

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**United States District Court
Central District of California**

MICHAEL TERPIN,
Plaintiff,

v.
AT&T MOBILITY, LLC; AND DOES
1-25

Defendants.

Case No. 2:18-cv-06975-ODW (KSx)

ORDER GRANTING, IN PART, AND DENYING IN PART, DEFENDANT’S MOTION TO DISMISS [14]; AND DENYING DEFENDANT’S MOTION TO STRIKE [15]

I. INTRODUCTION

Defendant AT&T Mobility LLC (“AT&T”) moves to dismiss Plaintiff Michael Terpin’s (“Terpin”) Complaint. (*See generally* Mot. to Dismiss (“MTD”), ECF No. 14.) Additionally, AT&T moves to strike portions of Mr. Terpin’s Complaint. (*See generally* Mot. to Strike (“MTS”), ECF No. 15.) For the reasons that follow, the Court **GRANTS, IN PART, AND DENIES, IN PART**, Defendant’s Motion to Dismiss (ECF No. 14), and **DENIES** Defendant’s Motion to Strike (ECF No. 15).¹

¹ After carefully considering the papers filed in connection with the motions, the Court deemed the matters appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 Mr. Terpin is a prominent and well-known member of the cryptocurrency
3 community. (Compl. ¶¶ 13–14, ECF No. 1.) He is domiciled in Puerto Rico with a
4 residence in California. (Comp. ¶ 1.) On June 11, 2017, Mr. Terpin’s phone suddenly
5 became inoperable because his cell phone number had been hacked. (Compl. ¶ 64.)
6 After hackers attempted and failed eleven times to change Mr. Terpin’s AT&T
7 password in AT&T stores, the hackers were able to change his password remotely.
8 (Compl. ¶ 64.) Mr. Terpin alleges that this allowed the hackers to gain control of Mr.
9 Terpin’s phone number, which allowed them to divert his personal information,
10 including telephone calls and text messages, to gain access to his accounts that use his
11 telephone number for authentication. (Compl. ¶¶ 64–65.) The hackers used Mr.
12 Terpin’s telephone number to access his cryptocurrency accounts and also
13 impersonated him by using his Skype account. (Compl. ¶ 65.) By impersonating Mr.
14 Terpin, the hackers convinced Mr. Terpin’s client to send them cryptocurrency and
15 diverted the cryptocurrency to themselves. (Compl. ¶ 65.) Later that day, AT&T was
16 able to cutoff the hackers’ access to Mr. Terpin’s telephone number. (Compl. ¶ 65.)
17 However, by this time, the hackers had stolen substantial funds from Mr. Terpin.
18 (Compl. ¶ 65.)

19 Around June 13, 2017, Mr. Terpin met with AT&T representatives in Puerto
20 Rico to discuss the hack. (Compl. ¶ 66.) AT&T allegedly promised to place Mr.
21 Terpin’s account “on a higher security level with special protection.” (Compl. ¶ 67
22 (internal quotation marks omitted).) This included requiring a six-digit passcode
23 (known only to Mr. Terpin and his wife) of anyone attempting to access or change Mr.
24 Terpin’s account or transfer his telephone number to another phone. (Compl. ¶ 67.)

25 On Sunday, January 7, 2018, Mr. Terpin’s phone again became inoperable.
26 (Compl. ¶ 72.) Mr. Terpin eventually learned that an employee at an AT&T store in
27
28

1 Norwich, Connecticut assisted an imposter with a SIM card swap.² (Compl. ¶¶ 71–
2 72.) This resulted in AT&T transferring Mr. Terpin’s phone number to an imposter.
3 (Compl. ¶ 72.) Mr. Terpin alleges that when his phone became inoperable, he
4 attempted to contact AT&T to have his telephone number canceled, but AT&T failed
5 to promptly to cancel his account. (Compl. ¶ 73.) By having access to Mr. Terpin’s
6 phone number, Mr. Terpin alleges that “the hackers were able to intercept Mr. Terpin’s
7 personal information, including telephone calls and text messages, and gain access to
8 his cryptocurrency accounts.” (Compl. ¶ 76.) As a result, between January 7 and 8,
9 2018, Mr. Terpin alleges that the imposter stole nearly \$24 million worth of
10 cryptocurrency from him. (Compl. ¶ 72.)

