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LLC

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13

14 MICHAEL TERPIN,
15 Plaintiff,
16 v.
17 AT&T MOBILITY LLC; and DOES 1-
18 25,
19 Defendants.

CASE NO. 2:18-CV-6975 (ODW)

**DEFENDANT AT&T MOBILITY
LLC’S NOTICE OF MOTION AND
MOTION TO DISMISS PLAINTIFF
MICHAEL TERPIN’S SECOND
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF
[F.R.C.P. 12(B)(6)]**

*[Proposed] Order lodged concurrently
herewith*

Action Filed: August 15, 2018

Hearing:

Date: May 4, 2020
Time: 1:30 p.m.
Place: 350 West 1st Street, 5th Floor
Courtroom 5D
Los Angeles, CA 90012
Judge: Hon. Otis D. Wright II

NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 1:30 p.m. on May 4, 2020, before the Honorable Otis D. Wright II, United States District Court Judge, in Courtroom 5D, at 350 West 1st Street, 5th Floor, Los Angeles, California 90012, Defendant AT&T Mobility LLC (“AT&T” or “Defendant”) will and hereby does move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the following portions of Plaintiff Michael Terpin’s Second Amended Complaint:

1. Claim 3 (Deceit by Concealment) because Mr. Terpin has not alleged a duty to speak and because he has not plausibly alleged that he was unaware of the limits of AT&T’s security measures;

2. Claim 4 (Misrepresentation) because Mr. Terpin has not alleged that he even read the documents he claims contain misrepresentations and has not alleged that AT&T’s alleged statements about its future intentions were false when made;

3. Mr. Terpin’s claims against the Doe defendants because Mr. Terpin has alleged more than ten fictitious defendants and has not made individualized allegations about particular fictitious defendants;

4. Mr. Terpin’s request for punitive damages because Mr. Terpin has not pled facts amounting to ratification of alleged wrongful conduct by AT&T; because Mr. Terpin has not pled the required mental state for punitive damages; because punitive damages are not available for Mr. Terpin’s negligence-based claims; and because punitive damages are not available for issues of first impression, like those presented here.

The Motion is based on this Notice of Motion, the Memorandum of Points and Authorities that follows, all pleadings and records on file in this action, and any other arguments and evidence presented to this Court at or before the hearing on the Motion.

This Motion is made following the conference of counsel pursuant to Civil Local Rule 7-3, which took place on March 24, 2020.

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Dated: March 30, 2020

Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: /s/ Ashley E. Johnson
Marcellus A. McRae
Ashley E. Johnson

Attorney for Defendant
AT&T MOBILITY LLC

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I. Introduction

Mr. Terpin’s Second Amended Complaint (“SAC”) still fails to address fatal flaws in his deceit by concealment and misrepresentation claims, as well as his request for punitive damages. At bottom, he alleges that AT&T knew that he faced a risk of a SIM swap but either failed to disclose, or misrepresented the facts regarding, this risk to him. But Mr. Terpin ignores the undisputed fact, acknowledged in the SAC, that AT&T disclosed to him that it could not guarantee that third parties would not take unauthorized actions that would disclose his personal information. Mr. Terpin’s deceit and misrepresentation claims seek to punish AT&T not for concealing or misrepresenting material facts, but simply for failing to provide further specifics on how Mr. Terpin’s information could be stolen. Neither tort provides a cause of action for such allegations.

Mr. Terpin’s claims fail for additional reasons. Deceit by concealment requires that the defendant have a duty to speak, and Mr. Terpin has done nothing to undermine this Court’s previous conclusion that Mr. Terpin had failed to allege any basis for such a duty in his previous complaint. Moreover, Mr. Terpin all but admits that he cannot base a misrepresentation claim on written documents by AT&T, which he does not allege that he even saw or read, much less relied upon. And his allegation that AT&T misrepresented facts by making a promise that, he claims, it ultimately failed to perform falls far short of the required promise with no intention to perform required by the law.

Finally, Mr. Terpin has not remedied the failings in his request for punitive damages. The only change the SAC makes that pertains to punitive damages is the identification of two AT&T executives and the assertion that both were aware, by virtue of their titles, that SIM swaps could occur. This does not plausibly allege a state of mind or level of involvement by officers, directors, or managing agents that reflects anything close to the malice, fraud, or oppression that is required under California law to plead punitive damages.

In sum, Mr. Terpin’s new allegations do not solve the core problems identified by the Court. His deceit by concealment and misrepresentation claims should be dismissed

1 with prejudice, and his request for punitive damages should be dismissed with prejudice.

2 **II. Factual and Procedural Background¹**

3 According to the allegations of the Second Amended Complaint (“SAC”), Mr.
4 Terpin entered into a wireless contract with AT&T in 2011. Dkt. 42, SAC ¶ 112. On or
5 about June 11, 2017, Mr. Terpin learned that his AT&T cell phone number had been
6 hacked when his phone suddenly became inoperable. SAC ¶ 86. He later learned that
7 his AT&T password had been changed remotely by hackers after 11 failed attempts to
8 change his password were made from AT&T’s retail stores. SAC ¶ 86. Mr. Terpin
9 alleges that the hackers accessed Mr. Terpin’s telephone and Skype accounts. SAC ¶ 87.
10 By impersonating Mr. Terpin, the hackers convinced one of Mr. Terpin’s clients to send
11 them cryptocurrency owed to Mr. Terpin. SAC ¶ 87.

12 Two days later, on June 13, 2017, Mr. Terpin met with AT&T representatives in
13 Puerto Rico to discuss the hack. SAC ¶ 88. AT&T purportedly told him that it would
14 place his account on a “higher security level” with “special protection,” requiring a six-
15 digit passcode in order to access or change his account. SAC ¶ 89. Mr. Terpin alleges
16 that he “relied upon AT&T’s promises that his account would be much more secure
17 against hacking, including SIM swap fraud, after it implemented the increased security
18 measures” and therefore retained his account with AT&T. SAC ¶ 92.

19 Thereafter, on January 7, 2018, Mr. Terpin alleges that an employee in an AT&T
20 store in Norwich, Connecticut, permitted a SIM swap of Mr. Terpin’s wireless number
21 in violation of AT&T’s security procedures. SAC ¶¶ 95, 99.² Mr. Terpin alleges
22 imposters “gained control over [his] accounts and stole nearly \$24 million worth of
23 cryptocurrency from him on January 7 and 8, 2018.” SAC ¶ 95.

24 On August 15, 2018, Mr. Terpin filed a complaint against AT&T arising from
25 _____

26 ¹ For this motion only, AT&T assumes the truth of the well-pled allegations of Mr.
27 Terpin’s Second Amended Complaint.

28 ² In fact, the individual Mr. Terpin references was never an AT&T employee. He
worked for Spring Communications Holding, Inc., which was an independent company
that sold AT&T service.

1 these two alleged thefts, alleging sixteen common-law and statutory claims. Dkt. 1. On
2 July 19, 2019, the Court dismissed the majority of Mr. Terpin’s claims with leave to
3 amend. Dkt. 29. Mr. Terpin filed his Amended Complaint on August 9, 2019, this time
4 alleging nine claims, and AT&T again moved to dismiss. Dkt. 32.

