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AT&T SERVICES, INC. and AT&T MOBILITY, LLC

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 KATHERINE SCOTT, CAROLYN JEWEL, and
17 GEORGE PONTIS, individually and on behalf of
all others similarly situated,

18 Plaintiffs,

19 v.

20 AT&T INC.; AT&T SERVICES, INC.; AT&T
21 MOBILITY, LLC; TECHNOCOM CORP.; and
22 ZUMIGO, INC.,

23 Defendants.

Case No. 19-cv-4063-SK

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' FURTHER BRIEFING
REGARDING DEFENDANTS' CALL
ROUTING SERVICES**

Judge: Hon. Sallie Kim

TABLE OF CONTENTS

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

	Page
I. PRELIMINARY STATEMENT	1
II. ARGUMENT AND AUTHORITIES	3
A. Plaintiffs Admit That Their Complaint Does Not Address Call Routing; In Fact, The Practice Is Wholly Different From What Was Alleged In The Complaint.....	4
B. Plaintiffs Lack Standing to Seek Injunctive Relief Because There Are No Allegations About Call Routing in the Complaint	9
C. Plaintiffs’ Reliance on General Conclusions of Law in Their Complaint Do Not Confer Standing	11
D. Leave to Amend Should Be Denied; Plaintiffs’ Counsel Can File A New Lawsuit If They Can Find Any Plaintiff Who Has Actually Suffered an Injury In Connection with Call Routing.....	12
III. CONCLUSION AND RELIEF REQUESTED	13

TABLE OF AUTHORITIES

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

Page(s)

Cases

Kendall v. Visa U.S.A., Inc.,
518 F.3d 1042 (9th Cir. 2008)13

Lacano Investments, LLC v. Balash,
765 F.3d 1068 (9th Cir. 2014)12

Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.,
810 F.3d 631 (9th Cir. 2015)4, 10, 11

Salmon Spawning & Recovery All. v. Gutierrez,
545 F.3d 1220 (9th Cir. 2008)4

Summers v. Earth Island Inst.,
555 U.S. 488 (2009).....10

Villa v. Maricopa Cty.,
865 F.3d 1224 (9th Cir. 2017)10

Statutes

Communications Act12

Other Authorities

Washington Post7

What is a cell tower’s range?, The Washington Post (June 27, 2014)

1 complaining about the sufficiency of discovery, claiming they need even more detailed discovery to
2 answer the Court’s basic questions. They do so by making unfounded allegations. Plaintiffs
3 contend that AT&T somehow failed to disclose the call routing practice during jurisdictional
4 discovery. To the contrary, AT&T plainly disclosed that “[t]here are certain call routing functions in
5 which cell tower location (not the precise latitude and longitude of the caller) is given to a third party
6 call router, but [it] do[es] not think this is the practice complained of in the Complaint.” Email from
7 R. Velevis to A. Ognibene, dated Sept. 1, 2020, attached as Ex. C to Plaintiffs’ Opp. to Motion to
8 Dismiss, Dkt. 112-1. These are the exact facts that Plaintiffs now use to justify their claim for an
9 injunction. AT&T also disclosed that AT&T used location data for internal purposes. *See id.*
10 AT&T’s position was that neither of these uses was alleged in the Complaint and that AT&T did not
11 think that jurisdictional discovery – to determine whether the practice actually alleged in the
12 Complaint had stopped – could reasonably encompass entirely separate practices.

13 After the Motion to Dismiss hearing, AT&T submitted a declaration from the person most
14 knowledgeable at AT&T about this call routing practice demonstrating that this was a wholly
15 different practice from what was alleged in the Complaint. At the 30(b)(6) deposition, AT&T had
16 the same person testify as its corporate representative. Plaintiffs’ complaints about the witness’s
17 inability to answer specific questions largely involve highly technical questions about computer
18 systems, architecture, and security features of a third party’s computer systems. Much like their
19 similar efforts in connection with jurisdictional discovery concerning the aggregator system,
20 Plaintiffs do not provide any basis (data breach or otherwise) to make such lines of inquiry relevant
21 or reasonably the subject of a deposition.

