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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

SAMAN MOLLAEI, individually and on behalf of all others similarly situated,

Plaintiff,

v.

OTONOMO INC., a Delaware Corporation,

Defendant.

Case No. 4:22-cv-02854-JST

DEFENDANT OTONOMO INC.'S NOTICE OF MOTION AND MOTION TO DISMISS CLASS ACTION COMPLAINT

Date: October 6, 2022
Time: 2:00 p.m.
Court: Courtroom 6, 2nd Floor
Hon. Jon S. Tigar

NOTICE OF MOTION AND MOTION TO DISMISS

TO THE COURT, CLERK, PLAINTIFF AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 6, 2022 in Courtroom 6 of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, California, Defendant Otonomo Inc. will and hereby does move for an order dismissing Plaintiff's Class Action Complaint ("Complaint") with prejudice.

The Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) on the ground that Plaintiff's Complaint fails to state a claim as a matter of law.

This motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities; the concurrently filed Request for Judicial Notice; the concurrently filed Declaration of Melanie Blunschi; the pleadings and papers on file in this action; the arguments of counsel; and any other matter that the Court may properly consider.

STATEMENT OF RELIEF SOUGHT

Otonomo Inc. seeks an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing with prejudice the claim in Plaintiff's Complaint for failure to state any claim upon which relief can be granted.

DATED: June 13, 2022

LATHAM & WATKINS LLP

By: */s/ Melanie M. Blunschi*

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STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiff's Complaint against Otonomo Inc. should be dismissed with prejudice under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

I. INTRODUCTION

Plaintiff's barebones, one-count complaint seeks to misconstrue the receipt of vehicle GPS data as unlawful under Section 637.7 of the California Invasion of Privacy Act ("CIPA"), a criminal statute written to prevent private investigators from surreptitiously attaching trackers to people's cars to track them. But Otonomo's receiving vehicle GPS data through its contracts with car manufacturers and fleet managers—data used for things like roadside assistance, emergency location, vehicle theft protection, real-time weather and hazard notifications, and traffic flow management—is not criminal surveillance. Federal courts have uniformly rejected analogous attempts to expand Section 637.7 beyond its plain language, and this Court should do the same here for the following reasons:

First, receiving data about a *vehicle* is not the same as tracking a *person*. The statute's plain language and legislative history make that clear. Section 637.7 prohibits "us[ing] an electronic tracking device to determine the location or movement of a *person*." Cal. Penal Code § 637.7(a) (emphasis added). Here, Plaintiff claims that Otonomo is able to "determine *the car's* precise physical GPS location." Compl. ¶ 15 (emphasis added). That is not unlawful, and for good reason; obtaining vehicle location data facilitates critical services on which drivers rely, such as roadside and emergency assistance. And Plaintiff fails to plausibly allege that Otonomo tracks him—nor could he do so, consistent with the Rules, because Otonomo does *not* track him, or any other people. There are no factual allegations plausibly suggesting Otonomo is able to associate vehicle data with any specific person, let alone that Otonomo actively takes such steps. For instance, there is no allegation that Otonomo is ever informed by car manufacturers or anyone else of the identity of the person (or persons) who drive any particular vehicle. Courts agree that collecting location data without associating it to a specific person does not state a Section 637.7 claim. *See In re Google Location Hist. Litig.*, 428 F. Supp. 3d 185 (N.D. Cal. 2019); *Moreno v. San Francisco Bay Area Rapid Transit*, No. 17-CV-02911-JSC, 2017 WL 6387764 (N.D. Cal. Dec. 17, 2017).

Second, Plaintiff complains about a component part of his vehicle, not an electronic tracking device attached to it. The statute defines "electronic tracking device" as "any device attached to a vehicle or other movable thing ..." Cal. Penal Code § 637.7(d). Plaintiff alleges that

his vehicle came with a preinstalled telematics control unit ("TCU"), which is hardware that car manufacturers (not Otonomo) build into their vehicles. *See* Compl. ¶¶ 15, 18. TCUs are not "devices" attached to a vehicle; they are a component part of the "vehicle"—just like the engine or climate-control system. Section 637.7 does not purport to regulate what parts automakers include in their vehicles. And even if TCUs were "devices" within the meaning of the statute, Otonomo did not "attach" them to the vehicle—Plaintiff does not and cannot allege otherwise. Every court to consider these issues has ruled uniformly that software is not a tracking "device," and that the defendant must actually "attach" the device to the vehicle. *See, e.g.*, *Google Location Hist. Litig.*, 428 F. Supp. 3d at 193 ("Software … are not 'devices' within the meaning of CIPA"); *id.* at 195 ("[T]he bill denotes that 'attach' requires some affirmative act by the wrongdoer."). That reasoning applies equally here.

