

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY AND MATTHEW STREET,

NO. 2:21-cv-0912-BJR

Plaintiffs,

**ORDER DENYING MOTION TO
AMEND**

v.

AMAZON.COM SERVICES, LLC, a
Delaware Limited Liability Company, and
AMAZON DIGITAL SERVICES, LLC, a
Delaware Limited Liability Company,

Defendants.

I. INTRODUCTION

This matter comes before the Court on a Motion to Amend, Dkt. No. 44, filed by Plaintiffs Mary and Matthew Street (“Plaintiffs” or the “Streets”). Plaintiffs filed this Motion after the Court granted the Motion to Dismiss, filed by Defendants Amazon.com Services, LLC and Amazon Digital Services, LLC (collectively “Defendants” or “Amazon”). The Order Granting the Motion to Dismiss was “grounded in the insufficiency of Plaintiffs’ allegations,” and was without prejudice, providing Plaintiffs the opportunity to cure the deficiencies in their complaint by amendment. Order Granting Mot. to Dismiss, Dkt. No. 43, at 11.

Having reviewed the parties’ briefs and supporting material filed in support of and opposition to the motion, including the Proposed Second Amended Complaint (“PSAC”), and the

ORDER DENYING MOTION TO AMEND

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

2 II. BACKGROUND

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

13 Plaintiffs own a Sidewalk-compatible Echo Dot smart speaker, which they purchased in
14 2018. PSAC, ¶ 14. Sidewalk launched on June 8, 2021, and Plaintiffs disabled the Sidewalk
15 feature on their Echo on June 27, 2021. *Id.*, ¶¶ 46, 50. The Streets have alleged “on information
16 and belief” that during that 19-day period, Sidewalk provided third parties access to the internet
17 using Plaintiffs’ personal internet account, which “consumed data from the Streets’ limited
18 Internet data allocations.” *Id.*, ¶¶ 16, 53. The Streets pay for internet access, with a data limit of
19 1.2 terabytes¹ a month, but do not allege that they incurred any overage charges or other fees
20 during the period that Sidewalk was enabled on their device. They also do not claim that their
21

22
23

¹ A terabyte is equal to one million megabytes.

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.

18 ///

19 ///

21 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
23 if they did. *See Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (increased risk of future harm is an
injury for Article III standing only where plaintiffs “alleged a credible threat of real and immediate harm.”).

24 ORDER DENYING MOTION TO AMEND

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

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).

ORDER DENYING MOTION TO AMEND

1 and plausibility.” *Id.* at 678; *Li v. Kerry*, 710 F.3d 995, 999 (9th Cir.2013). All allegations of
2 material fact are taken as true and construed in the light most favorable to the non-moving party.
3 *Faulkner v. ADT Sec. Servs.*, 706 F.3d 1017, 1019 (9th Cir. 2013). However, the Court is not
4 required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact,
5 or unreasonable inferences.” *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n. 4 (9th Cir.
6 2012); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

7 **B. Whether Plaintiffs’ Amendments Would Be Futile**

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

23
24 ORDER DENYING MOTION TO AMEND

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.