No. 16-15496

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HELENE CAHEN AND MERRILL NISAM, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

TOYOTA MOTOR CORPORATION,
TOYOTA MOTOR SALES, U.S.A., INC., AND GENERAL MOTORS LLC,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California

APPELLANTS' OPENING BRIEF

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Introduction

This appeal turns on the standards for establishing standing to sue. The district court assumed the power to recast the facts alleged in the complaint and hold, to the contrary of the stated claims, that plaintiffs had suffered no injury and therefore lacked standing. It is well established that for purposes of a motion to dismiss under Rule 12(b)(6), a court must accept all well pleaded facts as true and must construe factual allegations in favor of the non-moving party. The simple issue in this appeal is whether the district court erred in applying a standard substantially less protective of the right to sue for a motion to dismiss under Rule 12(b)(1).

Specifically, the question is whether a district court can find, contrary to the allegations of the complaint, that plaintiffs who allege a defendant's unfair trade practices caused them to lose money nonetheless have suffered no injury and accordingly do not have Article III standing to sue under California's consumer protection statutes and the common law. According to the complaint, a class of consumers was harmed by spending money for cars with outmoded technology that made them vulnerable to malfunction and invasions of privacy. Each of these claimed harms—sale of a car that does not perform as warranted and failure to protect privacy—is recognized as a compensable harm under California law. This Court has repeatedly held, to the contrary of the district court's grounds for

dismissal, that a court has less authority to probe the merits of the dispute under Rule 12(b)(1) than under Rule 12(b)(6) and that, accordingly, allegations of harm must be strictly accepted as true, provided the claim is recognized at law.

In fact, Appellants submit that this case is squarely controlled by *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011), in which this Court held that an allegation of having paid an inflated price at purchase was sufficient to establish threshold standing to assert a claim, even if the inflated price was the result of undisclosed future risks that had not yet materialized. According to the complaint in this case, as in *Maya,* disclosure of the risk would have made the property (in *Maya* homes; here cars) less desirable resulting in lower prices or non-sales. That the future risk had not yet occurred is irrelevant to the alleged effect of the failure to disclose the risk at the time of sale.

In this case, however, the district court ignored the plaintiffs' concrete allegations that the defendants' specific acts and omissions invaded their privacy and caused them to lose money. Instead, the district court treated the plaintiffs' complaint as pure speculation about future harm, and—based on this mischaracterization—held plaintiffs lacked Article III standing to bring any claims.

The basic facts are as follows: Helene Cahen and Merrill Nisam (the "Drivers") bought cars from Toyota and GM (the "Automakers").[1] When the Drivers bought their cars, the Automakers knew but did not tell the Drivers that the cars contained outmoded technology that made them susceptible to hacking and therefore unsafe. The Automakers also used other technology in the cars to track the Drivers' location data, which they sold to third parties. After news of these issues broke on the heels of a Congressional report, the Drivers sued the Automakers in this proposed class action, bringing claims for violations of California's UCL, CLRA, and FAL, as well as for breach of the implied warranty of merchantability, fraud by concealment, and invasion of privacy under Article I of the California Constitution.

The district court analyzed standing almost entirely in terms of its subjective view of the risk of future harm to the Drivers—either bodily harm, or harm resulting from third-party misuse of vehicle location data. It paid scant attention to the Drivers' specific allegations of harm they already suffered: monetary loss at the time of purchase, and an invasion of privacy every time the Automakers collected their vehicle location data.

[1] Other drivers originally named Ford Motor Company as a defendant in addition to the Automakers, but the district court dismissed Ford Motor Company for lack of personal jurisdiction. Excerpts of Record ("ER") 9-15. The Drivers do not appeal the district court's dismissal of Ford Motor Company.

As set forth in *Maya*, the law in the Ninth Circuit is clear that the Drivers' allegations of lost money are sufficient for purposes of establishing Article III standing, and their contentions that the Automakers invaded their privacy are specifically recognized as grounds for suit under California's Constitution. Ninth Circuit law is equally unambiguous that the district court should have accepted the Drivers' allegations as true and construed the complaint in their favor instead of speculating about the risk of future harm for which the Drivers were not seeking relief. Had the district court followed this Court's well-established precedents, it should have found the Drivers had Article III standing to pursue all of their claims. This Court should accordingly reverse the district court's dismissal of the Drivers' complaint, and it should remand all of the Drivers' claims for trial.