5 The Court granted AT&T’s motion to dismiss in part and denied it in part. Dkt.
6 37 (“*Terpin II*”). The Court dismissed Mr. Terpin’s claim for deceit by concealment.
7 *Terpin II* at 11. Although Mr. Terpin alleged that AT&T failed to disclose the limits of
8 its security systems, the Court held that he had not adequately alleged that AT&T had
9 “a duty to disclose.” *Terpin II* at 10. Not only did AT&T actually disclose the limits of
10 its security systems, Mr. Terpin did not identify any “affirmative acts” by AT&T to
11 conceal the limits of its security systems. *Terpin II* at 10.

12 The Court also dismissed Mr. Terpin’s misrepresentation claim. *Terpin II* at 12.
13 Mr. Terpin’s misrepresentation claim was based on two alleged theories: that AT&T
14 made misrepresentations in its Privacy Policy and Code of Business Conduct, and that
15 statements by alleged AT&T representatives that they would place a six-digit passcode
16 on his account were false. *Terpin II* at 11–12. As to the first theory, Mr. Terpin never
17 alleged that he read or saw AT&T’s Privacy Policy or Code of Business Conduct. *Terpin*
18 *II* at 11. As to the second theory, Mr. Terpin failed to allege that AT&T representatives
19 never intended to place a six-digit code on his account. *Terpin II* at 11–12. These
20 omissions doomed Mr. Terpin’s misrepresentation claim. *Terpin II* at 12.

21 Finally, the Court struck Mr. Terpin’s request for punitive damages. *Terpin II* at
22 14. Mr. Terpin failed to “plead that an officer, director, or managing agent of AT&T
23 committed or ratified an act of oppression, fraud, or malice.” *Terpin II* at 14. He also
24 alleged “no facts showing that an officer, director, or managing agent of AT&T knew
25 about or ratified the alleged wrongful conduct of which he complains.” *Terpin II* at 14.
26 Due to these failures, the Court did not rule on whether Mr. Terpin could recover
27 punitive damages for his negligence claims. *Terpin II* at 14.

28 With respect to punitive damages, the SAC adds two new sets of allegations.

1 First, Mr. Terpin added the names of two AT&T executives, Bill O’Hern and David
2 Huntley, to his prior allegations. *See, e.g.*, SAC ¶ 75. Mr. Terpin alleges that Mr.
3 O’Hern and Mr. Huntley knew about SIM swaps generally, but does not allege that either
4 man even knew of Mr. Smith, who Mr. Terpin alleges may have cooperated with
5 criminal hackers, much less that either man knew of or ratified Mr. Smith’s alleged
6 criminal conduct. Second, Mr. Terpin added allegations that AT&T employees made
7 specific promises to him about AT&T’s security measures, but he fails to allege that the
8 employees made these promises with no intention of performing them. SAC ¶¶ 159–61.

9 III. Standard of Review

10 Under federal pleading standards, “[t]o survive a motion to dismiss, a complaint
11 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
12 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
13 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim meets the plausibility test “when
14 the plaintiff pleads factual content that allows the court to draw the reasonable inference
15 that the defendant is liable for the misconduct alleged.” *Id.* Conversely, a “pleading
16 that offers labels and conclusions or a formulaic recitation of the elements of a cause of
17 action will not do.” *Id.* (internal quotation marks and citations omitted). If a complaint
18 “pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of
19 the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting
20 *Twombly*, 550 U.S. at 557).

21 Moreover, claims for deceit and misrepresentation sound in fraud and thus “must
22 meet the heightened pleading requirements of Rule 9(b).” *UMG Recordings, Inc. v.*
23 *Glob. Eagle Entm’t, Inc.*, 117 F. Supp. 3d 1092, 1106 (C.D. Cal. 2015). Similarly, to
24 the extent a claim for punitive damages rests on an allegation that the defendant acted
25 fraudulently, the circumstances allegedly amounting to fraud must be pled with
26 particularity. *Perez v. Auto Tech. Co.*, 2014 WL 12588644, at *6 & n.33 (C.D. Cal. July
27 14, 2014).

28

IV. Argument

A. Claim 3 (Deceit by Concealment) Should Be Dismissed with Prejudice.

Deceit by concealment is the “suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.” Cal. Civ. Code § 1710(3). A defendant can only be liable for fraudulent concealment if it has a “legal duty to disclose” a “material fact.” *Hoffman v. 162 N. Wolfe LLC*, 228 Cal. App. 4th 1178, 1186 (2014), *as modified on denial of reh’g* (Aug. 13, 2014). Such a duty only exists in four limited circumstances: “(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.” *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 862 (9th Cir. 2018) (internal citation omitted).

In dismissing Mr. Terpin’s deceit by concealment claim, this Court previously held that Mr. Terpin did not “sufficiently allege a duty to disclose” under any of these four circumstances. *Terpin II* at 10. The heart of Mr. Terpin’s “concealment claim [was] that AT&T hid the fallibility of its data security system from him.” *Terpin II* at 10. But AT&T “did in fact disclose the limits of its security to Mr. Terpin” in its Privacy Policy, which stated that AT&T “cannot guarantee that your Personal Information will never be disclosed in a manner inconsistent with [AT&T’s] Policy (for example, as the result of unauthorized acts by third parties that violate the law or this Policy).” *Terpin II* at 10. AT&T further disclosed that “AT&T DOES NOT GUARANTEE SECURITY” and “no security measures are perfect.” SAC, Ex. B at 27; Ex. D at 57 (§ 4.3). Mr. Terpin did not adequately allege that AT&T had “exclusive knowledge of the vulnerability of its security practices,” because, in addition to these disclosures by AT&T, “many of Mr. Terpin’s own allegations regarding the prevalence of SIM swap fraud in the cryptocurrency community suggest the exact opposite” of exclusive knowledge by AT&T. *Terpin II* at 10. The FAC was also “devoid of specific allegations of

1 ‘affirmative acts’ AT&T took ‘in hiding, concealing, or covering up’ its imperfect
2 security.” *Terpin II* at 10 (quoting *Czuchaj v. Conair Corp.*, 2014 WL 1664235, at *6
3 (S.D. Cal. Apr. 18, 2014)). The Court cautioned that Mr. Terpin “should not replead
4 this claim if he cannot cure these deficiencies.” *Terpin II* at 11.

5 Mr. Terpin’s newest allegations do not address these flaws. Accordingly, his
6 deceit by concealment claim should be dismissed with prejudice.

7 **1. Claim 3 Should Be Dismissed with Prejudice Because Mr. Terpin Did**
8 **Not Allege a Duty to Speak.**

9 Although a key element of a deceit by concealment claim is the imposition of a
10 legal duty to speak, Mr. Terpin does not allege any basis for such a duty here. As an
11 initial matter, Mr. Terpin certainly has not alleged and cannot allege that he and AT&T
12 were fiduciaries, because a “fiduciary relationship generally does not arise out of
13 ordinary arms-length business dealings.” *Tsai v. Wang*, 2017 WL 2587929, at *4 (N.D.
14 Cal. June 14, 2017) (internal citation omitted). Because Mr. Terpin does not identify
15 the basis for his claim, AT&T will address each of the three other circumstances in which
16 a duty to disclose *could* (but does not) exist, none of which are pled here.

