No. 16-80099

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARC OPPERMAN, ET AL.,

Plaintiffs-Respondents,
v.

APPLE INC.,
Defendant-Petitioner.

On Petition For Permission to Appeal From The
United States District Court For The
Northern District of California
The Honorable Jon S. Tigar
Case No. 3:15-cv-00453-JST

PLAINTIFFS' OPPOSITION TO APPLE INC.'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

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I. INTRODUCTION

This case seeks redress for the unauthorized taking of address book "Contacts" information from the iPhones and similar Apple devices of millions of individuals. Plaintiffs sued Path, Inc. and other iOS "App" developers who used their mobile Apps to take Contacts data from users' devices without permission to do so, in violation of those users' right to privacy. Plaintiffs also sued Apple, Inc. for aiding and abetting the App Developers, as well as for falsely advertising the security and privacy of its iPhones and iOS mobile devices.

Apple's petition challenges district court Judge Jon. S. Tigar's discretionary grant of class certification on Plaintiffs' intrusion upon seclusion claim against Path and the related aiding and abetting claim against Apple. The district court correctly noted that all of Path's and Apple's conduct was common to the entire class: the Path App software functioned identically for every person in the class, and Apple aided and abetted Path without regard to facts related to any individual user. The district court properly recognized that these and other common issues overwhelmingly predominate over any individual ones in the case, and granted class certification.

Apple, but not Path, asks this Court to take the rare step of granting interlocutory review of Judge Tigar's sensible decision. Apple fails, however, to identify any manifest error or other justification for such review. Instead, Apple rehashes several incorrect legal arguments that failed in district court.

Apple first insists that there can never be a class action for intrusion upon seclusion because, according to Apple, each class member must individually prove he or

she had "an actual, subjective expectation of privacy." No such element exists in California law.

Apple next argues that each individual person must prove "mental anguish" and thus, again, it is impossible in Apple's view to ever certify a claim for violation of privacy. "[M]ental distress . . . of a kind that normally results from such an invasion" is one of several possible types of recoverable damages from invasion of privacy. Rest. 2d Torts § 652H (1977). But it is not a required element thereof, and class members can disclaim it.

Apple lastly argues in a reworked reboot of its prior argument that not every class member was injured by the unauthorized taking of their Contacts, essentially because Apple speculates that some people may not care, a situation not unique to this or any other class action. As the district court correctly held, the classwide fact that no consent was sought for the intrusive acts is sufficient to demonstrate injury. Finally, Apple complains that punitive damages cannot be awarded on a classwide basis. This argument, like the last one, rests on Apple's incorrect assertion that it and its developers need only ask forgiveness, not permission, for taking people's Contacts.

Apple, which regularly touts itself to courts in this Circuit as the public's mobile privacy champion,[1] is effectively asking this Court to eviscerate citizens' mobile privacy

[1] Apple stressed the importance of users' mobile privacy and security when it opposed the FBI's demand that Apple unlock a domestic terrorist's iPhone. In the Matter of the Search of an Apple iPhone, No. 16-cm-00010-SP [*Apple Inc.'s Reply to Government's Opposition to Apple Inc.'s Motion to Vacate Order* (ECF No. 177) at pp. 17-19], (C.D. Cal., Mar. 25, 2016) ("Apple prioritizes the security and privacy of its users, and that priority is reflected in Apple's increasingly secure operating systems, in

rights and categorically hold that, as a matter of law, intrusion upon seclusion privacy claims can never be certified for class treatment, even where, as here, the intrusion was recursively initiated by a computer program and Apple mobile devices acting in the exact same way toward everyone who used them.[2] That is not the law, and there is no basis for interlocutory review of the district court's reasoned and proper grant of class certification.

II. STATEMENT OF THE CASE

Apple's petition arises from a set of consolidated class actions against Apple and multiple developers of iOS mobile device applications for uploading Plaintiffs' private contacts data without consent and, in the case of Apple, for promoting its iPhones and other iOS-based mobile devices as secure and protective of private user data despite knowing that application developers could (and did) engage in such intrusions. The class certification order challenged in the Petition involves only one App, the iOS Path App created by defendant Path (and aided by Apple). Plaintiffs have not yet moved for certification of the remaining claims.

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which Apple has chosen not to create a back door. Compelling Apple to reverse that choice is 'offensive to it.' … [A]ny vulnerability or back door, whether introduced intentionally or unintentionally, can represent a risk to all users of Apple devices simultaneously.").

