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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FUMIKO LOPEZ, et al.,
Plaintiffs,
v.
APPLE, INC.,
Defendant.

Case No. [19-cv-04577-JSW](#)

**ORDER GRANTING IN PART AND
DENYING IN PART APPLE’S
MOTION TO DISMISS**

Re: Dkt. No. 71

Now before the Court is the motion to dismiss the revised second amended class action complaint filed by the defendant Apple, Inc. (“Apple”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and it finds the motion suitable for disposition without oral argument. N.D. Civ. L.R. 7-1(b). The Court GRANTS IN PART and DENIES IN PART Apple’s motion.

BACKGROUND

Plaintiffs Fumiko Lopez, Fumiko Lopez as guardian of minor A.L., Lishomwa Henry, Joseph Harms, John Pappas, and David Yacubian (collectively, “Plaintiffs”) bring this consumer class action against defendant Apple, Inc. (“Apple”) alleging that Apple’s voice-activated “Siri” software intercepts speech in violation of privacy. Namely, Plaintiffs allege that Siri is routinely triggered by “accidental activations” when the user neither intends nor expects it to be “listening” and thereafter records voice conversations. Moreover, Plaintiffs allege that Apple discloses these accidentally-recorded conversations to third-party contractors as part of a “quality improvement program.” (Dkt. No. 70 (“SAC”) ¶¶ 4-5.)

Plaintiffs bring claims under the Wiretap Act, 18 U.S.C. § 2510, *et seq.*; the California Invasion of Privacy Act (“CIPA”), Cal. Penal Code § 632; intrusion upon seclusion; invasion of

1 privacy under the California Constitution; breach of contract; the California Unfair Competition
2 Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et seq.*; and for declaratory and equitable relief
3 under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

4 The Court will address additional facts as necessary in its analysis.

5 ANALYSIS

6 A. Legal Standard on Motion to Dismiss.

7 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the
8 pleadings fail to state a claim upon which relief can be granted. The Court’s “inquiry is limited to
9 the allegations in the complaint, which are accepted as true and construed in the light most
10 favorable to the plaintiff.” *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).
11 Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), “a plaintiff’s
12 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
13 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell*
14 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted).

15 Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but
16 must instead allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.
17 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
18 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
19 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Where the allegations are
20 insufficient to state a claim, a court should grant leave to amend, unless amendment would be
21 futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss &*
22 *Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

23 As a general rule, “a district court may not consider any material beyond the pleadings in
24 ruling on a Rule 12(b)(6) motion.” *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (citation
25 omitted)). An exception is documents subject to judicial notice which the Court may consider
26 without converting a motion to dismiss to one for summary judgment. *See Mack v. South Bay*
27 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (overruled on other grounds by *Astoria Fed.*
28 *Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991)).

1 **B. Analysis.**

2 **1. Plaintiffs Have Partly Remedied Deficiencies.**

3 In the previous iteration of motion to dismiss briefing, the Court found the claims largely
 4 well-pled, but dismissed the complaint for failure to allege that Plaintiffs' *particular* confidential
 5 communications were intercepted.¹ (Dkt. No. 65 ("Order").) Because Plaintiffs did not allege that
 6 they themselves suffered from accidental activation in settings where confidential communications
 7 could be intercepted, they failed to show standing or state claims for laws that require a reasonable
 8 expectation of privacy. (*Id.* at 4-7, 9, 16, 18-20.) The Court also dismissed the UCL claim for
 9 failure to allege economic injury, including that they "actually purchased the devices" and "saw
 10 Apple's representations." (*Id.* at 21.)

11 In the revised version of the complaint, Plaintiffs seek to remedy these defects by adding
 12 factual allegations regarding their use of Siri-enabled devices. Plaintiffs Lopez and A.L. allege
 13 that they charge their devices in private settings (such as the bedroom) and have received targeted
 14 advertisements based on private conversations that took place near the devices, (SAC ¶¶ 16-17);
 15 Plaintiff Henry claims that his phone accidentally activated "at least once a week" while he used
 16 his device "primarily at home" and reports similar targeted advertising, (*id.* ¶¶ 22-26); Plaintiff
 17 Harms alleges that he observed Siri automatically triggering in May 2019 while having a private
 18 conversation inside his bedroom, (*id.* ¶ 34); Plaintiff Pappas alleges that he talked to his physician
 19 in the presence of his device in December 2020 and received targeted advertising tailored to his
 20 condition and branded drug afterward, (*id.* ¶ 41); and Plaintiff Yacubian alleges that he observed
 21 accidental activations in private settings, such as the bedroom. (*Id.* ¶ 47.)

