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 below[1]

I. BACKGROUND

According to the complaint's allegations, plaintiffs Joseph Taylor, Edward Mlakar, Mick Cleary, and Eugene Alvis are non-California residents[2] 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

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

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

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

carriers." *Id.* ¶ 54.[3] The complaint asserts jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), on the grounds that the amount in controversy exceeds $5 million, exclusive of interest and costs, there are 100 or more class members, and the parties are minimally diverse. *Id.* ¶ 13. Plaintiffs seek an injunction "directing Google to stop using cellular data purchased by consumers without their consent," as well the "fair market value of the cellular data converted by Google," the "reasonable value of the cellular data used by Google to extract and deliver information that benefited Google," and fees and costs. *Id.* ¶ 78.

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

II. DISCUSSION

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

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

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

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

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

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

Under Article III of the Constitution, federal courts have jurisdiction to decide only actual "Cases" or "Controversies," U.S. Const., art. III, § 2, and plaintiffs have standing to sue if they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs' claimed injury must be both "particularized" and "concrete." A "particularized" injury is one that "'affect[s] the plaintiff in a personal and individual way.'" *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). A "concrete" injury is not limited to one that is tangible. *Id*. at 1549. "Various intangible harms can also be concrete," and "[c]hief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," such as "reputational harms, disclosure of private information and intrusion upon seclusion." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Nevertheless, a "concrete" injury "must actually exist" and must be "real, and not

abstract." *Spokeo, Inc.*, 136 S. Ct. at 1548.

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

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

Citing *In re Facebook, Inc. Internet Tracking Litigation*, 956 F.3d 589 (9th Cir. 2020), plaintiffs argue that their "interest in disgorging Google's unjust enrichment" is sufficient to establish Article III standing. Dkt. No. 39 at 13-14. In *Facebook Internet Tracking*, Facebook admittedly used plug-ins to track logged-out users' browsing histories, and compiled those browsing histories into personal profiles that Facebook sold to advertisers to generate revenue. 956 F.3d at 596. The district court dismissed several common law claims, including trespass to chattels and fraud, for lack of standing on the ground that the plaintiffs failed to allege that they

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