UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARC OPPERMAN, et al.,

Plaintiffs,

v.

KONG TECHNOLOGIES, INC., et al.,

Defendants.

Case No. 13-cv-00453-JST

ORDER DENYING MOTION FOR CLASS CERTIFICATION RE FALSE ADVERTISING LAW AND RELATED CLAIMS

Re: ECF No. 802

This is a putative class action against Apple for alleged invasions of privacy through applications on Apple devices. Before the Court is Plaintiffs' Motion for Class Certification Regarding False Advertising Law and Related Claims. ECF No. 802. The Court will deny the motion.

I. BACKGROUND

A. Factual History

This is a putative class action challenging Apple's alleged misrepresentations regarding the security features on certain Apple devices. See Second Consolidated Amended Complaint ("SCAC"), ECF No. 478. Plaintiffs allege that, between July 10, 2008 and February 2012, they owned one or more of three Apple products – the iPhone, iPad, and/or iPod touch (collectively "iDevices"). Id. ¶ 2. They further allege that Apple engaged in a mass marketing campaign in which it "consciously and continuously misrepresented its iDevices as secure, and that the personal information contained on iDevices – including, specifically, address books – could not be taken without their owners' consent." Id. ¶ 3. Plaintiffs and the putative class allege they overpaid for their iDevices in reliance on Apple's misrepresentations.

1. Contacts Data

Before addressing the merits of Plaintiff's legal contentions, the Court first briefly

discusses how iDevices store contacts data, how iDevice software applications allegedly misappropriated this data, the role of Apple's App Store, and the two Apple security features allegedly designed to protect against misappropriation of contact data.

Each iDevice comes pre-loaded with a "Contacts" mobile software application (or "App"), which iDevice owners may use as an address book to input and store the following information about the owner's contacts:

> (1) first and last name and phonetic spelling of each, (2) nickname, (3) company, job title and department, (4) address(es), (5) phone number(s), (6) e-mail address(es), (7) instant messenger contact, (8) photo, (9) birthday, (10) related people, (11) homepage, (12) notes, (13), ringtone, and (14) text tone.

Id. ¶ 54, 55. The "information in the Contacts App is among the most private and personal of such information a user maintains on an iDevice. The address book data reflects the connections, associations, and relationships that are unique to the owner of the iDevice." Id. ¶ 56. The data "is highly personal and private," and "is not shared, is not publicly available, is not publicly accessible, and is not ordinarily obtainable by a third party unless the owner physically relinquishes custody of his or her iDevice to another individual." Id.

2. Apps' Use of Contact Information

According to Plaintiffs, notwithstanding Apple's representations about the security of its iDevices, Apple knew that the devices permitted the Defendants' Apps "to secretly upload, store, and in some cases disseminate [Plaintiffs'] personal and private address books as stored in the 'Contacts' App from the iDevices without [Plaintiffs'] knowledge or consent." Id. ¶ 2. In fact, Plaintiffs allege, Apple provided its "assistance and cooperation" to the App Defendants in accessing and misusing iDevice owners' address-book information. Id. And despite Apple's "unique knowledge that its iDevices were not as secure as represented," Apple "consistently and deliberately failed to reveal its products' security flaws to consumers . . ." Id. ¶ 4. Because of "Apple's conduct, Plaintiffs and millions of other people purchased iDevices reasonably believing that they were secure when, in fact, they are not, and then downloaded Apps, including the Apps manufactured by App Defendants, and suffered the unexpected and unauthorized theft of their personal data." Id. Plaintiffs allege that they would not have paid as much for their iDevices had

they known of the devices' security flaws. Id. ¶¶ 142, 148, 154, 161, 168, 174, 180, 186, 192, 197, 203, 210, 216, 223, 230.

3. The App Store and App Development

Apple offers Apps solely through its App Store, which Apple launched in July 2008. Id. ¶ 39. "Apple has exclusive control over what Apps are available in the App Store, and the iDevices are designed to only accept software downloads from the App Store . . ." Id. According to Plaintiffs, "[t]he App Store and the availability of numerous Apps to perform different functions are key parts of Apple's marketing strategy and the popularity of the iDevices." Id. ¶ 40. In order to offer an App through the App store, "a third-party developer must be registered as an 'Apple Developer,' agree to the iOS Developer Program License Agreement with Apple, and pay a $99 yearly registration fee." Id. ¶ 44. To further control the Apps offered through its store, "Apple provides third-party developers with review guidelines, and conducts a review of all applications submitted for inclusion in the App Store- for compliance with these documents." Id. In addition, Apple provides a host of tools, as well as support services and guidelines to third-party developers who are licensed to provide Apps through the App Store. Id. ¶¶ 44, 45, 49, 53. The result of these circumstances, according to Plaintiffs, is that "all iDevice Apps were built, in part, by Apple." Id. ¶ 46.

4. Sandboxing and the Curated App Store

Plaintiffs allege that Apple's focus on privacy was a "cornerstone of its marketing strategy" for iDevices. Id. ¶ 76. To support this assertion, Plaintiffs point to various statements Apple made during the Class Period. See id. ¶ 76(i)-(xxix); ¶ 76(xxiii) ("We have created strong privacy protections for our customers . . . . Privacy and trust are vitally important."); ¶ 76(xxv) ("Protecting customer privacy is a key feature of all App Store transactions."); ¶ 76(xxvii) ("Apple will continue to be one of the leaders in strengthening personal information security and privacy.").