22 Likewise, Plaintiffs make the unfounded allegation that there are somehow other third parties
23 that access location data for the purposes of call routing. But Plaintiffs never asked such a question;
24 instead, they were focused on whether any other commercial call routing function exists within
25 AT&T. Mr. Weterrings explained that there are other call routing functions because he believed that
26 it is AT&T’s business to route calls. *See* Tr. 29:10-24 (Q: “are you saying that there could be other
27 call routing and you just don’t know or that you are not aware?” A: “I know there are; I mean that’s
28

1 our business, we route calls, so I'm sure there are other call routing capabilities that are outside my
 2 product scope." (objection omitted)). The topic of this deposition was the use of location data **with**
 3 **third parties** to route calls, and AT&T provided the best witness within the company to address that
 4 topic, and his testimony should be construed in accordance with the notice for which he was
 5 designated to testify. *See* 30(b)(6) Deposition Notice, Dkt. 141-5 at 4.

6 Most importantly, despite Plaintiffs' suggestions that they were not provided sufficient
 7 information, the deposition, **and indeed Plaintiffs' brief based on the deposition**, makes it
 8 abundantly clear that the call routing function at issue presents different factual and legal issues than
 9 those alleged in the Complaint. The Complaint alleges: (1) "AT&T has been selling its customers'
 10 **real-time location data** to credit agencies, bail bondsmen, and countless other third parties"¹; and
 11 (2) "Unauthorized individuals gained access to AT&T customers' **real-time data** without consent or
 12 legal authority because of AT&T's practice of selling this data to data aggregators and hundreds of
 13 additional third-parties"², **whereas the call routing function**: (1) "does not provide the precise
 14 latitude and longitude of any AT&T mobile phone customer to any third party"³; (2) AT&T "does
 15 not sell geolocation information in connection with call routing,"⁴ rather **it pays**⁵ for its third-party
 16 vendor to manage this function because "municipalities and other governmental agencies are the
 17 primary users."⁶ Based on the record before it, the Court should dismiss Plaintiffs' claims for
 18 injunctive relief alleged in the lawsuit, which concern the provision of precise, real-time location
 19 information through data aggregators for lack of subject matter jurisdiction.

20 II. ARGUMENT AND AUTHORITIES

21 Plaintiffs' brief acknowledges in footnote 4 that they have no good answer to the Court's
 22 request, *i.e.*, "to explain if and/or how AT&T's call routing practices discloses AT&T customers'
 23 geolocation data in violation of the FCA **as alleged in their Complaint.**" Order, Dkt. 135. Instead,

24 ¹ Compl. ¶ 1.

25 ² *Id.* ¶ 83.

26 ³ Weterrings Decl., Dkt. 129 ¶ 6.

27 ⁴ *Id.* ¶ 5.

⁵ *Id.*

⁶ Weterrings Decl., Dkt. 129 ¶ 5.

1 Plaintiffs claim that “it is of no moment that the Complaint does not describe AT&T’s ADC-routing
2 program.” This concession is fatal to Plaintiffs’ effort to avoid dismissal of the injunctive relief
3 claim alleged in the Complaint for at least two key reasons.

4 First, the motion to dismiss for lack of standing to pursue injunctive relief was based on the
5 undisputed fact that the practice at issue in the Complaint had stopped. *See* AT&T’s Motion to
6 Dismiss, Dkt. 73. Plaintiffs’ new contention that there is a different practice with different data that
7 also violates the same law is not relevant to the motion to dismiss. *See Salmon Spawning &*
8 *Recovery All. v. Gutierrez*, 545 F.3d 1220, 1228 (9th Cir. 2008) (affirming dismissal for lack of
9 standing based on allegations in the complaint and stating that it would not consider “an entirely new
10 theory” of standing not alleged in the complaint). The Court can and should dismiss the injunctive
11 relief claims alleged in the lawsuit on this basis alone. Any claims Plaintiffs (mistakenly) believe
12 they may have based on information they learned during the limited discovery granted by the Court
13 here could be brought in a separate action.

