but also  
4 significantly tailored to serve that purpose.

5         Take, for instance, a letter carrier who physically places a package that happens to  
6 contain a videotape into a consumer’s mailbox. No person is more obviously “delivering”  
7 a video tape to a consumer than this employee. Yet, the letter carrier could not be  
8 characterized as “engaged in *the business*” of delivering video content because her job  
9 responsibilities are in no way tailored to delivering packages that contain videotapes as  
10 opposed to any other package. In the same way, the developers of many other products or  
11 services that might be peripherally or passively involved in video content delivery do not  
12 fall within the statutory definition of a video tape service provider.

13         In keeping with this statutory definition, Plaintiffs plausibly allege that Vizio’s  
14 Internet Apps and Internet Apps Plus are designed to enable consumers to seamlessly  
15 access Netflix, Hulu, YouTube, and Amazon Instant Video content in their homes.  
16 (Compl. ¶¶ 33-34, 45-46, 81.) A reasonable inference is that Vizio enters into agreements  
17 with these content providers to enable consumers to access their programming on Vizio’s  
18 Smart TVs. (*See id.* ¶ 45; Opp’n at 12-13.) Vizio then advertises its Smart TVs as “a  
19 passport to a world of entertainment, movies, TV shows and more,” and charges  
20 consumers a premium for its Vizio Smart TVs specifically because these Smart TVs are  
21 designed to stream video content through Vizio’s Internet Apps and Internet Apps Plus  
22 software. (Compl. ¶¶ 34, 81.) Essentially, Vizio has designed its Smart TVs to perform all  
23 the same functions of—and its Smart TVs are in direct competition with—Roku’s devices  
24 (*see id.* at ¶ 18; Opp’n at 11); that Vizio has integrated what others sell as a separate device  
25 into its televisions makes no meaningful difference.

26         Vizio’s alternative construction of the statute starts with the implicit premise that  
27 there can be only one video tape service provider in any transaction, and, because the  
28 content provider (like Hulu or Netflix) does fit within the statutory definition of a video

1 tape service provider, Vizio cannot. (*See* Mem. 14-16.) But such a limitation is found  
2 nowhere in the text of the statute, and Vizio’s construction fails to give the phrase  
3 “engaged in the business . . . of” any real meaning.

4 Defendants also resort to parade of horrors, arguing that if Vizio is considered a  
5 video tape service provider, “[c]ountless products and services,” such as “shipping  
6 services, Blu-Ray players, smartphones, app stores, cable boxes, wireless routers, personal  
7 computers, video game consoles, and even cars” would also fall within the statutory  
8 definition of video tape service providers. (Mem. at 16; Reply at 5-7.) But the statute’s text  
9 once again alleviates Vizio’s concerns. Most of these products or services are far too  
10 peripherally or passively involved in the delivery of video content to reasonably constitute  
11 “the business” of delivering video content. By contrast, Plaintiffs allege that Vizio has  
12 developed a product intimately involved in the delivery of video content to consumers, has  
13 created a supporting ecosystem to seamlessly deliver video content to consumers  
14 (including entering into agreements with content providers such as Netflix and Hulu), and  
15 has marketed its product to consumers as a “passport” to this video content. Other textual  
16 limitations further cabin the scope of the Act: The VPPA applies only if the consumer is a  
17 “renter, purchaser, or subscriber of goods or services” from the video tape service  
18 provider. 18 U.S.C. §§ 2710(a)(1), (b). And a video tape service provider is liable only if it  
19 releases personally identifiable information without the consent of the consumer. *Id.* §§  
20 2710(a)(3), (b). Accordingly, Vizio’s policy-laden argument cannot overcome the statute’s  
21 plain meaning.

22 **ii. “Consumer”**

23 The VPPA defines a “consumer” as “any renter, purchaser, or subscriber of goods  
24 or services from a video tape service provider.” 18 U.S.C. § 2710(a)(1). Thus, unlike its  
25 definition of “video tape service provider,” the statute’s definition of “consumer” is  
26 somewhat narrower than the word’s ordinary meaning. Because Plaintiffs do not contend  
27 they are renters or purchasers, they must be “subscribers” for the VPPA to apply.

28



1 In *Ellis v. Cartoon Network, Inc.*, the Eleventh Circuit held that “a person who  
2 downloads and uses a free mobile application on his smartphone to view freely available  
3 content, without more, is not a ‘subscriber’ . . . under the VPPA.” 803 F.3d 1251, 1252  
4 (11th Cir. 2015). After analyzing various definitions of “subscriber,” the Eleventh Circuit  
5 concluded that that a “‘subscription’ involves some type of commitment, relationship, or  
6 association (financial or otherwise) between a person and an entity.” *Id.* at 1256. While a  
7 “payment is not a necessary element of subscription,” it is “one factor a court should  
8 consider when determining whether an individual is a ‘subscriber’ under the VPPA.” *Id.*  
9 Besides payment, other factors to consider are “registration, commitment, delivery,  
10 [expressed association,] and/or access to restricted content.” *Id.* (citation omitted).

11 By contrast, in *Yershov v. Gannett Satellite Information Network, Inc.*, the First  
12 Circuit concluded that a consumer need not make a monetary payment in return for a  
13 mobile application to be considered a “subscriber.” 820 F.3d 482, 488-89 (1st Cir. 2016).  
14 Instead, the plaintiff’s provision of personal information in return for the defendant’s video  
15 content was sufficient consideration for the plaintiff to be a “subscriber.” *Id.* at 489. And,  
16 by downloading the defendant’s application, the plaintiff “established a relationship with  
17 [the defendant] that [was] materially different from what would have been the case had  
18 [the defendant’s publication] simply remained one of millions of sites on the web that [the  
19 plaintiff] might have accessed through a web browser.” *Id.*

20 Here, Plaintiffs are more plausibly “subscribers” than the plaintiffs in either *Ellis* or  
21 *Yershov* because they allege that they *do* pay for Vizio’s applications. Plaintiffs contend  
22 that Vizio charges a premium for its Smart TVs because of their ability to seamlessly  
23 deliver video content to consumers through Vizio’s Internet Apps, Internet Apps Plus, and  
24 SmartCast. (Compl. ¶¶ 22, 33.) After consumers purchase their Smart TVs, Vizio  
25 continues to service them by pushing software updates that improve security and provide  
26 additional features. (*See id.* ¶¶ 45, 59, 66, 92.) Thus, under either *Ellis* or *Yershov*’s  
27 holdings, Plaintiffs plausibly allege an association with Vizio that is sufficiently substantial  
28 and ongoing to constitute a subscription.





