JAMES F. MCCABE (SBN 104686)
JMcCabe@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

BRYAN WILSON (SBN 138842)
BWilson@mofo.com
TERESA N. BURLISON (SBN 230854)
TBurlison@mofo.com
MORRISON & FOERSTER LLP
755 Page Mill Road
Palo Alto, California 94304-1018
Telephone: 650.813.5600
Facsimile: 650.494.0792

Attorneys for Defendant
APPLE INC.

MICHAEL L. CHARLSON (Bar No. 122125)
michael.charlson@hoganlovells.com
MAREN J. CLOUSE (Bar No. 228726)
maren.clouse@hoganlovells.com
HOGAN LOVELLS US LLP
525 University Avenue, 4th Floor
Palo Alto, California 94301
Telephone: 650.463.4000
Facsimile: 650.463.4199

CHRISTOPHER WOLF (Admitted *Pro Hac Vice*)
christopher.wolf@hoganlovells.com
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: 202.637.5600
Facsimile: 202.637.5910

CLAYTON C. JAMES (Admitted *Pro Hac Vice*)
clay.james@hoganlovells.com
HOGAN LOVELLS US LLP
One Tabor Center, Suite 1500
1200 Seventeenth Street
Denver, Colorado 80202
Telephone: 303.899.7300
Facsimile: 303.899.7333

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re iPhone Application Litigation

Case No. CV-10-5878 LHK (PSG)

DEFENDANT APPLE INC.'S MOTION TO DISMISS PLAINTIFFS' FIRST CONSOLIDATED CLASS ACTION COMPLAINT PURSUANT TO RULES 12(b)(1), 12(b)(6) AND 12(b)(7)

Date: September 1, 2011
Time: 1:30 p.m.
Ctrm: 4, 5th Floor
Judge: Honorable Lucy H. Koh

NOTICE OF MOTION AND MOTION TO DISMISS

FIRST CONSOLIDATED CLASS ACTION COMPLAINT

PLEASE TAKE NOTICE THAT at 1:30 p.m. on September 1, 2011, or as soon thereafter as the matter may be heard by the Court, in the Courtroom of the Honorable Lucy H. Koh, located at the Robert F. Peckham Federal Building, 280 South First Street, Fifth Floor, San Jose, California, Defendant Apple Inc., through its attorneys of record, will, and hereby does, move the Court for an order dismissing Plaintiffs' First Consolidated Class Action Complaint under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(b)(7) with prejudice.

This Motion is based upon this Notice; the attached Memorandum of Points and Authorities; the accompanying Declaration of James F. McCabe and the exhibits thereto; the complete files and records of this action, the arguments of counsel, and such other matters that the Court properly may consider.

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1. Whether Plaintiffs lack Article III standing;
2. Whether Plaintiffs' agreements with Apple bar Plaintiffs' claims;
3. Whether Plaintiffs fail to state any claim for which relief can be granted; and
4. Whether Plaintiffs fail to join necessary and indispensible parties.

I. INTRODUCTION

This case against Apple Inc. ("Apple") purports to be about the misuse of consumer information, yet Plaintiffs nowhere allege that *Apple* misused any consumer information. Rather, Plaintiffs seek to make Apple the guarantor of the practices of 85,000 third parties from whom consumers license more than 425,000 applications[1] they freely choose to install on Apple mobile devices ("iOS Devices"). Furthermore, Plaintiffs have filed suit against Apple and others notwithstanding the fact that they have suffered no injury, and hence have no standing.

In December 2010, a report appeared in the press asserting that six specific third-party applications ("apps") that run on iOS Devices collected and made use of device-specific data without the device user's consent. Only the app developers, not Apple, were reported to have collected and used such information. No actual harm to any mobile device or mobile device user was reported then, and none has been reported since.

Starting within weeks and continuing until May 10, 2011, Plaintiffs filed seven putative class actions in this Court alleging that 13 named app developer defendants communicated device data to third party advertisers and analytics companies without the user's consent. After the customary scuffle among the lawyers purporting to represent classes, the Court ordered that four of the cases be consolidated,[2] and that a consolidated complaint be filed. (Order Adopting

[1] "There are several hundred thousand third-party apps available at the App Store." (Consolidated Complaint (Doc. 71) ("Comp.") ¶ 39.)

[2] These four cases were: *Lalo v. Apple Inc. et. al.*, CV-10-5878-LHK; *Freeman, et. al. v. Apple Inc. et. al.*, CV-10-5881-LHK; *Chiu v. Apple Inc. et. al.*, CV-11-0407-LHK and *Rodimer v. Apple Inc., et. al.*, CV-11-0700-PSG.

Stipulation to Consolidate Related Cases (Doc. 36).) However, the consolidated complaint omits the app developers entirely, the very parties Plaintiffs claim communicated device data without consent. Furthermore, the consolidated complaint is hopelessly vague: it fails to state which app or apps any plaintiff used, whether the apps included disclosures about data collection and the nature of those disclosures, what information the app developer collected or communicated, or to whom that information was communicated. It purports to state claims on behalf of all users of iOS Devices who have in the last two and one half years downloaded from Apple's App Store any of the more than 425,000 apps available there. No limitation to apps that collect data. No limitation to (let alone assertion of liability against) app developers alleged to acquire information without consent. No limitation to apps that transmit data to mobile industry companies in violation of the license agreements and consents related to such apps.

Furthermore, the consolidated complaint does not allege facts establishing the "injury-in-fact" required for this Court to have subject matter jurisdiction. Plaintiffs do not allege – nor could they – that the defendants' supposed knowledge of information from Plaintiffs' iOS Devices damaged those devices. Nor do Plaintiffs claim that such knowledge resulted in identity theft or any other harm – Plaintiffs' or any one else's. The *possibility* that an advertising or analytics company *might* in the future use information in a way that *could* harm Plaintiffs does not constitute "injury-in-fact." In the absence of "injury-in-fact," Plaintiffs lack standing, and the Court has no jurisdiction.

Even if it could be said that Plaintiffs have alleged "injury-in-fact," the complaint should still be dismissed: numerous contracts to which Plaintiffs agreed disclaim any liability against Apple for the conduct of third parties, including the app developers and advertising and analytics companies with which the app developers do business.

In addition, Plaintiffs fail adequately to allege one or more elements of each of the asserted claims. For example, the negligence claim fails adequately to allege duty or compensable damage, the Computer Fraud and Abuse Act and California Penal Code Section 502 claims fail adequately to allege Apple's unauthorized access to Plaintiffs' devices, and the

California Unfair Competition Law claim fails adequately to allege any loss of "money or property" as a result of Apple's alleged conduct.