11 On August 15, 2018, Mr. Terpin filed his Complaint against AT&T alleging
12 sixteen causes of action for: (1) declaratory relief that AT&T’s consumer agreement is
13 unconscionable and contrary to public policy; (2) unauthorized disclosure of customer
14 confidential proprietary information, 47 U.S.C. §§ 206, 222; (3) assisting unlawful
15 access to computer, California Penal Code section 502 *et seq.*; (4) violation of
16 California’s Unfair Competition Law (“UCL”) – unlawful business practice,
17 California Business and Professions Code section 17200 *et seq.*; (5) violation of
18 UCL – unfair business practice, California Business and Professions Code section
19 17200 *et seq.*; (6) violation of UCL – fraudulent business practice, California Business
20 and Professions Code section 17200 *et seq.*; (7) violation of California Consumer
21 Legal Remedies Act (“CLRA”), California Civil Code section 1750 *et seq.*; (8) deceit
22 by concealment, California Civil Code sections 1709, 1710; (9) misrepresentation;
23 (10) negligence; (11) negligent supervision and training; (12) negligent hiring;
24 (13) breach of contract – privacy policy; (14) breach of implied contracts (in the
25 alternative to breach of express contract); (15) breach of covenant of good faith and
26

27 ² Mr. Terpin alleges that “SIM swapping consists of tricking a provider . . . into transferring the
28 target’s phone number to a SIM card controlled by the criminal. Once they get the phone number,
fraudsters can leverage it to reset the victims’ passwords and break into their online accounts.”
(Compl. ¶ 53.)

1 fair dealing; and (16) violation of California’s Customer Records Act – inadequate
2 security, California Civil Code section 1798.81.5. (Compl. ¶¶ 80–241.)

3 As part of his allegations, Mr. Terpin alleges that on April, 8, 2015, AT&T
4 entered into a consent decree (“Consent Decree”) with the Federal Communications
5 Commission (“FCC”) to implement detailed measures to protect against unauthorized
6 disclosure of customers’ private information. (Compl. ¶¶ 4, 32.)

7 AT&T moves to dismiss Mr. Terpin’s Complaint in its entirety and strike
8 portions of the Complaint referencing the Consent Decree. (*See generally* MTD;
9 MTS.) The Court will address each in turn.

10 III. MOTION TO DISMISS

11 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
12 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
13 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). “To
14 survive a motion to dismiss . . . under Rule 12(b)(6), a complaint generally must
15 satisfy only the minimal notice pleading requirements of Rule 8(a)(2)” — a short and
16 plain statement of the claim. *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003); *see*
17 *also* Fed. R. Civ. P. 8(a)(2). The “[f]actual allegations must be enough to raise a right
18 to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
19 (2007). The “complaint must contain sufficient factual matter, accepted as true, to
20 state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662,
21 678 (2009) (internal quotation marks omitted). “A pleading that offers ‘labels and
22 conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not
23 do.’” *Id.* (citing *Twombly*, 550 U.S. at 555).

24 Whether a complaint satisfies the plausibility standard is a “context-specific
25 task that requires the reviewing court to draw on its judicial experience and common
26 sense.” *Id.* at 679. A court is generally limited to the pleadings and must construe all
27 “factual allegations set forth in the complaint . . . as true and . . . in the light most
28 favorable” to the plaintiff. *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir.

1 2001). But a court need not blindly accept conclusory allegations, unwarranted
2 deductions of fact, and unreasonable inferences. *Sprewell v. Golden State Warriors*,
3 266 F.3d 979, 988 (9th Cir. 2001). Accusations of fraud require a plaintiff to plead
4 with particularity the circumstances constituting fraud. *See* Fed. R. Civ. P. 9(b). Rule
5 9(b) requires that the complaint identify the “who, what, when, where, and how” of
6 the fraudulent activity, “as well as what is false or misleading about” it, and why it is
7 false. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047,
8 1055 (9th Cir. 2011) (internal quotation marks omitted).

9 Where a district court grants a motion to dismiss, it should generally provide
10 leave to amend unless it is clear the complaint could not be saved by any amendment.
11 *See* Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d
12 1025, 1031 (9th Cir. 2008).

13 **A. Proximate Cause**

14 AT&T moves to dismiss the Complaint in its entirety on the basis that Mr.
15 Terpin failed to sufficiently allege proximate cause for each of his claims. (MTD 4.)
16 Specifically, AT&T advances two arguments: (1) the independent, intervening
17 criminal acts of others, the hackers/imposter, destroy proximate cause; and (2) Mr.
18 Terpin failed to adequately allege how the flaws in AT&T’s security resulted in Mr.
19 Terpin’s funds being stolen. (MTD 4–6.)

