UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JON HART,

Plaintiff,

v.

TWC PRODUCT AND TECHNOLOGY LLC,

Defendant.

Case No. 20-cv-03842-JST

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: ECF No. 18

Before the Court is Defendant TWC Product and Technology LLC's motion to dismiss. ECF No. 18. The Court will grant the motion in part and deny it in part.

I. BACKGROUND

Plaintiff Jon Hart brings this putative class action against Defendant TWC on behalf of "[a]ll persons and entities who reside in California who (1) downloaded the Weather Channel App and (2) Granted TWC access to the user's geolocation data before January 25, 2019." ECF No. 1 ¶ 12. "This case seeks to hold TWC accountable for its years-long practice of tracking and selling the physical locations of the users of its mobile weather application, without those users' permission." *Id.* ¶ 6. Hart alleges that:

> Until recently, TWC never did anything at all to disclose to App users the specificity with which it tracked users' geolocation, that it maintained this data, or that it directly profited from App [users'] geolocation data by transmitting or selling that data to affiliates and third parties for advertising and marketing purposes. Instead, TWC told users that their data would only be used for the user's benefit to provide them with personalized local weather information. Nothing in the description of the App or prompts to allow geolocation tracking alerted users to the extent and purpose of the location tracking function of the App.

Id. ¶ 4. TWC "tracked users' locations at all times, day and night, 365 days a year," even when

the users did not have the App open. *Id.* ¶¶ 5, 33. TWC has now changed its disclosures "[a]s a result of lawsuits and in an attempt to correct its past misrepresentations and deceptions." *Id.* ¶ 4.

The App "is available for download on Android and Apple devices" for free, although "an 'ad-free' version is offered for a small fee." *Id.* ¶ 22. The allegations are unclear as to which version of the App was downloaded and used by Hart. *See id.* ¶ 8 (alleging only that "Plaintiff Jon Hart . . . downloaded the App"). The download process allegedly worked as follows:

> Immediately upon opening the Weather Channel App for the first time, the app asked the user for permission to access the user's "location." Regardless of the device being used, this request did not inform the user that TWC would be tracking the users every move or that this information will be used for any purpose other than providing the user information about the weather. Specifically, the request to access the user's location on Apple devices simply stated that granting access will result in "personalized local weather data, alerts, and forecasts." The request on Android devices simply said "Allow The Weather Channel to access this device's location?" with the option to "Deny" or "Allow."
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> The consent process employed by the Weather Channel App made absolutely no reference to any additional information the user should read or review prior to providing consent to geolocation tracking. Nowhere in the consent process was the user confronted with the information that their minute-by-minute geolocation data will be broadly disseminated by TWC and that TWC would make millions disseminating users' geolocation data. Importantly, the consent process did not direct users to any "Privacy Policy" or "Privacy Settings", so users had no reason to search those voluminous documents for any vague discussions of geolocation data that might be buried within those documents.
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> The consent process did not involve disclosures that the user would be subjected to targeted advertisements based on their captured geolocation data that would be transferred to affiliates and third parties.
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> The consent process did not involve disclosing that, in addition to simply capturing users' geolocation data and transferring it, TWC would maintain that data for an indefinite period.

Id. ¶¶ 28-31 (paragraph numbers omitted).

The complaint asserts five claims: violation of the privacy rights contained in article I, section 1 of the California Constitution; violation of the Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 et seq.; violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq.; declaratory judgment pursuant to 28 U.S.C. § 2201; and unjust enrichment.

TWC seeks to dismiss the complaint in its entirety. ECF No. 18.

II. JURISDICTION

The parties do not dispute that the Court has jurisdiction under 28 U.S.C. § 1332(d)(2).

III. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Dismissal under Federal Rule of Civil Procedure 12(b)(6) "is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint need not contain detailed factual allegations, but facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks and citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In determining whether a plaintiff has met this standard, the Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

IV. DISCUSSION

A. Constitutional Privacy

1. Timeliness

The parties dispute whether a one- or two-year statute of limitations governs Plaintiffs' California constitutional privacy claim. This Court previously cited *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 896 (1974), as "equating invasion of privacy claims with defamation claims for purposes of statute of limitations," and concluded that a one-year statute of limitations governed invasion of privacy claims. *Harris v. Wells Fargo Bank, N.A.*, No. 12-cv-05629-JST, 2013 WL 1820003, at *13 (N.D. Cal. Apr. 30, 2013) (considering false light claim). In reaching that conclusion, the Court did not consider the change in California law that occurred

in 2003. Having considered that statutory change, the Court agrees with Hart that a two-year statute of limitation applies. As explained by another court:

