Nos. 16-2378 and 16-2528

United States Court of Appeals
for the
Eighth Circuit

Melissa Alleruzzo, Heidi Bell, Rifet Bosnjak, John Gross, Kenneth Hanff, David Holmes, Steve McPeak, Gary Mertz, Katherin Murray, Christopher Nelson, Carol Puckett, Alyssa Rocke, Timothy Roldan, Ivanka Soldan, Melissa Thompkins, and David Young
Appellants/Cross-Appellees,

v.

Supervalu Inc., AB Acquisition LLC, and New Albertson's, Inc.
Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Case No. 14-md-02586-ADM-TNL
Hon. Ann D. Montgomery, United States District Judge

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SUMMARY OF THE CASE

This appeal arises from an order dismissing Plaintiffs-Appellants' claims under Rule 12(b)(1) for lack of Article III standing. Plaintiffs sued two grocery retailers under state statutory and common law theories following two criminal intrusions into Defendants-Appellees' computerized payment card processing networks. Sixteen named plaintiffs failed to allege they suffered a single, actual or imminent injury-in-fact fairly traceable to the Intrusions.

The district court correctly followed the vast consensus of courts to address data breach lawsuits, and reasoned that absent allegations of actual or imminent harm, neither an increased risk of future harm nor the mitigation of the risk of such non-imminent harm is sufficient to clear the Article III standing hurdle. Plaintiff Holmes's vague allegation that he suffered a single fraudulent charge does not give rise to standing. And Plaintiffs cannot manufacture standing simply by purporting to plead a breach of implied contract supported only by conclusory allegations.

Even if the court had jurisdiction to adjudicate the Complaint, Plaintiffs did not plausibly state a claim on any of their causes of action as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Appellees believe that twenty minutes of argument per side is sufficient to address these issues.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees Supervalu Inc., New Albertson's, Inc., and AB Acquisition LLC submit the following corporate disclosure statement. Supervalu Inc. is a Delaware corporation with no parent corporation. No publicly-held company owns more than 10% of the shares of Supervalu Inc. New Albertson's, Inc. is a wholly-owned subsidiary of Albertsons Companies, LLC. Albertsons Companies, LLC's parent corporation is AB Acquisition LLC. No publicly-held company owns more than 10% of AB Acquisition LLC.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants filed a putative class action in which they invoked the jurisdiction of the district court under 28 U.S.C. § 1332. CAC ¶ 14.[1] The district court entered an order dismissing Plaintiffs-Appellants' Consolidated Amended Class Action Complaint (the "Complaint" or "CAC") on January 7, 2016, and entered judgment on the same date. P-ADD-1-17, JA-131. Following the district court's entry of judgment, Plaintiffs-Appellants timely moved for relief under Federal Rule of Civil Procedure 59(e) (JA-132), and the district court denied that motion on April 20, 2016. JA-227.

This Court has jurisdiction over the appeal and the cross-appeal pursuant to 28 U.S.C. § 1291. Plaintiffs-Appellants timely filed their notice of appeal on May 18, 2016, seeking appellate review of the district court's January 7, 2016 judgment. JA-235. Defendants-Appellees timely filed their notice of cross-appeal on May 31, 2016. JA-243.

[1] All references to the Joint Appendix are abbreviated as "JA-", followed by the relevant page number(s). The Complaint begins at JA-12, and specific allegations within the Complaint are cited herein as "CAC-" followed by the relevant paragraph(s). Citations to the Brief of Plaintiffs-Appellants Melissa Alleruzzo, et al. are abbreviated as "Pls.' Br." References to Plaintiffs' addendum are abbreviated as "P-ADD-". References to Defendants' addendum filed herewith are abbreviated as "D-ADD-".

STATEMENT OF THE ISSUES

1. Whether Plaintiffs plead a certainly impending, imminent future injury under *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), based on a possibility that third-party hackers might have stolen their payment card data from Defendants, that such third-party hackers might at some point in the future sell it to other third-party criminals, that the other third-party criminals might at some point after that use it to commit fraud, and that such fraud might result in harm to Plaintiffs.

Most Apposite Cases: *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Johnson v. Missouri*, 142 F.3d 1087 (8th Cir. 1998); *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011).

2. Whether steps Plaintiffs claim to have taken to mitigate the possibility that they might – at some unknown point in the future – experience a fraudulent charge on their payment cards constitute a cognizable injury-in-fact under *Clapper*.

Most Apposite Cases: *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011); *New Creation Fellowship v. Town of Cheektowaga*, 164 F. App'x 5 (2d Cir. 2005); *In re Barnes & Noble Pin Pad Litig.*, No. 12-cv-8617, 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013).

3. Whether Plaintiff Holmes may argue now that he has plausibly pled an actual, fairly traceable injury based on a single suspicious charge on his payment card, even though (a) he did not plead an actual injury in the Complaint; (b) he does not allege that the charge resulted from the intrusions into Defendants' networks; (c) he does not allege that he even shopped at Defendants' stores during the periods when the intrusions occurred; and (d) he does not allege that the bank that issued his card held him responsible for the charge.

Most Apposite Cases: *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655 (8th Cir. 2012); *People To End Homelessness, Inc. v. Develco Singles Apartments Assocs.*, 339 F.3d 1 (1st Cir. 2003); *Torres v. The Wendy's Co.*, 6:16-cv-210-Orl-40DAB, 2016 U.S. Dist. LEXIS 96947 (M.D. Fla. July 15, 2016); *Peters v. St. Joseph Servs. Corp.*, 74 F. Supp. 3d 847 (S.D. Tex. 2015).

4. Whether Plaintiffs adequately plead the existence of an implied contract for data security and, if so, whether they can establish injury-in-fact solely on that basis, even though they do not allege that any harm resulted from the alleged breach.

Most Apposite Cases: *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Stalley v. Catholic Health Initiatives*, 509 F.3d 517 (8th Cir. 2007); *Remijas*

v. Neiman Marcus Grp., 794 F.3d 688 (7th Cir. 2015); *Hancock v. Urban Outfitters*, No. 14-7047, 2016 WL 3996710 (D.C. Cir. July 26, 2016).

5. Whether Plaintiffs plausibly plead state common law and statutory claims for which relief can be granted.

Most Apposite Cases: *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184 (8th Cir. 1996); *Krottner v. Starbucks Corp.*, 628 F. 3d 1139 (9th Cir. 2010); *E-Shops Corp. v. U.S. Bank Nat'l Ass'n*, 678 F.3d 659 (8th Cir. 2012).

STATEMENT OF THE CASE

Defendants-Appellees Supervalu, Inc., AB Acquisition LLC, and New Albertson's, Inc. (together, "Defendants") own and operate several grocery store brands, where they accept payment cards for the purchase of goods. CAC ¶¶ 2-3. Plaintiffs-Appellants Alyssa Rocke, Steve McPeak, Katherin Murray, Timothy Roldan, Darla Young, Kenneth Hanff, Ivanka Soldan, Rifet Bosnjak, Melissa Alleruzzo, Carol Puckett, Gary Mertz, Melissa Thompkins, Christopher Nelson, Heidi Bell, John Gross, and David Holmes (together, "Plaintiffs") brought this putative class action, alleging various forms of "injury" arising out of two instances in 2014 during which criminal hackers accessed – but did not necessarily extract anything from – the portion of the computer network that processes Defendants' payment card transactions (the "Intrusions"). CAC ¶¶ 4-5; *see also* JA-61-84.

On August 14, 2014, Defendants first announced that criminal hackers apparently had unauthorized access to the network between June 22 and July 17, 2014. CAC ¶¶ 4-5; *see* also JA-62, 70. Defendants investigated the intrusion with the assistance of forensic experts, and took various steps to notify law enforcement and provide lists of potentially-affected store locations. JA-61-72. On September 29, 2014, Defendants announced a second intrusion (CAC ¶¶ 6-7), and took similar steps. JA-73-84. Defendants underscored that "there has not been a determination

that any payment card data was in fact stolen as a result of either incident" (JA-82), and offered consumers one year of identity protection services. JA-63, 70, 75, 82.

I. PLAINTIFFS' ALLEGATIONS OF INJURY

The Complaint offers an abundance of detail about the implications of data breaches suffered by *other* companies. *See* CAC ¶¶ 46-81. However, the Complaint fails to allege a concrete injury suffered by any Plaintiff as a result of the Intrusions into Defendants' networks.[2] *See id.* at ¶¶ 16-31. Plaintiffs provided only payment card data to Defendants; Defendants had no access to other types of personal information, such as social security numbers. *See* CAC ¶¶ 1, 16-31. As to Plaintiffs' payment cards, the Complaint fails to allege a single unreimbursed fraudulent charge. No Plaintiff alleges actual injury arising from the misuse of his or her payment card data as a result of the Intrusions.[3] Indeed, the Complaint

[2] Plaintiffs asserted a number of grounds for standing in the Complaint and before the district court that they have abandoned on appeal, including: (1) the alleged diminished value and deprivation of the value of their payment card data; (2) untimely or inadequate notification; (3) invasion of privacy; (4) breach of the confidentiality of their payment card data; and (5) lost benefit of the bargain. *See* CAC ¶¶ 32, 82. Because Plaintiffs declined to raise these theories of standing on appeal, they are waived. *Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008) ("Claims not raised in an opening brief are deemed waived."); *Borough v. Duluth, Missabe & Iron Range Ry. Co.*, 762 F.2d 66, 68 n.1 (8th Cir. 1985).

