1 The Honorable Barbara J. Rothstein
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5 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 MARY AND MATTHEW STREET,
8 Plaintiffs,
9 v.
10 AMAZON.COM SERVICES, LLC, a Delaware Limited Liability Company, and
11 AMAZON DIGITAL SERVICES, LLC, a Delaware Limited Liability Company,
12 Defendants.

NO. 2:21-cv-0912-BJR

ORDER DENYING MOTION TO AMEND

13
14 **I. INTRODUCTION**

15 This matter comes before the Court on a Motion to Amend, Dkt. No. 44, filed by Plaintiffs
16 Mary and Matthew Street ("Plaintiffs" or the "Streets"). Plaintiffs filed this Motion after the Court
17 granted the Motion to Dismiss, filed by Defendants Amazon.com Services, LLC and Amazon
18 Digital Services, LLC (collectively "Defendants" or "Amazon"). The Order Granting the Motion
19 to Dismiss was "grounded in the insufficiency of Plaintiffs' allegations," and was without
20 prejudice, providing Plaintiffs the opportunity to cure the deficiencies in their complaint by
21 amendment. Order Granting Mot. to Dismiss, Dkt. No. 43, at 11.
22 Having reviewed the parties' briefs and supporting material filed in support of and
23 opposition to the motion, including the Proposed Second Amended Complaint ("PSAC"), and the

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relevant case law, the Court finds and rules as follows.

II. BACKGROUND

This proposed class action challenges an Amazon technology called Sidewalk, which is enabled on certain newer models of Amazon's Echo smart speakers ("Sidewalk Devices"). The technology "enables those Sidewalk Devices to connect to other Sidewalk-enabled devices nearby through their Bluetooth connections, creating a new, shared network." PSAC, ¶ 3. Using this network, nearby third-party devices such as pet trackers like Tile can connect to the internet and send small amounts of data (concerning, for example, their location) using the private residential internet accounts belonging to owners of the Sidewalk Devices. *Id.*, ¶¶ 3, 4. Use of these internet accounts is capped at 500 megabytes. *Id.*, ¶ 42. Echo owners are not compensated for use of their internet, but can opt out of Sidewalk by disabling the feature on their devices. Opting out requires owners to "take several steps to disable Sidewalk on their devices." *Id.*, ¶ 43.

Plaintiffs own a Sidewalk-compatible Echo Dot smart speaker, which they purchased in 2018. PSAC, ¶ 14. Sidewalk launched on June 8, 2021, and Plaintiffs disabled the Sidewalk feature on their Echo on June 27, 2021. *Id.*, ¶¶ 46, 50. The Streets have alleged "on information and belief" that during that 19-day period, Sidewalk provided third parties access to the internet using Plaintiffs' personal internet account, which "consumed data from the Streets' limited Internet data allocations." *Id.*, ¶¶ 16, 53. The Streets pay for internet access, with a data limit of 1.2 terabytes[1] a month, but do not allege that they incurred any overage charges or other fees during the period that Sidewalk was enabled on their device. They also do not claim that their

[1] A terabyte is equal to one million megabytes.

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1 internet speed was slowed or otherwise affected, or that their privacy was somehow invaded.[2] The
2 only other putative injury they claim to have suffered relates to the "significant time" they spent
3 learning about how to disable Sidewalk on their Echo. *Id.*, ¶ 50.

4 On March 21, 2022, the Court granted Amazon's Motion to Dismiss, finding several
5 critical deficiencies in Plaintiffs' First Amended Complaint. The Court found, among other
6 things, that Plaintiffs had failed "to include in their FAC any allegation *their* Echo ever actually
7 connected through Sidewalk, or that *their* data and bandwidth were ever actually shared," and that
8 Plaintiffs "fail[ed] . . . to allege facts supporting [a] required element of their theft claim." Order
9 Granting Mot. to Dismiss, p. 5. In their opposition to Amazon's Motion to Dismiss, Plaintiffs
10 requested leave to amend their FAC. The Court granted Plaintiffs leave to file a motion to amend,
11 setting a deadline of April 22, 2022. On that day, Plaintiffs filed the instant motion.