20 Proximate cause “limits the defendant’s liability to those foreseeable
21 consequences that the defendant’s negligence was a substantial factor in producing.”
22 *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1342 (1998). “Ordinarily,
23 proximate cause is a question fact” *Kane v. Hartford Accident & Indem. Co.*, 98
24 Cal. App. 3d 350, 359 (1979). In California, “a criminal act will be deemed a
25 superseding cause unless it involves a particular and foreseeable hazard inflicted upon
26 a member of a foreseeable class.” *Id.* at 360. “[W]here an intervening act by a third
27 party was foreseeable, it does not amount to a superseding cause relieving the
28

1 negligent defendant of liability.” *Ileto v. Glock Inc.*, 349 F.3d 1191, 1208 (9th Cir.
2 2003).

3 At this point, taking the Complaint as true, Mr. Terpin has sufficiently alleged
4 that the criminal acts of a third party were reasonably foreseeable by AT&T. Mr.
5 Terpin alleges that he informed AT&T in June 2017 that he was the victim of a SIM
6 card swap and that AT&T placed his account on a higher security level with special
7 protection. Thus, AT&T was put on actual notice that Mr. Terpin’s account was at
8 risk. Despite this knowledge, Mr. Terpin was again the victim of a SIM card swap in
9 January 2018, allegedly as a result of AT&T’s assistance. Accordingly, at this stage,
10 Mr. Terpin has sufficiently alleged that the criminal act was reasonably foreseeable
11 such that the claim should not be dismissed on this basis.

12 Separately, AT&T contends that Mr. Terpin has not sufficiently pleaded how the
13 SIM card swap resulted in Mr. Terpin losing \$24 million. Mr. Terpin does not address
14 this issue in his Opposition. (*See generally* Opp’n to MTD, ECF No. 19.)

15 “It is a well established principle of [the common] law that in all cases of loss,
16 we are to attribute it to the proximate cause, and not to any remote cause.” *Bank of*
17 *Am. Corp. v. Miami*, 137 S. Ct. 1296, 1305 (2017) (alteration in original) (internal
18 quotation marks omitted). “Proximate cause is that cause which, in natural and
19 continuous sequence, unbroken by any efficient intervening cause, produced the injury
20 [or damage complained of] and without which such result would not have occurred.”
21 *California v. Superior Court*, 150 Cal. App. 3d 848, 857 (1984) (alteration in original)
22 (internal quotation marks omitted). The proximate cause requirement “bars suits for
23 alleged harm that is ‘too remote’ from the defendant’s unlawful conduct.” *Lexmark*
24 *Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014).

25 Mr. Terpin fails to sufficiently allege proximate cause. Mr. Terpin does not
26 connect how granting the hackers/fraudsters access to Mr. Terpin’s phone number
27 resulted in him losing \$24 million. Based on the allegations of the Complaint, Mr.
28 Terpin asserts that AT&T assisted the hackers with a SIM card swap, thus granting the

1 hackers access to Mr. Terpin’s phone number. This allegedly resulted in Mr. Terpin
2 losing \$24 million in cryptocurrency. However, Mr. Terpin does not explain how the
3 hackers accessed Mr. Terpin’s cryptocurrency account(s), whether they sold Mr.
4 Terpin’s cryptocurrency then transferred the money, or whether they transferred the
5 cryptocurrency to a cold wallet. At this stage, the Court is left to speculate how
6 having access to Mr. Terpin’s phone number resulted in the theft of cryptocurrency.

7 Mr. Terpin alleged in each of his sixteen claims (with the exception of the
8 declaratory relief claim) that AT&T’s actions resulted in him losing \$24 million worth
9 in cryptocurrency. (See Compl. ¶¶ 109, 118, 130, 142, 153, 163, 175, 181, 189, 201,
10 213, 221, 227, 233, 239.) Thus, to the extent Mr. Terpin’s claims rely on the \$24
11 million in damages, those claims are **DISMISSED with leave to amend**.

12 **B. Declaratory Relief**

13 AT&T moves to dismiss Mr. Terpin’s claim for declaratory relief on the
14 grounds that the claim is not ripe.

15 The Declaratory Judgment Act provides jurisdiction “[i]n a case of actual
16 controversy . . . [to] any court of the United States . . . [so that it] may declare the
17 rights and other legal relations of any interested party seeking such declaration,
18 whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). Declaratory
19 relief is not appropriate unless “there is a substantial controversy, between parties
20 having adverse legal interests, of sufficient immediacy and reality to warrant the
21 issuance of declaratory judgment. A case is ripe where the essential facts establishing
22 the right to declaratory relief have already occurred.” *Boeing Co v. Cascade Corp.*,
23 207 F.3d 1177, 1192 (9th Cir. 2000) (internal quotation marks omitted).