Jurisdictional Statement

The district court had jurisdiction pursuant to 28 U.S.C. § 1332(d) because the case is a proposed class action consisting of more than 100 members, an amount in controversy in excess of $5,000,000 exclusive of interest and costs, and minimal diversity exists. The district court also had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Final judgment was entered in the court below on February 22, 2016. Excerpts of Record ("ER") 3. Helene Cahen and Merrill Nisam, Plaintiffs-Appellants (the

"Drivers") filed a timely notice of appeal under Fed. R. App. P. 4(a)(1)(A) on March 22, 2016. ER 1. The appeal is from a final judgment that disposes of all the Drivers' claims in this action against Defendants-Appellees Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., and General Motors LLC (the "Automakers").

Statement of the Issues

The Drivers alleged they lost money by paying more for the Automakers' cars than they otherwise would have paid, or buying them when they otherwise would not have done so, if the Automakers had disclosed the material safety defects to them. The Drivers also alleged the Automakers wrongfully collected their vehicle location data and shared it with third parties. Accepting these allegations as true and construing them in the Drivers' favor, do the Drivers have standing under Article III to bring claims for economic damages under California's consumer protection statutes and the common law, and for invasion of privacy under California's Constitution?

Statement of the Case

This is a proposed class action. In February of 2015, United States Senator Edward J. Markey (D-Massachusetts) released a report detailing the data collection practices of the Automakers and other vehicle manufacturers, and describing the material safety defects in the vehicles they sold. ER 66-79. With this knowledge,

the Drivers sued the Automakers on March 10, 2015. ER 83. The Drivers filed an amended complaint on July 1, 2015, ER 28-79, to which the Automakers responded with motions to dismiss. ER 86-87. The district court (Hon. William H. Orrick, Northern District of California) granted the Automakers' motions on exclusively on grounds that the Drivers lacked Article III standing. ER 4, 9, 15-27; *see also Cahen v. Toyota Motor Corp.*, --- F. Supp. 3d ---, 2015 WL 7566806 (N.D. Cal. Nov. 25, 2015). This appeal follows.

1. The Drivers' complaint specifically alleges the Automakers harmed them by causing them to lose money and by invading their privacy

The following summary of the key factual allegations of the Drivers' complaint shows that the Drivers described, in detail, the Automakers' knowing manufacture and sale of flawed and dangerous cars without any disclosure of these problems, as well as the Automakers' collection and unauthorized sharing of the Drivers' private data. As a result of these specific acts and omissions of the Automakers, the Drivers alleged that they were harmed economically, and that their privacy was invaded.

A. Using old technology, the Automakers knowingly built and sold unsafe vehicles to Drivers without disclosing the problems

The Automakers equipped the Drivers' cars with ancient, outmoded computer technology that exposes the cars to being "hacked"—infiltrated and taken over by third parties—making the cars unreasonably dangerous. ER 29 (¶¶

1-2). Such "hacking" can result in loss of driver authority over the basic functions of the vehicle—the throttle, braking and steering—as well as loss of personal and private data. ER 29 (¶¶ 1-2).

The Drivers' vehicles contain dozens of electronic control units (ECUs) that are connected through an insecure controller area network (typically a "CAN" or "CAN bus"). ER 29, 34-35 (¶¶ 3, 28-30). The ECUs communicate by sending each other "CAN packets," which are digital messages containing data and/or requests. ER 29, 34-35 (¶¶ 4, 28-30).

The CAN standard was first developed in the mid-1980s and is a low-level protocol which does not intrinsically support any security features. ER 35 (¶ 32). Lacking such security, an automobile reliant upon CAN packets for safety is exposed to hacking that injects one or more false messages onto a CAN bus or manipulates packets in transit on the network. ER 29, 35 (¶¶ 4, 33). Wireless interfaces, such as Bluetooth, dramatically increase the attack surface in a vehicle by allowing anyone capable of connecting to such a wireless interface to gain access to the CAN bus to invade a user's privacy, by observing CAN packets and/or injecting or modifying them to take remote control of the operation of a vehicle. ER 35-36 (¶ 34).