Moreover, by overreaching to encompass all apps available in the App Store, Plaintiffs have implicated the interests of 85,000 app developers, making them necessary parties to the litigation. The sheer number of such necessary parties makes their joinder infeasible. Since Plaintiffs have adequate alternatives to filing a grossly overblown case, this complaint should be dismissed.

II. ALLEGATIONS OF THE CONSOLIDATED COMPLAINT

As to their personal connection to the allegations of the complaint, Plaintiffs allege only that they "use mobile devices manufactured by [Apple] that operate using Apple's proprietary operating system, iOS" (Comp., ¶ 8), and that each plaintiff "downloaded and used numerous free and paid apps from the App Store." (*Id.* ¶ 9 (Lalo); ¶ 10 (Freeman); ¶ 11 (Chiu); ¶ 12 (Rodimer); ¶ 13 (Parsley).) The complaint does not identify even a single app allegedly downloaded by any plaintiff or the developer of any app downloaded by any plaintiff.

The thrust of most of Plaintiffs' claims is that the "Tracking Defendants" (hereinafter referred to as "Mobile Industry Defendants") are alleged to have obtained personal information about Plaintiffs without their consent. However, Plaintiffs do not allege any direct relationship whatsoever between Apple and the Mobile Industry Defendants. Instead, the complaint focuses on the Mobile Industry Defendants' ties to the absent app developers, alleging that the Mobile Industry Defendants acquire information from them, *not* from Apple: "the [Mobile Industry Defendants], ***through the apps [developers] with whom they had entered into relationships and to whom they had provided code,*** have continued to acquire details about consumers and to track consumers on an ongoing basis . . ." (*Id.* ¶ 67) (emphasis added). The conduit for device information is alleged to be the app: "When users download and install **the apps** on their iDevices, the [Mobile Industry Defendants'] code accesses personal information on those devices . . ." (*Id.* ¶ 63) (emphasis added). Further, "[s]ome [Mobile Industry Defendants] pay app developers to include code that causes banner ads to be displayed when users run the apps." (*Id.* ¶ 64) (emphasis added).

The complaint repeatedly asserts the legal conclusion that Apple is "jointly and severally liable" for the alleged conduct of the Mobile Industry Defendants. (*Id.* ¶ 133 (Computer Fraud and Abuse Act); ¶ 157 (Cal. Penal Code § 502); ¶ 178 (Trespass to Chattels); ¶ 195 (California Unfair Competition Law). However, Plaintiffs provide no factual allegations that might support holding Apple liable for the Mobile Industry Defendants' conduct. The only factual allegation even remotely linking Apple and mobile industry companies (not the Mobile Industry Defendants specifically) is that Apple "designs its mobile devices to be readily accessible to ad networks and Internet metrics companies to track consumers and access their personal information." (*Id.* ¶ 6.)

As for Apple's *own* conduct, Plaintiffs allege that Apple designed the iOS, and that Apple runs the App Store, exercising some control over the subject matter and code content of the apps sold there. (*Id.* ¶¶ 1-7, 26-60, 65-66, 70-73.) Plaintiffs also allege that Apple has a privacy policy, and that the Mobile Industry Defendants' alleged receipt of device information violates that policy. (*Id.* ¶ 197.) However, Plaintiffs do not allege that a violation of Apple's privacy policy amounts to the violation of any law.

The Complaint refers to, but does not quote, several agreements that are material to the case.[3] Plaintiffs state that only "iDevices" – which they define as "mobile devices . . . that operate using the . . . operating system software known as iOS" (*id.* ¶ 32) – may be licensed to use its iOS software. (*Id.* ¶ 27.) The iOS Software License Agreements ("User SLAs") for the iPad, iPod touch and iPhone devices are attached as Exhibits A, B, C, D and E to the Declaration of James F. McCabe ("McCabe Decl.") filed herewith. As more fully described below, each of the User SLAs provides that *Apple does not "warrant or endorse and [does] not assume and will not have any liability or responsibility" to customers or any person for third-party services or materials.* (*Id.*, Exs. A-E at ¶ 5(c) (emphasis added)). Plaintiffs also allege that "[a]pps may only be obtained from Apple's App Store" (Comp., ¶ 32), refer to "a click-through agreement required

[3] In ruling on a motion to dismiss, the Court may consider documents specifically referred to in the complaint and whose authenticity no party questions, even if the documents are not physically attached to the complaint. *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002); *see also Rubio v. Capital One Bank*, 613 F.3d 1195, 1199 (9th Cir. 2010).

to create a user App Store account," (*id*. ¶ 36) and claim that the Mobile Industry Defendants' activities "were in conflict with the privacy policies and/or terms of use of the Apple App [S]tore." (*Id.* ¶ 77.) These references are to the App Store Terms of Service, a copy of which is attached as Exhibit F to the McCabe Declaration. As described more fully below, the App Store Terms of Service specifically state that *"Apple does not warrant and will not have any liability or responsibility for any third-party materials or websites."* (McCabe Decl., Ex. F, Section C, "Third Party Materials" at p. 10 (emphasis added).) Plaintiffs also purport to describe substantive terms of Apple's Privacy Policy. (Comp., ¶ 197.) A copy of Apple's Privacy Policy is attached as Exhibit G to the McCabe Declaration. That policy provides, in part, that "*Information collected by third parties, which may include such things as location data or contact details, is governed by their privacy practices*." (*Id.* at 3 (emphasis added).)

III. LEGAL STANDARDS

A. Standing and Rule 12(b)(1)

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court there-fore lacks subject matter jurisdiction over the suit." *Cetacean Cmty v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004), *citing Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998). Since a challenge to standing is a challenge to the Court's subject matter jurisdiction, it is "properly raised in a motion under Federal Rule of Civil Procedure 12(b)(1)." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

The burden is on the plaintiff "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *United States v. Hays*, 515 U.S. 737, 743 (1995) (citations omitted). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) he has suffered an 'injury-in-fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Congress lacks the power to enact statutes conferring jurisdiction on a district court in the absence

of Article III standing." *Cetacean Cmty*, 386 F.3d at 1174–75.[4] The allegation of a statelaw claim, without more, does not establish injury-in-fact. *See Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) ("[A] plaintiff whose [unfair business practices] 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" for Article III purposes).