14 Second, Plaintiffs also should not be permitted to amend their Complaint to avoid dismissal
15 because Plaintiffs do not even suggest that they have ever dialed an abbreviated dial code in which
16 location was used to route the call. *See Pac. Radiation*, 810 F.3d at 633; *Stavrianoudakis*, 435 F.
17 Supp. 3d at 1078. Indeed, Plaintiffs are complaining about a practice requiring a customer to
18 actively dial a number (such as the highway patrol or the **Law example) for the very purpose of
19 having their call routed to a specific location. Thus, it is not clear that any person is complaining
20 about this practice or would not expect their location to be used.

21 **A. Plaintiffs Admit That Their Complaint Does Not Address Call Routing; In Fact,**
22 **The Practice Is Wholly Different From What Was Alleged In The Complaint.**

23 The allegations in the Complaint demonstrate that the Plaintiffs’ lawsuit is about AT&T’s
24 past provision of *precise real-time location information* to data aggregators and third parties
25 through those aggregators—not call routing. This Court has also recognized that “[i]n their
26 Complaint, Plaintiffs allege that [AT&T] has improperly provided its customers’ real-time location
27 data to third parties without the customers’ consent.” Order, Dkt. 135 at 1. This is the foundation of
28

1 Plaintiffs’ entire lawsuit. The entire theory of Plaintiffs’ Complaint is that AT&T had permitted a
 2 system to exist through data aggregators in which AT&T allegedly sold to unknown third parties
 3 (allegedly bounty hunters, rogue police officers, abusive spouses) the ability to look up the precise,
 4 real time location of AT&T consumers. AT&T strongly disputes these allegations, but it is clear that
 5 this is the basis of the Complaint. In fact Plaintiffs’ Complaint:

- 6 • Uses the words “Aggregator(s)” or “Aggregated” 107 times;
- 7 • Uses the word “precise” 38 times;
- 8 • Uses the phrase “real-time location” 85 times;
- 9 • Uses the words “sale” or “sell(s)” 175 times; and
- 10 • Uses the phrase “bounty hunter” 30 times.

11 The evidence (and Plaintiffs’ own brief) shows that ADC-based call routing is a completely
 12 different practice than the aggregator-model of geolocation information alleged in the Complaint.
 13 Unlike the provision of geolocation information to aggregators and third-parties through aggregators
 14 (a practice which indisputably ceased before Plaintiffs’ filed this lawsuit), AT&T’s call routing
 15 function:

- 16 • Does not involve the same system used to provide geolocation to aggregators.
 17 Weterrings Decl., Dkt. 129 ¶ 7.
- 18 • Does not use or disclose the “precise location” of any AT&T subscriber. *Id.* ¶ 6; Tr. 73:5-
 19 73-16.
- 20 • Does not permit any “lookups” of location information. Weterrings Decl., Dkt. 129 ¶ 4,
 21 6.
- 22 • Is not sold (AT&T pays for this service). Weterrings Decl., Dkt. 129 ¶ 5; Tr. 54:16-19.

23 Specifically, AT&T’s call routing function utilizes abbreviated dialing codes (“ADCs”) to
 24 allow calls to be routed to certain services **when a caller dials the ADC**. Weterrings Decl., Dkt.
 25 129 ¶ 5. For example, a caller could dial #77 to be routed to the nearest state highway patrol. *Id.*
 26 AT&T contracts with and pays a third-party service provider to manage this call routing function, for
 27 the primary purpose of providing call routing to municipality services for no fee to the
 28

1 municipalities. *Id.*; Tr. 50:3-50:6. When a mobile user dials an ADC, AT&T sends the ADC, the
2 phone number of the call, and the cell ID of the cell tower that is handling the call at the time to
3 AT&T's third-party vendor, StarStar Mobile. Tr. 87:11-17; Call Routing Diagram, Dkt. 141-8. The
4 cell ID is a "naming convention" that identifies a particular cell tower but does not contain or
5 provide any location information. Tr. 72:6-9. The cell ID is matched to a separate file to obtain the
6 location of the cell tower handling the call. Tr. 72:6-15. StarStar Mobile matches this cell ID to the
7 cell tower location and then converts the cell tower location to the county in which the cell tower is
8 located to determine which local business or service (based on county) to route the call. Tr. 85:20-
9 86:5; Call Routing Diagram, Dkt. 141-8. StarStar Mobile then sends the phone number where to
10 route the call back to AT&T for AT&T to complete the call. Tr. 98:7-98:13; Call Routing Diagram,
11 Dkt. 141-8. This process is nothing like the process alleged in the Complaint.

