MORGAN, LEWIS & BOCKIUS LLP
David L. Schrader, Bar No. 149638
david.schrader@morganlewis.com
300 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90071-3132
Tel: +1.213.612.2500
Fax 1.213.612.2501

Mark A. Feller, Bar No. 319789
mark.feller@morganlewis.com
One Market, Spear Street Tower
San Francisco, CA 94105-1126
Tel: +1.415.442.1000
Fax: +1.415.442.1001

Brian M. Ercole
(*pro hac vice forthcoming*)
brian.ercole@morganlewis.com
Melissa M. Coates
(*pro hac vice forthcoming*)
melissa.coates@morganlewis.com
600 Brickell Ave, Suite 1600
Miami, FL 33131-3075
Tel: +1.305.415.3000
Fax: +1.305.415.3001

Attorneys for Defendant
TESLA, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DAVID BUI-FORD, IGOR KRAVCHENKO, MICAH SIEGAL, and LUCAS BUTLER, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

TESLA, INC. d/b/a TESLA MOTORS, INC., a Delaware corporation,

Defendant.

Case No. 3:23-CV-002321

DEFENDANT TESLA, INC.'S NOTICE OF MOTION, MOTION TO DISMISS PLAINTIFFS' CLASS ACTION COMPLAINT PURSUANT TO 12(B)(6) AND RULE 9(B) AND TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: October 12, 2023
Time: 2:00 p.m.
Judge: Hon. Jon S. Tigar
Ctrm.: 6, 2d Floor.
Complaint filed: May 12, 2023

NOTICE OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO RULE 12(B)(6) AND RULE 9(B) AND TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS PURSUANT TO RULE 12(F) AND RULE 23(D)(1)(D)

PLEASE TAKE NOTICE that on October 12, 2023, at 2:00 p.m. or as soon thereafter as the matter may be heard before the Honorable Jon S. Tigar, Courtroom 6, of the above-entitled Court, located at 1301 Clay Street, Oakland, CA 94612, Tesla, Inc. ("Tesla") will and does move: (a) to dismiss the claims brought by Plaintiffs David Bui-Ford, Igor Kravchenko, Micah Siegal, and Lucas Butler ("Plaintiffs") pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure; and (b) to strike the class allegations pursuant to Rules 12(f) and 23(d)(1)(D). With respect to Plaintiffs Kravchenko and Siegal, Tesla makes this motion ("Motion") in the alternative to its pending motion to compel arbitration of their claims on an individual basis under the Federal Arbitration Act ("Motion to Compel"; ECF No. 16).

Plaintiffs Kravchenko and Siegal should be compelled to arbitrate their claims on an individual basis for the reasons set forth in Tesla's Motion to Compel. In addition, Plaintiffs' Complaint should be dismissed, and their class allegations should be stricken. All of Plaintiffs' claims fail under Rule 12(b)(6) because Plaintiffs do not allege facts to show that Tesla hacked into or trespassed upon their vehicles. Nor do Plaintiffs plead facts to show that Tesla intended to interfere with or harm their vehicles through routine software updates. Each of Plaintiffs' claims also fail as a matter of law for additional independent claim-specific reasons, including that California law does not apply to the claims of non-residents, Plaintiffs have not alleged cognizable damages or loss under applicable law, Plaintiffs cannot satisfy key elements of their claims, and they have not pled any fraud with particularity under Rule 9(b). Lastly, Plaintiffs' class allegations are grossly overbroad, and it is clear from the face of the Complaint that Plaintiffs' proposed classes cannot be certified; thus, the class allegations should be stricken under Rules 12(f) and 23(d)(1)(D).

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the exhibit attached to the declaration of David L. Schrader, all pleadings and filings in this action, and on such other written or oral argument as may be presented to the Court at or prior to the hearing on this Motion.

Dated: July 27, 2023

MORGAN, LEWIS & BOCKIUS LLP
David L. Schrader
Brian M. Ercole
Mark A. Feller
Melissa M. Coates

By s/ *David L. Schrader*
David L. Schrader

Attorneys for Defendant Tesla, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs David Bui-Ford, Igor Kravchenko, Micah Siegal, and Lucas Butler claim that Tesla violated anti-hacker statutes and committed a common-law trespass through its software updates to Tesla vehicles. Plaintiffs offer conclusory allegations that some unidentified software updates on their Tesla vehicles—many of which are more than ten-years old—caused some diminished battery performance. Critically absent from Plaintiffs' Complaint are any facts showing that Tesla hacked their vehicles to perform these software updates or intended to interfere with Plaintiffs' batteries—which are essential elements of Plaintiffs' claims.

Tesla manufactures and sells electric vehicles that rely on software. Tesla offers software updates to owners to enhance the features and operation of those vehicles. All owners, including Plaintiffs, must first authorize the implementation of any software update, including by connecting to the Internet and clicking the necessary icons on the vehicle touchscreen to start the installation. Tesla did not criminally infiltrate or trespass on any vehicle. As set forth below, Plaintiffs' Complaint must be dismissed, and their class allegations must be stricken, for the following independent reasons:

First, all of Plaintiffs' claims fail because, as alleged, each Plaintiff necessarily agreed to download and install software updates prior to implementation. There was no unauthorized or unlawful access, and no trespass by Tesla upon Plaintiffs' vehicles.

Second, Plaintiffs' claims fail because they require intent, yet Plaintiffs do not and cannot allege that Tesla designed any software update with an intent to negatively impact batteries. Plaintiffs do not even identify what specific software update they are complaining about. At most, Plaintiffs offer a perceived correlation between unidentified software updates, from different dates, and drastically different alleged battery impacts. These vague and disparate allegations are wholly insufficient, particularly where Plaintiffs acknowledge that battery performance declines over time.

Third, Plaintiffs' claims (Counts I–II) for violation of two anti-hacking statutes, the Computer Fraud and Abuse Act ("CFAA") and the California Computer Data Access and Fraud Act ("CDAFA"), must be dismissed because Tesla did not hack into any vehicle. Plaintiffs do not

plead any evasion of technical barriers, the requisite loss or damage, or misuse of data necessary to state a claim. The CDAFA claim also does not apply to Plaintiffs Kravchenko, Siegal, or Butler, who have no connection to California. Moreover, Plaintiffs do not allege the specific software updates at issue for each vehicle, when they were implemented, or any false statement or omission by Tesla that they received and relied upon at the time of authorizing any software update, much less with the specificity required by Rule 9(b).

Fourth, Plaintiffs' trespass to chattels claims (Count IV) fail because they fail to plead lack of authorization. Nor do they plead the varying elements of these claims under the laws of Plaintiffs' respective home states.

Fifth, Plaintiffs' Unfair Competition Law ("UCL") claim (Count III) fails because: (a) it is derivative of their other flawed claims; (b) it does not apply to the non-California Plaintiffs; (c) Plaintiffs allege an adequate remedy at law; and (d) Plaintiffs cannot pursue injunctive relief.

Lastly, to the extent the Court does not dismiss the Complaint in its entirety, Plaintiffs' class allegations should be stricken because it is clear from the face of the Complaint (and Tesla's contemporaneously filed Motion to Compel) that named Plaintiffs alone are not similarly situated and their proposed classes, as alleged, cannot be certified.

Because the fundamental defects with Plaintiffs' Complaint cannot be cured, Tesla respectfully requests the Complaint be dismissed with prejudice.

II. FACTUAL BACKGROUND

A. Software Updates Add And Enhance Vehicle Features And Safety.

Tesla designs, manufactures, markets, and sells electric vehicles. Compl. ¶ 15. As Tesla discloses on its website, "Tesla vehicles regularly receive over-the-air software updates that add new features and enhance existing ones over Wi-Fi." *Id.* ¶ 25. Tesla also makes clear that, like all other vehicles, the battery performance of its vehicles will decrease over time. *Id.* ¶ 34. Plaintiffs acknowledge that many different factors can influence that performance. *Id.* ¶ 1.