The fact that Plaintiffs claim to represent a class does not alter their burden to establish individual standing and to plead adequately individual claims. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)). A class action must be dismissed unless at least one named plaintiff can establish the requisite case or controversy. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003). Similarly, a named plaintiff's claim must be dismissed if the plaintiff fails to allege facts supporting his own claim; it is insufficient to allege that some member of the class, other than the plaintiff, has the claim. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) (stating that, in order to satisfy Article III, "the plaintiff . . . must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.").

On a motion to dismiss for lack of standing, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the court from evaluating for itself the merits of jurisdictional claims." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

[4] "Absent injury, a violation of a statute gives rise merely to a generalized grievance but not to standing." *Waste Mgmt. of N. Am., Inc. v. Weinberger*, 862 F.2d 1393, 1397-98 (9th Cir. 1988) (internal citations omitted).

B. Rule 8 and Rule 12(b)(6)

The United States Supreme Court has, over the last several years, clarified Rule 8's requirement that a complaint set out "a short and plain statement showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* and *Iqbal* require a two-step analysis. *See Iqbal*, 129 S. Ct. at 1949. *First*, a court must consider only the factual allegations of the complaint − neither its legal conclusions nor its bare recitation of the elements of a claim − in determining whether the plaintiff has made a plain statement of the grounds of her entitlement to relief. *See* Fed R. Civ. P. 8(a)(2); *Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"); *Iqbal*, 129 S. Ct. at 1949 (providing Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). However, a court need not accept as true "allegations that contradict matter properly subject to judicial notice or by exhibit" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.,* 536 F.3d 1049, 1055 (9th Cir. 2008). *Second*, if the plaintiff has alleged sufficient facts to bear out the elements of the claim, the Court must then consider whether the adequately pleaded facts state a "plausible," rather than a merely "possible" claim. *See Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 555.

A court may resolve a contract claim on a motion to dismiss if the terms of the contract are unambiguous. *See Bedrosian v. Tenet Healthcare Corp.,* 208 F.3d 220, at *1 (9th Cir. 2000).

C. Rule 9(b)'s Heightened Standard

Federal Rule of Civil Procedure 9(b) imposes a heightened pleading standard on allegations of fraud: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R.Civ. P. 9(b). When allegations sound in fraud, plaintiffs must plead the "who, what, when, where and how" of the alleged misconduct, including particular misrepresentations on which they supposedly relied. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-26 (9th Cir. 2009). Plaintiffs' claims for alleged violations of the following statutes sound in fraud and are subject to

Rule 9(b): the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq*. ("CLRA"); and the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq* ("UCL"). *See Kearns*, 567 F.3d at 1125-26 (Rule 9(b) applies to CLRA and UCL claims that "allege a unified course of fraudulent conduct" and therefore sound in fraud); *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2010 U.S. Dist. LEXIS 106600, at *13-15 (N.D. Cal. Oct. 5, 2010) (citing *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 997, 1004 (N.D. Cal. 2009) and holding CLRA and UCL claims are subject to the Rule 9(b) pleading requirements when fraud is alleged).

D. Rule 19 and Rule 12(b)(7)

Federal Rule of Civil Procedure 12(b)(7) authorizes the Court to dismiss an action if a plaintiff has failed "to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7); *see also Shropshire D/B/A Elmo Publ'g v. Canning*, Case No. 10-CV-01941, 2011 U.S. Dist. LEXIS 4025, at *19-20 (N.D. Cal. Jan. 11, 2011) (Koh, J.) (dismissing complaint for, among other things, failure to join necessary and indispensible parties). Rule 19(a) provides, *inter alia*, that a person "must be joined as a party" if "in that person's absence, the court cannot accord complete relief among existing parties." *Elmo Pub'g*, 2011 U.S. Dist. LEXIS 4025, at *19 (quoting Fed. R. Civ. P. 19(a).) In determining whether a party is "necessary" under Rule 19(a), a court must also consider whether the absent party has a "legally protected interest in the subject of the suit." *Id.* at *20 (quoting *Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992). If the required person cannot be joined, then "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id*. (quoting Fed. R. Civ. P. 19(b).) The Rule 19 inquiry is "fact specific," and the party seeking dismissal has the burden of persuasion. *See id.* (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).)

IV. PLAINTIFFS' LACK OF STANDING COMPELS DISMISSAL UNDER RULE 12(B)(1).

Plaintiffs fail adequately to plead two essential elements of Article III standing: (i) a concrete and particularized injury-in-fact (ii) that is fairly traceable to the alleged actions of

Apple. *See Lujan*, 504 U.S. at 560-61. The Court therefore lacks subject matter jurisdiction over this action, and it must be dismissed pursuant to Rule 12(b)(1).

A. Plaintiffs Fail to Allege Concrete, Particularized Injuries-In-Fact.

To assess whether Plaintiffs have adequately alleged standing, the Court must separate Plaintiffs' allegations as to their own claims from their allegations as to others, *Warth,* 422 U.S. at 499, exclude "labels and conclusions . . . [and] formulaic recitation[s] of the elements of a cause of action," *Twombly,* 550 U.S. at 555, and, as to the remaining allegations, consider whether they establish a "plausible" basis for standing. *See Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 555.

Plaintiffs' allegations as to *themselves* are that they use iOS Devices running iOS (Comp., ¶ 8), that they downloaded apps from the App Store (*id.* ¶¶ 8-13), that they consider certain information on their iOS Devices to be confidential (*id.* ¶¶ 74, 79-80), and that they have not expected, received notice of, or consented to its collection. (*Id.* ¶¶ 76.) Plaintiffs also make conclusory allegations that the Mobile Industry Defendants misappropriated or diminished the value of their "personal"[5] information (*id.* ¶¶ 84, 93-94). But the allegations about the actual collection of information, its value, and pricing of apps are made only on behalf of "*consumers*" and "*users*" generally (*id.* ¶¶ 61-68-72, 75, 81, 85-92), not the named plaintiffs. Plaintiffs allege that these practices were visited upon someone, but they do not allege that they were visited upon *Plaintiffs*. And they allege that users were injured – but never claim that they themselves were injured. In addition, Plaintiffs' two theories of injury – misappropriation of information and diminution of its value – is predicated on the Mobile Industry Defendants' receipt of information, yet they nowhere allege that any of these defendants received their personal information. Plaintiffs therefore fail to allege injury to themselves. *See Birdsong v. Apple Inc.,* 590 F.3d 955, 960-61 (9th Cir. 2009) (plaintiffs fail to allege Article III injury where "the plaintiffs plead a

[5] Apple does not concede that any information found on any iOS Device is "personal" to the device user. For example, each iOS Device has a unique device identifier ("UDID"), akin to a serial number. (Comp., ¶ 58(i)). A UDID is no more personal to an iPhone user than a VIN number is to the driver of an automobile.

potential risk of hearing loss not to themselves, but to other unidentified iPod users who might *choose* to use their iPods in an unsafe manner.") (emphasis in original). Thus, the allegations of Plaintiffs' actual experience do not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal,* 129 S. Ct. at 1949 (*quoting Twombly,* 550 U.S. at 570).

