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9
 10 **UNITED STATES DISTRICT COURT**
 11 **NORTHERN DISTRICT OF CALIFORNIA**
 12 **OAKLAND DIVISION**

13
 14 SAMAN MOLLAEI, individually and on
 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 OTONOMO INC., a Delaware Corporation,

18 Defendant.
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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

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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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27
28

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 3

 A. Plaintiff’s Allegations 3

 B. Plaintiff’s Omissions 3

III. LEGAL STANDARD 5

IV. ARGUMENT 5

 A. Plaintiff Does Not—And Cannot—Allege That Otonomo Tracks
 The Location Of People 5

 B. Plaintiff Does Not—And Cannot—Allege That Otonomo Used An
 “Electronic Tracking Device Attached To” His Vehicle 9

 C. Plaintiff Does Not Allege That He Did Not Consent To The Use
 Of An Electronic Tracking Device With Respect To His Vehicle 11

 D. Plaintiff’s Threadbare Complaint Falls Far Short Of The Pleading
 Standard 12

V. CONCLUSION 13

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....2, 5, 13

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....5

In re Gilead Scis. Sec. Litig.,
536 F.3d 1049 (9th Cir. 2008)5, 13

Gonzales v. Uber Technologies, Inc.,
305 F. Supp. 3d 1078 (N.D. Cal. 2018)11, 12

In re Google Location Hist. Litig.,
428 F. Supp. 3d 185 (N.D. Cal. 2019) *passim*

Heeger v. Facebook, Inc.,
No. 18-CV-06399-JD, 2019 WL 7282477 (N.D. Cal. Dec. 27, 2019).....11

Jones v. United States,
529 U.S. 848 (2000).....9

Levine v. Entrust Grp., Inc.,
No. C 12-03959 WHA, 2013 WL 1320498 (N.D. Cal. Apr. 1, 2013).....13

Messano v. Experian Info. Sols., Inc.,
251 F. Supp. 3d 1309 (N.D. Cal. 2017)13

Moreno v. San Francisco Bay Area Rapid Transit,
No. 17-CV-02911-JSC, 2017 WL 6387764 (N.D. Cal. Dec. 17, 2017)..... *passim*

People v. Agnelli,
68 Cal. App. 5th Supp. 1 (2021)7, 9

Starr v. Baca,
652 F.3d 1202 (9th Cir. 2011)13

United States v. Nosal,
676 F.3d 854 (9th Cir. 2012) (en banc)8, 9, 10, 11

United States v. Santos,
553 U.S. 507 (2008).....8

United States v. Winkles,
795 F.3d 1134 (9th Cir. 2015)6

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STATUTES

Cal. Penal Code

§ 637.7(a)	1, 5, 6
§ 637.7(b)	2, 11
§ 637.7(d)	1, 6, 9, 10

RULES

Fed. R. Civ. P.

8	12
11	7
12(b)(6)	5

1
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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.

1 **I. INTRODUCTION**

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

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

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

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

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

20 ***Last***, Plaintiff’s pleading is incompatible with Ninth Circuit and Supreme Court standards
21 requiring that complaints plausibly support their allegations with *facts*. A plaintiff cannot just
22 baldly assert that a business is acting illegally without tethering their allegations to actual facts—
23 that is a core holding of the seminal *Iqbal* and *Twombly* cases. *See, e.g., Ashcroft v. Iqbal*, 556 U.S.
24 662, 663 (2009) (emphasizing that court need not accept as true “threadbare recitals of a cause of
25 action’s elements, supported by mere conclusory statements”). Plaintiff asks this Court to break
26 massively new ground and expand a criminal statute into the transportation ecosystem upon which
27 so many rely based on four paragraphs of conclusory allegations. Compl. ¶¶ 13-16. Plaintiff’s
28 Complaint is so lacking in factual details that it is facially implausible.

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

7 **II. BACKGROUND**

8 **A. Plaintiff's Allegations**

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

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

22 **B. Plaintiff's Omissions**

23 Plaintiff's Complaint is more notable for what it fails to allege. Despite detailed, publicly
 24 available information regarding Otonomo's services and privacy practices, the Complaint
 25 conspicuously fails to allege any facts regarding the company's collection and use of vehicle data.¹
 26

27 ¹ Otonomo offers the additional background information below based on judicially noticeable
 28 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.