22 On balance, the Court finds that these allegations plausibly show that Plaintiffs' private
 23 communications were intercepted. First, Plaintiffs Henry, Harms, and Yacubian allege specific
 24 incidents where Siri activation occurred in private settings. Apple faults Plaintiffs for not alleging
 25 the contents of their communications, but the private setting alone is enough to show a reasonable
 26 expectation of privacy. *See Flanagan v. Flanagan*, 27 Cal. 4th 2002, 774-75 (2002). Second, the

27 _____
 28 ¹ The Court dismissed claims under the Stored Communications Act, 18 U.S.C. §§ 2701 and 2702,
 and Section 631(a) of CIPA as legally insufficient. Plaintiffs no longer assert these claims.

1 targeted advertising claims, while attenuated, are rendered plausible by the unique nature of *oral*
 2 communications. While advertising tracking abounds online, there are far fewer ways to intercept
 3 oral communications taking place in person.² Thus, drawing all inferences in favor of Plaintiffs,
 4 the complaint plausibly alleges that targeted advertising arose from Siri interception, rather than
 5 another commercial auditory interception device.³

6 As for dissemination, the allegations remain sparse. Nevertheless, because the information
 7 regarding third-party contractors' review of Siri recordings lies exclusively in Apple's possession,
 8 Plaintiffs' allegations of interception are sufficient at this stage. *See Soo Park v. Thompson*, 851
 9 F.3d 910, 928 (9th Cir. 2017) (*Twombly* "does not prevent a plaintiff from pleading facts alleged
 10 upon information and belief where the facts are peculiarly within the possession and control of the
 11 defendant" (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010))); *Slack v.*
 12 *Int'l Union of Operating Eng'rs*, 83 F. Supp. 3d 890, 900 (N.D. Cal. 2015) ("Because details of
 13 the precise nature of Defendants' management practice rests solely in the hands of Defendants at
 14 this juncture, greater specificity is not required at this pleading stage.").

15 That said, Plaintiffs still have not alleged economic injury. Some Plaintiffs allege that they
 16 saw Apple's representations while purchasing devices, but they do not rely on the representations
 17 for their economic injury. (E.g., SAC ¶ 22.) Instead, Plaintiffs claim that they stopped using Siri
 18 or purchased a new phone out of concern over interception, which "rendered a valuable aspect of
 19 Plaintiffs' devices useless." (*Id.* ¶ 48; Dkt. No. 72 ("Opp.") at 9.) This injury is expressly based
 20 on a benefit-of-the-bargain theory. (Opp. at 8.) That theory, however, requires reliance on the
 21 alleged misrepresentation. *See Birdson v. Apple Inc.*, No. C. 06-02280 JW, 2008 WL 7359917, at
 22 *6 (N.D. Cal. June 13, 2008), *aff'd* 590 F.3d 955 (9th Cir. 2009); *see also Backhaut v. Apple, Inc.*,

23
 24 ² Apple relies on representations in privacy documents that Siri recordings are "not used to build a
 25 marketing profile" or "sold to anyone." (Dkt. No. 71-4 ("As Siri, Dictation and Privacy") at 1.)
 26 However, these are the exact documents that Plaintiffs contend include misrepresentations. (SAC
 27 ¶¶ 171-72.) Thus, the Court does not assume the truth of their contents. The request for judicial
 28 notice is otherwise GRANTED as to exhibits A through D for the reasons stated previously. (Dkt.
 No. 71-7; Order at 10 n.4.)

³ Apple also argues that Plaintiffs' allegations that targeted advertisements continued after Siri was
 deactivated belies their claims. (SAC ¶ 20.) The Court disagrees. Once data is released to
 advertisers, targeted advertising may persist even after data collection has stopped.

1 74 F. Supp. 3d 1033, 1047-48 (N.D. Cal. 2014) (rejecting a claim that plaintiffs “paid more for
2 iPhones that they would have if they had known” of the challenged conduct absent reliance).

