Case No. 16-15496

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

HELENE CAHEN, KERRY J. TOMPULIS, MERRILL NISAM, RICHARD GIBBS, and LUCY L. LANGDON,

*Plaintiffs-Appellants*,

v.

TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A., INC., and GENERAL MOTORS LLC,

*Defendants-Appellees.*

On Appeal From the United States District Court
for the Northern District of California
The Honorable William H. Orrick | Case No. 4:15-cv-01104-WHO

# BRIEF FOR APPELLEES TOYOTA MOTOR CORPORATION AND TOYOTA MOTOR SALES, U.S.A., INC.

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## CORPORATE DISCLOSURE STATEMENT

Toyota Motor Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock. Toyota Motor Sales, U.S.A., Inc. is a wholly-owned subsidiary of Toyota Motor North America, Inc., which is directly or indirectly a wholly-owned subsidiary of Toyota Motor Corporation.

Dated: September 28, 2016

Respectfully submitted,

/s/ *Christopher Chorba*

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## INTRODUCTION

The District Court properly rejected plaintiffs-appellants' purely speculative theory of injury and dismissed this class-action complaint for lack of Article III standing. In their complaint, plaintiffs contended that vehicles manufactured by Toyota, Ford, and GM—collectively, close to 50% of the domestic automobile market—are "defective" because they may not be impenetrable to sophisticated cyberattacks that have never happened. Specifically, plaintiffs claimed that the electronic control systems in these vehicles are vulnerable to an unspecified risk of "hacking," even though plaintiffs did not allege that *any* of these automakers' vehicles has *ever* experienced such a criminal attack.

Judge William H. Orrick dismissed these claims in a thorough, 24-page opinion that systematically considered—and rejected—each of plaintiffs' contentions. He ruled that plaintiffs' alleged injury-in-fact was purely hypothetical, "especially in light of the fact that plaintiffs do not allege that anybody outside of a controlled environment has ever been hacked." (Excerpts of Record ("ER") 20.) Although Judge Orrick granted plaintiffs leave to amend their complaint, plaintiffs declined that opportunity and filed this appeal instead.

This Court should affirm the district court's well-reasoned ruling. The United States Constitution permits federal courts to exercise their judicial power only over "Cases" or "Controversies." U.S. CONST. art. III, § 2, cl. 1. To ensure that the

federal judiciary acts within this scope of authorized power, and "to identify those disputes which are appropriately resolved through the judicial process," a plaintiff invoking the jurisdiction of the federal courts must allege an actual injury-in-fact that was caused by the defendant and that the court can redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). If any of those elements is not present, a federal court cannot decide the matter because there is no "case" or "controversy" presented for resolution.

The Supreme Court's recent Article III ruling, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), emphasized yet again the importance of the injury-in-fact requirement, holding that the plaintiff's complaint must establish that the alleged injury is actual or imminent, *and* particularized, *and* concrete. If the complaint does not establish *all* of those elements, the court must dismiss for lack of jurisdiction.

Plaintiffs now contend that simply paying money for their vehicles unlocks the Article III gate and enables their action to proceed to trial. But this Court has rejected this boundless theory of standing, which would eviscerate the injury-in-fact requirement. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th Cir. 2009) (rejecting attempt to base standing on "the alleged loss in value" of a product because the alleged injury involved "a hypothetical risk"). Plaintiffs incorrectly assert that Judge Orrick "largely ignored" their allegations of economic injury (Br. [Dkt. 12]

at 10–11, 14–18), but his ruling devoted several pages (and an entire section) to rejecting this argument.

That decision comported with binding precedent and common sense. Indeed, if a plaintiff could sue based on the mere theoretical possibility of a future criminal "hack," she also could sue based on the theoretical possibility that a person could throw a rock at her vehicle's windshield and shatter it, or that a vandal could cut her vehicle's brake lines. But that a vehicle—or any other product—is not impervious to every hypothetical risk does not mean plaintiffs have suffered an actual or imminent, concrete, and particularized harm simply because the plaintiff paid money for the product. This lawsuit is precisely the type of manufactured dispute that the standing doctrine was meant to eliminate—one premised on an entirely speculative, abstract injury that has never occurred. This Court should therefore affirm the district court's dismissal of plaintiffs' complaint.

## STATEMENT OF JURISDICTION

Toyota agrees with Ms. Cahen's statement that this case is a proposed class action under 28 U.S.C. § 1332(d). Toyota also agrees with Ms. Cahen's statement that this is an appeal from a final judgment pursuant to 28 U.S.C. § 1291, and that Ms. Cahen filed a timely notice of appeal from that judgment. (ER 1–3.)

## STATEMENT OF THE CASE

On March 10, 2015, plaintiffs filed a lengthy class-action complaint—which contained 343 pages, 2,181 numbered paragraphs, and 238 separate claims arising under federal law and the laws of all 50 states and the District of Columbia—against Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc. (collectively, "Toyota"), Ford Motor Company, and General Motors LLC. (Appellees' Supplemental Excerpts of Record ("SER") 134.) Approximately four months later, plaintiffs' counsel filed an amended (and substantially shortened) complaint that asserted claims against the same defendants but only under the laws of the states of California, Oregon, and Washington. (ER 28.) The core allegations of the First Amended Complaint remained the same—that these automakers' vehicles are vulnerable to "hacking" and that industry-wide data-collection practices invade drivers' privacy. (ER 29–31 [¶¶ 1–8].)

Of the plaintiffs, only Helene Cahen alleged that she owned a vehicle manufactured by Toyota—an out-of-warranty Lexus RX 400h that she purchased in 2008, seven years before the complaint was filed. Ms. Cahen's complaint asserted several California law claims: (1) alleged violations of California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq*.); Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq*.); and False Advertising Law (Cal. Bus.

& Prof. Code § 17500 *et seq*.); (2) breach of implied warranty; (3) common law fraud; and (4) invasion of privacy under the California Constitution. (ER 44–54.)[1]

In support of these claims, Ms. Cahen alleged that Toyota's vehicles are "susceptible" to hacking because of electronic control units in the vehicles that are connected through a "controller area network" ("CAN bus"). (ER 29.) This technology—which is not unique to Toyota, Ford, or GM vehicles, and is in fact mandated by state and federal law[2]—enables different parts of the vehicle to communicate with one another. (*See* ER 34–35 [¶¶ 28, 30].) Among other things, this CAN bus technology allows the vehicle to detect when there is a problem and to alert the driver. But Cahen contended that this technology is allegedly "insecure" and, as a result, "*if* an outside source, such as a hacker, *were* able to send CAN packets to ECUs . . . the hacker *could* confuse one or more ECUs and thereby . . . take control of basic functions of the vehicle away from the driver." (*Id*. (emphases added).) As Judge Orrick noted, Ms. Cahen alleged that some academics and researchers have demonstrated—in highly controlled, experimental settings—that such hacking is theoretically possible. (ER 5, 19–20, 34–37.) Critically, however,

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[1] Ms. Cahen's complaint also asserted a breach-of-express-warranty claim, but she voluntarily dismissed this claim in response to Toyota's motion to dismiss. (ER 49–50; SER 61.)

[2] *See, e.g.*, 40 C.F.R. § 86.094-38(g)(1); Cal. Code Regs. tit. 13, § 1968.2*; see also* (SER 131–33.) Plaintiffs have never explained why they singled out Toyota, GM, or Ford and not other auto manufacturers.

she did not allege that any person has ever hacked *her vehicle* or *any other vehicle*, including any *Toyota vehicle*, in the real world. In other words, her "hacking" claims were based entirely on the theoretical possibility that a vehicle using CAN bus technology might be hacked in a way that places its driver at risk, even though she did not allege that anyone had ever done so or will do so at any particular time in the future. (ER 19.)

Ms. Cahen also alleged that "Defendants" violated the California Constitution by collecting certain "personal data" of "*drivers*" and transmitting that data to unnamed third parties without securing it. (ER 30, 40 [¶¶ 7, 49–50] (emphasis added).) But she did not allege that any particular automaker had done anything to *her* or collected data from *her* vehicle, nor did she allege that any of the defendants misused the data or that she suffered a concrete detriment from this collection. (*See id.*)

On August 28, 2015, Toyota, Ford, and General Motors moved to dismiss the complaint, arguing—among other things—that plaintiffs lacked standing, that the claims failed on the merits, and that the court lacked personal jurisdiction over Ford. (*See*, *e.g.*, SER 85, 123–31.)