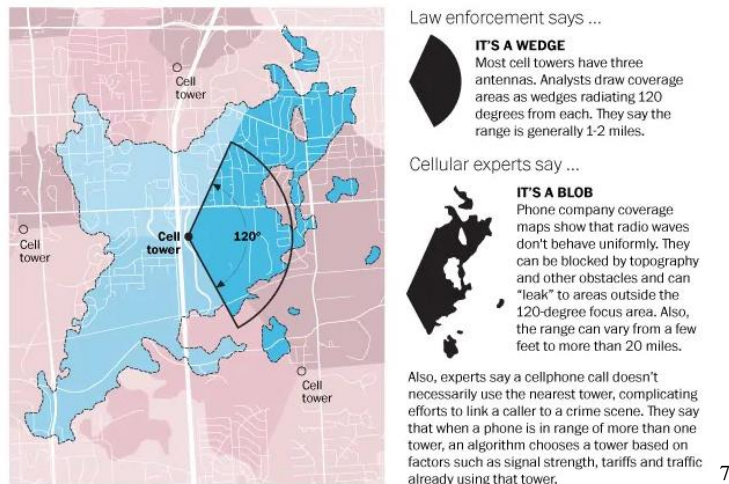
12 Moreover, there is an entirely different analysis concerning consent in the case of someone's
13 information being looked up by a third party (as alleged in the Complaint) as opposed to ADC call
14 routing, where someone affirmatively places a call for the purpose of connecting with a specific
15 location (the highway patrol or the law office near the Alameda County Courthouse). This is yet
16 another reason why the issues Plaintiffs are asserting regarding call routing are not included in their
17 Complaint.

18 Recognizing the processes are wholly different, Plaintiffs attempt to equate the types of data
19 at issue by suggesting a cell tower ID converted to a county reveals a customer's precise, real-time
20 location. Because the evidence from the deposition contradicts their argument, Plaintiffs instead use
21 an out of context quotation from a Supreme Court opinion. The reference in *Carpenter v. United*
22 *States* to "nearly GPS-level location data about their location," concerns cell phone tower
23 triangulation, a wholly different technology. 138 S. Ct. 2206, 2219 (2018). The very next sentence
24 of the Supreme Court's opinion makes clear that the Court was describing a "new technology
25 measuring the time and angle of signals hitting [cell] towers" which gives "wireless carriers ... the
26 capability to pinpoint a phone's location within 50 meters." *Id.* Cell phone tower triangulation is
27 not used for ADC-based call routing; converting a cell tower ID into a county location does not
28

1 measure time and angles of signals hitting a cell phone. And Plaintiffs’ counsel knows this
2 distinction intimately well because one of Plaintiffs’ law firms submitted the very amicus brief cited
3 by the Supreme Court in *Carpenter*. *See id.* (citing Brief for Electronic Frontier Foundation et al. as
4 Amici Curiae 12 (describing triangulation methods that estimate a devices location inside a given
5 cell sector)). Plaintiffs’ counsel’s amicus brief itself makes the distinction between the cell site
6 location data at issue in *Carpenter* and the data related to the one-time transmission of cell tower
7 location when a user dials a phone number. Brief for Electronic Frontier Foundation et al. as Amici
8 Curiae at 21, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (“[P]hones generate [cell site
9 location information] whenever they are on and searching for a signal—frequently, automatically,
10 and *regardless of whether the device is actively in use.*” (citations omitted)).

11 As Mr. Weterrings testified, the only location information available about a mobile user from
12 AT&T’s call routing function would be a range within the cell tower that is handling the call at the
13 time the user dials an ADC. Tr. 73:5-74:3. However, the coverage range of a cell tower varies
14 greatly based on geographic placement. Tr. 73:21-74:3. Thus, merely having knowledge of the
15 location of a cell tower provides a large range of where a mobile user could have been located when
16 he or she initiated the call. Indeed, converting the cell ID to a county increases the area in which the
17 mobile user may be located. There is simply no parallel to the type of information at issue here, and
18 the information at issue in *Carpenter*, which the Court described as being “historical cell-site records
19 [that] . . . tracks nearly exactly the movements of its owner.” *Carpenter*, 138 S. Ct. at 2218.