[3] Plaintiff Holmes is the only named plaintiff who even alleges suspicious account activity, but he did not allege actual injury, or any causal connection between the "fraudulent charge on his credit card statement" and the Intrusions, nor did he allege any out-of-pocket loss. *See* CAC ¶ 31. Mr. Holmes does not even allege that he shopped at any of Defendants' locations during the compromised time periods, let alone the date or amount of the allegedly fraudulent charge. *See id.*

pleads no factual basis – beyond conclusory conjecture – from which this Court can conclude that the payment card data was even stolen. *Compare* CAC ¶ 9 *with* JA-61-84. Half of the named plaintiffs fail to allege they shopped at Defendants' locations during the time periods associated with the Intrusions. CAC ¶¶ 23-29, 31. No Plaintiff quantified time allegedly spent "monitoring . . . account information to guard against potential fraud." CAC ¶¶ 16-31. Instead, Plaintiffs' alleged injuries reflect only generalized annoyances and inconveniences of a type and character that virtually all courts have held are insufficient to satisfy Article III.

II. THE LITIGATION

On August 18, 2014, five plaintiffs filed suit in the Southern District of Illinois. By November 2014, a total of four complaints were pending in three district courts. On December 16, 2014, the Judicial Panel on Multidistrict Litigation centralized the four complaints in the United States District Court for the District of Minnesota, for coordinated pre-trial proceedings. JA-9.

On June 16, 2015, the sixteen named plaintiffs filed the Consolidated Amended Class Action Complaint, alleging six causes of action. JA-12, 39-51. Defendants moved to dismiss on August 10, 2015, on the grounds that the Complaint was fatally deficient and subject to dismissal under Fed. R. Civ. P. 12(b)(1) for want of Article III standing, and under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. JA-55-57. Following

briefing and oral argument, the district court issued a Memorandum Opinion and Order on January 7, 2016, concluding that dismissal without prejudice under Rule 12(b)(1) was appropriate based on "Plaintiffs' failure to plead specific facts to demonstrate they have standing to bring this suit." P-ADD-17. The district court did not reach Defendants' arguments for dismissal with prejudice for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Id.* Judgment of dismissal entered the same day. JA-131.

Plaintiffs subsequently moved for relief under Fed. R. Civ. P. 59(e), arguing the district court made errors of law and fact, and claiming that they had identified "new evidence" in support of standing. JA-132-33. Plaintiffs appended the declaration of Greg Anderson of the University of Illinois Employees Credit Union ("UIECU") ("Anderson Decl.") to their Rule 59(e) motion (JA-225), and later appended the declarations of Mark Malinowski of the Raritan Bay Federal Credit Union (P-ADD-23), and Darren K. Williams of United Bankshares, Inc. (P-ADD-24) to their reply (together, the "Declarations"). On April 20, 2016, the district court denied Plaintiffs' Rule 59(e) motion, concluding (1) there was no manifest error of fact or law; and (2) Plaintiffs failed to satisfy the standard for a motion premised on the discovery of "new evidence." JA-227-34.

Plaintiffs timely filed their notice of appeal on May 18, 2016, seeking appellate review of the district court's January 7, 2016 judgment. JA-235.

Plaintiffs have not, however, appealed the district court's denial of their Rule 59(e) motion.[4] *Id.*; *see also* Pls.' Br. at 8 ("Plaintiffs seek review of the district court's order, and the resulting judgment entered, granting Defendants' motion to dismiss and dismissing Plaintiffs' CAC for lack of subject matter jurisdiction."). Defendants timely filed their notice of cross-appeal on May 31, 2016, seeking appellate review of their arguments under Rule 12(b)(6) in the event this Court were to reverse the district court's judgment with respect to standing. JA-243.

III. STANDARD OF REVIEW

The Court of Appeals "review[s] a decision dismissing a complaint for lack of standing de novo, construing the allegations of the complaint, and the reasonable inferences drawn therefrom, most favorably to the plaintiff." *Glickert v. Loop Trolley Transp. Dev. Dist.*, 792 F.3d 876, 880 (8th Cir. 2015) (internal quotations and citations omitted). "A party invoking federal jurisdiction has the burden of establishing standing . . . by alleging and eventually proving he has suffered an injury-in-fact traceable to the defendant's challenged action and redressable by the court's favorable decision." *Shain v. Veneman*, 376 F.3d 815,

[4] Nonetheless, Plaintiffs rely heavily upon the Declarations filed in support of their Rule 59(e) motion to support their claim for Article III standing. These Declarations were not submitted to the district court when it rendered the judgment from which Plaintiffs now appeal. Despite this, Plaintiffs repeatedly cite to this "new evidence" in advance of their arguments before this Court. For the reasons articulated *infra* at 20-23, this Court cannot properly consider the Declarations and, even if this were not so, the Declarations do not support standing.

817–18 (8th Cir. 2004) (affirming district court's dismissal of complaint for lack of standing where plaintiff "failed to allege even an imminent injury" because the threatened harm was "speculative and unpredictable") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). If a plaintiff fails to allege that he suffered any injury, "there is no standing and the court is without jurisdiction to consider the action." *Tarsney v. O'Keefe*, 225 F.3d 929, 934 (8th Cir. 2000).

When a defendant challenges Article III standing based on the insufficiency of the allegations in the complaint, the court applies the same standard of review as a motion to dismiss under Rule 12(b)(6). *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). To satisfy that standard, Plaintiffs must proffer more than mere labels and conclusions, and instead must assert facts "that affirmatively and plausibly suggest that the pleader has [standing], rather than facts that are merely consistent with that right." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The district court did not reach Defendants' motion to dismiss under Rule 12(b)(6) below, but this Court is empowered to rule *de novo* on alternative grounds that were briefed, but not decided, below. *See, e.g., Wycoff v. Menke*, 773 F.2d 983, 986 (8th Cir. 1985). *Cf. Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 697 (7th Cir. 2015). To withstand a motion to dismiss under Rule 12(b)(6), Plaintiffs must proffer more than mere labels and conclusions, and instead must allege sufficient factual matter to support a right to relief beyond the

speculative level. *Twombly*, 550 U.S. at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

SUMMARY OF THE ARGUMENT

Plaintiffs argue that the Intrusions will "necessarily cause" them "serious and permanent harm." Pls.' Br. at 9. However, it has been two years since the Intrusions and no harm has materialized, and Plaintiffs plead no factual allegations indicating that it is coming. The bottom line is that sixteen individuals purport to bring an action on behalf of a nationwide class, yet not one of them pleads an actual or certainly impending injury-in-fact that is fairly traceable to the Intrusions.

Plaintiffs rely on strained constructions of Article III standing law to argue that an abstract risk of potential future harm constitutes "certainly impending" injury-in-fact. Plaintiffs ask this Court to endorse the position that they face imminent, certainly impending harm solely from the alleged theft of their personal identifying information ("PII"). And yet, Plaintiffs have not plausibly alleged that their payment card data was stolen at all. Instead, Plaintiffs hang their hats upon conclusory allegations, conjecture, and improperly adduced declarations. The district court joined the overwhelming majority of federal courts that have properly concluded that an ill-defined, speculative risk of future harm simply is not sufficient to establish injury-in-fact. *See* P-ADD-6-13; JA-230-31.

In full recognition of their failure to plead imminent, certainly impending future harm, Plaintiffs resort on appeal to two additional theories of injury that are nowhere alleged in the Complaint. First, Plaintiffs now contend that Mr. Holmes' purported fraudulent charge constitutes an actual injury fairly traceable to the Intrusions. Pls.' Br. at 6, 27-28. But even if they had made that allegation in the Complaint (which they did not), Plaintiffs do not allege or even argue that Plaintiff Holmes shopped during the period of the Intrusions or that the charge was unreimbursed. As such, their new theory does not support Article III standing. Second, Plaintiffs argue that merely asserting a claim for breach of implied contract – based on two unsupported and conclusory allegations in a sixty-page Complaint – automatically gives rise to Article III standing. Pls.' Br. at 31-33. But there is no legal support or policy reason for the notion that any plaintiff can establish standing to sue in federal court merely by uttering the words "breach of implied contract."

The Complaint's defects do not end at Plaintiffs' failure to plead facts sufficient to establish standing. The Complaint is also riddled with fatal pleading defects rendering Plaintiffs unable to state a claim. Though the district court's dismissal was without prejudice, this Court is empowered to affirm the dismissal with prejudice on alternative grounds. Plaintiffs failed to plead legally cognizable claims for the six causes of action they assert. Accordingly, if this Court concludes

the Plaintiffs plead facts sufficient to establish standing, it can dismiss Plaintiffs' claims with prejudice for failure to state a claim.

For the foregoing reasons, this Court should affirm the district court's judgment. Or, in the alternative, it should hold that the Complaint fails to state a cognizable claim and direct the district court to enter dismissal with prejudice.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL FOR LACK OF ARTICLE III STANDING UNDER RULE 12(B)(1).

A. Plaintiffs Fail to Allege Any Actual or Certainly Impending Injury.

Plaintiffs bear the burden of pleading facts sufficient to establish subject-matter jurisdiction, including the "prerequisite" showing of Article III standing. *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006). Plaintiffs must allege an injury in fact that is "fairly traceable to the challenged action" and is "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). The injury must be "concrete, particularized, and actual or imminent." *Id.* Plaintiffs attempt to extend their case on appeal from allegations of future injury to include claims of actual injury sustained on the part of one plaintiff, David Holmes. Pls.' Br. at 6, 27-31. But Plaintiffs failed to plead actual injury in the Complaint, and therefore, that theory is not sustainable here. CAC ¶¶ 32, 82. Moreover, Plaintiff Holmes does not assert sufficient facts to demonstrate a concrete, particularized injury-in-fact (*see infra* at 32-36), and he would lack standing on the basis of actual injury even if he had alleged it in the Complaint.