24 “A claim is not ripe for adjudication if it rests upon ‘contingent future events
25 that may not occur as anticipated, or indeed may not occur at all.’” *Texas v. United*
26 *States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods.*
27 *Co.*, 473 U.S. 568, 580–81 (1985)). Article III of the Constitution requires that there
28 exist a “case or controversy” and that the issues presented must be “definite and

1 concrete, not hypothetical or abstract” for them to be ripe for determination. *Thomas*
2 *v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (quoting *Ry.*
3 *Mail Ass’n v. Corsi*, 326 U.S. 88, 93 (1945)). However, “a litigant need not await the
4 consummation of threatened injury to obtain preventive relief. If the injury is
5 *certainly* impending, that is enough.” *Addington v. U.S. Airline Pilots Ass’n*, 606 F.3d
6 1174, 1179 (9th Cir. 2010) (internal quotation marks omitted).

7 Mr. Terpin’s claim for declaratory relief is ripe and sufficiently alleged. He
8 seeks to declare AT&T’s wireless customer agreement as unconscionable, void
9 against public policy, and unenforceable in its entirety. Mr. Terpin identifies several
10 provisions of the customer agreement with which he takes issue. Specifically, he
11 objects to the exculpatory provision that exempts AT&T from liability from its own
12 negligence, acts or omissions of a third party, or damages or injury caused by the use
13 of the device (Compl. ¶ 87); the damages restriction clause that exempts AT&T from
14 certain forms of damages (Compl. ¶ 90); the indemnity provision requiring customers
15 to indemnify AT&T for claims arising out of the services provided by AT&T (Compl.
16 ¶ 94); and the arbitration provision requiring Mr. Terpin to arbitrate his claims
17 (Compl. ¶ 97). Mr. Terpin alleges that as a result of these illegal contract provisions,
18 the entire customer agreement is unenforceable because the central purpose of the
19 agreement is tainted with illegality. (Compl. ¶ 96.)

20 There is substantial controversy between AT&T and Mr. Terpin, particularly
21 given the context of this lawsuit. AT&T and Mr. Terpin have adverse legal interests
22 of sufficient immediacy and reality to warrant a claim for declaratory judgment. The
23 terms of the wireless customer agreement are directly implicated by this lawsuit,
24 particularly the terms that Mr. Terpin has identified. The contract between Mr. Terpin
25 and AT&T, if enforceable, would potentially result in a denial Mr. Terpin’s claims
26 and/or damages, or at the very least, a transfer of his claims to arbitration. Taking the
27 allegations in the Complaint as true, Mr. Terpin has sufficiently alleged a claim for
28 declaratory relief. Accordingly, the Court finds that the claim for declaratory relief is

1 sufficiently ripe and alleged to survive a motion to dismiss.

2 **C. Unauthorized Disclosure, 47 U.S.C. §§ 206, 222 (Claim 2)**

3 AT&T moves to dismiss Mr. Terpin’s second claim for unauthorized
4 disclosure on the basis that Mr. Terpin failed to plead the claim sufficiently.
5 (MTD 8.)

6 47 U.S.C. § 222(a) provides that “[e]very telecommunications carrier has a
7 duty to protect the confidentiality of proprietary information of, and relating to
8 other telecommunication carriers, equipment manufacturers, and customers.” The
9 statute does not define proprietary information; however, as AT&T recognizes, this
10 information includes “information that is extremely personal to customers . . . such
11 as to whom, where, and when a customer places a call, as well as the types of
12 service offerings to which the customer subscribes.” *U.S. W., Inc. v. F.C.C.*, 182
13 F.3d 1224, 1235 (10th Cir. 1999) (alteration in original). 47 U.S.C. § 222 “was
14 principally intended to protect consumer’s privacy interests.” *ICG Commc’ns, Inc.*
15 *v. Allegiance Telecom*, 211 F.R.D. 610, 612 (N.D. Cal. 2002) (citing *U.S. W.*, 182
16 F.3d at 1236).

17 The FCC has interpreted proprietary information as broadly encompassing
18 “all types of information that should not be exposed widely to the public, whether
19 that information is sensitive for economic or personal privacy reasons, and that this
20 includes privileged information, trade secrets, and personally identifiable
21 information.” *In re Cox Commc’ns*, 30 FCC Rcd. 12302, 12307 (2015) (footnotes
22 omitted); *see also In re Terracom Inc. & Yourtel Am., Inc.*, 29 FCC Rcd. 13325, at
23 *6 (2014) (internal quotation marks omitted) (finding that personally identifiable
24 information can include “(1) any information that can be used to distinguish or
25 trace an individual’s identity, such as name, social security number, date and place
26 of birth, mother’s maiden name, or biometric records; and (2) any other
27 information that is linked or linkable to an individual, such as medical, educational,
28 financial, and employment information”).