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

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

10 Ex. 5 (Otonomo Privacy Policy) at 5.²

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

20 Otonomo’s Platform is specific to vehicles and the transportation ecosystem (*see* Ex. 4 at
 21 34, 37); the driver’s identity is not part of Otonomo’s business model and the company does not
 22 make efforts to identify drivers—and Otonomo further prohibits its customers from attempting to
 23 re-identify individuals based on de-identified data. Otonomo designed the Platform with driver
 24 privacy foremost in mind. *See Id.* at 33-34. In the first instance, Otonomo contractually requires
 25 OEMs to ensure that drivers explicitly consent to the sharing of vehicle attributes with third parties
 26 like Otonomo. Ex. 4 at 43. These parties interface directly with drivers, and represent to Otonomo

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

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

6 **III. LEGAL STANDARD**

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

14 **IV. ARGUMENT**

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

22 **A. Plaintiff Does Not—And Cannot—Allege That Otonomo Tracks The** 23 **Location Of People**

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

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

3 Section 637.7 prohibits tracking a person, not a vehicle. To give rise to liability, an
4 “electronic tracking device” must first be “attached to a *vehicle*” and then used “to determine the
5 location or movement of a *person*.” Cal. Penal Code § 637.7(a), (d) (emphases added). Reading
6 the statute to apply any time a vehicle’s location is tracked would render the core prohibition of
7 637.7 to be surplusage. The statute prohibits use of an “electronic tracking device,” defined as
8 “any device *attached to a vehicle* or other movable thing *that reveals its location or movement by*
9 *transmission of electronic signals*,” *id.* § 637.7(d) (emphases added), so an electronic tracking
10 device *by definition* reveals a vehicle’s location or movement. If the statute had been intended to
11 bar obtaining data about vehicle locations, the words “to determine the location or movement of a
12 person” would be unnecessary surplusage. *See, e.g., United States v. Winkles*, 795 F.3d 1134, 1146
13 (9th Cir. 2015) (rejecting reading that would be “contrary to the ‘cardinal’ canon of statutory
14 construction that courts must interpret statutes so that no clause, sentence, or word shall be
15 superfluous, void, or insignificant”).

16 Though not necessary given the statute’s plain language, the legislative history
17 overwhelmingly confirms that the statute was not intended to apply to the receipt of vehicle
18 location data from car manufacturers and other third parties. *See In re Google Location Hist. Litig.*,
19 428 F. Supp. 3d at 193 (“Federal courts apply California rules of statutory construction when
20 interpreting a California statute. The touchstone of statutory interpretation is the probable intent of
21 the Legislature.”) (internal citations omitted). The legislature was focused on criminalizing the
22 tracking of private individuals, and the recurring example in the legislative history is the situation
23 of an investigator sticking a tracking device under someone else’s bumper to follow that *person*.
24 *See Ex. 1* (Analysis by Senate Committee on Public Safety) (stating that the bill is necessary
25 because it “protects private individuals from having their movements tracked by other private
26 individuals” and that the bill “would not allow a private investigator to place a device on the
27 automobile of an individual he or she was trying to follow”); *Ex. 2* (Legislative Counsel’s Digest)
28 (“The Legislature declares that electronic tracking of a person’s location without that person’s

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

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

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

27 _____
 28 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.

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

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

15 Even if there were any ambiguity on this point in the statute (and there is not), reading the
16 statute as broadly as Plaintiff urges would raise constitutional concerns and run headlong into the
17 “long-standing principle that [courts] must construe ambiguous criminal statutes narrowly so as to
18 avoid making criminal law in Congress’s stead.” *United States v. Nosal*, 676 F.3d 854, 862–63
19 (9th Cir. 2012) (en banc) (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008)). Plaintiff’s
20 theory that collection of GPS vehicle data alone violates Section 637.7 “would make criminals of
21 large groups of people who would have little reason to suspect they are committing a ... crime.”
22 *Id.* at 859. There is no indication that the legislature intended to criminalize the receipt of GPS
23 data that enables providing roadside assistance—but under Plaintiff’s view, collecting such data
24 would become unlawful even if associated only with a vehicle rather than any particular individual.
25 Indeed, Plaintiff’s reading would potentially make criminals out of every automaker that offers
26 GPS technology in its cars. There is no reason for this Court to embrace such an unsupported
27 expansion of criminal liability—particularly where doing so would create constitutional due
28 process concerns that can be avoided by interpreting the statute in accord with its text—*i.e.*,