3 Here, if Plaintiffs had purchased devices based on a subjective belief that their privacy
4 would be protected and stopped using Siri after finding out otherwise, they would not have a claim
5 under the UCL. That is because a plaintiff “must do more than allege that she did not receive the
6 benefit she *thought* she was obtaining. The plaintiff must show that she did not receive a benefit
7 for which she actually *bargained*.” *McGee v. S-L Snacks Nat’l*, 982 F.3d 700, 706 (9th Cir. 2020)
8 (emphases in original). Plaintiffs have adequately alleged that Apple made such representations,
9 but unless they saw and relied on the representations when making a purchase, they have not paid
10 more than in a world without the statements. Hence, a critical element of causation is absent. *See*
11 *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 (2011).

12 Accordingly, Plaintiffs have adequately alleged standing for purposes of the privacy
13 claims, but do not alleged economic injury for purposes of the UCL. That claim is dismissed.
14 Because Plaintiffs have alleged interception of confidential communications, they have stated a
15 claim under the Wiretap Act, CIPA, and the California Constitution, as well as for breach of
16 contract and declaratory judgment.

17 **2. Apple’s Remaining Arguments Are Unpersuasive.**

18 Apple also raises additional arguments that the Court has previously rejected. The Court
19 incorporates the analysis from the previous Order, but briefly re-addresses the issues.

20 First, Apple argues that it did not “intentionally” intercept communications because the
21 complaint now alleges that Siri alerts users when activated and mentions an article that discusses
22 reduced error rates.⁴ (SAC ¶¶ 25, 34, 47, 72; *see* Dkt. No. 71-6.) As the Court explained, this
23 issue is “close,” but Plaintiffs state a claim under a theory that “Apple knows of the accidental
24 Siri triggers and, instead of deleting the resulting messages, sends them to contractors to improve

25
26 ⁴ The article is mentioned twice in the complaint, which is not enough to incorporate by reference.
27 *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir 2018) (the “mere mention”
28 of a document is not enough). Even if the Court considered it, the “error rate” appears to refer to
correctly interpreting speech, not accidental triggers, so it does not directly relate to the challenged
conduct here.

1 Siri's functioning." (Order at 8.) The fact of alerting users to the activation does not change
2 matters; the disputed conduct takes place after the accidental recording.

3 Second, Apple argues that Plaintiffs provided consent based on the same Siri activation
4 alert noted above. Drawing all inferences in favor of Plaintiffs, they did not consent. Plaintiffs
5 allege only that they were able to observe Siri being accidentally activated (including, in one case,
6 by being asked what Plaintiff was searching for). (SAC ¶¶ 25, 34, 47.) That does not indicate that
7 Plaintiff provided consent to the recording, that they observed activation in every instance, or that
8 recording did not take place prior to their observation.

9 Third, Apple argues that Plaintiffs have not pled a privacy violation under the California
10 Constitution because two of the Plaintiffs knew of the accidental activations and the data was not
11 directly associated with any user. The Court has already rejected these arguments; they are only
12 "two elements" of a "fact-intensive inquiry" for evaluating the "offensiveness" of a privacy
13 intrusion under California law. (Order at 18.) The Court has also already rejected the breach of
14 contract and UCL arguments, which are the same as in the previous motion, and incorporates its
15 prior analysis here. (*Id.* at 19-20.)

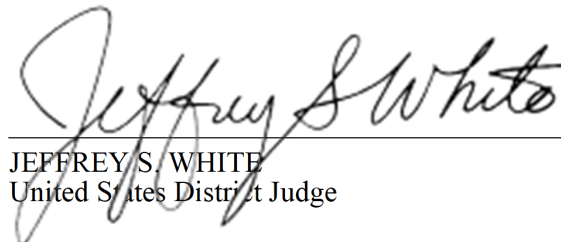
16 Accordingly, the Court does not dismiss the claims on these grounds.

17 **CONCLUSION**

18 For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Apple's
19 motion to dismiss with leave to amend. Plaintiff shall file and serve an amended complaint or a
20 statement that no such amended complaint shall be filed within twenty days of the date of this
21 Order. Defendants shall file their response within twenty days thereafter. Any motion to dismiss
22 shall be limited to the issue of economic injury under the UCL.

23
24 **IT IS SO ORDERED.**

25 Dated: September 2, 2021

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JEFFREY S. WHITE
United States District Judge