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

BRIEF IN OPPOSITION OF APPELLEE GENERAL MOTORS LLC

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FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

General Motors LLC is wholly-owned by General Motors Holdings LLC, which is wholly-owned by General Motors Company, which is publicly traded.

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INTRODUCTION

The district court properly dismissed the claims of plaintiff Nisam against GM for lack of standing because his complaint is based entirely on speculative fears that something "bad" *could* happen in the future:

- A hypothetical criminal "attacker" *could* seize control of his car through some unproven hacking techniques, which plaintiff concedes have never been employed in any real-world setting.
- This hypothetical susceptibility to hacking *could* one day result in the sale of his vehicle at a loss.
- Data generated by his car and collected by GM *could* hypothetically be stolen by hackers or otherwise used to harm him.

Article III requires more than hypotheses for standing; it demands concrete, particularized injury to a plaintiff's interests.

Plaintiff Nisam argues on appeal that the district court improperly rested its dismissal on Federal Rule of Civil Procedure 12(b)(6), rather than Rule 12(b)(1). Where the lack of standing is evident on the face of the complaint, as it is here, the analyses under Rules 12(b)(1) and 12(b)(6) are the same. For both Rules, the court accepts as true the well-pleaded facts and construes the complaint in the light most favorable to the plaintiff. Under this analysis, the district court properly found that plaintiff lacked standing because he makes no allegations that his car has

manifested, or is imminently likely to manifest, the alleged defect of susceptibility to hacking by a third-party "attacker."

Having no concrete injury for standing, plaintiff invokes his economic harm theory, but that theory lacks the factual allegations required to sustain it. Plaintiff Nisam alleges only that he "overpaid" for his car because it could theoretically be hacked by a criminal; there are no allegations of facts showing a loss in value. The district court properly concluded that plaintiff's inapposite authorities do not overcome the case law holding that a bare allegation of overpayment, without demonstrating "something more," does not assert sufficient injury for standing.

Plaintiff is also wrong in arguing that an allegation of an invasion of privacy, without more, is enough to confer standing. To the contrary, as the Supreme Court recently reaffirmed in *Spokeo, Inc. v. Robins*, plaintiff must point to some *de facto* impact on his interests that "actually exists" in the real world. Plaintiff Nisam does not allege that GM collected any of his personal information, that GM shared it with any specific others (with or without consent), or that information has been misused to his harm. He does not allege any concrete, particularized injury arising from GM's alleged sharing of data purportedly collected from cars. Nor does he allege any facts showing a "credible threat" that his car data may be stolen or otherwise misused. On plaintiff's bare allegations, the district court correctly dismissed the invasion of privacy claim for lack of standing.

Beyond a lack of standing, there are additional reasons to dismiss the Complaint. First, plaintiff does not address in his appeal the district court's ruling that he failed to state a claim for invasion of privacy under the California Constitution, and therefore waives any challenge to that dismissal. In any event, the district court correctly held that the Complaint does not adequately allege the three essential elements for an invasion of privacy claim under settled California law. As the district court correctly held, the tracking of a vehicle's driving history, performance or location is not, without more, the type of sensitive and confidential information the California constitution aims to protect.

Second, plaintiff does not allege essential elements of his contract, warranty and consumer protection claims, including injury. Third, plaintiff does not plead his fraud-based claims with the specificity required by Federal Rule of Civil Procedure 9(b). Further, plaintiff declined the district court's invitation to amend his claims to correct these deficiencies, and therefore waived any further opportunity to amend the First Amended Complaint.

For these reasons, this appeal should be denied and the claims against GM should remain dismissed.

STATEMENT OF ISSUES

1. Did the district court correctly dismiss plaintiff Nisam's claims for lack of Article III standing where plaintiff alleges only the possibility of a future

"hack" of his car, which would require a criminal act by a third party, and no concrete actual injury or economic loss?

2. Did the district court correctly dismiss plaintiff's claim for invasion of privacy for lack of Article III standing and failure to state a claim because there are no allegations that GM collected plaintiff's personal data, that GM used plaintiff's personal data, that the collection of this data was a serious invasion of his privacy interests, or that plaintiff suffered harm from any supposed data collection?

3. Did the district court correctly dismiss plaintiff's contract, warranty and consumer protection claims because he did not allege essential elements, including injury?

4. Did the district court correctly dismiss plaintiff's fraud-based consumer protection and fraudulent concealment claims because he did not plead them with the required particularity under Rule 9(b)?

STATEMENT OF THE CASE

A. The Complaint

On March 10, 2015, named plaintiffs Helene Cahen, Merrill Nisam, and Kerry Tompulis filed their first putative class action complaint in the Northern District of California. That complaint spanned 343 pages and asserted 238 claims, under the laws of all 50 states, against four defendants: GM, Ford Motor Company, and two Toyota entities. On April 30, these plaintiffs filed an amended complaint (1) naming two additional putative class representatives, Richard Gibbs

and Lucy L. Langdon; (2) dropping 223 of their claims arising under federal law and the laws of states other than California, Oregon, and Washington; and (3) adding a claim for invasion of privacy under the California Constitution. This First Amended Complaint ("Complaint") is the pleading dismissed by the district court and the subject of this appeal.

Only two named plaintiffs pursue this appeal.[1] Those plaintiffs seek to bring claims against GM and Toyota on behalf of a putative state-wide class of owners whose vehicles contain a controller area network (CAN or CAN bus) that is connected to an integrated cell phone or Class 1 or Class 2 master Bluetooth device. ER 29, 41 (¶¶ 3, 51). Only plaintiff Nisam asserts claims against GM, alleging that in March 2013, he purchased a new 2013 Chevrolet Volt from a dealer, Novato Chevrolet. ER 31 (¶ 14). He does not allege any direct contact or relationship with GM.

Plaintiff alleges that his vehicle—along with every single Ford, Toyota, and GM vehicle installed with electronic control units ("ECUs") connected through CAN buses—"[is] *susceptible* to hacking and [thus] neither secure nor safe." ER 29-30 (¶¶ 3, 6, 8) (emphasis added). Plaintiff "alleges the hypothetical possibility that these CANs "*can be* used maliciously" by third party attackers to "invade a user's privacy" or "to take remote control of the operation of a vehicle."

[1] Plaintiffs Tompulis, Gibbs and Langdon voluntarily dismissed their appeal against Ford Motor Company.

ER 35 (¶¶ 32-34) (emphasis added). He describes the vehicles as "*susceptible* to an attacker remotely and wirelessly accessing the vehicle's CAN bus through Bluetooth connections." ER 35 (¶ 34) (emphasis added).

Yet plaintiff Nisam does not allege *a single instance* in which an "attacker" has taken control of, or otherwise "remotely hacked," any vehicle in the real world through its CAN—not his car, and not any other GM vehicle. Rather, the Complaint relies upon news media, online articles, and one academic study suggesting that remote control is *possible* by experts under test conditions, but no actual incidents of such hacking taking place. ER 35-37 (¶¶ 34-35, 37).

Though the Complaint also alleges that, "[w]ithout drivers ever knowing, Defendants also collect data from their vehicles and share the data with third parties," ER 40 (¶ 49), it similarly does not allege any actual collection or use of plaintiff's own data. Further still, plaintiff concedes that "drivers [are] aware of such data collection" through "Defendants'" disclosures in "owners' manuals, online 'privacy statements,' and terms & conditions of specific feature activations." ER 40 (¶ 50).

Relying on these threadbare allegations, the Complaint asserts eight causes of action against GM: (1) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"); (2) violation of California's Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* ("CLRA"); (3) California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.*

("FAL"); (4) breach of the UCC implied warranty of merchantability, Cal. Com. Code § 2314; (5) breach of contract/common law warranty; (6) fraud by concealment; (7) violation of the Song-Beverly Consumer Warranty Act implied warranty of merchantability, Cal. Civ. Code §§ 1791.1 & 1792; and (8) invasion of privacy, Cal. Const. art. I, § 1. ER 44-54 (¶¶ 62-138). It seeks broad relief against GM, including injunctive relief, punitive damages, restitutionary disgorgement, other unspecified damages, pre- and post-judgment interest, and attorneys' fees. ER 62-63.

B. Proceedings Below

Pursuant to Rules 12(b)(1) and 12(b)(6), GM moved to dismiss the Complaint for lack of subject matter jurisdiction on its face, and for failure to state a claim upon which relief can be granted. On November 25, 2015, the Honorable William H. Orrick granted GM's motion in full. ER 4-27. The district court allowed plaintiff until January 8, 2016 to file a second amended complaint. ER 27. On his request, Dkt. 78, Judge Orrick extended this deadline to February 22, 2016, Dkt. 80. One week before this due date, plaintiff filed a Notice of Intent Not to Amend Complaint. Dkt. 81. Accordingly, the district court entered judgment in GM's favor. Dkt. 82. This appeal followed.