20 The coverage range of cell towers is routinely discussed and analyzed in publicly available
21 articles, as illustrated in the example below from the Washington Post. This is wholly different from
22 precise, “GPS-level” location about a mobile user.



Moreover, despite being relegated to a footnote, Plaintiffs' allegation that AT&T discloses customer location data to "unknown and additional third parties" is not sufficient to confer standing to seek injunctive relief for a call-routing practice. Pls' Br. at 4 n. 4. Plaintiffs ignore that they do not allege that cell ID information or call routing was at issue in their Complaint at all.

AT&T's call routing function, which AT&T primarily provides as a public service to municipalities for free and does not use or disclose precise, real-time location of mobile users, also is *wholly different* than the alleged "profit-making scheme" Plaintiffs claim AT&T engaged in when it allegedly sold its customers' precise, real-time geolocation information to aggregators and third-parties. Compl. ¶ 295. There are no allegations about call routing in the Complaint, and Plaintiffs lack standing to seek injunctive relief, as explained below.

Finally, in an effort to suggest there is some other undisclosed call routing function that provides location information to third parties, Plaintiffs rely on a passage from Mr. Weterings deposition transcript—which they take out of context—that he is "sure" that there are other call routing functions. *See* Tr. 22:2-3 (Q: Are there other call routing products? A: I'm sure there are."). Mr. Weterings made clear that he believes there are other call routing functions at AT&T because he understands that AT&T's core business is to route and connect calls. *See* Tr. 29:10-24 (Q: "are you

⁷ *What is a cell tower's range?*, The Washington Post (June 27, 2014), https://www.washingtonpost.com/local/what-is-a-cell-towers-range/2014/06/27/a41152ce-fe3b-11e3-b1f4-8e77c632c07b_graphic.html.

1 saying that there could be other call routing and you just don't know or that you are not aware?" A:
 2 "I know there are; I mean that's our business, we route calls, so I'm sure there are other call routing
 3 capabilities that are outside my product scope." (objection omitted)). Mr. Weterrings was not
 4 testifying about all such other uses, however, because the topic of the deposition was "Identify all . .
 5 . PERSONS to whom [AT&T] . . . permitted access to any type of customer LOCATION data for
 6 call routing purposes." See 30(b)(6) Deposition Notice, Dkt. 141-5 at 4. Plaintiffs never asked
 7 whether there were other situations in which third parties receive location data for call routing
 8 purposes, and the deposition testimony demonstrated that the call routing function in response to
 9 their noticed topic was the same ADC-based call routing function that AT&T had disclosed months
 10 prior. See Email from R. Velevis to A. Ognibene, dated Sept. 1, 2020, attached as Ex. C to
 11 Plaintiffs' Opp. to Motion to Dismiss, Dkt. 112-1. The Court should not entertain Plaintiffs' efforts
 12 to constantly shift the goalposts in this case, particularly when those efforts are based on obscuring
 13 the actual evidence and transforming the issue into something that Plaintiffs know it is not.⁸

14 **B. Plaintiffs Lack Standing to Seek Injunctive Relief Because There Are No**
 15 **Allegations About Call Routing in the Complaint.**

16 In addition to the above reasons why the call routing practices are not at issue in this case, the
 17 Court can disregard Plaintiffs' new theories because Plaintiffs do not allege that they ever utilized
 18 call routing, currently utilize call routing, or in the future intend or desire to utilize call routing.

19 "To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in
 20 fact' that is *concrete and particularized*; the threat must be *actual and imminent, not conjectural or*
 21 *hypothetical*; it must be fairly traceable to the challenged action of the defendant; and it must be
 22 likely that a favorable judicial decision will *prevent or redress the injury*." *Summers v. Earth Island*
 23 *Inst.*, 555 U.S. 488, 493–94 (2009) (emphasis added). Plaintiffs must show "either 'continuing,
 24 present adverse effects' due to [their] exposure to [the defendant's] past illegal conduct or a

25 ⁸ Moreover, to the extent the Court determines that call routing is alleged in Plaintiffs' Complaint
 26 (which it is not), AT&T does not dispute that the call routing practice is ongoing. As the Court has
 27 previously held, "[t]he only relevant issue before the Court on Defendants' motion to dismiss
 28 Plaintiffs' requests for injunctive relief for lack of standing is whether Defendants have stopped
 selling 'location data' or 'geolocation information' to third parties." Order on Discovery Letter, Dkt.
 96 at 2.