As for Plaintiffs' allegations of future injury, Plaintiffs' allegations are woefully deficient, for the reasons stated herein.

1. Supreme Court and Eighth Circuit Precedent Hold that "Certainly Impending" Is the Standard for Establishing Future Injury-in-Fact.

Allegations of potential future harm, or an "objectively reasonable likelihood" of harm, are insufficient; where a plaintiff alleges a future injury, the injury must be "certainly impending." *Id.*; *see also Johnson v. Missouri*, 142 F.3d 1087, 1089 (8th Cir. 1998). This Court has repeatedly "recognized that a threatened injury must be certainly impending to constitute injury in fact," *Miller v. City of St. Paul*, 823 F.3d 503, 507-08 (8th Cir. 2016) (quoting *Johnson*, 142 F.3d at 1089), and the Supreme Court affirmed the application of that standard in *Clapper*.[5] 133 S. Ct. at 1147. "Standing theories that rest on speculation about the decisions of independent actors," or that "rel[y] on a highly attenuated chain of

[5] Perhaps recognizing that their Complaint fails to satisfy the high jurisdictional bar set by the "certainly impending" standard, Plaintiffs attempt to gloss over the weight of Supreme Court and Eighth Circuit authority and assert that a "substantial risk" of future harm suffices to establish injury-in-fact. *See* Pls.' Br. at 14-18 (citing *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)). It is far from certain that any such separate standard exists at all, as this Court has never applied it, and instead has correctly continued to apply the "certainly impending" standard for imminent injury even since *Driehaus* was decided in 2014. *See*, *e.g.*, *Balogh v. Lombardi*, 816 F.3d 536, 541 (8th Cir. 2016); *Miller*, 823 F.3d at 507-08. In any event, *Driehaus* used the term only in the context of applying the relaxed "credible threat" standard for pre-enforcement constitutional challenges to state action that could result in criminal prosecution, a context that is obviously inapplicable here. 134 S. Ct. at 2431. In its subsequent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (*as revised* May 24, 2016), the Supreme Court cited *Clapper*, not *Driehaus*, as supplying the relevant standard for future harm in a suit against a private entity.

possibilities," do "not satisfy the requirement that the threatened injury must be certainly impending." *Id.* at 1148, 1150.

2. Plaintiffs' Allegations of Threatened Harm from Future Misuse of Payment Card Data Fail to Satisfy the Certainly Impending Standard.

Plaintiffs premise their claim of injury-in-fact on a remote and speculative increased risk of future harm. In the data breach context, courts routinely reject the contention that the "risk of future harm" is sufficient to show Article III injury-in-fact. *See, e.g., Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) ("Most courts have held that such plaintiffs lack standing because the harm is too speculative. We agree with the holdings in those cases.") (internal citation omitted); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1053 (E.D. Mo. 2009); *Torres v. The Wendy's Co.*, No. 6:6:16-cv-210-Orl-40DAB, 2016 U.S. Dist. LEXIS 96947, at *9-13 (M.D. Fla. July 15, 2016); *Chambliss v. Carefirst, Inc.*, No. RDB-15-2288, 2016 WL 3055299 at *5 (D. Md. May 27, 2016) (appeal pending); *Whalen v. Michael Stores Inc.*, No. 14-CV-7006 (JS)(ARL), 2015 WL 9462108, at *5 (E.D.N.Y. Dec. 28, 2015) (appeal pending); *Peters v. St. Joseph Servs. Corp.*, 74 F. Supp. 3d 847, 857 (S.D. Tex. 2015); *Galaria v. Nationwide Mut. Ins..*, 998 F. Supp. 2d 646, 654-57 (S.D. Ohio 2014) (appeal pending); *In re Horizon Healthcare Servs. Data Breach Litig.*, No. 13-7418 (CCC), 2015 WL 1472483, at *5-7 (D.N.J. Mar. 31, 2015) (appeal pending); *In re Zappos.com, Inc.*,

108 F. Supp. 3d 949, 958-59 (D. Nev. 2015); *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litg.*, 45 F. Supp. 3d 14, 26-27 (D.D.C. 2014); *In re Barnes & Noble Pin Pad Litig.*, No. 12-cv-8617, 2013 WL 4759588 at *4-5 (N.D. Ill. Sept. 3, 2013); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08 Civ. 6060 (RMB) (RLE), 2010 WL 2643307, at *7-8 (S.D.N.Y. June 25, 2010). *See also U.S. Hotel & Resort Mgmt., Inc. v. Onity, Inc.*, No. CIV. 13-1499 SRN/FLN, 2014 WL 3748639, at *5 (D. Minn. July 30, 2014) (appeal dismissed Jan. 27, 2015).

As the U.S. Court of Appeals for the Third Circuit explained in *Reilly*:

> [W]e cannot now describe how [plaintiffs] will be injured in this case without beginning our explanation with the word "if": *if* the hacker read, copied, and understood the hacked information, and *if* the hacker attempts to use the information, and *if* he does so successfully, only then will Appellants have suffered an injury.

664 F.3d at 43 (concluding plaintiffs' alleged risk of future injury depends "on entirely speculative, future actions of an unknown third-party"). So, too, here. Only *if* hackers succeeded in stealing Plaintiffs' payment card data, and *if* third parties become aware of the stolen information, and *if* they reveal their interest in it, and *if* they actually take steps to acquire and use the information to Plaintiffs' detriment, and *if* they are successful in doing so, and *if* Plaintiffs became personally financially responsible for the misuse, then and only then will Plaintiffs suffer any injury from the Intrusions.

In an effort to manufacture a certainly impending injury, Plaintiffs contend that the district court was required to accept the Complaint's conclusory allegation that their payment card data was stolen. *See* Pls.' Br. at 19-20. But on a motion to dismiss, the court is not required to accept conclusory allegations at face value. Rather, at the pleading stage, the Complaint must include facts sufficient to support a plausible inference for the case to proceed. *See Iqbal,* 556 U.S. at 678. "While general factual allegations of injury might suffice to establish standing in some instances, general allegations of *possible* or *potential* injury do not." *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009); *see also Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 n.5 (8th Cir. 2012) ("While a court should construe the complaint liberally in the light most favorable to the plaintiff, and general factual allegations of injury resulting from the defendant's conduct may suffice, it is still necessary to include some well-pleaded factual allegations to support the claim.") (internal quotations and citations omitted).

Plaintiffs' Complaint relies upon a combination of "information and belief" and speculation to allege that Plaintiffs' payment card data was stolen. They allege that the Intrusions "enabled the hackers to steal" Plaintiffs' payment card data, and go on to allege, on information and belief, that the "stolen" card information is

available to fraudsters and counterfeiters on the Internet. CAC ¶¶ 8-9.[6] But none of the allegations in the Complaint asserts any *factual* basis for Plaintiffs' belief that their payment card data was stolen. To the contrary, Plaintiffs' brief indicates that they do not know whether their payment card data was actually stolen, but rather assume as much based on general information they have obtained about "hackers" and the purported typical purposes of malware in general, none of which is specific to the Intrusions. Plaintiffs' speculation on the methods hackers may have used to effectuate the Intrusion (CAC ¶¶ 38-42), is not equivalent to a specific allegation showing that the hackers *succeeded* in extracting payment card data.

This is not a case where Plaintiffs allege a widespread misuse of data, a barrage of stolen identity claims (or even one), or any defendant's acknowledgement that a theft of data has occurred. To the contrary, the press releases incorporated into Plaintiffs' Complaint state there was no determination that any payment card data was stolen. JA-62, 63, 70, 74-75, 82. While Plaintiffs protest the district court's citation to those press releases (*see* Pls.' Br. at 11, 19-20), the court was correct in doing so because Plaintiffs incorporated the press releases into the Complaint in an attempt to bolster their allegation that the Intrusions might

[6] As the district court aptly observed, plaintiffs should not be permitted to make this allegation on "information and belief," particularly given the facts of third parties' use or sale of payment card data is not peculiarly within Defendants' possession or control. P-ADD-12, n.3 (citing *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)).

have been more expansive than initially believed. *Id.* at ¶ 37. Plaintiffs cannot have it both ways, at once referencing and relying upon the releases in support of their own claims and arguing that the Court cannot consider them when the statements therein demonstrate their own failure plausibly to allege actual theft of payment card data. By relying on the press releases, Plaintiffs incorporated them into their complaint by reference. *See Moses.com Secs., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1063 n.3 (8th Cir. 2005) (finding press release was "incorporated into the pleadings by reference" and appropriate to consider on motion to dismiss where complaint "specifically mentioned it as a ground for [plaintiff's] claims"). The releases are "necessarily embraced by the pleadings," and the Court is permitted to construe statements in the releases as true. *See Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999).

It is ironic that, at the same time they contend (erroneously) that the district court improperly considered Defendants' press releases, Plaintiffs try to place impermissible materials before this Court in the form of Declarations purportedly obtained from financial institutions, in a belated attempt to show that their payment card data was stolen. *See* Pls.' Br. at 2, 6, 18, 19, 26. These Declarations were not part of the record when Plaintiffs filed their Complaint, nor when the district court decided the motion. Instead, Plaintiffs waited until after the district court entered judgment before bringing these Declarations before the court, attaching the

Anderson Declaration to a Rule 59(e) motion to alter or amend the judgment, and two more declarations to their reply brief. JA-225; P-ADD-23-25.