The automakers heavily promote the safety of their vehicles. ER 38-40 (¶¶ 41-44, 47-48). Yet, they also know—and do not disclose to buyers—the material

fact that their CAN bus-equipped vehicles are susceptible to hacking, and their ECUs cannot detect or stop hacked CAN packets. ER 30, 36-37 (¶¶ 5-6, 36-39). For this reason, the Automakers' vehicles are not secure, and are therefore not safe—owners and lessees of these vehicles are currently at risk of theft, damage, serious physical injury, or death as a result of hacking. ER 30 (¶¶ 5-6).

One journalist described the experience of driving a vehicle whose CAN bus was being hacked remotely (but under controlled circumstances) as follows:

> As I drove to the top of the parking lot ramp, the car's engine suddenly shut off, and I started to roll backward. I expected this to happen, but it still left me wide-eyed.
>
> I felt as though someone had just performed a magic trick on me. What ought to have triggered panic actually elicited a dumbfounded surprise in me. However, as the car slowly began to roll back down the ramp, surprise turned to alarm as the task of steering backwards without power brakes finally sank in.
>
> This wasn't some glitch triggered by a defective ignition switch, but rather an orchestrated attack performed wirelessly, from the other side of the parking lot, by a security researcher.

ER 36 (¶ 35).

B. The Automakers collect and transmit vehicle data, in violation of the Drivers' privacy rights

Without drivers ever knowing, the Automakers also collect data from the Drivers' vehicles, such as their geographic locations at various times. ER 30, 40, 54 (¶¶ 7, 49, 135). Even though the Drivers have a reasonable expectation of privacy in this data, the Automakers share it with or sell it to third parties. ER 30,

40 (¶¶ 7, 50). This violates the privacy rights of the Drivers. ER 30, 54 (¶¶ 7, 134-38).

C. The Drivers alleged economic harm and invasion of privacy

To redress the economic harm the Automakers caused them by selling them the defective cars without disclosing the defects, the Drivers brought claims for violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. (UCL), Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq*. (CLRA), False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq*. (FAL), breach of the implied warranty of merchantability, Cal. Com. Code § 2314, fraud by concealment, and violation of California's Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1791.1 & 1792. ER 44-53. The Drivers specifically alleged that if they had known about the defects the Automakers failed to disclose, they wouldn't have bought their cars for as much as they did, or they wouldn't have bought them at all. ER 44, 46-47, 51-53 (¶¶ 66, 78, 80-81, 88-89, 112-14, 124-25, 128). The Drivers asked for equitable and monetary relief, including damages. ER 44-46, 48-49, 51, 53 (¶¶ 67-68, 83, 90-91, 100, 115-16, 129-31).

In connection with the Automakers' unauthorized data collection, the Drivers brought a claim for invasion of privacy under Article I, Section 1 of the California Constitution. ER 53-54 (¶¶ 132-38). In support, the Drivers alleged: (1)

they have a legally protected privacy interest in their personal data (including location information) that the Automakers collect and transmit to third parties; (2) the Automakers knew or should have known they had a reasonable expectation of privacy in this data; (3) the Automakers collected the data and transmitted it to third parties regardless and without the Drivers' consent; and (4) that this violated the Drivers' constitutionally-protected right to privacy and (5) caused them damage. ER 54 (¶¶ 135-38). The Drivers asked for damages as a result of the Automakers' wrongful conduct in collecting and transmitting data from their car to third parties. ER 54 (¶¶ 137-38).

2. The district court largely ignored the Drivers' allegations and dismissed their complaint for lack of Article III standing

Notwithstanding the foregoing allegations, the district court found that the Drivers lacked Article III standing to sue the Automakers. ER 4, 9. In a section of its dismissal order entitled "legal standard," the district court summarized the standards applicable to a motion to dismiss under Rule 12(b)(6), ER 8, but it never considered the standards governing a motion to dismiss for lack of standing under Rule 12(b)(1), and, thus, never applied them in its analysis of whether the Drivers had Article III standing. ER 4-27.

Summary of the Argument

Despite the fact that there are well-established standards governing a district court's determination of a motion to dismiss for lack of Article III standing under

Rule 12(b)(1), the district court failed to apply them in this case. Those standards required the district court to reject the Automakers' challenges to the Drivers' standing, but the district court failed to do so.