Third, Plaintiff has failed to plausibly allege that he did not consent to the use of an electronic tracking device with respect to his vehicle, as required by the statute. He claims that he did not provide such consent directly to *Otonomo*. Compl. ¶¶ 16, 20. But under the plain language of Section 637.7(b), *any* consent to use of such a device for a particular vehicle precludes liability. Notably, Plaintiff does not allege that he did not provide the car manufacturer with such consent—and though not necessary to resolve this Motion given the gaps in Plaintiffs' allegations and other dispositive issues here, judicially noticeable facts indicate that Plaintiff *did* provide consent to the manufacturer.

Last, Plaintiff's pleading is incompatible with Ninth Circuit and Supreme Court standards requiring that complaints plausibly support their allegations with *facts*. A plaintiff cannot just baldly assert that a business is acting illegally without tethering their allegations to actual facts—that is a core holding of the seminal *Iqbal* and *Twombly* cases. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (emphasizing that court need not accept as true "threadbare recitals of a cause of action's elements, supported by mere conclusory statements"). Plaintiff asks this Court to break massively new ground and expand a criminal statute into the transportation ecosystem upon which so many rely based on four paragraphs of conclusory allegations. Compl. ¶¶ 13-16. Plaintiff's Complaint is so lacking in factual details that it is facially implausible.

What Plaintiff aims to do here is stretch Section 637.7 to capture lawful conduct plainly outside its reach: he seeks to create criminal liability for anyone who receives GPS data from car manufacturers derived from features the manufacturers build into the cars. But as the plain language and legislative history of Section 637.7 confirm, that is not what the statute was designed to (or does) forbid. Otonomo respectfully submits that the Court should reject this wholly unsupported effort to make new law and dismiss the Complaint with prejudice.

II. BACKGROUND

A. Plaintiff's Allegations

Plaintiff's Complaint includes just four paragraphs about Otonomo. Compl. ¶¶ 13-16. Plaintiff's conclusory allegations that Otonomo "partners with automobile manufacturers—such as BMW—to install electronic tracking devices in their cars" and send GPS location data to Otonomo without drivers' "permission or consent" lack supporting facts. *Id*. ¶¶ 2, 15. The allegation that BMW would let third parties install trackers on its vehicles is implausible on its face, and Plaintiff does not provide any factual allegations to support this theory.

The only purported "electronic devices" identified in the Complaint are "telematics control units ('TCUs')" that come as part of the vehicle. *Id*. ¶¶ 15, 18. These TCUs allegedly "determine the car's precise physical GPS location" and "transmit the data" to Otonomo through partnerships with the car manufacturers, and then, Plaintiff posits, Otonomo allegedly sells that data to its third-party customers. *Id*. ¶¶ 14-15. Plaintiff alleges that he drives a 2020 BMW X3, and when the "vehicle was delivered to him" it allegedly contained a TCU that tracked the vehicle's GPS location without his consent. *Id*. ¶¶ 17-20.

B. Plaintiff's Omissions

Plaintiff's Complaint is more notable for what it fails to allege. Despite detailed, publicly available information regarding Otonomo's services and privacy practices, the Complaint conspicuously fails to allege any facts regarding the company's collection and use of vehicle data.[1]

[1] Otonomo offers the additional background information below based on judicially noticeable materials. Although these additional details are not necessary to resolution of the Motion to Dismiss, Otonomo believes that they provide helpful context for the Court—and explain Plaintiff's deliberate failure to plead facts.

Otonomo is a data platform developer focused on providing *vehicle*-based insights—not *person*-based insights, such as:

- Data about the use of vehicles, automated road tolls, and road infrastructure, which supports urban planning, road maintenance, and transportation improvements;
- Data to support usage-based insurance, vehicle theft protection, collision warnings, and real-time weather and hazard notifications;
- Data to enable automatic emergency calls; and
- Data for research, including driving skills improvement and education and electrical vehicle infrastructure insights.