> Prior to 2003, an action for tortious invasion of privacy was subject to a one-year statute of limitations in California. *See* Cal. Code Civ. Proc. § 340 (2002); *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 895-96 (1974). However, 2002's Senate Bill 688 amended Cal. Code Civ. Proc. § 340 and added a new section to provide for a two-year limitations period covering "[a]n action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." Cal. Code Civ. Proc. § 335.1; *see* Stats. 2002, Ch. 448 (SB 688).
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> In support of their contention that the applicable limitations period for invasion of privacy is one year pursuant to section 340, Defendants cite to one case interpreting the law prior to the 2002 amendment, *Cain v. State Farm Mut. Auto. Ins. Co.*, 62 Cal. App. 3d 310, 313 (1976). (Defs.' First Mot. to Dismiss [Doc. 16] 7:17-18 n.8, 8:1-2 n.9.) The *Cain* court applied the then-applicable Cal. Code Civ. Proc. § 340(3), providing a one-year limitations period "for injury to . . . one caused by the wrongful act . . . of another[.]" *Id.* Defendants do not show why the applicable statute of limitations today is the current section 340, which covers, among others, "libel, slander, [and] false imprisonment[,]" but which omits injury caused by wrongful act. *See* Cal. Code Civ. Proc. § 340(c). Rather, section 335.1 of the California Code of Civil Procedure now provides a two-year statute of limitations for "injury to . . . an individual **. . .** caused by the wrongful act . . . of another." *See* Cal. Code Civ. Proc. § 335.1.
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> Accordingly, section 335.1 provides the applicable limitations period of two years. *See* Cal. Code Civ. Proc. § 335.1; *Cain*, 62 Cal. App. 3d at 313; *see also Wilson v. City of Oakland*, 2012 WL 669527, at *3 (N.D. Cal. Feb. 29, 2012).

Blanton v. Torrey Pines Prop. Mgmt., Inc., No. 15-CV-0892 W (NLS), 2015 WL 9692737, at *7-8 (S.D. Cal. Dec. 17, 2015). Other district courts have also applied a two-year statute of limitations to privacy claims under California law. *E.g.*, *Abdulaziz v. Twitter, Inc.*, No. 19-cv-06694-LB, 2020 WL 6947929, at *7 & n.60 (N.D. Cal. Aug. 12, 2020); *Pham v. Bast*, No. 17-cv-04194-WHO, 2019 WL 7753450, at *10 (N.D. Cal. July 22, 2019); *Saling v. Royal*, No. 2:13-cv-01039-TLN-EFB, 2016 WL 5870772, at *5 (E.D. Cal. Oct. 7, 2016); *Mitchell v. Reg'l Serv. Corp.*, No. C 13-04212 JSW, 2014 WL 12607809, at *3 (N.D. Cal. Apr. 23, 2014); *Buzayan v. City of Davis*, No. 2:06-cv-01576-MCE-DAD, 2008 WL 4468627, at *10 (E.D. Cal. Sept. 29, 2008); *see also* Kathleen M. Banke & John L. Segal, *California Practice Guide: Civil Procedure Before Trial, Statutes of Limitations* ¶ 4:305-07 (2021) ("CCP § 335.1 applies to actions for . . . Invasion of

privacy") (citing *Cain*, 62 Cal. App. 3d at 313); *but see Guillen v. Bank of Am. Corp.*, No. 5:10-cv-05825 EJD, 2011 WL 4071996, at *10 (N.D. Cal. Aug. 31, 2011) (applying one-year statute of limitations from California Civil Procedure Code Section 340(c) to intrusion upon seclusion and false light claims).

Courts that have applied a one-year statute of limitations appear not to have considered the statutory change. For example, one court relied on *Cain* for the proposition that "[a] claim for invasion of the California constitutional right to privacy has a statute of limitations of one year" without considering that the subdivision of the California Code of Civil Procedure cited in *Cain* had since been amended. *Lauter v. Anoufrieva*, No. CV 07-06811-JVS (JCx), 2011 WL 13175659, at *7 (C.D. Cal. Nov. 28, 2011).[1] Another court also relied on *Cain* and cited "California Code of Civil Procedure Section 340(3)," which, after the 2003 amendments, no longer exists. *Greenwald v. Bohemian Club, Inc.*, No. C07-05261 WHA, 2008 WL 2331947, at *8 & n.5 (N.D. Cal. June 4, 2008). A third court relied on a 1980 California appellate court decision, *Ion Equipment Corporation v. Nelson*, 110 Cal. App. 3d 868, 880 (1980), to conclude that a one-year statute of limitation governs invasion of privacy claims. *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 134 (N.D. Cal. 2020). But, like *Cain*, *Ion Equipment* relied on the then-in-effect, and now-superseded, version of California Code of Civil Procedure Section 340.