1 486; *see, e.g., United States v. Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981) (“The use of the  
2 word ‘includes,’ rather than a more restrictive term such as ‘means,’ ‘indicates that the list  
3 is not exhaustive but merely illustrative.’” (citation omitted)). Hence, while “information  
4 which identifies a person as having [selected] a video” surely is covered, “personally  
5 identifiable information” is not restricted to such information. *See* 18 U.S.C. § 2710(a)(3);  
6 *Yershov*, 820 F.3d at 486.

7 The statutory structure confirms that Congress intended “personally identifiable  
8 information” to encompass more than a person’s name and physical address. In the original  
9 Act, Congress included both an opt-out and opt-in disclosure process. If a consumer opted  
10 in to a disclosure, a video tape service provider could reveal any type of personally  
11 identifiable information. Video Privacy Protection Act of 1988, S. 2361, 100th Cong. § 2,  
12 102 Stat. 3195 (1988). But if the consumer had to opt out of the disclosure, the video tape  
13 service provider could disclose only the consumer’s name and address. *See id.* Thus,  
14 Congress contemplated that the Act would protect more than just a person’s name or  
15 physical address. *Yershov v. Gannett Satellite Info. Network, Inc.*, 104 F. Supp. 3d 135,  
16 140 (D. Mass. 2015), *rev’d in part on other grounds*, 820 F.3d 482 (1st Cir. 2016).

17 Based on many of these textual clues, the First Circuit in *Yershov* concluded that  
18 “personally identifiable information” extends beyond a person’s name to embrace  
19 “information reasonably and foreseeably likely to reveal which . . . videos [the plaintiff]  
20 has obtained.” 820 F.3d at 486. While at some point “the linkage of information to identity  
21 becomes too uncertain, or too dependent on too much yet-to-be-done, or unforeseeable  
22 detective work,” the court found the plaintiff’s allegations that the defendant disclosed his  
23 phone’s GPS coordinates from the moment when he watched videos to be personally  
24 identifiable information. *Id.*

25 By contrast, the Third Circuit in *In re Nickelodeon* held that IP addresses do not  
26 constitute personally identifiable information under the VPPA. *See* 827 F.3d at 290. While  
27 recognizing that the “text itself is . . . amenable” to a broader interpretation, the Third  
28 Circuit relied heavily on statements by Senator Patrick Leahy and Representative Robert

1 Kastenmeier at a joint hearing to conclude that personally identifiable information covers  
2 only “the kind of information that would readily permit an ordinary person to identify a  
3 specific individual’s video-watching behavior.” *Id.* at 285-86, 290.

4 The Court finds *Yershov* to be a more persuasive interpretation of the VPPA than *In*  
5 *re Nickelodeon*. First, *Yershov* focused foremost on the text of the statute, while *In re*  
6 *Nickelodeon* turned quickly to “the more controversial realm of legislative history.” *See*  
7 *Lamie*, 540 U.S. at 536. Perhaps, if the statutory language were particularly indecipherable  
8 and the legislative history decisively resolved the issue, this approach might be  
9 understandable. But *In re Nickelodeon* recognized that “portions” of the legislative history  
10 suggested a *broader* interpretation of personally identifiable information and the statutory  
11 text was “amenable” to such an interpretation. 827 F.3d at 286-86.<sup>5</sup> Second, *In re*  
12 *Nickelodeon* relied heavily on Congress’s decision *not* to amend the statute substantially in  
13 2002. As the Supreme Court has instructed, this kind of “[p]ost-enactment legislative  
14 history (a contradiction in terms) is not a legitimate tool of statutory interpretation.”  
15 *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). Indeed, *Yershov* examined the same  
16 Congressional inaction and reached the exact *opposite* conclusion about its proper  
17 meaning. *See* 820 F.3d at 488. Third, under the Third Circuit’s “ordinary person” test it  
18 would be highly questionable whether even social security numbers would constitute  
19 personally identifiable information because, as the Third Circuit itself recognized, this  
20 information “might not be easily matched to . . . persons without consulting another entity,  
21 such as a credit reporting agency or government bureau.” *In re Nickelodeon Consumer*  
22 *Privacy Litig.*, 827 F.3d at 283.

23

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25 <sup>5</sup> The Third Circuit’s legislative history analysis focused on two statements made at a joint  
26 hearing that do not obviously concern the proper scope of the term “personally identifiable  
27 information” and relate to a prior version of the bill that also covered libraries. *In re Nickelodeon*  
28 *Consumer Privacy Litig.*, 827 F.3d at 285-86. The Supreme Court has repeatedly criticized  
attempts to divine Congressional intent from “highly generalized, conflicting statements in the  
legislative history.” *Rust v. Sullivan*, 500 U.S. 173, 185 (1991).

1 Yet, the Court need not disagree with *In re Nickelodeon* because Plaintiffs allege  
2 that Vizio’s Inscape platform discloses even more about their digital identities—in  
3 particular, consumers’ MAC addresses and information about other devices connected to  
4 the same network. Plaintiffs allege that MAC addresses are frequently linked to an  
5 individual’s name and can be used to acquire highly specific geolocation data. (Compl. ¶¶  
6 69-71.) MAC addresses allegedly can also identify a person when combined with Vizio’s  
7 disclosure of consumers’ IP addresses, zip codes, product model numbers, hardware and  
8 software versions, chipset IDs, and region and language settings. (*Id.* ¶¶ 72-79.) Besides  
9 collecting and disclosing extensive information regarding consumers’ Smart TVs, Vizio  
10 supposedly collects and discloses information about all other devices connected to the  
11 same network. (*Id.* ¶¶ 63, 72.) Plaintiffs have thus plausibly alleged that Vizio’s provision  
12 of—to quote its own prospectus—“highly specific viewing behavior data on a massive  
13 scale with great accuracy” amounts to the disclosure of personally identifiable  
14 information.<sup>6</sup> (*Id.* ¶ 62.)