By pleading that they lost money as a result of the Automakers' deliberate failure to disclose the safety defects in the vehicles they sold, the Drivers established Article III standing for their statutory and common law claims under this Court's well-settled precedents. The district court's transformation of these allegations into a request for relief based purely on future harm was unwarranted, and its dismissal of the Drivers' claims based on this recasting was therefore erroneous.

Also, invasion of privacy is an injury that, while intangible, is historically and currently recognized as grounds for suit. By pleading that the Automakers collected and shared their private location data in violation of their privacy rights under the California Constitution, the Drivers established Article III standing. The district court erred by holding to the contrary. For all these reasons, this Court should reverse the district court, and it should remand all of the Drivers' claims for trial.

Standard of Review

The standard of review for a district court's dismissal for lack of Article III standing is *de novo*. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015).

Argument

The legal standards governing motions challenging a plaintiff's standing are straightforward: "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Maya*, 658 F.3d at 1068 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (alteration in original).

In *Maya*, this Court drew a distinction between the analyses of a motion to dismiss for failure to state a claim under Rule 12(b)(6) and a motion to dismiss for lack of standing under Rule 12(b)(1): "[I]n determining whether plaintiff states a claim under 12(b)(6), the court necessarily assesses the merits of plaintiff's case.

But the threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim. Rather, '[t]he jurisdictional question of standing precedes, and does not require, analysis of the merits.'" *Maya*, 658 F.3d at 1068 (quoting *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008)).

Crucially, analysis of a motion to dismiss under Rule 12(b)(1) gives a district court less latitude to engage the merits of the claim than even the limited factual review under Rule 12(b)(6). A court's analysis of standing cannot be used to disguise a merits analysis of whether a claim for relief can be granted if factually true, and the question of whether there is standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal. *Maya*, 658 F.3d at 1068. Thus, a court should not conflate its analysis of whether the plaintiff has alleged standing with the merits; rather, it must consider the issue of standing by itself, and, in doing so, it should credit general factual allegations of injury. *See id.* at 1067-68.

In this case, the district court missed the mark. It began its discussion by reciting the standards governing Rule 12(b)(6) motions to dismiss, ER 8, and it never cited Rule 12(b)(1) or discussed any of the standards governing jurisdictional dismissal. This is clear error because the only issue the district court considered was the question of the Drivers' standing. ER 4-27. This incorrect approach led the

district court to impose an inappropriately high pleading standard on the Drivers and to shift its focus away from their allegations supporting standing, resulting in erroneous findings that the Drivers lacked standing even though they clearly alleged actionable economic harm and invasion of privacy.

1. The district court insupportably ignored the Drivers' allegations that the Automakers caused them to lose money, erroneously mischaracterizing them as pure speculation about future harm

Standing has three elements: "The plaintiff must have (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*, --- U.S. ---, 136 S. Ct. 1540, 1547 (2016). This case concerns injury in fact, as the district court held only that the Drivers failed to meet this first element of standing. ER 15-27.[2] "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560); *see also Maya*, 658 F.3d at 1069.

[2] The Drivers' allegations that the Automakers failed to disclose the defects in the cars they bought and their related requests for equitable and monetary relief establish the second and third elements of standing. *See* ER 44-49, 51-53 (¶¶ 66-68, 78, 80-81, 83, 88-91, 100, 112-16, 124-25, 128-31).

As this Court routinely holds, when plaintiffs allege they spent money that, absent a defendant's actions, they would not have spent, plaintiffs have established a quintessential injury-in-fact sufficient for Article III standing to sue for violations of the same California statutes and common law claims as the Drivers alleged. *Maya*, 658 F.3d at 1069; *see also Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 595 (9th Cir. 2012).

In *Hinojos*, this Court made clear that such allegations in and of themselves are enough to establish an injury in fact for standing purposes. 718 F.3d at 1104 n.3. Without discussing any other facts of the case, the Court referred to its earlier opinion in *Mazza* and held: "We have explained that when, as here, 'Plaintiffs contend that class members paid more for [a product] than they otherwise would have paid, or bought it when they otherwise would not have done so' they have suffered an Article III injury in fact." *Hinojos*, 718 F.3d at 1104 n.3 (quoting *Mazza*, 666 F.3d at 595) (alteration in original). The Court's analysis in *Mazza* was similarly direct: after recapping the plaintiffs' contentions that they paid more money than they otherwise would have, the Court noted: "To the extent that class members were relieved of their money by [defendant's] deceptive conduct—as Plaintiffs allege—they have suffered an 'injury in fact.'" 666 F.3d at 595.