Ex. 5 (Otonomo Privacy Policy) at 5.[2]

To enable its customers' (such as cities and businesses in the mobility sector) diverse use cases, Otonomo's Automotive Data Services Platform (the "Platform") receives a range of vehicle data from sources such as original equipment manufacturers ("OEMs"). Ex. 4 (Otonomo Annual Report) at 34; *see also* Compl. ¶ 13 fig. 1 (recognizing 12 OEMs). Otonomo offers this data to its customers through its Platform, allowing them to derive actionable insights and make data-driven decisions in the mobility and transportation sector. Ex. 4 at 34. Otonomo's Platform thereby enables vehicle data to be used for purposes such as roadside assistance, electronic vehicle charging services, occupant safety, subscription-based fueling, usage-based insurance, remote diagnostics, and parking payments. *Id*.

Otonomo's Platform is specific to vehicles and the transportation ecosystem (*see* Ex. 4 at 34, 37); the driver's identity is not part of Otonomo's business model and the company does not make efforts to identify drivers—and Otonomo further prohibits its customers from attempting to re-identify individuals based on de-identified data. Otonomo designed the Platform with driver privacy foremost in mind. *See Id*. at 33-34. In the first instance, Otonomo contractually requires OEMs to ensure that drivers explicitly consent to the sharing of vehicle attributes with third parties like Otonomo. Ex. 4 at 43. These parties interface directly with drivers, and represent to Otonomo

[2] All cited exhibits are attached to the concurrently filed Declaration of Melanie Blunschi and are properly considered on this Motion, as established in the concurrently filed Request for Judicial Notice.

that drivers have properly consented to sharing their vehicle information before it is shared with Otonomo. *Id*. at 39; *see also* Ex. 5 at 2 (party providing data to Otonomo must have obtained consent to share the data); Ex. 6 at 2 (data providers are responsible for the "legality of the Personal Information that the Data Provider provides" to Otonomo and for acquiring all necessary consents from drivers).

III. LEGAL STANDARD

A complaint must be dismissed unless it pleads "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see* Fed. R. Civ. P. 12(b)(6). The Court need not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). Taking only "well-pleaded factual allegations" as true, a court "determine[s] whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

IV. ARGUMENT

Plaintiff seeks to extend liability for violations of a criminal statute far beyond what is contemplated by the statute's text, legislative history, or prior case law applying it. The Complaint is defective many times over because Plaintiff does not plausibly allege (1) that Otonomo tracked him, let alone any other "person," (2) that Otonomo "attached" a "device" to his vehicle, or (3) that Plaintiff did not consent to the disclosure of his location data. Dismissal is also warranted because Plaintiff's conclusory allegations lack supporting factual allegations and are not only implausible but incurably inadequate.

A. Plaintiff Does Not—And Cannot—Allege That Otonomo Tracks The Location Of People

The Complaint fails to state a claim because liability under Section 637.7(a) requires that a defendant "determine the location or movement *of a person*." Cal. Penal Code § 637.7(a) (emphasis added). But Otonomo does not do that, and Plaintiff does not (and cannot) plausibly allege otherwise: Plaintiff's allegations show at most that Otonomo received data about the location of *vehicles*. This is a significant statutory distinction, and the very basis on which other

courts have rejected similar attempts to stretch Section 637.7 beyond its plain words. *See*, *e.g.*, *In re Google Location Hist. Litig.*, 428 F. Supp. 3d 185; *Moreno*, 2017 WL 6387764.

Section 637.7 prohibits tracking a person, not a vehicle. To give rise to liability, an "electronic tracking device" must first be "attached to a *vehicle*" and then used "to determine the location or movement of a *person*." Cal. Penal Code § 637.7(a), (d) (emphases added). Reading the statute to apply any time a vehicle's location is tracked would render the core prohibition of 637.7 to be surplusage. The statute prohibits use of an "electronic tracking device," defined as "any device *attached to a vehicle* or other movable thing *that reveals its location or movement* by transmission of electronic signals," *id.* § 637.7(d) (emphases added), so an electronic tracking device *by definition* reveals a vehicle's location or movement. If the statute had been intended to bar obtaining data about vehicle locations, the words "to determine the location or movement of a person" would be unnecessary surplusage. *See, e.g.*, *United States v. Winkles*, 795 F.3d 1134, 1146 (9th Cir. 2015) (rejecting reading that would be "contrary to the 'cardinal' canon of statutory construction that courts must interpret statutes so that no clause, sentence, or word shall be superfluous, void, or insignificant").