17 First, Mr. Terpin fails to allege that AT&T had “exclusive knowledge” of a
18 material fact not known to him. In his prior Opposition, Mr. Terpin asserted, despite not
19 alleging this basis in his First Amended Complaint, that “AT&T had exclusive
20 knowledge of the vulnerability of its security practices.” Dkt. 34, at 16 (*quoted in Terpin*
21 *II* at 10. But as the Court noted in its Opinion, “many of Mr. Terpin’s own allegations
22 regarding the prevalence of SIM swap fraud in the cryptocurrency community suggest
23 the exact opposite.” *Terpin II* at 10. Nothing in the SAC undercuts the Court’s prior
24 conclusion, or changes the fact that Mr. Terpin’s own allegations about the media
25 coverage of SIM swaps and thefts conclusively demonstrate that AT&T lacked
26 “exclusive knowledge” of the alleged vulnerabilities. SAC ¶¶ 60–85. Accordingly, Mr.
27 Terpin goes beyond simply failing to plead that the second circumstance is the basis for
28 his claim that AT&T has a duty to disclose; indeed, he pleads facts that affirmatively

1 demonstrate the second circumstance does *not* apply here.

2 Second, Mr. Terpin’s SAC does not provide any facts showing “affirmative acts”
3 AT&T took “in hiding, concealing, or covering up the matters complained of.” *Czuchaj*,
4 2014 WL 1664235, at *6 (internal citation omitted). As the Court previously pointed
5 out, “[t]he gravamen of Mr. Terpin’s concealment claim is that AT&T hid the fallibility
6 of its data security system from him.” *Terpin II* at 10. But Mr. Terpin did not allege
7 any “‘affirmative acts’ AT&T took ‘in hiding, concealing, or covering up’ its imperfect
8 security.” *Terpin II* at 10 (quoting *Czuchaj*, 2014 WL 1664235, at *6). And “[m]ere
9 nondisclosure does not constitute active concealment.” *Czuchaj*, 2014 WL 1664235, at
10 *6; *see also Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 878 (2017) (“Active
11 concealment occurs when a defendant prevents the discovery of material facts.”). If it
12 were permissible to “infer affirmative acts from mere knowledge and inaction, then
13 active concealment would be reduced to a weakened form of exclusive knowledge.”
14 *Czuchaj*, 2014 WL 1664235, at *6. Like the prior complaint, the SAC does not list a
15 single affirmative act AT&T took to conceal information from Mr. Terpin. As a result,
16 Mr. Terpin did not allege a duty to disclose based on active concealment. *Blissard v.*
17 *FCA US LLC*, 2018 WL 6177295, at *14 (C.D. Cal. Nov. 9, 2018) (dismissing claim
18 based on an active concealment theory in the absence of “a well-supported allegation of
19 intentional acts to conceal” knowledge from the plaintiff).

20 Finally, Mr. Terpin does not adequately allege that AT&T made a partial
21 disclosure of a material fact. This exception applies when “the defendant makes
22 representations but does not disclose facts which materially qualify the facts disclosed,
23 or which render his disclosure likely to mislead.” *Herron v. Best Buy Co. Inc.*, 924 F.
24 Supp. 2d 1161, 1177 (E.D. Cal. 2013) (internal citations omitted). Although Mr. Terpin
25 does not explicitly identify a “partial representation” that he asserts provides the basis
26 for his deceit by concealment claim, he seems to suggest in new allegations that AT&T
27 disclosed fewer than all relevant facts. *See* SAC ¶¶ 58, 143–44. Specifically, Mr. Terpin
28 alleges that, although AT&T disclosed that its security measures were not perfect and

1 could be evaded, AT&T did not disclose that one of the ways that security measures
2 could be evaded was by the bribery or cooperation of AT&T “employees.”³ SAC ¶ 144.
3 But this new level of specificity regarding *what* was supposedly not disclosed adds
4 nothing to the question of whether AT&T had a *duty* to disclose.

5 As to the new alleged facts Mr. Terpin claims were not disclosed—specifically,
6 that AT&T’s “level of protection” was “poro[u]s” or “inadequa[te]” and could be
7 circumvented, SAC ¶¶ 58, 143—these allegations do not “materially qualify” AT&T’s
8 disclosures that “AT&T DOES NOT GUARANTEE SECURITY” and “no security
9 measures are perfect.” SAC, Ex. B at 27; Ex. D at 57 (§ 4.3). Instead, they *reinforce*
10 AT&T’s disclosures. Mr. Terpin’s argument is nothing more than an allegation that
11 AT&T had a legal duty to disclose *more details* about the ways in which a breach of
12 security might happen, which simply is not the circumstance of a partial representation.
13 Moreover, where, as here, the allegedly disclosed information is substantially disclosed,
14 no cause of action for concealment is available. *See Riggins v. Ortho McNeil Pharm.,*
15 *Inc.*, 51 F. Supp. 3d 708, 712 (N.D. Ohio 2014) (“In the warning document which
16 accompanied the patch, the Defendants disclosed the dangers associated with the use of
17 the patch. Therefore, no false representation has been established.”); *Clayton v.*
18 *Landsing Pac. Fund, Inc.*, 2002 WL 1058247, at *6 (N.D. Cal. May 9, 2002), *aff’d*, 56
19 F. App’x 379 (9th Cir. 2003) (dismissing claim based on fraudulent concealment where
20 defendants “*actually disclosed the information . . . plaintiff says was kept secret from*
21 *her*”) (emphasis in original). Mr. Terpin did not, therefore, allege a duty to disclose
22 based on partial representation.

23 Accordingly, Mr. Terpin’s SAC does not address the Court’s previous conclusion
24 that he has not pled a duty to disclose. As a result, Claim 3 should be dismissed with
25 prejudice.

26
27
28 ³ As previously noted, Mr. Smith, the focus of Mr. Terpin’s allegations, was not an
AT&T employee, but worked for a vendor.

1 **2. Claim 3 Should Be Dismissed with Prejudice Because Mr. Terpin Has**
2 **Not Pled That He Was Unaware of Any Allegedly Concealed Facts.**

3 A claim for deceit also requires a plaintiff to plausibly plead that he was unaware
4 of a concealed material fact and would have acted differently had he known about it.
5 *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1011–12 (9th Cir. 2011). Because this
6 claim sounds in fraud, it must be pled with particularity. *See Vess v. CIBA-Geigy Corp.*
7 *USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003); *Patera v. Citibank, N.A.*, 79 F. Supp. 3d
8 1074, 1085 (N.D. Cal. 2015).