[2] Even Apple acknowledges the identical functionality across the class. In the Matter of the Search of an Apple iPhone, No. 16-cm-00010-SP [*Apple Inc.'s Reply to Government's Opposition to Apple Inc.'s Motion to Vacate Order* (ECF No. 177) at p. 19], (C.D. Cal., Mar. 25, 2016) ("Apple does not create hundreds of millions of operating systems each tailored to an individual device. Each time Apple releases a new operating system, that operating system is the same for every device of a given model.").

Apple mobile devices—i.e., iPhone, iPad, and iPod Touch ("iDevices")—include a digital address book known as "Contacts" managed directly through the default iOS operating system provided and pre-installed by Apple. Contacts is designed to store many categories of private user data: (1) first and last name and phonetic spelling of each, (2) nickname, (3) company, job title and department, (4) address(es), (5) phone number(s), (6) e-mail address(es), (7) instant messenger contact, (8) photo, (9) birthday, (10) related people, (11) homepage, (12) notes, (13) ringtone, and (14) text tone. (Order, Appendix tab A at 2:2-4.)

With Apple's help, Path developed and marketed an App that, between November 29, 2011 and February 7, 2012, took advantage of the access allowed by Apple's operating system (and of Apple's refusal to follow its publicly touted device privacy rules) to automatically upload the iDevice address books of all Path users without providing any notice or seeking or securing any user consent. According to Path's records, over 480,000 users were affected by this practice. (Order, Appendix tab A p. 2:15-3:14.)

Plaintiffs sought—and the district court granted—certification of a class of all users that were Path registrants and activated via their Apple iDevices (iPhone, iPad, iPod touch) version 2.0 through 2.0.5 of the iOS mobile application entitled Path between November 29, 2011 and February 7, 2012. (Order, Appendix tab A pp. 4:18-20, 28:5-7.)

Plaintiffs' certification motion presented the district court with three theories of damages. First, testimony from Dr. Hank Fishkind demonstrated that Plaintiffs could use a conjoint analysis to isolate the value of the privacy right lost to Path's (and Apple's)

conduct. The district court held, however, that "Plaintiffs [ ] failed to provide any method of feasibly and efficiently calculating damages, and that claims based on the recovery of monetary damages are not suitable for class certification." (Order, Appendix tab A p. 23:15-17.) Second, Plaintiffs presented preliminary evidence that Path had unjustly enriched itself by using the harvested contact data to grow its user base and by trumpeting that, obtained substantial venture funding at a private market valuation of ten times that of the company just one year previous. The district court held that "Plaintiffs have not sufficiently alleged classwide damages based on unjust enrichment." (Id. at p. 24:1-2.) Third, Plaintiffs showed that they are—at minimum—entitled to classwide nominal damages for Path and Apple's wrongs with the potential availability of punitive damages. The district court agreed. (Id. at pp. 25:11-12, 27:1-3.)

Apple petitioned to appeal the district court's certification order under Federal Rule of Civil Procedure 23(f). Path did not bring a similar petition.

III. RELIEF SOUGHT

Plaintiffs respectfully request that the Court deny Apple's petition for interlocutory review.

IV. STANDARD OF REVIEW

"[P]etitions for Rule 23(f) review should be granted sparingly." Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005). Only in the "rare case" is interlocutory review preferable to end-of-the-case review. Id. Apple argues that Judge Tigar's class certification order presents a "manifest error" warranting immediate review. Such an error "must be truly 'manifest,' meaning easily ascertainable from the petition

itself. If it is not, then consideration of the petition will devolve into a time consuming consideration of the merits, and that delay could detract from planning for the trial in the district court." Id.

V. ARGUMENT

A. THE DISTRICT COURT PROPERLY INTERPRETED CALIFORNIA LAW

Apple insists that, under California law, the intrusion upon seclusion tort must always be proven on a person-by-person basis and is categorically unfit for class treatment. Apple claims that the tort requires both demonstrating that each person had an actual subjective expectation of privacy and that each person individually suffered mental anguish. The district court properly rejected both of these incorrect interpretations of California law.

1. Intrusion Upon Seclusion Rests On An Objective Standard

California intrusion law does not contain the purported subjective element that Apple attempts to invent. As the district court, the leading California case shows that intrusion upon seclusion has **two** elements: "(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." Shulman v. Grp. W Prods., Inc., 18 Cal. 4th 200, 231 (1998) (cited at Order, Appendix tab A p. 16:17-19.)