15 The Court stresses the posture of this case: Ultimately, Plaintiffs will have to  
16 demonstrate that Vizio’s disclosures are “reasonably and foreseeably likely to reveal” what  
17 video content Plaintiffs have watched. *Yershov*, 820 F.3d at 486. But this is a factual  
18 inquiry ill-suited for resolution on a motion to dismiss. *Yershov*, 104 F. Supp. 3d at 145  
19 (observing that a “factual record would need to be developed before concluding that an  
20 Android ID is not PII”). The Court simply cannot accept Vizio’s offer to engage in judicial  
21 fact-finding or make sweeping determinations as a matter of law on this Motion to  
22 Dismiss. Because Plaintiffs have plausibly alleged that the array of information Vizio  
23  
24

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25  
26 <sup>6</sup> While this Motion was pending, the FTC, in conjunction with a consent decree, filed a  
27 complaint against Vizio regarding its collection and disclosure practices. (*See* Notice of Pendency,  
28 Doc. 128.) Because the FTC’s allegations have not been incorporated into Plaintiffs’ Complaint,  
the Court does not consider them in determining the plausibility of Plaintiffs’ claims.

1 discloses about them is personally identifiable information, the Court must DENY Vizio's  
2 Motion to Dismiss Plaintiffs' VPPA claims.<sup>7</sup>

3 **D. Wiretap Act Claims**

4 The Wiretap Act affords a private right of action to "any person whose wire, oral, or  
5 electronic communication is intercepted, disclosed, or intentionally used in violation of  
6 this chapter . . ." 18 U.S.C. § 2520(a). Defendants argue that Plaintiffs' Wiretap Act  
7 claims should be dismissed because Defendants do not "intercept" any electronic  
8 communications and the messages they collect do not constitute the "contents" of an  
9 electronic communication. (Mem. at 23-27.) For the reasons elaborated below, the Court  
10 concludes that Plaintiffs have inadequately pleaded interception.

11 The Wiretap Act proscribes the "intentional[] intercept[ion] . . . [of] any wire, oral,  
12 or electronic communication." 18 U.S.C. § 2511(1)(a). In *Konop v. Hawaiian Airlines,*  
13 *Inc.*, the Ninth Circuit held that, for an electronic communication "to be 'intercepted' in  
14 violation of the Wiretap Act, it must be acquired during transmission, not while it is in  
15 electronic storage." 302 F.3d 868, 878 (9th Cir. 2002). In so holding, *Konop* strove to  
16 distinguish between information acquired *contemporaneously* to its transmission and  
17 information that resides in electronic storage. *Id.*; see *Theofel v. Farey-Jones*, 359 F.3d  
18 1066, 1077 (9th Cir. 2004) ("We . . . held in *Konop v. Hawaiian Airlines, Inc.* . . . that the  
19 Act applies only to "acquisition contemporaneous with transmission." (citation omitted)).  
20 Access to information maintained in electronic storage is governed by the Stored  
21 Communications Act, while the Wiretap Act regulates access to information acquired  
22 contemporaneously to its transmission. See *Konop*, 302 F.3d at 878.

23 While some language in *Konop* suggests that information cannot be "intercepted"  
24 within the meaning of the Wiretap Act if it is acquired *simultaneously* with its arrival, see  
25 *id.* at 879-880, the issue was not squarely presented in the case. The plaintiff in *Konop*  
26

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27 <sup>7</sup> Plaintiffs have chosen to abandon their state law video privacy claims (Opp'n at 3 n.2),  
28 so the Court DISMISSES Plaintiffs' fourth, tenth, and twelfth causes of action.



1 alleged that his former employer used another employee's password to access disparaging  
2 posts that the plaintiff kept on his online bulletin board. *Id.* at 873. Thus, the information  
3 the employer acquired had been in electronic storage for a considerable period before his  
4 employer accessed it. Like *Konop*, most of the decisions in this Circuit addressing the  
5 simultaneous transmission requirement involve the collection of emails or other  
6 communications that were unquestionably in electronic storage for a substantial period  
7 before the defendants collected them. *See, e.g., Theofel v. Farey-Jones*, 359 F.3d 1066,  
8 1077 (9th Cir. 2004) (stored emails); *NovelPoster v. Javitch Canfield Grp.*, 140 F. Supp.  
9 3d 938, 953 (N.D. Cal. 2014) (stored emails); *see also Steve Jackson Games, Inc. v. U.S.*  
10 *Secret Serv.*, 36 F.3d 457, 460 (5th Cir. 1994) (stored unread emails).

11 In *United States v. Szymuszkiewicz*, the Seventh Circuit concluded that information  
12 acquired "within a second of each message's arrival and assembly" satisfies the  
13 contemporaneous interception requirement. 622 F.3d 701, 706 (7th Cir. 2010). In  
14 *Szymuszkiewicz*, the defendant inserted a command into his supervisor's copy of Microsoft  
15 Outlook that directed a copy of all incoming messages to him. *Id.* at 703. The defendant  
16 argued that "he did not 'intercept' anything, for (at least in football) 'interception' means  
17 catching a thing in flight, and any message would have reached its destination ([his  
18 supervisor's] inbox) before a copy was made for him." *Id.* Judge Easterbook observed that  
19 it did not matter whether his supervisor's computer or an intermediary diverted the  
20 information:

21  
22 Several circuits have said that, to violate § 2511, an interception must be  
23 "contemporaneous" with the communication. . . . [The defendant] sees this  
24 as support for his "in flight" reading, but it is not. "Contemporaneous" differs  
25 from "in the middle" or any football metaphor. Either the server in Kansas  
26 City or [his supervisor's] computer made copies of the messages for [the  
27 defendant] within a second of each message's arrival and assembly; if both  
28 [the defendant and his supervisor] were sitting at their computers at the same



1 time, they would have received each message with no more than an eyeblink  
2 in between. That's contemporaneous by any standard. Even if [the  
3 supervisor's] computer (rather than the server) was doing the duplication and  
4 forwarding, it was effectively acting as just another router, sending packets  
5 along to their destination . . . .