SUMMARY OF ARGUMENT

The unprecedented theory of this case rests on plaintiff's speculative fear that he could suffer some harm in the future, either by criminal attack on his

vehicle, or unauthorized use of unspecified personal data. The district court correctly concluded that this alleged hypothetical risk of harms from the remote possibility of future hacking is too speculative to constitute Article III injury.

Even plaintiff concedes that he does not allege his or any GM vehicle has ever been hacked in the real world. He does not allege that any hack of his vehicle is certainly impending, nor could he because the hacking can occur only through the criminal conduct of a third party. The district court correctly ruled that plaintiff has no standing because he does not allege actual or imminent injury.

Without any actual hack, plaintiff turns to a theory of economic loss—that he would not have purchased or paid as much for his vehicle had he known about the alleged possibility of hacking by a sophisticated criminal. But when "economic loss is predicated solely" on an alleged defect that has not manifested, "something more" than just "overpaying" is required for standing. Disregarding that precedent, plaintiff argues that any allegation of overpayment for a product *categorically* establishes injury in fact; he cites no supporting authority.

Plaintiff likewise does not allege any concrete, particularized injury arising from GM's collection of driving data to support standing for his invasion of privacy claim. He alleges no facts on what data about *him* GM has collected or shared with others, and what use, if any, has been made of his data or how that harmed him. Although plaintiff attempts to raise the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, to overcome the lack of facts or harm, he and

the amicus misread its ruling. They argue that simply alleging the violation of the plaintiff's right to privacy is enough to constitute injury in fact. But *Spokeo* is clear that a plaintiff must allege *concrete* harm that is *real* and *de facto*, even in the context of alleged violations of some legal right. Plaintiff's further argument that the alleged "invasion of his privacy" is an established "intangible harm" under California law is also ineffective because the vague "collection" practices he alleges are far from the "serious invasion" that California courts recognize as actionable.

Even apart from the lack of standing on the invasion of privacy claim, the district court also correctly concluded that plaintiff's invasion of privacy claim is subject to dismissal as a matter of law because plaintiff has not (and cannot) alleged its essential elements. Plaintiff waived his right to challenge that ruling because he did not address it in his appeal. In any event, plaintiff does not adequately allege the three essential elements of this claim: (1) that his driving data were the type of "sensitive and confidential" information in which he has a "legally protected privacy interest"; (2) that he had an objectively reasonable "expectation of privacy" given GM's disclosure of the alleged data-collection; or (3) that the alleged collection and sharing of drivers' data represented an "egregious breach of social norms."

There are alternative grounds on which this Court may affirm beyond those raised in plaintiff Nisam's appeal. This Court should dismiss plaintiff's contract,

warranty and consumer protection claims for failure to allege the necessary element of actual injury because plaintiff alleges only a *risk* of future injury. This Court should dismiss the claims for breach of the implied warranty of merchantability because plaintiff does not allege that the theoretical possibility that his vehicle could be hacked by a criminal rendered it "unfit" for its "ordinary purpose"—driving. Further, as plaintiff concedes below, his claims for breach of contract and common law warranty cannot proceed because he does not allege the terms of any alleged agreement or warranty with GM. Finally, plaintiff does not plead his fraud-based claims with the particularity required by Rule 9(b).

ARGUMENT

I. STANDARD OF REVIEW

This Court's review is *de novo*. *See, e.g.*, *Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2008). The Court is "*free to affirm the district court on any* ground supported by the record and briefed by the parties, and [it is] not limited to reviewing the district court's stated basis for its decision." *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003).

II. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF NISAM'S CLAIMS FOR LACK OF ARTICLE III STANDING.

Plaintiff Nisam lacks standing. There is no "case or controversy" here, as Article III requires. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual

cases or controversies.") (citation omitted). Plaintiff bears the burden to satisfy this case or controversy requirement. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *United States v. City & Cnty. of San Francisco*, 979 F.2d 169, 171 (9th Cir. 1992). To meet this burden, plaintiff must plead and prove facts to show "(1) . . . an injury in fact . . . ; (2) [that] is fairly traceable to the [] action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Montana Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (internal quotation marks omitted); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[2]

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[2] Because plaintiff has no injury, this Court need not address the other requirements of Article III standing. In any event, plaintiff Nisam's claim does not meet the requirement that his injury be traceable to GM because his fear of hacking requires, as a predicate, the independent, criminal act of a third party. The Supreme Court rejects theories of standing where establishing injury requires speculating about the possible actions of third parties not before the court. *See. e.g.*, *Lujan*, 504 U.S. at 560 (Article III requires a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" (citation and alterations omitted)); *see also Clapper*, 133 S. Ct. at 1148 (rejecting a theory of injury-in-fact that relied on a "highly attenuated chain of possibilities," several of which involved the decisions of third parties not before the Court); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (denying taxpayer standing because "[e]stablishing injury requires speculating" about the actions of "elected officials"); *Alston v. Advanced Brands and Importing Co.*, 494 F.3d 562, 565 (6th Cir. 2007) ("[T]he causal connection between the defendants' advertising and the plaintiffs' alleged injuries is broken by

(continued…)

The district court's dismissal of plaintiff Nisam's claims for failure to plead injury in fact is consistent with Supreme Court precedent, which requires a "concrete and particularized" injury in fact that is '"actual or imminent, not conjectural or hypothetical'"—this is "the first and foremost of standing's three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544, 1547 (2016) (quoting *Lujan*, 504 U.S. at 560). A "concrete" injury is one that actually exists; in other words it is "real" and not "abstract." *Spokeo*, 136 S. Ct. at 1556. An injury that is sufficiently imminent to confer standing "must be *certainly impending*," "allegations of *possible* future injury are not sufficient." *Clapper*, 133 S. Ct. at 1147 (emphasis in original) (internal citation and alteration omitted).[3] Plaintiff Nisam does not allege actual or certainly impending injury.

(continued…)

the intervening criminal acts of the third-party sellers and the third-party, underage purchasers. . . . A crime is an independent action.").

[3] The Amicus acknowledges *Clapper*, but quickly dismisses it as "entirely irrelevant" because it "concerned injunctive relief to prevent future violations of law." Br. of Amicus Curiae Elec. Privacy Info. Ctr. in Supp. of Pls.-Appellants and in Supp. of Reversal, Doc. ID 10068825, at 9 (Aug. 5, 2016) ("Amicus Br.") This argument is curious. For one, plaintiff's Complaint seeks multiple forms of injunctive relief. ER 62-63 (Request for Relief). And a plaintiff "bears the burden of showing that he has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). For another, the Amicus relies upon a case in which the plaintiffs sought injunctive relief, *Lujan*, 504 U.S. at 559 (plaintiffs seek "a declaratory judgment . . . and an injunction"), as establishing the appropriate governing standard here. Amicus Br. at 9.

A. Plaintiff Does Not Allege Actual or Certainly Impending Injury.

Plaintiff concedes that his GM car has never actually been hacked. *See supra* note 6. Instead, he alleges that his vehicle is "*susceptible*," *e.g.*, ER 30 (¶¶ 5, 8), to being "hacked," by a third-party "attacker" who "tak[es] control of [the] basic functions of the vehicle." ER 29 (¶¶ 1, 4), ER 35 (¶ 34).

Plaintiff attempts to distance himself from his alleged theory of harm on appeal. Appellant's Opening Br., Doc. ID 10068825, at 4 (July 29, 2016) ("Opening Br.") ("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*") (emphasis added).[4] But a plaintiff may not revise his allegations through briefing. *See Barbera v. WMC Mortg. Corp.*, No. C 04-3738 SBA, 2006 WL 167632, at *2 n.4 (N.D. Cal. Jan. 19, 2006) ("It is axiomatic that the complaint may not be amended by briefs in opposition to a motion to dismiss."); Fed. R. Civ. P. 7(a) (briefs are not among the recognized "pleadings").

[4] Plaintiff's complaint repeatedly alleges "risk" of and "susceptibility" to hacking. *E.g.*, ER 30 (¶ 6) ("owners and/or lessees of Defendants' vehicles are currently at risk . . . as a result of hacking, and they will continue to face this risk until they are notified of the dangers associated with their vehicles and are given funds and guidance by Defendants . . ."); ER 53 (¶¶ 125, 129) ("[Because] the Class Vehicles' electronic and computerized components . . . cause crucial functions of the Class Vehicles to be susceptible to hacking, they are not safe to drive"); *see also*, *Cahen et al. v. Toyota Motor Corp. et. al.*, No. 15-cv-01104-WHO, Dkt. No. 53, Pls.' Opp'n to GM's Mot. to Dismiss at 12 (N.D. Cal. Sept. 28, 2015) ("Nisam sues not only because GM's defects put his car at risk of theft, but also because it unreasonably puts him at risk of severe bodily injury or death.").