TWC does not argue that Hart's claim is untimely under a two-year statute of limitations, and the Court therefore does not dismiss the claim as time-barred.

2. Merits

The Court now turns to the merits of Hart's privacy claim. To plead a privacy violation under the California Constitution, plaintiffs must allege "that (1) they possess a legally protected privacy interest, (2) they maintain a reasonable expectation of privacy, and (3) the intrusion is so serious as to constitute an egregious breach of the social norms such that the breach is highly offensive." *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020)

[1] The Ninth Circuit affirmed this decision in an unpublished opinion that did not refer to the statute of limitations. *Lauter v. Anoufrieva*, 550 F. App'x 473 (9th Cir. 2013) ("Lauter also contends that defendants invaded his privacy when they helped Anoufrieva move and forwarded her mail. These actions, however, did not affect Lauter's privacy.").

(quotation marks and alterations omitted) (quoting *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 287 (2009)). These elements can be simplified as: "(1) there exists a reasonable expectation of privacy, and (2) the intrusion was highly offensive." *Id.* TWC challenges both elements.

a. Reasonable Expectation of Privacy

A reasonable expectation of privacy "rests on an examination of customs, practices, and physical settings surrounding particular activities, as well as the opportunity to be notified in advance and consent to the intrusion." *Hernandez*, 47 Cal. 4th at 287 (quotation marks and citation omitted). TWC argues that Hart cannot satisfy this element because (1) he consented to disclosure of his location data when he downloaded the app and (2) TWC adequately disclosed its data gathering policies in its privacy policy. Neither of these arguments is persuasive.

First, contrary to TWC's assertions, it is not dispositive that Hart admits that he granted access to his location data for some purposes. California courts have consistently recognized that "[t]here are degrees and nuances to societal recognition of our expectations of privacy," which need not be "complete" or "absolute" to be reasonable. *Sanders v. Am. Broad. Cos.*, 20 Cal. 4th 907, 916 (1999). For instance, in *Sanders*, the California Supreme Court found that a reasonable expectation of privacy could be maintained in a workplace against videotaping by a reporter, notwithstanding the fact that other employees could overhear the conversations in a shared office space. *Id*. at 911. As the court explained, "[t]he mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone." *Id*. at 916. "[V]arious factors . . . affect societal expectations of privacy," including "the identity of the intruder," whether the intruder "deliberately misled" the plaintiff into granting access, and "the nature of the intrusion," including its "means." *Hernandez*, 47 Cal. 4th at 289. Here, Hart alleges that the "intruder" is an innocuous-seeming weather app that gained access to his location data by promising to provide "personalized local weather data, alerts, and forecasts." ECF No. 1 ¶¶ 22, 28. He alleges that TWC then used this access to conduct wholesale surveillance, including "minute-by-minute and sometimes second-by-second" location monitoring, even when the app was closed, and sold this data to third parties. *Id*. ¶¶ 33-36. Given the wide discrepancy between Hart's alleged expectations for TWC's use of his data and its actual alleged

use, Hart has plausibly alleged a reasonable expectation of privacy against TWC's practices.[2]

Second, the mere existence of a privacy policy is not dispositive because users might lack actual or constructive notice of the policy. *See, e.g.*, *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1073-74 (N.D. Cal. 2016). To determine notice, the Ninth Circuit distinguishes between "click-wrap" agreements, to which a user must affirmatively assent by some action, and "browsewrap" agreements, to which a user purportedly assents by using the website. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-76 (9th Cir. 2014). Browsewrap agreements are not enforceable unless they "put[] a reasonably prudent user on inquiry notice of the terms of the contract" through the "design and content of the website and the agreement's webpage." *Id.* at 1177; *cf. id.* at 1179 ("[C]onsumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.").