B. Tesla Owners Are Given Notice Of Software Updates And Must Authorize Their Implementation.

Plaintiffs allege that to receive a software update, owners "connect to Tesla directly via Wi-

Fi from their homes or businesses." *Id.* ¶ 4. Owners receive a notification through an alert on their vehicle's touchscreen and the Tesla app when a software update is available. *See* Tesla Software Updates, attached as Ex. A to Schrader Declaration, at p. 2 ("When do software updates become available").[1] Owners then must "[t]ap on the yellow clock icon to display the scheduling window," and can either affirmatively choose to install it, schedule a time to install it later, or not install it. *Id.* ("How do I start a software update"). Tesla makes available video guides that offer a step-by-step process for installing updates for different model vehicles. *Id.* ("Videos").

Contrary to Plaintiffs' conclusory allegation that owners "at no point elect to perform the software updates in the first instance" (Compl. ¶ 29), their own screenshot in Paragraph 4 shows otherwise. After an owner connects the vehicle to Wi-Fi and clicks on the clock icon, Tesla sends a "message" to customers to ask whether they want to install it now. An owner then must select "Yes" to begin the software update installation. *Id.* ¶ 4. Alternatively, the owner could select "No." *Id.* If the owner chooses not to install the software update, it does not take place at that time. *Id.*

C. Plaintiffs Implemented Unidentified Software Updates At Different Times.

Plaintiffs allegedly purchased different Tesla vehicles at different times and had different experiences implementing different unidentified software updates. No Plaintiff alleges that he did not click "Yes" on the screen asking whether he wanted to initiate a particular software update.

Plaintiff David Bui-Ford. Bui-Ford alleges that he purchased a used 2013 Model S from a private seller in California in 2022. *Id.* ¶ 8. Bui-Ford claims that he received notice of an unidentified software update on September 19, 2022. *Id.* ¶ 9. Bui-Ford alleges that he received a "BMS_u029" error message five days later (*id.*) but does not allege any facts about that message. Bui-Ford claims that on that same day, he noticed his battery range went from 270 miles per charge to 80 miles per charge. *Id.* One month later, Bui-Ford paid an unidentified auto shop $500 to perform a "'software reset'" and his battery range allegedly returned to 270 miles per charge. *Id.*

Plaintiff Igor Kravchenko. Kravchenko purchased a new Model S directly from a Tesla showroom in Illinois in 2021. *Id.* ¶ 10. As described in Tesla's Motion to Compel, Kravchenko

[1] Plaintiffs cherry-pick from this document in their Complaint. Compl. ¶¶ 25–28. The Court can consider the full document because Plaintiffs quote from, cite to, and rely upon this document in their Complaint. *See, e.g.*, *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007).

entered into an arbitration agreement with Tesla. ECF No. 16, at 4–5. Kravchenko alleges that "following a series of [unidentified] software updates," occurring at unidentified times since his purchase, he "noticed" that the "average daily battery drain" of his vehicle rose from 1–5% per day to 8% per day. Compl. ¶ 10. While Kravchenko alleges that Tesla never asked for consent to perform "these specific software updates," Kravchenko never alleges that he did not authorize the update to his vehicle's software by clicking "Yes" on the screen depicted in Paragraph 4. *Id.* ¶ 11. Kravchenko alleges no out-of-pocket costs to investigate the software updates or service his vehicle. Nor has Kravchenko attempted to utilize the Tesla warranty for his new Tesla vehicle.

Plaintiff Micha Siegal. Siegal purchased a used Model S of indeterminate age in March of 2022. *Id.* ¶ 12. Despite having "experienced at least a dozen [unidentified] software updates," Siegal has "noticed" only a "modest drop in the stated/estimated capacity of the battery." *Id.* Siegal pleads no facts linking the "dozen software updates," let alone any particular software update, to his alleged "modest drop" in battery capacity. Siegal alleges no out-of-pocket costs. Siegal also entered into an arbitration agreement with Tesla. ECF No. 16, at 5–7.

Plaintiff Lucas Butler. Butler alleges he purchased a used 2013 Model S in February 2022 from a third-party. Compl. ¶ 14. Butler alleges no facts regarding the condition of the battery when he purchased his used vehicle, including its history, how many miles it had driven, or whether he had it tested at the time of purchase. Butler alleges that he received notice of an unidentified software update on March 19, 2023. *Id.* While he claims that Tesla never "provided the option to decline the software package," Butler never alleges that he did not follow the procedures on Tesla's website and in Paragraph 4. *Id.* Butler claims that on March 20, 2023, his vehicle would not turn on. *Id.* While Butler alleges he was "told" at an unidentified Tesla "showroom" that he "needed to replace the battery," Butler does not allege who told him that or provide any facts about his battery. *Id.* Butler does not allege he has paid to replace the battery or incurred any costs. *Id.*

D. Contrary to Their Own Factual Allegations, Plaintiffs Claim That Tesla Intentionally Sought To Damage The Vehicles Of Tesla Owners And Never Got Authorization For Software Updates.

Plaintiffs contend that Tesla "deliberately and significantly interfered with the[ir] cars[']

performance through software updates that reduce the operating capacity of the[ir] vehicles." *Id.* ¶ 1. Contrary to their recognition that owners are asked whether to agree to install a software update (*id.* ¶ 4), Plaintiffs contend that Tesla never got "consent" for such updates or exceeded the scope of that consent (*id.* ¶¶ 25, 35, 69, 88, 97, 103). Based upon conclusory allegations, Plaintiffs assert claims for: (1) violation of the CFAA (*id.* ¶¶ 56–76); (2) violation of the CDAFA (*id.* ¶¶ 77–92); (3) violation of the UCL (*id.* ¶¶ 93–100); and (4) trespass to chattels (*id.* ¶¶ 101–23).

Plaintiffs seek to represent a nationwide class of all "persons or entities who purchased or leased one or more of the Class Vehicles." *Id.* ¶ 46. Plaintiffs alternatively plead state-specific sub-classes limited to purchasers or lessees in California, Illinois, Michigan, and Washington. *Id.* The Complaint defines "Class Vehicles" as "Tesla Model S and Model X" (*id.* ¶ 45), even though no Plaintiff purchased a Model X and there are no facts about any Model X battery performance.

As set forth below, all claims should be dismissed under Rule 12(b)(6), Rule 9(b), or both. In addition, Plaintiffs' class allegations should be stricken under Rule 12(h) and Rule 23(d)(1)(D).

III. ALL CLAIMS ALLEGED BY PLAINTIFFS SHOULD BE DISMISSED

To survive a motion to dismiss under Rule 12(b)(6), Plaintiff must provide "more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The Court must disregard "legal conclusions" and "conclusory statements," and must scrutinize the well-pleaded factual allegations to ensure that they are more than "'merely consistent with' a defendant's liability." *Id.* at 677–79. Plaintiffs must plead "facts tending to exclude the possibility that the alternative explanation[s are] true." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (citing *Twombly*, 550 U.S. at 554).

Additionally, because certain claims sound in fraud, they are subject to the heightened pleading standard set forth in Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) applies to both misrepresentation and omission claims and requires the complaint to set forth "'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted).

Here, because each Plaintiff fails to meet these standards, all claims should be dismissed.

A. <u>All Claims Fail Because Each Plaintiff Agreed To Download The Software Updates And, Thus, There Was No Unauthorized Access.</u>

Unauthorized access to each Plaintiff's vehicle is one of the essential elements of each claim. *See Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 123 (N.D. Cal. 2020) (under California law, trespass only occurs where interference is "unauthorized"); *Dalley v. Dykema Gossett*, 788 N.W.2d 679, 691 (Mich. App. 2010) (under Michigan law, "[a] trespass is an unauthorized invasion on the private property of another"); *Fidlar Techs. v. LPS Real Est. Data Sols., Inc.*, 2013 WL 5973938, at *9 (C.D. Ill. Nov. 8, 2013) (under Illinois law, trespass requires "unauthorized use of or intermeddling with another's physical property"); *Del Vecchio v. Amazon.com, Inc.*, 2012 WL 1997697, at *8 (W.D. Wash. June 1, 2012) (Washington trespass law requires "intentional interference with a party's personal property without justification" (citation omitted)); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004) (violating CFAA requires access "without authorization or exceeds authorized access"); *Facebook, Inc. v. Power Ventures, Inc.*, 2010 WL 3291750, at *7 (N.D. Cal. July 20, 2010) (access must be "without permission" to violate CDAFA); Compl. ¶ 96 (UCL claim rests upon lack of authorization and is derivative of other claims).