Apple represented to the marketplace that it had implemented two security features or practices intended to prevent third-party apps from taking private user data – including Contacts App data – from iDevices without the owner's consent. ECF No. 802 at 9. These two features

were known as "sandboxing" and the "curated" App Store. Id. "Sandboxing" technology was designed to prevent apps from accessing data inside other apps, including the Contacts app. Id. at 12.[1] This security feature was advertised as a way iDevices protected user data, including data stored in the Contacts App, from misappropriation by third party apps. Id. Apple advertised that the App Store was "curated" so that Apps were only available for download if they met certain privacy standards. Id. at 14. Apple made specific statements regarding these security features. See ECF No. 478 ¶ 77(i)-(v); id. ¶ 77(i) ("[A]n Apple representative stated that Apple is 'putting . . . a number of different things in place, from sandboxing to other . . . technical things you want to do to protect applications and the [iPhone] system.'"); id. ¶ 77(ii) ("Applications on the device are 'sandboxed' so they cannot access data stored by other applications.").

Apple's guidelines provide that "Apps 'cannot transmit data about a user without obtaining the user's prior permission and providing the user with access to information about how and where the data will be used.'" Id. ¶ 47. And "Apple has sole discretion over the App approval process and may reject any App at any time and for any reason," including a violation of the terms and conditions of the licensing agreement, providing Apple with inaccurate information, or if Apple learns the App "violates, misappropriates, or infringes the rights of a third party." Id.

B. Procedural History

This action began as separate class actions filed in California and Texas against Apple and multiple App Defendants. The four actions were consolidated here, and Plaintiffs filed their Consolidated Amended Complaint ("CAC"), ECF No. 362, on September 3, 2013.

Apple and App Defendants filed several motions to dismiss the CAC. ECF Nos. 393, 394, 395, 396. On May 14, 2014, the Court granted the motions in part. ECF No. 471. The Court dismissed Plaintiffs' false and misleading advertising, consumer legal remedies/misrepresentation,

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[1] In their motion, Plaintiffs state:

> As represented by Apple, "Applications on the device are 'sandboxed' so they cannot access data stored by other applications. In addition, system files, resources, and the kernel are shielded from the user's application space." RJN, ¶ 5, Exh. E.

ECF No. 802 at 12. While this is a good explanation of how sandboxing works, the cited exhibit unfortunately does not contain the quoted language.

deceit, Unfair Competition Law ("UCL"), and conversion claims, which Plaintiffs subsequently amended in their SCAC. Id. The Court denied the motions to dismiss Plaintiffs' invasion of privacy (intrusion upon seclusion) claim. Id.

Plaintiffs then filed their SCAC. ECF No. 478. In the SCAC, Plaintiffs alleged conversion and invasion of privacy (intrusion upon seclusion) claims against all Defendants, and the following claims against Apple alone: (1) violation of California's False and Misleading Advertising Law ("FAL"), Business and Professions Code § 17500, *et seq*.; (2) violation of California's Consumer Legal Remedies Act ("CLRA"), Civil Code § 1750, *et seq*.; (3) deceit, California Civil Code § 1709, *et seq*.; and (4) violation of California's UCL, Business and Professions Code § 17200, *et seq*. ECF No. 478 ¶¶ 243-323. Plaintiffs requested certification of a class; an injunction prohibiting Defendants from continuing the challenged conduct; actual, compensatory, statutory, presumed, punitive, and/or exemplary damages; declaratory relief; restitution; the imposition on Defendants of constructive trusts; and fees, costs, and interest. Id. at 78-79.

In February 2016, Plaintiffs filed a motion for class certification against Path and Apple for Plaintiffs' intrusion upon seclusion claim against Path and for aiding and abetting against Apple, ECF No. 651, which was granted in part and denied in part, ECF No. 761.

On August 23, 2016, Plaintiffs filed the instant motion for class certification. ECF No. 802. Plaintiffs seek to certify the following class against Apple with regard to Plaintiffs' FAL, CLRA, deceit, and UCL claims:

> All United States residents who, prior to February 8, 2012 (the "Class Period") purchased an iDevice of the following models: iPhone 3G, iPhone 3GS, iPhone 4, iPhone 4s, iPad, iPad 2 or the second through fourth generations of the iPod Touch (the "Class Devices").

Id. at 9. Apple opposes the motion. ECF No. 875.[2]

[2] Apple has raised several evidentiary objections pertaining to the relevance, foundation, and completeness of certain exhibits attached to Plaintiffs' Reply. ECF No. 890. "In conjunction with a Rule 23 class certification motion, the Court may consider all material evidence submitted by the parties to determine Rule 23 requirements are satisfied, and need not address the ultimate admissibility of evidence proffered by the parties." Coleman v. Jenny Craig, Inc., 2013 WL 6500457, at *3 (S.D. Cal. Nov. 27, 2013) (citing Gonzalez v. Millard Mall Servs., 281 F.R.D. 455,

II. JURISDICTION

The Court has jurisdiction over this case pursuant to the Class Action Fairness Act. This is a class action in which a member of the class of plaintiffs is a citizen of a state different from the defendant, there are more than 100 class members nationwide, and the matter in controversy exceeds the sum of $5 million, exclusive of interest and costs. 28 U.S.C. § 1332(d).

III. REQUESTS FOR JUDICIAL NOTICE

Before turning to the merits of the motion to dismiss, the Court resolves the Defendants' requests for judicial notice. Plaintiffs ask the Court to take judicial notice of 42 different documents that include news articles, videos, webpages, and a patent. See ECF No. 803. The request is unopposed.