9 Mr. Terpin does not satisfy this element because he does not allege that he was
10 unaware of the facts he claims AT&T should have disclosed. The Court was not required
11 to reach this failing in Mr. Terpin’s deceit by concealment claim because of its decision
12 on Mr. Terpin’s failure to plead a duty to disclose. But it is equally fatal to Mr. Terpin’s
13 claim. Specifically, Mr. Terpin alleges that AT&T did not disclose the alleged
14 inadequacy and ineffectiveness of its data security measures; that its employees could
15 bypass those measures and/or cooperate with thieves; that AT&T did not provide a SIM
16 lockdown with its higher level of security; that AT&T could not protect Mr. Terpin’s
17 Personal Information; that SIM swap fraud was common in the cryptocurrency
18 community; that his Personal Information was readily obtained by hackers; and that
19 AT&T inadequately supervised and trained its employees. SAC ¶¶ 142–52. But Mr.
20 Terpin does not claim that he was *unaware* of these alleged facts, nor would such claim
21 be plausible. Mr. Terpin describes himself as a “prominent member of the blockchain
22 and cryptocurrency community,” and it is implausible that such an individual would not
23 be aware of what Mr. Terpin alleges is a rampant practice of cryptocurrency thefts via
24 SIM swaps. SAC ¶ 19. Moreover, the “prior incidents” that he alleges inform AT&T’s
25 awareness of purported deficiencies in its data security procedures necessarily include
26 the June 11, 2017 SIM swap that Mr. Terpin alleges he experienced. SAC ¶¶ 86–87.
27 After that point, Mr. Terpin cannot plausibly claim that he was unaware of the risk of a
28 SIM swap. As a result, he cannot plausibly allege that he would have acted differently
if AT&T had made further, more specific disclosures about the limits of its security.

1 **B. Claim 4 (Misrepresentation) Should Be Dismissed with Prejudice.**

2 In the FAC, Mr. Terpin alleged that AT&T misrepresented its security practices
3 in two ways. First, he alleged that AT&T’s Privacy Policy and Code of Business
4 Conduct (“COBC”) contain misrepresentations about AT&T’s security practices.
5 SAC ¶¶ 159, 160. Second, he alleged that an AT&T employee promised him that a six-
6 digit code would be added to his account after his SIM card was swapped to provide him
7 additional protection. SAC ¶¶ 159, 160.

8 This Court dismissed this claim in its entirety because Mr. Terpin “fails to allege
9 knowledge of falsity and justifiable reliance.” *Terpin II* at 12. The Court allowed Mr.
10 Terpin to replead to the extent he “can plead that he actually relied upon the statements
11 in AT&T’s Privacy Policy and COBC or that AT&T never intended to adhere to its
12 heightened security protocols.” *Terpin II* at 12. The SAC does not plausibly plead either
13 of these things. Accordingly, the misrepresentation claim should be dismissed, this time
14 with prejudice.

15 **1. The SAC Confirms that Mr. Terpin Cannot Plausibly Allege Reliance**
16 **on the Privacy Policy or Code of Business Conduct Because He Did Not**
Read Them.

17 “To state a claim for intentional misrepresentation under California law, a plaintiff
18 must plead, among other things, that ‘the defendant intended that the plaintiff rely on
19 the representation’ and ‘the plaintiff reasonably relied on the representation.’” *Welk v.*
20 *Beam Suntory Imp. Co.*, 124 F. Supp. 3d 1039, 1044 (S.D. Cal. 2015) (internal citations
21 omitted). To adequately plead reliance, the plaintiff must allege that he was somehow
22 exposed to the alleged misrepresentation. *Sloan v. General Motors LLC*, 287 F. Supp.
23 3d 840, 874 (N.D. Cal. 2018), *order clarified*, 2018 WL 1156607 (N.D. Cal. Mar. 5,
24 2018) (“In an affirmative misrepresentation case, a plaintiff obviously must plead that
25 they in fact viewed or were exposed to the misleading misrepresentation; otherwise, they
26 could not have relied on it.”).

27 Here, Mr. Terpin does nothing to cure his inadequate reliance allegations as to the
28 written statements in the Privacy Policy and the COBC. As the Court noted in its recent

1 opinion, Mr. Terpin did not “allege that he actually read AT&T’s Privacy Policy or
2 COBC, which makes Mr. Terpin’s allegation that he reasonably relied on the statements
3 contained therein implausible.” *Terpin II* at 11. Mr. Terpin makes no changes on this
4 issue in the SAC; he still does not allege that ever read, saw, or heard AT&T’s Privacy
5 Policy or COBC. Absent this crucial factual allegation, his misrepresentation claim must
6 be dismissed with prejudice. *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2017
7 WL 3727318, at *27–28 (N.D. Cal. Aug. 30, 2017) (dismissing plaintiffs’ affirmative
8 misrepresentation claim because plaintiffs did not allege that they “*actually read*”
9 defendant’s Privacy Policy) (emphasis in original)). Because Mr. Terpin does not make
10 any amendment to his SAC that bears on this point, he has all but conceded that his
11 misrepresentation claim should be dismissed with prejudice to the extent it is based on
12 a theory of reliance on statements in the Privacy Policy or COBC.

13 **2. Claim 4 Should Be Dismissed with Prejudice Because Mr. Terpin Does**
14 **Not Allege that AT&T Employees Never Had An Intention of**
15 **Performing.**

16 In the SAC, Mr. Terpin instead focuses on his alternative theory—specifically,
17 that AT&T made verbal false promises to him. However, he is unable to allege, as the
18 Court required, that “AT&T intended to ignore its heightened security protocol when it
19 represented to Mr. Terpin that it would require a six-digit passcode before allowing
20 changes to his account.” *Terpin II* at 11–12. Such an allegation is necessary, especially
21 where particularity is required by Rule 9(b). *Bullard v. Wastequip, Inc.*, 2014 WL
22 10987394, at *3–4 (C.D. Cal. Sept. 11, 2014).

23 To adequately plead misrepresentation based on a false promise, the plaintiff must
24 plead “facts from which it can be inferred that the promisor had no intention of
25 performing at the time the promise was made.” *UMG Recordings*, 117 F. Supp. 3d at
26 1108; *see also Tarmann*, 2 Cal. App. 4th at 158–59 (“To maintain an action for deceit
27 based on a false promise, one must specifically allege and prove, among other things,
28 that the promisor did not intend to perform at the time he or she made the promise and
that it was intended to deceive or induce the promisee to do or not do a particular thing.”).

1 Because a false promise claim alleges a “subspecies of fraud,” such claims must meet
2 the “heightened pleading requirements of Rule 9(b).” *Bullard*, 2014 WL 10987394, at
3 *3–4.

4 A plaintiff cannot meet this standard by merely pleading non-performance. *See*
5 *id.* at *5 (“[M]ere nonperformance does not suffice to explain the falsity of the
6 promise.”); *Magpali v. Farmers Grp., Inc.*, 48 Cal. App. 4th 471, 481 (1996)
7 (“[S]omething more than nonperformance is required to prove the defendant’s intent not
8 to perform his promise . . . if plaintiff produces no further evidence of fraudulent intent
9 than proof of nonperformance of an oral promise, he will never reach a jury.” (internal
10 citation omitted)). Instead, the plaintiff must “plead facts explaining why the statement
11 was false when it was made,” such as “inconsistent contemporaneous statements or
12 information which was made by or available to the defendant.” *Smith v. Allstate Ins.*
13 *Co.*, 160 F. Supp. 2d 1150, 1153–54 (S.D. Cal. 2001); *see also Tenzer v. Superscope,*
14 *Inc.*, 39 Cal. 3d 18, 30–31 (1985) (holding that “fraudulent intent can be inferred from
15 such circumstances as defendant’s insolvency, his hasty repudiation of the promise, his
16 failure even to attempt performance, or his continued assurances after it was clear he
17 would not perform.”).