12 Like the First Amended Complaint, the Proposed Second Amended Complaint includes
13 three claims: (1) for violation of the Washington Consumer Protection Act ("CPA"), RCW
14 19.86.010, *et seq*.; (2) for Theft of Telecommunications Services ("TTS"), under RCW §
15 9A.56.268 and .262; and (3) for unjust enrichment. Plaintiffs seek an award of damages and
16 injunctive relief, and propose to represent a class of "[a]ll persons in the United States who
17 bought or acquired and use an Amazon Sidewalk Device." PSAC, ¶ 55.

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[2] The PSAC does make reference to a potential "increased risk to the security of [Plaintiffs'] personal data," PSAC,
22 ¶ 8, but Plaintiffs have not argued that this caused them injury, and the facts as alleged here would not support them
if they did. *See Krottner v. Starbucks Corp*., 628 F.3d 1139, 1143 (9th Cir. 2010) (increased risk of future harm is an
23 injury for Article III standing only where plaintiffs "alleged a credible threat of real and immediate harm.").

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III. DISCUSSION

A. Standard on a Motion to Amend: Whether Amendment Would Be Futile

Under Federal Rule 15, leave to amend a complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). However, leave need not be granted when the proposed amendment is futile.[3] *See Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1059 (9th Cir. 2018). A proposed amended complaint is futile if it would be immediately "subject to dismissal." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir.1998). Thus, the "proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir.1988).

To avoid a Rule 12(b)(6) dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-570 (2007).[4] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Plausibility" means less than "probability," but "more than a sheer possibility," and facts that are "merely consistent with" a defendant's liability stop "short of the line between possibility

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[3] Defendants do not raise any of the other recognized grounds for denying a motion to amend a complaint, such as bad faith or prejudice.

[4] Both Plaintiffs and Defendants assert that "[a] proposed amendment is futile if no set of facts can be proven under the amended pleading that would constitute a valid and sufficient claim." Defs.' Opp. at 3; Pls.' Rep. at 2 (citing *Miller*, 845 F.2d at 214). However, "*Twombly* retired the *Conley* no-set-of-facts test." *Iqbal*, 556 U.S. at 678. In the wake of *Twombly* and *Iqbal*, therefore, "it might more appropriately be said that an amendment is futile when the proposed amended complaint fails to allege 'enough facts to state a claim to relief that is plausible on its face.'" *Fulton v. Advantage Sales & Mktg., LLC*, 2012 WL 5182805, at *2–3 (D. Or. Oct. 18, 2012) (citations omitted) (acknowledging that *Twombly* abrogated *Conley's* "no set of facts" standard for purposes of evaluating the futility of a motion to amend a complaint).

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and plausibility." *Id.* at 678; *Li v. Kerry*, 710 F.3d 995, 999 (9th Cir.2013). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Faulkner v. ADT Sec. Servs*., 706 F.3d 1017, 1019 (9th Cir. 2013). However, the Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Wilson v. Hewlett–Packard Co.*, 668 F.3d 1136, 1145 n. 4 (9th Cir. 2012); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

B. Whether Plaintiffs' Amendments Would Be Futile

Defendants argue that the claims in the Proposed Second Amended Complaint fail because the Streets have not alleged enough facts to support a reasonable inference that they sustained any injury. "In a class action, the named plaintiffs attempting to represent the class '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.'" *In re Zappos.com, Inc*., 108 F. Supp. 3d 949, 953–54 (D. Nev. 2015) (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)). Adequately alleging injury is necessary to establish both standing in this Court under Article III to the U.S. Constitution, and a required element of each of Plaintiffs' three claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (to establish standing "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical") (citations omitted); *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 57 (2009) ("Washington requires a private CPA plaintiff to establish the deceptive act caused injury.") (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co*., 105 Wn.2d 778, 794 (1986)); *Young v. Young*, 164 Wn.2d 477, 484–85 ("A claim of unjust

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