Judge Wu, in the Central District of California, recently held that plaintiffs making allegations very similar to those here failed to establish Article III standing. *See LaCourt v. Specific Media, Inc.*, No. SACV-10-1256-GW (JCGx), 2011 U.S. Dist. LEXIS 50543, at *7-10 (C.D. Cal. Apr. 28, 2011). In *Specific Media*, the plaintiffs accused an online third party ad network, Specific Media, of installing on their computers "Flash Cookies" to circumvent internet user privacy controls and track internet use without user knowledge or consent. *See id.* at *2-3. As here, the *Specific Media* plaintiffs described the defendant's practices in general terms and failed to allege that Specific Media ever actually tracked the named plaintiffs. *See Id.* at *8. Also, as here, the *Specific Media* plaintiffs failed to allege that they ascribed any value to their "personal" information. *See Id.* at *12. Further, like the consolidated complaint, the plaintiffs in *Specific Media* alleged as "injury" theoretical postulations as to loss of the value of information about their browsing history, but failed to offer any "particularized example" of the application of such concepts to the plaintiffs. *Id.* at *11-12. The court did not credit those conclusory allegations: "Plaintiffs do not explain how they were 'deprived' of the economic value of their personal information simply because their unspecified personal information was purportedly collected by a third party." *Id.* at *12. The court concluded that the *Specific Media* plaintiffs had not adequately alleged a factual basis for Article III standing. *Id.* at *15, 21.

Even if Plaintiffs had adequately alleged that a Mobile Industry Defendant had acquired information from any of the Plaintiffs' devices – which they did not – that allegation does not establish an "economic loss" sufficient to create an injury-in-fact. *See In re Doubleclick, Inc., Privacy Litig.*, 154 F. Supp. 2d 497, 525 (S.D.N.Y. 2001) (granting Rule 12(b)(6) motion to dismiss CFAA claim against online advertiser accused of using "cookies" to collect user data for lack of damages because while "demographic information is valued highly . . . the value of its

collection has never been considered an economic loss to its subject."); *see also In re JetBlue Airways Corp., Privacy Litig.*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005) (finding airline's disclosure of passenger data to third party in violation of airline's privacy policy had no compensable value). While the court in *Specific Media* did not reach this specific issue, it signaled approval of *Doubleclick. Specific Media*, 2011 U.S. Dist. LEXIS 505043 at *14 (stating *Doubleclick's* reasoning "suggests that the question of Plaintiffs' ability to allege standing is a serious one . . .").

Plaintiffs have not, and cannot, assert a "concrete and particularized" injury-in-fact to satisfy the gateway requirement of constitutional standing. *See Lujan*, 504 U.S. at 560. Their claims therefore should be dismissed, as the Court lacks subject matter jurisdiction.

B. Plaintiffs Fail to Allege Injury Fairly Traceable to Apple.

Beyond their failure as to injury-in-fact, Plaintiffs have not alleged any causal connection between Apple and the purported injury of having user personal data devalued. *See Lujan*, 504 U.S. at 560-61 (citations omitted). This is fatal to their claims. To establish standing, the alleged injury must be "fairly . . . trace[able] to the challenged action of the defendant, *and not . . . the result [of] the independent action of some third party not before the court*." *Id.* (citations omitted) (emphasis added).

As noted, the only injury alleged by Plaintiffs is the wrongful acquisition of information from their iOS Devices, which is alleged either to have conferred a benefit on the Mobile Industry Defendants (Comp., ¶ 94) or to have devalued Plaintiffs' personal information. (*Id.* ¶ 93.) Plaintiffs do *not* allege that Apple acquired or transferred such information; they allege only that unnamed app developers and the Mobile Industry Defendants worked together to collect it using apps. Apple's only purported role in the allegedly improper transfer of information is that it allegedly "designed" a platform in which the Mobile Industry Defendants and the absent app developers can engage in harmful acts. (*Id.* ¶¶ 58, 61, 67.) The Complaint also contains some conclusory allegations about Apple's platform causing "users' iDevices to maintain, synchronize, and retain detailed, unencrypted location history files." (*Id.* ¶¶ 125, 140.) Yet nothing in the complaint ever articulates a nexus between the design of Apple's platform (or the information it

supposedly caches) and the alleged misappropriation of or devaluation of personal data. Plaintiffs thus have not met their burden of proving that the purported injury-in-fact is "fairly . . . trace[able] to the challenged action of [Apple]." *Lujan*, 504 U.S. at 560-61. For this independent reason, the complaint should be dismissed under Rule 12(b)(1).

V. PLAINTIFFS' AGREEMENTS WITH APPLE BAR THEIR CLAIMS.

Dismissal of the case under Rule 12(b)(1) would end the Court's inquiry. Should the Court find that Plaintiffs have alleged an injury-in-fact that is fairly traceable to Apple, the Court must consider whether Plaintiffs have adequately alleged facts supporting each element of the pleaded claims. The plaintiffs have acknowledged through their allegations the existence of several agreements between themselves and Apple, and the Court properly may consider those agreements on a motion to dismiss. *See Rubio,* 613 F.3d at 1199; *In re Gilead Scis. Sec. Litig.,* 536 F.3d at 1055. The Court should dismiss all claims against Apple with prejudice.

All of Plaintiffs' claims against Apple are based on one of two footings, *either* the Mobile Industry Defendants' receipt and use of device information through the operation of apps, *or* Apple's design of iOS. Claims of the first type are unambiguously barred by the App Store Terms of Service. Claims of the second type are unambiguously barred by the User SLAs applicable to various iOS Devices.

