UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ALASDAIR TURNER,

Plaintiff,

v.

APPLE, INC.,

Defendant.

Case No. 5:20-cv-07495-EJD

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: Dkt. No. 34

Plaintiff Alasdair Turner alleges that Defendant Apple, Inc.'s product, the iPhone, possesses software that, when activated, allows the phone to secretly consume cellular data for Defendant's benefit without the user's knowledge or consent. On March 4, 2021, Defendant moved to dismiss Plaintiff's complaint. *See* Motion to Dismiss First Amended Complaint ("Mot."), Dkt. No. 34. On March 25, 2021, Plaintiff filed an opposition, to which Defendant filed a reply. *See* Opposition to Motion to Dismiss ("Opp."), Dkt. No. 37; Apple's Reply in Support of its Motion to Dismiss ("Reply"), Dkt. No. 38. Having read the Parties' papers, the Court **GRANTS in part and DENIES in part** Defendant's motion to dismiss.

I. BACKGROUND

Plaintiff purchased his iPhone in 2018 from a Verizon store and, at that time, "reviewed the materials accompanying his purchase and the documentation necessary to complete setup of the device." *See* First Amended Class Action Complaint ("FAC") ¶¶ 1, 39, Dkt No. 30.

Sometime in September or October 2019, Plaintiff updated his iPhone with the iOS version 13 software. FAC ¶ 9. Defendant promised this update would bring "improvement across the entire system that make [] iPhone[s] even faster and more delightful to use." FAC ¶ 2. Plaintiff

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alleges, on behalf of himself and a putative class, that the update did not improve use. According to Plaintiff, Defendant designed the iPhone with the undisclosed capability to appropriate and consume users' cellular data for Defendant's own benefit. FAC ¶¶ 3, 42 ("Apple did not disclose—either in connection with iPhone purchases, installation of iOS 13, or otherwise—that it has the capability to surreptitiously use consumers' valuable cellular data exclusively for its own purposes, including for software development or other technical improvements."). Plaintiff alleges that Defendant activated this capability in 2019 by rolling out iOS 13, which caused iPhones to send significant amounts of data to Apple, routed Apple's data transfers exclusively over cellular networks, and exempted Apple's data transfers from normal settings favoring Wi-Fi connections. *See* FAC ¶ 5. Defendant did not disclose that iOS 13 contained hidden software code (the "Consuming Code") that caused devices running iOS 13 to consume cellular data without the user's input or control. FAC ¶ 4. To prevent users from noticing that Defendant's software was consuming data, Defendant mischaracterized the data-drain as coming from "Uninstalled Apps" on the iPhone's internal cellular data meter. FAC ¶¶ 42, 47. That is, Defendant's iOS 13 falsely suggested that the user was causing the data consumption by uninstalling applications. FAC ¶¶ 26–27.

The iOS 13 Software Licensing Agreement ("SLA") did not warn users that iOS 13 would cause a data drain, but instead advised users that they would be able to view and control how much data iOS 13 used. It provided that:

> You agree that many features, built-in apps, and Services of the Apple Software transmit data and could impact charges to your data plan, and that you are responsible for any such charges. You can view and control which applications are permitted to use cellular data and view an estimate of how much data such applications have consumed under Cellular Data Settings. In addition, Wi-Fi Assist will automatically switch to cellular when you have a poor Wi-Fi connection, which might result in more cellular data use and impact charges to your data plan.

FAC ¶ 18.

Because Plaintiff, and the putative class, had cellular data plans with a limited amount of data (*e.g.*, 5 GB per month), being able to predict and control their cellular data usage was

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imperative otherwise they could be charged exorbitant overage fees by their carriers. FAC ¶¶ 21–22. Plaintiff seeks relief because Defendant's iOS 13 impacted his ability to control his cellular data usage by, among other things, misclassifying how iOS 13 consumed data and making it impossible for users to disable iOS 13's use of data. Plaintiff argues that Defendant misappropriated his cellular data for its own use, and thus that he, and the class, are entitled to restitution for the value of the data Defendant consumed. FAC ¶ 83.

Plaintiff brings four claims: (1) First, he asserts a claim under the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; (2) Second, he asserts a claim under the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (3) Third, he asserts a claim under the California Computer Data Access and Fraud Act ("CDAFA"), Cal Penal Code §§ 502 *et seq.*; and (4) Fourth, he asserts a claim for trespass to chattels. *See* FAC ¶¶ 63–96. Plaintiff seeks both monetary and injunctive relief.