Plaintiffs cannot satisfy this element. Plaintiffs purchased electric vehicles manufactured by Tesla with software that allows for updates. There is no allegation that Plaintiffs were not aware of this before purchasing their vehicles. Moreover, the ***factual*** allegations make clear that Plaintiffs had to authorize those updates by voluntarily connecting their vehicles to their home or business Wi-Fi, by receiving a notice on their Tesla software screen about the specific software update at issue, and then by actively clicking "Yes" to install the software update. Compl. ¶ 4 (describing process); *see also* Tesla Software Updates, Schrader Decl., Ex. A, at 2 (same). Plaintiffs do not allege a single update that they installed that did not go through this process. Their conclusory assertions about lack of authorization and consent simply do not state a claim. *See Brodsky*, 445 F. Supp. 3d at 123 (dismissing similar claims because "Plaintiffs' bald assertions in the SAC that they did not consent to enabling 2FA is a legal conclusion").

Plaintiffs also appear to allege that Tesla exceeded any such authorization because they did

not agree to a software update that could impact battery performance. Compl. ¶¶ 69, 88, 97, 103. But Plaintiffs do not and cannot allege how authorization to install any software update was exceeded. Tesla did not improperly access or take any data from Plaintiffs' vehicles. Plaintiffs cannot turn Tesla's making of software updates available for Tesla owners to download into criminal hacking and trespass claims. *See, e.g.*, *McCarthy v. Toyota Motor Corp.*, 2019 WL 3220579, at *7 (C.D. Cal. Apr. 9, 2019) (dismissing trespass claim based upon software updates that purportedly caused undisclosed problems with vehicle, such as lower fuel efficiency and sluggishness, because plaintiff gave consent to updates); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1066 (N.D. Cal. 2012) (dismissing CFAA claims when "[v]oluntary installation of software that allegedly harmed the phone was voluntarily downloaded" and, thus, not without authorization); *Siebert v. Gene Sec. Network, Inc*., 2013 WL 5645309, at *11 (N.D. Cal. Oct. 16, 2013) (Tigar, J.) (dismissing CDAFA claim because "[c]ourts within this District have interpreted 'without permission' to require that a defendant access a network 'in a manner that circumvents technical or code-based barriers in place to restrict or bar a user's access" (citation omitted)).

Because Plaintiffs provided Tesla access to their vehicles and then voluntarily installed and authorized software updates, all of Plaintiffs' claims fail.

B. <u>All Claims Fail Because Plaintiffs Plead No Facts Showing That Tesla Intentionally Designed Its Updates To Reduce Battery Performance.</u>

Plaintiffs also aver that Tesla "deliberately and significantly interfere[s] with the[ir] [vehicles'] performance through software updates." Compl. ¶¶ 1–2; *see also id.* ¶¶ 35, 59, 69, 73, 88, 96, 103, 105, 113, 119, 121, 126, 128. But Plaintiffs do not plausibly allege "facts that support their theory that Defendant intentionally developed [software updates] to [diminish] battery life." *Crittenden v. Apple, Inc.*, 2022 WL 2132224, at *3–4 (N.D. Cal. June 14, 2022) (dismissing trespass to chattels, CDAFA, CFAA, and UCL claims on this ground); *McCarthy*, 2019 WL 3220579, at *7 (dismissing California trespass claim for lack of "allegations that [defendant] intentionally designed the software update to cause the alleged damage such that Plaintiffs' consent was vitiated"). Indeed, the facts Plaintiff do allege undermine Plaintiffs' contention.

In *Crittenden*, plaintiffs brought nearly identical claims against Apple based on allegations that Apple's software updates "reduced performance and inhibited battery life on their iPhones." 2022 WL 2132224, at *1. For all four claims, the plaintiffs had to "plausibly plead facts showing that [Apple] intentionally developed iOS updates to slow their iPhones." *Id.* at *3. The Court (Judge Davila) dismissed the claims, finding that plaintiffs had "not pled facts that support their theory that [Apple] intentionally developed [the updates] to slow iPhone performance and battery life." *Id.* The Court rejected the conclusory allegation "that their iPhone devices were 'damaged as a result of the conduct by Apple . . . in the form of reduced processing speeds and/or reduced battery performance.'" *Id.* (quoting allegation). The Court further reasoned that Plaintiffs "cannot rely on negative online reviews alone to establish deficiency, as there are other reviews that establish non-deficiency." *Id.*

As in *Crittenden*, Plaintiffs do not come close to alleging facts to show that Tesla intentionally developed software updates to drain Plaintiffs' batteries or diminish battery capacity. When the conclusory allegations are discarded, there is not a single well-pled fact about any software update, much less its intended design. Plaintiffs' theory makes no sense. Tesla is in the market of selling electric vehicles, its batteries are warranted for years, and its own data shows that its batteries last for more than 200,000 miles on average. Compl. ¶¶ 32–35. There is no plausible reason why Tesla would intentionally design harmful software updates or that it did so. *See, e.g.*, *McCarthy*, 2019 WL 3220579, at *7 (dismissing trespass claims because not facts that "Toyota intentionally and without authorization interfered with [plaintiffs'] possession of their vehicles"); *In re iPhone Application Litig.*, 2011 WL 4403963, at *13 (N.D. Cal. Sept. 20, 2011) (California trespass to chattels claim requires an "intentional interference with the possession of personal property"); *In re iPhone Application Litig.*, 844 F. Supp. 2d at 1067 (CFAA requires "that the Defendant intended to impair").

The sparse factual allegations Plaintiffs do include about their own experiences confirm the implausibility of their theory. Two of the Plaintiffs' vehicles have been on the road (with the original batteries) for at least 10 years (Compl. ¶¶ 8, 14); another named Plaintiff alleges that he has noticed only a "modest" drop in battery "capacity" after "at least a dozen software updates" (*id.*

¶ 12); and the last Plaintiff continues to drive his vehicle and claims only a tiny percentage decrease in battery "drain" (*id.* ¶ 10), which is something Tela makes clear might happen over time (*id.* ¶ 34). No Plaintiff identifies what particular software update(s) he installed or any technical details about how it purportedly impacted the battery. In short, Plaintiffs allege zero facts to show that Tesla intended to harm Tesla batteries through software updates.

Plaintiffs also rely on the same type of "negative online reviews" about software updates that the *Crittendon* court found insufficient. 2022 WL 2132224, at *3. These reviews neither show that Tesla intended software updates to harm battery life nor remedy the lack of sufficient details about Plaintiffs' own vehicle experiences. Many reviews also are irrelevant. Several address the 12-volt battery used to start the vehicle—not the high-voltage battery used to drive Plaintiffs' electric vehicles and allegedly impacted by software updates. *See, e.g.*, Compl. ¶ 40, n.19 (post about 12-volt battery issue in non-class vehicle); *id.* n.21 (12-volt battery); *id.* n.23 (12-volt battery in non-class vehicle); *id.* n.24 (problem identified as wiring issue in the 12-volt battery later in the post); *id.* n.26 (12-volt battery). Other posts address memory cards, not battery issues at all. *See id.* ¶ 40, n.20 (post about SD Card failure). And Plaintiffs ignore "other reviews that establish non-deficiency," *Crittenden*, 2022 WL 2132224, at *3–4, such as entries from owners stating "I am not seeing any battery drain" and "did not drop any." Compl. ¶ 40, n.25.

