

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOSEPH TAYLOR, et al.,
Plaintiffs,
v.
GOOGLE LLC,
Defendant.

Case No. 20-cv-07956-VKD

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS COMPLAINT**

Re: Dkt. No. 33

Plaintiffs sue Google LLC (“Google”), individually and on behalf of a putative class of Android mobile device owners, for conversion and quantum meruit based on alleged “passive” data transfers performed by Google over its Android operating system without consent. Google moves pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint. Plaintiffs oppose the motion. Upon consideration of the moving and responding papers, as well as the oral arguments presented, the Court grants Google’s motion to dismiss with leave to amend as discussed below¹

I. BACKGROUND

According to the complaint’s allegations, plaintiffs Joseph Taylor, Edward Mlakar, Mick Cleary, and Eugene Alvis are non-California residents² who own Android mobile devices that they use with a monthly cellular data plan purchased from various service providers, including T-

¹ All parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by a magistrate judge. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; Dkt. Nos. 16, 23.

² The complaint states that Messrs. Taylor and Mlakar are residents and domiciliaries of Illinois, Mr. Cleary is a resident and domiciliary of Wisconsin, and Mr. Alvis is a resident and domiciliary

1 Mobile, Verizon and U.S. Cellular. Dkt. No. 1 ¶¶ 8-11. Messrs. Taylor, Mlakar, and Cleary each
2 have unlimited data plans. Mr. Alvis has a limited data plan he purchased from one service
3 provider, as well as an unlimited data plan he purchased from another service provider. *Id.*

4 Plaintiffs allege that Google “designed the Android operating system to collect vast
5 amounts of information about users, which Google uses to generate billions in profit annually by
6 selling targeted digital advertisements.” *Id.* ¶ 1. Much of this information-gathering activity, say
7 plaintiffs, takes place “secretly,” is “not initiated by any action of the user” and is “performed
8 without their knowledge,” including at times when their devices are seemingly idle. *Id.* ¶¶ 3, 33.
9 Indeed, according to the complaint, “Google deliberately designed and coded its Android
10 operating system and Google applications to indiscriminately take advantage of Plaintiffs’ data
11 allowances and passively transfer information at all hours of the day—even after Plaintiffs move
12 Google apps to the background, close the programs completely, or disable location-sharing.” *Id.*
13 ¶ 3. In performing these so-called “passive” data transfers, plaintiffs allege that Google “secret[ly]
14 appropriate[es] . . . Android users’ cellular data allowances,” even though the transfers are “not
15 time-sensitive and could be delayed until Plaintiffs are in Wi-Fi range to avoid consuming
16 Plaintiffs’ cellular data allowances.” *Id.* ¶¶ 2, 3. Plaintiffs further allege that they never consented
17 to these data transfers, and that Google’s various policies and terms of service are contracts of
18 adhesion that do not in any way provide users with notice of these passive data transfers. Instead,
19 say plaintiffs, mobile device users only consent to Google’s use of their cellular data when they
20 are actively using Google’s products. *Id.* ¶¶ 4, 5, 29-31, 45-50.

21 Claiming that they have property interests in their cellular data allowances, plaintiffs
22 contend that the alleged passive data transfers “depriv[e] them of data for which they, not Google,
23 paid” and benefit “[Google]’s product development and lucrative targeted advertising business” at
24 plaintiffs’ expense. *Id.* ¶¶ 6, 7. As noted above, plaintiffs assert claims for conversion and
25 quantum meruit for themselves and on behalf of a proposed class of “[a]ll natural persons in the
26 United States (excluding citizens of the State of California) who have used mobile devices running
27 the Android operating system to access the internet through cellular data plans provided by mobile
28

1 carriers.” *Id.* ¶ 54.³ The complaint asserts jurisdiction under the Class Action Fairness Act of
2 2005, 28 U.S.C. § 1332(d), on the grounds that the amount in controversy exceeds \$5 million,
3 exclusive of interest and costs, there are 100 or more class members, and the parties are minimally
4 diverse. *Id.* ¶ 13. Plaintiffs seek an injunction “directing Google to stop using cellular data
5 purchased by consumers without their consent,” as well the “fair market value of the cellular data
6 converted by Google,” the “reasonable value of the cellular data used by Google to extract and
7 deliver information that benefited Google,” and fees and costs. *Id.* ¶ 78.

8 Google moves to dismiss the complaint pursuant to Rule 12(b)(1), arguing that plaintiffs
9 lack standing to pursue their claims because they have not alleged facts indicating that they have
10 suffered any injury. Even if plaintiffs have standing, Google moves to dismiss pursuant to Rule
11 12(b)(6), arguing that (1) plaintiffs’ conversion claim fails because the complaint does not allege a
12 cognizable property interest, interference, or damages and because plaintiffs consented to the
13 alleged data use and (2) plaintiffs’ quantum meruit claim fails because it is merely derivative of
14 plaintiffs’ conversion claim. For the reasons discussed below, the Court grants Google’s motion
15 to dismiss with leave to amend as specified below.⁴

16 **II. DISCUSSION**

17 **A. Rule 12(b)(1) Motion to Dismiss**

18 Google argues that plaintiffs lack standing to bring their claims because they have not
19 alleged an injury-in-fact. Standing is a jurisdictional issue properly addressed under a Rule
20 12(b)(1) motion. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). A Rule 12(b)(1)
21 motion to dismiss challenges a federal court’s jurisdiction over the subject matter of a plaintiff’s
22 complaint. A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the
23

24 ³ The proposed class excludes Google, “its officers, directors, management, employees,
25 subsidiaries, and affiliates” and “any judges or justices involved in this action and any members of
26 their immediate families or their staff.” *Id.* ¶ 55.