"As a general rule, we may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." United States v. Corinthian Colleges, 655 F.3d 984, 998-99 (9th Cir. 2011) (internal quotation marks and citations omitted). Pursuant to Federal Rule of Evidence 201(b), however, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Court may properly take judicial notice of materials attached to the complaint and of matters of public record. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2). However, the Court takes judicial notice only of the existence of the document, not of the veracity of allegations or legal conclusions asserted in it. See Lee, 250 F.3d at 689-90.

Because a court "may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true," Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010), the Court

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459 (S.D. Cal. 2012)); see also Frlekin v. Apple Inc., 2015 WL 6851424, at *11 (N.D. Cal. Nov. 7, 2015) (overruling Apple's evidentiary objections as moot because the disputed evidence was not necessary to the order). Thus, because the Court need not determine the admissibility of the evidence at this time, and the disputed evidence was unnecessary to this order, the Court overrules Apple's evidentiary objections.

grants judicial notice of Exhs. C, F, H, I, J, K, L, M, S, V, X, BB, CC, EE, GG, HH, JJ, and LL "solely as an indication of what information was in the public realm at the time," id.

Because the SCAC makes reference to Exhs. A, E, G, T, U, W, Y, Z, AA, DD, FF, II, NN, and ECF No. 803 ¶ 39, 40, these documents and videos are judicially noticeable. See In re Adobe Sys., Inc. Privacy Litig., 2014 WL 4379916, at *2 n.2 (N.D. Cal. Sep. 4, 2014) (taking judicial notice of Adobe's terms of use and privacy policies, which were incorporated by reference into the complaint).

Because Exhs. B, O, P, Q and R are available to the public on Apple's website, the website's authenticity is not in dispute, and the exhibits "[are] capable of accurate and ready determination," the Court may take judicial notice of this information. See Prime Healthcare Servs., Inc. v. Humana Ins. Co., 2017 WL 738586, at *3 (C.D. Cal. Jan. 27, 2017) (granting judicial notice of pages publicly available on defendant's website). Because Exh. KK is information available on a government website, the Court takes judicial notice of this information. See Gustavson v. Wrigley Sales Co., 961 F.Supp.2d 1100, 1113 n.1 (N.D. Cal. 2013) ("The Court may take judicial notice of materials available on government agency websites.").

Because Exhs. D and N are part of the record in other court proceedings, the Court takes judicial notice of these documents. See Bias v. Moynihan, 508 F.3d 1212, 1225 (9th Cir. 2007) (A court "may take judicial notice of proceedings in other courts . . . if those proceedings have a direct relation to matters at issue.").

Because patents are judicially noticeable, the Court grants Plaintiffs' request with regard to Exh. MM. See Feathercombs, Inc. v. Solo Products Corp., 306 F.2d 251, 253 n.1 (2nd Cir. 1962) (granting judicial notice of a patent).

IV. LEGAL STANDARD

Class certification under Rule 23 is a two-step process. First, a plaintiff must demonstrate that the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a) are met:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or

> defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that Rule 23(a) has been satisfied." Wang v. Chinese Daily News, Inc., 709 F.3d 829, 833 (9th Cir. 2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 546 U.S. 338, 351 (2011)).

Second, a plaintiff must also meet one of the requirements of Rule 23(b). Here, Plaintiffs invoke Rule 23(b)(3), which requires the Court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Furthermore, ascertainability is not a requirement under Rule 23. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1125 (9th Cir. 2017) (holding that "Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification" and finding that "Supreme Court precedent . . . counsels in favor of hewing closely to the text of Rule 23."). "[Briseno] suggests that the concerns that have led courts to conclude that classes are not ascertainable should be addressed with reference to the requirements of Rule 23 that are expressly enumerated in that rule." Senne v. Kansas City Royals Baseball Corp., No. 14-CV-00608-JCS, 2017 WL 897338, at *28 (N.D. Cal. Mar. 7, 2017).

The party seeking class certification bears the burden of demonstrating by a preponderance of the evidence that all four requirements of Rule 23(a) and at least one of the three requirements under Rule 23(b) are met. See Dukes, 564 U.S. at 350-51. "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." Amgen Inc. v. Conn. Retirement Plans and Trust Funds, 133 S. Ct. 1184, 1194-95 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Id. at 1195.

V. DISCUSSION

Apple opposes the motion for class certification, arguing that Plaintiffs have not established predominance under Rule 23(b)(3); that Plaintiffs have not demonstrated that damages can be measured, as required by Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); and that the proposed class contains uninjured members. See ECF No. 875. Because the Court concludes that

Plaintiffs have not established predominance or demonstrated a feasible way of measuring damages, it will deny certification.[3]

A. Commonality and Predominance

"Commonality" is a shorthand way of describing Rule 23's requirement that "there [be] questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "[F]or purposes of Rule 23(a)(2) [e]ven a single [common] question will do." Dukes, 564 U.S. at 359 (internal citation omitted). Where questions common to class members present significant issues that can be resolved in a single adjudication "there is clear justification for handling the dispute on a representative rather than on an individual basis." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (internal quotation marks and citation omitted). However, the common contention "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 564 U.S. at 350.

In seeking to certify a Rule 23(b)(3) class, Plaintiff must show that these common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "Considering whether questions of law or fact common to class members predominate begins . . . with the elements of the underlying causes of action." Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011). In determining whether common questions predominate, the Court identifies the substantive issues related to the plaintiff's claims (both the causes of action and affirmative defenses), and then considers the proof necessary to establish each element of the claim or defense, and how these issues would be tried. See Schwarzer, et al., Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 10–C § 10:412. The predominance inquiry requires that the plaintiffs demonstrate that common questions predominate as to each cause of action for which the plaintiffs seek class certification. Amchem, 521 U.S. at 620.