6  
7 *Id.* at 705-06 (citations omitted). In reaching this conclusion, the Seventh Circuit cited  
8 *Konop*, *see id.* at 706, indicating that the court found its decision consistent with the Ninth  
9 Circuit's simultaneous transmission requirement.<sup>8</sup>

10 *Szymuszkiewicz* emphasized that its holding was necessary to keep modern  
11 telephonic communications within the purview of the Wiretap Act. *Id.* Interception of  
12 telephone calls made through modern "packet switching" technology "must be done by  
13 programming a computer to copy the contents [of packets] it sends along . . . ." *Id.* So, if  
14 interception "within a second of each message's arrival and assembly" did not qualify as  
15 "simultaneous," the Wiretap Act would no longer govern phone calls—the very  
16 communications Congress had in mind when it enacted the Wiretap Act. *Id.* at 704, 706;  
17 *see In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1076-81 (N.D. Cal. 2015) (concluding that  
18 *Konop*'s simultaneous transmission requirement does not place packet switching  
19 technology outside the ambit of the Wiretap Act). A contrary holding would also mean that  
20 different substantive rules would apply to those engaged in the same real-time electronic  
21 conversation based on whose electronic device was bugged and who was sending or  
22 receiving the particular message in question. If, say, Person A's device was bugged, all of

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24  
25 <sup>8</sup> *DirectTV, LLC v. Wright*, No. 15-CV-474-FPG, 2016 WL 3181170 (W.D.N.Y. June 3,  
26 2016) is not to the contrary. In *DirectTV*, the district court stressed that the defendant "*legitimately*  
27 *received*" the plaintiff's satellite signals and then illegally rebroadcasted them. *Id.* at \*6. As the  
28 district court observed, "numerous courts have focused on this distinction in finding that [the  
Wiretap Act] requires the unauthorized receipt, not simply the unauthorized redistribution." *Id.* at  
\*6.

1 the messages she *sends* to Person B would be subject to the Wiretap Act, while all the  
2 message she *receives*—even if immediately collected—would be subject to the Stored  
3 Communications Act. Nothing in the text or structure of the Wiretap Act or Stored  
4 Communications Act suggests such a hopelessly convoluted legal framework.

5 But, even if the Court were to accept *Szymuszkiewicz*'s reasoning, Plaintiffs have  
6 not articulated with sufficient clarity when Vizio supposedly intercepted their  
7 communications. Besides their conclusory allegation that Vizio intercepted their electronic  
8 communications “during transmission” (Compl. ¶ 128.), Plaintiffs rely on a rather  
9 inscrutable graphic with no textual explanation (*id.* ¶ 52) and vague allegations about how  
10 Vizio’s data collection occurs “in real time” (*id.* ¶¶ 39, 41-42, 49, 62). While Plaintiffs  
11 need not prove their theory of interception on a motion to dismiss, Plaintiffs must provide  
12 fair notice to Defendants of when they believe Vizio intercepts their communications. A  
13 written explanation of Plaintiffs’ theory of interception is particularly important in this  
14 case because the graphic Plaintiffs include in their Complaint suggests that Vizio transmits  
15 their data to its Inscap platform significantly after the data arrive at their Smart TVs. (*See*  
16 *id.* ¶ 52.) The Court, therefore, DISMISSES with LEAVE TO AMEND Plaintiffs’ Wiretap  
17 Act claims. As Plaintiffs have inadequately pleaded interception, the Court need not  
18 address Defendants’ alternative argument that Vizio does not collect the “contents” of any  
19 electronic communications.<sup>9</sup>

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25 <sup>9</sup> Courts have generally construed the California Invasion of Privacy Act (“CIPA”) as  
26 coextensive with the Wiretap Act, *Sunbelt Rentals, Inc. v. Victor*, 43 F. Supp. 3d 1026, 1033 (N.D.  
27 Cal. 2014); *NovelPoster v. Javitch Canfield Grp.*, 140 F. Supp. 3d 938, 954 (N.D. Cal. 2014), and  
28 Plaintiffs have offered no reason why the Court’s analysis would be any different under the CIPA  
(*see* Opp’n at 21). The Court, therefore, DISMISSES with LEAVE TO AMEND Plaintiffs’ CIPA  
claims.

1                   **E. Fraud Claims**

2           Defendants move to dismiss Plaintiffs’ fraud-based claims<sup>10</sup> for failure to satisfy  
3 Rule 9(b). (Mem. at 28-33.) Plaintiffs contend that Defendants overstate Plaintiffs’ burden  
4 in alleging claims based on fraudulent omissions and that both their fraudulent omission  
5 and affirmative misrepresentation theories are well pleaded. (Opp’n at 21-27.)

6                   **i. Fraudulent Omission-Based Claims**

7           Under Rule 9(b), a party must plead allegations of fraud, whether through  
8 affirmative misrepresentations or omissions, “with particularity.” Fed. R. Civ. P. 9(b). To  
9 satisfy this Rule, a plaintiff must generally allege the “‘who, what, when, where, and how’  
10 of the misconduct charged.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir.  
11 2009). “However, in the context of a fraudulent omission claim, a plaintiff cannot plead a  
12 specific time or place of a failure to act.” *Peel v. BrooksAmerica Mortg. Corp.*, 788 F.  
13 Supp. 2d 1149, 1160 (C.D. Cal. 2011). In such circumstances, “a plaintiff may plead fraud  
14 by alternative means.” *Id.* The purpose of Rule 9(b)’s heightened pleadings standard is “to  
15 give defendants notice of the particular misconduct which is alleged to constitute the fraud  
16 charged so that they can defend against the charge and not just deny that they have done  
17 anything wrong.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (citation  
18 omitted).