Following a hearing, Judge Orrick granted the motions and held that plaintiffs (1) failed to establish standing as to all of their claims; (2) did not adequately allege a necessary element for an invasion-of-privacy claim; and (3) were unable to

establish personal jurisdiction as to Ford. *Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955 (N.D. Cal. 2015) (ER 4–27). Plaintiffs requested leave to amend the complaint if the district court determined that their allegations were insufficient (SER 63), and the district court gave plaintiffs leave to amend (ER 27 & n.6), as well as an extension of time to file a second amended complaint (SER 4–5).

But on February 19, 2016, plaintiffs announced that they no longer intended to amend their complaint, and would instead appeal the dismissal order. (SER 1–2.) Plaintiffs noticed their appeal on March 22, 2016. (ER 1.) On July 29, 2016, plaintiffs notified this Court that they voluntarily dismissed their appeal of the dismissal of Ford. (Dkt. 11.) That same day, plaintiffs filed their opening brief, which challenges just one of the district court's three major holdings—that plaintiffs failed to establish standing to assert their claims. (Br. at 5.) The Electronic Privacy Information Center ("EPIC") filed an amicus brief in support of plaintiffs-appellants on August 5, 2016. (Dkt. 27.)

## STATEMENT OF THE ISSUES

1. Whether the district court correctly held that Ms. Cahen failed to establish Article III standing to assert claims premised on her vehicle's alleged susceptibility to "hacking," because her theory of injury rested on a purely hypothetical risk and speculation about the actions of third-party criminals.

2. Whether the district court correctly held that Ms. Cahen also lacked standing to assert an invasion-of-privacy claim because she did not allege a concrete, particularized injury-in-fact resulting from automakers' alleged data-collection practices.

3. Whether Ms. Cahen waived her challenge to the district court's alternative holding that she inadequately alleged a necessary element of an invasion-of-privacy claim by failing to address that portion of the court's ruling in her opening brief on appeal.

4. Whether the Court should uphold the dismissal of Ms. Cahen's claims against Toyota on the alternate ground that the claims are barred by the applicable statutes of limitation.

## SUMMARY OF THE ARGUMENT

The district court properly dismissed the complaint for at least four independent reasons.

*First*, Ms. Cahen lacks Article III standing to bring any claims based on the alleged vulnerability of her vehicle to theoretical criminal "hacking" attacks. Her allegations rested on an entirely hypothetical risk that her vehicle *could be* hacked—she did not allege that *any* vehicle has ever been hacked outside of highly controlled, experimental settings. In addition, her theory of injury requires speculation about

whether third-party criminal hackers may or may not decide to hack her vehicle, or any other vehicle, at some undetermined point in the future.

In an attempt to overcome these obvious deficiencies, Ms. Cahen suggests on appeal that she has suffered "economic" injury sufficient to establish standing because her vehicle's alleged susceptibility to hacking made it worth less than what she paid for it. (*See, e.g.*, Br. at 10–11, 14–18.) But both the Supreme Court and the Ninth Circuit have squarely held that a plaintiff cannot establish injury-in-fact, economic or otherwise, based on an entirely hypothetical risk that a possible injury *may* occur at some point in the future. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) (a "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending"). And this Court has held that plaintiffs may not transform a hypothetical risk into a concrete injury with conclusory allegations that the risk has caused a "loss in value." *Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th Cir. 2009) (holding that "the alleged loss in value does not constitute a distinct and palpable injury that is actual or imminent because it rests on a hypothetical risk of hearing loss to other consumers who may or may not choose to use their iPods in a risky manner"). This is particularly true when—as here—the hypothetical risk depends entirely on speculation about what third-party criminals may or may not do at some undetermined future time.

Ms. Cahen also argues that she has suffered economic injury because she would not have bought her car if she knew it was "defective"—*i.e.*, that its CAN bus technology was susceptible to "hacking." But this Court has held that a plaintiff cannot establish economic injury-in-fact based on a product "defect" when the product has never malfunctioned and the defendant has never made representations about the alleged "defect" that deceived the plaintiff about the product's value or functionality. *See, e.g.*, *Birdsong*, 590 F.3d at 961–62. As Ms. Cahen alleged, Toyota has made representations in its advertising that safety is a top priority and that it aims to build safe vehicles (ER 38–39 [¶¶ 41–44]), and Toyota stands by those statements. But Toyota has not advertised its vehicles as "hack proof," just as it has not advertised its vehicles as "accident proof" or "theft proof." That a plaintiff has paid money for a product that is not impervious to every theoretical risk of harm does not establish standing to sue the product's manufacturer based on any risk that the plaintiff can imagine, especially when that risk has never materialized in a real-world setting. As Judge Orrick determined, something more must be present for a plaintiff to establish an *actual* or *imminent* injury-in-fact. (ER 23.) Ms. Cahen did not, and cannot, allege that "something more" in this case.

Ms. Cahen's claims also fail for the independent reason that she did not adequately allege that Toyota caused any injury. Again, all of her claims depended on a hypothetical risk that, in turn, depended on further speculation about the future,

potential, independent, and criminal actions of third parties. The Supreme Court has held that when a plaintiff's theory of causation depends on the conduct of third parties, rather than the decisions or actions of the defendant, no causal connection exists for standing purposes between the plaintiff's injury and the defendant's conduct.

For these reasons, this Court should affirm the district court's dismissal of Ms. Cahen's hacking-based claims for lack of standing.

*Second*, Ms. Cahen also lacks Article III standing to pursue her California "invasion of privacy" claim. Her allegations amounted to the assertion that "defendants" collect certain "personal data" of "*drivers*" and transmit that data to unnamed third parties, without securing it. (ER 30, 40, 54 [¶¶ 7, 49–50, 135–36] (emphasis added).) Ms. Cahen contended that these sparse allegations establish injury-in-fact, but she did not allege that *Toyota* has done anything to *her*, nor did she allege any concrete injury or risk of injury from these actions. *She even acknowledged that these data-collection practices were fully disclosed.* (ER 40 [¶ 50].) For those reasons, she failed to allege a particularized, concrete injury-in-fact that traces back to Toyota's practices.

*Third*, despite Ms. Cahen's assertion that the district court dismissed her claims on standing grounds only, the court alternatively ruled that the sparse allegations noted above were insufficient to state a claim of invasion of privacy. She

does not challenge this decision in her opening brief and has therefore waived her right to do so on appeal.

*Fourth*, although the district court did not reach the issue, all of Ms. Cahen's claims were time-barred. As she implicitly acknowledged in her briefing before the district court, the statute of limitations has run on all of her claims. Those claims accrued when she bought her vehicle in 2008, and they expired no later than 2012—three years *before* she filed this lawsuit. Plaintiff's conclusory allegations failed to establish even the most basic facts to toll the limitations period, including that she could not have discovered the facts underlying her claims earlier (despite her citation to numerous publicly available documents revealing those facts years before she filed her claims). Her implied-warranty claims are also untimely because she did not allege any breach within the one-year warranty period. Ms. Cahen did not (and could not) remedy these deficiencies.

For all these reasons, this Court should affirm the district court's dismissal of plaintiffs' complaint.

## ARGUMENT

### I. The District Court Correctly Held That Plaintiff Failed To Allege Facts Establishing Article III Standing.

As the Supreme Court recently reaffirmed, Article III limits the power of federal courts to decide only "cases or controversies." *Spokeo*, 136 S. Ct. at 1547. The doctrine of standing ensures that federal courts do not exercise judicial power

in a context other than that of a case or controversy. *Id*. As a result of these principles, a plaintiff cannot bring a claim in federal court unless she establishes that she has standing to assert it. *Lujan*, 504 U.S. at 561.

To satisfy the "irreducible constitutional minimum of standing," a plaintiff must establish three core elements: (1) a concrete, particularized, and actual or imminent injury-in-fact; (2) a causal connection between that injury-in-fact and the challenged conduct such that the injury is traceable to the defendant's actions, rather than those of an independent third party; and (3) the ability to redress the injury if the plaintiff prevails. *Id.* at 560. If any of these elements are missing, a court lacks jurisdiction to hear the claim and must dismiss the complaint. *See Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011).

