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' REPLY BRIEF

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Introduction

In their Opening Brief, the Drivers showed that the Court's opinion in *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011) controls the outcome of this appeal. As the Court held in *Maya*, allegations of a seller's failure to disclose a risk that leads either to an inflated price or to a sale that would not otherwise have occurred gives buyers like the Drivers Article III standing to sue. Whether the risk has occurred is irrelevant to standing.

Under the controlling precedent of *Maya*, the Drivers have standing to sue the Automakers for failing to disclose the dangerous technological shortcomings of the cars they made and sold, even without having experienced a third-party hack. And because the district court erroneously found the Drivers lacked standing to bring their claims and dismissed them for this reason only, the Court must reverse.

Because *Maya* mandates reversal, the Automakers needed to distinguish the case. They don't. Instead, both Toyota and GM dance around *Maya* with a series of evasions and distractions.

The Automakers first attempt to recast the Drivers' allegations as complaining only of a risk of future harm, purposefully ignoring both the Drivers' actual allegations and the clear instruction of *Maya* that such reframing is not allowed. The Automakers then dwell on authority that, unlike *Maya*, has no application to the Drivers' allegations and is therefore easily distinguished.

The Automakers also ask the Court to affirm based on a host of extraneous Rule 12(b)(6) issues the district court did not address. But the Court should not even consider these, because the Automakers did not cross-appeal the district court's judgment, and their request for affirmance of the district court's 12(b)(1) dismissal on 12(b)(6) grounds impermissibly seeks to expand a dismissal without prejudice into a dismissal with prejudice. (The Court should, however, address one extraneous issue: whether Toyota breached Circuit Rule 30-1.5 by filing reams of material as Supplemental Excerpts of Record that the Rule unequivocally prohibits.)

With no compelling reasons to depart from the precedent of *Maya*, the Court should reverse the district court's dismissal of the Drivers' claims. Following *Maya*, it should find the Drivers have Article III standing to sue the Automakers, and it should remand the case for trial.

1. The Automakers fail to distinguish *Maya*

In *Maya*, the Court reversed a dismissal for lack of standing. It found allegations of paying more for something than it was actually worth at the time of sale (or that there would be no sale had the seller disclosed the risk) sufficient for Article III standing. Appellants' Opening Brief (OB) 16-17 (discussing *Maya*, 658 F.3d at 1065-69). The plaintiffs' ongoing ownership of the property and then-present market conditions were completely irrelevant to the economic injury the

plaintiffs alleged they suffered *at the time of sale* due to the defendants' nondisclosure. OB 16-17 (discussing *Maya*, 658 F.3d at 1065-69). The Court therefore found the plaintiffs alleged an injury in fact that qualified as "actual or imminent, not conjectural or hypothetical" despite the lower court's finding to the contrary. OB 16-17 (discussing *Maya*, 658 F.3d at 1065-69).

The Court also made clear in *Maya* that analysis of standing is a threshold issue separate from the merits, such that the Rule 12(b)(6) standard is not appropriate. OB 12-13 (discussing *Maya*, 658 F.3d at 1067-68). Importantly, the Court reinforced that *general* factual allegations of injury are sufficient for standing purposes, and they are accepted as true and construed in the complainant's favor. OB 12-13 (discussing *Maya*, 658 F.3d at 1067-68).

In this case, accepting the Drivers' allegations as true, there is no question they have standing under *Maya*. The Drivers allege the Automakers failed to disclose material security risks at the time of sale, leading the Drivers to pay more for the vehicles than they would have (if they would have bought them at all). ER 44, 46-47, 51-53 (¶¶ 66, 78, 80-81, 88-89, 112-14, 124-25, 128). And *Maya* teaches that whether the Drivers experienced a hack as a result of the flawed security is irrelevant to the question of standing. 658 F.3d at 1065-69.

