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 FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND

Re: Dkt. No. 65

Defendant Google LLC ("Google") moves pursuant to Rule 12(b)(6) to dismiss plaintiffs' first amended complaint ("FAC"). Plaintiffs oppose the motion. Upon consideration of the moving and responding papers,[1] as well as the oral arguments presented, the Court grants Google's motion to dismiss without leave to amend.[2]

I. BACKGROUND

Plaintiffs Joseph Taylor, Edward Mlakar, Mick Cleary, and Eugene Alvis, each of whom are non-California residents and domiciliaries, filed this putative class action against Google, asserting claims for conversion and quantum meruit based on alleged "passive" data transfers performed by Google over its Android operating system. The alleged passive data transfers are made without plaintiffs' knowledge or consent, and at times when their mobile devices are idle,

[1] In resolving the present motion, the Court finds it unnecessary to consider the various terms of service and policies Google submitted for judicial notice (Dkt. No. 65-1), or the declaration of Marc A. Wallenstein submitted in support of plaintiffs' opposition (Dkt. No. 67-1). Google's request for judicial notice is denied as moot.

[2] 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.

stationary, untouched and with all applications closed.[3] Plaintiffs assert their conversion and quantum meruit claims for themselves and on behalf of a putative 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 networks operated by mobile carriers." Dkt. No. 60 ¶ 84.[4] Plaintiffs invoke federal jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d). *Id.* ¶ 18.

On October 1, 2021, the Court granted Google's motion to dismiss the original complaint, with limited leave to amend. Google moved to dismiss that complaint pursuant to Rule 12(b)(1), arguing that plaintiffs lack Article III standing to pursue their claims because they did not allege facts indicating that they have suffered any injury. Even if plaintiffs have standing, Google argued that dismissal was warranted under Rule 12(b)(6) because the complaint failed to allege sufficient facts supporting claims for conversion or quantum meruit. Dkt. No. 33. With respect to their Article III standing, the Court noted that no plaintiff alleged any facts demonstrating injury, i.e., that he was charged an overage fee or experienced throttled connection speeds. Dkt. No. 51 at 5. The Court nonetheless addressed Google's Rule 12(b)(6) motion to dismiss the conversion and quantum meruit claims, finding that the issue of plaintiffs' Article III standing was intertwined with the parties' dispute about whether the complaint stated plausible claims for relief. *Id.* at 6.

The Court dismissed the conversion claim, finding that plaintiffs did not allege facts demonstrating that their "cellular data allowances" are personal property capable of exclusive possession or control. *Id.* at 7-13. The Court dismissed the quantum meruit claim as merely derivative of the conversion claim. *Id.* at 13-15. Although plaintiffs did not articulate any additional facts that could be alleged on amendment to support a plausible claim for conversion, the Court nonetheless granted leave to amend that claim. The Court also gave plaintiffs leave to

[3] The Court assumes the parties' familiarity with the general background facts as described in its prior order on Google's motion to dismiss plaintiffs' original complaint (Dkt. No. 51 at 1-3) and does not repeat those facts in this order.

[4] There is a parallel proceeding pending in the Santa Clara County Superior Court concerning a putative class of California citizens, *Csupo, et al. v. Alphabet, Inc.*, Case No. 19CV352557.

amend their quantum meruit clam to the extent plaintiffs believed they plausibly could assert such a claim based on their cellular data allowances. *Id*. at 15. However, plaintiffs were not given leave to amend their quantum meruit claim based on the alleged use of "personal information," because they "not only failed to articulate additional facts that could be asserted on amendment, but have also not explained why they did not plead those allegations in their original complaint." *Id*.

Plaintiffs' FAC names an additional plaintiff, Jennifer Nelson, identified as a resident and domiciliary of Wisconsin who has a data plan that requires her to pay a fixed price for up to one gigabyte of data per month, plus an additional charge for each additional gigabyte of data she uses in that month. *See* Dkt. No. 60 ¶ 16. The FAC reasserts a conversion claim, this time based on the theory that "cellular data" (rather than "cellular data allowances") is property subject to conversion. *Id*. ¶¶ 3-4, 28-34. The FAC also reasserts a quantum meruit claim, which plaintiffs contend is not a common count and is not derivative of their conversion claim. *See id*. ¶¶ 3, 5, 10, 77-83, 92-99. In plaintiffs' view, "[e]ither cellular data is property subject to conversion, or it is a contractual right of access to a service subject to quantum meruit. It may even be both—but it must at least be one or the other." *Id*. ¶ 5; *see also* Dkt. No. 67 at 1.