An appellate court cannot consider evidence that was offered for the first time after judgment was entered. *Garner v. Arvin Indus. Inc.*, 77 F.3d 255, 258-59 (8th Cir. 1996) (refusing to consider affidavits cited on appeal where plaintiff had offered them for the first time in support of a Rule 59(e) motion denied by the district court); *see also United States ex rel. Onnen v. Sioux Falls Indep. School Dist. No. 49-5*, 688 F.3d 410, 413 (8th Cir. 2012) (declining to consider new evidence that was not before the district court). Likewise, "[a]rguments not made to the district court until a Rule 59(e) motion that the district court declines to address are waived." *See Williams v. Decker*, 767 F.3d 734, 741 n.2 (8th Cir. 2014). Plaintiffs neither appeal the district court's decision on their Rule 59(e) motion, nor argue the district court was required to revisit its dismissal order in light of the Declarations. *See* JA-225; Pls.' Br. at 8 ("Plaintiffs seek review of the district court's order, and the resulting judgment entered, granting Defendants' motion to dismiss and dismissing Plaintiffs' CAC for lack of subject matter jurisdiction."). They have waived any ability to enter the Declarations into the

record properly, and it is plainly inappropriate for Plaintiffs to present the Declarations for this Court's consideration.[7]

Nor do the Declarations even support Plaintiffs' contention that their payment card data was stolen. Though the Declarations contend that Visa sent Compromised Account Management System ("CAMS") alerts regarding "Visa credit cards compromised by the Breach" (*e.g.*, JA-225), such alerts do not provide evidence of actual theft or fraud of the "alerted-on accounts." *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 166 n.3 (3d Cir. 2008) ("The alert is purely informational and does not mean that the accounts listed had been compromised."). The Declarations are inadmissible hearsay, and in any event do not allege that the CAMS alerts referenced any accounts belonging to Plaintiffs, or that Plaintiffs were even customers at the relevant financial institutions.[8] The

[7] Plaintiffs may contend that they made reasonable efforts to obtain this information from Defendants prior to entry of judgment. But the district court correctly rejected this argument when it denied the Rule 59(e) motion, noting that Plaintiffs did not serve any discovery on Defendants until nearly two weeks *after* they filed their opposition to Defendants' motion to dismiss, and that Plaintiffs received Defendants' discovery responses well before judgment was entered. JA-232. Moreover, the Declarations and the information contained therein would not have been in Defendants' possession in any event.

[8] All of these facts distinguish the Declarations from the defendant's disclosure of 9,200 known fraudulent uses in *Neiman Marcus*. 794 F.3d at 690. Here, Plaintiffs offer only the hearsay recitation of what the CAMS alerts purportedly demonstrate. What is more, these Declarations state only that a small number of payment cards were misused, divorced from any information about the ordinary extent to which these few credit unions' customers experience fraud.

Declarations do not even indicate that the degree of alleged fraud was incrementally greater than the baseline level of fraud in any pool of payment cards. "In class action litigation, the named plaintiff purporting to represent a class must establish that he, personally, has standing to bring the cause of action. If the named plaintiff cannot maintain the action on his own behalf, he may not seek such relief on behalf of the class." *Amburgy*, 671 F. Supp. 2d at 1050 (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Hall v. Lhaco, Inc.*, 140 F.3d 1190, 1196-97 (8th Cir. 1998)).[9] The Court should thus disregard the Declarations and the arguments in Plaintiffs' brief reliant upon them.

Even if Plaintiffs had adequately alleged that their payment card data was stolen, they still fail to allege that the theft poses a certainly impending, imminent harm sufficient to constitute an injury-in-fact. Plaintiffs can only speculate that third parties will become aware of the purportedly stolen information and reveal their interest in it; that they will take steps to acquire and actually use the information to Plaintiffs' detriment; that they will be successful in doing so; and

[9] The Declarations also fail to show that any of the alleged fraud became the financial responsibility of consumers, as opposed to the financial institutions. To the contrary, the Anderson Declaration acknowledges that the charges at issue were all "absorbed by UIECU," (JA-226, ¶ 6), meaning no UIECU consumer suffered any injury. *See Whalen*, 2015 WL 9462108, at *3 (reimbursed credit card fraud insufficient for standing); *Wendy's*, 2016 U.S. Dist. LEXIS 96947, at *5-9; *Burton v. MAPCO Express, Inc.*, 47 F. Supp. 3d 1279, 1284-85 (N.D. Ala. 2014); *Hammond*, 2010 WL 2643307, at *8; *see also St. Joseph*, 74 F. Supp. 3d at 857 (no standing because "Discover never charged [plaintiff] for the fraudulent purchase identified in the Complaint").

that any resulting charges will not be reimbursed by Plaintiffs' financial institutions. Such a "highly attenuated chain of possibilities" is insufficient to support standing. *Clapper*, 133 S. Ct. at 1148.

Clapper rejects standing premised on "speculation about the decisions of independent actors." *Id.* at 1150. Numerous courts throughout the country have held that in data breach actions, even if their data had been stolen, plaintiffs may not rely on speculation that third-party criminals will misuse that information. *See, e.g.*, *Reilly*, 664 F.3d at 42, 45 (noting that theft alone is insufficient, because "in data breach cases where no misuse is alleged . . . there has been no injury—indeed, no change in the status quo;"); *Zappos*, 108 F. Supp. 3d at 959 (no certainly impending identity theft where plaintiffs' "speculation" regarding future harm was "based entirely on the decisions of capabilities of an independent, and unidentified, actor"); *SAIC*, 45 F. Supp. 3d at 25 (no standing where plaintiffs' allegations of potential future identity theft were "entirely dependent on the actions of an unknown third party"); *Horizon*, 2015 WL 1472483, at *6 (no standing where plaintiffs' alleged "future injuries stem from the conjectural conduct of a third party bandit"); *Galaria*, 998 F. Supp. 2d at 655 (rejecting standing on the basis of plaintiffs' allegations of theft because "whether Named Plaintiffs will become victims of theft or fraud or phishing is entirely contingent on what, if anything, the third party criminals do with that information"); *Duqum v. Scottrade*, No. 4:15-

CV-1537-SPM, 2016 WL 3683001, at *4-5 (E.D. Mo. July 12, 2016) (denying standing even where data had been stolen, because any eventual harm depended on the actions of third-party criminals); *St. Joseph*, 74 F. Supp. 3d at 857 (same); *Fernandez v. Leidos*, 127 F. Supp. 3d 1078, 1087 (E.D. Cal. 2015) (same); *Attias v. Carefirst, Inc.*, No. 15-cv-00882 (CRC), 2016 U.S. Dist. LEXIS 105480, at *9-15 (D.D.C. Aug. 10, 2016) (same).

Moreover, even if Plaintiffs had adequately pleaded *that* the harm from purportedly stolen data is certainly impending, they have failed to plead *when* that harm will occur. Where, as here, plaintiffs have failed to allege that any future harm will materialize "imminently," courts have not found standing. *See, e.g.*, *Clapper*, 133 S. Ct. at 1147 (injury must be "actual or imminent"); *Zappos*, 108 F. Supp. 3d at 959 (future harm from data breach must be "*immediate*" to create standing). As the district court recognized, more than two years have elapsed since the Intrusions, and the sixteen named Plaintiffs have put forth only a single purportedly fraudulent charge with no alleged link to the Intrusions.[10] The passage

[10] The district court recognized that in today's world, credit card fraud is an unfortunate but common occurrence. There can be no reasonable inference that a single charge on an unspecified date and of unspecified amount to one customer over the course of two years is fairly traceable to the Intrusions. CAC ¶ 31; *see also* P-ADD-10, 13. Holmes alleges he canceled the payment card in question, meaning he is not subject to any future risk of harm at all. *See Irwin v. Jimmy John's Franchise, LLC*, No. 14-2275, 2016 WL 1355570, at *6 (C.D. Ill. Mar. 29, 2016) (no standing where plaintiff had cancelled her credit card account and received new card).

of so much time without incident belies Plaintiffs' assertion that they are imminently subjected to harm. *See Zappos*, 108 F. Supp. 3d at 949 ("The [more than three] years that have passed without Plaintiffs making a single allegation of theft or fraud demonstrate that the risk is not immediate."); *Chambliss*, 2016 WL 3055299, at *5 (no standing where plaintiffs did "not cite to a single instance of data misuse even though a significant amount time has passed since the data breaches"); *Storm v. Paytime*, 90 F. Supp. 3d 359, 367 (M.D. Pa. 2015). The Complaint itself alleges that any possible fraud might not happen for "years to come." CAC ¶¶ 45, 133. *See Green v. Ebay, Inc.*, No. 2:2014cv01688, 2015 WL 2066531, at *5 (E.D. La. May 4, 2015) (denying standing where plaintiffs conceded that fraud may not happen for "many years"); *St. Joseph*, 74 F. Supp. 3d at 854 (no standing where complaint made clear that harm could happen "at any point in time"). The district court dismissed the Complaint without prejudice, and Plaintiffs have not filed a new complaint, presumably because they have suffered no additional harm.[11]

The cases cited by Plaintiffs do not support their argument that they face imminent, certainly impending injury. In *Neiman Marcus* and *Lewert*, the Seventh

[11] Contrary to Plaintiffs' assertion (Pls.' Br. at 26), requiring well-pleaded facts plausibly suggesting an actual or imminent injury does not place an "insurmountable burden" on data breach plaintiffs. As the district court noted, Plaintiffs are better positioned than Defendants to know whether their data has been misused, and are just as well-positioned as Defendants to know whether their data is being sold on black markets. P-ADD-12 n. 3.