In *Maya*, this Court emphasized that a district court's analysis of injury in fact must credit such allegations without recasting them. 658 F.3d at 1067-69. The *Maya* plaintiffs were homeowners who sued homebuilders for selling them houses in purportedly "stable, family neighborhoods occupied by owners of the homes"—while also selling to "high-foreclosure-risk buyers" which "drastically altered" the "desirability" of their properties and neighborhoods. *Id.* at 1065-66. Like the Drivers in this case, the *Maya* plaintiffs sued for violations of California consumer statutes and brought common law claims, alleging "injuries that occurred *at the time of sale*: namely, that they paid more for their homes than they were actually worth at the time, and that they would not have purchased their homes had defendants made the proper disclosures." *Id.* at 1066 (emphasis in original).

The district court in *Maya* dismissed the homeowners' claims for lack of Article III standing, noting they hadn't sold or attempted to sell their homes and finding their alleged injury "conjectural and speculative, not actual or imminent." *Id*. In reversing the district court, this Court explained:

> The district court concluded that the possibility of improvement in the housing market made plaintiffs' injuries speculative, because it is possible that they could sell their homes for a profit at some point in the future. The district court misapprehended plaintiffs' allegations. Plaintiffs claim that they paid more for their homes than they were worth *at the time of sale*. Future recovery in the housing market will not cure plaintiffs' injuries—if plaintiffs had paid what the homes were worth at the time of sale, they would obtain greater returns if they sold during a time of economic improvement. Further, if plaintiffs would not have purchased their homes absent defendants'

> misconduct, the injury was created at the moment of fraudulent purchase and is not affected by any changes in the housing market.

Id. at 1069 (emphasis in original).

Here, as in *Maya*, the district court misapprehended the Drivers' allegations. Instead of following the law of the Ninth Circuit by crediting the Drivers' allegations of economic harm suffered at the time of sale by paying more than they would have for the Automakers' defective cars had the Automakers disclosed the defects, the district court ran down a rabbit trail: it exclusively analyzed the allegations in terms of the risk of future harm. ER 15-23. It all but entirely ignored the Drivers' allegations of economic harm, except to criticize them (once, in passing) as "conclusory." ER 20. And the district court based its misguided analysis at least partially on a falsehood; in determining that the Drivers' alleged injury was "hypothetical," the district court found:

> [*A*]*ll* vehicles manufactured post-2008 are required to be equipped with some form of the CAN bus protocol that plaintiffs allege to be insufficient. This means that potentially all post-2008 cars vehicles [sic] on the American market, and not just defendants' vehicles, lack the allegedly necessary security protections and firewalls. Because the alleged harm is unmanifested and widespread, how that would translate into economic injury is unclear.

ER 21 (emphasis in original).

Notably, the district court cited no law, regulation, or other authority for its assertion that after 2008, CAN buses are required in all vehicles on the American market. This is because no such authority exists, and the district court fabricated a

"requirement" out of whole cloth to justify a finding it need not have considered in the first instance.

Instead, the district court should have done what this Court requires in connection with a Rule 12(b)(1) motion to dismiss for lack of Article III standing. It should have credited the Drivers' actual allegations of economic harm at the time of purchase without recasting them solely in terms of other, future harm, and it should have found that by alleging they paid more for their vehicles than they would have had the Automakers disclosed the defects (or that they would not have bought them at all), the Drivers stated the quintessential injury-in-fact of actual and concrete economic harm. *Maya*, 658 F.3d at 1069; *see also Hinojos*, 718 F.3d at 1104 n.3; *Mazza*, 666 F.3d at 595. The district court's failure to do so was error, and this Court should reverse the district court accordingly.