Apple argues that Plaintiffs have not demonstrated that common issues of fact predominate

[3] Apple does not dispute that Plaintiffs have established adequacy, typicality, or numerosity, and the Court concludes that these prerequisites are satisfied. The Court also finds that a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3), if the other requirements of Rule 23 were met.

with respect to the reliance element in Plaintiffs' CLRA, UCL, and FAL claims. See Cal. Civ. Code § 1780(a); In re Tobacco II Cases, 46 Cal. 4th 298, 326 (2009) (class representatives must establish reliance under the UCL and FAL to have standing); Pfizer v. Superior Court, 182 Cal. App. 4th 622, 631-32 (2010) (under the UCL and FAL, members of a putative class cannot obtain restitutionary relief where they were never exposed to the defendant's alleged misrepresentations). Plaintiffs are entitled to a classwide inference of reliance only if they can show "(1) that uniform misrepresentations were made to the class, and (2) that those misrepresentations were material." In re ConAgra Foods, Inc., 302 F.R.D. 537, 571 (C.D. Cal. 2014). "An inference of classwide reliance cannot be made where there is no evidence that the allegedly false representations were uniformly made to all members of the proposed class." Davis-Miller v. Auto. Club of S. Cal., 201 Cal. App. 4th 106, 125 (2011).

Plaintiffs acknowledge that "[i]n misrepresentation cases like this one, the question of whether classwide reliance should be implied comes down to whether the court can 'confidently say' that the putative class members 'were actually exposed to the same, common alleged misrepresentations.'" ECF No. 888 at 13 (quoting Waller v. Hewlett-Packard, 295 F.R.D. 472, 487 (S.D. Cal. 2013)). They argue, however, that they do not need to show class members' reliance on any particular advertisement because Apple conducted a "pervasive [advertising] campaign" on the subject of privacy protection including "print advertising, television advertising, website advertising, buzz media, email advertising, and retail advertising." Id. at 13-14.

1. Classwide Exposure

While Plaintiffs need not "prove individualized reliance," see Todd v. Tempur-Sealy Int'l, Inc., No. 13-CV-04984-JST, 2016 WL 5746364, at *7 (N.D. Cal. Sept. 30, 2016), Plaintiffs must "demonstrate[] that the class was exposed to the challenged marketing materials" in order to demonstrate commonality and predominance," id. at *6. In other words, Plaintiffs must show that the class members were exposed to the alleged misrepresentations in the first place.[4] See Berger

[4] Exposure to the alleged misrepresentations is not an element of class membership as Plaintiffs have defined it, because Plaintiffs do not limit their proposed class to include consumers who saw the alleged misrepresentations regarding sandboxing and the Curated App Store. Instead, they seek to certify a class for every individual who purchased an iDevice within the Class Period,

v. Home Depot USA, Inc., 741 F.3d 1061, 1068 (9th Cir. 2014), abrogated on other grounds by Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017) (holding that "the question of likely deception does not automatically translate into a class-wide question," and that the party seeking certification must show that the class was "actually exposed to the business practices at issue"); Stearns v. Ticketmaster Corp., 655 F.3d at 1020 (9th Cir. 2011) ("We do not, of course, suggest that predominance would be shown in every California UCL case. For example, it might well be that there was no cohesion among the members because they were exposed to quite disparate information from various representatives of the defendant."). It means little that an objective, reasonable consumer would have found the alleged misrepresentations material if none of the class members actually saw, read, or were otherwise exposed to those misrepresentations. Todd, 2016 WL 5746364, at *8.

Apple argues Plaintiffs do not meet the predominance requirement because Plaintiffs have not "'affirmatively demonstrate[d]' that all or nearly all class members were exposed to uniform misrepresentations," they are not entitled to an "inference" of reliance because they have not shown there was an extensive and long-running advertising campaign with uniform content, and class members were exposed to disparate information. ECF No. 875 at 22-29.

a. Relevant Case Law

Plaintiffs' argument relies heavily on the In re Tobacco II Cases ("Tobacco II"). In Tobacco II, Plaintiffs brought consumer protection claims against tobacco companies for the "decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease." 46 Cal. 4th at 30. The California Supreme Court concluded that although "a plaintiff must plead and prove actual reliance . . . [a plaintiff] is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements where, as here, those misrepresentations and false

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regardless of whether those persons were even aware of the specified security features. The Court nonetheless focuses on exposure to the alleged misrepresentations because (1) the Plaintiffs have acknowledged that they must, at a minimum, present evidence of a Tobacco II-type advertising campaign and (2) iDevice purchasers who were never exposed to any privacy-related representations cannot have been injured in the way Plaintiffs allege.

statements were part of an extensive and long-term advertising campaign." Id. at 328.

Subsequent decisions have identified the factors courts should consider in determining whether a plaintiff is entitled to claim Tobacco II's long-term advertising exception. See Opperman v. Path, Inc., 87 F. Supp. 3d 1018, 1048-51 (N.D. Cal. 2014) (discussing factors). In Mazza v. Am. Honda Motor Co., 666 F.3d 581, 595 (9th Cir. 2012), for example, the Ninth Circuit recognized the validity of Tobacco II but declined to apply that approach to the case before it, which involved marketing by Honda in brochures, television ads, dealership kiosks, and other contexts regarding their "Collision Mitigation Braking System." The Ninth Circuit held that "Tobacco II's holding was in the context of a decades-long tobacco advertising campaign where there was little doubt that almost every class member had been exposed to defendants' misleading statements, and defendants were not just denying the truth but representing the opposite." Id. at 596 (citation omitted). In Mazza, by contrast, Honda's "product brochures and TV commercials fall short of the extensive and long-term fraudulent advertising campaign at issue in Tobacco II." Id. (citation omitted).