19           Relying on *Marolda v. Symantec Corp.*, Defendants assert that to satisfy Rule 9(b),  
20 a fraudulent omission claim “must describe the content of the omission and where the  
21 omitted information should or could have been revealed, as well as provide representative  
22 samples of advertisements, offers, or other representations that plaintiff relied on to make  
23 her purchase and that failed to include the allegedly omitted information.” 672 F. Supp. 2d  
24 992, 1002 (N.D. Cal. 2009). “As other courts have recognized, however, ‘the *Marolda*

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26           <sup>10</sup> By “fraud-based claims,” the Court refers to Plaintiffs’ fifth, sixth, eighth, ninth,  
27 eleventh, fourteenth, and eighteenth causes of action to the extent that these claims sound in fraud.  
28 See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). The Court addresses Plaintiffs’ FAL claims separately.

1 requirements are not necessarily appropriate for all cases alleging a fraudulent omission.”  
2 *Philips v. Ford Motor Co.*, No. 14-CV-02989-LHK, 2015 WL 4111448, at \*12 (N.D. Cal.  
3 July 7, 2015). Rather, courts have applied Rule 9(b)’s “who, what, when, where, and how”  
4 test mindful of the “the inherent limitations of an omission claim.” *MacDonald v. Ford*  
5 *Motor Co.*, 37 F. Supp. 3d 1087, 1096 (N.D. Cal. 2014); *Velasco v. Chrysler Grp. LLC*,  
6 No. CV 13-08080 DDP VBKX, 2014 WL 4187796, at \*5 (C.D. Cal. Aug. 22, 2014);  
7 *Philips*, 2015 WL 4111448, at \*12.

8       Here, Plaintiffs allege that Vizio (“who”) failed to disclose to consumers that its  
9 Smart Interactivity software collects and discloses consumers’ viewing histories as well as  
10 personally identifiable information related to their Vizio Smart TVs and other devices  
11 connected to the same Wi-Fi network (“what”). (Compl. ¶¶ 35-42, 45-73.) This material  
12 information, Plaintiffs allege, was not disclosed prior to their purchase of their Smart TVs  
13 or while they used their Smart TV’s capabilities (“when”) on the product packaging, in  
14 Vizio’s Privacy Policy, or on Vizio’s website (“where”). (*Id.* ¶¶ 81-94.) Besides providing  
15 the exact model numbers for their televisions and where they purchased them, Plaintiffs  
16 provide a representative sample of a Vizio Smart TV’s product packaging that omits any  
17 mention of Vizio’s Smart Interactivity software. (*Id.* ¶¶ 16-21, 81-84.) Plaintiffs further  
18 contend that, when using a Vizio Smart TV, the only reference to Smart Interactivity is  
19 “deeply imbedded in an obscure settings menu” and “does not explain what Smart  
20 Interactivity is.” (*Id.* ¶¶ 7, 85.) Viewed together, Plaintiffs’ allegations are as well pleaded,  
21 if not more detailed, than those found sufficient in *Velasco*, *Philips*, and *MacDonald*. *See*  
22 2015 WL 4111448, at \*12; 2014 WL 4187796, at \*5; 37 F. Supp. 3d 1087, 1096. Contrary  
23 to Defendants’ assertion, Plaintiffs do not need to specify the precise date they purchased  
24 their Smart TVs to state a fraudulent omission claim, because Vizio’s fraudulent omissions  
25 allegedly continued from the launch of its Smart Interactivity software through Plaintiffs’  
26 purchases of their Smart TVs. Thus, Defendants’ Motion to Dismiss Plaintiffs’ claims  
27 based on fraudulent omissions is DENIED.

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**ii. Affirmative Fraud-Based Claims**

In contrast to Plaintiffs’ omission-based fraud claims, Plaintiffs’ affirmative fraud-based claims are devoid of the “who, what, where, when, and how” allegations required by Rule 9(b). For instance, Plaintiffs contend that certain language in Vizio’s Privacy Policy and on Vizio’s website is misleading, but none of the Plaintiffs allege that they even viewed these purported misrepresentations. (*See* Compl. ¶¶ 22, 88.) *See, e.g., Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d 682, 694 (Ct. App. 2010) (“[T]he SAC does not allege [plaintiff] ever visited Sharp’s Web site or even that he ever read the Agreement for Services”). Plaintiffs also reference certain statements on the Smart TV packaging that they contend are misleading “in light of the information not provided.” (Opp’n at 25.) Besides Plaintiffs’ failure to provide the “who, what, where, when, and how” allegations necessary to support this theory, the statements Plaintiffs reference on Vizio’s product packaging about a Vizio Smart TV’s functions have little to do consumers’ data security or privacy. (*See* Compl. ¶¶ 81-84.) Therefore, to the extent that Plaintiffs’ fraud claims are based on supposed affirmative misrepresentations, Defendants’ Motion to Dismiss is GRANTED with LEAVE TO AMEND. In any amended complaint, Plaintiffs must plead the necessary “who, what, where, when, and how” allegations necessary to state a claim for affirmative fraud.

**F. Negligent Misrepresentation Claims**

Under California law, “[a] negligent misrepresentation claim ‘requires a positive assertion,’ not merely an omission.” *Lopez v. Nissan N. Am., Inc.*, 135 Cal. Rptr. 3d 116, 136 (Ct. App. 2011) (quoting *Vega v. Jones, Day, Reavis & Pogue*, 17 Cal. Rptr. 3d 26, 32 (Ct. App. 2004). “An ‘implied’ assertion or representation is not enough.” *Wilson v. Century 21 Great W. Realty*, 18 Cal. Rptr. 2d 779, 783 (Ct. App. 1993). Similarly, under Washington law, “[a]n omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation.” *Ross v. Kirner*, 172 P.3d 701, 704 (Wash. 2007); *see Trimble v. Washington State Univ.*, 993 P.2d 259, 264 (Wash.



1 2000) (holding that failing to discuss the downsides of an offer of employment did not  
2 create the false impression necessary to state a claim for negligent misrepresentation).