1 sufficient likelihood that [they] will again be wronged *in a similar way*.” *Villa v. Maricopa Cty.*, 865
 2 F.3d 1224, 1229 (9th Cir. 2017) (internal quotation marks and citations omitted) (emphasis added).

3 “When a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court
 4 does not have the authority to issue an injunction.” *Pac. Radiation Oncology, LLC v. Queen's Med.*
 5 *Ctr.*, 810 F.3d 631, 633 (9th Cir. 2015). Moreover, a plaintiff lacks standing to seek injunctive relief
 6 when allegations in the Complaint do not allege that the named plaintiffs have ever been subjected to
 7 the challenged conduct because “the Court is forced to speculate” as to whether the plaintiffs will be
 8 subject to the conduct in the future. *Stavrianoudakis*, 435 F. Supp. at 1078.

9 In *Stavrianoudakis*, the plaintiffs sought injunctive relief to enjoin searches conducted
 10 pursuant to certain regulations. 435 F. Supp. 3d at 1079. “However, Plaintiffs [did] not allege that
 11 they have been personally subjected to the unconstitutional searches pursuant to the challenged
 12 regulations.” *Id.* The Court dismissed the claims for lack of standing holding that “[g]iven that none
 13 of the named Plaintiffs have ever previously been subjected to the unannounced inspections pursuant
 14 to the challenged regulations, the Court is forced to speculate as to whether unannounced inspections
 15 will be conducted on Plaintiffs in the future.” *Id.*

16 Here, like *Pac. Radiation*, Plaintiffs lack standing to seek injunctive relief related to call
 17 routing because, as described in Part II.A above, there are no allegations or claims in the Complaint
 18 related to call routing. 810 F.3d at 633. And even if there were any allegations about call routing,
 19 Plaintiffs lack standing because similar to *Stavrianoudakis*, they did not allege they utilized call
 20 routing (*i.e.*, dialed an ADC). As demonstrated above, Plaintiffs’ lawsuit is clearly about the
 21 provision of precise, real-time geolocation information to aggregators and third parties. The
 22 undisputed evidence shows that AT&T’s call routing function is wholly different: it does **not** use,
 23 disclose, or access any “precise, real-time geolocation” information nor does AT&T “sell” location
 24 information (or any information) in connection with call routing.

25 Plaintiffs do not allege that they ever engaged in the challenged conduct—here dialing an
 26 ADC to be routed to a local business or service. Notably, **Plaintiffs concede that they were**
 27 **“unaware” about AT&T’s call routing function at the time they filed their Complaint.** Pls’ Br.
 28

1 4 at n.4. Thus, Plaintiffs are asking the Court to speculate that at the time they filed the lawsuit, they
2 faced a real and immediate threat of harm from a practice that: (1) they never allege they utilized; (2)
3 they were admittedly “unaware” of; and (3) requires the user to initiate by affirmatively dialing a
4 code on their phone. This is identical to Plaintiffs’ attempt to try to establish standing by relying on
5 AT&T’s use of location information in connection with life alert pendants, when they did not allege
6 that they are or were ever users of life alert pendants. This Court has already held Plaintiffs lack
7 standing to seek an injunction related to conduct that they do not allege they ever engaged in. *See*
8 Order, Dkt. 135 (“Plaintiffs do not allege that any of them are customers of a life alert company.
9 Thus, Plaintiffs do not have standing to challenge a practice of providing geolocation data to such
10 companies.”).

11 Plaintiffs cannot show that they face a real and immediate threat of harm from a practice
12 nowhere alleged in their Complaint, and the Court lacks subject-matter jurisdiction over any newly
13 developed claims for injunctive relief related to AT&T’s call routing practice.