18 As this Court previously held, Mr. Terpin does not satisfy these requirements
19 because he “does not allege that AT&T intended to ignore its heightened security
20 protocol when it represented to Mr. Terpin that it would require a six-digit passcode
21 before allowing changes to his account.” *Terpin II* at 11-12. Moreover, Mr. Terpin is
22 unable to plausibly make such an allegation as he has failed to satisfy the requirement
23 of Rule 9(b) that he “allege the names of the employees or agents who purportedly made
24 the fraudulent representations or omissions” or, at the very least, identify the speakers
25 “by their titles and/or job responsibilities.” *Bullard*, 2014 WL 10987394, at *6. Mr.
26 Terpin fails to allege even this minimal information about the employees he spoke with
27 in Puerto Rico. SAC ¶¶ 88, 144.

28

1 In the absence of such allegations, Mr. Terpin alleges only that “AT&T did not
2 intend to perform . . . its promises . . . because it knew that its security protections,
3 including the six-digit security code, were ineffectual and could easily be evaded or
4 bypassed by its employees.” SAC ¶ 160. As a threshold matter, the suggestion that
5 AT&T did not disclose the limits of security is false; in AT&T’s express disclosure about
6 possible security breaches, AT&T made clear that it could not promise that breaches
7 would never occur. *See* SAC, Ex. B at 27; Ex. D at 57 (§ 4.3). Further, an allegation
8 that AT&T knew that it may be unable to prevent a security breach is not the same as
9 plausibly alleging that AT&T did not place the heightened security protection on Mr.
10 Terpin’s account or did not intend it to limit the ability to swap Mr. Terpin’s SIM card.
11 *See Magpali*, 48 Cal. App. 4th at 481 (“[The defendant] may have been overly optimistic
12 in believing that an inexperienced agent could generate sufficient sales to justify the
13 continued operation of the agency, but an erroneous belief, no matter how misguided,
14 does not justify a finding of fraud.”); *see also Tarmann*, 2 Cal. App. 4th at 159
15 (sustaining the defendant’s demurrer because “making a promise with an honest but
16 unreasonable intent to perform is wholly different from making one with no intent to
17 perform and, therefore, does not constitute a false promise.”).

18 Because Mr. Terpin does not and cannot plausibly allege that “AT&T intended to
19 ignore its heightened security protocol when it represented to Mr. Terpin that it would
20 require a six-digit passcode before allowing changes to his account,” *Terpin II* at 11–12,
21 this aspect of his misrepresentation claim should also be dismissed with prejudice.

22 **C. Mr. Terpin’s Claims Against All Fictitious Defendants Should Be Dismissed**
23 **with Prejudice.**

24 Just as he did in the FAC, Mr. Terpin names as defendants in this litigation Does
25 1-25. Despite the Court’s dismissal of these defendants previously, Mr. Terpin adds no
26 additional allegations about those Defendants. Accordingly, the Does should be
27 dismissed from the litigation, this time with prejudice.

28

1 First, Central District of California Local Rule 19-1 provides that “No complaint
2 or petition shall be filed that includes more than ten (10) Doe or fictitiously named
3 parties.” Courts in this district have routinely dismissed any fictitious defendants
4 beyond the ten-party limit of Local Rule 19-1. *See, e.g., Parker v. Hughes*, 2017 WL
5 10574939, at *2 (C.D. Cal. May 31, 2017); *Delquin Plastics USA, Inc. v. Larach*, 2017
6 WL 4786000, at *1 (C.D. Cal. July 25, 2017). Accordingly, Does 11-25 should be
7 dismissed with prejudice.

8 Second, in this District “[u]nidentifiable Doe defendants may be dismissed from
9 the complaint.” *MGA Entmt., Inc. v. Dynacraft BSC, Inc.*, 2018 WL 2448123, at *8
10 (C.D. Cal. May 30, 2018) (Wright, J.). This Court has explained that “[w]hile a plaintiff
11 may sue up to ten unidentified Doe defendants (*see* Local Rule 19-1), it is required to
12 make individualized allegations about each such Doe defendant[] and may not merely
13 name an indistinguishable group of Doe defendants.” *Id.* (quoting *Rhue v. Signet*
14 *Domain LLC*, 2015 WL 4111701, at *5 (C.D. Cal. Jul. 8, 2015)). Because Mr. Terpin
15 has failed to “identify ‘each unidentified defendant by a separate fictitious name . . . and
16 allege facts that demonstrate a causal link between’ each unidentified defendant and the
17 alleged offense,” his claims against the Doe defendants should be dismissed with
18 prejudice. *Id.* (emphasis in original).

19 **D. Mr. Terpin’s Request for Punitive Damages Should Be Dismissed with**
20 **Prejudice.**

21 Mr. Terpin requests punitive damages for Claims 3–7. Punitive damages are
22 “disfavored by the law.” *Kelley v. Corr. Corp. of Am.*, 750 F. Supp. 2d 1132, 1147 (E.D.
23 Cal. 2010) (internal citation omitted). These damages are only available upon clear and
24 convincing evidence that the conduct giving rise to the award is “so vile, base,
25 contemptible, miserable, wretched or loathsome that it would be looked down upon and
26 despised by ordinary decent people” or “[having] the character of outrage frequently
27 associated with crime.” *Tomaselli v. Transamerica Ins. Co.*, 25 Cal. App. 4th 1269,
28 1287 (1994) (internal citation omitted).

1 California law holds that punitive damages may only be awarded against an entity
2 defendant based on the entity's "own wrongful conduct." *Weeks v. Baker & McKenzie*,
3 63 Cal. App. 4th 1128, 1154 (1998) (emphasis in original). An entity may not be held
4 liable for punitive damages based upon the acts of an employee unless the plaintiff
5 proves, by clear and convincing evidence, that an "officer, director or managing agent"
6 of the entity either "had advance knowledge of the unfitness of the employee and
7 employed him or her with a conscious disregard of the rights or safety of others or
8 authorized or ratified the wrongful conduct for which the [punitive] damages are
9 awarded or was personally guilty of oppression, malice, or fraud." Cal. Civ. Code
10 § 3294(b). Managing agents are employees who "exercise[] substantial discretionary
11 authority over decisions that ultimately determine *corporate policy*." *Cruz v.*
12 *HomeBase*, 83 Cal. App. 4th 160, 167 (2000) (alteration and emphasis in original)
13 (quoting *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 573 (1999)). By confining liability to
14 "officer[s], director[s], and managing agent[s]," California law "avoids punishing the
15 corporation for malice of low-level employees which does not reflect the corporate 'state
16 of mind' or the intentions of corporate leaders." *Cruz*, 83 Cal. App. 4th at 167; *see also*
17 *White*, 21 Cal. 4th at 569.