Plaintiffs seek to hold Apple liable on the first type of claim because Apple allegedly failed to prevent app developers and Mobile Industry Defendants from transferring device information without adequate consent. Plaintiffs allege that iOS Device apps are only available through Apple's App Store (Comp., ¶ 35), and that Apple requires that apps meet certain guidelines before being made available through the App Store. (*Id.* ¶ 38.) Plaintiffs seek to imply from Apple's maintenance of the App Store and app developer guidelines a generalized warranty of unimpeachable developer and third party conduct in the operation of all of the 425,000 apps available there. However, the App Store Terms of Service unambiguously disclaim *any* such warranty: Under the heading "THIRD-PARTY MATERIALS," the agreement states:

> You agree that Apple is not responsible for examining or evaluating the content or accuracy and ***Apple*** *does not warrant and* ***will not have any liability or responsibility for***

> ***any third-party materials or website*s, *or for any other materials, products, or services of third parties.***

(McCabe Decl., Ex. F at p. 10) (emphasis added). Plaintiffs agreed, when creating an App Store user account (Comp., ¶ 36), that Apple would have no liability for apps, developed by others, that Plaintiffs might later choose to install. This does not leave Plaintiffs without a remedy, though, since the agreement continues:

> ***The Application Provider of each Third-Party Product is solely responsible for that Third-Party Product,*** the content therein, any warranties to the extent such warranties have not been disclaimed, ***and any claims that you or any other party may have relating to that Third-Party Product.***

(McCabe Decl., Ex. F, "License of Mac App Store and App Store Products," at p.12) (emphasis added). Simply put, if Plaintiffs do not like what their third party app does, they can sue the third-party app developer. Apple is not even *partially* responsible for the app developer's conduct: "***[t]he Application Provider . . . is solely responsible.***" (*Id*.)

In service of their first theory, Plaintiffs selectively quote the privacy policy section of the App Store Terms of Service to suggest that Apple has a duty to guarantee that app developers and companies with whom they do business will not misuse information about App Store users. (Comp., ¶ 36.) While Plaintiffs allude to the iOS software license agreements (Comp., ¶¶ 2, 27, 110), Plaintiffs fail to disclose that those agreements specifically advise iOS Device users that third party services, such as apps, may collect information, and thus such collection is governed by the *third party's* privacy policy. (McCabe Decl., Exs. A-E, §4(b)) Plaintiffs also fail to note the disclaimer of liability found in the App Store agreement:

> APPLE SHALL USE REASONABLE EFFORTS TO PROTECT INFORMATION SUBMITTED BY YOU IN CONNECTION WITH THE [APP STORE] SERVICE[S], BUT *YOU AGREE THAT* ***YOUR SUBMISSION OF SUCH INFORMATION IS AT YOUR SOLE RISK***, AND ***APPLE HEREBY DISCLAIMS ANY AND ALL LIABILITY TO YOU*** **FOR ANY LOSS OR LIABILITY RELATING TO SUCH INFORMATION IN ANY WAY**.

(McCabe Decl., Ex. F, "Disclaimer of Warranties; Liability Limitations", at p. 11) (emphasis added). All of Plaintiffs' injuries are alleged to arise from the further dissemination of information Plaintiffs submitted to app developers through their iOS Devices. Those claims are

entirely foreclosed by Plaintiffs' agreement, made in connection with establishing their App Store accounts, that Apple would have no liability related to submitted information or for third party conduct.

As to Plaintiffs' claims based on the design of iOS (leaving device information "accessible" to apps (Comp., ¶ 117) and maintaining a cache of location data (*id.*, ¶¶ 58(d), 117, 125,140)), those are barred by the iOS software license agreements. iOS users agree that they use iOS at their "SOLE RISK". (McCabe Decl., Exs. A-E, §7.2.) Furthermore, the User SLAs disclaim all warranties as to the software, express or implied, (*Id.*, § 7.3) and specifically disclaim that the software will be error free. (*Id.*, §7.4.) Both the App Store Terms of Service and the User SLAs limit Apple's liability for "damages . . . arising out of or related to [the user's] use of the [iOS Device] software, however caused, regardless of the theory of liability (contract, tort, or otherwise), and even if Apple has been advised of the possibility of such damages." (McCabe Decl., Exs. A-E, §8; *See also* Ex. F, p. 11.)

Because each of the theories of liability that Plaintiffs seek to assert against Apple is barred by Plaintiffs' agreements with Apple, the complaint should be dismissed as to Apple with prejudice.

VI. PLAINTIFFS FAIL TO STATE CLAIMS FOR ADDITIONAL CLAIM-SPECIFIC REASONS.

The Court may dismiss the case in its entirety on either of the two grounds described above (*viz*, lack of Article III standing and/or Apple's agreements barring Plaintiffs' claims), or on the basis of Plaintiffs' failure to join indispensible parties, discussed below at Section VI. In addition to these "case-wide" bases for dismissal, there are claim-specific defects as well. These independently require dismissal of the claim for failure to state a claim.

A. Plaintiffs Fail to State a Claim Against Apple for Negligence.

While Plaintiffs do not allege which law governs their tort claims, California law as to negligence is conventional. "The elements of a cause of action for negligence are well established. They are '(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury.'" *Ladd v. Cnty. of San Mateo*,

12 Cal. 4th 913, 917 (1996) (quoting *Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828, 834 (1992) (italics in original).

Here, Plaintiffs make only the conclusory allegation that "Apple owed a duty to Plaintiffs." (Comp., ¶ 114.) This conclusion is not supported by any allegation of fact. Indeed, the suggestion of a duty of care seems to be grounded on relationships between Apple and its customers that are explicitly governed by *contracts* that explicitly *disclaim* the sort of duty Plaintiffs seek to assert. Tort law may not be used to supplant private contractual agreements: the failure to perform a contractual duty is never a tort, unless that failure involves an independent legal duty. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514-15 (1994).

In addition, the complaint fails to allege either breach of a duty or causation of harm. As noted above, the complaint contains no allegation that any information from any of Plaintiffs' iOS Devices was communicated to anyone, much less that Apple caused any such communication.

Plaintiffs also do not adequately allege injury. An "appreciable, nonspeculative, present injury is an essential element of a tort cause of action." *Aas v. Super. Ct.*, 24 Cal. 4th 627, 646 (2000), *superseded by statute on other grounds as stated in Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070, 1079-80 (2003); s*ee also Duarte v. Zachariah*, 22 Cal. App. 4th 1652, 1661-62 (1994) (actual damage in "the sense of 'harm' is necessary to a cause of action in negligence; nominal damages are not awarded"). Allegations of "some future, anticipated harm" from an electronic breach of user data and the resulting potential for identity theft are insufficient to state a negligence claim. *See Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 638-40 (7th Cir. 2007); *see also Stollenwerk v. Tri-West Health Care Alliance*, 254 Fed. Appx. 664 (9th Cir. 2007) (dismissing claim where plaintiffs alleged only risk of identity theft); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060 (RMB) (RLE), 2010 WL 2643307, at *1 (S.D.N.Y. June 25, 2010) (collecting cases rejecting argument that threat of identity theft is enough to defeat a dispositive motion).