This lawsuit alleges no cognizable injury. It rests solely on conjecture of a risk of future harm. This is not enough for standing. *See* ER 18 ("Judges in this [Northern] District regularly deny standing in product liability cases where there has been no actual injury and the injury in fact theory rests only on an unproven risk of future harm."); *see, e.g.*, *Contreras v. Toyota Motor Sales USA, Inc.*, No. C 09-06024 JSW, 2010 WL 2528844, at *6 (N.D. Cal. June 18, 2010) (dismissing with prejudice under Fed. R. Civ. P. 12(b)(1) for lack of Article III standing), *aff'd and rev'd on other* grounds, 484 Fed. App'x 116 (9th Cir. 2012); *Whitson v. Bumbo*, No. C 07-05597 MHP, 2009 WL 1515597, at *6 (N.D. Cal. Apr. 16, 2009) (no standing because plaintiff "fails to allege that her [product] manifested the purported defect"); *Riva v. PepsiCo, Inc.*, 82 F. Supp. 3d 1045, 1052 (N.D. Cal. 2015) (dismissing with prejudice) (no standing where plaintiffs do not allege credible and substantial risk of cancer from ingesting Pepsi products).

Article III requires particularized allegations of injury in fact that "affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548. This Constitutional requirement applies fully when the claimed injury is "susceptibility" to "hacking." *Flynn v. FCA US LLC*, No. 15-cv-0855-MJR-DGW, Dkt. No. 115, Mem. Order at 4 (S.D. Ill. Sept. 23, 2016) (finding allegation that "the uConnect vulnerabilities have exposed [plaintiffs] to an increased risk of injury or death if their vehicles were hacked" insufficient to confer Article III standing under *Clapper*); *U.S. Hotel and Resort Mgmt., Inc. v. Onity*, No. 13-499 (SRN/FLN),

2014 WL 3748639, at *3-*5 (D. Minn. July 30, 2014) ("While it is possible that a potential intruder would in fact attempt to gain entry, 'allegations of *possible* future injury are not sufficient'" to confer Article III standing; "no such unauthorized entry could occur unless and until [a] third-party acted with criminal intent to gain entry") (quoting *Clapper*, 133 S. Ct. at 1147)).[5]

Because "plaintiffs do not allege that any future risk of harm is 'concrete and particularized *as to themselves*,'" the district court correctly dismissed the Complaint. ER 18-19 (quoting *Birdsong v. Apple, Inc.*, 590 F.3d 955, 960 (9th Cir. 2009)) and noting the Complaint here "does not allege that plaintiffs have suffered a hacking attack, nor does it plead any facts that would establish that plaintiff[] face[s] an increased risk of a future hacking attack on [his] vehicle[] as opposed to other vehicle owners."). In dismissing the claims, the district court rightly relied on the "closely analogous" *Contreras* decision, ER 18, in which the plaintiffs lacked standing because they did "not allege that their vehicles ha[d] manifested

[5] The Amicus misses the mark in arguing that the district court incorrectly found plaintiff to lack standing "because it fundamentally misunderstands the security vulnerabilities created by connected cars." Amicus Br. at 11. As plaintiff did below, the Amicus "conflate[s] the *nature* of the future risk at stake with the *plausibility* of the future risk for standing purposes—that a greater risk may be at stake in this case does not speak to whether the risk is any more plausible." ER 17. The existence of "potential" supposed vehicle vulnerabilities, Amicus Br. at 11, has no bearing on the likelihood of a "hack" and only serves to emphasize that the intervening act of a third party would be required. The Amicus' citation to purported criminal exploitations of connected vehicles is likewise irrelevant to whether plaintiff here has alleged a risk of hacking that is concrete and particularized *as to himself* (which he has not). *Contreras*, 2010 WL 2528844, at *6.

the alleged defect" or that a defect was "reasonably likely" to occur in plaintiffs' vehicles. 2010 WL 2528844, at *6; *see also* ER 18.

Plaintiff here does not allege that the purported defect manifested (no actual hack) or is reasonably likely (no future hack) in his own GM car or even anyone else's GM car.[6] *See* ER 20 ("Plaintiffs have alleged only that their cars are susceptible to hacking but have failed to plead that they consequently face a credible risk of hacking."). In fact, as the district court noted "[t]he case for standing here is more speculative than that presented in *Contreras*, where the alleged brake problems had manifested with other drivers, if not with the plaintiffs themselves." ER 18.

Courts throughout the country similarly find allegations of injury in fact conjectural and hypothetical when no defect has manifested in the plaintiff's own product. *E.g.*, *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002) (insufficient injury where plaintiffs suffered no negative health consequences from ingesting drug with high risk of liver and gastrointestinal damage); *Harrison v. Leviton Mfg. Co.*, No. 05-cv-0491, 2006 WL 2990524, at *3 (N.D. Okla. Oct. 19, 2006) (insufficient injury where plaintiff homeowner did not allege fire or damage in his home from allegedly defective electrical system); *Thunander v. Uponor,*

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[6] In addition to the absence of any allegation in the Complaint asserting that plaintiff's vehicle was hacked, in opposing GM's motion to dismiss below, plaintiff confirmed that he "does not allege that his vehicle was 'hacked.'" *Cahen*, No. 3:15-cv-01104-WHO, Pls.' Opp'n to GM's Mot. to Dismiss at 2.

Inc., 887 F. Supp. 2d 850, 864 (D. Minn. 2012) ("allegation that a product was merely *at risk* for manifesting a defect" is "insufficient to confer standing").

For the reasons set forth in *Onity, Contreras* and the authorities rejecting speculative allegations of injury, the district court correctly ruled that plaintiff does not have standing here. To paraphrase the Third Circuit, allegations of injury are too speculative for Article III purposes when a plaintiff describes the manner of his injury by beginning with the word 'if': *if* the hacker breaches plaintiff's car, and *if* he or she assumes control of it, and *if* someone is harmed, only then will plaintiff have suffered an injury. *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011); *see also Clapper*, 133 S. Ct. at 1147 ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.") (internal citation omitted)).[7]

B. Plaintiff Nisam's Bare Allegation of Economic Loss Is Insufficient.

The district court correctly rejected plaintiff's theory of economic loss (he allegedly would not have purchased or paid as much for his car if he had known of

[7] Contrary to United States Supreme Court jurisprudence, the Amicus advances a theory of standing under which the mere facial allegation that a defendant violated a plaintiff's rights is enough to meet the Constitutional injury in fact requirement. Amicus Br. at 10. Relying upon this misconception of the law, the Amicus argues that "[s]everal courts—including the lower court here—misunderstand *Clapper* to require that plaintiffs allege that *consequential harms* have already occurred or are 'certainly impending.'" Amicus Br. at 9. This, in fact, is precisely what *Clapper* requires. *Clapper* 113 S. Ct. at 1147.

the alleged "hackability," ER 44 (¶ 66)), as lacking any plausible allegations of fact, and therefore insufficient to establish injury under Article III. *Lujan*, 504 U.S. at 560 (injury in fact is an "irreducible constitutional minimum" that must be demonstrated by facts, not bare, conclusory allegations); *Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 971 (C.D. Cal. 2014); *Whitson*, 2009 WL 1515597, at *6 n.4.

California courts consistently reject such conclusory assertions of economic loss, particularly in the context of alleged vehicle defects when the vehicle has not malfunctioned. *E.g.*, *Lee*, 992 F. Supp. 2d at 973 (dismissing with prejudice "conclusory allegations" of diminished value as "insufficient" to establish Article III standing); *In re Toyota Motor Corp. Unintended Acceleration Litig.*, 790 F. Supp. 2d 1152, 116 n.11 (C.D. Cal. 2011) ("When the economic loss is predicated solely on how a product functions, and the product has not malfunctioned, the Court agrees that something more is required than simply alleging an overpayment for a 'defective' product."); *Barakezyan v. BMW of N. Am., LLC.*, No. CV 16-00173 SJO (GJSx), 2016 WL 2840803, at *4 (C.D. Cal. Apr. 7, 2016) (no standing where "Plaintiff fails to allege facts that supports the proposition that his leased car has lost value" as a result of the alleged defect); *see also Parker v. Iolo Techs., L.L.C.*, No. 12-00984, 2012 WL 4168837, at *2 (C.D. Cal. Aug. 20, 2012) (no standing and dismissing with prejudice where plaintiff did not plausibly allege that he experienced a product defect or paid money for a

product that "did not function as advertised"); *contrast Flynn*, No. 15-cv-0855-MJR-DGW, Dkt. No. 115, Mem. Order at 7 (S.D. Ill. Sept. 23, 2016) (allegations of overpayment for or drop in vehicle value sufficient to confer standing where plaintiffs alleged, among other things, that well-publicized vehicle vulnerabilities were exploited by hackers in at least 30 vehicles).