Though not necessary given the statute's plain language, the legislative history overwhelmingly confirms that the statute was not intended to apply to the receipt of vehicle location data from car manufacturers and other third parties. *See In re Google Location Hist. Litig.*, 428 F. Supp. 3d at 193 ("Federal courts apply California rules of statutory construction when interpreting a California statute. The touchstone of statutory interpretation is the probable intent of the Legislature.") (internal citations omitted). The legislature was focused on criminalizing the tracking of private individuals, and the recurring example in the legislative history is the situation of an investigator sticking a tracking device under someone else's bumper to follow that *person*. *See* Ex. 1 (Analysis by Senate Committee on Public Safety) (stating that the bill is necessary because it "protects private individuals from having their movements tracked by other private individuals" and that the bill "would not allow a private investigator to place a device on the automobile of an individual he or she was trying to follow"); Ex. 2 (Legislative Counsel's Digest) ("The Legislature declares that electronic tracking of a person's location without that person's

knowledge or permission violates that person's reasonable expectation of privacy."); Ex. 3 (Analysis by Assembly Committee on Public Safety) (stating the bill "provides it is a misdemeanor for a person or entity to use an ETD to determine the location or movement of a person"). And indeed, that is how the law has been applied in the criminal context: for example, in *People v. Agnelli*, 68 Cal. App. 5th Supp. 1, 2 (2021), the defendant was convicted for placing "a magnetically-attached tracking device underneath" the car of the woman who was seeking a divorce from him so that he could locate her.[3]

Here, the Complaint does not include any plausible allegations that Otonomo does (or even can) connect any vehicle data to him personally (or to any other person). Plaintiff alleges that Otonomo "determine[s] ***the car's*** precise physical GPS location." Compl. ¶ 15 (emphasis added). The Complaint focuses on the collection of vehicle GPS data. *Id.*; *see id.* ¶ 18 ("When Plaintiff's *vehicle* was delivered to him, *it* contained an attached electronic tracking device that allowed Otonomo to track *its* real-time GPS locations and movements, and to transmit the data wirelessly to Otonomo.") (emphases added). Though there are stray references to "pinpoint[ing] consumers' precise locations" and "tracking the locations of consumers" (*e.g.*, Compl. ¶¶ 1, 4), there are no factual allegations plausibly supporting that Otonomo actually tracks him (or any other people). For example, Plaintiff does not allege that Otonomo is notified by car dealerships as to the identity of individual(s) who purchase particular cars, or that Otonomo otherwise connects the vehicle geolocation data it receives with individuals. The Complaint does not even specifically allege that Otonomo collects sufficient information that *could be* used to link cars to individuals, much less that it actively does so—nor could such allegations be asserted within the confines of Rule 11.

Other courts have applied this reasoning to reject similar attempts to expand Section 637.7. For example, consider *Moreno*, 2017 WL 6387764, a case brought by the same plaintiff's counsel, where the court rejected an analogous attempt to stretch Section 637.7 beyond its plain words. There, the plaintiff alleged that she was unaware that a mobile app she downloaded to her phone "was designed to (and actually did) collect her smartphone's unique identifier and physical

[3] The Court of Appeal then reversed on the grounds that both the defendant and victim were co-owners of the vehicle, and that the law was unconstitutionally vague as applied to the circumstance of determining who can consent to tracking when there are co-owners.

location and then transmit that information to Defendants." 2017 WL 6387764, at *2 (N.D. Cal. Dec. 17, 2017). Judge Corley determined that while a user's "unique clientid" was allegedly transmitted along with the precise location of the device, "there is no plausible allegation that the App tracked *Plaintiff's* location as opposed to some anonymous clientid that is not matched to any particular person." *Id*. at *4 (emphasis in original).