What is more, the type of vague "injury" alluded to in the complaint is not a type compensable on a claim of negligence, since Plaintiffs do not allege damage to property. *See Jimenez v. Super. Ct.*, 29 Cal. 4th 473, 483 (2002) (citing *Aas*, 24 Cal. 4th at 636 ("In actions for

negligence, a manufacturer's liability is limited to damages for physical injur[y]; no recovery is allowed economic loss alone.").

The complaint thus fails to state a claim against Apple for negligence.

B. Plaintiffs Fail To State A Claim Against Apple for Breach of the Covenant of Good Faith and Fair Dealing.

In their Seventh Cause of Action, Plaintiffs refer to Apple's Privacy Policy and App Store agreement and characterize them as "promises" to "protect users' privacy." (Comp., ¶ 197.) Plaintiffs further characterize the agreement as affording Apple discretion in the "protection of users' privacy." (*Id.* ¶ 201.) Plaintiffs then claim that Apple abused that discretion by "deliberately, routinely, and systematically mak[ing] Plaintiffs' personal information available to third parties." (*Id.*). In other words, Plaintiffs contend that Apple breached an *implied* term of the App Store agreement and the Privacy Policy. As shown above, though, the *express* terms of Apple's agreements with Plaintiffs (and with its users generally) disclaim liability for the information privacy practices of the app developers with whom users do business. A party cannot use the implied covenant of good faith and fair dealing to deny to another party specific contract benefits for which such party bargained. *See Kinderstart.com, LLC v. Google, Inc.*, No. C06-2057 JF (RS), 2006 WL 3246596, at *3 (N.D. Cal. July 13, 2006) (finding no violation of implied covenant where parties' website agreement disclaimed referral warranties). The complaint thus fails to state a claim for breach of the implied covenant of good faith and fair dealing.

C. Plaintiffs Fail to State a Claim Against Apple for Violation of the California Consumer Legal Remedies Act.

Plaintiffs purport to plead a claim against Apple under the CLRA (Cal. Civ. Code §§ 1750 et seq.). Plaintiffs do not link any specific conduct to the claim; they simply string together fragments of statutory language describing supposed "violations" of the Act. (Comp., ¶ 180.) The lack of specificity and truncation of the statutory language is understandable: were Plaintiffs any more specific, it would be obvious on the face of the complaint that Plaintiffs have stated no claim.

Every one of Plaintiffs' claims against Apple reduces to a complaint about software: either the software sold by app developers through the App Store or iOS 4, the operating system for iOS Devices. The complaint about the apps is that they channel some unspecified "consumer" information to unspecified Mobile Industry Defendants. The complaint about iOS 4 is that it is "designed" to allow mobile industry companies to "access" device information. But the CLRA provides civil remedies for specific conduct in the sale of "goods" or "services." Cal. Civ. Code § 1770. And, as this Court has held, software is neither a "good" nor a "service" within the meaning of the CLRA. *See Ferrington*, 2010 U.S. Dist. LEXIS 106600 at *52-58. Plaintiffs thus fail to state a CLRA claim against Apple.

D. Plaintiffs Fail To State a Claim Against Any Defendant On The Remaining Causes of Action.

Plaintiffs have asserted several causes of action against both Apple and the Mobile Industry Defendants. The Mobile Industry Defendants are filing concurrently a motion to dismiss the complaint that addresses those overlapping claims. To avoid burdening the Court with repetitive briefs, Apple joins in the Mobile Industry Defendants arguments as to (i) Plaintiffs' failure to satisfy the pleading requirements of Rule 8(a) (section V(B) of the Mobile Industry Defendants' brief ("MID Brief"); (ii) the CFAA (MID Brief, section V(C)(1)); (iii) California Penal Code §502 (MID Brief, section V(C)(2)); (iv) trespass to chattel (MID Brief, section V(C)(3)); and (v) the UCL (MID Brief, sections V(A)(2) (standing) and V(C)(4).). Given the different roles that Apple and the Mobile Industry Defendants are alleged by Plaintiffs to play, the legal analysis as to the insufficiency of the complaint differs to some degree in some instances as between Apple and the other defendants. Apple notes below those differences.

1. Plaintiffs fail to state a claim against Apple under the Computer Fraud and Abuse Act.

The Mobile Industry Defendants explain in their brief the structure and intended purposed of the Computer Fraud and Abuse Act (18 U.S.C. §§ 1030, "CFAA"), a description in which Apple joins. Apple further joins in the Mobile Industry Defendants' argument that the complaint fails to state a claim against those defendants under the CFAA since the complaint (a) is based

only on use of information, not access to a device, (b) fails adequately to allege unauthorized access to Plaintiffs' devices, (c) fails adequately to allege harm, and (d) fails adequately to allege damage in the jurisdictional amount to each of their computers. *See Specific Media,* 2011 U.S. Dist. LEXIS 50543 at *17 n.4 (statute's mention of aggregation of damage to multiple computers solely in the context of government action may imply that in private plaintiff actions, jurisdictional minimum applies on a computer-by-computer basis). Thus, even if the CFAA were to provide for joint and several liability (which its plain statutory text does not), the complaint would fail to state any basis on which Apple might be held liable for the conduct of such defendants.

As to the non-derivative CFAA claim against Apple, the complaint only alleges that "Apple's *design* of the iDevice allows application developers to build apps that can easily access . . . an unencrypted log of the user's movements . . ." (Comp., ¶¶ 58, 58(d)) (emphasis added). Plaintiffs claim that "Apple violated the CFAA in that it caused the transmission to users' iDevices, either by native installation or iOS upgrade, of code that caused users' iDevices to maintain, synchronize and retain detailed, unencrypted location history files." (Comp., ¶ 125.) In other words, Plaintiffs allege that Apple violated the CFAA in its design of the iOS operating system, and the installation of that operating system on iOS Devices.