Aware of the floodgate of claims that could be opened if bare allegations of overpayment could meet the requirement for economic injury, these courts have required that where the "alleged wrong stems from the assertion of insufficient performance of a product or its features, a plaintiff must allege something more than overpaying for a defective product to support a claim." *Lee*, 992 F. Supp. 2d at 973 (dismissing for lack of Article III standing Toyota Prius owners' claims of overpayment based on allegations that a "pre-collision" warning system in their vehicles was ineffective because the bare allegation of "overpayment" is insufficient to allege economic injury) (internal quotation marks omitted). Conclusory allegations of economic loss ring hollow where the plaintiff has not experienced functional problems with his vehicle or its equipment, the driver continues to drive the vehicle and there is no allegation that he sold or traded his vehicle at a loss. *Barakezyan*, 2016 WL 2840803, at *1, *2, *4 (facts do not demonstrate diminished value where "[p]laintiff does not allege that the carbon ceramic brakes do not work as described; that he experienced any functional

problems with the carbon ceramic brakes; that he is unwilling to drive his vehicle; that he sold or traded-in his vehicle at a loss").[8]

Plaintiff Nisam does not distinguish *Lee*, *In re Toyota Motor Corp.* or *Barakezyan*, and instead urges a bright-line rule inconsistent with those precedents—that any allegation of overpayment for a product, or a product purchase a plaintiff would not otherwise have made, *categorically* establishes Article III injury in fact. Opening Br. at 15-18. This is not the law; and plaintiff cites no supporting authority. Not one of the three cases (*Hinojos*, *Maya* and *Mazza*) from which he extrapolates, Opening Br. at 15-18, supports his bright-line rule; and all three cases are distinguishable from the facts here.

Plaintiff's first case, *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1101-02 (9th Cir. 2013), does not involve allegations of insufficient product performance, but rather allegations of price gouging by a retailer preying on a consumer's preference for bargain pricing. The retailer allegedly lied by saying that its product was on sale when the advertised "sale" price was no different than the "original" or "regular" price. *Id.* at 1102. *Hinojos* simply did not address the question of whether alleged economic loss stemming from a subsequently-claimed product defect, rather than point-of-sale false advertising, is sufficient to create standing.

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[8] Plaintiffs' allegations of economic loss are particularly implausible because "*all* vehicles manufactured post-2008 are required to be equipped with some form of the CAN bus protocol that plaintiffs allege to be insufficient." ER 21.

The district court rightly rejected *Hinojos* as "not analogous to the instant case."[9] ER 20; *see also id.* ("Plaintiffs here do not assert any demonstrably false misrepresentations of value, but rather make conclusory allegations that their cars are worth less because of the risk of future injury.").

Plaintiff's second case, *Maya v. Centex Corp.*, 658 F. 3d 1060 (9th Cir. 2011), is equally inapposite. In *Maya*, this Court "decide[d] a fairly narrow question":

> whether individuals who purchased homes in new developments have standing to sue the developers for injuries allegedly caused by the developers' practice of marketing neighboring homes to individuals who presented a high risk of foreclosure and abandonment of their homes, financing those high-risk buyers, concealing that information, and misrepresenting the character of the neighborhood.

Id. at 1064-65. The impact on home values caused by the alleged marketing and sales practices in *Maya* presents no parallels to plaintiff's claim here for an unmanifested car defect. The *Maya* plaintiffs' allegations were not conclusory but based on concrete facts on the diminished value of their properties, such as the foreclosures and short sales of neighbors' homes, abandoned homes in their neighborhood, multiple families living in one home, transience, and crime. *Id.* at 1066. And the *Maya* plaintiffs' allegations were specific to their properties. *Id.* at

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[9] *Hinojos* is inapplicable to the issue of Article III standing for the additional reason that, as this Court noted, "the only question before us on this appeal is whether Hinojos . . . has *statutory* standing under California law," not Article III standing. *Hinojos*, 718 F.3d at 1101 (emphasis added).

1065-66. Here, plaintiff alleges "car owners in general face a risk of hacking at some point in the future. The risk faced by the individual plaintiffs themselves [including plaintiff Nisam] remains speculative." ER 18.

Plaintiff's third case, *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 586 (9th Cir. 2012), is a class certification decision in which this Court devoted only one paragraph to addressing standing. The *Mazza* plaintiffs alleged that *their vehicles* were equipped with a technology package that did not operate as advertised. *Id.* at 585-87. Because the technology package was an add-on feature with a specific value ($4,000), the plaintiffs also alleged concretely that there was a difference in value between what they paid for the "add on" package and what they received. *Id.* at 586. Plaintiff here does not make any such allegations.

The district court did not "ignore" plaintiff's allegation of economic loss.[10] The district court considered the allegation and found it insufficient to establish injury because well accepted precedent requires plaintiff Nisam to plead facts showing something more than he paid "too much" for his vehicle. The district court correctly held that where no defect had manifested, plaintiff Nisam failed to

[10] Plaintiff complains that the district court "gave scant attention to," Opening Br. at 3, and "all but entirely ignored the Drivers' allegations of economic harm," Opening Br. at 17. This is simply untrue. The district court devoted three pages to a discussion titled "Whether Injury In Fact Exists Based On The Alleged Economic Loss Flowing From The Risk Of Future Hacking." ER 20-23.

allege "the required 'something more' beyond the speculative risk of future harm." ER 23.

C. The District Court Correctly Analyzed Injury Under The Rules.

Plaintiff challenges the district court's citation to Rule 12(b)(6), rather than Rule 12(b)(1), in dismissing his claims for lack of injury. A facial attack on subject matter jurisdiction under Rule 12(b)(1) is assessed in the same manner as a motion to dismiss pursuant to Rule 12(b)(6). *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) ("Whether we construe Defendants' motion as one under Rule 12(b)(6) or as a facial attack on subject matter jurisdiction under Rule 12(b)(1), all factual allegations in Pride's complaint are taken as true and all reasonable inferences are drawn in his favor."); *Duqum v. Scottrade, Inc.*, No. 4:15-CV-1537-SPM, 2016 WL 3683001, at *2 (E.D. Mo. July 12, 2016) ("In evaluating a facial attack, 'the court restricts itself to the face of the pleadings and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).'" (citation omitted)). "Since nothing in the analysis of the court[] below turned on the mistake, a remand would only require a new Rule 12(b)([1]) label for the same Rule 12(b)([6]) conclusion." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010).

Therefore, the district court here correctly analyzed and concluded that because plaintiff "allege[s] only that [his] vehicle[] [is] susceptible to future hacking by third parties" since "car owners in general face a risk of hacking at

some point in the future," plaintiff does not allege Article III injury. ER 18. The district court did not "recast" plaintiff's allegations but simply held that as pleaded they were too speculative to establish the requisite injury for standing. Further, the district court based its decision in part on authority applying Rule 12(b)(1). *E.g.*, ER 18, 19 (citing *Contreras*, 2010 WL 2528844 and *Riva*, 82 F. Supp. 3d 1045).

III. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S PRIVACY CLAIM OF ALLEGED COLLECTION AND DISCLOSURE OF CAR DATA FOR LACK OF ARTICLE III STANDING.

Plaintiff argues that his allegation that GM collected and shared driving data from cars is sufficient for a "concrete injury" conferring standing under *Spokeo*. *See* Opening Br. at 18-19, 21 (citing *Spokeo*, 136 S. Ct. at 1548); *see also* Amicus Br. at 8-9. To the contrary, *Spokeo* confirms that the district court correctly found plaintiff Nisam must allege some sort of concrete, "real-world" injury to himself to meet his burden and establish standing.

A. Plaintiff Does Not Allege Particularized or Concrete Injury from Car Data Collection.

In *Spokeo*, the Supreme Court reaffirmed that "an injury in fact must be both concrete *and* particularized" to create standing. 136 S. Ct. at 1548. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* And while a concrete injury must be "real, and not abstract," it need not necessarily be "tangible"; "intangible injures can nevertheless be concrete." *Id.* at 1549 (internal quotation marks omitted).

The Complaint does not allege an injury that is either particular or concrete under this rubric. First, plaintiff Nisam does not plead any injury *particularized* to himself showing that he *personally* has "been affected by these alleged [data collection] behaviors." ER 25 (citing *LaCourt v. Specific Media, Inc.*, No. 8:10-cv-01256-GW-JCG, 2011 WL 1661532, at *4 (C.D. Cal. Apr. 28, 2011)). "This . . . alone is sufficient reason to dismiss" the Complaint. *E.g.*, *In re iPhone Application Litig.*, No. 11-MD-02250-LHK, 2011 WL 4403963, at *4 (N.D. Cal. Sept. 20, 2011) ("*iPhone I*"). This Court has underscored that where putative class representatives plead only that consumers face the *general* risk of a harm that they themselves have not incurred, "[t]he risk of injury the plaintiffs allege is not . . . particularized *as to themselves*." *Birdsong*, 590 F.3d at 960-61; *accord Warth v. Seldin*, 422 U.S. 490, 502 (1975) (putative class representatives "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"). This type of generalized "injury" is exactly what plaintiff pleads here, and what the district court correctly found was not sufficiently particular to plaintiff Nisam.[11]

[11] Indeed, district courts in this circuit have consistently reached similar results based on this Court's guidance. *See, e.g.*, *Burton v. Time Warner Cable Inc.*, No. CV 12-06764 JGB (AJWx), 2013 U.S. Dist. LEXIS 94310, at *33 (C.D. Cal. Mar. 20, 2013); *In re iPhone I*, 2011 WL 4403963, at *8; *LaCourt*, 2011 WL 1661532, at *4-*5.