Similarly, *In re Google Location Hist. Litig.*, involved claims of Section 637.7 violations based on location tracking by mobile phone apps. The plaintiffs in that case alleged that the statute covered undisclosed tracking by applications installed on mobile phones, which they brought into their vehicles. 428 F. Supp. 3d at 188. Judge Davila held that plaintiffs' allegations concerned only the "*collection* and *storage*" of their geolocation data, rather than the "determination [of] the[ir] location or movement," and therefore their Section 637.7 claim failed as a matter of law. *Id*. at 193 (emphasis and alteration in original). Like the plaintiffs in *Moreno* and *Google*, Plaintiff here alleges only that GPS data is transmitted to Otonomo (Compl. ¶ 15); they allege no facts that Otonomo uses the data to track his (or anyone else's) location or movement.

Even if there were any ambiguity on this point in the statute (and there is not), reading the statute as broadly as Plaintiff urges would raise constitutional concerns and run headlong into the "long-standing principle that [courts] must construe ambiguous criminal statutes narrowly so as to avoid making criminal law in Congress's stead." *United States v. Nosal*, 676 F.3d 854, 862–63 (9th Cir. 2012) (en banc) (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008)). Plaintiff's theory that collection of GPS vehicle data alone violates Section 637.7 "would make criminals of large groups of people who would have little reason to suspect they are committing a … crime." *Id.* at 859. There is no indication that the legislature intended to criminalize the receipt of GPS data that enables providing roadside assistance—but under Plaintiff's view, collecting such data would become unlawful even if associated only with a vehicle rather than any particular individual. Indeed, Plaintiff's reading would potentially make criminals out of every automaker that offers GPS technology in its cars. There is no reason for this Court to embrace such an unsupported expansion of criminal liability—particularly where doing so would create constitutional due process concerns that can be avoided by interpreting the statute in accord with its text—*i.e.*,

affirming that tracking a "person" means tracking a person, not a "vehicle." *See Nosal*, 676 F.3d at 858 (choosing narrow interpretation of criminal statute in face of two plausible readings). In such circumstances "it is appropriate to avoid the constitutional question that would arise were [a court] to read" an ambiguous criminal statute broadly. *Jones v. United States*, 529 U.S. 848, 858 (2000); *cf. Agnelli*, 68 Cal. App. 5th Supp. at 7 (finding constitutional infirmities with Section 637.7 due to vagueness in how it applies when only one vehicle co-owner consents to tracking).

In short, receiving data that some BMW X3 is moving around California is not the same as tracking and knowing the location of Plaintiff Saman Mollaei. Plaintiff has not alleged (and cannot plausibly allege) that Otonomo tracked him or any other California resident. This alone requires dismissal.

B. Plaintiff Does Not—And Cannot—Allege That Otonomo Used An "Electronic Tracking Device Attached To" His Vehicle

Plaintiff also fails to state a claim under Section 637.7 because he does not allege the existence of a "electronic tracking device" on his car. Cal. Penal Code § 637.7(d). Section 637.7 defines "electronic tracking device" to mean "any device attached to a vehicle or other movable thing that reveals its location or movement by the transmission of electronic signals." Cal. Penal Code § 637.7(d). Thus, the plain language of the statute therefore contemplates (a) a "vehicle" and (b) a separate "device" that is "attached to a vehicle." But Plaintiff alleges he purchased a vehicle with integrated hardware built in by the manufacturer. *See* Compl. ¶18 ("When Plaintiff's vehicle was delivered to him, it contained an attached electronic tracking device."). This is far outside Section 637.7.

The telematics control units (TCUs) at issue here are part of the "vehicle"—not separate "devices." The Complaint's allegation that Otonomo "partners with automobile manufacturers" (Compl. ¶ 15) to install TCUs in vehicles is another way of saying that such TCUs come preinstalled in vehicles. *See also id.* ¶ 18. This does not state a Section 637.7 claim because the TCUs are a *part of the vehicle*, not a *device attached to* a vehicle. This is a simple application of the statutory text, supported again by the legislative history concerns about private investigators surreptitiously sticking tracking devices on private citizens' cars. *See, e.g.*, Ex. 1. Integrated