The installation on or upgrade of iOS on user devices cannot be said to violate the CFAA: any such claim requires "unauthorized" access to a device. *See LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1132 (9th Cir. 2009). An OEM's installation of an operating system is hardly "unauthorized." In addition, Plaintiffs nowhere allege that Apple *intended*, through its iOS design, to permit unauthorized access to device information. *In re Apple & ATTM Antitrust Litig.*, No. C 07-05152 JW, 2010 U.S. Dist. LEXIS 98270, at *26 (N.D. Cal. July 8, 2010) ("Voluntary installation runs counter to the notion that the alleged act was a trespass and to CFAA's requirement that the alleged act was 'without authorization' as well as [California Penal Code § 502's] requirement that the act was 'without permission'") (citations omitted). Plaintiffs are thus limited to complaining that Apple violated that CFAA with a negligent design of the iOS. (Comp., ¶ 117.) A negligent software design, though, cannot serve as the basis for a CFAA

claim. The CFAA specifically provides that "[n]o cause of action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware." 18 U.S.C. § 1030(g).

For the reasons stated herein and in the Mobile Industry Defendants' brief, the complaint fails to state a CFAA claim against Apple.

2. Plaintiffs fail to state a claim against Apple under California Penal Code Section 502.

Once again, the Mobile Industry Defendants explain the legal standards applicable to a claim under California's Comprehensive Computer Data Access and Fraud Act, Cal. Penal Code § 502 ("Section 502"), an explanation in which Apple joins. Apple further joins in the Mobile Industry Defendants' argument that the complaint fails to state a claim against those defendants under Section 502 since the complaint (a) fails adequately to allege "damage or loss," and (b) fails adequately to allege that any defendant accessed or used the iOS Devices "without permission." Thus, even if Section 502 were to provide for joint and several civil liability (which it does not), the complaint would fail to state any basis on which Apple might be held liable for the conduct of such defendants.

As with the CFAA claim, Plaintiffs contend that Apple violated Section 502 by causing the transmission of code to users' iOS Devices "that caused users' iDevices to maintain, synchronize, and retain detailed, unencrypted location history files." (Comp., ¶ 140.) As with the CFAA claim, an OEM's installation of an operating system cannot be said to be done "without permission," an element of a violation of Section 502. *See* Cal. Penal Code § 502(c)(1)-(7); *In re Apple & ATTM Antitrust Litig.*, 2010 U.S. Dist. LEXIS 98270 at *26 ("Voluntary installation runs counter to . . . [Section 502's] requirement that the act was 'without permission.'"). Plaintiffs do not allege, nor could they, that to install iOS on their iOS Devices, Apple had to "overcome[] technical or code-based barriers." *In re Facebook Privacy Litig.*, No. C 10-02389 JW, 2011 WL 2039995, at *7-8 (N.D. Cal. May 12, 2011) (citing *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-05780-JW, 2010 WL 3291750, at *11 (N.D. Cal. July 20, 2010).)

For the reasons stated herein and in the Mobile Industry Defendants' brief, the complaint fails to state a Section 502 claim against Apple.

3. Plaintiffs fail to state a claim against Apple for common law trespass to chattels.

In their trespass to chattels claim, Plaintiffs make the same undifferentiated allegations as to all defendants. Apple joins in the Mobile Industry Defendants' argument that the complaint fails adequately to allege unauthorized interference with Plaintiffs' possessory interest in their iOS Devices and use causing damage. *See eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000). Apple also notes that when a consumer voluntarily downloads software − as Plaintiffs did here − the results of running that software on a computer device is an authorized, non-trespassing use of personal property. *See In re Apple & ATTM Antitrust Litig.*, 2010 U.S. Dist. LEXIS 98270 at *26 ("Voluntary installation runs counter to the notion that the alleged act was a trespass . . . ").

For the reasons stated herein and in the Mobile Industry Defendants' brief, the complaint fails to state a claim against Apple for trespass to chattels.

4. Plaintiffs fail to state a UCL claim against Apple.

As explained in the Mobile Industry Defendants' brief, Plaintiffs lack standing to assert a claim under the UCL, as they do not and cannot allege the loss of money or property. *See Arias v. Super. Ct.*, 46 Cal. 4th 969, 977-78 (2009) ("[A] private plaintiff may bring a representative action under this law only if that plaintiff has 'suffered injury in fact and has lost money or property as a result of such unfair competition"); *see also Birdsong,* 590 F.3d at 960 ("[P]laintiffs must show . . . that they suffered a distinct and palpable injury as a result of the alleged unlawful or unfair conduct."). Plaintiffs' allegations concern the "loss" of "personal" information. "However, personal information does not constitute property for purposes of a UCL claim." *In re Facebook Priv. Litig*, No. C 10-02389, slip op. at 11 (N.D. Cal. May 12, 2011); *In re Zynga Privacy Litig.*, C-10-04680, slip op. at 4 (N.D. Cal. June 15, 2011)(same); *Claridge v. RockYou, Inc.*, No. C 09-6032 PJH, 2011 U.S. Dist. LEXIS 39145, at *15-16 (N.D. Cal., Apr. 11, 2011) (personally identifiable information obtained by hacker not "money" or "property" and not

"lost"); *Thompson v. Home Depot, Inc.* No. C 07cv1058 IEG (WMc), 2007 U.S. Dist. LEXIS 68918, at *7-8 (S.D. Cal. Sept. 18, 2007) (personal information provided to defendant and used by defendant for marketing purposes not "money or property" under the UCL); *Cf. In re Jetblue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005) ("There is . . . no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large.").

As also explained in the Mobile Industry Defendants' brief, Plaintiffs have not plausibly alleged that Apple engaged in any unlawful business practice: Plaintiffs have failed to state a claim as to each statute invoked as a cause of action in the complaint. *See Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1190-91 (N. D. Cal. 2009) (dismissing UCL claim because court "has dismissed all of Plaintiffs' predicate violations."). Plaintiffs' attempt to invoke California Business & Professions Code section 17500 *et seq.* (the "False Advertising Law") as a predicate act for an "unlawful" UCL violation fares no better. Such claims sound in fraud, and must be pleaded with particularity. Plaintiffs simply allege that "Defendants" made "misleading statements relating to Defendants' performance of services and provision of goods" (Comp., ¶ 186), but fail to provide the particulars of even one such statement.

To state a UCL claim, a plaintiff must show that the economic injury was caused by the unfair business practice or false advertising that is the gravamen of the claim. *See In re Tobacco II Cases,* 46 Cal. 4th 298, 326 (2009). While the complaint describes with fanfare alleged representations that may have been made to *someone*, it altogether fails to describe any reliance by any *named plaintiff* on any representation whatsoever. The complaint simply does not connect the terms of Apple's Privacy Policy or purported statements to or in the media to anything that the *named plaintiffs* themselves did. Plaintiffs thus fail adequately to allege the causation element of a UCL claim. *See In re Tobacco II Cases,* 46 Cal. 4th at 306 (a plaintiff "proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements.")