Although at the motion-to-dismiss stage the court must "accept as true" the plaintiff's factual allegations, *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011), the plaintiff must offer more than labels or legal conclusions to adequately allege standing, *Chapman*, 631 F.3d at 955 n.9; *see also Maya*, 658 F.3d at 1068 (although the question of standing does not require "analysis of the merits" of the plaintiff's claims, the plaintiff may not "rely on a bare legal conclusion to assert injury-in-fact"). In particular, plaintiff's complaint must set forth factual allegations that—if true—establish she personally suffered a "concrete," "*de facto*" injury that "must actually exist." *Spokeo*, 136 S. Ct. at 1548. It cannot be based on conjecture

or speculation, but rather must be an actual or truly imminent harm. *See id.*; *Lujan*, 504 U.S. at 564. An injury is sufficiently imminent "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Montana Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1189 (9th Cir. 2014) (internal quotation marks omitted).

In addition, to establish the requisite causal connection, a plaintiff cannot "engage in an ingenious academic exercise in the conceivable" to demonstrate that the defendant caused the plaintiff's injury. *See Maya*, 658 F.3d at 1068 (internal quotation marks omitted). Instead, plaintiff must plead "concrete facts showing that the defendant's actual action has caused" the plaintiff's alleged injury. *Clapper*, 133 S. Ct. at 1150 n.5. Allegations amounting to "speculation about 'the unfettered choices made by independent third actors not before the court'" do not qualify. *Id.* (quoting *Lujan*, 504 U.S. at 562).

Applying those established principles to this case, Ms. Cahen failed to establish any actual injury caused by any of Toyota's conduct.

### A. Ms. Cahen's Conclusory Allegations Of Economic Injury Do Not Establish Injury-In-Fact.

Before the district court, Ms. Cahen repeatedly stated that her vehicle's alleged susceptibility to hacking was an "injury-in-fact" for standing purposes

because it placed her at risk of death or serious injury,[3] despite her acknowledgement that "*many if not most* of the cars driven by the class [she] seeks to represent *will not* be the target of a hack that takes over the vehicle and causes physical injury." (SER 74 (emphases added).)

Before this Court, however, Ms. Cahen has apparently conceded that she cannot establish injury-in-fact on that basis. In her opening brief, she challenges only one aspect of Judge Orrick's well-reasoned decision rejecting her hacking-based claims—his conclusion that she failed to establish an actual or imminent *economic* injury-in-fact. (Br. at 5, 10–11, 14–18.)

But the attempt to repackage speculation about future injury as lost economic value cannot salvage Ms. Cahen's claims. Despite her critiques that Judge Orrick "ignored" her allegations of economic injury and recast them to focus "purely on future harm" (*id*. at 2, 10–11, 17), the record establishes that Judge Orrick gave proper attention to Ms. Cahen's conclusory allegations that she would not have

[3] *See, e.g.*, SER 74 ("[Ms.] Cahen sues not only because Toyota's defect puts her car at risk of theft, but also because it unreasonably puts her at risk of severe bodily injury or death."); SER 17 ("It's now come to light, and one day it's going to be Judge Orrick's car . . . or a senator's car, and all of a sudden people are going to go crazy."); *see also* ER 30 [¶ 6] ("[O]wners and/or lessees of Defendants' vehicles are currently at risk of theft, damage, serious physical injury, or death as a result of hacking"). Despite these repeated assertions, Ms. Cahen attempts to disavow these allegations by contending on appeal that the district court erred by "transform[ing]" her "allegations into a request for relief based purely on future harm[.]" (Br. at 11.)

bought or paid as much for her 2008 Lexus had she known about its purported "design defects." *Cahen*, 147 F. Supp. 3d at 966 (ER 15) (citing ER 44 [¶ 66]); *see also* ER 46, 53 [¶¶ 78, 127] (alleging that Ms. Cahen paid "an inflated price" and failed to receive "the benefit of [her] bargain" and that her vehicle had "depreciate[d]" in value).[4] Judge Orrick then correctly held that these allegations were insufficient to establish injury-in-fact.

The Court rejected similar allegations of injury in *Birdsong*. There, the plaintiffs sued Apple on the theory that their iPods were "defective" because users faced "an unreasonable risk of noise-induced hearing loss." *Birdsong*, 590 F.3d at 956. Like Ms. Cahen here, the plaintiffs in *Birdsong* alleged that this purported "defect" made their iPods "worth less than what they paid for them" and that they

[4] In her appellate brief, Ms. Cahen asserts that Toyota sold the vehicles "without any disclosure of these problems" (Br. at 6), but she did not allege any facts suggesting that Toyota knew about its vehicles' alleged susceptibility to hacking until 2013, *five years* after she purchased her Lexus. (ER 31, 37 [¶¶ 12, 38] ("Before the researchers went public with their 2013 findings, they shared the results with Toyota and Ford[.]").) Even assuming that Toyota had knowledge of publicly available documents revealing the allegedly defective nature of CAN bus technology (although Ms. Cahen did not allege that Toyota did have this knowledge), the earliest such document cited in the complaint was published in 2011, *three years after* Ms. Cahen purchased her Lexus. (ER 31, 36 [¶¶ 12, 36 & n.18].) *See Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1147–48 (9th Cir. 2012) (affirming dismissal of UCL and CLRA claims because post-sale complaints about a product "do not support an inference that [defendant] was aware of the defect at the time" the defendant sold it).

failed to obtain "the full benefit of their bargain." *Id.* at 961.[5] The Court held that these allegations of economic harm failed to establish injury-in-fact for three reasons that are particularly relevant here.

First, the Court in *Birdsong* held that plaintiffs' allegations were insufficient because "the alleged loss in value" was not "actual or imminent"—it "rest[ed] on a *hypothetical risk* of hearing loss to other consumers who may or may not choose to use their iPods in a risky manner." *Birdsong*, 590 F.3d at 961 (emphasis added). Ms. Cahen's economic-injury allegations rest on a similar "hypothetical risk": She did not (and apparently could not) allege that *any* person has ever in the real world hacked *any* Toyota vehicle (let alone her vehicle), or attempted to hack a Toyota vehicle, or even wanted to hack a Toyota vehicle. Ms. Cahen alleged simply that her vehicle is not worth what she paid for it in 2008 because studies conducted years after her purchase purportedly show hacking is theoretically possible. (*See, e.g.*, ER 29 [¶ 4] ("***[I]f*** an outside source, such as a hacker, ***were able*** to send CAN packets to ECUs on a vehicle's CAN bus, the hacker ***could*** confuse one or more ECUs and thereby . . . take control of basic functions of the vehicle[.]") (emphases

[5] Although *Birdsong* addressed the question of standing under the rules applicable to California Unfair Competition Law claims, the Court specifically noted that "insofar as the [Unfair Competition Law] incorporates Article III's injury in fact requirement, the plaintiffs would lack an Article III injury in fact for the same reasons[.]" 590 F.3d at 960 n.4 (citation omitted).

added).) But that is the same theory of injury that this Court has repeatedly rejected. *See Birdsong*, 590 F.3d at 961; *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (if plaintiffs had sued their employer based on the risk that a company laptop containing their personal data *might* be stolen "at some point in the future," the court "would find the threat far less credible"); *Maya*, 658 F.3d at 1068 (plaintiff cannot merely "engage in an 'ingenious academic exercise in the conceivable' to explain how defendants' actions caused his injury"). *See also Whitmore v. Arkansas*, 495 U.S. 149, 157 (1990) (rejecting plaintiff's alleged injury as "too speculative to invoke" Article III jurisdiction); *Lujan*, 504 U.S. at 564 n.2 (the "imminence" requirement "ensure[s] that the alleged injury is not too speculative for Article III purposes").

Second, like the "hypothetical risk" in *Birdsong*, which depended on the actions of other iPod users who may or may not choose to use their iPods in an unsafe manner, the risk here likewise depends on the independent actions of third parties. But those actions are even further afield here than in *Birdsong*. The third-party conduct that plaintiff fears in this case would violate several criminal anti-hacking laws,[6] rendering the alleged injury even *more* speculative. The Supreme Court

[6] *See, e.g.*, 18 U.S.C. § 1030 (Computer Fraud and Abuse Act; outlaws third-party hacking, such as "intentionally access[ing] a computer without authorization [] and thereby obtain[ing] information from any protected computer"); Cal. Penal Code

regularly rejects theories of standing that require speculation about the independent acts of third parties. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (rejecting standing where "establishing injury requires speculating" about the actions of "elected officials"); *Clapper*, 133 S. Ct. at 1148 (rejecting a theory of injury-in-fact that relied on a "highly attenuated chain of possibilities," several of which involved the decisions of absent third parties).