Put simply, Plaintiffs have chosen to bring intent-based hacking and trespass claims. They therefore must plead facts to show that Tesla intended to interfere with (rather than enhance) their vehicles through software updates, and, in fact, did so. They offer no facts to support this implausible theory. Accordingly, the Complaint should be dismissed.

C. The UCL, CDAFA, And California Trespass To Chattel Claims Do Not Apply To The Non-California Plaintiffs.

Plaintiffs Kravchenko, Siegal, and Butler have no connection to California, yet they attempt to assert UCL, CDAFA, and California common-law trespass to chattel claims. *Id.* ¶¶ 102, 94, 78. They cannot do so.

First, these Plaintiffs cannot assert UCL claims because "[n]either the language of the UCL nor its legislative history provides any basis for concluding the Legislature intended the UCL to

operate extraterritorially." *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011) (upholding California's strong presumption against extraterritorial application of California law). Consistent with this principle, courts have dismissed UCL claims brought by non-California plaintiffs where they experienced harm in another state and there are insufficient facts showing that the unlawful conduct at issue occurred in California. *See*, *e.g.*, *Hayden v. Retail Equation, Inc.*, 2022 WL 18397355, at *3 (C.D. Cal. Nov. 28, 2022) (applying principle to dismiss claim); *Cooper v. Simpson Strong-Tie Co., Inc.*, 460 F. Supp. 3d 894, 911 (N.D. Cal. 2020) (same); *Warner v. Tinder Inc.*, 105 F. Supp. 3d 1083, 1096–97 (C.D. Cal. 2015) (same); *Gentges v. Trend Micro Inc.*, 2012 WL 2792442, at *6 (N.D. Cal. July 9, 2012) (same); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1076 (N.D. Cal. 2011) (same).

So, too, here. Plaintiff Kravchenko purchased a new vehicle in Illinois, downloaded a software update in Illinois, drove his vehicle in Illinois, and then purportedly experienced a battery impact in Illinois. Compl. ¶ 10. Plaintiff Siegal downloaded his software updates in Michigan, where he lives, drives his vehicle, and experienced his "modest" decrease in battery capacity. *Id.* ¶ 12. And Butler did so in Washington. *Id.* ¶ 14. None of these Plaintiffs alleges any connection to California. Moreover, apart from a few conclusory allegations (*id.* ¶¶ 17–18), Plaintiffs offer no facts to show that any of the unidentified software updates they complain about were designed in and then sent by Tesla from California. Indeed, Plaintiffs acknowledge that Tesla is now headquartered in Texas and moved there ***before*** Plaintiffs' vehicle purchases and, thus, ***before*** any named Plaintiff installed any software update. *Id.* ¶ 15; *see also id.* ¶¶ 9–10, 12, 14, 16.

Second, the same result applies to the CDAFA claim that these non-California Plaintiffs purport to bring. Consistent with California's strong presumption against extraterritorial application of its statutes, *Sullivan*, 51 Cal. 4th at 1207, this statute does not apply to Plaintiffs who purchased their vehicles, drove their vehicles, implemented software updates, and experienced any harm in states other than California. Moreover, unlike in *Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018 (N.D. Cal. 2014) (Tigar, J.), where this Court found the CDAFA might apply to non-California plaintiffs because they alleged Apple designed and distributed its software updates from California, *id.* at 1041–42, Plaintiffs do not allege facts showing that Tesla designed and sent the

software updates at issue in California, as set forth above.

Lastly, with respect to the trespass claims, the laws of Illinois, Michigan, and Washington—not California—apply to Plaintiffs Kravchenko, Siegal, and Butler respectively. Under California choice of law rules, where a true conflict exists, the Court must "evaluate[] and compare[] the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied." *Brown v. Madison Reed, Inc.*, 622 F. Supp. 3d 786, 797, 799 (N.D. Cal. 2022) (citing *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 590 (9th Cir. 2012)) (dismissing claim because state's interest "in applying its laws to transactions between citizens and corporations that occur in its own state outweighs California's attenuated interest in applying its laws to residents of other states").

California courts have recognized that trespass to chattel laws "materially differ" and that California's government interest test requires application of the law where each plaintiff resides and the alleged harm occurred. *See, e.g.*, *Grace v. Apple, Inc.*, 328 F.R.D. 320, 344–48 (N.D. Cal. 2018). So, too, here. The relevant trespass laws materially differ, such as with respect to whether a physical touching is required,[2] whether the law applies to intangible property,[3] the appliable statute of limitations,[4] when that limitation period accrues,[5] and even what type of harm is required.[6]

---

[2] *Compare Fidlar Techs. v. LPS Real Est. Data Sols., Inc.*, 82 F. Supp. 3d 844, 859 (C.D. Ill. 2015) (requiring direct "physical" interference under Illinois law) *with Intel Corp. v. Hamidi,* 30 Cal. 4th 1342, 1350 (2003) (not included as element under California law).

[3] *Compare Walgreens Co. v. Peters*, 2021 WL 4502125, at *2 (N.D. Ill. Oct. 1, 2021) (Illinois law does not recognize claim based upon intangible property) *with Best Carpet Values, Inc. v. Google LLC*, 2021 WL 4355337, at *6 (N.D. Cal. Sept. 24, 2021) ("intangible property" can be "subject to the tort of trespass to chattels" under California law).

[4] *Compare* RCW 4.16.080(2) (3-year statute of limitation under Washington law) and Cal. Civ. Proc. Code § 338 (same under California law) *with* 735 Ill. Comp. Stat. Ann. 5/13-205 (5-year statute of limitation under Illinois law).

[5] *Compare* MCL 600.5827 (accrual for three-year limitation period under Michigan law occurs "at the time the wrong upon which the claim is based was done regardless of the time when damage results") *with Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999) (claim accrues under California law "when the cause of action is complete with all of its elements"); *with Fradkin v. Northshore Util. Dist.*, 977 P.2d 1265, 1269 (Wash. Ct. App. 1999) ("claim for trespass must be brought within three years of the injury").

[6] *Compare Hamidi*, 30 Cal. 4th at 1357 (California law requires "measurable loss" to the "use of [the] computer system") *with G&G Closed Cir. Events, LLC v. Single, LLC*, 2020 WL 5815050,

Moreover, the trespass laws of each Plaintiffs' home state would be more significantly impaired if they were not applied here, given that Plaintiffs do not reside in California, they did not install any software updates in California, they did not suffer any harm in California, and the chattel is not located in California. Accordingly, Plaintiffs Kravchenko, Siegal, and Butler cannot bring claims under the UCL, the CDAFA, or California trespass law.

D. Plaintiffs' CFAA Claim (Count I) Fails For Multiple Other Reasons.

The CFAA "is 'an anti-hacking statute,' not 'an expansive misappropriation statute.'" *Andrews v. Sirius XM Radio Inc.*, 932 F.3d 1253, 1263 (9th Cir. 2019) (quoting *United States v. Nosal*, 676 F.3d 854, 857 (9th Cir. 2012)). It was designed "to target hackers who accessed computers to steal information or to disrupt or destroy computer functionality, as well as criminals who possessed the capacity to access and control high technology processes vital to our everyday lives." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1130–31 (9th Cir. 2009) (internal quotation and citation omitted); *see* 18 U.S.C. § 1030(a)(1)–(7); *Van Buren v. United States*, 141 S. Ct. 1648, 1659–60 (2021). It has no applicability here.

Plaintiffs allege a violation of 18 U.S.C. §§ 1030(a)(4) and (a)(5). (Compl. ¶¶ 58–59.) To establish a violation of section 1030(a)(4), Plaintiff must plead facts to show that Tesla:

> knowingly and with intent to defraud, accesse[d] a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period[.]

18 U.S.C. § 1030(a)(4). Because a section 1030(a)(4) claim "sounds in fraud," an alleged violation also must satisfy Rule 9(b). *So v. HP, Inc.*, 2022 WL 16925965, at *5–6 (N.D. Cal. Nov. 14, 2022) (dismissing CFAA claim due to printer software updates under Rule 9(b)).