VII. THE COMPLAINT FAILS TO JOIN INDISPENSIBLE PARTIES

Another separate ground for dismissing Plaintiffs' complaint is Plaintiffs' failure to join the app developers as necessary and indispensible parties. *See* Fed. R. Civ. P. 12(b)(7). Because the joinder of tens of thousands of app developers is not feasible, and any judgment rendered in the app developers' collective absence would cause them and Apple great prejudice, the Court's dismissal should be without leave to amend. *See* Fed. R. Civ. P. 19(b).

A. Joinder of the App Developers is Mandatory Under Fed. R. Civ. P. 19(a).

The app developers constitute the veritable glue that holds the plaintiffs' claims together, and the plaintiffs admitted as much by originally naming a cherry-picked few of them as defendants. While all app developers have been dropped as named defendants, the basic allegations regarding them as a group have not. In the consolidated complaint, Plaintiffs portray apps as the "conduit" through which user information flows from the iOS Devices to third party advertisers and analytics companies. (Comp., ¶71; *see also* ¶¶63-64, 66-67.) They describe no other point of access to iOS Devices or the user data resident on such devices except apps. (*Id*.) In this respect, the contributing liability of app developers is implicit. (*Id*.)

Since Plaintiffs contend apps are the only way the Mobile Industry Defendants can access iOS Devices, app developers have a legally protected interest in virtually all of Plaintiffs' claims. Specifically, Plaintiffs' negligence claim (*id.* ¶115) (referring to "privacy-violating apps"), CFAA claim (*id.* ¶122) (averring third parties accessed user data without authorization or exceeding authorization), Section 502 claim (*id.* ¶¶ 139-148) (alleging third parties "knowingly and without permission" accessed user iOS Devices), trespass to chattel claim (*id.* ¶163) (contending defendants "accessed" and "caused the installation of code" on user iOS Devices), and derivative UCL claim ((*id.* ¶¶ 183-193) (incorporating the foregoing alleged acts).

Further, because Plaintiffs seek an injunction against all defendants – including the Mobile Industry Defendants, whose only access to iOS Devices is through apps – prohibiting them from collecting or transmitting user data without consent, the Court cannot accord complete relief among the existing parties without joining the app developers. (*Id.* Demand for Relief

["DFR"] ¶¶ C(i), C(v) and (F). It is axiomatic that the flow of user data from iOS Devices to third party analytics and advertising companies cannot reasonably be addressed by any injunction that excludes the one and only "conduit" through which that data flows. As a practical matter, moreover, the requested injunction could affect the economic viability of specific apps. (Comp., ¶64 (alleging "[s]ome [Mobile Industry Defendants] pay app developers to include code that causes banner ads to be displayed when users run the apps.")

Finally, Plaintiffs concede in their complaint that Apple's policies permit app developers to collect user data that is necessary to their app's functionality. (Comp. ¶ 48.) Accordingly, if Apple is restrained as requested by the plaintiffs, the contractual right of app developers to obtain data necessary for their app's functionality will be impaired. One whose contract rights could be impaired in the resolution of the case is necessary. *See Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) (holding an attack on the terms of a negotiated agreement cannot be adjudicated without jurisdiction over the parties to that agreement.)

The app developers are necessary and indispensible parties. *See* Fed. R. Civ. P. 19(a). Their joinder therefore is mandatory under Rule 19(a). *See* Fed. R. Civ. P. 19(a)(1)(A) and (B)(i).

B. The Required Joinder of the App Developers is Not Feasible and Dismissal is Warranted under Fed. R. Civ. P. 19(b).

Joinder is not feasible, however, given the more than 85,000 app developers who have authored the apps at issue. In any action involving multiple apps, the app developer (and very likely Apple and the Mobile Industry Defendants) would have the right to defend based on the actual data practices of the app (*e.g.*, no information collected or transferred), any in-app user prompts (*e.g.*, "Velour Stylist wants to use your location information. Allow/Don't Allow."), the app-specific end user license agreement (*e.g.*, "we can collect location information"), as well as on actual expectations of app users as to device data use. *See Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 236 & n.8 (9th Cir. 1974) (stating that Rule 23 does not "foreclose the right of each defendant to assert his defenses before a jury if one is requested"); *see also Walmart Stores, Inc. v. Dukes*, No. 10-277, slip op. at 27 (U.S. June 20, 2011) (holding "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual

claims.") Issues of liability would be differentiated at the app level, as well as at the class member level. The trial of an action requiring proof of the actual data practices and in-app prompts of 425,000 apps and consideration of those apps' end user license agreements would without doubt be unmanageable. *Kline*, 508 F.2d at 236 (holding that the need for individualized treatment of 2,000 defendants rendered the action unmanageable). It is thus infeasible to join the parties necessary to resolution of the claims embraced by the complaint.

In "equity and good conscience," this action cannot proceed against the existing defendants. *See* Fed. R. Civ. P. 19(b). The factors to be considered in such a determination are the extent to which a judgment rendered in the person's absence would be prejudicial, the efficacy of protective provisions in the judgment to lessen or avoid prejudice, whether a judgment rendered in the person's absence will be adequate, and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. *See Id., see also, generally, Am. Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015 (9th Cir. 2002). The analysis here is straightforward. The first relevant factor overlaps to a large extent with the determination that the app developers are necessary parties – they have an interest in the resolution of the case that could be impaired by a judgment rendered without their participation. The fourth factor is, in these circumstances, dispositive. There is nothing that compels Plaintiffs to bring a putative class action that purports to involve every app available on the App Store. If any plaintiff has actually suffered an injury-in-fact, they can file suit against those to whom their injury is fairly traceable. Joinder of one implicated app developer would be feasible, and would be adequate to redress that plaintiff's grievance.

For the reasons discussed above, any judgment entered against Apple or the Mobile Industry Defendants in the absence of the app developers will cause unavoidable prejudice. *See id.* As a result, Rule 12(b)(7) compels complete dismissal of the plaintiffs' complaint without leave to amend.

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JAMES F. McCABE
BRYAN WILSON
TERESA BURLISON
MORRISON FOERSTER LLP

MICHAEL L. CHARLSON
MAREN J. CLOUSE
HOGAN LOVELLS US LLP

By: /s/ James F. McCabe
JAMES F. McCABE

Attorneys for Defendant
APPLE INC.