27 ⁴ In resolving the present motion, the Court finds it unnecessary to consider the various terms and
28 policies Google submitted and the Form 10-K, and website materials submitted by plaintiffs (Dkt.
29 No. 39-1, Exs. 3-5). The parties’ respective motions for judicial notice of those materials (Dkt.
30 Nos. 33-7, 39-2) are denied as moot.

1 pleadings (a “facial attack”) or by presenting extrinsic evidence (a “factual attack”). *Warren v.*
 2 *Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (citing *White v. Lee*, 227 F.3d
 3 1214, 1242 (9th Cir. 2000)). “In a facial attack, the challenger asserts that the allegations
 4 contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast,
 5 in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would
 6 otherwise invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th
 7 Cir. 2004).

8 Because Google’s arguments focus on the sufficiency of the complaint’s allegations, the
 9 Court construes the present motion as a facial attack on plaintiffs’ standing. As such, the record is
 10 limited to the complaint and materials that may be judicially noticed. *See Hyatt v. Yee*, 871 F.3d
 11 1067, 1071 n.15 (9th Cir. 2017). Additionally, the Court must accept well-pled allegations of the
 12 complaint as true, draw all reasonable inferences in plaintiffs’ favor, and determine whether their
 13 allegations are sufficient to support standing. *See id.* As the parties asserting federal subject
 14 matter jurisdiction, plaintiffs bear the burden of establishing its existence. *Kokkonen v. Guardian*
 15 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

16 Under Article III of the Constitution, federal courts have jurisdiction to decide only actual
 17 “Cases” or “Controversies,” U.S. Const., art. III, § 2, and plaintiffs have standing to sue if they
 18 “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the
 19 defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v.*
 20 *Robins*, 136 S. Ct. 1540, 1547 (2016); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-
 21 61 (1992). Plaintiffs’ claimed injury must be both “particularized” and “concrete.” A
 22 “particularized” injury is one that “affect[s] the plaintiff in a personal and individual way.”
 23 *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). A “concrete” injury is not
 24 limited to one that is tangible. *Id.* at 1549. “Various intangible harms can also be concrete,” and
 25 “[c]hief among them are injuries with a close relationship to harms traditionally recognized as
 26 providing a basis for lawsuits in American courts,” such as “reputational harms, disclosure of
 27 private information and intrusion upon seclusion.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190,

1 abstract.” *Spokeo, Inc.*, 136 S. Ct. at 1548.

2 “The Art[icle] III judicial power exists only to redress or otherwise to protect against injury
3 to the complaining party, even though the court’s judgment may benefit others collaterally,” and
4 “[a] federal court’s jurisdiction therefore can be invoked only when the plaintiff himself has
5 suffered some threatened or actual injury resulting from the putatively illegal action.” *Warth v.*
6 *Seldin*, 422 U.S. 490, 499 (1975) (internal quotations and citation omitted). Thus, in the class
7 action context, plaintiffs “must allege and show that they personally have been injured, not that
8 injury has been suffered by other unidentified members of the class to which they belong and
9 which they purport to represent.” *Id.* at 502.

10 Google argues that the complaint merely speculates about harms that other Android device
11 users may have experienced, and fails to allege facts demonstrating that the plaintiffs themselves
12 have suffered any injury. For example, Google points out that while the complaint alleges that
13 individuals with limited data plans typically are charged an overage fee if they exceed their data
14 allowances, Mr. Alvis (the only plaintiff with a limited data plan) does not allege that he was ever
15 charged such fees. *See* Dkt. No. 33 at 7; *see also* Dkt. No. 1 ¶¶ 11, 26. Similarly, Google notes
16 that the complaint alleges that individuals with unlimited data plans are “typically subject to
17 quotas on their usage and will have their cellular connection speeds throttled if they exceed such
18 quotas,” resulting in lost functionalities, such as video streamlining, or in significantly impaired
19 device performance. *See* Dkt. No. 33 at 7; *see also* Dkt. No. 1 ¶¶ 8-11, 26. However, no plaintiff
20 alleges that his unlimited data plan was subject to such quotas or that his connection speed was
21 ever throttled.

22 Citing *In re Facebook, Inc. Internet Tracking Litigation*, 956 F.3d 589 (9th Cir. 2020),
23 plaintiffs argue that their “interest in disgorging Google’s unjust enrichment” is sufficient to
24 establish Article III standing. Dkt. No. 39 at 13-14. In *Facebook Internet Tracking*, Facebook
25 admittedly used plug-ins to track logged-out users’ browsing histories, and compiled those
26 browsing histories into personal profiles that Facebook sold to advertisers to generate revenue.
27 956 F.3d at 596. The district court dismissed several common law claims, including trespass to
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