To establish a violation of section 1030(a)(5), Plaintiffs must allege facts that Tesla:

> (A) knowingly cause[d] the transmission of a program, information, code, or command, and as a result of such conduct, intentionally cause[d] damage without authorization, to a protected computer;

---

at *4 (W.D. Wash. Sept. 30, 2020) (listing "three types of cognizable harms for a trespass to chattels claim" under Washington law).

> (B) intentionally accesse[d] a protected computer without authorization, and as a result of such conduct, recklessly cause[d] damage; or
>
> (C) intentionally accesse[d] a protected computer without authorization, and as a result of such conduct, cause[d] damage and loss.

18 U.S.C. § 1030(a)(5).

Even where there is an alleged violation, the CFAA "supplies a private right of action under very limited circumstances." *Fish v. Tesla, Inc.*, 2022 WL 1552137, at *8 (C.D. Cal. May 12, 2022). A civil action "may be brought" for a violation of the CFAA "only if the conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i)[,]" including specific requirements for economic damages. 18 U.S.C. § 1030(g). Importantly, ***no*** private cause of action may be brought over negligent software design. *Id.*

Plaintiffs' CFAA claims fails for multiple reasons.

1. <u>Plaintiffs Authorized And Voluntarily Downloaded All Upgrades</u>.

The "without authorization" requirement for a CFAA claim "extends liability only to hacking." *Volkswagen Grp. of Am., Inc. v. Smartcar, Inc.*, 2022 WL 20184651, at *5 (N.D. Cal. July 7, 2022) (Tigar, J.) (dismissing claim with "no hacking allegations"); *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322, 1343 (N.D. Ga. 2007) ("Under the more reasoned view, a violation for accessing 'without authorization' occurs only where initial access is not permitted.").

Where a software update is voluntarily downloaded or installed by the user, there is no violation of the CFAA because there is no hacking. *See, e.g.*, *Opperman*, 87 F. Supp. 3d at 1063 ("[w]here the software that allegedly harmed the phone was voluntarily downloaded by the user, other courts in this District and elsewhere have reasoned that users would have serious difficulty pleading a CFAA violation"); *In re iPhone Application Litig.*, 2011 WL 4403963, at *12 (holding that "plaintiffs have failed to sufficiently allege that Defendants accessed a protected computer 'without authorization' or 'exceeded authorized access' to Plaintiffs' iDevices" because software was voluntarily downloaded); *In re Apple & ATTM Antitrust Litig.*, 2010 WL 3521965, at *7 (N.D. Cal. July 8, 2010) ("Voluntary installation runs counter to the notion that the alleged act was a trespass and to CFAA's requirement that the alleged act was 'without authorization' as well as the

[CDAFA's] requirement that the act was 'without permission.'"), *vacated in part on other grounds sub nom. In re Apple & AT & TM Antitrust Litig.*, 826 F. Supp. 2d 1168 (N.D. Cal. 2011).

Here, as described above, Tesla did not hack Plaintiffs' vehicles. Plaintiffs purchased Tesla vehicles with software that allows for updates. As Plaintiffs' Complaint makes clear, Plaintiffs must voluntarily install updates by connecting their vehicles to the Internet and clicking "Yes" for each particular update. Compl. ¶ 4. Accordingly, there are no facts showing that Tesla engaged in criminal activity amounting to a violation of the CFAA.

2. Plaintiffs Do Not Meet The Threshold For Loss Under The CFAA.

The CFAA requires that "Plaintiffs must allege 'loss to 1 or more persons during any 1-year period . . . aggregating at least $5,000 in value." *Fish*, 2022 WL 1552137, at *8 (citing 18 U.S.C. § 1030(g) and § 1030(c)(4)(A)(i)(I)); *see also Turner v. Hubbard Sys., Inc.*, 855 F.3d 10, 13 (1st Cir. 2017). The CFAA specifically defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11). This "narrow conception of 'loss'" is limited by "the specific terms that surround it." *Andrews*, 932 F.3d at 1262–63.

In *Fish*, the court rejected nearly identical allegations to those at issue here. There, plaintiffs alleged that Tesla "manipulated [plaintiffs'] batteries through software updates resulting in diminished battery capacity," thereby causing at least $10,000 in damage or half the value of the battery. 2022 WL 1552137, at *8. In dismissing the CFAA claims, the court reasoned that this theory "misapprehends the 'narrow conception of 'loss' under the CFAA.'" *Id.* (quoting *Andrews*, 932 F.3d at 1263). Plaintiffs' claims failed because they had "not alleged that they incurred any costs to remedy Defendant's alleged improper access to their vehicles' battery systems." *Id.*

The same result applies here. Only Plaintiff Bui-Ford alleges he paid any money to address the alleged improper access to his battery, and that cost was only $500. *See* Compl. ¶¶ 9–14. No other Plaintiff has incurred any other costs to date. At most, Plaintiff Butler pleads that "a Tesla showroom" told him "that he needed to replace the battery" at a price of $20,798 (*id.* ¶ 14)—not

that he has incurred costs paying for any replacement. As *Fish* makes clear, the diminished value of the battery does not fall within the narrow statutory definition of "loss" under the CFAA. 2022 WL 1552137, at *8 (dismissing nearly identical claims for failure to plead loss).

In addition, even if the Court were to find that Plaintiff Butler has satisfied the $5,000 loss threshold (and he has not), Plaintiffs Bui-Ford, Kravchenko, and Siegal cannot piggyback on his alleged loss. Aggregation of loss across multiple plaintiffs is only appropriate where "damages arose from the same act by a defendant." *In re Apple & AT & TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1308 (N.D. Cal. 2008). Here, Plaintiffs cannot rely upon aggregated loss because they do not allege that a single, or even the same, software update caused their alleged battery issues. *See In re iPhone Application Litig.*, 2011 WL 4403963, at *11–12 (dismissing claim because "even had economic damages been alleged, Plaintiffs have not identified the 'single act' of harm by Defendants that would allow the Court to aggregate damages across victims and over time'); *see also In re Toys R Us, Inc. Priv. Litig.*, 2001 WL 34517252, at *11 (N.D. Cal. Oct. 9, 2011) (same); *So*, 2022 WL 16925965, at *5–6 (granting motion to dismiss on this ground). At a minimum, therefore, the CFAA claims brought by the remaining Plaintiffs must be dismissed.

3. Plaintiffs Plead No Facts To Show An Intentional Effort To Impair Their Vehicles' Batteries.

The CFAA expressly provides that "[n]o cause of action may be brought under this subsection for the ***negligent*** design or manufacture of computer hardware, computer software, or firmware." 18 U.S.C. § 1030(g) (emphasis added). Plaintiffs do not overcome this bar. At most, Plaintiffs allege that certain software updates negatively impacted battery performance for a few people (Compl. ¶¶ 9, 10, 12, 14), even though Tesla's own data shows that Tesla batteries lose just 12% of their capacity on average after 200,000 miles (*id.* ¶ 34). Because the Complaint contains ***no*** facts to show an intentional effort by Tesla to design software updates that harm the batteries of its vehicles, the CFAA claims must be dismissed. *See So*, 2022 WL 16925965, at *5–6; *In re iPhone Application Litig.*, 2011 WL 4403963, at *12.

4. Plaintiffs' § 1030(a)(4) Theory Also Fails Because Plaintiffs Do Not Plead Fraud With Particularity.

Section 1030(a)(4) forbids "knowingly and with intent to defraud, access[ing] a protected computer without authorization, or exceed[ing] authorized access, and by means of such conduct further[ing] the intended fraud and obtain[ing] anything of value . . . ." *So*, 2022 WL 16925965, at *6 (quoting 18 U.S.C. § 1030(a)(4); alteration in original). The Complaint contains no facts regarding any alleged fraud by Tesla, let alone how any access to Plaintiffs' vehicles furthered some fraudulent scheme and let Tesla obtain anything of value from Plaintiffs. Indeed, three of the four Plaintiffs did not even purchase their vehicles from Tesla (Compl. ¶¶ 9, 12, 14), and Tesla does not charge money for software updates. Given that no Plaintiff alleges that he has paid Tesla anything in connection with any software update, Plaintiffs' theory of fraud makes no sense.