As the Third Circuit has observed, the harm is hypothetical if the plaintiffs—like Ms. Cahen here—cannot "describe" their injury "without beginning [their] explanation with the word 'if:' *if* the hacker read, copied, and understood the hacked information, and *if* the hacker attempts to use the information, and *if* he does so successfully, only then will Appellants have suffered an injury." *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (emphasis in original). Ms. Cahen's alleged injury is even more speculative than the injury in *Reilly*; in that case, the hack had actually occurred, yet the plaintiffs still failed to establish injury-in-fact. *Id.* at 40. Here, it is most likely that no hack ever will occur, as Ms. Cahen admitted "many if

§ 502 (Comprehensive Computer Data Access & Fraud Act; criminalizes third-party acts that "tamper[], interfere[], damage, and [provide] unauthorized access to lawfully created computer data and computer systems").

not most of the cars driven by the class [she] seeks to represent will not be the target of a hack." (SER 74).[7]

Third, this Court held in *Birdsong* that the plaintiffs failed to allege economic injury-in-fact because they "failed to allege a cognizable defect" that "caused their iPods to be worth less than what they paid." 590 F.3d at 961. In particular, there were no allegations of a "history of malfunction," or that "the iPods failed to do anything they were designed to do," or that the plaintiffs, "or any others, have suffered or are substantially certain to suffer inevitable hearing loss or other injury from iPod use." *Id.* at 959, 961.

[7] In its amicus brief, EPIC asserts that Judge Orrick incorrectly held that plaintiffs did not "face a credible risk of hacking," because this conclusion "fundamentally misunderstands the security vulnerabilities created by connected cars." (EPIC Br. [Dkt. 27] at 10–11.) EPIC offers extended argument on that point, including multiple citations to third-party publications that go well beyond the four corners of Ms. Cahen's complaint. (*Id.* at 10–23). EPIC overlooks that Ms. Cahen had the opportunity, but chose not, to amend her complaint to incorporate any of the information EPIC discusses in its brief (or any other information). *Cahen*, 147 F. Supp. 3d at 974 (ER 27; SER 6 [Dkt. 78 at 2].) If a federal court cannot create "jurisdiction by embellishing otherwise deficient allegations of standing," *Whitmore*, 495 U.S. at 155–56, neither can EPIC as amicus curiae. Moreover, although EPIC asserts that "many customers have already suffered due to vulnerable car systems" (EPIC Br. at 16), EPIC does not once connect its discussion of purportedly vulnerable car systems to actions by *Toyota* or even a vehicle manufactured by Toyota. Like Ms. Cahen's complaint, all of the theoretical harm cited by EPIC depends on speculation about the possible future actions of independent criminal hackers, which cannot establish injury-in-fact (*supra* pp. 14–20) or causation (*infra* pp. 27–31).

For the same reasons, Ms. Cahen's allegations failed to establish that Toyota vehicles are "defective." Again, she did not allege that anyone in the real world actually has ever hacked a Toyota vehicle, nor did she allege that such hacking is imminent. Although she alleged that *academic researchers* have shown that hacking is conceivably possible by tampering with certain vehicles (none of which are a 2008 Lexus RX 400h) in highly controlled, experimental settings (ER 35–37 [¶¶ 34–37]), *Birdsong* rejected the notion that examples of "'extreme'" use establish that a product is defective. 590 F.3d at 958 (holding that the district court did not err in finding that the risk of hearing loss existed only when iPods were used "'in an extreme way'"). Ms. Cahen also did not allege that she is unable to use her vehicle for its ordinary purposes—namely, driving. To the contrary, she alleged that she still owns it. (ER 31 [¶ 12].) Thus, like the plaintiffs in *Birdsong*, Ms. Cahen did not allege any "defect" in her vehicle that decreased its value or resulted in economic harm to her.[8]

[8] Toyota anticipates that Ms. Cahen's reply brief will cite the recent district court opinion in *Flynn v. FCA US LLC*, No. 15-00855, slip op. (S.D. Ill. Sept. 23, 2016), which also involved claims based on the alleged threat of vehicle hacking. *Flynn* does not support reversal. In that case, the district court—like Judge Orrick—rejected plaintiffs' argument that the "risk of injury or death" from vehicle hacking established Article III standing because "there is no allegation that a real world hacker has ever hacked the uConnect system to cause injury[.]" *Id.* at 6. But *Flynn* also held that plaintiffs alleged an economic injury because they made specific allegations resulting from the widely-publicized hack of a Jeep Cherokee that

Plaintiff attempts to defeat this sensible conclusion by citing to three decisions of this Court. As Judge Orrick's decision shows, however, all three are distinguishable. *Cahen*, 147 F. Supp. 3d at 969–71 (ER 20–23). The first two cases involved allegations of deceptive advertising practices, which are not at issue here:

- In *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1102 (9th Cir. 2013), the plaintiff alleged that Kohl's department store falsely advertised its apparel prices as "substantially reduced" from their original prices, when in fact those prices were not "substantially reduced." The Court held that plaintiff's allegation that he would not have purchased apparel from Kohl's if not for these "deceptive advertisements" established economic injury. *See id.* at 1102, 1105.

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"suggest[ed] a drop" in the value of the vehicles. *Id.* For example, plaintiffs' complaint: (a) claimed that the manufacturer's recall arose from the claimed "defect"; (b) cited 27 real-world hacking incidents in vehicles equipped with the same technology as plaintiffs' vehicles; (c) "allege[d] that a journalist driving one of the affected vehicles was hacked in real time and his event narrated for the market to read in a national magazine" (*Wired*); and (d) included "clear allegations as to what vulnerabilities the recall didn't fix," including "documents from the recall offer[ing] some doubt as to whether everything is fixed." *Id.* at 7-8. The district court held that these specific allegations were sufficient to withstand dismissal "at this stage." *Id*. at 16.

In sharp contrast here, Ms. Cahen alleged that she lost money from the purchase of her Lexus seven years *earlier*, because some academic researchers have shown that hacking is theoretically possible in experiments involving *other* vehicles. (*See supra* at pp. 5–6.) *That's it.* Her allegations of economic injury-in-fact were insufficient because they were based entirely on speculation and hypothetical risks. *See*, *e.g.*, *Birdsong*, 590 F.3d at 961; *Lujan*, 504 U.S. at 564 n.2.

- In *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 586–87, 595 (9th Cir. 2012), the plaintiffs alleged that Honda made misrepresentations in advertisements about its automatic braking system—an add-on option that cost an additional $4,000—because the advertisements failed to disclose certain limitations that would prevent the system from braking in time to avoid an accident. The Court held that the plaintiffs had alleged injury-in-fact because they "were relieved of their money by Honda's deceptive conduct." *Id.* at 595.

Unlike *Hinojos* or *Mazza*, this is not a case in which the plaintiff is challenging the accuracy of specific representations about a product's value or functionality. As Judge Orrick reasoned, Ms. Cahen did not allege that Toyota engaged in advertising or other affirmative conduct that deceived her or other purchasers about Toyota vehicles' susceptibility to hacking. *Cahen*, 147 F. Supp. 3d at 969 (ER 20) (distinguishing *Hinojos* on the basis that plaintiffs "do not assert any demonstrably false misrepresentations of value, but rather make conclusory allegations that their cars are worth less because of the risk of future injury") (citing *Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 972 (C.D. Cal. 2014) (holding that "[p]laintiffs do not have a bargained-for benefit claim based on the extent of performance of the [automatic braking feature] in the absence of a claim that Toyota made representations about the amount or extent of speed reduction provided by the

[feature]")). Nor did Ms. Cahen allege, as in *Mazza*, that she paid more money for an anti-hacking safety feature, which has limitations that Toyota failed to disclose.