vehicle components are not devices attached to vehicles—*e.g.*, an engine is not a device attached to a vehicle, nor are brake pads, nor are air-pressure sensors, nor are climate-control systems, and so on. *See also In re Google Location*, 428 F. Supp. 3d at 194 (rejecting analogous argument "that GPS hardware, cellular radios, and WiFi chips" in manufactured cell phones "qualify as 'electronic tracking devices'"). Otherwise, courts would be required to draw lines around what component parts of a car are the "vehicle" and what parts are separately attached "devices"—a nonsensical exercise that would turn clear statutory language into an amorphous, ambiguous provision that would not provide clear notice about what is in scope of a criminal law. *See Nosal*, 676 F.3d at 863 (rule of lenity "ensures that citizens will have fair notice of the criminal laws").

And even if the TCU *were* a separate "device" rather than part of the "vehicle," the Complaint still does not plausibly allege unlawful conduct by Otonomo. Plaintiff's theory is that he purchased a vehicle that included certain hardware (a TCU), and that the TCU transmitted GPS data to Otonomo. Compl. ¶ 15. Otonomo therefore never "attached" any type of "device" to Plaintiff's vehicle to enable location tracking. Cal. Penal Code § 637.7(d); *see Google Location Hist. Litig.*, 428 F. Supp. 3d at 194 ("Indeed, the bill denotes that 'attach' requires some affirmative act by the wrongdoer" such as "*plac[ing]* a device on the automobile") (emphasis in original; citing Ex. 1). As described above, Otomono is a data platform company. The device alleged in the Complaint to be an electronic tracking device was never "attached" to the vehicle by Otonomo, but rather has been part of the vehicle from the moment it left the factory. Plaintiff does not attempt to offer an explanation for why OEMs such as BMW would allow third parties to attach tracking devices to their vehicles during their production—perhaps because Plaintiff realizes that they do not. Otonomo cannot be liable under Section 637.7 for receiving information that car manufacturers collected from devices that the manufacturers built into their cars.

Every court to consider this issue has interpreted narrowly the attachment requirement under Section 637.7 to reject the very type of argument Plaintiff makes in this case:

- In *In re Google Location Hist. Litig.*, "Plaintiffs argue[d] [that] CIPA's 'attach' does not require Defendant to have personally 'placed' something on a moveable thing because it only requires some association with a moveable thing." 428 F. Supp. 3d at 194. Judge Edward J. Davila rejected this argument and held that "[t]hese arguments

push CIPA beyond its plain meaning and transform the statute into something unrecognizable." *Id.*

- In *Moreno*, the Court rejected this Plaintiff's counsel's attempt to push the very same theory that software could trip Section 637.7—according to then-Magistrate Judge Jacqueline Scott Corley, "[a] device could be 'attached to' a moveable object, but software, such as the App, cannot." 2017 WL 6387764, at *5.

- And when Judge James Donato addressed this issue, he reached the same conclusion: Section 637.7's plain language "does not accommodate technology like a mobile app on a digital device . . . [the] language contemplates things like a freestanding GPS unit hidden on a car, but not a downloaded Facebook app . . . ." *Heeger v. Facebook, Inc.*, No. 18-CV-06399-JD, 2019 WL 7282477, at *3 (N.D. Cal. Dec. 27, 2019).

This uniform set of case law alongside clear statutory language defeats Plaintiff's case.

Furthermore, to the extent there is any doubt as to Section 637.7's meaning with respect to this requirement, it too must be resolved narrowly in Otonomo's favor under the rule of lenity. *See Nosal*, 676 F.3d at 862–63. Indeed, interpreting the statute to outlaw "attach[ing]" devices that are purposefully built into a vehicle prior to the time of purchase by its manufacturer would open up a wide range of ordinary commercial activity to criminal sanction and significant civil liability in the form of statutory damages.

Plaintiff's claim should thus be dismissed for the additional, independent reason that he did not (and cannot) allege that Otonomo attached a tracking device to his vehicle within the meaning of Section 637.7.

C. Plaintiff Does Not Allege That He Did Not Consent To The Use Of An Electronic Tracking Device With Respect To His Vehicle

On top of Plaintiff's misinterpretations of the statute, Plaintiff's claim additionally fails because he does not adequately allege the absence of consent: the Complaint alleges *at most* that Plaintiff never provided *Otonomo* with consent, not that he never consented to use of the electronic tracking device on his vehicle.