Plaintiffs also plead no facts that they received or relied on any representation by Tesla when agreeing to install software updates, the content of any such representation, or why it was false. At the end of the day, Plaintiffs legal conclusions about "Tesla's fraudulent intent and conduct" (Compl. ¶ 71) do not satisfy *Iqbal* and *Twombly*, let alone the particularity demands of Rule 9(b). *See, e.g.*, *So*, 2022 WL 16925965, at *5–6 (dismissing claims about software updates because fraud not pled with particularity); *In re iPhone Application Litig.*, 2011 WL 4403963, at *11 (same); *Nowak v. Xapo, Inc.*, 2020 WL 6822888, at *3 (N.D. Cal. Nov. 20, 2020) (same).

E. Plaintiffs' CDAFA Claim (Count II) Also Fails For Multiple Reasons.

Like the CFAA, "Section 502 [the CDAFA] is an anti-hacking statute[.]" *Facebook, Inc.*, 2010 WL 3291750, at *7 (citing *Chrisman v. City of Los Angeles*, 155 Cal. App. 4th 29, 35 (Cal. Ct. App. 2007)). As relevant here, this statute makes it a crime when someone:

> (3) Knowingly and without permission uses or causes to be used computer services;
>
> (4) Knowingly accesses and without permission adds, alters, damages, deletes, or destroys any data, computer software, or computer programs which reside or exist internal or external to a computer, computer system, or computer network; . . . [or]
>
> (7) Knowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network.

Cal. Penal Code § 502(c)(3), (4), (7). Importantly, conduct that does not rise to the level of overcoming technical barriers and "hacking the computer's 'logical, arithmetical, or memory function resources'" does not violate Section 502. *Facebook, Inc.*, 2010 WL 3291750, at *7.

Here, Plaintiffs do not come close to meeting their pleading burden for several reasons.

1. Plaintiffs' Allegations Confirm That Access Was Not "Without Permission" Under The CDAFA, Since Tesla Did Not Overcome Any Technical Or Code-Based Barriers.

The term "without permission" is not defined within the language of the CDAFA. The majority of courts, however, have held that "individuals may only be subjected to liability for acting 'without permission' under Section 502 if they 'access[ ] or us[e] a computer, computer network, or website in a manner that overcomes technical or code-based barriers.'" *In re iPhone Application Litig.*, 2011 WL 4403963, at *12–13 (citations omitted). This Court has applied the majority view. *See Opperman*, 87 F. Supp. 3d at 1053–54; *but see Volkswagen Grp. of Am., Inc.*, 2022 WL 20184651, at *5 (recognizing "CDAFA also criminalizes 'unauthorized use'" and allowing claim to survive dismissal based on allegations of unauthorized use of information not present here).

In *Opperman*, consumers alleged that apps available on Apple's App Store, accessed and uploaded information from consumers' devices, such as contacts, without the consumers' permission. 87 F. Supp. 3d at 1032. In granting dismissal of the CDAFA claim, this Court reasoned that "Courts in this district have interpreted 'without permission' to mean 'in a manner that circumvents technical or code[-]based barriers in place to restrict or bar a user's access.'" *Id.* at 1053. Because plaintiffs included no such allegations, the Court granted Apple's motion to dismiss. *Id.*; *see also Custom Packaging Supply, Inc. v. Phillips*, 2015 WL 8334793, at *3 (C.D. Cal. Dec. 7, 2015) (dismissing claim because while "CPS sufficiently alleges that Defendants exceeded authorized access . . . . CPS does not allege that Defendants circumvented any technological barriers to gain access to the portions of the database at issue here" and "it seems that there were no technological barriers to [defendant's] access because CPS was not trying to keep them out of the database at issue"); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1217 (N.D. Cal. 2014) (applying principle to dismiss claim); *Facebook, Inc.*, 2010 WL 3291750, at *7, *9, *11; *cf. LVRC*

Holdings LLC, 581 F.3d at 1130 ("access to a computer may be 'authorized,' within the statutory meaning of the term, even if that access violates an agreed upon term of using that computer").

Here, there are no facts that Tesla circumvented any technical barriers to get access to the software on Plaintiffs' vehicles. To the contrary, each Plaintiff had to connect to Wi-Fi to enable over-the-air updates, and they necessarily had to select "Yes" when asked whether to install the update now. Compl. ¶ 4. Tesla did not hack into their vehicles or usurp any technical barrier.

2. Plaintiffs Do Not Alleged An Unauthorized Taking Or Use Of Information As Required By CDAFA.

A "plain reading of the [CDAFA] demonstrates that its focus is on unauthorized taking or use of information." *United States v. Christensen*, 828 F.3d 763, 789 (9th Cir. 2015). Plaintiffs' allegations focus solely on software updates installed on Plaintiffs' vehicles. There are no allegations that Tesla took any information from the computer systems in Plaintiffs' vehicles or that Tesla subsequently used that data. *See id.* ("What makes that access unlawful is that the person 'without permission takes, copies, or makes use of' data on the computer." (quoting Cal. Penal Code § 502(c)(2))). Accordingly, Plaintiffs' CDAFA claim fails for this additional reason.

3. Plaintiffs Fail To Plead Fraud With The Required Particularity.

Plaintiffs CDAFA claim sounds in fraud. Compl. ¶¶ 77 (incorporating all prior allegations), 92 (seeking punitive damage under Cal. Penal Code § 502(e)(4) due to Tesla's alleged fraud). As such, Plaintiffs are required to plead this claim with particularity. *See, e.g.*, *So*, 2022 WL 16925965, at *4 (dismissing CDAFA claims because underlying claim not pled with particularity); *Nowak*, 2020 WL 6822888, at *5 ("because Plaintiff's CDAFA claim 'sound[s] in fraud,' it is subject to Rule 9(b) pleading standards"); *Williams v. Facebook, Inc.*, 384 F. Supp. 3d 1043, 1052 (N.D. Cal. 2018) (dismissing CDAFA claim on this ground).

Here, Plaintiffs do not come close to satisfying Rule 9(b). Plaintiffs fail to plead the details of any fraudulent conduct by Tesla, including what information, if any, from Tesla that each Plaintiff viewed when he installed software updates, the content of any purported misrepresentation or omission that each Plaintiff relied upon, when he did so, what Tesla supposedly gained by the alleged fraud, or even the specific software update at issue. *Nowak*, 2020 WL 6822888, at *3, *5.

4. Plaintiffs Kravchenko And Siegal Lack Statutory Standing To Bring Their CDAFA Claims Because They Allege No Economic Damage.

To bring a CDAFA claim, each Plaintiff must allege that he experienced economic "damage or loss." Cal. Penal Code § 502(e)(1); *see also Williams*, 384 F. Supp. 3d at 1052 (dismissing claims for failure to plead injury). Plaintiffs Kravchenko and Siegal fail to do so.

Plaintiff Siegal pleads no loss of value to his vehicle or any out-of-pocket costs. At most, he pleads that he "noticed at least a modest drop in the stated/estimated capacity of the battery" to his used Tesla vehicle. Compl. ¶ 12. This is not compensable harm, particularly where Tesla makes clear that there is some level of normal "battery degradation over time." *Id.* ¶ 34.

Likewise, Kravchenko has not suffered any economic damage or loss. He, too, does not claim that his vehicle has lost value, that he incurred any out-of-pocket costs to address the software update, or that he has been damaged at all. He claims only an incremental additional amount of "battery drain" (Compl. ¶ 10)—not any financial harm. Thus, his CDAFA claim fails.