1 Additionally, the statute defines customer proprietary network information
2 as “information that relates to the quantity, technical configuration, type,
3 destination, location, and amount of use of a telecommunications service
4 subscribed to by any customer of a telecommunications carrier, and that is made
5 available to the carrier by the customer solely by virtue of the carrier-customer
6 relationship.” 47 U.S.C. § 222(h)(1)(A). 47 U.S.C. § 206 holds common carriers
7 liable “for the full amount of damages sustained in consequence of any such
8 violation of the provisions of this chapter, together with a reasonable counsel or
9 attorney’s fee.”

10 Mr. Terpin alleges that AT&T disclosed both customer proprietary network
11 information and his customer proprietary information. (Compl. ¶ 115.) AT&T
12 contends that Mr. Terpin failed to adequately allege that AT&T provided any third-
13 party unauthorized access to any information covered by 47 U.S.C. § 222(a). In
14 response, Mr. Terpin points to his allegation that AT&T divulged his telephone
15 number, account information, and his private communications to hackers in the
16 January 7, 2018 SIM card swap. (Compl. ¶ 108.) Mr. Terpin further alleges that
17 “AT&T permitted hackers to access Mr. Terpin’s telephone number, telephone
18 calls, text messages and account information to steal nearly \$24,000,000 worth of
19 his cryptocurrency.” (Compl. ¶ 108.) Although Mr. Terpin has not identified any
20 information that falls within the definition of “customer proprietary network
21 information,” Mr. Terpin has sufficiently alleged that AT&T permitted
22 unauthorized access to his proprietary information, specifically his account
23 information and private communications. AT&T argues that the hackers already
24 had Mr. Terpin’s account information, which allowed the hackers to access his
25 account in the first place. However, at this stage of the proceeding, the Court must
26 accept the allegations in the Complaint as true, that AT&T divulged this
27 information to the hackers in violation of § 222(a).

28

1 Accordingly, Mr. Terpin has sufficiently alleged his second claim for
2 unauthorized disclosure.

3 **D. Extraterritoriality of California Statutory Claims (Claims 3–7 and 16)**

4 AT&T moves to dismiss Mr. Terpin’s California statutory claims (claims 3–7
5 and 16)³ on the basis that the California statutes do not apply extraterritorially.
6 (MTD 11–12.)

7 California law presumes that the legislature “did not intend the statutes of this
8 state to have force or operation beyond the boundaries of the state.” *Norwest Mortg.,*
9 *Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222 (1999). Unless the legislature
10 explicitly indicates otherwise, “if the liability-creating conduct occurs outside of
11 California, California law generally should not govern that conduct.” *Oman v. Delta*
12 *Air Lines, Inc.*, 889 F.3d 1075, 1079 (9th Cir. 2018). This includes claims under the
13 UCL and CLRA. *See Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1207 (2011) (“[T]he
14 presumption against extraterritoriality applies to the UCL in full force.”); *McKinnon v.*
15 *Dollar Thrifty Auto. Grp.*, No. 12-4457 SC, 2013 WL 791457, at *4 (N.D. Cal. Mar.
16 4, 2013) (internal quotation marks omitted) (“With regard to the UCL and CLRA,
17 non-California residents’ claims are not supported where none of the alleged
18 misconduct or injuries occurred in California.”). A plaintiff’s residence alone is not
19 sufficient to bring claims under the UCL or CLRA where the injuries occur outside of
20 California. *McKinnon*, 2013 WL 791457, at *5.

21 Mr. Terpin has not overcome the presumption against extraterritoriality. Mr.
22 Terpin argues two points: (1) he owns a residence in California; and (2) his contract
23 with AT&T is governed by California law. (Opp’n 12.) Neither points are
24 persuasive. As to Mr. Terpin’s first point, residence alone is not sufficient. *See*
25 *McKinnon*, 2013 WL 791457, at *5. Moreover, Mr. Terpin does not even allege that
26 he is a resident of California, just that he owns a residence in California. Mr. Terpin
27 does not identify any legal authority that states owning property in a given state

28 _____
³ The Court does not address the other issues that AT&T raises related to these claims.

1 results in the extraterritorial application of that state’s laws unrelated to the property.
2 Mr. Terpin is domiciled in Puerto Rico and was in Puerto Rico at the time of the
3 incidents. Further, Mr. Terpin does not allege that the hacks giving rise to this
4 Complaint occurred in California. After the first hack, Mr. Terpin met with AT&T
5 representatives in Puerto Rico. (Compl. ¶ 66.) Regarding the second hack, Mr.
6 Terpin alleges that an employee of AT&T “in Norwich, Connecticut ported over Mr.
7 Terpin’s wireless number to an imposter.” (Compl. ¶ 72.)