Circuit erred by applying the "objectively reasonable likelihood" of future harm standard that the Supreme Court expressly rejected in *Clapper*. *Neiman Marcus*, 794 F.3d at 694 (finding standing because of "objectively reasonable likelihood" of harm); *Lewert v. P.F. Chang's Cina Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016) (same). *See also Clapper*, 133 S. Ct. at 1143, 1147 (holding that a theory of standing based on an "objectively reasonable likelihood" of future harm is "too speculative to satisfy the well-established" "certainly impending" standard); *Scottrade*, 2016 WL 3683001, at *5 (declining to follow *Neiman Marcus* because the Seventh Circuit applied a "standard that was rejected by the Supreme Court in *Clapper*"). Even courts within the Seventh Circuit have refused to apply *Neiman Marcus*'s objectively reasonable likelihood standard, because it conflicts with *Clapper*. *See Alonso v. Blue Sky Resorts, LLC*, No. 15-CV-00016-TWP-TAB, 2016 WL 1535890, at *5 (S.D. Ind. Apr. 14, 2016). This Court should do the same.

Even if the Seventh Circuit had applied the correct standard, *Neiman Marcus* and *Lewert* are inapposite. *Neiman Marcus* concerned allegations of widespread, actual misuse of customers' personal information, to the point that defendant admitted that 9,200 credit cards were known to have been used fraudulently as a result of the data breach. 794 F.3d at 690. The *Lewert* plaintiffs alleged at least four fraudulent charges after the P.F. Chang's intrusion and the defendant in *Lewert* publicly acknowledged that customers' data had been stolen. 819 F.3d at

965. Here, Plaintiffs fail to adequately allege that anyone's payment card data was stolen, and the Complaint is devoid of any factual allegation supporting the conclusion that misuse or fraudulent charges are certainly impending.[12]

Plaintiffs' reliance on *Krottner*, *Adobe*, and *Sony* is similarly inappropriate. *Krottner* predated *Clapper*, and applied a legal standard for injury-in-fact—"credible threat of harm"—that is inconsistent with *Clapper*. *Krottner*, 628 F.3d at 1143. Moreover, in all three cases, plaintiffs alleged actual theft of their personal information. *Id.* at 1140 (thief stole a laptop containing the unencrypted names, addresses, and social security numbers of Starbucks employees); *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1206, 1214 (N.D. Cal. 2014) (plaintiffs alleged that hackers spent "up to several weeks removing customer data" from Adobe's network); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 955, 961 (S.D. Cal. 2014) (plaintiffs alleged that data had been stolen and specified the date Sony learned of the theft). In addition, all three cases involved misuse or attempted misuse of the stolen data fairly traceable to the breaches. *Krottner*, 628 F.3d at 1141 (bank account fraudulently opened

[12] Plaintiffs also err in relying on *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568 (6th Cir. 2005), which involved the distinguishable defective-medical-device context. As *Reilly* explained, the standing analysis in that context has no application in the data breach context, because there, an injury has *already* occurred from implanting a device into the human body, and the injury cannot adequately be compensated with a money award in the event the risk of device failure is realized. 664 F.3d at 44-45.

after laptop containing plaintiff's PII was stolen); *Sony*, 996 F. Supp. 2d at 957 (multiple fraudulent charges); *Adobe*, 66 F. Supp. 3d at 1215 (stolen data appeared for sale on the Internet). As discussed above, Plaintiffs here fail to adequately allege actual theft, much less any misuse resulting from theft. Accordingly, Plaintiffs fail to allege a cognizable injury-in-fact under *any* standard.[13]

B. Because the Alleged Risk of Harm Is Merely Speculative and Not Certainly Impending, Mitigation Measures Cannot Create Standing.

Plaintiffs also contend that they have suffered an actual injury in the form of measures they took to mitigate the risk of future harm. Pls.' Br. at 18-19. But courts in data breach cases have consistently held that harm must be certainly impending before plaintiffs can cite their mitigation costs as a cognizable injury-in-fact. *Reilly*, 664 F.3d at 46 ("That a plaintiff has willingly incurred costs to protect against an alleged increased risk of identity theft is not enough to demonstrate a

[13] Plaintiffs' reliance on *In re Nickelodeon Consumer Privacy Litig.* for the proposition that disclosure of protected information alone constitutes a concrete harm is misplaced. The *Nickelodeon* court found standing largely on the basis of an imperative to defer to *Congress*, which via statutes such as the Privacy Act of 1974, "has long provided plaintiffs with the right to seek redress for unauthorized disclosure of information that, in Congress's judgment, ought to remain private." No. 15-1441, 2016 WL 3513782, at *7 (3rd Cir. June 27, 2016) (citing *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 134 & n.19 (3d Cir. 2015)). The Third Circuit premised its decision on a misreading of *Spokeo*, which in fact held that allegations of a "bare procedural violation [of a statute], divorced from any concrete harm" could not satisfy the injury-in-fact requirement of Article III. *Spokeo, Inc.* 136 S. Ct. at 1549. Moreover, because there is no federal statute at issue in this case, the Third Circuit's policy reasons for finding standing on the basis of information disclosure are inapposite.

'concrete and particularized' or 'actual or imminent' injury."); *Chambliss*, 2016 WL 3055299, at *5; *Zappos*, 108 F. Supp. 3d at 960-61; *Horizon*, 2015 WL 1472483, at *6 n.5; *Antman v. Uber Techs., Inc.*, No. 3:15-CV-01175-LB, 2015 WL 6123054, at *11 (N.D. Cal. Oct. 19, 2015); *Green*, 2015 WL 2066531, at *5; *Crisafulli v. Ameritas Life Ins. Co.*, No. 13-5937, 2015 WL 1969176, at *3-4 (D.N.J. Apr. 30, 2015); *Storm*, 90 F. Supp. 3d at 367-68; *SAIC*, 45 F. Supp. 3d at 26; *Onity*, 2014 WL 3748639, at *3-4; *Strautins v. Trustwave Holdings, Inc.*, 27 F. Supp. 3d 871, 876 n.9 (N.D. Ill. 2014); *Polanco v. Omnicell, Inc.*, 988 F. Supp. 2d 451, 470-71 (D.N.J. 2013); *Barnes & Noble*, 2013 WL 4759588 at *4. As the Supreme Court has stated, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical harm that is not certainly impending." *Clapper*, 133 S. Ct. at 1151. Otherwise, "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id.* Because Plaintiffs allege no certainly impending harm, measures purportedly taken to mitigate a speculative risk of harm do not confer Article III standing.[14]

[14] *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 162-65 (1st Cir. 2011) is not to the contrary. The case did not discuss Article III standing at all, and merely held that Maine law recognized a cause of action for mitigation measures where, unlike here, defendant admitted that no fewer than 1,800 of the compromised cards experienced unauthorized payment card charges. *Id.* at 154.

While Plaintiffs did not sufficiently plead a risk of certainly impending harm, even if they had done so, Plaintiffs' allegations of spending time and money on mitigation are too conclusory to support standing. *Horras v. Am. Capital Strategies, Ltd.*, 729 F.3d 798, 801 (8th Cir. 2013) (a complaint fails to state a claim "if it tenders naked assertions devoid of further factual enhancement") (internal quotation omitted); *see also Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of the Treasury*, 773 F.3d 243, 246 (11th Cir. 2014). None of the Plaintiffs alleges that the time spent was anything more than a *de minimis* inconvenience, which is insufficient to constitute an injury-in-fact. *See New Creation Fellowship v. Town of Cheektowaga*, 164 F. App'x 5, 7 (2d Cir. 2005) (unpublished) ("[A]t most the Town's conduct resulted in minor inconveniences to the Fellowship insufficient to satisfy the injury-in-fact requirement for Article III standing . . . .") (citing *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course, a de minimis level of imposition with which the Constitution is not concerned.")); *Barnes & Noble*, 2013 WL 4759588 at *6 (holding that there was no standing when charges were reimbursed and the only injury that remained was "a time lag of unknown length" before receiving a new card).[15,16] Notably, not one of the Plaintiffs alleges

[15] Since Mr. Holmes does not plead (much less plead facts suggesting) that the Intrusions caused the fraudulent charge, his time spent contacting the bank to cancel the card is not fairly traceable to the Intrusions. CAC ¶ 31. In any event, he fails to plead that the time spent or the short period of time to receive his new card

that he or she enrolled in the free credit monitoring offered by Defendants. *See* CAC ¶¶ 16-31.

C. Plaintiff Holmes Fails to Allege an Actual, Fairly Traceable Injury.

Recognizing that they have failed to allege a certainly impending future harm sufficient to sustain their theories of injury, Plaintiffs resort to a contention that is absent from the Complaint: namely, that Mr. Holmes suffered an actual injury from the Intrusions in the form of the single fraudulent charge on his credit card. Pls.' Br. at 11-12, 27. As previously noted, this theory is not properly before the Court because it is not alleged in the Complaint. *See Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 6646 (8th Cir. 2012) (declining to consider theory absent from complaint and raised for first time in opposition to motion to dismiss); *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 225 n.2 (1st Cir. 2012) ("It is clear beyond hope of contradiction . . . that a plaintiff cannot constructively amend his complaint with an allegation made for the first time in an appellate brief." (quotation omitted)). The Complaint lists completely *different* injuries (*see* CAC ¶¶ 32, 82), depriving the district court of the opportunity to address the argument that

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was anything more than *de minimis*. *See New Creation Fellowship*, 164 F. App'x at 7; *Barnes & Noble*, 2013 WL 4759588, at *5.