2. The district court incorrectly determined that the Drivers lacked standing to bring invasion of privacy claims by impermissibly recasting their allegations

As the Supreme Court recently held, a "concrete" injury is not synonymous with "tangible" for purposes of injury in fact. *Spokeo, Inc.*, 136 S. Ct. at 1549. The Supreme Court further explained: "Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged

intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.*

American courts have long recognized common law claims for invasion of privacy, including misuse or publication of confidential information: "One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of another." RESTATEMENT (SECOND) OF TORTS § 652A (1977); *see also id.* cmt. a ("the existence of a right of privacy is now recognized in the great majority of the American jurisdictions.").

Article I, Section 1 of California's Constitution specifically identifies "privacy" as an "inalienable right," and the Supreme Court of California has explicitly recognized a private cause of action for invasion of privacy. *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39-40 (1994). Invasion of privacy under California law is, therefore, a quintessential "harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," and is indisputably a sufficiently concrete injury for standing purposes. *Spokeo, Inc.*, 136 S. Ct. at 1549.

Here, the Drivers alleged: (1) they have a legally protected privacy interest in their personal data (including location information) that the Automakers collect and transmit to third parties; (2) the Automakers knew or should have known they had a reasonable expectation of privacy in this data; (3) the Automakers collected

the data and transmitted it to third parties regardless and without the Drivers' consent; and (4) that this violated the Drivers' constitutionally-protected right to privacy and (5) caused them damage. ER 40, 54 (¶¶ 49-50, 135-38). For purposes of assessing whether the Drivers sufficiently alleged injury in fact sufficient to support their standing to bring an invasion of privacy claim under California's Constitution, the district court was required to credit these allegations by accepting them as true and construing them in the Drivers' favor. *Maya*, 658 F.3d at 1068. Had it done so, it should have found the Drivers alleged a well-recognized and concrete injury in fact that conferred standing on the Drivers to sue the Automakers for invasion of privacy based on the Automakers' data collection practices. *Spokeo, Inc.*, 136 S. Ct. at 1549.

But the district court again diverged from the Ninth Circuit's straightforward standards for analyzing a Rule 12(b)(1) motion. It recast the Drivers' allegations as being concerned with speculative risk of future harm resulting from the theft of their location data, when in fact the Drivers based their invasion of privacy claim on the Automakers' collection and sharing of the data. *Compare* ER (21-23) *with* ER 40, 54 (¶¶ 49-50, 135-38). And it made an unwarranted determination that the Drivers' allegations were not sufficiently specific regarding such matters as "the frequency of which [sic] the data is being tracked," ER 26, thereby imposing a Rule 9(b) heightened pleading standard on the Drivers instead of assessing whether

the actual invasion of privacy the Drivers complained of was a recognized harm in American law.

The district court thus failed to analyze "concreteness" as the Supreme Court recently instructed. *Spokeo, Inc.*, 136 S. Ct. at 1549. Instead, the district court confused this requirement with the wholly inapplicable heightened pleading standard of Rule 9(b). The district court thus erred in finding that the Drivers lacked standing to sue the Automakers for invading their privacy based on their collection of vehicle location data. In reviewing this issue *de novo*, this Court should find the Drivers' invasion of privacy claims sufficiently allege a well-established concrete injury in fact that supports their Article III standing, and it should reverse the district court accordingly.

Conclusion

As this Court has determined, courts considering whether a plaintiff has alleged injury in fact sufficient to support standing under Article III must credit the plaintiff's general allegations, accepting them as true and construing them in the plaintiff's favor. The Ninth Circuit routinely finds allegations of an overpayment as a result of a defendant's failure to disclose material information at the time of a sale sufficient to support claims for violations of California's consumer protection statutes as well as common law claims, for these are quintessential economic injuries that necessarily support standing to sue. And, as the Supreme Court

recently reiterated, allegations of a long-recognized intangible injury such as invasion of privacy are sufficiently concrete to support injury in fact for purposes of Article III standing. Because the district court in this case entirely failed to follow the governing rules and standards, it made erroneous findings that the Drivers lacked standing even though their allegations established injury in fact for all their claims.

The district court clearly transgressed its role under Rule 12(b)(1). The law of this Circuit, as exemplified by *Maya,* is unambiguous. This Court should summarily reverse the district court and order this litigation to proceed.

DATED July 29, 2016.

Respectfully submitted,

/s/ Martin Woodward

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/s/ Martin Woodward
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Certificate of Service

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/s/ Martin Woodward
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