As the Ninth Circuit subsequently explained in Berger, 741 F.3d at 1068, Mazza limited the extent of Tobacco II based on "two crucial facts" regarding the advertising campaign at issue. First was the "breadth" of the advertising, or the fact that Honda's advertising was not sufficiently "extensive and longterm." Id. (citing to Mazza, 666 F.3d at 596). Second was the "content" of the advertising, or the fact that the advertising materials "do not deny" that limitations to the challenged brake system exist. Id.

Finally, in Todd, this Court denied class certification to a class alleging health-related misrepresentations determining that defendant's production of 300 million pages of direct mail each year, 25 million website page views per year, and 4.3 billion consumer impressions per month was insufficient to demonstrate classwide exposure. 2016 WL 5746364, at *11-12. The Court noted Plaintiffs' failure to apportion out "which of these impressions were based on the alleged health-related misrepresentations, as opposed to the myriad of other claims that Defendants made in advertising their products—such as comfort, durability, support, customer recommendations, and so forth." Id. at *11. Particularly relevant to this case, the Court noted that

classwide exposure could not be inferred from the materials in the record because there was no showing that those materials were actually presented to class member consumers. Id. at *12. The Court contrasted the advertising campaign at issue with advertising directly present on a product's packaging, "such that one could infer anyone who bought that product also viewed the package." Id.

b. Application

The Court previously dealt with this issue in its March 23, 2015 order granting in part and denying in part Defendants' Motion to Dismiss. In that motion, Apple contended that Plaintiffs failed to plead reliance on any particular representation by Apple, ECF No. 501 at 7, and that its alleged misrepresentations were not sufficiently alleged to have been part of "an extensive and long-term advertising campaign," such that Plaintiffs should be excused from pleading reliance, ECF No. 501 at 8. After evaluating the six factors relevant to the Tobacco II analysis, this Court determined that Plaintiffs' Tobacco II allegations were sufficient to survive Apple's motion to dismiss. Opperman v. Path, Inc., 84 F. Supp. 3d 962, 983 (N.D. Cal. 2015).

The question presented here is different. The inquiry is no longer whether Plaintiffs have merely pleaded a plausible claim under Rule 12(b)(6), but rather whether they have shown the existence of such a campaign sufficiently to establish predominance.[5] Having now reviewed the body of evidence offered by Plaintiffs in support of class certification, the Court finds they have failed to demonstrate that Apple's privacy-related marketing was sufficiently extensive to support an inference of class-wide exposure.

Plaintiffs argue that Apple's advertising reach was "global" and included print advertising, television advertising, website advertising, buzz media, email advertising, and retail advertising.

[5] Plaintiffs' assertion that the Court should not address merits issues at the class certification stage, ECF No. 888 at 13, 22, 23, is only partially correct. In Comcast Corp. v. Behrend, the Supreme Court emphasized that a "[Rule 23] analysis will frequently entail overlap with the merits of the plaintiff's underlying claim. That is so because the 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" 133 S. Ct. 1426, 1432 (2013) (internal citations omitted). Here, while the Court reaches no conclusion about the truth or falsity of Apple's advertising, it must analyze Apple's representations sufficiently to determine whether Plaintiffs can satisfy the predominance requirement.

ECF 888 at 14. Plaintiffs contend that Apple assured consumers that data stored on iDevices was secure and such statements "reached consumers in a multitude of ways at a variety of times." Id. at 15. Plaintiffs point to statements made by class representatives to demonstrate this message was communicated to consumers. ECF No. 802 at 19 (Plaintiff Green recalled, "I was told through marketing campaigns, 'Hey, this is a safe place to be. You don't have to worry.'" Plaintiff Hodgins stated, "[B]asically you could trust putting all this information on your phone because it was going to be safe and protected.").

This evidence falls far short of demonstrating the "extensive" and "longstanding" marketing campaign needed to justify class certification in the absence of a uniform, classwide misrepresentation. Although some of Apple's marketing materials may have touched on the question of iDevice privacy, the same problem present in Todd is present here: while class members may have been exposed to Apple's advertising generally, Plaintiffs have not shown that class members saw, heard, or relied upon representations about the specific security features—sandboxing and the Curated App Store—at issue in the case. The Court agrees with Apple that with regard to privacy and these two security features in particular, Plaintiffs "offer virtually nothing as far as true Apple advertising (e.g., specific television spots, internet display advertising, print advertising, etc.)" and "provide no evidence of consumer reach with such advertising (e.g., broadcast frequency, audience measurement, publication circulation, or number of impressions)." ECF No. 875 at 25.