8 Further, Mr. Terpin’s allegation that his contract with AT&T is governed by
9 California law is also unpersuasive, notwithstanding that he seeks declaratory
10 judgment that the contract is void in its entirety. Mr. Terpin’s Complaint does not
11 allege that the contract is governed by California law, just that “Mr. Terpin obtained
12 wireless services from AT&T in Los Angeles County in or about the mid-1990’s.”
13 (Compl. ¶ 2.) However, Mr. Terpin then alleges that he “entered into a wireless
14 contract with AT&T in or about 2011.” (Compl. ¶ 81.) Thus, the Complaint is
15 unclear whether the contract at issue is one for wireless services that Mr. Terpin
16 obtained in California in the mid-1990s, or the contract entered into in 2011 at an
17 undisclosed location. As such, Mr. Terpin has not overcome the presumption against
18 extraterritoriality.

19 Because Mr. Terpin does not adequately allege that the liability-creating
20 conduct occurred in California or establish how any of his California statutory claims
21 apply extraterritorially, these claims fail. Accordingly, the Court **GRANTS** AT&T’s
22 motion to dismiss claims three through seven and sixteen, **with leave to amend**.
23 Although Mr. Terpin is given leave to amend, he should not replead these claims if he
24 cannot cure these deficiencies.

25 **E. Economic Loss Doctrine (Claims 8–12)**

26 AT&T contends that the economic loss rule bars Mr. Terpin’s tort claims
27 because his tort claims are based on the same facts as his contract-based claims.
28 (MTD 19.)

1 Generally, the economic loss rule “bars tort claims based on contract breaches.”
2 *UMG Recordings, Inc. v. Global Eagle Entm’t*, 117 F. Supp. 3d 1092, 1103 (C.D. Cal.
3 2015). In California, “[t]he economic loss rule requires a purchaser to recover in
4 contract for purely economic loss due to disappointed expectations, unless he can
5 demonstrate harm above and beyond a broken contractual promise.” *Robinson*
6 *Helicopter Co., v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004). Under the rule, a plaintiff
7 may recover in tort only where she can allege personal injury or damage to property
8 other than the product itself. *Jimenez v. Superior Court*, 29 Cal. 4th 473, 483 (2002).

9 The California Supreme Court recognized an exception to the economic loss
10 rule in *J’Aire Corporation v. Gregory*, wherein the rule does not prevent recovery in
11 tort if a special relationship exists between the plaintiff and the defendant. 24 Cal. 3d
12 799, 804 (1979). The exception applies to cases involving contracts for services
13 “where the parties are in contractual privity”. *N. Am. Chem. Co. v. Superior Court*, 59
14 Cal. App. 4th 764, 783 (1997); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*,
15 313 F. Supp. 3d 1113, 1132 (N.D. Cal. 2018). The *J’Aire* exception is available if
16 plaintiffs adequately plead a special relationship. *In re Yahoo!*, 313 F. Supp. 3d at
17 1132.

18 There is no dispute that the contract between AT&T and Mr. Terpin is one for
19 services, not goods. However, AT&T argues that the *J’Aire* exception does not apply
20 because Mr. Terpin has a contractual relationship with AT&T and is not a third party
21 to the contract. Courts have rejected this argument. *See N. Am. Chem*, 59 Cal. App.
22 4th at 783 (“Subsequent cases have extended the application of *J’Aire* to cases where
23 the parties are in contractual privity.”); *see also In re Yahoo!*, 313 F. Supp. 3d at
24 1131–32 (“Although Defendants argue that the “special relationship” exception never
25 applies when the plaintiff and the defendant are in privity . . . this Court has
26 previously rejected that argument.”). Further, as the contract here is for services,
27 AT&T’s heavy reliance on cases involving goods, as opposed to services, is
28 unpersuasive.

1 Accordingly, the issue is whether Mr. Terpin has sufficiently pleaded a special
2 relationship between AT&T and himself. Courts examine six factors to determine
3 whether a special relationship exists:

4 (1) the extent to which the transaction was intended to affect the plaintiff,
5 (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty
6 that the plaintiff suffered injury, (4) the closeness of the connection
7 between the defendant's conduct and the injury suffered, (5) the moral
8 blame attached to the defendant's conduct and (6) the policy of
preventing future harm.

9 *J'Aire*, 24 Cal. 3d at 804.