Toyota argues that *Maya* is distinguishable only because the *Maya* defendants "were allegedly lying," whereas "[h]ere, in contrast, Ms. Cahen did not

allege that Toyota made any promises it failed to keep….” Toyota Brief at 24. This mischaracterizes *Maya*. The *Maya* plaintiffs alleged a failure by the defendants to make proper disclosures—in essence, an omission claim just like the Drivers’ based on concealed information. *Compare* ER 44, 45, 46-47, 51-53 (¶¶ 66, 75, 78, 80-81, 88-89, 112-14, 124-25, 128) *with Maya*, 658 F.3d at 1065-66. And, in determining that the plaintiffs had standing in *Maya*, the Court did not even consider whether the alleged malfeasance involved affirmative representations as opposed to omissions: the key to the Court’s holding was “if plaintiffs would not have purchased their homes absent defendants’ *misconduct*, the injury was created at the moment of fraudulent purchase….” *Maya*, 658 F.3d at 1069 (emphasis added).

Automaker GM says three things about *Maya*. First, GM misleadingly implies the Court limited its holding in *Maya* to the facts presented. GM Brief at 21. But the Court nowhere suggested—even remotely—that its detailed discussion of Article III standing principles should not apply to similar fact patterns such as the Drivers’ allegations. *See Maya*, 658 F.3d at 1067-69. Second, GM insinuates the Court only reached its holding in *Maya* because it found the plaintiffs’ allegations reached a particular level of specificity. GM Brief at 21 (“The *Maya* plaintiffs’ allegations were not conclusory but based on concrete facts….”). But the Court never analyzed specificity at all. Instead, it reiterated that for purposes of

assessing standing, it presumes "general allegations embrace those specific facts that are necessary to support the claim." *Maya*, 658 F.3d at 1068. GM's second argument is inaccurate and irrelevant.

Third, and finally, GM says "the *Maya* plaintiffs' allegations were specific to their properties," suggesting that the Drivers don't plead they were injured economically by purchasing defective vehicles from the Automakers. GM Brief at 21-22. But, of course, the Drivers make these exact allegations (*see, e.g.*, ER 31 ¶¶ 12 & 14; ER 44 ¶ 66; ER 45 ¶ 75; ER 47 ¶¶ 88-89), and GM's insinuation to the contrary is incorrect.

With only these cursory and unavailing arguments, the Automakers entirely fail to distinguish *Maya*. The Court should therefore have no difficulty or hesitation in applying *Maya* to the Drivers' allegations, which compels the finding that they have Article III standing.

2. The Automakers impermissibly recast the Drivers' allegations and rely on distinguishable authority

Instead of distinguishing *Maya*, the Automakers rely on diversion. They repeatedly burn down straw men by ignoring what the Drivers actually allege, instead railing against theories the Drivers don't advance. For example, GM cites *Flynn v. FCA US LLC*, --F. Supp. 3d --, 2016 WL 5341749, at *2 (S.D. Ill. Sept. 23, 2016) in support of the argument that the Drivers lack standing to sue based on

exposure to an increased risk of injury or death if their vehicles were hacked. GM Brief at 14. In actuality, the Drivers' claims are not based on this theory, but rather on the economic injury caused by paying more than what they would have paid (if they would have paid anything at all) as a result of the Automakers' failure to disclose the security vulnerabilities to them at the time of sale—the very same theory the district court in *Flynn* held sufficient for Article III standing after distinguishing it from the theory GM attacks (which the Drivers do not advance). 2016 WL 5341749, at *2-*3.

Another example is Toyota's argument that the Drivers "fail[] to allege that [they] suffered a particularized injury to support [their] invasion of privacy claim." Toyota Brief at 33; *see also* GM Brief at 25. The Automakers insinuate that the Drivers fail to allege the requisite "concrete and particularized" injury because they purportedly never state that the Automakers "did anything" to them in particular (as opposed to unidentified other drivers in general). Toyota Brief at 33; *see also* GM Brief at 25. This is wrong, as it purposefully recasts and ignores the Drivers' specific allegations that (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); *see also* ER 40 (¶¶ 49-50). Accepting these allegations as true for purposes of assessing standing makes clear beyond doubt that the Drivers have Article III standing to bring a claim for invasion of privacy under California's Constitution. *Maya*, 658 F.3d at 1068.[1]

The Automakers cite other authority in support of affirmance. For example, they rely heavily on *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), arguing that—like the lawyer and journalist plaintiffs in *Clapper* suing the government for an injunction to prevent future surveillance—the Drivers can't have standing