Plaintiffs do not seriously engage with this argument. Instead, they argue on reply that "tobacco ads about cigarettes being healthy were not irrelevant to the campaign in [Tobacco II] just because they did not talk about nicotine being addictive or whether tobacco and tar cause cancer." ECF No. 888 at 13. But the analogy does not hold. In Tobacco II, the plaintiffs complained about defendants' long-running campaign to promote the idea that smoking was not unhealthy. Tobacco II, 46 Cal. 4th at 308 ("Pertinently, the complaint alleged that defendants had engaged in a 'public disinformation strategy . . . concerning the health effects of cigarette smoking,' beginning in the 1960's with magazine articles that questioned the link between cigarette smoking and lung cancer. It was further alleged that '[o]ther public statements by the

Defendants over the years have repeated the misrepresentations that Defendants were dedicated to the pursuit and dissemination of the scientific truth regarding smoking and health.'"). Plaintiffs here have not established an equivalent, pervasive campaign by Apple that it valued consumer privacy. Apple's advertising for its iDevices *generally* was extensive, but with regard to the issue of privacy Plaintiffs offer only a handful of statements per year, contained in "buzz marketing" materials, press releases, statements in investor calls, and similar materials. These materials were not widely disseminated to consumers, and they do not support Plaintiffs' claim that Apple's privacy claims were "widely publicized and disseminated through the mainstream and non-traditional media," ECF No. 478 at 18, and do not bring Plaintiff's claims into the ambit of Tobacco II. Moreover, Plaintiffs have also failed to demonstrate that class members were exposed to the materials containing allegedly misleading representations about privacy. Accordingly, Plaintiffs have failed to demonstrate predominance.

2. Uniform Misrepresentations

Apple argues that Plaintiffs must affirmatively demonstrate that all class members were exposed to uniform misrepresentations. Apple cites Mazza and Berger to support this assertion. ECF No. 875 at 23. While an "affirmative demonstration" of individualized reliance is not necessary in the context of an extensive and long-term advertising campaign, Tobacco II, 46 Cal. 4th at 328, where advertising of the specific features is more limited, "'[a]n inference of classwide reliance cannot be made where there is no evidence that the allegedly false representations were uniformly made to all members of the proposed class.'" Mazza, 666 F.3d at 595. The Court has already concluded that Apple's privacy advertising does not reach the level of Tobacco II, and it further concludes that Plaintiffs have not demonstrated that allegedly false representations were uniformly made to the proposed class.

3. Disparate Information

Apple also argues that predominance is not satisfied because class members were exposed to widely disparate information – i.e., information that undermined or qualified any affirmative privacy claims. ECF No. 875 at 27. Specifically, Apple contends that because the App Store

Privacy Policy[6] disclosed privacy limitations, and Plaintiffs' own allegations acknowledge that certain apps could access data on iDevices,[7] class certification is inappropriate. Id. at 27-29. Apple cites to several cases that support the proposition that when advertising materials acknowledge limitations exist, predominance is not satisfied. See Philips v. Ford Motor Co., No. 14-CV-02989-LHK, 2016 WL 7428810, at *16 (N.D. Cal. Dec. 22, 2016) ("[A] class member who read the warnings in Class Vehicles' owner's manuals would be aware that "limitations exist" and that the EPAS system may fail unexpectedly . . . the information to which class members were exposed was not uniform because some unknown number of class members was exposed to Ford's warnings in the Class Vehicles' owner's manuals."); Mazza, 666 F.3d at 596 ("And while Honda might have been more elaborate and diligent in disclosing the limitations . . . its advertising materials do not deny that limitations exist. A presumption of reliance does not arise when class members were exposed to quite disparate information from various representatives of the defendant.") (internal quotations marks and citations omitted).

Here, Apple attempts to have its cake and eat it too. On the one hand, it rests much of its opposition to Plaintiff's certification motion on the fact that putative class members were unlikely to have read any of the materials containing Apple's alleged misrepresentations. See ECF No. 875 at 18 ("Testimony from the proposed class representatives also confirms, over and over, that the putative class was not exposed to uniform statements touting sandboxing as a security feature of

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[6] All users of the App store had to agree to the following Privacy Policy before downloading any App:

> "Our products and services may also use or offer products or services from third parties—for example, a third-party iPhone app. Information collected by third parties, which may include such things as location data or contact details, is governed by their privacy practices. We encourage you to learn about the privacy practices of those third parties."

ECF No. 502-7 at 4.

[7] "On or around August 28, 2008, in an article, Apple Working on iPhone Software Update to Fix Security Flaw, Apple issued a statement that it was 'readying a software update to the iPhone, fixing a security flaw in the device that gives unauthorized access to contacts and e-mails." In the article, Apple spokeswoman Jennifer Bowcock said, "We are aware of this bug." This article was widely publicized and disseminated through the mainstream and non-traditional media." ECF No. 478 ¶ 76(ix).

Apple devices."); id. at 19 ("Plaintiffs likewise provide no evidence whatsoever that class members—or even their own five proposed class representatives—were exposed to uniform messaging regarding App Store curation. The majority of proposed class representatives have no knowledge or recollection of Apple advertising on this subject."). Yet Apple bases its "disparate information" argument on materials that Plaintiffs were at least as unlikely to read, such as Apple's privacy policy. The Pew Research Center has reported that half of Americans do not even know what a privacy policy is. Aaron Smith, "Half Of Online Americans Don't Know What A Privacy Policy Is," Pew Research Center Fact Tank (on-line ed. Dec. 4, 2014) (http://www.pewresearch.org/fact-tank/2014/12/04/half-of-americans-dont-know-what-a-privacy-policy-is/). And even for those who know what a privacy policy is, almost no one reads them.[8] See Susan E. Gindin, Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC's Action Against Sears, 8 Nw. J. Tech. & Intell. Prop. 1 (2009). Nor should that surprise anyone, since – as researchers at Carnegie Mellon have discovered – it would take 76 work days to read the privacy policies the average citizen encounters in a year. Alexis C. Madrigal, "Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days," The Atlantic (on-line ed. Mar. 1, 2012) (https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/). The collective opportunity cost of this

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[8] In the spring of 2010, thousands of online customers clicked on the terms of service at Game-station.co.uk and unwittingly sold their souls.