10 Although the Court finds that the *J'Aire* exception is available in this case, Mr.
11 Terpin has not sufficiently alleged that a special relationship exists. Specifically, as to
12 the second and third *J'Aire* factors, Mr. Terpin has sufficiently alleged that it was
13 foreseeable that Mr. Terpin would suffer injury if AT&T did not protect his personal
14 information, and the parties agree that Mr. Terpin adequately alleged the degree of
15 certain of his injury. (*See* Opp'n 20; Reply in Supp. of MTD ("MTD Reply") 10, ECF
16 No. 22.) However, as to the remaining *J'Aire* factors, Mr. Terpin has not adequately
17 pleaded the extent to which the transaction was intended to benefit Mr. Terpin, the
18 closeness of the connection between AT&T's conduct and the injury suffered, the
19 moral blame attached to AT&T's conduct, or the policy of preventing future harm.

20 Accordingly, the Court **GRANTS** AT&T's motion to dismiss claims eight
21 through twelve⁴ based on the economic loss rule **with leave to amend**.

22 **F. Breach of Implied Contract (Claim 14)**

23 AT&T moves to dismiss Mr. Terpin's claim for breach of implied contract on
24 the basis that he failed to sufficiently plead that the parties entered into an agreement
25 on specific terms and conditions. (MTD 20.)

26 In California, the elements of a claim for breach of an express or implied
27 contract are the same. *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508, 525 (2009). To

28 _____
⁴ Consequently, the Court does not address whether these claims are sufficiently pleaded.

1 state a claim for breach of an implied contract, a plaintiff must allege facts sufficient
2 to establish: (1) the existence of a contract; (2) performance by the plaintiff or excuse
3 for nonperformance; (3) breach by the defendant; and (4) damages. *First Commercial*
4 *Mortg. Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001). In an implied contract, the
5 existence and terms of the contract are manifested by the parties' conduct. Cal. Civ.
6 Code § 1621.

7 Mr. Terpin alleges a breach of implied contract as an alternative to his breach of
8 contract claim. (Compl. ¶ 225.) He alleges that AT&T breached the implied contracts
9 "by failing to adhere to the terms of the applicable Privacy Policy and COBC [(code
10 of business conduct)] . . . to maintain the confidentiality and security of the Personal
11 Information of Mr. Terpin." (Compl. ¶ 226.) However, Mr. Terpin fails to allege the
12 parties' conduct that form the basis of the implied contract. He offers only a
13 conclusory statement that "the opening of an AT&T wireless account by Mr. Terpin
14 created implied contracts between AT&T and Mr. Terpin." (Compl. ¶ 225.) This is
15 not sufficient to state claim for breach of implied contract.

16 Accordingly, Mr. Terpin's claim for breach of implied contract is **DISMISSED**
17 **with leave to amend.**

18 **G. Breach of Implied Covenant of Good Faith and Fair Dealing (Claim 15)**

19 AT&T moves to dismiss Mr. Terpin's claim for breach of the implied covenant
20 of good faith and fair dealing for failing to sufficiently plead the claim. (MTD 21.)

21 To state a claim for breach of an implied covenant of good faith and fair
22 dealing, the specific contractual obligation from which the implied covenant arose
23 must be alleged. *Inter-Mark USA, Inc. v. Intuit, Inc.*, 2008 WL 552482, at *6 (N.D.
24 Cal. Feb. 27, 2008). "A breach of the implied covenant of good faith and fair dealing
25 involves something beyond breach of the contractual duty itself." *Careau & Co. v.*
26 *Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1394 (1990) (internal quotation
27 marks omitted). The allegations must show "that the conduct of the defendant . . .
28 demonstrates a failure or refusal to discharge contractual responsibilities . . . by a

1 conscious and deliberate act.” *Id.* at 1395. The covenant is implied by law in every
 2 contract and supplements the express contractual obligations “to prevent a contracting
 3 party from engaging in conduct which . . . frustrates the other party’s rights to the
 4 benefits of the contract.” *Thrifty Payless, Inc. v. Americana at Brand, LLC*, 218 Cal.
 5 App. 4th 1230, 1244 (2013) (internal quotation marks omitted).

6 AT&T specifically argues that Mr. Terpin has not alleged facts beyond AT&T’s
 7 breach of the express contract. (MTD 21–22; MTD Reply 11.) As such, AT&T
 8 contends that Mr. Terpin has not alleged a separate claim for breach of the implied
 9 covenant of good faith and fair dealing. Mr. Terpin states that the “argument raises
 10 factual issues that cannot be determined on a motion to dismiss.” (Opp’n 21.) Mr.
 11 Terpin misses the point. At this point, the Court is concerned only with the
 12 allegations in the Complaint, and the Complaint fails to sufficiently allege a claim for
 13 breach of the implied covenant of good faith and fair dealing. Mr. Terpin does not
 14 allege how AT&T failed or refused to discharge their contractual responsibilities
 15 through a conscious or deliberate act to frustrate their contractual agreement. The
 16 covenant of good faith and fair dealing “cannot impose substantive duties or limits on
 17 the contracting parties beyond those incorporated in the specific terms of their
 18 agreement.” *Guz v. Bechtel Nat’l Inc.*, 24 Cal. 4th 317, 349–50 (2000). At most, Mr.
 19 Terpin alleges that AT&T failed to comply with its privacy policy and code of
 20 business conduct, but not that AT&T failed to act in good faith in doing so.