The third case that Plaintiff cites, and upon which she principally relies throughout her brief (*Maya v. Centex Corp.*), is similarly distinguishable. In that case, the plaintiff homebuyers alleged that their homes were worth less than what they paid for them because the defendant housing developers created artificial demand by telling buyers they were "building stable, family neighborhoods occupied by owners of the homes." *Maya*, 658 F.3d at 1065. But the developers were allegedly lying, and instead sold homes to unqualified buyers with a high risk of foreclosure and to investors who did not plan to live in the homes. *Id.* The Court held that these allegations established that defendants' alleged misconduct directly resulted in "actual and concrete economic injuries" to the plaintiffs because the "'artificial demand' created by defendant[s'] marketing and financing practices had an identifiable impact on the price [plaintiffs] paid for their homes." *Id.* at 1069–70. Here, in contrast, Ms. Cahen did not allege that Toyota made any promises it failed to keep, or that Toyota took affirmative steps that undermined the value of its vehicles, or that there was an identifiable impact on the price she paid for her vehicle. Instead, Ms. Cahen only alleged a completely hypothetical and nebulous "threat" of hacking that apparently was not even known as a theoretical possibility until 2011—three years *after* her purchase. (ER 31, 36 [¶¶ 12, 36].)

In sum, these three cases (*Hinojos*, *Mazza*, and *Maya*) offer no support for Ms. Cahen's assertion that her economic-injury allegations—disconnected from any related affirmative conduct by Toyota—established any injury-in-fact. And *Birdsong* confirms this conclusion. As here, the plaintiff in *Birdsong* did not allege that Apple made affirmative misrepresentations—such as a misrepresentation that "iPod users could safely listen to music at high volumes for extended periods of time"—that became part of the "bargain" Apple struck with iPod users. 590 F.3d at 961–62. Ms. Cahen likewise did not allege that Toyota made affirmative representations about whether its vehicles could or could not be hacked that then became part of the "bargain" she struck with Toyota when she purchased her vehicle.

Ms. Cahen's position is that a plaintiff has standing to sue every time she pays money for a good that is not impervious to the hypothetical future risks posed by unspecified external forces. If she has standing based on the theoretical possibility that a criminal could "hack" a vehicle—even though no one ever has—she could sue Toyota based on the hypothetical risk that a rock could shatter her windshield, or that a vandal could slash her tires.[9] None of those hypothetical risks means that a

[9] EPIC's amicus brief takes an even more aggressive position, arguing that Judge Orrick should have determined "whether each of the plaintiffs' alleged violations *of their legal rights*" under the various statutes is an injury-in-fact. (EPIC Br. at 10) (emphases in original). In other words, under EPIC's formulation, the Article III gate would unlock whenever a plaintiff could conceive of a harm, even if there was

customer suffers an economic injury sufficient to confer standing when she buys a Toyota vehicle. Something more must be present to create a case or controversy under Article III. To hold otherwise "would drain" the injury-in-fact "requirement of meaning." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294–95 (D.C. Cir. 2007) (permitting claims of injury caused by "remote" and "speculative increased risks" threatens to "eviscerate the Supreme Court's standing doctrine").[10]

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*no* probability that harm ever would occur. But as the Supreme Court has stated repeatedly, "[a]bstract injury is not enough." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Even if "the alleged vehicle vulnerabilities"—standing alone—violated a statute, that violation must still cause a "concrete injury" to establish Article III standing. *Spokeo*, 136 S. Ct. at 1549; *see also Lujan*, 504 U.S. at 572–73 (rejecting the argument that "an abstract . . . 'right' to have" the laws obeyed could establish injury-in-fact).

[10] *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1165 (C.D. Cal. 2011), cited by Ms. Cahen below (SER 71), held that plaintiffs established economic injury based on their purchase of Toyota vehicles. That court reasoned that plaintiffs "offer[ed] detailed, non-conclusory factual allegations of" a claimed safety defect—"incidents of sudden, unintended acceleration"—that more than half of the named plaintiffs allegedly experienced. *Id.* at 1157, 1163, 1166. But the court also noted that when—as in this case—"economic loss is predicated solely on how a product functions, *and the product has not malfunctioned*," the plaintiff must allege "something more" than "an overpayment for a 'defective' product." *Id.* at 1165 n.11 (emphasis added); *accord Lee*, 992 F. Supp. 2d at 972 ("Plaintiffs have not alleged an actual economic injury because they have not had any negative experience with the [automatic braking feature]."); *Boysen v. Walgreen Co.*, No. 11-06262, 2012 WL 2953069, at *7 (N.D. Cal. July 19, 2012) (no economic injury because plaintiff did not allege that either he, or anyone else, had ever been (or was likely to be) injured by the levels of arsenic and lead found in the defendant's fruit juices).

This Court should therefore hold that Ms. Cahen failed to allege an injury-in-fact sufficient to establish standing.[11]

### B. Ms. Cahen Did Not Establish A Causal Link Between Toyota's Conduct And Her Alleged Injury.

In addition to failing to establish that her Toyota vehicle's alleged susceptibility to hacking resulted in an "injury-in-fact," Ms. Cahen also failed to establish "causation." *Lujan*, 504 U.S. at 560. To satisfy her burden of showing standing to sue, a plaintiff must allege a "causal connection between the injury and the conduct complained of" such that the injury is "fairly traceable to the challenged action of the defendant." *Id.* (internal punctuation omitted). This is an independent ground on which this Court may affirm.[12]

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[11] Amicus curiae EPIC asserts that class-action defendants engage in a "semantic trick" to "confuse" federal courts into "conflat[ing]" injury-in-fact and consequential "damages." (EPIC Br. at 6.) But it is *EPIC* that engages in a "semantic trick," conflating the Supreme Court's definition of "injury-*in-fact*"—a particularized, concrete, and actual or imminent injury, *Spokeo*, 136 S. Ct. at 1548—with the dictionary definition of "injury"—"the illegal invasion of a legal right," 22 Am. Jur. 2d *Damages* § 2 (2016). EPIC offers no authority for its assertion that a plaintiff can establish standing with the mere showing of an invasion of a legal right, and its argument disregards binding precedent. *See Spokeo*, 136 S. Ct. at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation."); *Krottner*, 628 F.3d at 1143 (no standing to sue for negligence or breach of contract based on the mere risk that a laptop containing sensitive data might be stolen).

[12] The District Court specifically noted the causal problems with Ms. Cahen's theory (*Cahen*, 147 F. Supp. 3d at 965–66, 968–69 (ER 15–16)), but this Court may affirm on this alternative ground even if Judge Orrick had not reached it. *See, e.g.*, *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) ("We may

As the Supreme Court has held repeatedly, the requisite "causal connection" is missing when the plaintiff's theory of causation "rest[s] on speculation about the decisions of independent actors" not before the court. *Clapper*, 133 S. Ct. at 1150; *Lujan*, 504 U.S. at 560. In *Clapper*, the plaintiffs (who were lawyers and journalists) challenged the constitutionality of a law that authorized electronic surveillance of certain international communications. 133 S. Ct. at 1142 & n.1. The plaintiffs claimed that the law would inevitably result in the unconstitutional interception of their communications because they frequently spoke with persons likely to be targeted for such surveillance. *Id.* The Court held that plaintiffs could not establish standing to challenge the law because their theory of standing not only "relie[d] on a highly attenuated chain of possibilities," and thus failed to show a "certainly impending" injury, but also that one of the "link[s]" in the "chain of contingencies" amounted to "mere speculation." *Id.* at 1148. Specifically, plaintiffs' theory rested "on speculation about the decisions of independent actors," including speculation about whether the Government would "imminently target communications to which respondents are parties" and whether the Foreign Intelligence Surveillance Court

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affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt."); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1076–77 (9th Cir. 2003) (affirming district court's dismissal of plaintiff's claims on alternate ground of claim preclusion because "the facts giving rise to res judicata are amply supported by the record on appeal").

would authorize such surveillance. *Id.* at 1148–51. As a result, the plaintiffs could not "satisfy the requirement that any injury in fact must be fairly traceable" to the challenged conduct. *Id.* at 1148; *see also Maya*, 658 F.3d at 1068 (an "ingenious academic exercise in the conceivable" cannot establish causation).