> As an April Fool's prank, the British gaming retailer slipped an "immortal soul clause" into its license agreement, knowing full well that nobody looks at them. In fact, a 2006 UC Berkeley survey found that only 1.4 percent of participants read these sorts of agreements "often and thoroughly."
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> "People don't read privacy policies," Nick Bicanic, founder of Echoecho, a Los Angeles location app with baked-in privacy features, said at a Churchill Club event last week. "Like nobody."

James Temple, "Why Privacy Policies Don't Work – And What Might," S.F. Chronicle (on-line ed. Jan. 29, 2012) (http://www.sfgate.com/business/article/Why-privacy-policies-don-t-work-and-what-might-2786252.php).

time expenditure would be $781 billion. Aleecia M. McDonald and Lorrie Faith Cranor, The Cost of Reading Privacy Policies, 4 I/S: J.L. & Pol'y for Info. Soc'y 543, 564 (2009).

Apple correctly argues that the Court should not certify a class over Apple's representations unless Plaintiffs demonstrate that putative class members actually read them. The same holds true in reverse – if Apple wants to show class members were exposed to countervailing information, it must show they actually read it. But Apple does not meet this burden, and it is unlikely that it could. See also Robert Glancy, "Will You Read This Article About Terms and Conditions? You Really Should Do," The Guardian (on-line ed. Apr. 24, 2014) (https://www.theguardian.com/commentisfree/2014/apr/24/terms-and-conditions-online-small-print-information) ("We live in a time of terms and conditions. Never before have we signed or agreed to so many. But one thing hasn't changed: we still rarely read them."). And while the other materials Apple relies on, such as its public disclosures of security flaws or articles on its website, see ECF No. 875 at 28-29, are *somewhat* more likely to have been read, Apple does not demonstrate – and it seems unlikely that it could – that the difference in likelihood is material. In short, while Apple's opposition contains some persuasive arguments, this is not one of them.

5. Damages Calculation

In addition to its arguments regarding the alleged misrepresentations, Apple also contends that Plaintiffs have not adequately defined their damages.

Rule 23(b)(3)'s predominance requirement also applies to questions of damages. "Plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979, 987-88 (9th Cir. 2015) (quoting Leyva v. Medline Industries Inc., 716 F.3d 510, 514 (9th Cir. 2013)). To satisfy this requirement, plaintiffs must show that "damages are capable of measurement on a classwide basis." Comcast, 133 S. Ct. at 1433. However, "damage calculations alone cannot defeat certification." Yokoyama v. Midland Nat. Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010). And "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." Leyva, 716 F.3d at 514. At the class certification stage, Plaintiffs must show that damages can "feasibly and efficiently be calculated once the common liability questions

are adjudicated." Leyva, 716 F.3d at 514. The Court concludes that Plaintiffs fail to meet this burden.

To prove damages on a classwide basis, Plaintiffs propose conducting conjoint analysis surveys[9] to calculate the "market value of the security features Apple falsely promised and calculate the damages required as restitution to class members who overpaid for insecure iDevices." ECF No. 802 at 31-32.[10] Apple counters that Plaintiffs make no showing that class damages can be feasibly or reliably measured because (1) Dr. Howlett, Plaintiffs' expert witness, has not proposed a sufficient methodology and (2) Dr. Howlett's approach is not consistent with Plaintiffs' theory of liability. ECF No. 875 at 29. Apple points to Dr. Howlett's failure to "define or even predict the number and substance of the attributes for her conjoint survey(s), [which] in itself, establishe[s] that she has not proposed a sufficient methodology." ECF No. 875 at 32.[11] In reply, Plaintiffs do not directly refute either of Apple's arguments. Instead, Plaintiffs assert that as long as conjoint analysis provides a "reasonable approximation," some level of imperfection is permitted. ECF No. 888 at 21.

Dr. Howlett's failure to identify the specific attributes to be used in a conjoint survey prevents the Court from finding that it will adequately measure damages. Several courts in this circuit facing similar circumstances have found that when a proposed damages model omits the specific variables to be used, the model is inadequate. In In re ConAgra Foods, Inc., 302 F.R.D. at

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[9] "In conjoint analysis, we determine what value a customer places on a particular feature of a product by measuring the partial value ('partworth' utility) of multiple individual features of the product. For example, we measure the value to the customer of the product offered in several combinations, some of which might contain feature 1 (but perhaps not feature 2), some of which might contain feature 2 (but perhaps not feature 1), and some of which might contain both features 1 and 2. We can use the data we collect to isolate the value to the customer of one particular feature." Microsoft Corp. v. Motorola, Inc., 904 F. Supp. 2d 1109, 1120 (W.D. Wash. 2012).

[10] This is not the first time Plaintiffs have proposed the use of a conjoint analysis. See Opperman v. Path, Inc., No. 13-CV-00453-JST, 2016 WL 3844326, at *14–15 (N.D. Cal. July 15, 2016).

[11] As Dr. Howlett said in her deposition, she "did not do any in-depth analysis of the different kinds of attributes to be looking at. I didn't do – I didn't do the work that would be necessary to actually institute this survey." ECF No. 876-18 at 53:18-21. Later in the same deposition, when she was asked what attributes she would be testing, she answered simply, "I don't know." Id. at 144:6-11.