21 Accordingly, Mr. Terpin’s claim for breach of implied covenant of good faith
 22 and fair dealing is **DISMISSED with leave to amend.**⁵

23 IV. MOTION TO STRIKE

24 AT&T moves to strike portions of Mr. Terpin’s Complaint that reference the
 25 Consent Decree as irrelevant, impertinent, and immaterial. (MTS 1, 5.)

26
 27
 28 ⁵ As the Court finds that the claims on which Mr. Terpin seeks punitive damages have not been sufficiently pleaded, Mr. Terpin’s request for punitive damages is also **DISMISSED with leave to amend.**

1 Federal Rule of Civil Procedure 12(f) provides that “[t]he court may strike from
2 a pleading an insufficient defense or any redundant, immaterial, impertinent, or
3 scandalous matter.” Fed. R. Civ. P. 12(f). The decision on whether to grant a motion
4 to strike is made at the Court’s discretion. *See Fantasy, Inc. v. Fogerty*, 984 F.2d
5 1524, 1528 (9th Cir. 1993), *rev’d on other grounds in Fogerty v. Fantastic, Inc.*, 510
6 U.S. 517 (1994)). In using its discretion, the court must view the pleadings in the
7 light most favorable to the non-moving party. *In re 2TheMart.com Sec. Litig.*, 114 F.
8 Supp. 2d 955, 965 (C.D. Cal. 2000).

9 Courts may grant a motion to strike “to avoid the expenditure of time and
10 money that must arise from litigating spurious issues by dispensing with those issues
11 prior to trial” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir.
12 2010) (quoting *Fantasy*, 984 F.2d at 1527). Courts may also grant such a motion in
13 order to streamline the resolution of the action and focus the jury’s attention on the
14 real issues in the case. *See Fantasy*, 984 F.2d at 1528. Yet, motions to strike are
15 generally disfavored due to the limited role that pleadings play in federal practice, and
16 because they are often used as a delay tactic. *Cal. Dep’t of Toxic Substances Control*
17 *v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002).

18 AT&T argues that the SIM card swap is not covered by the protections of the
19 Consent Decree, and thus references to the Consent Decree are irrelevant and highly
20 prejudicial. (MTS 1, 7.) The question of whether Mr. Terpin’s allegations fall within
21 the purview of the Consent Decree is not properly before the Court on a motion to
22 strike. The issue is, in viewing the pleadings in the light most favorable to Mr.
23 Terpin, whether the Consent Decree “could have no possible bearing on the subject
24 matter of the litigation.” *Color Me Mine Enters., Inc. v. S. States Mktg., Inc.*, 2012
25 WL 12888693, at *1 (C.D. Cal. July 25, 2012). At this stage, the Court is not
26 prepared to find that the Consent Decree has no possible bearing in this litigation. As
27 Mr. Terpin points out, the Consent Decree is relevant to the issue of foreseeability.
28 (Opp’n to MTS 6, ECF No. 18.) Specifically, Mr. Terpin alleges that the FCC

1 investigation discovered that AT&T’s “employees had been paid by criminals to hand
2 over customers’ information, [AT&T’s] employees had used their login credentials to
3 access confidential information, and [AT&T] had not properly supervised its
4 employees’ access to its customers’ information.” (Opp’n to MTS 6 (internal citations
5 omitted).) Thus, the FCC investigation and corresponding Consent Decree could be
6 relevant on the issue of notice, that such actions were previously occurring, and that
7 the acts perpetrated on Mr. Terpin were reasonably foreseeable.

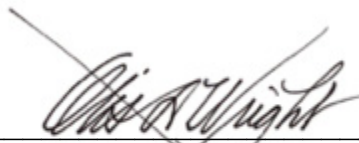
8 Accordingly, the Motion to Strike is **DENIED**.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court **GRANTS IN PART**, and **DENIES IN**
11 **PART**, AT&T’s Motion to Dismiss (ECF No. 14) and **DENIES** AT&T’s Motion to
12 Strike (ECF No. 15). Mr. Terpin may amend his Complaint to address the deficiencies
13 identified above within **twenty-one (21) days** from the date of this Order.

14
15 **IT IS SO ORDERED.**

16
17 July 19, 2019

18
19 

20 **OTIS D. WRIGHT, II**
21 **UNITED STATES DISTRICT JUDGE**