18 Recognizing these principles, the Court previously dismissed Mr. Terpin's
19 request for punitive damages. *Terpin II* at 14. Mr. Terpin not only alleged no facts
20 showing that any "officer, director, or managing agent of AT&T knew about or ratified
21 the alleged wrongful conduct," he did not name any AT&T employee who would qualify
22 as an officer, director, or managing agent. *Terpin II* at 14. Mr. Terpin's SAC fails to
23 cure the flaws in his request for punitive damages and dismissal with prejudice is
24 appropriate here.

25 **1. Mr. Terpin Did Not Plead Any Facts Plausibly Alleging Ratification of**
26 **the Alleged Wrongful Conduct by AT&T.**

27 Under California law, "ratification generally occurs where, under the particular
28 circumstances, the employer demonstrates an intent to adopt or approve oppressive,

1 fraudulent, or malicious behavior by an employee in the performance of his job duties.”
2 *Coll. Hosp. Inc. v. Superior Ct.*, 8 Cal. 4th 704, 726 (1994). In short, the employer has
3 to ratify that which is oppressive, fraudulent, or malicious to satisfy the punitive
4 damages pleading threshold, not just ratify any conduct alleged in the complaint. For
5 example, an employer may be found to have ratified the relevant conduct where it fails
6 to “stop known on-the-job sexual harassment of [an] employee by coworkers” or
7 “directs, reviews, and approves malicious claims settlement practices.” *Id.* (internal
8 citations omitted). On the other hand, in *Razo v. TIMEC Co., Inc.*, the court dismissed
9 the plaintiff’s request for punitive damages, in part, because the plaintiff did not allege
10 that any of the defendant’s executives “had actual knowledge of any wrongdoing by [the
11 unfit employee].” 2017 WL 5079249, at *19 (N.D. Cal. Nov. 3, 2017). Tracking this
12 distinction, in *Khan v. 7-Eleven, Inc.*, the Court held that the plaintiff adequately alleged
13 the mental state for punitive damages on an anti-stalking claim where a managing agent
14 “ratified the allegedly malicious conduct of [the] employees by knowingly allowing
15 them to continue to follow” the plaintiff. 2015 WL 12743691, at *3 (C.D. Cal. Sept. 15,
16 2015). But it dismissed plaintiff’s request for punitive damages as to an assault and
17 battery claim involving one of the same employees, because the complaint lacked any
18 allegations that the employer’s “managing agent authorized or ratified” the assault. *Id.*

19 The Court previously held that Mr. Terpin has “allege[d] no facts showing that an
20 officer, director, or managing agent of AT&T knew about or ratified the alleged
21 wrongful conduct of which he complains.” *Terpin II* at 14. In a failed attempt to address
22 this defect, Mr. Terpin simply throws in the names of two AT&T executives, Mr.
23 Huntley and Mr. O’Hern as window dressing. SAC ¶ 75. However, Mr. Terpin’s SAC
24 does not change the core of his theory: specifically, that a supposed “employee” (who
25 actually worked for a vendor) intentionally aided hackers in swapping Mr. Terpin’s SIM
26 card, somehow leading to Mr. Terpin’s alleged loss. Neither Mr. Huntley nor Mr.
27 O’Hern is, or could plausibly be, alleged to have known about or ratified the alleged
28 intentional misconduct by the relevant vendor’s employee/contractor. Instead, Mr.

1 Terpin alleges only that (i) based on their positions, they knew or should have known
2 about “structural security flaws and lapses” at AT&T; and (ii) as a result, “they
3 committed or ratified the acts of oppression, fraud or malice alleged herein.” SAC ¶¶ 75,
4 77–79, 83–84, 90–93, 143–49, 156, 165. These allegations are not enough to avoid the
5 fatal problem the Court previously identified.

6 First of all, Mr. Terpin is seeking punitive damages in the name of Mr. Huntley
7 and Mr. O’Hern by conflating their alleged actions (which are alleged to be negligent at
8 most) with the allegedly intentional misconduct of Mr. Smith and third party criminals.
9 Specifically, Mr. Terpin equivocates on whether Mr. Huntley and Mr. O’Hern “knew”
10 or “should have known” about the potential for SIM swaps, SAC ¶¶ 77, 79, 93, 145, and
11 then suggests that the two men were responsible for security and privacy measures that
12 Mr. Terpin alleges were negligent, SAC ¶¶ 176, 190, 204. This “knew or should have
13 known” allegation sounds in negligence, not the intentional action required for punitive
14 damages. Moreover, even if Mr. Huntley and Mr. O’Hern were aware of a generalized
15 risk that criminals might engage in SIM swaps, that falls far short of the required “intent
16 to adopt or approve oppressive, fraudulent, or malicious behavior by an employee.”
17 *Coll. Hosp.*, 8 Cal. 4th at 726. That is, an alleged failure to exercise due care is not the
18 same as: (i) personally committing any acts of misconduct; (ii) knowing anything about
19 Mr. Smith; or (iii) knowing of or ratifying any oppressive, fraudulent, or malicious acts
20 by Mr. Smith and approving those acts, including any acts that led to the harm here. By
21 focusing on alleged conduct that was at best negligent, Mr. Terpin has failed to allege
22 any conduct of Mr. Huntley or Mr. O’Hern that fits within the narrow scope for which
23 employer liability for punitive damages is allowed by California Civil Code Section
24 3294.

25 By contrast, in *Cardenas v. American Airlines, Inc.*, the plaintiff alleged that the
26 defendant’s executives “knew that [the unfit employee] had difficulty in dealing with
27 members of the opposite sex based on previous events.” 2018 WL 1963787, at *5 (S.D.
28 Cal. Apr. 26, 2018). And in *Greenfield v. Spectrum Investment Corp.*, the plaintiff

1 alleged that the defendant retained the unfit employee even though it knew about his
2 violent temper and assault on a customer at work. 174 Cal. App. 3d 111, 118–121
3 (1985), *overruled on other grounds by Lakin v. Watkins Associated Indus.*, 6 Cal. 4th
4 644, 664 (1993). Each of these cases therefore focuses on what the defendant’s
5 executives knew about the *particular* employee and the *particular* wrongdoing in which
6 he or she engaged, not on a general awareness that employees could exploit the
7 company’s security limitations at a random time and location. Mr. Terpin’s allegations
8 are inadequate under this precedent.

9 Mr. Terpin’s other new allegations—conclusory statements “devoid of factual
10 support” that particular individuals meet the legal test by virtue of their titles—are
11 precisely the type of “formulaic recitation of the elements of a cause of action” that the
12 Supreme Court instructed in *Twombly* was inadequate. *Perez*, 2014 WL 12588644, at
13 *7; *Twombly*, 550 U.S. at 555; *see also Diehl v. Starbucks Corp.*, 2014 WL 5171799, at
14 *5 (S.D. Cal. Oct. 14, 2014) (“Although the names and titles of certain personnel are
15 sprinkled throughout the TAC, the TAC is still wanting in regard to factual allegations
16 supporting a punitive damages prayer.”). Because Mr. Terpin has not remedied his
17 failure to plausibly allege facts to support a conclusion that any “officer, director or
18 managing agent” of AT&T ratified the wrongful conduct, his request for punitive
19 damages should be dismissed with prejudice.