Second, even if plaintiff had properly alleged that GM collected *his* personal information, he does not allege a resulting *concrete* injury. The Complaint does not allege specific facts to meet the *Spokeo* requirement for a *de facto* and *actually existing* impact on his privacy interests. 136 S. Ct. at 1549.

The district court observed that plaintiff's "factual allegations with regard to the privacy claim are contained within just three paragraphs of the FAC . . . ." ER 23. These allegations are sparse, vague, and "conclusorily pleaded." ER 4. They assert that GM (1) "collect[s] large amounts of data on driving history and vehicle performance," including vehicles' "geographic location[s]"; and (2) shares the purportedly "private" data with "third-party data centers without effectively securing the data." ER 40, 54 (¶¶ 49, 50, 135). The Complaint never alleges (1) what specific "data" GM is collecting from his vehicle, (2) who these "data centers" are, (3) what the data centers do, (4) what data they are receiving, (5) why it is sensitive or personal, (6) how frequently it is shared, (7) for what purpose it is shared, or (8) how, if at all, the data centers are using it.

In short, the Complaint offers no specific facts[12] from which to reasonably assess the *de facto*, "real-world" impact on plaintiff Nisam.[13] The district court

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[12] Amicus EPIC offers a laundry list of sources ostensibly supporting its assertion that "[c]ar manufacturers collect a great deal of personal information about drivers." *See* Amicus Br. at 23-30. Such materials beyond the pleadings cannot be considered here, as the district court decided against plaintiff based on the insufficiency of the allegations in his Complaint under Rules 12(b)(1) and

(continued…)

thus did not, as plaintiff argues, impose a "heightened pleading" standard. Rather, it correctly held that plaintiff has not alleged a "concrete harm from the alleged collection and tracking of [his] personal information sufficient to create injury in fact." ER 24 (quoting *iPhone I*, 2011 WL 4403963, at *5) (internal quotation marks omitted).

(continued…)

12(b)(6). *See San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

[13] The Amicus argues that a plaintiff can establish a concrete yet "intangible" injury in fact simply by alleging a violation of any "legally protected interest," including an invasion of a privacy interest. *See* Amicus Br. at 6-10. This reading overstates—even ignores—*Spokeo*'s actual reasoning. *Spokeo* does not contemplate that plaintiff may establish "concrete" injury simply by alleging, without more, a violation of a legally protected interest, such as a statutory or constitutional right. To the contrary, the Court explicitly held that "Article III standing requires a concrete injury *even in the context of a statutory violation*." *Spokeo*, 136 S. Ct. at 1549 (emphasis added). This, in turn, requires that a plaintiff allege some "*real* harm"—"tangible" or "intangible"—attributable to the defendant's actions. *Id.* at 1549-50 (emphasis added). A plaintiff can potentially satisfy this requirement by alleging, for example, "harms [that] may be difficult to prove or measure," or even "the *risk* of real harm." *Id.* at 1549 (emphasis added). But what is critical, in any case, is that the plaintiff must allege a *real-world impact* on his interests. Where, for instance, a plaintiff alleges only that the defendant violated her statutory rights by disseminating an "incorrect zip code," "[i]t is difficult to imagine how [this violation], without more, could work *any concrete harm*." *Id.* at 1550 (emphasis added). As this example makes clear, *Spokeo* does not reach so far as to support the argument that a plaintiff need only allege the violation of some legal right, divorced from any actual harm. *See* Amicus Br. at 6-8.

B. Plaintiff's Vague Allegations of Invasion of Privacy Lack the Concrete Injury In Fact Required for Article III Standing.

Plaintiff misinterprets *Spokeo* in arguing that the "invasion of privacy" he alleges is a sufficiently concrete harm because "American courts have long recognized common law claims for invasion of privacy." *See* Opening Br. at 18-19. Plaintiff bases this argument on dicta from the majority opinion explaining that, in assessing injury in fact, "it is instructive [for courts] 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." *Spokeo*, 136 S. Ct. at 1549 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)). A private right of action conferred by a *federal* statute is especially important, the majority held, because "Congress is well positioned to identify intangible harms that meet [federal] Article III requirements." *Spokeo*, 136 S. Ct. at 1543.

Plaintiff's allegations do not amount to a "concrete harm" under this analysis. First, the "legally protected interest" that plaintiff alleges here arises under the California Constitution, not a federal statute. While *Spokeo* observed that "*Congress* may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," it nowhere held that *state* legislation or ballot measures can do the same, *i.e.*, by recognizing new "injuries in fact" for *federal* constitutional standing. *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 578) (internal quotation marks and alterations omitted); *see also*

Hollingsworth v. Perry, 133 S. Ct. 2652, 2658 (2013) (holding that California ballot initiative could not confer "a ticket to the federal courthouse" for its proponents "who otherwise lack[ed] standing"); *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) ("[A] plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury.").

Second, plaintiff ignores the actual requirements necessary to assert an invasion of privacy claim under California law. The vaguely defined "invasion" that plaintiff alleges is simply not the type of "intangible harm" historically recognized under California law; rather, California courts have consistently required that plaintiffs allege a "serious invasion" of their privacy that represents an "egregious breach of the social norms." *Hill v. NCAA*, 865 P.2d 633, 655 (Cal. 1994) ("Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right."). As the California Supreme Court has explained, "[n]o community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for

invasion of privacy. . . . Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." *Id.*[14]

Applying this guidance, one court in this circuit ruled that the disclosure of "geolocation information," in particular, "does not constitute an egregious breach of social norms." *E.g.*, *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) ("*iPhone II*") (citing *Fogelstrom v. Lamps Plus, Inc.*, 125 Cal. Rptr. 3d 260 (2011)). Likewise, it is difficult, if not impossible, to characterize the alleged data collection here as "egregious" when the Complaint itself alleges that GM discloses these practices to consumers through owners' manuals and other sources. ER 40 (¶ 50). The "intangible harm" that plaintiff offers as a purportedly "concrete" injury in fact is not a sufficient basis for a lawsuit under California law.

C. Plaintiff Does Not Allege Actual or Imminent Injury From Car Data Collection.

Plaintiff does not plead facts showing how the sharing of "driving history and vehicle performance" data is *actual* injury, rather than "conjectural" or "hypothetical." *See Lujan*, 504 U.S. at 560. There are no allegations that GM collected and shared his individual data with third parties, that his data was exposed in any way, or that he was harmed by any exposure of his data.

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[14] *See also id.* at 647-48 ("The common law right of privacy contains several important limiting principles that have prevented its becoming an all-encompassing and always litigable assertion of individual right," including "the *likelihood of serious harm*.") (emphasis added); *id.* at 642 (one of the purposes of the privacy cause of action is to prevent the "misuse" of "sensitive personal information").

There are likewise no allegations of any *imminent* injury to plaintiff. He does not allege any credible risk of impending harm from GM's alleged sharing of his data with data centers. The Complaint does not address what these "data centers" are or what they do with data. And it alleges no specific instances in which data centers, or anyone else, have misused data. Plaintiff hints that hackers could "steal" or intercept these data by vaguely alleging that GM does not "effectively secur[e]" the information sent to data centers. ER 40 (¶ 50). But the Complaint is silent on how or why the data is vulnerable, and how or why it could be misused to harm plaintiff.

Against this backdrop, the district court correctly dismissed, following the precedent of this Court finding the "risk of future harm" (ER 25), arising from personal-data disclosures can constitute injury in fact only where the plaintiff alleges that she faces "a *credible* threat of *real and immediate harm* stemming from" the disclosure. *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (emphasis added).

In *Krottner*, this Court established what constitutes a sufficiently "real and immediate" risk for injury in data-disclosure cases. The Court found that the deliberate theft of a laptop containing plaintiffs' unencrypted personal data, including social security numbers, demonstrated a "credible threat of harm" sufficient to constitute injury in fact. 628 F.3d at 1143. It cautioned, however, that, "[w]ere [the plaintiffs'] allegations more conjectural or hypothetical—for

example, if no laptop had been stolen, and [p]laintiffs had sued based on the risk that it would be stolen at some point in the future—[it] would [have] f[ound] the threat far less credible." *Id.*

Applying *Krottner*, courts in this circuit have consistently declined to find standing in data-disclosure cases unless plaintiffs have alleged, for example: (1) that "sensitive personal data, such as names, addresses, social security numbers and credit numbers, [have been] improperly disclosed or disseminated into the public," *Low v. LinkedIn Corp.*, No. 11-cv-01468-LHK, 2011 U.S. Dist. LEXIS 130840, at *14 (N.D. Cal. Nov. 11, 2011); and/or (2) that third parties have hacked, stolen, misappropriated, or otherwise misused personal data in a way that evinces a "risk of harm."[15] Neither is the case here.