[16] Mr. Hanff, the only named plaintiff who actually alleges an expense, does not allege that he closed his checking account and opened a new one *because* of the Intrusions – just that he did so "after" them – and he says nothing of what these expenses were, how they were associated with opening a new account, or whether he was reimbursed for the expenses. CAC ¶ 18.

the charge is an actual injury in and of itself (as opposed to merely a potential indicator of a risk of harm). Accordingly, the district court properly limited its analysis of Defendants' motion to dismiss to the purported injuries Plaintiffs actually asserted. *See* P-ADD-7.

But even if it had been pleaded, this theory would not support standing. Mr. Holmes does not allege that he shopped at Defendants' locations during the Intrusions. *See* CAC ¶ 31. Without that threshold allegation, the fraudulent charge cannot be fairly traceable to the Intrusions.[17] Mr. Holmes does not allege that the fraudulent charge occurred *because of* the Intrusions – he alleges only that he noticed the charge after learning of the Intrusions. He does not even specify the date or amount of the purportedly fraudulent charge. Mere temporal proximity and/or a similarity between the type of data misused and the type of data provided to Defendants is not sufficient to show the charge resulted from the Intrusions. *See Barnes & Noble*, 2013 WL 4759588, at *6 (no standing because "it is not directly apparent that the fraudulent charge was in any way related to the security

[17] While the question whether an injury is "fairly traceable" may be a fact-sensitive inquiry under some circumstances, it is entirely appropriate for a court to decide whether this necessary element of standing has been properly alleged at the motion to dismiss stage. *See McClain v. Am. Econ. Ins. Co.*, 424 F.3d 728, 732 (8th Cir. 2005) (affirming grant of motion to dismiss where district court found plaintiff lacked standing because injury was not "fairly traceable" to defendant's conduct).

breach").[18] As the district court observed, credit card fraud is a regular occurrence, and a single fraudulent charge is insufficient to support an inference that the Intrusions were the cause. P-ADD-10; *see also 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504-05 (6th Cir. 2013) (holding the "existence of obvious alternatives simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made" for purposes of motion to dismiss).

Moreover, Mr. Holmes does not allege that the charge was unreimbursed. As the majority of courts to have addressed the issue in the data breach context have concluded, plaintiffs must plead an *unreimbursed* charge in order for the charge itself to constitute an actual injury-in-fact. *See Whalen*, 2015 WL 9462108, at *3; *Burton*, 47 F. Supp. 3d at 1284-85; *Hammond*, 2010 WL 2643307, at *8; *Barnes & Noble*, 2013 WL 4759588, at *5; *Wendy's*, 2016 U.S. Dist. LEXIS 96947, at *5-9; *see also St. Joseph*, 74 F. Supp. 3d at 857 (no standing because "Discover never charged [plaintiff] for the fraudulent purchase identified in the Complaint"); *see also People To End Homelessness, Inc. v. Develco Singles Apartments Assocs.*, 339 F.3d 1, 9 (1st Cir. 2003) (no standing where plaintiff's "alleged injuries, to the extent they can be redressed, have already been remedied").

[18] Contrary to Plaintiffs' assertion, *Neiman* and *Lewert* did not overrule *Barnes & Noble*'s holding on this point. Those decisions made no mention of the case.

Resnick, *Target*, and *Lewert* are not to the contrary. *Resnick* found injury-in-fact because Plaintiffs alleged that they became victims of actual identity theft and "*suffered monetary damages as a result*." *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1323 (11th Cir. 2012) (emphasis added); *see also Wendy's*, 2016 U.S. Dist. LEXIS 96947, at *6-9 (holding that *Resnick* requires unreimbursed damages to support standing). Moreover, these cases all involved far more substantive allegations than here, suggesting a causal connection between the purported injuries and the breach. In *Resnick*, the plaintiffs pleaded not only that their data was contained on laptops stolen in the breach, but also that they were "careful in guarding their sensitive information and had never been victims of identity theft before the laptops were stolen." 693 F.3d at 1322. In *Target*, no fewer than 41 named plaintiffs alleged fraudulent charges, and they all alleged that they had shopped at Target during the period of the data breach. *In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1157-58 (D. Minn. 2014); *see also* Consumer Pls.' First Am. Consol. Compl., *In re Target Corp. Data Sec. Breach Litig.*, No. 14-md-02522-PAM (D. Minn. Dec. 1, 2014), ECF No. 258, ¶¶ 1, 8-112. In *Lewert*, the defendant admitted that data had been stolen in the breach, plaintiffs alleged they had shopped during the window of the intrusion, and, contrary to Plaintiffs' contention here (Pls.' Br. at 29), the customer plaintiffs alleged four unauthorized charges. *Lewert*, 819 F.3d at

965.[19] Holmes's stray and vague allegation of a single isolated charge – without even a claim to have shopped at Defendants' stores during the Intrusions – is nothing like the allegations in cases where courts have found plaintiffs had standing based on fraudulent use.

D. Plaintiffs Cannot Establish Injury-in-Fact on the Basis of an Implied Contract Term that Does Not Exist.

The Complaint alleges that because of the Intrusions, Plaintiffs lost a "benefit" that they would have obtained if Defendants had upheld their end of a "bargain" over data security, and that they lost the "value of" data protection services supposedly purchased from Defendants. CAC ¶¶ 32, 82. Plaintiffs, however, abandon these theories on appeal, instead arguing that Defendants' alleged breach of contract is an injury in and of itself because the alleged breach supposedly "invades" Plaintiffs' "legal rights." Pls.' Br. at 31-33. Here again, Plaintiffs' failure to include this theory in the Complaint precludes them from now relying on it. *See Gomez*, 676 F.3d at 664-65. But even if this theory had been pleaded, it would be insufficient to manufacture Article III standing.

As an initial matter, the premise on which Plaintiffs' argument rests – that Defendants had an implied contract with Plaintiffs covering data security – is

[19] Plaintiffs' reference to *E-Shops Corp. v. U.S. Bank Nat'l Ass'n*, 678 F.3d 659 (8th Cir. 2012) (*see* Pls.' Br. at 30), is even more out of place. Not only did *E-Shops* involve more substantial allegations of causation than those pled here, but it did not discuss Article III standing at all. *See* 678 F.3d at 662-66.

unsupported by any factual allegations in the Complaint. Plaintiffs' burden requires them affirmatively and plausibly to assert facts supporting standing, rather than pleading conclusory facts merely consistent with that conclusion. *See Stalley*, 509 F.3d at 521 (citing *Twombly*, 550 U.S. 544). Determining whether a claim is plausible is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. The Complaint's allegations simply do not plausibly support the existence of any implied contractual term promised by Defendants covering data security. Plaintiffs simply fail to substantiate with *facts* their conclusory assertions that their purchases were subject to "mutually agreed upon implied contract terms that Defendants would take reasonable measures to protect the PII of Consumer Plaintiffs . . . and that Defendants would timely accurately notify [them] if and when such information was compromised." CAC ¶ 138. *See infra* Section II.D.1.

Plaintiffs' reliance on a supposed "breach of implied contract" theory fails for the additional reason that they have failed to plead any damages caused by the breach – a required element of a breach of contract claim. *See infra* Section II.D.3. Because they have alleged no damages as required by the state common law they purport to rely on for standing, they have pleaded no injury to their common law rights. *See Neiman Marcus*, 794 F.3d at 695-96 (purported invasion of state

statutory rights could not create Article III standing because plaintiffs failed to plead damages as required by those state laws); *Lewert*, 819 F.3d at 968-69 (same).

Plaintiffs' heavy reliance on *ABF Freight* is misplaced because that case arose under entirely distinguishable factual circumstances. There, plaintiff was a party to an express contract that covered the subject matter at the center of the dispute. *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F3d. 954, 960 (8th Cir. 2011). The court concluded that the plaintiff had "produced sufficient facts, for standing purposes, indicating a judicially cognizable interest," and that the ultimate question of whether the defendant breached was an issue for the merits. *Id.* Here, Plaintiffs fail to plead facts plausibly suggesting they even had an implied contract with Defendants covering data security in the first place, let alone whether that implied contract was breached. *See Spokeo*, 136 S. Ct. at 1547 ("[A]t the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element [of standing].'" (quoting *Warth v. Sedlin*, 422 U.S. 490, 518 (1975)). Moreover, in *ABF Freight*, unlike here, the plaintiff alleged that the breach of contract caused it "economic harm." 645 F.3d at 961.[20]

[20] *Katz v. Pershing, LLC* is also distinguishable on this issue because plaintiffs there alleged that defendant made express representations to plaintiff regarding its data security practices. 672 F.3d 64, 76 (1st Cir. 2012). Rather than countenancing conclusory allegations in support of standing of the type alleged here, the court recognized that "well-pleaded factual averments" were required. *Id.* at 70. Similarly, the unpublished district court cases cited by Plaintiffs, *Coccoli v. Daprato*, No. 13-12757, 2014 WL 1908934, at *8 (D. Mass. May 13, 2014),

Even if state common law purported to be so permissive as to grant plaintiffs a cause of action in the absence of actual injury – which it is not –Plaintiffs still would not satisfy their Article III burden. State courts cannot manufacture Article III standing through causes of action for a litigant who has not suffered a concrete injury. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667-68 (2013) (holding "standing in federal court is a question of federal law, not state law," and thus "the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary;" thus, states cannot alter the role of the federal judiciary established by Article III "simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse"); *Lee v. American Nat'l Ins. Co*., 260 F.3d 997, 1001-02 (9th Cir. 2001) ("[A] plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury."). *See also Hancock v. Urban Outfitters*, No. 14-7047, 2016 WL 3996710, at *3 (D.C. Cir. July 26, 2016) (violation of plaintiff's rights under local privacy statute was insufficient to create Article III injury).