Hart alleges that the TWC app "did not direct users to any 'Privacy Policy' or 'Privacy Settings'" when asking for access to location data. ECF No. 1 ¶ 29. Instead, the app stated only that granting access "will result in 'personalized local weather data, alerts, and forecasts'" on Apple devices and nothing at all on Android devices. *Id.* ¶ 28. Assuming the truth of these allegations, Hart did not consent to TWC's data practices through a click-wrap agreement, and TWC's privacy policy is closer to browsewrap. Its significance therefore depends on the surrounding facts of its presentation – which are neither alleged in the complaint nor presented in TWC's requests for judicial notice.[3] Accordingly, at this stage of the proceedings, the Court cannot determine whether TWC's privacy policy eliminated a reasonable expectation of privacy.

Against this background, TWC's argument that its compliance with the California Online

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[2] Moreover, the scale of the collection may itself give rise to a reasonable expectation of privacy. In *Facebook Internet Tracking*, for example, the Ninth Circuit considered allegations that Facebook acquired "'an enormous amount of individualized data' to compile a 'vast repository of personal data.'" 956 F.3d at 603. The Court concluded that the plaintiffs did not need to allege disclosure of any specific sensitive data because Facebook's alleged practices provided "access to a category of information otherwise unknowable." *Id.* (quoting *Patel v. Facebook*, 932 F.3d 1264, 1273 (9th Cir. 2019)).

[3] Although TWC seeks judicial notice of the privacy policy itself, it provides no details of how it was presented to users. The Court denies judicial notice of TWC's privacy policies and settings, as well as the remaining documents, because this order does not rely on them.

Privacy Protection Act ("CalOPPA") resolves the issue misses the mark. There is no indication that the California Legislature intended CalOPPA to operate as a ceiling, rather than a floor, for privacy protection. Moreover, CalOPPA requires website operators to "conspicuously post" a privacy policy outlining collection and use of certain data. Cal. Bus. & Prof. Code § 22575(a). As explained above, there is no information in the record about TWC's posting of its privacy policy, conspicuous or otherwise. That Hart does not contest CalOPPA compliance does not serve as an admission where none of the claims relates to CalOPPA. TWC's asserted compliance with CalOPPA is not relevant to the present motion.

Hart has adequately alleged a reasonable expectation of privacy.

b. Highly Offensive Intrusion

Turning to the second contested element, determining the "offensiveness" of a privacy intrusion "requires a holistic consideration of factors such as the likelihood of serious harm to the victim, the degree and setting of the intrusion, the intruder's motives and objectives, and whether countervailing interests or social norms render the intrusion inoffensive." *Facebook Internet Tracking*, 956 F.3d at 606 (citing *Hernandez*, 47 Cal. 4th at 287). The California Constitution "sets a high bar" for establishing a privacy violation and requires an "egregious breach of social norms" to be actionable. *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1038 (N.D. Cal. 2014) (quotation marks and citations omitted). However, as the Ninth Circuit recently concluded, "[t]he ultimate question" of whether certain practices "could highly offend a reasonable person is an issue that cannot be resolved at the pleading stage." *Facebook Internet Tracking*, 956 F.3d at 606. The court permitted a claim based on widespread tracking of internet browsing activity, even though the plaintiff did not allege specific harm or sensitive data collection. *See id*. The same result follows here. TWC allegedly tracked, stored, and shared precise location data on a continuous basis, even when the user did not have the app open. ECF No. 1 ¶¶ 33-36; *see Facebook Internet Tracking*, 956 F.3d at 606 n.8 (distinguishing cases where there were "no allegations that the defendants tracked the plaintiffs after the plaintiffs stopped using the defendant's services"). The complaint's allegations are sufficient to plausibly allege that TWC's intrusion of Hart's privacy was highly offensive. *Goodman v. HTC America, Inc.*, No. C11-

1793MJP, 2012 WL 2412070, at *13-15 (W.D. Wash. June 26, 2012) (denying motion to dismiss California constitutional privacy claim in case alleging continuous collection of fine location data by a different weather app).

3. Remedies

TWC next argues that Hart cannot recover damages under article I, section 1 of the California Constitution, and that he fails to state a claim for injunctive relief. As to damages, one California appellate court has determined that they are not available against a government entity. *Clausing v. San Francisco Unified Sch. Dist.*, 221 Cal. App. 3d 1224, 1238 (1990). However, the California Supreme Court has subsequently described the availability of damages as "an open question." *Hernandez*, 47 Cal. 4th at 286 (citing *Katzberg v. Regents of Univ. of Cal.*, 29 Cal. 4th 300, 313 n.13 (2002)); *see also Katzberg*, 29 Cal. 4th at 314-15 & n.16 (characterizing *Clausing* as having "summarily" reached its conclusion while "overlook[ing]" *Porten v. University of San Francisco*, 64 Cal. App. 3d 825 (1976), which "suggested that money damages are available").