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[15] *Compare, e.g.*, *In re Adobe Sys. Privacy Litig.*, 66 F. Supp. 3d 1197, 1214 (N.D. Cal. 2014) (standing based on theft of credit card numbers by hackers); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 954 (S.D. Cal. 2014) (same) *with In re Zappos.com, Inc.*, 108 F. Supp. 3d 949, 958-59 (D. Nev. 2015) (no standing where no "theft or fraud" occurred for years after data breach); *Antman v. Uber Techs., Inc.*, No. 3:15-cv-01175, 2015 U.S. Dist. LEXIS 141945, at *29 (N.D. Cal. Oct. 19, 2015) (no standing based on "only the theft of names and driver's licenses"); *Whitaker v. Health Net of Cal., Inc.*, No. CIV S-11-0910 KJM-DAD, 2012 U.S. Dist. LEXIS 6545, at *9-*13 (E.D. Cal. Jan. 19, 2012) (no standing where plaintiff failed to allege theft or likelihood of misuse); *see also Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 690 (7th Cir. 2015) (standing found where 9,200 of 350,000 credit card numbers hacked had already been misused); *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 19 (D.D.C. 2014) ("[T]he mere loss of data—without any evidence that it has been either viewed or misused—does not constitute an injury sufficient to confer standing.").

Plaintiff Nisam explicitly elected not to amend his Complaint despite the district court's invitation to do so and the nearly 18 months of additional history since its filing. He has yet to allege a specific instance of actual harm arising from the alleged disclosure of his data. Thus, the district court correctly concluded that "[n]owhere do plaintiffs allege the kind of theft, malicious breach, or widespread accidental publication of sensitive personally identifying information such as social security numbers or credit card information that [other courts in this circuit have] found so dangerous." ER 25.

IV. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S INVASION OF PRIVACY CLAIM UNDER THE CALIFORNIA CONSTITUTION.

The district court found that "[e]ven if [his] allegations were sufficient to establish standing, they would not demonstrate a violation of the right to privacy under the California Constitution." ER 26. Plaintiff waives his challenge to this ruling by not addressing it in his Brief. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) ("Issues which are not specifically and distinctly argued and raised in a party's opening brief are waived."); *accord Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant . . . ." (citation omitted)).

Even without waiver, this Court should affirm the district court's dismissal because plaintiff's privacy claim fails as a matter of law. To state a claim for

invasion of privacy under Article I, Section 1 of the California Constitution, a plaintiff must plead "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Hill*, 865 P.2d at 657. Plaintiff Nisam does not adequately allege any of these three elements.

First, plaintiff does not allege a "legally protected privacy interest," which under California law extends only to information that is "sensitive and confidential," such as medical or financial records. *See In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1041 (N.D. Cal. 2014); *see also Hill*, 865 P.2d at 654 (information is "private" when "well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity"). While the Complaint is indecipherably vague in identifying what specific "data" are at issue, courts have consistently rejected privacy claims based on the one concrete category of information that plaintiff specifies: geolocation data. *See, e.g.*, *iPhone II*, 844 F. Supp. 2d at 1063 (finding disclosure of geolocation information not actionable as invasion of privacy under California Constitution); *Fredenburg v. City of Fremont*, 14 Cal. Rptr. 3d 437, 446 (Cal. Ct. App. 2004) ("A person's general location is not the type of core value, informational privacy explicated in *Hill*."). The district court was thus correct in holding that the driving data at issue is not "categorically the

type of sensitive and confidential information the constitution aims to protect." ER 26.

Second, plaintiff Nisam does not allege that he had an *objectively reasonable* expectation of privacy in data relating to his "driving history and vehicle performance," namely his car's "geographic location" at "various times." The Complaint acknowledges that GM made "drivers aware of [its] data collection in owners' manuals, online 'privacy statements,' and terms & conditions of specific feature activations." ER 40 (¶ 50).[16] *See, e.g.*, *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1041; *Berry v. Webloyalty.com, Inc.*, No. 10-CV-1358-H (CAB), 2011 WL 1375665, at *10 (S.D. Cal. Apr. 11, 2011), *vacated and remanded on other grounds*, 517 Fed. App'x 581 (9th Cir. 2013).

Third, plaintiff Nisam does not allege a "serious" invasion of his privacy as required by California law. "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an *egregious breach* of the social norms underlying the privacy right." *In re iPhone II*, 844 F. Supp. 2d at 1063 (quoting *Hill*, 865 P.2d 633) (internal quotation marks omitted). Many courts have recognized that the collection or sharing of innocuous

[16] Although the district court did not reach this element in dismissing plaintiff's privacy claim, he cautioned that, "[i]f plaintiffs ch[o]se to amend their complaint," "they should also consider whether [GM's] notice and [drivers'] consent would vitiate a plausible invasion of privacy claim under the California Constitution." ER 27 at n.6.

data like geolocation information does not constitute an "egregious breach of social norms." *In re iPhone II*, 844 F. Supp. 2d at 1063 (geolocation data); *Folgelstrom v. Lamps Plus, Inc.*, 125 Cal. Rptr. 3d 260, 265 (Cal. Ct. App. 2011).

V. THIS COURT MAY AFFIRM THE DISTRICT COURT'S DISMISSAL ON ALTERNATIVE GROUNDS.

This Court may affirm the district court's dismissal on alternative grounds. *Forest Guardians*, 329 F.3d at 1097. There are four grounds on which this Court may alternatively dismiss plaintiff's claims here: (1) plaintiff does not plead actual injury for each of his claims; (2) he does not state a claim for breach of the implied warranty of merchantability because he does not allege that the hacking risk rendered his car unfit to drive; (3) he does not adequately plead the terms of any alleged contract or warranty with GM; and (4) he does not plead his fraud-based claims with the heightened specificity required by Rule 9(b).

A. Plaintiff's Claims Also Fail Under Rule 12(b)(6) for Lack of Injury.

All of the claims plaintiff asserts have actual injury as a required element. Plaintiff does not satisfy this element because he alleges only a risk of injury in the future, premised upon an alleged defect that has not manifested in his own car. Plaintiff's allegations of speculative future risk do not support claims for breach of warranty, fraud, invasion of privacy, or violation of California's consumer protection statutes.

1. Warranty Claims.

For express and implied warranty claims, without an allegation of product failure, unmanifested defect claims are subject to dismissal for failure to allege the essential element of injury. *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 630 (8th Cir. 1999) (dismissing express and implied warranty claims where no defect manifested in vehicles' brakes); *Taragan v. Nissan N. Am. Inc.*, No. C 09-3660 SBA, 2013 WL 3157918, at *4 (N.D. Cal. June 20, 2013) (dismissing implied warranty claim as "theoretical" because "none of the Plaintiffs has actually experienced a rollaway incident"); *see also, e.g.*, *Birdsong*, 590 F.3d at 959 (dismissing implied warranty claim where no product failure and no allegation injury inevitable); *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 505 (8th Cir. 2009) (dismissing express and implied warranty claims where purported defect did not cause the feared harm). "In asserting a warranty claim, . . . it is not enough to allege that a product line contains a defect or that a product is at risk for manifesting this defect; rather, the plaintiffs must allege that their product *actually exhibited the alleged defect*." *Taragan*, 2013 WL 3157918, at *4 (quoting *O'Neil*, 574 F.3d at 503) (alterations and internal quotation marks omitted).

Plaintiff here alleges no injury because he never claims a "product failure" or "hack" of his own vehicle. He claims only a potential future risk. Without more, his warranty claims cannot proceed.

2. Consumer Protection Claims.

Claims under California's consumer protection statutes also require an injury in fact. If a product performs and does not manifest a defect, that plaintiff cannot assert an injury under the UCL, the CLRA or the FAL and lacks standing to assert these claims. *Lee*, 992 F. Supp. 2d at 973 (dismissing UCL and fraud claims for failure to state a claim because plaintiffs did not allege vehicle's pre-collision system failed to operate as intended or as advertised); *Davidson v. Kimberly-Clark Corp.*, 76 F. Supp. 3d 964, 976 (N.D. Cal. 2014) ("where—as here—a consumer fails to allege facts showing that he/she experienced any harm resulting from product use, the consumer has failed to allege damage under the UCL/FAL/CLRA or common law fraud"); *Birdsong*, 590 F.3d at 961-62; *Parker*, 2012 WL 4168837, at *3; *Whitson,* 2009 WL 1515597, at *6.