1 affirming that tracking a “person” means tracking a person, not a “vehicle.” *See Nosal*, 676 F.3d
 2 at 858 (choosing narrow interpretation of criminal statute in face of two plausible readings). In
 3 such circumstances “it is appropriate to avoid the constitutional question that would arise were [a
 4 court] to read” an ambiguous criminal statute broadly. *Jones v. United States*, 529 U.S. 848, 858
 5 (2000); *cf. Agnelli*, 68 Cal. App. 5th Supp. at 7 (finding constitutional infirmities with Section
 6 637.7 due to vagueness in how it applies when only one vehicle co-owner consents to tracking).

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

11 **B. Plaintiff Does Not—And Cannot—Allege That Otonomo Used An**
 12 **“Electronic Tracking Device Attached To” His Vehicle**

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

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

1 vehicle components are not devices attached to vehicles—*e.g.*, an engine is not a device attached
 2 to a vehicle, nor are brake pads, nor are air-pressure sensors, nor are climate-control systems, and
 3 so on. *See also In re Google Location*, 428 F. Supp. 3d at 194 (rejecting analogous argument “that
 4 GPS hardware, cellular radios, and WiFi chips” in manufactured cell phones “qualify as ‘electronic
 5 tracking devices’”). Otherwise, courts would be required to draw lines around what component
 6 parts of a car are the “vehicle” and what parts are separately attached “devices”—a nonsensical
 7 exercise that would turn clear statutory language into an amorphous, ambiguous provision that
 8 would not provide clear notice about what is in scope of a criminal law. *See Nosol*, 676 F.3d at
 9 863 (rule of lenity “ensures that citizens will have fair notice of the criminal laws”).

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

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

- 26 • In *In re Google Location Hist. Litig.*, “Plaintiffs argue[d] [that] CIPA’s ‘attach’ does
 27 not require Defendant to have personally ‘placed’ something on a moveable thing
 28 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

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

- 3 • In *Moreno*, the Court rejected this Plaintiff’s counsel’s attempt to push the very same
4 theory that software could trip Section 637.7—according to then-Magistrate Judge
5 Jacqueline Scott Corley, “[a] device could be ‘attached to’ a moveable object, but
6 software, such as the App, cannot.” 2017 WL 6387764, at *5.
- 7 • And when Judge James Donato addressed this issue, he reached the same conclusion:
8 Section 637.7’s plain language “does not accommodate technology like a mobile app
9 on a digital device . . . [the] language contemplates things like a freestanding GPS unit
10 hidden on a car, but not a downloaded Facebook app” *Heeger v. Facebook, Inc.*,
11 No. 18-CV-06399-JD, 2019 WL 7282477, at *3 (N.D. Cal. Dec. 27, 2019).

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

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

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

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

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

28 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

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

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

10 Any collection, processing, and use of personal data above and beyond that
 11 needed to provide [services from the vehicle manufacturer described in the
 12 manual] must always be based on a legal permission, contractual
 13 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.

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

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

22 **D. Plaintiff’s Threadbare Complaint Falls Far Short Of The Pleading Standard**

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

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

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

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

15 V. CONCLUSION

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

18 Respectfully submitted,

19 DATED: June 13, 2022

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25 ⁵ *See, e.g., In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted)
 26 (court need not “accept as true allegations that are merely conclusory, unwarranted deductions of
 27 fact, or unreasonable inferences”); *Messano v. Experian Info. Sols., Inc.*, 251 F. Supp. 3d 1309,
 28 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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10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **OAKLAND DIVISION**
14

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

17 Plaintiff,

18 v.

19 OTONOMO INC., a Delaware Corporation,

20 Defendant.
21
22

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

**[PROPOSED] ORDER GRANTING
DEFENDANT OTONOMO INC.'S
MOTION TO DISMISS CLASS ACTION
COMPLAINT**

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THIS MATTER comes before this Court upon Defendant Otonomo Inc.'s Motion to Dismiss Class Action Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6). After full consideration, IT IS HEREBY ORDERED THAT:

Defendant's Motion to Dismiss Class Action Complaint is GRANTED. Plaintiff Saman Mollaei's claim is accordingly DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: _____

By: _____

HONORABLE JON S. TIGAR
United States District Judge