14 To be clear, nothing about the Court’s decision to dismiss the injunctive relief claims for lack
15 of subject matter jurisdiction would prejudice Plaintiffs from filing a new lawsuit here.

16 **C. Plaintiffs’ Reliance on General Conclusions of Law in Their Complaint Do Not**
17 **Confer Standing.**

18 Recognizing there are no factual allegations about call routing in their Complaint, Plaintiffs
19 impermissibly try to fall back on their contention that they alleged violations of the same law, even
20 though the factual allegations are wholly different. The Ninth Circuit is clear that Plaintiffs can only
21 rely upon *facts* in the Complaint to establish standing. *See Lacano Investments, LLC v. Balash*, 765
22 F.3d 1068, 1071 (9th Cir. 2014). In a facial attack on subject-matter jurisdiction, courts are to accept
23 *factual allegations*—but not *legal conclusions*—as true. *Id.* The Ninth Circuit has cautioned
24 against accepting the “truth of *legal conclusions* merely because they are cast in the form of factual
25 allegations.” *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (quoting *Warren v. Fox Family*
26 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 1981)).
27
28

1 Plaintiffs claim they have standing to seek an injunction on their newly-developed call
2 routing theory by pointing to vague references that AT&T's practice of disclosing data is a violation
3 of the Communications Act. To the extent that Plaintiffs are arguing that they alleged a similar
4 violation of laws, the Court should not entertain this as a basis for this entirely separate practice to be
5 included in the Complaint. For example, the Plaintiffs point to the paragraph in the Complaint that
6 states, "AT&T failed to provide proper, individual notice to Plaintiffs and Class before using,
7 disclosing, or permitting access to their real-time location CPNI by the Aggregator Defendants and
8 other third parties." Compl. at ¶ 189. This statement provides no *facts* as to how AT&T disclosed
9 location information that was an alleged violation of the FCA. Plaintiffs merely regurgitate a
10 violation of the law (failing to provide notice and obtain consent) and claim AT&T committed that
11 violation. This is the sort of couched statement that the Ninth Circuit deemed insufficient in *Doe*
12 and should not be a basis upon which Plaintiffs may avoid a motion to dismiss. 557 F.3d at 1073.

13 **D. Leave to Amend Should Be Denied; Plaintiffs' Counsel Can File A New Lawsuit**
14 **If They Can Find Any Plaintiff Who Has Actually Suffered an Injury In**
15 **Connection with Call Routing.**

16 Finally, Plaintiffs suggest in one line in a footnote that even though they have no allegations
17 in the current Complaint concerning the call routing practice, "Plaintiffs can amend the Complaint to
18 include allegations about the ADC-routing program." Pls' Br. at 4 n.4. Although the Plaintiffs did
19 not move for leave to amend, to the extent Plaintiffs' seek leave to file an amended complaint, the
20 Court should deny such a request.

21 Plaintiffs do not explain how they could amend their Complaint to confer standing to seek
22 injunctive relief related to call routing. Indeed, Plaintiffs concede that they were "unaware" about
23 AT&T's call routing function at the time they filed their Complaint. Pls' Br. at 4 n.4. There is no
24 explanation of how Plaintiffs could correct a pleading deficiency to allege that they either dialed or
25 intended to dial an ADC for call routing services when they were "unaware" of "AT&T's ADC-
26 routing program," especially when call routing requires the mobile user to dial an ADC to initiate the
27 service. See Tr. 66:7-12; *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1052 (9th Cir. 2008) (denying
28 leave to amend when plaintiffs failed to state what additional facts they would plead or what

1 additional discovery they would conduct to discover such facts). Of course, if Plaintiffs can allege
2 actual harm from AT&T's call routing practice, this Court's dismissal for lack of subject matter
3 jurisdiction will not operate as *res judicata* with respect to the bringing of such a lawsuit.

4 **III. CONCLUSION AND RELIEF REQUESTED**

5 For the reasons above, Defendants respectfully request that this Court grant Defendants'
6 12(b)(1) Motion to Dismiss and dismiss Plaintiffs' requests for injunctive relief. Defendants
7 respectfully request any other relief to which they are justly entitled.

8
9
10
11 Dated: February 8, 2021

Respectfully submitted,

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