The first element requires that "the defendant must have 'penetrated some zone of physical or sensory privacy . . . or obtained unwanted access to data' by electronic or other covert means, in violation of the law or social norms." Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 286 (2009). The California Supreme Court has explicitly held that the

"reasonableness" of an expectation of privacy is "an objective entitlement founded on broadly based and widely accepted community norms." Hill v. NCAA, 7 Cal. 4th 1, 36 (1994). This is consistent with the Restatement (Second) of Torts, which says nothing about any subjective element. Rest. 2d Torts § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

No California case holds that, in addition to providing this objective zone of privacy, a plaintiff must also show that he or she individually and subjectively considered the matter. The district court properly rejected Apple's citation to Medical Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc., 306 F.3d 806 (9th Cir. 2002), which applied Arizona law, not California law. (Order, Appendix tab A p. 17 n.7.) Apple's misreading of stray language from cases that do not squarely address the question do not and cannot create a new, third element in the tort of intrusion on seclusion.[3]

The district court properly concluded that the question of whether taking address book Contacts from class members' phones without first seeking (much less obtaining) their consent is an "intrusion into a private place, conversation or matter" is a class-wide question that will be answered in one-stroke for all class members. (Order, Appendix tab

[3] Apple makes no attempt to argue that the second element includes a subjective element. The second element of the California intrusion test is "a 'policy' determination as to whether the alleged intrusion is 'highly offensive' under the particular circumstances. Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives." Hernandez, supra, 47 Cal. 4th at 287. That policy determination will turn on Apple and Path's motives. (See Order, Appendix tab A p. 17:10-13.)

A pp. 16:11-18:22.) California privacy law does not turn on what specific phone numbers are on a person's phone or how they individually feel about them. The district court thus properly rejected Apple's unsupported argument that invasion of privacy can only be judged on a person-by-person basis.

2. Plaintiffs Do Not, And Need Not, Seek To Prove Individual Mental Anguish

Apple also insists that a claim for intrusion upon seclusion requires proof of each person's individual mental anguish. Once again, Apple misstates California law.

No California case holds that an individual must prove mental anguish to establish intrusion upon seclusion. That is not one of the elements of the tort. Shulman, 18 Cal. 4th at 231. Apple's argument is based on a misreading of cases where mental anguish was sought as if those cases set a requirement for all intrusion cases.

In Hernandez, the California Supreme Court noted that the policy reasons behind limiting intrusion to matters that are "highly offensive to a reasonable person" recognize "a measure of personal control over the individual's autonomy, dignity, and serenity" which relates to "the mental anguish sustained when both conditions of liability exist." Hernandez, 47 Cal. 4th at 286. The Court did not hold that mental anguish is a third condition of liability, but rather it is a natural consequence where "both" conditions of liability (i.e., the two elements discussed above) exist.[4] Nothing in Hernandez suggests, much less holds, that each plaintiff must allege and prove mental anguish to establish an

[4] The Restatement, too, is inopposite to Apple's position as the "mental distress" damages awardable are for those "of a kind that normally results from such an invasion." Rest. 2d Torts § 652H (1977).

intrusion upon seclusion, or that no intrusion occurs if a particular plaintiff does not suffer mental anguish when his or her privacy is violated.

Nor does Lugosi v. Universal Pictures, 25 Cal. 3d 813 (1979) support Apple's argument. Lugosi involved claims by the heirs of actor Bela Lugosi for use of the character Dracula. The question presented was whether the right to control the commercial exploitation of Bela Lugosi's likeness was a privacy right (it is, in fact, more properly considered a right of publicity), which expired upon his death, or a commercial right that survived his death. Id. at 833. The case had nothing to do with whether, as Apple claims, an individual must prove mental anguish to sue for intrusion upon seclusion.

Finally, Apple cites without discussion Operating Engineers Local 3 v. Johnson, 110 Cal. App. 4th 180 (2003). There, the court of appeal considered whether a claim for invasion of privacy is preempted by workers' compensation. The court reasoned that privacy violations are not preempted by the workers' compensation scheme because they fall outside the compensation bargain with the employer. Id. at 185-188. Again the court's discussion of the general nature of a privacy violation, and how it is different from a workplace injury, has nothing to do with whether proving an intrusion upon seclusion requires individual proof of mental anguish.

Plaintiffs did not seek to certify a claim for mental anguish here, and the district court consequently did not certify one. It is thus wholly irrelevant that the district court did not address how mental anguish can be shown on a classwide basis. That is not an

element of the intrusion claim, Shulman, 18 Cal. 4th at 231, and thus provides no basis for interlocutory review of the certification order.

VI. THE DISTRICT COURT PROPERLY HELD THAT ALL CLASS MEMBERS ARE INJURED BY THE VIOLATION OF THEIR PRIVACY

Apple's next assertion of error — that the certified class contains uninjured persons — rests on a misstatement of the district court's order. The district court did *not* acknowledge that the certified class included uninjured people. (Petition at 15-16.) Nor did Dr. Fishkind admit as much. (Id. at 16.) Instead, the district court explicitly found that "Path's *unconsented to* . . . access to use of [the Contacts] data" was a harm suffered by every member of the certified class. (Order, Appendix tab A p. 20:4.)