[1] The district court remarked in passing that "[e]ven if plaintiffs' allegations were sufficient to establish standing, they would not demonstrate a violation of the right to privacy under the California Constitution. … [w]ithout more robust allegations…." ER 26. The Automakers claim this was a discrete ground for dismissal the Drivers were required to separately raise in their Opening Brief to avoid waiving the ability to ever challenge it. GM Brief at 33; Toyota Brief at 37-38. This is palpably incorrect, for two reasons. First, the district court only identified lack of Article III standing as its grounds for dismissing the Drivers' claims. ER 9. Second, because the district court found the Drivers lacked Article III standing, it necessarily had no jurisdiction to evaluate the merits of the Drivers' allegations. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998); *see also id*. at 101-02 ("For a court to pronounce upon the meaning or constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."). When the district court found the Drivers lacked Article III standing, "the only function remaining to the court [wa]s that of announcing the fact and dismissing the cause." *Id*. at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)). Because the Drivers have asked the Court to reverse the district court's dismissal of their invasion of privacy claim for lack of Article III standing, they plainly did not waive any aspect of their right to pursue this claim. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 940 n.5 (9th Cir. 2008).

because their theory rests "on speculation about the decisions of independent actors," ostensibly third-party hackers. Toyota Brief at 28 (quoting *Clapper*, 133 S. Ct. at 1148). But this ignores that the Drivers are not suing the Automakers for something hackers have yet to do; they are suing the Automakers for their failure to disclose material information about the technological vulnerabilities of cars at the time of sale, and for their unauthorized collection and transmission of the Drivers' private data. *Clapper* thus has no applicability to the Drivers' claims (unless their allegations are recast into something other than what they are, which *Maya* prohibits).

And the Automakers place great weight on the Court's opinion in *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009). They argue that just as the Court found no standing in *Birdsong* for claimants alleging they bought iPods posing unreasonable risks of hearing loss, the Court should similarly find the Drivers have no standing for claims based on their purchase of defective cars, because the risk to them is too hypothetical. Toyota Brief at 16-18; GM Brief at 25. But *Birdsong* is distinguishable because Apple specifically warned buyers of the risk of hearing loss if the iPod is used at a high volume. 590 F.3d at 957; *id.* at 961 ("[T]he plaintiffs admit that Apple provided a warning against listening to music at loud volumes."). Here, in contrast, the Drivers allege the Automakers deliberately did

not disclose material information about the security vulnerabilities of their cars, leading to inflated prices or sales instead of non-sales.

In sum, none of the authority the Automakers discuss should cause the Court to reach a different conclusion about the Drivers' standing than it did as to the plaintiffs in *Maya*. And *Maya* is unequivocal that the Drivers' allegations must be taken as true, so there is no reason for the Court to recast them and then evaluate standing based on something other than what the Drivers allege.

3. The Court should not consider the Automakers' extraneous Rule 12(b)(6) arguments

The district court dismissed the Drivers' claims exclusively on the Automakers' Rule 12(b)(1) arguments that the Drivers lacked Article III standing. ER 9 ("Because I find that … the plaintiffs have failed to establish standing for their claims, I do not discuss the other arguments."). On appeal, the Automakers urge the Court to affirm based on various Rule 12(b)(6) arguments the district court did not reach. GM Brief at 36-50; Toyota Brief at 39-43.

The Court should decline to consider these extraneous arguments. In *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 969-70 (7th Cir. 2016), the Seventh Circuit reversed a dismissal for lack of standing. Chang, the defendant/appellee, asked the Seventh Circuit to affirm based on other arguments it made to the district court under Rule 12(b)(6), arguing (like the Automakers here)

that those arguments presented alternate grounds for affirmance. *Id*. The Seventh Circuit rejected Chang's request: it observed that a dismissal for lack of standing is without prejudice, as opposed to a Rule 12(b)(6) dismissal for failure to state a claim upon which relief can be granted, which is with prejudice. *Id*. Citing the Supreme Court, the Seventh Circuit noted that it could not grant the additional relief of a dismissal with prejudice in the absence of a cross-appeal from the district court's dismissal, which Chang—like the Automakers here—failed to perfect. *Id*. at 970 (citing *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015)). As in *Lewert*, the Court cannot grant the Automakers additional relief to which they are not entitled, and it should therefore not consider any of their extraneous Rule 12(b)(6) arguments. *Lewert*, 819 F.3d at 969-70; *see also U.S. v. Bajakajian*, 84 F.3d 334, 338 (9th Cir. 1996) (unless appellee files cross-appeal, it may not supplement district court judgment to enlarge its rights as to a matter not dealt with below).