F. Plaintiffs' Trespass To Chattels Claims (Count IV) Fail For Additional, State-Specific Reasons.

Plaintiffs also plead trespass to chattel claims. Compl. ¶¶ 109–30. As set forth above, these claims arise under the law of each Plaintiff's home state, where the chattel is located, each Plaintiff installed updates, and each Plaintiff suffered alleged harm. These claims fail under each law.

1. Plaintiff Kravchenko's Claim Under Illinois Law Fails Because Tesla Did Not Physically Touch His Vehicle And Dispossess Him Of It.

Plaintiff Kravchenko's claim arises under Illinois law. Compl. ¶ 10. Illinois law "does not recognize a claim for . . . conversion of intangible property," *Walgreens Co.*, 2021 WL 4502125, at *2, such as "digital information contained on a USB drive." *Ogbolumani v. Young*, 2015 IL App (1st) 141930-U, ¶ 33. Moreover, it requires "direct physical interference" that dispossesses another of his tangible property. *Fidlar Techs.*, 82 F. Supp. 3d at 859. While "trespass to chattels is experiencing a strange afterlife as a cause of action for unauthorized intermeddling with another's computer or network . . . the requirement that the trespass involve an act of 'direct physical interference' remains." *Id.* (quoting *Antonelli v. Sherrow*, 2005 WL 2338813, at *10 (N.D. Ill.

Sept. 21, 2005) (rejecting claim based upon "conclusory assertion that its computer network was interfered with and its computer physically 'touched'")); *see also City of E. St. Louis v. Netflix, Inc.*, 630 F. Supp. 3d 1003, 1018–19 (S.D. Ill. 2022) (applying principle to dismiss trespass claim).

Plaintiff Kravchenko does not and cannot allege any physical touching of his vehicle by Tesla. Nor has Tesla dispossessed him of the use of his vehicle (or any component of it). For this reason alone, his claim under Illinois law must be dismissed with prejudice.

2. Each Plaintiff Fails To Plead Any Intentional Trespass.

Under the laws of California, Illinois, Michigan, and Washington, each Plaintiff must plead facts to show that Tesla intended to interfere with his property—here, that the software updates were intended to negatively impact the battery performance of their Tesla vehicles. *See, e.g.*, *Brodsky*, 445 F. Supp. 3d at 122 (California law requires "'an intentional interference with the possession of personal property has proximately caused injury'" (quoting *Hamidi*, 30 Cal. 4th at 1350–51); *Fidlar Techs.*, 2013 WL 5973938, at *9 (Illinois law requires "intentional, unauthorized, and substantial" tangible interference with a chattel); *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 739 (E.D. Mich. 2010) (under Michigan law, "'trespass to chattels is actionable if one dispossesses another of or intentionally and harmfully interferes with another's property'" (citation omitted)); *United Fed'n of Churches, LLC v. Johnson*, 598 F. Supp. 3d 1084, 1100 (W.D. Wash. 2022) (Washington law requires intent).

Here, as described above, Plaintiffs fail to plead facts showing any intent by Tesla to interfere with any Plaintiff's vehicle. They certainly do not plead facts to show an intent to design software updates to harm battery life or capacity. As a result, the trespass claims fail. *See, e.g.*, *McCarthy*, 2019 WL 3220579, at *7 (dismissing trespass claim for failure to plead facts supporting intent that software update cause the alleged damage); *Crittenden*, 2022 WL 2132224, at *3 (same).

3. Plaintiffs Bui-Ford, Kravchenko, And Siegal Do Not Allege Cognizable Damage Under Applicable Trespass Law.

Cognizable damage is an element of a trespass to chattel claims under California, Illinois, and Michigan law. *See, e.g.*, *Brodsky*, 445 F. Supp. 3d at 124–25 (dismissing California trespass to chattels claim for failing to allege trespass harmed them); *Fidlar Techs.*, 2013 WL 5973938, at

*9 (Illinois trespass to chattels "protects against harm to the physical quality of the chattel or any substantial deprivation of the possessor's use of it."); *Price v. High Pointe Oil Co.*, 493 Mich. 238, 254, 828 N.W.2d 660, 669, n.8 (2013) (recognizing, under Michigan law, "trespass to chattel actually deprives the owner of the chattel and, by necessity, causes actual damage").

Here, Plaintiff Siegal pleads no cognizable damage under Michigan law. He does not allege that he was deprived of anything. Nor does he allege that this his vehicle has lost value or that he cannot drive it. Moreover, it is equally, if not more, plausible that any "modest drop" in battery capacity has resulted from the age of his used vehicle. Tesla, in fact, discloses that battery capacity decreases over time. Compl. ¶ 34 (noting average decrease over time).

Likewise, Kravchenko's trespass claim also fails under Illinois law for lack of alleged "harm to the physical quality of the chattel or any substantial deprivation of the possessor's use of it." *Fidlar Techs.*, 2013 WL 5973938, at *9 (applying Illinois law). Kravchenko does not allege any harm to the quality of his Tesla vehicle or that he is unable to charge, use, and drive it.

Lastly, Plaintiff Bui-Ford has not pled any cognizable harm from the alleged trespass under California law. He does not allege the software update prevented him from driving or operating his vehicle. While Bui-Ford claims he spent $500 to remove an update that reduced his "battery range" (Compl. ¶ 9), California law requires "measurable loss" to the "use of [the] computer system," *Hamidi*, 30 Cal. 4th at 1357—not the consequential cost of $500 to reverse an update. *Id.* ("consequential economic damage" not cognizable). In other words, the defendant must have "interfered with plaintiff's possessory interest in the computer system[,]" *McCarthy*, 2019 WL 3220579, at *7, and "financial injury resulting from a trespass to a computer is not an actionable harm." *WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 472 F. Supp. 3d at 685–86 (N.D. Cal. 2020), *aff'd on other grounds*, 17 F.4th 930 (9th Cir. 2021). As a result, his claim must be dismissed.

G. Plaintiffs' UCL Claim (Count III) Fails For Multiple Reasons.

The "UCL creates a cause of action for business practices that are (1) unlawful, (2) unfair, or (3) fraudulent." *Grace*, 328 F.R.D. at 336 (citation omitted); *see* Cal. Bus. & Prof. Code § 17200. Each Plaintiff also must allege that he "suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204.

First, as discussed above, the UCL claim does not apply to Plaintiffs Siegal, Kravchenko, and Butler, based upon extraterritorial prohibitions and choice of law principles. *See, e.g.*, *Hayden,* 2022 WL 18397355, at *3 (dismissing UCL claim); *Brown*, 622 F. Supp. 3d at 799 (same).

Second, Plaintiffs proceed only under the unlawful prong of the UCL. Compl. ¶¶ 95–98. But Plaintiffs' UCL claim is entirely derivative of their CFAA, CDAFA, and trespass to chattels claims. *Id.* at ¶ 96 ("Tesla has engaged in unlawful conduct in violation of the CFAA, the CDAFA, and trespass to chattels under California common law . . . ."). As a result, the UCL claim fails for the reasons discussed above. *See Aleksick v. 7-Eleven, Inc*., 205 Cal. App. 4th 1176, 1185 (2012) ("[w]hen a statutory claim fails, a derivative UCL claim also fails"); *Avila v. Countrywide Home Loans, Inc.*, 2011 WL 1192999, at *6 (N.D. Cal. Mar. 29, 2011) (applying rule).