This ruling was plainly correct because the tort of intrusion upon seclusion causes injury even where there is no economic harm. As the Supreme Court has noted, "one of the main rights attaching to property is the right to exclude others." Rakas v. Illinois, 439 U.S. 128, 143 & 163 & n.12 (1978). Every victim of Path's unpermitted access and upload of contact data lost this key right when they were robbed of their right to exclude Path from their private data. This is a "real, actual injury." Cal. Civ. Code § 3360; Allen v. McMillion, 82 Cal.App.3d 211, 219 (1978) ("if the forcible intruder were not the owner of the property, the party in peaceable possession would be entitled to an award of at least nominal damages"). The evidence in this case will show that every member of the certified class suffered precisely this real, actual injury when their registration via the Path App triggered the surreptitious upload of their contact data. Every member of the certified class therefore has standing under Article III to pursue their intrusion claim.

VII. THE DISTRICT COURT PROPERLY HELD THAT THE AVAILABILITY OF PUNITIVE DAMAGES CAN BE DETERMINED ON A CLASS-WIDE BASIS

Apple's final assertion of error — that the district court could not determine the availability of punitive damages on a class-wide basis — again misstates the law. Most significantly, Apple itself conceded this point in its opposition to class certification. (Apple Opp., Appendix tab C at 30 [agreeing that Ellis v. Costco, 285 F.R.D. 492 (N.D. Cal. 2012) held "the *availability* of punitive damages could be decided on the basis of class-wide evidence centering on defendant's conduct"].) This concession should dispose of Apple's challenge here, because the district court explicitly limited its holding in this way: "[i]t is sufficient to decide that the availability of punitive damages is amenable to classwide resolution, and leave the manner in which the amount will be determined to later case management." (Order, Appendix tab A at 27:1-3.)

Though the Court ordered precisely what Apple conceded it could, Apple now urges that the district court committed error by concluding that punitive damages are available where, as here, it previously concluded that compensatory damages were not suitable for classwide determination but that nominal damages were because "the amount of damages is uncertain" and "the right is one not dependent upon loss or damage." (Id. at 25:1-5.) Apple does so based on two plainly inapposite arguments.

First, Apple argues that California's prohibition against punitive damages where there is no ***actual injury*** applies in situations where there is an actual injury but the amount of damages cannot be readily assessed. Apple's only authority on this point states the opposite. Kizer v. Cty. of San Mateo, 53 Cal. 3d 139, 147 (1991) ("Even

nominal damages, which can be used to support an award of punitive damages, require actual injury").

Second, Apple argues that the district court erred by concluding that the ratio of punitive to nominal damages is not material. But the Ninth Circuit has held precisely this. In Arizona v. ASARCO LLC, 773 F.3d 1050, 1058 (9th Cir. 2014), the *en banc* Court found that that "[b]ecause nominal damages measure neither damage nor severity of conduct, it is not appropriate to examine the ratio of a nominal damages award to a punitive damages award." While it is true that ASARCO involves statutory damages, its holding applies more broadly, making the general point that "[w]hen compensatory or nominal damages are subject to a cap, there is no meaningful way to apply a *Gore* ratio analysis because the true harm is not measured." Id.

Here the district court made precisely the same finding: true harm, it held, cannot be feasibly or affordably measured and therefore only a nominal award may issue. Based upon this, the district court followed controlling *en banc* authority and noted in a footnote that no ratio analysis would be required. That is not error.

Moreover, this issue of punitive damages ratios is an ancillary one that does not bear on certification and would not be appropriate for interlocutory review even if the court had erred (which it did not). The district court would have held that the availability of punitive damages was properly subject to class determination even if individual awards would require individual analysis. (Order, Appendix tab A at 26:13-20 [discussing individualized punitive damages in Ellis v. Costco Wholesale Corp., 285 F.R.D. 492 (N.D. Cal. 2012), where the question of availability was nevertheless

certified].). Under these circumstances, the district court's ruling does not justify interlocutory review because it does not show that the "class certification decision" as a whole was manifestly erroneous. Chamberlan, 402 F.3d at 959.

VIII. CONCLUSION

The district court's grant of class certification on the claims that Path intruded on the seclusion of users of its App when it took their Contacts data without consent, and that Apple aided and abetted Path in doing so, was entirely appropriate. Each and every fact concerning the defendants' conduct on these claims is common to the class as a whole and predominates. There was no error, much less manifest error, and Plaintiffs respectfully request that the Court deny Apple's petition for interlocutory review.

DATED: August 8, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August 2016, copies of the foregoing Plaintiffs' Opposition to Defendant Apple Inc.'s Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) were served upon the following counsel via electronic mail:

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