3 Plaintiffs' negligent misrepresentation claims under California and Washington law  
4 are inadequately pleaded for much the same reason why Plaintiffs' affirmative fraud  
5 claims fail: Plaintiffs allege that Vizio's Smart TV packaging is misleading because Vizio  
6 advertises how its Smart TVs are ideal for watching programming from cable, satellite,  
7 and streaming content providers as well from devices connected to the Smart TV without  
8 disclosing that utilizing these features could result in Vizio collecting and disclosing  
9 consumers' personally identifiable information. (*Id.* ¶¶ 81-84.) None of the statements on  
10 the product packing, however, relate to Vizio's privacy policies or the security of  
11 consumers' personal information more broadly. Thus, because any alleged statements on  
12 Vizio's product packaging are too remotely related to Vizio's treatment of consumers' data  
13 to amount to the "positive assertion" necessary to state a claim for negligent  
14 misrepresentation, the Court DISMISSES these claims under California and Washington  
15 law with LEAVE TO AMEND. *See Lopez*, 135 Cal. Rptr. 3d at 136 (holding, in a case  
16 involving odometers that supposedly overregistered the number of miles driven, that  
17 "innocuous statements . . . about the basic function of odometers" did not amount to the  
18 "positive assertion" necessary to state a claim for negligent misrepresentation); *Ross v.*  
19 *Kirner*, 172 P.3d at 704.

### 20 **G. False Advertising Law Claims**

21 The False Advertising Law (FAL) prohibits making or disseminating "any  
22 statement" in the course of "dispos[ing]" of any property, product, or service that "is  
23 untrue or misleading, and which is known, or which by the exercise of reasonable care  
24 should be known, to be untrue or misleading . . ." Cal. Bus. & Prof. Code § 17500. Under  
25 the FAL, courts apply the "reasonable consumer" test, which requires a plaintiff to show  
26 that "members of the public are likely to be deceived." *Williams v. Gerber Products Co.*,  
27 552 F.3d 934, 938 (9th Cir. 2008) (quotation marks omitted). The FAL proscribes "not  
28 only advertising which is false but also advertising which[,] although true, is either



1 actually misleading or which has a capacity, likelihood or tendency to deceive or confuse  
2 the public.” *Williams*, 552 F.3d at 938 (quoting *Kasky v. Nike, Inc.*, 45 P.3d 243, 250 (Cal.  
3 2002)).

4 At first glance, districts courts seem to be divided over whether a plaintiff can  
5 predicate a FAL claim on a defendant’s failure to disclose certain information. *Compare*  
6 *Handy v. LogMeIn, Inc.*, No. 1:14-CV-01355-JLT, 2015 WL 1729681, at \*5 (E.D. Cal.  
7 Apr. 15, 2015) (“[A] a plaintiff may state a claim under the FAL for fraudulent omissions  
8 by a defendant.”); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996  
9 F. Supp. 2d 942, 991 (S.D. Cal. 2014) (finding that “fraud-based omission claims” under  
10 the FAL were adequately pleaded) *with Norcia v. Samsung Telecommunications Am.*,  
11 LLC, No. 14-CV-00582-JD, 2015 WL 4967247, at \*8 (N.D. Cal. Aug. 20, 2015) (“There  
12 can be no FAL claim where there is no ‘statement’ at all.”); *Stanwood v. Mary Kay, Inc.*,  
13 941 F. Supp. 2d 1212, 1222 (C.D. Cal. 2012). In practice, though, the disagreement seems  
14 largely superficial: Courts reject FAL claims premised solely on a defendant’s omissions,  
15 but a plaintiff may base a FAL claim on an affirmative statement that is misleading in light  
16 of the information omitted. *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1023 (N.D. Cal.  
17 2016); *see In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp.  
18 2d 942, 991 (S.D. Cal. 2014); *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1157-59,  
19 1173 (C.D. Cal. 2011). This approach comports with the text of the False Advertising Law,  
20 which prohibits false or misleading “statement[s],” not omissions. *See Cal. Bus. & Prof.*  
21 *Code* § 17500.

22 Plaintiffs allege that their FAL claims are premised on “partial representations . . .  
23 as well as omissions.” (Opp’n at 28 (citing Compl. ¶¶ 8, 10, 72-79, 84, 90-91.)) But none  
24 of the Plaintiffs allege that they were aware that Vizio had represented that it collects only  
25 anonymous data, which would be necessary for Plaintiffs to satisfy the FAL’s standing  
26 requirement. *See In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009) (holding that a plaintiff  
27 must demonstrate “actual reliance” to show that he lost “money or property as a result of”  
28 the allegedly unlawful conduct); *Kwikset Corp.*, 246 P.3d at 888 (applying the same

1 standard to the FAL). And, as the Court has already noted, the statements Plaintiffs did see  
2 on Vizio's product packaging about the Smart TV's functionality are too tangentially  
3 related to consumers' personal privacy or security to be misleading in light of Vizio's  
4 failure to disclose its data collection and disclosure practices. To be clear, as *In re*  
5 *Tobacco II Cases* instructs, Plaintiffs do not have to allege they "relied on particular  
6 advertisements or statements," especially if they allege a lengthy pattern of  
7 misrepresentations by Vizio, 207 P.3d at 40, but Plaintiffs must allege at least that they  
8 were generally familiar with Vizio's statements about its data privacy or security practices.  
9 Thus, because Plaintiffs have not plausibly alleged that they relied on any affirmative  
10 misstatements by Vizio, the Court DISMISSES with LEAVE TO AMEND Plaintiffs' FAL  
11 claims.

#### 12 **H. Invasion of Privacy and Intrusion Upon Seclusion Claims**

13 The elements of intrusion upon seclusion and invasion of privacy are similar in each  
14 of the states included in Plaintiffs' Complaint. California, Florida, and Washington have  
15 all endorsed the definition of the tort found in the Second Restatement, which requires (1)  
16 an intentional intrusion, physical or otherwise, "upon the solitude or seclusion of another,"  
17 (2) in a manner "highly offensive to a reasonable person." *Deteresa v. Am. Broad.*  
18 *Companies, Inc.*, 121 F.3d 460, 465 (9th Cir. 1997) (quoting *Miller v. Nat'l Broad. Co.*,  
19 232 Cal. Rptr. 668, 678 (Ct. App. 1986)); *Taus v. Loftus*, 151 P.3d 1185, 1212 (Cal. 2007);  
20 *Purrelli v. State Farm Fire & Cas. Co.*, 698 So. 2d 618, 620 (Fla. Dist. Ct. App. 1997);  
21 *Mark v. Seattle Times*, 635 P.2d 1081, 1094 (Wash. 1981); *see also* Restatement (Second)  
22 of Torts § 652B (1977).