B. Plaintiff Does Not State a Claim for Breach of the Implied Warranty of Merchantability.

Plaintiff's claims for breach of implied warranty under the California Commercial Code § 2314 and the Song-Beverly Act (Cal. Civ. Code § 1791.1, 1792) fail on at least two grounds. First, plaintiff does not allege that he stood in privity with GM, as required by California Commercial Code § 2314. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008). He alleges that he bought his vehicle from an independent dealer, Novato Chevrolet, rather than directly from the manufacturer. ER 31 (¶ 14).

Second, plaintiff Nisam does not allege facts showing his vehicle was not fit for its intended purpose. Under both section 2314 and Song-Beverly, a product is "merchantable" if merely "fit for the ordinary purposes for which [it is] used." Cal. Civ. Code § 1791.1(a)(2); Cal. Com. Code § 2314(a) & (c); *Am. Suzuki Motor Corp. v. Super. Ct.*, 44 Cal. Rptr. 2d 526, 529 (Cal. Ct. App. 1995) (implied warranty of merchantability "for a minimum level of quality.") (internal citations and quotation marks omitted). To state a claim, therefore, a plaintiff must allege that the product "did not possess even the most basic degree of fitness for ordinary use." *Mocek v. Alfa Leisure, Inc.*, 7 Cal. Rptr. 3d 546, 549 (Cal. Ct. App. 2003). For a vehicle, that means that the defect must render the car incapable of providing transportation. *Am. Suzuki Motor Corp*., 44 Cal. Rptr. 2d at 529 ("[I]n the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation").

Here, plaintiff makes no such allegation. He does not allege that his car has actually exhibited the alleged defect, let alone made it unfit to drive. *See Taragan*, 2013 WL 3157918, at *4 (to maintain implied warranty claim, "'plaintiffs must allege that their product actually exhibited the alleged defect'") (internal quotation marks and citation omitted); *Lee*, 992 F. Supp. 2d at 980 (vehicle not unmerchantable where alleged defect did not cause plaintiff to stop driving). This claim thus fails.

C. Plaintiff Does Not State a Claim for Breach of Contract or "Common Law Warranty."

The Complaint conflates two causes of action, breach of contract and common law warranty, into a single claim. Yet, as plaintiff himself concedes,[17] this hybrid claim fails as a matter of law. Plaintiff does not allege the terms of a specific oral or written contract with GM, attach any alleged contract to the Complaint, or identify contract provisions that have been breached. The same is true for his common law warranty claim: the Complaint does not allege the terms of the warranty, what language creates it, or where that language can be found.

Plaintiff does not plead the essential elements of a breach of contract claim: (1) a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) resulting damages to plaintiff. *Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d 682, 697 (Cal. Ct. App. 2010) (emphasis omitted). Plaintiff alleges a contract with GM only in conclusory terms, and elsewhere contradicts himself by admitting he bought his car from a dealer. ER 31, 59-60 (¶¶ 14, 104); *see also Lee*, 992 F. Supp. 2d at 981 (citing, *inter alia*, *Zody v. Microsoft Corp.*, No. 12–cv–00942–YGR, 2012 WL 1747844, at *4 (N.D. Cal. May 16, 2012)). Nor does he allege the specific terms of the alleged contract—or even state whether it was oral or written. *Alvarado v. Aurora Loan Servs., LLC*, No. 12-0254, 2012 WL 4475330, at *4 (C.D. Cal. Sept. 20, 2012) (written contract

[17] *See Cahen*, No. 15-cv-01104-WHO, Dkt. No. 53, Pls.' Opp'n to GM's Mot. to Dismiss at 1.

‘“must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference’” (citation omitted)); *Castro v. JPMorgan Chase Bank, N.A.*, No. 14-cv-01539, 2014 WL 2959509, at * 2 (N.D. Cal. June 30, 2014) (“To allege a breach of contract claim, the complaint must indicate on its face whether the contract is written, oral, or implied by conduct.”) (citing Cal. Civ. P. Code § 430.10(g)).

To the extent the “breach of contract/common law warranty” claim seeks to advance a common law warranty claim, *i.e.*, a claim under an express warranty outside the GM limited new vehicle warranty, it once again fails to plead essential elements: “To plead an action for breach of express warranty under California law, a plaintiff must allege: (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff’s injury.” *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 986-87 (N.D. Cal. 2009); *see also Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009 WL 1635931, at *4 (N.D. Cal. June 5, 2009) (California warranty law requires a plaintiff to prove that the defendant breached an express promise regarding its goods). The Complaint does not allege the terms of any warranty, or describe any express promise, and thus provides no plausible factual basis for a “common law warranty” claim. *See Zody*, 2012 WL 1747844, at *4. The Court may affirm the district court on this alternative ground, as well.

D. Plaintiff Does Not Plead His Fraud-Based Claims with Particularity.

Plaintiff's claims under the UCL, CLRA, and FAL, and his common law claim for fraud by concealment are fraud-based. Under Federal Rules of Civil Procedure 9(b) and 12(b)(6), these claims must be pleaded with particularity. The Court should dismiss these claims for: (1) failure to satisfy Rule 9(b)'s heightened pleading requirements; and (2) failure to allege reasonable or justifiable reliance.

1. Plaintiff's Fraud-Based Allegations Are Subject To Rule 9(b)'s Heightened Pleading Requirements.

Plaintiff's "fraud by concealment" claim is a cause of action for fraud and is therefore subject to Rule 9(b)'s heightened pleading standard. *Taragan*, 2013 WL 3157918, at *5. Rule 9(b) also applies to all claims—including claims under the UCL, the CLRA, and the FAL—that are "grounded in fraud" or that "sound in fraud." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *see also Netbula, LLC v. BindView Dev. Corp.*, 516 F. Supp. 2d 1137, 1153 (N.D. Cal. 2007) ("To establish a fraud claim under California law, a plaintiff must show: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or 'scienter'); (3) intent to defraud, *i.e.*, to induce reliance; (4) justifiable reliance; and (5) resulting damage.").

Plaintiff premises his UCL, CLRA, and FAL claims on alleged misrepresentations, omissions and concealment concerning the "hackability" of the CAN bus system. *See, e.g.*, ER 30, 33-34, 36, 44-47, 50-51 (¶¶ 5, 6, 26-27, 36, 65-66, 74, 78-80, 83, 87-88, 108-110, 112-116). Plaintiff alleges, for instance, that

"Defendants" engaged in "unfair, deceptive, and/or fraudulent business practices," ER 30 (¶ 6); "knowingly and intentionally conceal[ed]" information from plaintiffs," ER 44 (¶ 65); made "material omissions and misrepresentations," ER 46 (¶ 78); and "concealed and/or suppressed material facts," ER 50 (¶ 108). Because plaintiff alleges fraud to support his UCL, CLRA and FAL claims, they must be pleaded with particularity. Plaintiff conceded this point below.[18]

2. Plaintiff Fails To Plead His Fraud-Based UCL, CLRA And FAL Claims With Particularity.

To satisfy Rule 9(b), a pleading must identify "the who, what, when, where and, how of the misconduct charged," and "be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Kearns*, 567 F.3d at 1124 (citation and internal quotation marks omitted); *see also* Rule 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). To plead an actionable fraud-based claim under California's consumer protection statutes, moreover, a plaintiff must plausibly allege that a reasonable consumer would likely be deceived by the business practice or advertising at issue. *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 854 (N.D. Cal. 2012). Plaintiff does not allege with particularity any of the

[18] *See Cahen*, No. 15-cv-01104-WHO, Dkt. No. 53, Pls.' Opp'n to GM's Mot. to Dismiss at 14.

three bases on which he asserts fraud, and that a reasonable consumer would be deceived by GM's conduct.

First, plaintiff does not allege with particularity that GM made misrepresentations.[19] He identifies only two assertions by GM:

- "Quality and safety are at the top of the agenda at GM, as we work on technology improvements in crash avoidance and crashworthiness to augment the post-event benefits of OnStar, like advanced automatic crash notification." ER 39 (¶ 47).
- "General Motors today revealed that the development of one of the largest active automotive safety testing areas in North America is nearly complete at its Milford Proving Ground campus. . . . The Active Safety Testing Area . . . will complement the Milford Proving Ground's vast test capabilities and increase GM's ability to bring the best new safety technologies to the customer." ER 39-40 (¶ 48).