552, for example, the court refused to consider plaintiffs' proposed damage approach on class certification. The court determined that "[a]lthough the methodologies [plaintiffs' expert witness] describes may very well be capable of calculating damages in this action, [he] has made no showing that this is the case. He does not identify any variables he intends to build into the models, nor does he identify any data presently in his possession to which the models can be applied. The court is thus left with only [his] assurance that he can build a model to calculate damages." Id.; see also Saavedra v. Eli Lilly & Co., No. 2:12-CV-9366-SVW, 2014 WL 7338930, at *6 (C.D. Cal. Dec. 18, 2014) (denying class certification where plaintiff had "yet to design" conjoint survey and had not yet chosen attributes that would be included in model); Jones v. ConAgra Foods, Inc., No. C 12-01633 CRB, 2014 WL 2702726, at *20 (N.D. Cal. June 13, 2014) (concluding that plaintiffs failed to describe an adequate damage model where plaintiff's expert did not provide "a clearly defined list of variables" and had not determined comparator products or whether needed data existed).[12]

Furthermore, Plaintiffs' proposed damage model fails to satisfy the predominance requirement for the additional reason that it does not comport with Plaintiffs' theory of liability. Comcast requires that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the

[12] At the hearing on this motion, Plaintiffs' counsel urged the Court to rely upon In re ConAgra Foods, Inc., 90 F. Supp. 3d 919 (C.D. Cal. 2015), aff'd sub nom. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017), and aff'd sub nom. Briseno v. ConAgra Foods, Inc., 674 F. App'x 654 (9th Cir. 2017). But that case undermines Plaintiffs' claim rather than supports it. The ConAgra district court stated, referring to its earlier opinion, In re ConAgra Foods, Inc., 302 F.R.D. 537 (C.D. Cal. 2014):

> As ConAgra notes, the court previously rejected Weir's original declaration and proposed regression methodology because he failed to identify, *inter alia*, the variables he intended to build into the models and the data he possessed to which the models could be applied. Weir's declaration in support of plaintiffs' amended class certification *remedies these shortcomings*.

Id. at 945 (footnote omitted) (emphasis added). Dr. Howlett's proposal suffers from all the defects the ConAgra court identified in its first order, without providing any of the fixes that court identified in its second order. In other words, the shortcomings have not been remedied.

entire class for purposes of Rule 23(b)(3)." Comcast, 133 S. Ct. at 1433.

Dr. Howlett's proposed methodology suffers from the additional defect that it would overstate Plaintiffs' damages. Her analysis seeks to measure the value to consumers of privacy generally, but "privacy" encompasses a variety of concepts that are not at issue in this case. As Apple puts it, her study would measure the "value of security of privacy *broadly* in a smartphone rather than seek to value the two allegedly misrepresented security features [sandboxing and the curated App Store]." ECF No. 875 at 35 (emphasis in original).

In In re ConAgra Foods, Inc., 90 F. Supp. 2d at 1025, plaintiffs' expert sought to determine the "price premium attributable to the '100% Natural' label" on the product at issue, even though plaintiffs' theory of liability was that consumers were erroneously led to believe (because of the "100% Natural" label) that the product contained no GMO ingredients. The court determined that the plaintiffs' regression analysis alone did not satisfy Comcast's requirements since it did not "isolate the price premium attributable to consumers' belief that ConAgra's products did not contain GMOs." Id. The court concluded, however, that the regression model taken together with the proposed conjoint analysis survey did satisfy Comcast's requirements for class certification purposes since the survey would "segregate the percentage of the price premium specifically attributable to a customer's belief that '100% Natural' means 'no GMOs.'" Id. Thus, "[s]uch a calculation would necessarily produce a damage figure attributable solely to ConAgra's alleged misconduct—i.e., misleading consumers to believe that Wesson Oils contain no GMOs by placing a '100% Natural' label on the products." Id.

Here, Plaintiffs' proposed damage model is more akin to the rejected regression model in ConAgra. Just as the rejected regression analysis in ConAgra was overbroad, Dr. Howlett's proposed methodology would measure the value consumers attribute to security broadly, despite the focus of Plaintiffs' theory of liability on only two failed security features. Dr. Howlett agrees that security and privacy for Apple devices are indeed "broad concept[s]" with "multiple different meanings, multiple different sub-attributes." ECF No. 876-18 at 201-02. She considers protection of contacts information only one of multiple sub-attributes of security. Id. at 203-04. She acknowledges a high level attribute like security encompasses a wide variety of sub-attributes,

including email security, text security, virus protection, password protection, spy-ware protection, location data security, web browsing history protection, security for credit card information, protection from hacking, and voice transmission interception. Id. at 204-08. Dr. Howlett "would never use . . . [the term 'sandboxing'] with consumers"; she would "find it very surprising if they understood what sandboxing meant." Id. at 50; 52-53. Nor would she commit to testing only the sandboxing or Curated App Store features of the iDevice, since she had not decided which attributes she would test. Id. at 146:6-11 ("I, again, don't know if I would use just one, protects private data versus not protect private data. I don't know if I would just use that one attribute or if I would do something that would be like a sandbox attribute and a curated attribute. I don't know how I would design that yet."); see also id. at 230 (does not know whether consumers would understand concept of a curated App Store). Thus, because Dr. Howlett's model would not value the measure of the two challenged security features, sandboxing and the curated App Store, but rather would seek to value security in iDevices broadly, the model fails Comcast's requirement that Plaintiff's method of proving damages is tied to their theory of liability.

CONCLUSION

Plaintiffs' Motion for Class Certification Regarding False Advertising Law and Related Claims is DENIED.[13]

IT IS SO ORDERED.

Dated: July 25, 2017

JON S. TIGAR
United States District Judge

[13] Because the Court will not certify the proposed class, it does not reach Apple's remaining arguments.