23 The California Constitution and Massachusetts Privacy Act create similar causes of  
24 action for invasion of privacy. A cause of action under the California Constitution for  
25 invasion of privacy requires: (1) "the identification of a specific, legally protected privacy  
26 interest," (2) a reasonable expectation of privacy under the circumstances presented, and  
27 (3) a "sufficiently serious" intrusion upon the privacy interest by the defendant. *Hill v.*  
28 *Nat'l Collegiate Athletic Assn.*, 865 P.2d 633, 654-55 (Cal. 1994). California has

1 recognized two broad categories of legally protected privacy interests: “(1) interests in  
2 precluding the dissemination or misuse of sensitive and confidential information  
3 (‘informational privacy’); and (2) interests in making intimate personal decisions or  
4 conducting personal activities without observation, intrusion, or interference (‘autonomy  
5 privacy’).” *Id.* at 654.<sup>11</sup> If a plaintiff satisfies these threshold requirements, the privacy  
6 interest must be balanced against a defendant’s countervailing interests. *Id.* at 655-57. Like  
7 its California counterpart, the Massachusetts Privacy Act creates “a right against  
8 unreasonable, substantial or serious interference with [a person’s] privacy.” Mass. Gen.  
9 Laws ch. 214, § 1B. The invasion of privacy “must be both unreasonable and substantial or  
10 serious” to violate the Act. *Polay v. McMahon*, 10 N.E.3d 1122, 1126 (Mass. 2014). The  
11 Massachusetts Supreme Judicial Court has clarified that a plaintiff need not allege a public  
12 disclosure of the private information; an unreasonable intrusion upon a person’s “solitude”  
13 or “seclusion” may suffice. *Id.*

14 As an initial matter, the Court rejects Vizio’s argument that Plaintiffs have no  
15 cognizable interest in keeping detailed data about what video content they watch private.  
16 (Mem. at 36-37.) Defendants provide no reason why this information would be any less  
17 sensitive than the URL information that the Third Circuit found legally protected in *In re*  
18 *Google Inc. Cookie Placement*. See 806 F.3d at 151. To the contrary, the various federal  
19 and state statutes that specifically protect video viewing histories make Plaintiffs’ assertion  
20 of a protected privacy interest here stronger than the claimed privacy interest in *In re*  
21 *Google Inc. Cookie Placement*. See, e.g., 18 U.S.C. § 2710; Cal. Civ. Code § 1799.3;  
22 Mass. Gen. Laws ch. 93, § 106; N.Y. Gen. Bus. Law § 673. Nor does *In re Yahoo Mail*  
23 *Litigation*, 7 F. Supp. 3d 1016 (N.D. Cal. 2014), hold otherwise. *In re Yahoo Mail*  
24 *Litigation* found that there is no “legally protected privacy interest [or] reasonable  
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27 <sup>11</sup> Because of the substantial overlap between the constitutional and common law causes of  
28 action under California law, California courts have examined claims brought under both sources  
together. See *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1073-74 (Cal. 2009).

1 expectation of privacy in email *generally* . . . .” *Id.* at 1040. There, the court determined  
2 that allegations that an email service provider scanned, stored, and distributed to third  
3 parties the content of emails between users and non-users of its service were insufficient  
4 because the plaintiffs failed to allege the specific content of the emails at issue. *Id.*  
5 Whether or not this Court agrees with this holding in *In re Yahoo Mail Litigation*, it does  
6 not apply here. Unlike in *In re Yahoo Mail Litigation*, Plaintiffs identify a discrete type of  
7 sensitive information (video viewing history) that is legally protected, rather than arguing  
8 they have a legally protected interest in a method of communication. *See id.* at 1040-41.

9 Courts have been hesitant to extend the tort of invasion of privacy to the routine  
10 collection of personally identifiable information as part of electronic communications. *See,*  
11 *e.g., Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012); *Yunker v.*  
12 *Pandora Media, Inc.*, No. 11-CV-03113 JSW, 2013 WL 1282980, at \*15 (N.D. Cal. Mar.  
13 26, 2013). By contrast, collection of intimate or sensitive personally identifiable  
14 information may amount to a highly offensive intrusion. *See Goodman v. HTC Am., Inc.*,  
15 No. C11-1793MJP, 2012 WL 2412070, at \*14-15 (W.D. Wash. June 26, 2012). Further,  
16 more routine data collection practices may be highly offensive if a defendant disregards  
17 consumers’ privacy choices while simultaneously “h[olding] itself out as respecting’  
18 them.” *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d at 292 (quoting *In re Google*  
19 *Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 151 (3d Cir. 2015)). As the  
20 Third Circuit observed, “[w]hether or not data-based targeting is the internet’s pole star,  
21 users are entitled to deny consent, and they are entitled to rely on the public promises of  
22 the companies they deal with.” *In re Google Inc. Cookie Placement Consumer Privacy*  
23 *Litig.*, 806 F.3d at 151.