Several links in the "chain of contingencies" that would have to occur for any injury here likewise rely on "mere speculation" about the decisions of independent actors—namely, third-party criminal hackers. Ms. Cahen alleged that she suffered injury because her seven-year-old vehicle *could be* hacked if a third party someday in the future made the independent decision to commit a crime, and then decided to hack into *her* vehicle, and then *succeeded*, and then *also* chose to do something that endangered her safety or invaded her privacy. (ER 29 [¶¶ 1–2, 4].) She did not allege that any criminal has ever tried to hack into her vehicle (or *any* other vehicle). In fact, she contended only that researchers and other *academics* have demonstrated that hacking is possible in the context of highly controlled, experimental settings (and almost every experiment involved physical access to the vehicle). (ER 35–37 [¶¶ 34–37]; SER 99-100.) In sum, her allegations that Toyota caused her purported injury rested entirely on academic research allegedly demonstrating that certain types of car hacking are *conceivably possible*, and speculation that some unknown independent third party *might* someday in the future try to hack some vehicle made

by Toyota and actually succeed in taking control of that vehicle. These allegations are insufficient to establish causation under *Maya* and *Clapper*.[13]

Ms. Cahen responds that she did not allege injury resulting from the threat of "future harm" she faces at the hands of criminal hackers, but instead from her purchase of a vehicle that supposedly is worth less than what she paid for it because a criminal could hack it. (Br. at 2–3, 18.) But this characterization still rests on "speculation about the unfettered choices made by independent actors"—i.e., the decision of a hacker to attack her vehicle in the future—which severs any causal connection between the plaintiff's injury and the defendant's conduct. *See Clapper*, 133 S. Ct. at 1150 n.5 (internal citations omitted); *see also Krottner*, 628 F.3d at 1143 (if the plaintiffs "had sued based on the risk that [the laptop] would be stolen at some point in the future," the Court "would find the threat far less credible"); *Birdsong*, 590 F.3d at 961 (rejecting plaintiff's economic-injury claim because it rested "on a hypothetical risk of hearing loss to other consumers who may or may not choose to use their iPods in a risky manner"); *Maya*, 658 F.3d at 1070 (holding

[13] *See also Biden v. Common Cause*, 748 F.3d 1280, 1284–85 (D.C. Cir. 2014) (holding that plaintiffs lacked standing because the "alleged injury was caused not by any of the defendants, but by an 'absent third party'" that plaintiffs did not sue); *U.S. Hotel & Resort Mgmt., Inc. v. Onity Inc.*, No. 13−1499, 2014 WL 3748639, at *4 (D. Minn. July 30, 2014), *appeal dismissed* (Jan. 27, 2015) (rejecting plaintiffs' attempt to base Article III standing on hotels' allegedly defective room door locks because "no such unauthorized entry could occur unless and until [a] third-party acted with criminal intent to gain entry").

that plaintiffs satisfied standing requirements where "defendants, *not third parties*," engaged in the conduct that "caus[ed] plaintiffs to overpay") (emphasis added).

Thus, Ms. Cahen's allegations failed to establish that her alleged injury is "fairly traceable" to any conduct by Toyota. *Lujan*, 504 U.S. at 560 (internal punctuation omitted).

### C. Ms. Cahen Also Did Not Allege An Injury-In-Fact To Support Her Invasion-Of-Privacy Claim.

The district court also correctly dismissed Ms. Cahen's invasion-of-privacy claim for lack of standing. *Cahen*, 147 F. Supp. 3d at 971–73 (ER 23–26). Ms. Cahen alleged that "[w]ithout drivers ever knowing, Defendants also collect data from their vehicles"—namely, data concerning "driving history[,] vehicle performance[,]" and the "geographic location of their vehicles at various times"—"and share the data with third parties." (ER 40, 54 [¶¶ 49–50, 135].) Ms. Cahen conceded that defendants "make drivers aware" of their data-collection practices "in owners' manuals, online 'privacy statements,'" and other "terms [and] conditions," but she complained that "drivers" cannot "comprehensively opt out of all collection of data." (ER 40 [¶ 50].) She asserted, in a conclusory fashion, that these data collection and transmission practices violated her "right to privacy." (ER 54 [¶ 134].)

Judge Orrick carefully examined all of Ms. Cahen's allegations related to her privacy claim, and went so far as to quote them in his opinion. *Cahen*, 147 F.

Supp. 3d at 971 (ER 23). He then concluded that the allegations failed to establish injury-in-fact because they were insufficiently particularized or concrete. *Id.* at 971–73 (ER 23–26); *see also Spokeo*, 136 S. Ct. at 1548 (emphasizing that particularization and concreteness are "independent requirement[s]" that must both be present in the plaintiff's complaint). And Ms. Cahen's allegations, which she does not cite in her opening brief, failed to satisfy both requirements.

First, her allegations did not establish a particularized injury—one that "affect[s] the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks omitted); *see also Raines v. Byrd*, 521 U.S. 811, 819 (1997) (plaintiffs must show in the complaint that they have a "'personal stake'" in the dispute). Ms. Cahen alleged that "[d]efendants" collect and transmit "drivers'" personal data, without making drivers aware (despite the acknowledged disclosures of their data-collection practices (*see* ER 40 [¶ 50]; ER 27 n.6)), and that drivers cannot opt out. (ER 40 [¶ 50].) Notably missing from these allegations was any assertion that *Toyota* did anything to *her*.[14] In *Birdsong*, the plaintiffs similarly

[14] Ms. Cahen's appellate brief defines her and another lead plaintiff, Merrill Nisam, as "the Drivers" (Br. at 3), presumably to suggest that the complaint's allegations referencing "drivers" referred to both of these named plaintiffs. But the complaint did not draw any connection between Ms. Cahen or the other plaintiffs and the alleged harm suffered by "drivers." And Ms. Cahen ignores that three of the plaintiffs/"drivers" (Kerry J. Tompulis, Richard Gibbs and Lucy L. Langdon) dropped their appeal. The Supreme Court has "consistently stressed that a plaintiff's

alleged that Apple's iPods posed a "potential risk of hearing loss not to themselves, but to other unidentified iPod users." 590 F.3d at 960. The Court held that those allegations failed to establish particularity because they failed to show that the *plaintiffs themselves* personally suffered any harm or were exposed to any risk. *Id.* at 960–61; *Raines*, 521 U.S. at 829 (dismissing complaint because plaintiffs only alleged injury to the institution to which they belonged, not to themselves personally). This Court should likewise affirm the district court's decision that Ms. Cahen failed to allege that she suffered a particularized injury to support her invasion of privacy claim.

Second, Ms. Cahen failed to show that she suffered a concrete injury from the alleged data collection. A concrete injury is one that "actually exist[s]"—it is "real and not abstract"—and "cause[s] harm or present[s] [a] material risk of harm." *Spokeo*, 136 S. Ct. at 1548, 1550 (internal quotation marks omitted). This Court's decision in *Krottner v. Starbucks Corp.*, is instructive. In that case, a company laptop containing employees' unencrypted personal data (including social security numbers) was stolen. 628 F.3d at 1140. The Court held that the plaintiffs had "alleged a credible threat of real and immediate harm stemming from the theft of [the] laptop." *Id.* at 1143. The Court noted, however, that:

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*complaint* must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines*, 521 U.S. at 819 (emphasis added).

> Were Plaintiffs-Appellants' allegations more conjectural or hypothetical—for example, if no laptop had been stolen, and Plaintiffs had sued based on the risk that it would be stolen at some point in the future—we would find the threat far less credible.