Plaintiff Nisam does not allege, among other things, the manner in which these representations were communicated to him (if at all), when they were communicated to him, how they were communicated to him, or how they

[19] Only plaintiff's CLRA claim asserts a misrepresentation.

influenced his decision making[20] or misled him into believing that a third party could not criminally and maliciously "hack" his vehicle. Plaintiff likewise does not allege how these general statements regarding GM's commitment to safety would lead a reasonable consumer to believe that GM's cars cannot be the subject of criminal third-party conduct. Further, none of the representations that plaintiff Nisam complains of describe his Chevrolet Volt or even a specific GM vehicle, nor are these statements "specific and measurable" claims that are capable of being proved true or false and therefore are not actionable. *See Rasmussen v. Apple, Inc.*, 27 F. Supp. 3d 1027, 1039 (N.D. Cal. 2014) ("'misdescriptions of specific or absolute characteristics of a product are actionable,'" but statements "'merely . . . in general terms . . . [are] not actionable'"). Plaintiff thus fails to allege any misrepresentation *of fact* by GM with the requisite particularity. *See, e.g.*, *Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 998 (N.D. Cal. 2007) ("Although Plaintiffs identify specific comments from Defendant's website . . . they fail to specify the time frame during which these comments appeared. Nor have Plaintiffs identified any other specific advertisements that are allegedly false.").

[20] The second statement affirmatively could not have influenced his decision to purchase his car since GM issued that press release more than 18 months after the date that plaintiff alleges that he purchased his car. ER 39-40 (¶ 48).

Second, plaintiff's Complaint is devoid of support for his suggestion that GM "concealed" information. To satisfy Rule 9(b) when allegations of fraud rest upon claims of concealment, a plaintiff must specify affirmative acts of concealment. *Taragan*, 2013 WL 3157918, at *6. Plaintiff does not do so. Instead, he alleges concealment by GM in purely conclusory fashion. *See, e.g.*, ER 44 (¶ 65(a)) (GM "knowingly and intentionally conceal[ed] from Plaintiffs and the other California Class members that the Class Vehicles suffer from a design defect while obtaining money from Plaintiffs"); ER 50 (¶ 108) ("Defendants concealed and/or suppressed material facts concerning the safety, quality, functionality, and reliability of their Class Vehicles").

Third, plaintiff fails to adequately plead facts supporting his conclusory assertion that GM made "omissions." *See, e.g.*, ER 46 (¶ 78); ER 47 (¶ 87). He does not indicate, for instance, the content of the omission or where the omitted information could or should have been disclosed. *See also Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009) ("to plead the circumstances of omission with specificity, plaintiff must describe the content of the omission and where the omitted information should or could have been revealed").

For an omission to be actionable under California's consumer protection statutes, a plaintiff must allege a duty to disclose or facts "showing that the alleged omissions are 'contrary to a representation actually made by the defendant.'" *Davidson*, 76 F. Supp. 3d at 972 (quoting *Daugherty v. Am. Honda Motor Co.,*

Inc., 51 Cal. Rptr. 3d 118, 127 (Cal. Ct. App. 2006)); *see also Taragan*, 2013 WL 3157918, at *6 (for an omission to be actionable in fraud a plaintiff must allege facts creating a duty to disclose). Plaintiff contends that GM owed a duty to disclose for three reasons: (1) "[GM] marketed [its] Class Vehicles as safe," when they are not, ER 50 (¶ 109), (2) GM had "superior knowledge and access to the facts," ER 50-51 (¶ 110), and (3) GM "possessed exclusive knowledge" of the alleged defect. ER 51 (¶ 111). All three assertions fail as a matter of law.

Plaintiff's Complaint lacks any allegation that his vehicle functioned in any manner other than as intended; he alleges only that it is "susceptible" to "hacking." His claim therefore is entirely speculative. *See Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 990-91 (N.D. Cal. 2010), *aff'd* 462 Fed. App'x 660, 663 (9th Cir. 2011) (allegations that a defect could, among other things, potentially make a vehicle vulnerable to theft held too speculative as a matter of law to assert a safety defect that creates a duty to disclose). Plaintiff similarly asserts that his vehicle is susceptible to third-party criminal conduct, and therefore fails to allege a material safety hazard that gives rise to a duty to disclose.

Moreover, "[t]he existence of a safety hazard does not, standing alone, give rise to a duty to disclose." *Taragan*, 2013 WL 3157918, at *6 n.9. Only a "material" safety hazard must be disclosed. *Id.* To prove that non-disclosed information is material, a plaintiff "must be able to show that had the misrepresented or omitted information been [] disclosed, [a reasonable consumer]

would have been aware of it and behaved differently." *Winans v. Emeritus Corp.*, No. 13-CV-03962-SC (JCS), 2014 WL 3421115, at *2 (N.D. Cal. July 14, 2014); *Garcia v. Sony Computer Entm't Am., LLC*, 859 F. Supp. 2d 1056, 1067 (N.D. Cal. 2012). Plaintiff does not allege that a reasonable consumer would expect a car to be impervious to third-party criminal acts. His claim is no different from, and just as absurd as, a claim that GM should be required to disclose that all vehicle brakes are defective because they are susceptible to a criminal cutting the brake line so that the brakes could fail.

Conclusory allegations of "superior knowledge" of a defect are likewise insufficient to create a duty to disclose. *Taragan*, 2013 WL 3157918, at *6 (finding it insufficient under Rule 9(b) to allege merely that "the defendant has a superior understanding about the product's design generally"). And, to adequately allege a defendant's exclusive knowledge (another basis for asserting an actionable omission) of an alleged defect, a plaintiff "must offer 'specific substantiating facts.'" *Taragan*, 2013 WL 3157918, at *6. Plaintiff fails to do so.

At bottom, plaintiff seeks to assert fraud-based claims, but his complaint is bereft of allegations of the "who, what, when, where and how" of the alleged fraud. Plaintiff thus fails to meet his pleading obligations, and his consumer protection claims should be dismissed. Concealment and a duty to disclose are both elements of plaintiff's fraudulent concealment claim. *Taragan*, 2013 WL

3157918, at *6. Plaintiff's failure to allege these elements is equally fatal to that claim.

3. Plaintiff Does Not Allege Reasonable Or Justifiable Reliance.

Reliance is an "essential" element of any claim based on fraud or misrepresentation, including claims brought under California's consumer protection statutes. *See Clark v. Time Warner Cable*, 523 F.3d 1110, 1116 (9th Cir. 2008); *see Kearns*, 567 F.3d at 1126. To satisfy pleading requirements, there must be more pled than a simple statement plaintiff justifiably relied on the statements. *Foster Poultry Farms v. Alkar-Rapidpack-MP Equip., Inc.*, No. 1:11–cv–00030–AWI–SMS, 2012 WL 6097105, at *7 (E.D. Cal. Dec. 7, 2012). The complaint must "allege facts showing that the actual inducement of plaintiffs was justifiable or reasonable." *Id.* (citation and internal quotation marks omitted). It is not enough to identify alleged statements by the defendant; instead, the complaint must "provide an unambiguous account of the time, place, and specific content of the false representations." *Smedt v. Hain Celestial Grp.*, No. 5:12-cv-03029, 2013 WL 4455495, at * 4 (N.D. Cal. Aug. 16, 2013) (internal quotation marks and citation omitted); *accord Kearns*, 567 F.3d at 1126. "A mere conclusory allegation that the plaintiff relied on the misrepresentation is insufficient." *Foster Poultry Farms*, 2012 WL 6097105, at *7. Plaintiff's allegations of "reliance" are deficient.

Plaintiff's allegations of fraud rest upon two statements GM allegedly made, yet he does not, and cannot, allege that he relied upon either of these statements in

deciding to purchase his vehicle. One such statement, according to plaintiff, was made on October 23, 2014—more than a full year-and-one-half *after* plaintiff alleges he purchased his GM vehicle. ER 39-40 (¶ 48). Plaintiff neglects altogether to allege when GM made, or when he received, the remaining representation, *see generally* ER 29-63, except to allege that he last reviewed that statement on June 30, 2015, two years *after* he allegedly purchased his vehicle, ER 39 (¶ 47 n.30). Statements viewed *after* a plaintiff's purchase could not have induced that purchase.

Plaintiff likewise fails to demonstrate that, even if he had relied on GM's statements, his reliance was reasonable. Specifically, the two GM statements to which plaintiff refers concern crashworthiness, crash avoidance, and the opening of a facility to test new technologies. ER 39-40 (¶¶ 47, 48). Neither of these statements has any relationship to plaintiff's claimed defect: "susceptib[ility] to hacking." Crashworthiness and crash avoidance have nothing to do with CAN bus security. A commitment to testing safety technologies in the future, made 18 months after plaintiff's purchasing decision, has no bearing on the features or characteristics of plaintiff's own vehicle or his choice of car. Because plaintiff fails to allege reliance, much less reasonable and justifiable reliance, his fraud-based claims should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court dismissing all claims against GM.

STATEMENT OF RELATED CASES

Appellee GM and its counsel know of no related cases pending in this Court.

Respectfully submitted,

September 28, 2016

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B), because this brief contains 12,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The "Word Count" function of Microsoft Word 2010 was used for this purpose.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk for the United States Court of Appeals for the Ninth Circuit by the appellate CM/ECF system on September 28, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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