24 Plaintiffs have plausibly alleged a pattern of “highly offensive” conduct. Plaintiffs  
25 point to a report by the security software company Avast, which concluded that Smart  
26 Interactivity’s “off” function was not operational “for months, if not years.” (Compl. ¶¶ 7,  
27 65.) So, even if consumers believed they had opted out of Vizio’s data collection practices,  
28 Vizio was still collecting their data for a considerable period. (*See id.*) In addition, Vizio’s

1 Smart Interactivity software switches back on without warning if the Smart TV ever  
2 reverts to the factory settings—as can occur through Vizio’s software updates. (*Id.* ¶ 66.)  
3 Consumers would likely not realize for a significant period that Vizio’s collection and  
4 disclosure software has been re-enabled because the opt-out feature is allegedly buried in  
5 an obscure settings menu. (*Id.* ¶¶ 7, 85.) Further, Vizio’s disclosure practices are far less  
6 routine than, say, the use of cookies at issue in *In re Google Inc. Cookie Placement*  
7 *Consumer Privacy Litigation*: Plaintiffs allege not only that Vizio collects an exceptionally  
8 vast array of information about their digital identities and viewing histories, but also that  
9 the standard industry practice is not to collect viewing history data unless a consumer  
10 affirmatively opts in. (*Id.* ¶¶ 6, 61.) Considering the quantum and nature of the information  
11 collected, the purported failure to respect consumers’ privacy choices, and the divergence  
12 from the standard industry practice, Plaintiffs plausibly allege Vizio’s collection practices  
13 amount to a highly offensive intrusion. Defendants’ Motion to Dismiss Plaintiffs’ intrusion  
14 upon seclusion, Massachusetts’s Privacy Act, and California Constitution claims is  
15 accordingly DENIED.

16 **I. Unjust Enrichment Claims**

17 Defendants contend that the Court should dismiss Plaintiffs’ unjust enrichment  
18 claims because they have adequate remedies at law. The Court finds no basis for doing so.  
19 The Ninth Circuit has instructed district courts to construe claims for unjust enrichment  
20 under California law as quasi-contract claims. *Astiana v. Hain Celestial Grp., Inc.*, 783  
21 F.3d 753, 762 (9th Cir. 2015); *see Brazil v. Dole Packaged Foods, LLC*, No. 14-17480,  
22 2016 WL 5539863, at \*3 (9th Cir. Sept. 30, 2016) (reversing a district court’s dismissal of  
23 a claim for unjust enrichment). Similarly, under Florida law, an unjust enrichment claim  
24 fails “only upon a showing that an express contract exists [between the parties.]” *State*  
25 *Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr., Inc.*, 427 F. App’x 714, 722 (11th  
26 Cir. 2011), *rev’d in part sub nom. State Farm Mut. Auto. Ins. Co. v. Williams*, 824 F.3d  
27 1311 (11th Cir. 2014) (quoting *Williams v. Bear Stearns & Co.*, 725 So. 2d 397, 400 (Fla.  
28 Dist. Ct. App. 1998)); *accord Diamond “S” Dev. Corp. v. Mercantile Bank*, 989 So. 2d



1 696, 697 (Fla. Dist. Ct. App. 2008). As for Plaintiffs' unjust enrichment claims under New  
2 York, Washington, and Massachusetts law, "[w]hether plaintiffs [have] an adequate  
3 remedy at law remains to be seen."<sup>12</sup> *Fenerjian v. Nongshim Co., Ltd*, 72 F. Supp. 3d 1058,  
4 1086 (N.D. Cal. 2014). Because Plaintiffs can plead in the alternative under Rule 8(d)(3),  
5 it would be "premature to dismiss the unjust enrichment claims on that basis at this point."  
6 *Id.* Defendants' Motion to Dismiss Plaintiffs' unjust enrichment claims, therefore, is  
7 DENIED.

#### 8 V. CONCLUSION

9 For the foregoing reasons, Defendants' Motion is GRANTED IN PART and  
10 DENIED IN PART. Plaintiffs' Wiretap Act claims, California Invasion of Privacy Act  
11 claims, False Advertising Law claims, negligent misrepresentation claims under California  
12 and Washington law, and state law video privacy claims are DISMISSED with LEAVE  
13 TO AMEND. To the extent that Plaintiffs' fifth, sixth, eighth, ninth, eleventh, fourteenth,  
14 and eighteenth causes of action are premised on allegations of affirmative fraudulent  
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16 <sup>12</sup> Defendants contend that "in Massachusetts, New York, Florida, and Washington . . . an  
17 unjust enrichment claim *cannot* be pleaded when an adequate remedy at law exists." (Reply at 25.)  
18 The Court finds no basis in the cases Defendants cite for a rule holding that a court must  
19 determine on a motion to dismiss whether an adequate remedy at law exists; rather, the decisions  
20 Defendants reference merely support the uncontroversial proposition that in some circumstances  
21 the remedy at law is so obvious from the allegations in a complaint that the question may be  
22 resolved on a motion to dismiss. For instance, one of the decisions Defendants reference, *Go2Net,*  
23 *Inc. v. Freeyellow.com, Inc.*, 109 P.3d 875 (Wash. Ct. App. 2005), merely held in an unpublished  
24 part of the opinion that the trial court properly dismissed an unjust enrichment claim after  
25 determining that the plaintiff's claim "sounded in contract and thereby provided him an adequate  
26 remedy at law." *Id.* at 881. Similarly, another case Defendants cite, *Fed. Treasury Enter.*  
27 *Sojuzplodoimport v. Spirits Int'l N.V.*, 400 F. App'x 611 (2d Cir. 2010), addressed an attempt "to  
28 evade the statute of limitations applicable to a tortious interference with contract claim" by artfully  
pleading it as an unjust enrichment claim. *Id.* at 614. To the extent that *Licul v. Volkswagen Group*  
*of America* holds that a plaintiff must allege distinct predicate facts merely to plead a claim for  
unjust enrichment, *see* 2013 WL 6328734, at \*7 (S.D. Fla. Dec. 5, 2013), that decision finds little  
support in the common law and "improperly require[s] a complete absence of an adequate remedy  
at law to state a claim for unjust enrichment." *Harris v. Nordyne, LLC*, No. 14-CIV-21884, 2014  
WL 12516076, at \*7 n.5 (S.D. Fla. Nov. 14, 2014).

1 conduct, they are DISMISSED with LEAVE TO AMEND. Defendants' Motion is  
2 otherwise DENIED. Plaintiffs are given leave to file a Second Consolidated Complaint  
3 within 21 days of this Order. Failure to file a Second Consolidated Complaint by that date  
4 shall be deemed consent to the dismissal of Plaintiffs' claims against Defendants with  
5 prejudice.

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8 DATED: March 2, 2017

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JOSEPHINE L. STATON  
UNITED STATES DISTRICT JUDGE