Third, Plaintiffs appear to seek "damage[s]" under the UCL (Compl. ¶ 98), but the UCL does not permit damages. *See Stearns v. Select Comfort Rental Corp.*, 2009 WL 1635931, at *17 (N.D. Cal. June 5, 2009) ("A UCL action is equitable in nature, and damages cannot be recovered."). To the extent Plaintiffs seek equitable restitution, this claim is barred because Plaintiffs have alleged an adequate legal remedy. In *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), the Ninth Circuit affirmed the dismissal of claims for equitable restitution under California's UCL because the plaintiff failed to allege that she lacked an adequate remedy at law. *Id*. at 844. So, too, here. Plaintiffs do not allege that they are without an adequate legal remedy. Compl. ¶¶ 93–100. To the contrary, Plaintiffs bring legal claims and seek the legal remedy of damages for a variety of battery issues from unidentified software updates. *Id.* ¶¶ 76, 91, 107, 115, 123, 130. Moreover, Plaintiffs do ***not*** plead their UCL claim in the alternative, and, in fact, expressly incorporate all legal claims and remedies into this Count. *Id.* ¶ 93. Because Plaintiffs have alleged that they have an adequate remedy at law, any request for monetary relief under the UCL fails. *See, e.g.*, *Watkins v. MGA Ent., Inc.*, 550 F. Supp. 3d 815, 837–38 (N.D. Cal. 2021) (dismissing UCL claim because "Plaintiffs have not alleged any facts establishing that their remedies at law are inadequate.")

Fourth, Plaintiffs seek to enjoin Tesla via their UCL claim, but they offer no basis for this remedy. *See* Compl. ¶ 99 and Prayer for Relief. Plaintiffs cannot show an imminent risk of future

harm because they have already experienced any alleged battery issue and have the ability not to install any future updates, if they really believe such updates are causing those issues. Moreover, Plaintiffs appear to seek injunctive relief in the form of a "recall" or "replacement" or "buy-back" program (Prayer for Relief, at C), but there are no pled facts to support the basis for such relief. In any event, courts have dismissed UCL claims seeking this exact relief because legal damages would be adequate. *See*, *e.g.*, *Hamm v. Mercedes-Benz USA, LLC*, 2022 WL 913192, at *3 (N.D. Cal. Mar. 29, 2022) (dismissing UCL claim for "declaratory relief and an injunction forcing Defendant to acknowledge the alleged defect, which Plaintiff contends will trigger Defendant's obligations . . . to replace at its expense the defective parts and . . . safety recall" because damages are adequate); *Sharma v. Volkswagen AG*, 524 F. Supp. 3d 891, 908–09 (N.D. Cal. 2021) (Tigar, J.) (dismissing UCL claim for injunctive relief for repair of alleged defect or buyback because no facts showing "monetary damages would not provide nearly identical relief"); *Gibson v. Jaguar Land Rover N. Am., LLC*, 2020 WL 5492990, at *3–4 (C.D. Cal. Sept. 9, 2020) (same).

Lastly, for the reasons stated above, Plaintiffs Siegal and Kravchenko do not allege they lost any money or property, as required to establish UCL standing. *Volkswagen Grp of Am., Inc.*, 2022 WL 20184651, at *3 (dismissing UCL claim because conclusory allegations of lost value of property insufficient to plead economic injury necessary for UCL standing).

IV. PLAINTIFFS' CLASS ALLEGATIONS SHOULD BE STRICKEN.

"Under Rules 23(c)(1)(A) and 23(d)(1)(D), as well as pursuant to Rule 12(f), this Court has authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained." *Hovsepian v. Apple, Inc.*, 2009 WL 5069144, at *2 (N.D. Cal. Dec. 17, 2009); *see* Fed. R. Civ. P. 23(d)(1)(D) (court may "require that the pleadings be amended to eliminate allegations about representation of absent persons . . . "); Fed. R. Civ. P. 12(f) (court may strike "immaterial" or "impertinent" matter). This Court has recognized that while motions to strike class allegations are "rarely" granted, it is nonetheless appropriate to do so "when the face of the complaint shows conclusively that the proposed class cannot be certified." *Langan v. United Servs. Auto. Ass'n*, 69 F. Supp. 3d 965, 988 (N.D. Cal. 2014) (Tigar, J.). This is precisely the case here.

It is well settled that "[t]he class action is an 'exception to the usual rule that litigation is

conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). To certify a class, Plaintiffs must satisfy each Rule 23(a) requirement, including numerosity, commonality, typicality, and adequacy. *See, e.g.*, *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013). In addition, because Plaintiffs seek a Rule 23(b)(3) class, they must satisfy the requirements of predominance and superiority. *Dukes*, 564 U.S. at 350.

Here, Plaintiffs' putative classes broadly consist of all persons "who purchased or leased one of more of the Class Vehicles" across the country or in certain states. Compl. ¶ 46. The class definition is not tied to any software update, any time period, or class members who have allegedly experienced harm from a software update. On the face of the Complaint alone, it is clear Plaintiffs cannot certify the massively broad classes they seek for at least two threshold reasons.

A. Plaintiffs' Proposed Classes Consist Primarily Of Putative Class Members Who Entered Into Arbitration Agreements Precluding Participation In Any Class.

Plaintiffs' Complaint acknowledges that purchasers and lessees of Tesla vehicles are subject to arbitration agreements. Compl. ¶ 6 (recognizing Tesla has an "arbitration clause" but claiming "named Plaintiffs" are "not bound" by it because they never signed an agreement). As shown in Tesla's Motion to Compel Arbitration, Plaintiffs Bui-Ford and Kravchenko must arbitrate their claims on an individual basis. ECF No. 16, at 8–19. So too must most putative class members.

Tesla arbitration agreements apply to any person who acquired a vehicle from Tesla (Order Agreement) or any Tesla owner who purchased Premium Connectivity (Subscription Agreement), regardless from whom they purchased the vehicle. *Id.* at 4–5, 6–7, 11–15. Each arbitration agreement requires individual arbitration of any dispute arising from or out of the parties' "relationship," and prohibits participation in any class. *Id.* Given these arbitration agreements, Plaintiffs' proposed classes cannot be certified as defined because virtually all class members will be required to arbitrate their claims on an individual basis. The class allegations should be stricken.

B. Plaintiffs' Differing Circumstances Alone Show That The Resolution Of Each Claim Will Hinge Upon Individual Issues.

"Class allegations must [be] supported by sufficient factual allegations demonstrating that the class device is appropriate and discovery on class certification is warranted." *Jue v. Costco Wholesale Corp.*, 2010 WL 889284, at *6 (N.D. Cal. Mar. 11, 2010). No class can be certified where there are not common issues capable of resolving the litigation in "one stroke." *Dukes*, 564 U.S. at 350 (describing commonality requirement). In addition, no class for damages can be certified where individual issues would predominate the resolution of the claims at issue. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (describing predominance requirement).

Plaintiffs' own allegations foreclose these showings. From named Plaintiffs' allegations alone, it is clear that each putative class member is not similarly situated and that individual issues will predominate the resolution of each claim. Each named Plaintiff purchased a different Tesla vehicle in a different condition at a different time. Indeed, two of the named Plaintiffs' vehicles have been on the road since 2013—for at least 10 years. Each vehicle was subject to different software updates installed at different times. Each installation required individual authorization. Each battery for each Plaintiff's vehicle experienced a different result, if any, after a different update, and each Plaintiff responded differently. To resolve each claim, therefore, the individual circumstances of each class member, software update, and vehicle will need to be evaluated, including what Tesla vehicle he or she purchased or leased; whether the vehicle was used and, if so, the battery's history and how the prior owner maintained the vehicle; whether he or she entered into an arbitration agreement; whether he or she authorized a Tesla software update; the design of that particular software update; whether it impacted his or her battery; whether he or she experienced any costs or damages; and, if so, in what form and amount.

At bottom, Plaintiffs' Complaint makes clear that the proposed classes are grossly overbroad and that the claims cannot be resolved in one stroke for all class members, since they are riddled with individual issues. Accordingly, the class allegations should be stricken.

V. CONCLUSION

Plaintiffs' claims are insufficiently pled. The Court should dismiss the claims with prejudice as no amendment would cure them. In addition, the class allegations should be stricken.

DATED: July 27, 2023

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP
David L. Schrader
Brian M. Ercole
Mark A. Feller
Melissa M. Coates

By s/ *David L. Schrader*
David L. Schrader

Attorneys for Defendant Tesla, Inc.

.