*Id.*

Here, as Judge Orrick reasoned, Ms. Cahen's allegations did not even reach the level of the threat that *Krottner* warned would prove "less credible." Her allegations amounted to no more than an assertion that the "defendants" collect certain data from drivers and share it with third parties: (1) she did not allege that *Toyota* misused drivers' data or otherwise had an objectionable purpose for collecting and sharing data; (2) she did not allege that the data at issue *was* sensitive—let alone explain *why* it was sensitive—or that it could be used for nefarious purposes if it was publicly shared or fell into the hands of a bad actor; (3) she did not allege that she—or any other driver—stopped using a Toyota-made vehicle because of the alleged data-collection practices; (4) she did not allege that Toyota's practices make or are likely to make drivers nervous or fearful; and (5) she did not even allege that drivers *want* to opt out of such data collection. *And she acknowledged that defendants disclosed their data-collection practices to their customers*. (ER 40 [¶ 50].) Thus, her allegations failed to establish a "material risk of harm" from the alleged data-collection practices. *Spokeo*, 136 S. Ct. at 1550.[15]

[15] *See also Hancock v. Urban Outfitters, Inc.*, No. 14-7047, --- F.3d ---, 2016 WL

On appeal, Ms. Cahen responds that Judge Orrick's reasoning "***recast*** [her] allegations as being concerned with speculative risk of future harm resulting from the theft of [] location data," when "in fact" her claim was merely that "the Automakers' collection and sharing of the data" invaded the privacy of "the Drivers." (Br. at 20 (emphasis added).) But Judge Orrick did no such thing, and plaintiff cannot rest injury-in-fact upon a bare legal conclusion that the automakers' alleged data practices violate drivers' privacy. *See Chapman*, 631 F.3d at 955 n.9 (allegation that "the barriers at the Store 'denied [plaintiff] full and equal enjoyment'" did not establish standing because it merely "parrot[ed] the language" of the Americans with Disabilities Act). This is not a "heightened pleading standard," as Ms. Cahen suggests (Br. at 20), but the bare minimum that Article III requires to invoke federal jurisdiction.[16] Under this Court's and the Supreme Court's

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3996710, at *3 (D.C. Cir. July 26, 2016) (holding that plaintiffs failed to allege a concrete harm from the defendants' allegedly illegal requests for the plaintiffs' zip codes) (citing *Spokeo*, 136 S. Ct. at 1548–49); *Low v. LinkedIn Corp.*, No. 11-CV-01468-LHK, 2011 WL 5509848, at *6 (N.D. Cal. Nov. 11, 2011) (holding that plaintiff did not allege a concrete injury-in-fact because, unlike the plaintiffs in *Krottner*, he had "not alleged that his credit card number, address, and social security number have been stolen or published or that he is a likely target of identity theft as a result of LinkedIn's practices").

[16] To support her assertion that the district court imposed a "heightened pleading standard" to establish Article III standing, Ms. Cahen claims that the court "made an unwarranted determination that the Drivers' allegations were not sufficiently specific regarding such matters as 'the frequency of which [sic] the data is being tracked.'" (Br. at 20.) But Judge Orrick observed that Ms. Cahen's complaint did

settled precedent, to establish standing Ms. Cahen must allege something more than the legal "label" of the claim she asserts. *See Chapman*, 631 F.3d at 955 n.9; *Whitmore*, 495 U.S. at 155 (a "litigant must clearly and specifically set forth facts sufficient to satisfy [] Art. III standing requirements"); *see also Lujan*, 504 U.S. at 561 ("At the pleading stage, general *factual* allegations of injury resulting from the defendant's conduct may suffice[.]" (emphasis added)). Thus, her allegations were legally inadequate to establish that the alleged data-collection practices caused her any concrete injury and were therefore insufficient to establish standing.

### D. The District Court Correctly Dismissed Ms. Cahen's Claims For Lack Of Standing Even If It Did Not Cite Rule 12(b)(1).

Ms. Cahen faults the district court for not citing to Federal Rule of Civil Procedure 12(b)(1) when dismissing her complaint for lack of standing. (Br. at 10, 12.) As an initial matter, the Supreme Court has demonstrated on more than one occasion that a discussion of the standards for dismissing a complaint for failure to establish standing does not require a citation to Rule 12(b)(1). *See, e.g.*, *Spokeo*, 136 S. Ct. at 1550 (remanding for consideration of whether the plaintiff adequately alleged concrete harm, without citing to Rule 12(b)(1)); *Warth v. Seldin*, 422 U.S.

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not allege specific facts such as the frequency of data tracking in the context of evaluating whether she had adequately alleged a claim for relief under Rule 12(b)(6), *not* in the context of evaluating whether she had established standing to assert this claim. *See infra* pp. 37–38; *Cahen*, 147 F. Supp. 3d at 973 (ER at 26) (concluding that "[t]he California Class plaintiffs fail to adequately identify a protected privacy interest" and therefore failed to state a claim of invasion of privacy).

490, 518 (1975) (holding that plaintiff failed to allege standing, without citing to Rule 12(b)(1)). Moreover, Judge Orrick correctly determined that Ms. Cahen's allegations failed to establish that she had standing to sue, so any "error" was harmless and provides no basis for reversal. *See, e.g.*, *Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1490–91 (9th Cir. 1990) (asserted procedural error was harmless because the court correctly ruled that it lacked subject-matter jurisdiction).

Ms. Cahen also asserted that the district court erred by citing to Rule 12(b)(6) in its opinion "because the only issue the district court considered was the question of the Drivers' standing." (Br. at 13.) As discussed in the next section, however, the district court alternatively held that she failed to adequately allege an invasion-of-privacy claim—a dismissal governed by Rule 12(b)(6). *See, e.g.*, *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

## II. The District Court Dismissed The Invasion-Of-Privacy Claim For Failure To State A Claim Under Rule 12(b)(6), And Ms. Cahen Waived Any Challenge To That Ruling By Not Contesting It On Appeal.

As Judge Orrick concluded, "[e]ven if plaintiffs' allegations were sufficient to establish standing, they would not demonstrate a violation of the right to privacy under the California Constitution." *Cahen*, 147 F. Supp. 3d at 973 (ER 26). Specifically, he held that Ms. Cahen failed to establish the first element of this claim—that she had a "'legally protected privacy interest'" in the data allegedly

collected from drivers' vehicles and shared with third parties. *Id.* at 973 & n.5 (ER 26–27 & n.5 (citing *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 39–40 (1994) (reciting the elements of a California invasion-of-privacy claim)).)[17]

Ms. Cahen's opening brief did not challenge Judge Orrick's decision to dismiss her privacy claim for failure to state a claim pursuant to Rule 12(b)(6), and she has therefore waived her right to do so on appeal. *See, e.g.*, *Balser v. Dep't of Justice, Office of U.S. Tr.*, 327 F.3d 903, 911 (9th Cir. 2003) ("'Issues not raised in the opening brief usually are deemed waived.'"); *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994) (upholding dismissal because "[w]e review only issues which are argued specifically and distinctly in a party's opening brief"). Thus, this Court may uphold the dismissal of Ms. Cahen's privacy claim on the alternate ground that she waived her right to challenge the district court's determination that she failed to state a claim for relief.[18]

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[17] In a footnote, Judge Orrick observed that, if Ms. Cahen amended her complaint a second time, she should "consider whether [she] continue[d] to have a reasonable expectation of privacy"—the second element of a California invasion-of-privacy claim—in the allegedly collected and transmitted data, in light of her allegation that defendants *disclosed* their data-collection practices. *Cahen*, 147 F. Supp. 3d at 973 n.6 (ER 27 n.6). Ms. Cahen did not choose to amend her complaint to attempt to rectify this inconsistency. (SER 1–2.)

[18] Ms. Cahen did not simply ignore Judge Orrick's decision that her allegations failed to state a claim, but she also incorrectly stated in her opening brief that he decided this case on standing grounds only. (*See* Br. at 6 ("The district court . . . granted the Automakers' motions [] exclusively on grounds that the Drivers lacked Article III standing.").)

## III. This Court May Also Affirm The Judgment On The Alternate Ground That Plaintiff's Claims Are Time-Barred.

In addition to Ms. Cahen's failure to establish standing for her claims, this Court may also affirm the district court's dismissal of her claims on the independent ground that they were all barred by the applicable statutes of limitations. *See, e.g.*, *Atel*, 321 F.3d at 926 (affirming dismissal on different grounds than those relied on by the district court); *Tahoe-Sierra*, 322 F.3d at 1076–77 (affirming dismissal on the alternate ground of res judicata because "the facts giving rise to res judicata are amply supported by the record on appeal"). Ms. Cahen asserted seven claims arising under California law, and the longest statute of limitations applicable to those claims is four years.[19]

Ms. Cahen purchased her Lexus RX 400h vehicle in September 2008 (ER 31 [¶12]), and she asserted that she began to suffer the alleged economic harm on the day she purchased her vehicle. (*See* Br. at 17 (arguing that the district court should

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[19] *See* Cal. Bus. & Prof. Code § 17208 (Unfair Competition Law—4 years); Cal. Com. Code § 2725 and *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297, 1305–06 (2009) (Song-Beverly Act/Cal. Com. Code § 2314/breach of implied warranties—4 years); Cal. Civ. Code § 1783 (Consumers Legal Remedies Act—3 years); Cal. Civ. Proc. Code § 338(d) (fraud—3 years); Cal. Civ. Proc. Code § 335.1 and *Quan v. Smithkline Beecham Corp.*, 149 F. App'x 668, 670 (9th Cir. 2005) (invasion of privacy—2 years). Courts apply either a 3- or 4-year statute of limitations period to the False Advertising Law/Cal. Bus. & Prof. Code § 17500. *Compare Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 676 n.9 (2006) (suggesting a 3-year limitations period under Cal. Civ. Proc. Code § 338(a)), *with People v. Beaumont Inv., Ltd.*, 111 Cal. App. 4th 102, 136 (2003) (applying the Unfair Competition Law's 4-year limitations period).

have "credit[ed]" plaintiffs' "allegations of economic harm *suffered at the time of sale* by paying more than they would have for the Automakers' defective cars had the Automakers disclosed the defects") (emphasis added).) Thus, her last claim expired *four years* later, in September 2012, almost three years *before* she filed this lawsuit on March 10, 2015.