The general framework for determining availability of damages under the California Constitution is set out in *Katzberg* and requires considering: first, "whether there is evidence [of] . . . an affirmative intent either to authorize or withhold a damages action to remedy a violation" based on the "language and history" of the constitutional provision at issue, and, second, if there is no such evidence, whether the "constitutional tort analysis adopted by *Bivens* and its progeny" suggests that damages should be available. 29 Cal. 4th at 317 (quotation marks omitted) (referring to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)). The Court finds it prudent to decline ruling on the issue in the absence of briefing by the parties on how this framework applies. *Espinosa v. City & County of San Francisco*, No. C 11-02282 JSW, 2011 WL 6963094, at *4 (N.D. Cal. Sept. 7, 2011) ("The Court concludes that this issue is not adequately briefed and, thus shall not address it on this motion."); *see also John v. Lake County*, No. C 18-06935 WHA, 2019 WL 859227, at *7 (N.D. Cal. Feb. 22, 2019) ("Since this action is going forward, this order does not finally resolve these important issues of California constitutional law. Resolution of these issues will be made, if need be, on a complete evidentiary record.").

As to injunctive relief, TWC does not challenge that such relief is available under article I,

section 1. Instead, it argues that it is not plausible that TWC profits from sharing years-old data, and that an injunction cannot prevent Hart's claimed injury. At this stage, the Court assumes the truth of Hart's allegations, which include that TWC continues to use the location data, "share it with affiliates and third parties without consent," and profit from it. ECF No. 1 ¶ 24, 86. Although lacking in specifics, these allegations are plausible. TWC also points to Hart's hyperbolic allegation that "the bell . . . has been forever rung," *id.* ¶ 39, to argue that all harm has already occurred. However, Hart has adequately alleged a threat of further harm from additional data sharing with third parties, and TWC has cited no authority to support the proposition that an injunction against further data sharing would prevent such harm. Hart has sufficiently stated a claim for injunctive relief.

For all of the above reasons, the Court denies TWC's motion to dismiss Hart's constitutional privacy claim.

B. Consumer Legal Remedies Act ("CLRA")

Hart "elects not to rebut TWC's challenge to Plaintiff's CLRA claim and agrees to its dismissal." ECF No. 33 at 10 n.1. Accordingly, this claim is dismissed with prejudice.

C. Unfair Competition Law ("UCL")

To bring a UCL claim, a person must have "suffered injury in fact and . . . lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. Thus, a UCL plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011) (emphasis in original).

TWC argues that Hart lacks statutory standing because he fails to allege sufficient economic injury. The Court agrees. Hart does not contend that TWC's alleged actions caused him to lose any money. Instead, he contends that he has lost property because "TWC has taken, maintained, transmitted, and devalued his valuable and private geolocation data." ECF No. 33 at 12. However, Hart "has not shown how this information has economic value *to him*. That the information has external value, but no economic value to plaintiff, cannot serve to establish that

plaintiff has personally lost money or property." *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1040 (N.D. Cal. 2019); *see also In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 804 (N.D. Cal. 2019) (dismissing UCL claim for lack of standing without leave to amend because, although "Facebook may have gained money through its sharing or use of the plaintiffs' information, . . . that's different from saying the plaintiffs lost money"); *Gonzales v. Uber Techs., Inc.*, 305 F. Supp. 3d 1078, 1093 (N.D. Cal. 2018) ("[T]he sharing of names, user IDs, location and other personal information does not constitute lost money or property for UCL standing purposes.").[4]

The only contrary authority cited by Hart is *Goodman v. HTC America, Inc.*, 2012 WL 2412070, which Hart asserts is "identical to the fact pattern before this Court." ECF No. 33 at 11 (emphasis omitted). Similar to Hart, the *Goodman* plaintiffs alleged that "Defendants' misappropriation of their fine location data prevented them from using their location information for their own commercial advantage and exposed their personally identifiable information to third parties, who may have intercepted their data." *Goodman*, 2012 WL 2412070, at *2. Hart asserts that the *Goodman* court found that this "conduct constituted a diminution in the value of the plaintiff's personal location data, and that as such, plaintiff had standing to bring a UCL claim." ECF No. 33 at 12. But this grossly misstates *Goodman*'s holding. The plaintiffs in *Goodman* "allege[d] three forms of economic injury: overpayment for their HTC smartphones, diminution in value of their phones due to lost battery utility and lifespan, and misappropriation of their valuable personally identifiable information." *Goodman*, 2012 WL 2412070, at *5. The court held that the plaintiffs had UCL standing because they "allege[d] harm *by overpayment and diminution*," not because they alleged misappropriation of location data. *Id.* at *12 (emphasis added). Contrary to Hart's assertions, the court specifically held that the alleged misappropriation of data – the only harm alleged in this case – was insufficient to constitute an injury under Article III, let alone the lost money or property required to state an economic injury under the UCL. *Id.* at *7-8.