Brown v. Town & Country Masonry & Tuckpointing, LLC, No. 4:12-CV-1227, 2012 WL 6013215 (E.D. Mo. Dec. 3, 2012), and *S. Shore Hellenic Church, Inc.*, No. 12-11665, 2015 WL 846533, at *7-8 (D. Mass. Feb. 26, 2015), all involved express agreements covering the subject matter at hand.

A plaintiff cannot establish Article III standing by, as here, offering a single, conclusory allegation about the existence of an implied contract and an *ipse dixit*, self-serving claim that absent the implied contract, Plaintiffs would not have shopped at Defendants' stores.[21] *See* CAC ¶¶ 138-39. To accept the arguments advanced by Plaintiffs (and by the *amicus*) is to conclude that anyone has Article III standing to sue anyone in United States federal court – even in the absence of actual or imminent harm – simply by offering a few conclusory allegations in support of a meritless cause of action. Such an interpretation, if accepted, would vitiate the entire body of Article III standing case law, and render the compulsory showing of standing meaningless. *See, e.g.*, *Jones*, 470 F.3d at 1265.

[21] The Electronic Privacy Information Center claims that the mere assertion of a breach of contract claim – even where inadequately pled – is sufficient for standing, and brazenly claims that the assertion of other state law claims (like, in the instant case, negligence and state statutory violations) also creates standing. This argument is built on a fundamentally flawed reading of the Supreme Court's holding in *Spokeo*. *See Spokeo*, 136 S. Ct. at 1546-50 (assessing whether and to what extent *Congress* may confer Article III standing). The Supreme Court clarified that courts have an obligation to assess in all cases whether a sufficient actual or imminent harm existed in addition to the alleged legal violation. *Id.* at 1549 (holding that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation"); *see also Hancock*, 2016 WL 3996710, at *3.

II. IF THE COURT DETERMINES THAT ANY OF THE PLAINTIFFS HAS STANDING, IT SHOULD DIRECT THE DISTRICT COURT TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER RULE 12(B)(6).

Because the district court correctly dismissed Plaintiffs' action in its entirety for failure to satisfy the Article III pleading standard, the district court did not reach Defendants' alternative bases for dismissal under Rule 12(b)(6). However, this Court is empowered to rule on alternative grounds that were briefed, but not decided, below. *Wycoff v. Menke*, 773 F.2d at 986.[22] And, it is respectfully submitted that the Court should exercise that power where, as here, the alternative ground is readily capable of resolution on appeal, and resolving it could obviate the need for further district court proceedings. *See Brown v. Medtronic, Inc.*, 628 F.3d 451 (8th Cir. 2010) (overturning district court's holding as to Article III standing, but affirming dismissal on separate 12(b)(6) grounds not addressed by the lower court). Therefore, should this Court hold that Plaintiffs adequately plead Article III

[22] It makes no difference that a Rule 12(b)(6) dismissal, unlike the district court's dismissal on jurisdictional grounds, would be with prejudice. Defendants filed a protective cross-appeal (JA-243), enabling this Court to "enlarge[] [Defendants'] own rights … or … lessen[] the rights of [their] adversary.'" *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)). *Cf. Lewert*, 819 F.3d at 969-70 ("While we may affirm a judgment on an alternative ground, we may do so only when that ground supports the same relief." (internal citation omitted)).

standing, the Court should nonetheless dismiss the Complaint because Plaintiffs fail to allege any cognizable claim upon which relief can be granted.[23]

Accordingly, Plaintiffs' claims under Various State Consumer Protection Laws (Count I), Various State Data Breach Notification Statutes (Count II), Negligence (Count III), Breach of Implied Contract (Count IV), Negligence *Per Se* (Count V), and Unjust Enrichment (Count VI) are deficient and should be dismissed.

A. The Law of the States in which Plaintiffs Reside Governs Plaintiffs' Claims.

As an initial inquiry, this Court must determine which states' laws to apply in resolving the questions of state law presented. Here, that analysis is straightforward because the dispositive facts are alleged in the Complaint. *See Whitney v. Guys, Inc.*, 700 F.3d 1118, 1123-26 (8th Cir. 2012) (undertaking a choice-of-law analysis at the motion to dismiss stage); *see also In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig.*, MDL 8:11-mn-0200-JMC, 2013 WL 169289, at *2 (D.S.C. Jan. 16, 2013). A court sitting in diversity applies the substantive law, including choice-of-law rules, of the forum state in which it sits. *Prudential Ins. Co. of Am. v. Kamrath*, 475 F.3d 920, 924 (8th

[23] Resolution of the alternative grounds presented would also provide helpful guidance to the many other courts around the country faced with similar lawsuits, given that there are few appellate decisions applying the applicable state laws in the data security context.

Cir. 2007). In multi-district litigation ("MDL"), the relevant "forum states" are those in which the actions were initially filed. *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996). Here, the initial actions that preceded the consolidated complaint were filed in United States District Courts in Minnesota, Illinois, and Idaho.[24]

For common law claims, Illinois and Idaho apply the law of the state that bears the most "significant relationship" to the occurrence and the parties in the action. *Gregory v. Beazer E.*, 892 N.E.2d 563, 581 (Ill. App. Ct. 2008) (tort); *Estate of Bergman v. E. Idaho Health Servs., Inc.*, No. 4:13-cv-00202, 2015 WL 506566, at *3 (D. Idaho Feb. 6, 2015) (tort); *Champagnie v. W.F. O'Neil Constr. Co.*, 395 N.E.2d 990, 996 (Ill. App. Ct. 1979) (contract); *Carroll v. MBNA Am. Bank*, 220 P.3d 1080, 1085 (Idaho 2009) (same). The states in which Plaintiffs reside and swiped their cards in Defendants' store locations – which are alleged in the Complaint (*see* CAC ¶¶ 16-31) – bear the most significant relationship to the case as the place where the alleged injuries occurred and the relationship between the parties is centered. Minnesota applies a five-factor test to determine what law

[24] Minnesota law governs the choice-of-law analysis for the *Hanff* and *Mertz* actions, as well as for the four new named plaintiffs (Thompkins, Nelson, Bell, and Gross), because they filed for the first time as part of the Complaint in the MDL coordinated action. Illinois and Idaho govern the choice-of-law analyses in the *McPeak* and *Rocke* actions, respectively.

to apply to common law claims.[25] *SCM Corp. v. Deltak Corp.*, 702 F. Supp. 1428, 1430 (D. Minn. 1988). Only two factors are relevant in tort cases, namely: "[a]dvancement of the forum's governmental interests and . . . application of the better rule of law." *Schwartz v. Consol. Freightways Corp. of Del.*, 221 N.W.2d 665, 668 (Minn. 1974). The governmental interest factor "generally weighs in favor of application of the state law in which the plaintiff lives and in which the injury occurred." *Baycol*, 218 F.R.D. at 207. Accordingly, the laws of the states in which each named plaintiff resides govern their respective common law claims.[26] And the same is true of Plaintiffs' statutory claims.[27]

B. Plaintiffs Fail to State Cognizable Claims for Negligence and Negligence *Per Se*. (Counts III & V)

Under the applicable state laws, the Complaint fails to state negligence and negligence *per se* claims upon which relief can be granted.

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[25] The five factors include "1) predictability of results; 2) maintenance of interstate order; 3) simplification of the judicial task; 4) advancement of the forum's governmental interests; and 5) the better rule of law." *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 207 (D. Minn. 2003).

[26] No choice of law analysis is needed for Plaintiffs' quasi-contractual claim for unjust enrichment (Count VI), as to which the law is consistent across all jurisdictions. *See, e.g.*, *In re APA Assessment Fee Litig.*, 766 F.3d 39, 45 (D.C. Cir. 2014). *See also* CAC ¶ 83, n.11 (citing *Target*, 66 F. Supp. 3d at 1177).

[27] While Plaintiffs also seek to bring claims under the statutes of California and Minnesota, no Plaintiffs reside in these states, and therefore Plaintiffs lack sufficient contacts with them to assert claims under their consumer protection laws. *See In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005); *Ferrari v. Best Buy Co.*, No. 14-2956, 2015 WL 2242128, at *9 (D. Minn. May 12, 2015); *Norwest Mortg., Inc. v. Super. Ct.*, 72 Cal. App. 4th 214, 224-25 (1999).

1. Plaintiffs Fail to Plead Any Cognizable Injuries Necessary to Support a Negligence Claim.

To plausibly state a negligence claim, the Complaint must contain "facts demonstrating a duty owing from the defendant to the plaintiff, a breach of duty, and damages as a result." *Aaron v. Havens*, 758 S.W.2d 446, 447 (Mo. 1988); *see also B.N. v. KK.*, 312 Md. 135, 141 (1988); *Fox v. Cohen*, 406 N.E.2d 178, 179 (Ill. App. Ct. 1980); Restatement (Second) of Torts § 281. Plaintiffs must proffer more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" to withstand a motion to dismiss, *Iqbal*, 556 U.S. at 678, and their negligence claim must be dismissed if they fail to allege facts sufficient to state any element of the claim. *See Iodice v. United States*, 289 F.3d 270, 281 (4th Cir. 2002) (affirming dismissal of negligence claim under Rule 12(b)(6) for failure to allege sufficient facts).