Section 637.7 does "not apply when the registered owner, lessor, or lessee of a vehicle has consented to the use of the electronic tracking device *with respect to that vehicle*." Cal. Penal Code § 637.7(b) (emphasis added); *see Gonzales v. Uber Technologies*, Inc., 305 F. Supp. 3d 1078, 1089-90 (N.D. Cal. 2018) ("The plain language of Section 637.7 states that the statute does not apply when the owner of a vehicle consents to the use of the tracking device with respect to the

same vehicle."). Plaintiff's theory of illegality thus depends on a necessary precondition he has not alleged—that he never provided consent to *anyone*, for the collection and transmission of his location data. *See Gonzales*, 305 F. Supp. 3d at 1089 ("The statute's plain language, however, does not require consent be given to the person doing the tracking; instead, it says that the statute does not apply if the vehicle's owner, lessor or leseee 'consented to the use of the electronic tracking device with respect to that vehicle.'").

Nor could Plaintiff reasonably amend his Complaint to make such an allegation. The owner's manual for Plaintiff's vehicle explains that, "[e]lectronic control devices are installed in the vehicle." Ex. 7 at 11. The manual further provides:

> Any collection, processing, and use of personal data above and beyond that needed to provide [services from the vehicle manufacturer described in the manual] must always be based on a legal permission, contractual arrangement or consent. It is also possible to activate or deactivate the data connection as a whole. That is, with the exception of functions and services required by law such as Assist systems.

Id. at 13. The Complaint does not grapple with any of these basic facts, and contains no allegations that Plaintiff did not provide consent to the car manufacturer for the collection and disclosure of data related to his vehicle's location.

Under the plain language of Section 637.7, Plaintiff's allegations are insufficient, because "the language regarding consent is found in the statute itself." *Gonzales*, 305 F. Supp. 3d at 1089. Having failed to plead that he did not provide *anyone* with consent, Plaintiff cannot now turn around and sue Otonomo to the extent it lawfully acquires such data.[4] Plaintiff has not plausibly pleaded a lack of consent, and the Complaint should be dismissed on this basis as well.

D. Plaintiff's Threadbare Complaint Falls Far Short Of The Pleading Standard

The Complaint includes only four paragraphs of conclusory allegations about Otonomo that merely parrot the statutory requirements. Rule 8 requires more. A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (2009). This standard serves a critical gatekeeping function: "the factual

[4] Plaintiff should not be rewarded for omitting reference to his agreements with his car manufacturer, as his claim explicitly depends on the purported absence of the consent that would have been provided in those agreements.

allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Plaintiffs should not be rewarded for filing complaints like this one where they ignore basic, publicly available facts and rely instead on inflammatory and conclusory accusations in order to track the legal elements of a particular cause of action. *See, e.g.*, *Iqbal,* 556 U.S. at 678 (emphasizing that court need not accept as true "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements"). Otonomo publicly discloses its practices in detail, and BMW also publicly discloses its data-sharing practices. But Plaintiff has ignored all of this material in an effort to prevent the Court from making a fair determination on a motion to dismiss, and to try to drive this case into discovery to create settlement pressure. The Court should not reward this tactical approach to pleading.[5] This is particularly true here, where Plaintiff seeks a novel and disruptive extension of a narrow criminal statute, well beyond the legislature's words or documented intent.

V. CONCLUSION

For the foregoing reasons, Otonomo respectfully requests that the Court dismiss the Complaint with prejudice.

Respectfully submitted,

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[5] *See, e.g.*, *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted) (court need not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences"); *Messano v. Experian Info. Sols., Inc.*, 251 F. Supp. 3d 1309, 1315 (N.D. Cal. 2017) ("In fact, the complaint seems intentionally vague as to the details of Plaintiff's credit report. . . . [T]hese allegations are facially insufficient to plausibly support a finding of inaccurate or misleading reporting."); *Levine v. Entrust Grp., Inc., No.* C 12-03959 WHA, 2013 WL 1320498, at *5 (N.D. Cal. Apr. 1, 2013) (dismissing fraud suit where "purposefully vague allegation, the key to plaintiffs' claims, d[id] not give rise to a plausible inference" that could support claim).

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