Also, if the Court considers these arguments, it risks setting a grossly unfair precedent. Movants would load up motions for dismissal with as many different arguments as possible, and then assert on appeal (for the first time in answering briefs) that any one of the arguments supports affirmance, effectively hijacking the appeal by shifting the focus away from the grounds of the district court's decision and the issues presented in the opening brief. While *Lewert* makes clear that the

Court should not consider the Automakers' extraneous Rule 12(b)(6) arguments in any event, the interests of order and fundamental fairness weigh heavily against opening the door to extraneous arguments like those of the Automakers.

4. The Court should strike Toyota's excerpts for flagrantly violating Circuit Rule 30-1.5

Circuit Rule 30-1.5 states: "The excerpts of record shall not include briefs or other memoranda of law filed in the district court unless necessary to the resolution of an issue on appeal, *and shall include only those pages necessary therefor*." (emphasis added). Toyota filed two volumes of supplemental excerpts of record, consisting of 476 pages of material. These include the *entirety* of no less than four memoranda of law, the *entirety* of a hearing transcript, and the *entirety* of the 343-page original complaint that is not the subject of this appeal. In its brief, Toyota cites *once* to *one page* of the original complaint, and *twice* to *three pages* of the hearing transcript. *See* Toyota Brief at 4 (citing SER 134); Toyota Brief at 15 n.3 & 44 (citing SER 17 & 21-22). Elsewhere in its brief, Toyota cites to a few particular pages of the legal memoranda it filed, but it never comes close to citing or discussing all of the hundreds of pages it included in its supplemental excerpts.[2]

[2] In total, Toyota cites to only 50 of the 476 pages it filed. That means that 89.5% of Toyota's supplemental excerpts—or 426 of the 476 pages Toyota filed—were indisputably unnecessary. *See* Toyota Brief at 4 (citing SER 134), 5 nn.1-2 (SER 61, 131-33), 6 (SER 85, 123-31), 7 (SER 1-2, 4-5, 63), 15 & n.3 (SER 17, 74), 20

Even if Toyota believed in good faith that certain portions of the district court filings not included in the Drivers' Excerpts of Record were necessary to the resolution of the issues on appeal, it had no reason to burden the parties and the Court by filing hundreds of extra pages it never even bothers to cite or discuss. Toyota flagrantly violated Circuit Rule 30-1.5, and the Court should strike Toyota's excerpts under Circuit Rule 30-2.

Conclusion

The Court's resolution of the standing issue at the heart of this simple and straightforward appeal begins and ends with *Maya*. The Court need not consider any of the extraneous issues the Automakers raise (and it should appropriately penalize Toyota for its flagrant violation of an unambiguous Circuit Rule). As the Court made clear in *Maya*, a buyer's allegations of paying too much or paying anything at all because of a seller's failure to disclose material information about a genuine risk satisfy the injury-in-fact requirement of Article III—and whether the risk has occurred is irrelevant. Under *Maya*, the Drivers' allegations easily clear the threshold for Article III standing. The district court's determination to the

& n.7 (SER 6, 74), 26 n.10 (SER 71), 29 (SER 99-100), 38 n.17 (SER 1-2), 40 (SER 80-81), 41 n.20 (SER 110-11), 43 (SER 42, 47-51, 81, 112, 114-17), & 44 (SER 4-9, 21-22, 47-52, 111-20).

contrary was fundamental error, and this Court should reverse the district court's dismissal and remand all of the Drivers' claims for trial.

DATED November 9, 2016.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 3,074 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 9, 2016.

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