20 **2. Mr. Terpin Did Not Plead the Required Mental State for Punitive**
21 **Damages, Particularly on the Part of Any AT&T Executive.**

22 Mr. Terpin also fails to adequately plead the required mental state to support a
23 claim for punitive damages. In California, punitive damages are only permitted “where
24 it is proven by clear and convincing evidence that the defendant has been guilty of
25 oppression, fraud, or malice.” Cal. Civ. Code § 3294(a). As set forth above, where the
26 claim is against an employee, if an “officer, director, or managing agent of the
27 corporation” did not either have “advance knowledge of the unfitness of the employee”
28 or “authorize[] or ratif[y] the wrongful conduct for which the damages are awarded”—

1 neither of which has been pled here—the officer, director, or managing agent must have
2 been the one to engage in conduct with oppression, fraud, or malice. *Id.* A “conclusory
3 characterization of defendant’s conduct as intentional, willful and fraudulent is a
4 patently insufficient statement of ‘oppression, fraud or malice.’” *Brousseau v. Jarrett*,
5 73 Cal. App. 3d 864, 872 (1977) (quoting Cal. Civ. Code § 3294); *Torrallbo v. Davol*,
6 *Inc.*, 2017 WL 5664993, at *7 (C.D. Cal. Oct. 19, 2017). Instead, the “facts constituting
7 bad faith or fraud must be specifically alleged.” *Lavine v. Jessup*, 161 Cal. App. 2d 59,
8 69 (1958) (“mere use” of terms like fraud “is not enough”).

9 Malice requires “intentional injury or despicable conduct which is carried on by
10 the defendant with a willful and conscious disregard of the rights or safety of others.”
11 *Perez v. Auto Tech. Co.*, 2014 WL 12588644, at *4 (C.D. Cal. July 14, 2014) (internal
12 citation omitted). When there is no plausible allegation of “intentional injury,” the
13 plaintiff must allege conduct that is both willful and despicable. *See Lackner v. North*,
14 135 Cal. App. 4th 1188, 1211, 1213 (2006). “Oppression” similarly requires pleading
15 of “despicable conduct that subjects a person to cruel and unjust hardship in conscious
16 disregard of that person’s rights.” *Perez*, 2014 WL 12588644, at *4. Conduct only
17 becomes despicable when it is “so vile, base, contemptible, miserable, wretched or
18 loathsome that it would be looked down upon and despised by ordinary decent people.”
19 *Johnson & Johnson Talcum Powder Cases*, 37 Cal. App. 5th 292, 332–33 (2019)
20 (internal citation omitted). Courts often describe this conduct as “having the character
21 of outrage frequently associated with crime.” *Pac. Gas & Elec. Co. v. Superior Ct.*, 24
22 Cal. App. 5th 1150, 1159 (2018); *see also Coll. Hosp. Inc.*, 8 Cal. 4th at 725.

23 Mr. Terpin has pleaded no facts to support a theory of “malice, fraud, or
24 oppression.” Instead, just like in his FAC, Mr. Terpin’s allegations concerning malice,
25 fraud, and oppression are based on nothing more than conclusory allegations and
26 unreasonable inferences. *See, e.g.*, SAC ¶¶ 156, 165, 176, 190, 204. These assertions
27 are “devoid of factual support” and insufficient to support a prayer for punitive damages.
28 *Perez*, 2014 WL 12588644, at *7 (conclusory statements to support punitive damages

1 are “not entitled to the presumption of truth under *Iqbal* and *Twombly*”). Because Mr.
2 Terpin “invites the court to read . . . an evil motive” into “facts that describe nothing
3 more than the basic elements” of the claims he asserts, his request for punitive damages
4 should be dismissed with prejudice. *Kelley*, 750 F. Supp. 2d at 1148. Indeed, Mr. Terpin
5 pleads only that the “employees at the AT&T store who unlawfully handed over Mr.
6 Terpin’s telephone number to thieves were *either blind or complicit*.” SAC ¶ 98
7 (emphasis added). This acknowledgment that those employees may *not* have been
8 complicit further supports the rejection of Mr. Terpin’s request for punitive damages.

9 The facts that Mr. Terpin pleads do not rise to the level of conscious disregard.
10 To plead conscious disregard, the plaintiff must show that the defendant was (1) “aware
11 of the probable dangerous consequences of its conduct,” but (2) “willfully and
12 deliberately failed to avoid those consequences.” *Perez*, 2014 WL 12588644, at *4. The
13 plaintiff must allege “specific facts” showing both awareness of probably dangerous
14 consequences and willful and deliberate avoidance. Mr. Terpin did not plead either
15 prong.

16 To adequately plead awareness, the plaintiff is required to allege facts showing
17 that corporate executives were aware of a probable dangerous consequence *before* the
18 plaintiff suffered his alleged harm. For example, in *Rosa v. Taser International, Inc.*,
19 the Ninth Circuit held that the defendant “[l]ogically . . . could not have disregarded a
20 known risk that its products could cause [fatalities]” because the only report showing
21 such a danger was published *after* the product was already on the market. 684 F.3d 941,
22 949 n.7 (9th Cir. 2012). As a result, the plaintiff could not show conscious disregard
23 because the “risk was not knowable.” *Id.* Similarly, in *Johnson & Johnson Talcum*
24 *Powder Cases*, the court rejected a claim for punitive damages because clear “[s]cientific
25 evidence” about the potential dangers of talcum powder “developed post-injury.” 37
26 Cal. App. 5th at 334. As a result, the plaintiff “did not create a reasonable inference that
27 [the defendant] was acting with malice, pre-injury, in failing to warn of probable
28 dangerous consequences of the product.” *Id.*; see also *Garcia v. M-F Athletic Co.*, 2012

1 WL 531008, at *4 (E.D. Cal. Feb. 17, 2012) (“The fact that lawsuits were filed does not
2 establish that injuries actually occurred. Plaintiffs have been known to file frivolous
3 lawsuits and, without knowing any details regarding these lawsuits (not even the number
4 filed), the court cannot infer conscious disregard on the part of defendants.”). Mr.
5 Terpin’s allegations run afoul of this basic principle.

6 Mr. Terpin launches the conclusory allegation that Mr. O’Hern and Mr. Huntley
7 knew AT&T employees swapped SIM cards in cooperation with criminals well before
8 Mr. Terpin’s attack. SAC ¶¶ 75, 77. He also alleges that Mr. O’Hern and Mr. Huntley
9 should have known about SIM swapping because of “prior incidents and contacts with
10 law enforcement.” SAC ¶ 145. But he provides no factual support for this conclusion.
11 Instead, his allegations focus on examples of SIM swapping that occurred *after* Mr.
12 Terpin’s alleged attack in June of 2017. *See supra* at 9; *see also* SAC ¶¶ 65–78. In fact,
13 every instance of SIM swapping he references came *after* Mr. Terpin’s alleged attack.
14 Under *Rosa*, these instances are legally—not to mention logically—incapable of giving
15 Mr. O’Hern and Mr. Huntley advanced knowledge of SIM swapping, particularly of
16 SIM swapping by Mr. Smith. Without the ability to plead any advanced knowledge, Mr.
17 Terpin cannot plead conscious disregard.