[4] That Hart's location data may have economic value to others but not to him reflects a peculiar feature of the current information economy: that although there is a vibrant marketplace for location information, individual users cannot participate in that market.

The Court dismisses Hart's UCL claim for lack of statutory standing. Although it appears unlikely that Hart can cure this deficiency, the Court will err on the side of caution and grant leave to amend.

D. Declaratory Judgment

Having found that the complaint states a claim for violation of the California Constitution, the Court denies TWC's motion to dismiss Hart's declaratory judgment claim on grounds that Hart has not stated an underlying claim. Similarly, as explained above, Hart has adequately alleged the possibility of ongoing harm. Although Hart acknowledges that TWC has since changed the prompts presented to users who download the app, he also alleges ongoing use of data obtained from users who downloaded the app before the new prompts were put into effect. Thus, TWC is mistaken when it argues that the complaint seeks only to remedy past wrongs, and that a declaratory judgment would therefore serve no purpose. Additionally, the Court declines to dismiss the claim as potentially duplicative because the Declaratory Judgment Act "specifically allows a plaintiff to seek declaratory relief regardless of other claims brought." *In re Am. Bankers Ins. Co. of Fla.*, No. 19-cv-02237-HSG, 2020 WL 137164, at *3 (N.D. Cal. Jan. 13, 2020).

E. Unjust Enrichment

Although this Court has previously dismissed an unjust enrichment claim after concluding that there is no cause of action for unjust enrichment under California law, *Pirozzi v. Apple, Inc.*, 966 F. Supp. 2d 909, 924 (N.D. Cal. 2013), it has more recently allowed such a claim to proceed, *In re Gen. Motors LLC CP4 Fuel Pump Litig.*, 393 F. Supp. 3d 871, 881-82 (N.D. Cal. 2019). The latter is in accord with the Ninth Circuit, which has explained that an unjust enrichment claim may survive either "as an independent cause of action or as a quasi-contract claim for restitution." *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016).[5] "To allege unjust

[5] Since the *ESG* decision, the Ninth Circuit has also explained – albeit in an unpublished opinion – that "California's case law on whether unjust enrichment could be sustained as a standalone cause of action was uncertain and inconsistent. But [in 2015], the California Supreme Court . . . clarified California law, allowing an independent claim for unjust enrichment to proceed in an insurance dispute." *Bruton v. Gerber Prod. Co.*, 703 F. App'x 468, 470 (9th Cir. 2017) (citing *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 61 Cal. 4th 988, 1000 (2015)). The Court recognizes that *Bruton* is not binding precedent under Ninth Circuit Rule 36-3 but nonetheless relies on it as persuasive authority.

enrichment as an independent cause of action, a plaintiff must show that the defendant received and unjustly retained a benefit at the plaintiff's expense." *Id.* Hart has sufficiently pleaded a claim by alleging that TWC unjustly benefited from the use of his location data. Contrary to TWC's assertions, Hart has alleged that he did not receive the benefit of his bargain because he never agreed to share all his location data with TWC. Even though the Court earlier concluded that Hart "suffered no economic loss from the disclosure of [his] information, [he] may proceed at this stage on a claim for unjust enrichment to recover the gains that [TWC] realized from its allegedly improper conduct." *Facebook Consumer Priv. Litig.*, 402 F. Supp. 3d at 803.

CONCLUSION

TWC's motion to dismiss is granted in part and denied in part. Hart did not challenge dismissal of his CLRA claim, which is dismissed with prejudice. Hart's UCL claim is dismissed for lack of statutory standing, with leave to amend. The motion is denied as to Hart's remaining claims.

If Hart wishes to amend his UCL claim, he must do so within 21 day so the date of this order. Leave to amend is granted solely to correct the deficiencies identified in this order. Failure to file a timely amended complaint will result in dismissal of Hart's UCL claim with prejudice.

IT IS SO ORDERED.

Dated: March 17, 2021

JON S. TIGAR
United States District Judge

United States District Court
Northern District of California