Defendant argues that Plaintiff is barred from seeking injunctive relief since adequate remedies exist at law. Defendant further argues that Plaintiff lacks standing to pursue injunctive relief since he concedes that the alleged data misattribution issue was resolved in June 2020 and there are no facts in the complaint that suggest it will recur. With respect to Plaintiff's claims, Defendant seeks to dismiss his first, second, and fourth claims. Defendant argues that Plaintiff's UCL and CLRA claims must be dismissed because Plaintiff does not allege that he was exposed to or relied on omissions by Defendant at the time he purchased his iPhone. Defendant also argues that Plaintiff's trespass claim must be dismissed because Plaintiff has not alleged that he was deprived of the use of his iPhone for a substantial time or suffered a significant reduction in his iPhone's performance.

II. LEGAL STANDARD

A complaint must be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) if the plaintiff either fails to state a cognizable legal theory or has not alleged sufficient facts establishing a claim to relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the

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Court must accept well-pled facts as true, "conclusory allegations without more are insufficient to defeat a motion to dismiss." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). The Court cannot assume the truth of legal conclusions merely because they are pled in the form of factual allegations, nor should it accept as true allegations contradicted by judicially noticeable facts. *Iqbal*, 556 U.S. at 677–79; *Twombly*, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than the labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." (citations omitted) (alterations in original)).

Claims grounded in fraud, like the omissions pled in this case, are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Moore v. Apple*, 73 F. Supp. 3d 1191, 1198 (N.D. Cal. 2014). Rule 9(b) requires that a fraud-based claim "state with particularity the circumstances constituting fraud." *Id.* (quoting Fed. R. Civ. P. 9(b)). To satisfy this heightened standard, the allegations must be specific enough "to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Thus, claims sounding in fraud must allege "an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" *Moore*, 73 F. Supp. 3d at 1198 (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam)). The plaintiff must set forth "what is false or misleading about a statement, and why it is false." *Id.*; *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) ("A party alleging fraud must 'set forth more than the neutral facts necessary to identify the transaction.'" (citation omitted)).

III. DISCUSSION

As noted above, Plaintiff asserts four claims for relief: (1) violation of the CLRA; (2) violation of the UCL; (3) violation of the CDAFA; and (4) trespass to chattels. FAC ¶¶ 63–96. Defendants argue that Counts One, Two, and Four should be dismissed and that any request for

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1 equitable relief must also be dismissed. Mot. at 5.

2 **A. Claims for Restitution and Injunctive Relief**

3 Among other remedies, Plaintiff seeks restitution and an injunction for Defendant's
4 allegedly unlawful conduct under the UCL and the CLRA. Defendant argues that these claims
5 should be dismissed because Plaintiff cannot seek equitable relief since Plaintiff has an adequate
6 remedy at law. Mot. at 5–6. Plaintiff contends that he can pursue equitable relief since (1) an
7 injunction is the only way to address Defendant's continued failure to disclose its iPhone defects,
8 namely that it possesses software that allows Defendant to consume user's data without notice,
9 and (2) his restitution claims are not commensurate with his claims for damages.

10 Under Ninth Circuit law, a plaintiff must establish that they lack an "adequate remedy at
11 law before securing equitable restitution for past harm under the UCL and CLRA." *Sonner v.*
12 *Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020); *see also Schroeder v. United States*,
13 569 F.3d 956, 963 (9th Cir. 2009) ("[E]quitable relief is not appropriate where an adequate remedy
14 exists at law."). *Sonner* concerned equitable restitution; however, this Court and several others
15 have held that *Sonner* also applies to injunctive relief. *See In re MacBook Keyboard Litig.*, 2020
16 WL 6047253, at *3 (N.D. Cal. Oct. 13, 2020) (collecting cases).

17 Plaintiff must show that monetary damages for the past harm caused by iOS 13 are an
18 inadequate remedy for the future harm that an injunction under California consumer protection
19 law is aimed at. Plaintiff's remedy at law, damages, is retrospective and can only remedy Plaintiff
20 for the harm already incurred. An injunction, on the other hand, is prospective and would remedy
21 any threat of future harm.

22 The Court agrees with Plaintiff that legal remedies alone are inadequate. Defendant urges
23 that the Court read the complaint to allege that the Consuming Code caused the alleged data
24 depletion and that after the iOS 14 update, Defendant lost its ability to deplete user's data.
25 Plaintiff contends that an alternative reading is more appropriate. In Plaintiff's view, the
26 complaint alleges that iPhones contained general software that allowed Defendant to use user's
27 data and that the Consuming Code "triggered" this software. Under Plaintiff's reading of the

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