In her briefing before the district court, Ms. Cahen did not dispute that the statute of limitations has run on all her claims. (SER 80–81.) Instead, she argued that the statute of limitations was tolled. (*Id.*) To support her tolling argument, Ms. Cahen alleged only that Toyota "knowing[ly] and active[ly] conceal[ed] . . . [certain] facts" and that she "could not have reasonably discovered the true, latent defective nature of the CAN buses until shortly before this class action litigation was commenced." (ER 33–34 [¶¶ 26–27].)

To establish tolling, however, Ms. Cahen was required to plead specific facts demonstrating that she did not, and could not, discover the facts underlying her claim within the limitations period. *See, e.g.*, *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 638 (2007) ("In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.'"); *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 121 (9th Cir. 1980) (holding that fraudulent-concealment

tolling did not apply because plaintiff "failed to meet his burden of alleging facts showing due diligence on his part").[20]

Ms. Cahen's conclusory allegations were plainly insufficient to discharge her burden. Instead of alleging specific facts that demonstrated why she could not discover earlier the details of Toyota's alleged use of CAN bus technology, she merely recited the elements of California's tolling doctrines. The Court need look no further than the face of Ms. Cahen's complaint to see that she knew of, or could have reasonably discovered, the facts underlying her claim years before she filed suit:

- Her complaint cited several publications that supposedly revealed the allegedly "defective nature" of CAN buses long before she sued Toyota. (ER 35 n.9 (citing a CNN article, available on the Internet, from June 1, 2014 titled "*Your Car Is A Giant Computer—And It Can Be Hacked*" by Jose Paglieri); ER 37 [¶ 39 & n.22] (citing an August 8, 2014 letter, available on the Internet, from "members of a security research group who had independently studied automobile hacking").)

[20] As Toyota discussed below (SER 110–11), Ms. Cahen's complaint also failed to allege facts to establish the other elements of fraudulent concealment—"when the fraud was discovered" and "the circumstances under which it was discovered." *Baker v. Beech Aircraft Corp.*, 39 Cal. App. 3d 315, 321 (1974) (cited in *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008)).

- Ms. Cahen also alleged that researchers from the Universities of California San Diego and Washington "discovered in 2011 that modern automobiles can be hacked in a number of different ways" and then published that research in a report, which Ms. Cahen indicated is available on the Internet. (ER 36 [¶ 36 & n.18] (citing a 2011 study titled "*Comprehensive Experimental Analyses of Automotive Attack Surfaces*" by Stephen Checkoway *et al.*).)

Plaintiff did not explain why she could not have "reasonably discovered" earlier any of these publicly available documents, which allegedly supported her claims. These facts require dismissal. *See, e.g.*, *Grisham*, 40 Cal. 4th at 639 (dismissing Unfair Competition Law claim because it was apparent from the face of plaintiff's complaint that she "knew or should have known" about the facts underlying her claim years before she sued); *Clemens*, 534 F.3d at 1024 (plaintiff failed to show that either the discovery rule or fraudulent concealment applied because his deposition revealed that he had learned "three years before the filing of this action" of some of the facts underlying his claims).

Ms. Cahen's warranty claims were time-barred for another reason—the implied-warranty period for her 2008 Lexus expired years ago. She purchased her Lexus RX 400h in September 2008 (ER 31 [¶12]), and the implied-warranty period expired in September 2009, *see* Cal. Civ. Code § 1791.1(c); *Atkinson v. Elk Corp. of*

*Tex.*, 142 Cal. App. 4th 212, 230 (2006) ("[T]he duration of the implied warranty of merchantability under California law is limited to one year."). To state a claim, a plaintiff's complaint must therefore demonstrate that the alleged breach occurred within the implied-warranty period. The amended complaint here failed to do so, and Ms. Cahen ignored this argument in the district court. (*See, e.g.*, SER 47, SER 81, SER 112.)

## IV. Ms. Cahen's Claims Failed For Several Other Reasons, And She Waived Her Right To Amend Her Complaint To Remedy Any Of Those Deficiencies.

Judge Orrick did not reach, and did not need to consider, Toyota's other grounds for dismissing the complaint, including—among other arguments: (a) Ms. Cahen's failure to allege that Toyota was aware of a purported "defect" in 2008 when she bought her vehicle, as is required to state a claim under California's consumer-protection statutes (SER 50–51, SER 116–17); (b) her failure to allege with particularity her fraud claims (SER 42, SER 117); and (c) her failure to establish privity with Toyota because of her purchase of her vehicle from an independent dealer (SER 48–49, SER 114–15).

Toyota is confident that the arguments it has made in this brief provide this Court sufficient grounds to affirm the district court's dismissal of the complaint. As a purely protective measure, however, Toyota notes that it made several other arguments in its motion to dismiss and reply briefing before the district court. (*See*

SER 111–20 (Toyota's motion to dismiss); SER 47–52 (Toyota's reply briefing in support of its motion to dismiss).) Toyota respectfully requests that, if this Court disagrees with its arguments on appeal, the Court should remand with instructions for the district court to consider Toyota's other arguments for dismissal.

If the Court finds remand appropriate for any reason, Ms. Cahen has waived her right to amend her complaint to remedy any deficiencies in her pleadings. Judge Orrick expressly provided leave to amend the complaint when he granted Toyota's motion to dismiss. *Cahen*, 147 F. Supp. 3d at 974 (ER 27). In his order and at the hearing, Judge Orrick even identified deficiencies with specific allegations in the complaint. *See, e.g.*, *id.* at 973 n.6 (ER 27); SER 21–22. Plaintiffs thereafter requested, and the Court granted, an extension of time to amend the complaint. (SER 4–9 [Dkt. 78, 80].) But they declined to amend and elected to pursue this appeal instead. This Court has held that deciding to appeal the district court's decision, rather than amend, waives appellants' right to further amendment. *See, e.g.*, *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 977 (9th Cir. 2008). Thus, Ms. Cahen must stand by the allegations in the complaint, which—for the reasons discussed—failed to establish that she has standing to sue and failed to state a claim for relief.

## CONCLUSION

As the congressional report appended to Ms. Cahen's complaint suggests, the increasing prevalence of connected cars in American society presents both opportunities and challenges for product innovation and driver safety. The policy issues posed by those opportunities and challenges deserve discussion, and Toyota is an active participant in those conversations. But the appropriate place for those policy discussions is not in the context of a poorly pleaded class-action lawsuit premised solely on speculation and hypothetical risk. Even though the district court gave plaintiff another chance to demonstrate that she suffered an injury-in-fact (both from the theoretical possibility that a hacker might someday attack her vehicle, and from defendants' fully disclosed data-collection practices), plaintiff opted not to try again. This Court should therefore affirm the district court's dismissal of plaintiff's complaint.

## STATEMENT OF RELATED CASES

Toyota is not aware of any related cases under Circuit Court Rule 28-2.6.

Dated: September 28, 2016

Respectfully submitted,

/s/ Christopher Chorba

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## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Court Rule 32 because it contains fewer than 14,000 words [11,723 words total], excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2010.

Dated: September 28, 2016

*/s/ Christopher Chorba*
Christopher Chorba

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 28, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 28, 2016 /s/ *Christopher Chorba*
Christopher Chorba