18 Moreover, Mr. Terpin must plead that AT&T was not only aware of the danger of
19 SIM swaps, but that it willfully and deliberately avoided remedying that danger. In
20 multiple cases that find willful and deliberate avoidance, plaintiffs alleged that the
21 defendant refused to take remedial measures for lengthy periods of time despite clear
22 evidence showing a danger. For example, in *Maples v. 3M Co.*, the defendant’s top
23 management received “early warnings about the hazards of asbestos” but “did not issue
24 any warnings” about its products until “more than 20 years later.” 2017 WL 10592131,
25 at *10 (C.D. Cal. May 15, 2017). According to the court, the sheer “length of this period
26 during which [the defendant] did nothing” was “evidence of its conscious disregard of
27 the safety of others.” *Id.*; *see also Garcia*, 2012 WL 531008, at *4 (dismissing a
28 complaint for punitive damages because the complaint did not show how the defendant

1 “acted in a despicable manner such that they should be forced to pay punitive damages
2 above and beyond the damages normally assessed”).

3 Mr. Terpin alleges no similar facts. The most that he alleges is that Mr. O’Hern
4 and Mr. Huntley knew that SIM swaps were possible. SAC ¶¶ 92, 143, 145, 149, 156.
5 Yet, Mr. Terpin does not point to a single instance of SIM swapping prior to June 2017
6 that would show Mr. O’Hern or Mr. Huntley knew of the danger of SIM swaps prior to
7 the June 2017 swap, much less that they deliberately declined to address them or attempt
8 to prevent them in the face of such prior knowledge. Mr. Terpin’s allegations about
9 AT&T’s financial incentives are also insufficient to justify punitive damages. SAC ¶ 10.
10 This falls far short of the conscious disregard required by California law. *Maples*, 2017
11 WL 10592131, at *10. Moreover, speculation about financial motivations cannot, as a
12 legal matter, show conscious disregard. *Edison v. Mgmt. & Training Corp.*, 2018 WL
13 3491675, at *10 (E.D. Cal. July 19, 2018) (rejecting the notion that conjecture about
14 “financial motivations” alone can support a finding of conscious disregard). Without
15 pleading facts to suggest that Mr. O’Hern or Mr. Huntley had clear knowledge about the
16 danger of SIM swapping for a significant period of time but did nothing, Mr. Terpin’s
17 request for punitive damages must be dismissed with prejudice.

18 In sum, Mr. Terpin fails to allege that Mr. O’Hern or Mr. Huntley acted with
19 conscious disregard. As a result, his request for punitive damages must be dismissed
20 with prejudice.

21 **3. Punitive Damages Are Unavailable for Claims 5–7 as a Matter of**
22 **Law.**

23 Punitive damages are unavailable as a matter of law for Claims 5–7. It is well
24 established in California that “[m]ere . . . negligence, [e]ven gross negligence is not
25 sufficient to justify an award of punitive damages.” *Simmons v. S. Pac. Transp. Co.*, 62
26 Cal. App. 3d 341, 368 (1976) (internal citation omitted); *Molina v. J.C. Penney Co.*,
27 2015 WL 183899, at *3 (N.D. Cal. Jan. 14, 2015) (“The standard for punitive damages
28 requires behavior more offensive than the standard for gross negligence.”). Thus, Mr.

1 Terpin’s requests for punitive damages for his claims of negligence, negligent
2 supervision and training, and negligent hiring (Claims 5–7) are unavailing. SAC ¶¶ 176,
3 190, 204. The “formulaic recitation of the elements” required for punitive damages,
4 tacked on to the end of the negligence claims, is not adequate to plead the required basis
5 for ratification by the corporation or to plead malice, fraud, or oppression, as required
6 for punitive damages. *See Gilstrap v. United Airlines, Inc.*, 2014 WL 12734331, at *6
7 (C.D. Cal. Jan. 17, 2014).

8 **4. Punitive Damages Are Not Proper for Cases of First Impression.**

9 Finally, “[i]t is generally recognized in California and the Ninth Circuit that
10 punitive damages are not proper in cases of first impression.” *In re First All. Mortg.*
11 *Co.*, 2003 WL 21530096, at *10 (C.D. Cal. June 16, 2003) (rejecting a request for
12 punitive damages, in part, because the issue was one of first impression) (citing *Morgan*
13 *Guar. Trust Co. v. American Sav. & Loan Ass’n*, 804 F.2d 1487, 1500 (9th Cir. 1986);
14 *Bartling v. Glendale Adventist Med. Ctr.*, 184 Cal. App. 3d 961, 229 (1986)).

15 AT&T could not find one case involving an alleged SIM swap prior to this one,
16 making it a novel case of first impression. In such a situation, where the legal issues and
17 rights are not clearly established, the issues are unique, and the heightened standard for
18 punitive damages claims applies, punitive damages are inappropriate. Mr. Terpin’s
19 request for punitive damages should be dismissed with prejudice. *See Flo & Eddie, Inc.*
20 *v. Sirius XM Radio, Inc.*, 2016 WL 6916826, at *3 (C.D. Cal. Sept. 8, 2016) (rejecting a
21 claim for punitive damages because “the issue presented in this case [had] never been
22 directly addressed before”); *Morgan Guar. Trust Co.*, 804 F.2d at 1500 (“Although we
23 reverse, we acknowledge that this is a close case and that the key issue is one of first
24 impression. Punitive damages are inappropriate in this case.”).

25 **E. AT&T Preserves Previously Asserted Arguments.**

26 In briefing on its first two Motions, AT&T raised additional challenges to the
27 sufficiency of the allegations of the original Complaint and FAC. *See* Dkts. 14, 22, 33,
28 35. In particular, AT&T argued that Mr. Terpin failed to adequately plead proximate

1 cause for any of his claims, Dkt. 14 at 5–6, 22 at 1–3, 33 at 5–10, 35 at 1–5, and raised
2 challenges to Counts 1 and 2 of the FAC, which the Court rejected, as well as the
3 argument that the *J’Aire* exception to the economic loss doctrine does not apply where
4 the parties are in contractual privity, even with a contract for services. *See* Dkt. 14 at 6–
5 10; Dkt. 22 at 3–4, 9–10, Dkt. 33 at 10–13, Dkt. 35 at 5–7; *see also* *Body Jewelz, Inc. v.*
6 *Valley Forge Ins. Co.*, 241 F. Supp. 3d 1084, 1091–94 (C.D. Cal. 2017) (Wright, J.);
7 *Dep’t of Water and Power of City of L.A. v. ABB Power T & D Co.*, 902 F. Supp. 1178,
8 1189 (C.D. Cal. 1995). AT&T also argued that the independent criminal acts of the
9 hackers prevented a finding of proximate causation. *See* Dkt. 14 at 6.

10 Although AT&T does not believe it is required to raise its legal arguments in this
11 Motion to preserve them for later stages of this litigation, for avoidance of any risk of
12 waiver, AT&T preserves each of the arguments raised in its prior briefing here with
13 respect to the SAC.

14 **V. Conclusion**

15 For the reasons set forth above, Claims 3 and 4 (Deceit by Concealment and
16 Misrepresentation) should be dismissed with prejudice, and Mr. Terpin’s request for
17 punitive damages should be dismissed with prejudice.

18
19
20 Dated: March 30, 2020

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