Google contends that the FAC must be dismissed pursuant to Rule 12(b)(6) because plaintiffs still fail to state sufficient facts supporting a plausible claim for conversion or quantum meruit. Although Google does not directly challenge plaintiffs' standing, Google maintains that plaintiffs have not alleged any facts demonstrating that they personally suffered any concrete injury resulting from Google's alleged conduct. *See* Dkt. No. 65 at 10 n.4.

II. LEGAL STANDARD

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal sufficiency of the claims in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is appropriate where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. *Id*. (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). In such a motion, all material allegations in the complaint must be taken as true and construed in the light most favorable to the claimant. *Id*.

However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, "the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." This means that the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). However, only plausible claims for relief will survive a motion to dismiss. *Iqbal*, 556 U.S. at 679. A claim is plausible if its factual content permits the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id*. A plaintiff does not have to provide detailed facts, but the pleading must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id*. at 678.

Documents appended to or incorporated into the complaint or which properly are the subject of judicial notice may be considered along with the complaint when deciding a Rule 12(b)(6) motion. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

III. DISCUSSION

A. Conversion

"In California, conversion has three elements: ownership or right to possession of property, wrongful disposition of the property right and damages." *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 906 (9th Cir. 1992); *see also Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 119 (2007) ("The basic elements of the tort [of conversion] are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages."). Courts apply a three-part test to determine whether a property right exists: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established

a legitimate claim to exclusivity." *GS Rasmussen*, 958 F.2d at 903 (footnotes omitted). "Although the question was once the matter of some controversy, California law now holds that property subject to a conversion claim need not be tangible in form; intangible property interests, too, can be converted." *Voris v. Lampert*, 7 Cal. 5th 1141, 1151 (2019); *see also Kremen v. Cohen*, 337 F.3d 1024, 1033 (9th Cir. 2003) (stating that insofar as "California retains some vestigial merger requirement, it is clearly minimal, and at most requires only *some* connection to a document or tangible object[.]").

In their original complaint, plaintiffs' conversion claim asserted a property right in "their purchased data allowances" created by contract with their respective service providers. *See* Dkt. No. 1 ¶¶ 6, 27, ¶ 60.b., 63. The Court dismissed the conversion claim because plaintiffs did not allege facts demonstrating exclusive possession of the "purchased data allowances" for which they contract:

> Although plaintiffs argue that their data plans confer ownership of "[p]urchased [b]ytes of [c]ellular [d]ata" (Dkt. No. 39 at 14), they have not plausibly alleged facts demonstrating a right to exclusive access to unique or specific bytes of data. Rather, the complaint's allegations indicate that plaintiffs' data allowances provide them with a contractual right to access their service provider's cellular data network—a right that is not exclusive of others' rights to access the same network. Plaintiffs confirm that they "use the term 'data allowances' to refer to the quantity of cellular data bytes that they have purchased" through contracts with their respective service providers. Dkt. No. 39 at 16 n.5. In other words, a data allowance provides subscribers, such as plaintiffs, with a contractual right of access to a service, i.e., access to a service provider's cellular data network that enables users "to send and receive information over the internet without a Wi-Fi connection." *See* Dkt. No. 1 ¶ 24. For some subscribers that right of access is limited to a certain volume of data transmission per month (measured in bytes of data), and for others it is unlimited. *See* Dkt. No. 1 ¶¶ 8-11. In any event, that right of access is not exclusive of others' right of access to the same network, and no subscriber possesses or controls a particular byte or bytes of data in the network. Indeed, plaintiffs acknowledge that the purported property right of access to a cellular data network grants them the ability to access "quantities of cellular data available to all of [a carrier's] customers." Dkt. No. 39 at 17.

Dkt. No. 51 at 9.

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