The increased risk of future harm and the other intangible "injuries" that Plaintiffs allege are not cognizable injuries sufficient to support a negligence claim.[28] *Fox*, 406 N.E.2d at 183 ("[T]he injury must be actual; the threat of future harm not yet realized is not enough"); *Stephens v. Stearns*, 678 P.2d 41, 46 (Idaho 1984) ("actual damage" required). Because Plaintiffs do not allege any actual

[28] The instant case is distinguishable from *Target*, where the court found standing for plaintiffs' negligence claims premised on plaintiffs' alleged injuries of fraudulent card charges, blocked bank accounts, and new card fees in connection with the breach; Plaintiffs make no such allegations here. *See* 2014 WL 7192478, at *2.

identity theft, fraud, or other misuse of their payment card data as a result of the Intrusions, their claimed injuries rest primarily on the "disclosure" of their payment card data, which is not a cognizable harm for a negligence claim. *See Amburgy*, 671 F. Supp. 2d at 1054-55 ("Damages [in negligence] cannot reasonably be assessed for a hypothetical harm which may (or may not) come to plaintiff in the future."). Allegations of costs incurred to mitigate the risk of fraud likewise fall far short of stating a negligence claim. *See Reilly v. Ceridian Corp.*, No. 10-5142 (JLL), 2011 WL 735512, at *3-5 (Feb. 22, 2011 D.N.J. 2011), *aff'd* on standing grounds, 664 F.3d 38 (3rd Cir. 2011).

2. The Economic Loss Doctrine Bars Plaintiffs' Negligence Claims.

Even if Plaintiffs had alleged actual harm resulting from the breaches at issue, that harm would be entirely economic. CAC ¶¶ 32, 82. Because Plaintiffs allege no physical injury or property damage, the economic loss doctrine bars recovery for negligence claims under each applicable state's law. The economic loss doctrine "provides that no cause of action exists for negligence that results solely in economic damages unaccompanied by physical or property damage." *Sovereign Bank.*, 533 F.3d at 175 (quotation and citation omitted); *see also Aardema v. U.S. Dairy Sys., Inc.*, 215 P.3d 505, 510 (Idaho 2000) ("[P]urely economic interests are not entitled to protection against mere negligence . . . ." (quotation and citation omitted)); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp.

2d 518, 528 (N.D. Ill. 2011) (plaintiff may not recover for "purely economic losses under a tort theory of negligence").

Although some courts recognize exceptions to the economic loss doctrine, none applies here. For instance, in Idaho, Missouri, and Maryland, a negligence claim may be based on purely economic losses where a "special relationship" exists between plaintiff and defendant. But a purchase of goods from a merchant at arm's length, as occurred here, does not create a "special relationship." *See Blahd v. Richard B. Smith, Inc.*, 108 P.3d 996, 1001-02 (Idaho 2005); *Dannix Painting, LLC v. Sherwin–Williams Co.*, No.4:12 CV 01640 CDP, 2012 WL 6013217, at *2 (E.D. Mo. Dec. 3, 2012); *Swinson v. Lords Landing Vill. Condominium*, 360 Md. 462, 477-78 (2000).

3. Plaintiffs Fail to Allege that Defendants Breached a Duty to Avert Criminal Cyberattacks.

Plaintiffs' negligence claim fails for another fundamental reason: "There exists no general duty to protect a plaintiff against the intentional criminal conduct of unknown third persons," even when the criminal conduct is reasonably foreseeable. *Meadows v. Friedman R.R. Salvage Warehouse, a Div. of Friedman Bros. Furniture Co.*, 655 S.W.2d 718, 721 (Mo. Ct. App. 1983); *see also Brown v. Schnuck Mkts., Inc.*, 973 S.W.2d 530, 532 (Mo. Ct. App. 1998) (no duty even in "high crime" area); *Warr v. JMGM Grp., LLC*, 70 A.3d 347, 358 (Md. Ct. App. 2013). To establish that Defendants had a duty to protect them from third-party

criminal acts, Plaintiffs must, but do not, plausibly plead a "special relationship." *Warr*, 70 A.3d at 358-59; *see generally* CAC.

C. Plaintiffs Fail to Plead Negligence *Per Se*. (Count V)

1. Negligence *Per Se* Liability Cannot Be Premised on Section 5 of the Federal Trade Commission Act.

Plaintiffs allege negligence *per se* on the basis of a violation of Section 5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45.[29] However, "[t]here is no private cause of action for violations of the Federal Trade Commission Act." *F.T.C. v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015) (citing *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184, 1187 (8th Cir. 1996)). Plaintiffs should not be permitted to bootstrap such a private cause of action by way of a negligence *per se* claim, because "[a] fair reading of the statute and its legislative history evinces a plain intent by Congress to make the administrative program for enforcing the Federal Trade Commission Act an exclusive one." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973). Thus, in *Morrison*, this Court held

[29] Plaintiffs conceded in the district court that violation of Section 5 of the FTCA does not give rise to negligence *per se* claims under Illinois or Maryland law. *See* D-ADD-2 (Defs.' Mem. seeking dismissal of these claims); D-ADD-4-7 (Pls.' Opp. declining to address the arguments). These claims should therefore be dismissed with prejudice. *See United States v. Rees*, 447 F.3d 1128, 1130 (8th Cir. 2006) (declining to address on appeal an argument a party conceded before the district court). Even if they had not made this concession, dismissal would be appropriate because Illinois and Maryland do not recognize a cause of action for negligence *per se*. *See Absolon v. Dollahite*, 376 Md. 547, 557 (2003); *Davis v. Marathon Oil Co.*, 64 Ill. 2d 380, 390 (1976).

that a "plaintiff should not be permitted to plead violation of FTC regulations as part of a state common law fraud case" because "a decision to the contrary" would impermissibly "extend[] a private cause of action under the Federal Trade Commission Act." *Morrison*, 91 F.3d at 1187. That rationale applies equally to a negligence *per se* claim.

2. Plaintiffs Allege No Injury to Property or Person.

Section 5 also cannot form the basis for a negligence *per se* claim because Plaintiffs allege no injury to person or property. "Negligence *per se* is in effect a presumption that one who has violated a *safety* statute has violated his legal duty to use due care. . . . The doctrine of negligence *per se* has traditionally arisen in cases involving personal injury and physical injury to property." *Lowdermilk v. Vescovo Bldg & Realty Co.*, 91 S.W.3d 617, 628 (Mo. Ct. App. 2002) (emphasis added) (noting also plaintiffs cited no case extending negligence *per se* to cases involving "damage to economic interests"); *Millenkamp v. Davisco Foods Int'l, Inc.*, 391 F. Supp. 2d 872, 878 (D. Idaho 2005) (applying economic loss doctrine to negligence *per se* claim); *Rock v. Voshell*, 397 F. Supp. 2d 616, 628 (E.D. Pa. 2005) (same).

3. New Jersey Does Not Recognize Negligence *Per Se* Liability Premised on the FTCA.

Under New Jersey law, violation of a statute or regulation generally "is, at most, some evidence of negligence, not negligence *per se*." *Costantino v. Ventriglia*, 735 A.2d 1180, 1186 (N.J. App. Div. 1999).

D. Plaintiffs Fail to State a Claim for Breach of Implied Contract. (Count IV)

1. Plaintiffs Fail to Allege Any Definite Meeting of the Minds on Additional Terms to their Purchase of Goods.

To state a cognizable implied contract claim, a complaint "must allege all the requisite elements of a contract . . . which consist of 'a mutual intent to contract including offer, acceptance, and consideration.'" *Toon v. United States*, 96 Fed. Cl. 288, 299 (Fed. Cl. 2010) (citation omitted) (dismissing implied contract claim for failure to plead required elements). "One of the essential elements of a contract is 'mutuality of agreement' or 'mutual assent' – frequently referred to as a 'meeting of the minds' of the parties." *Neff v. World Publ'g Co.*, 349 F.2d 235, 248 (8th Cir. 1965). The law in each jurisdiction where Plaintiffs reside requires Plaintiffs to establish a definite meeting of the minds. *See e.g.*, *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 750 (D. Md. 2003); *Windsor v. Int'l Life Ins. Co.*, 29 S.W.2d 1112, 1116 (Mo. 1930); *Dicuio v. Brother Int'l Corp.*, No. 11-1447, 2012 WL 3278917, at *14 (D.N.J. 2012); *Argo Welded Prods, Inc. v. J. T. Ryerson Steel & Sons, Inc.*, 528 F. Supp. 583, 592 (E.D. Pa. 1981); *Foiles v. N. Greene Unit Dist. No. 3*, 633 N.E.2d 24, 27 (Ill. App. Ct. 1994); *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 329 P.3d 368, 374 (Idaho 2014).

In cases concerning a compromise of data security, courts have repeatedly rejected implied contract claims due to a lack of a definite meeting of the minds

over additional terms divined in plaintiffs' pleadings. *See, e.g., Krottner v. Starbucks Corp.*, 628 F. 3d 1139 (9th Cir. 2010) (dismissing implied contract claim because factual allegations failed to demonstrate a meeting of the minds of any specific offer to encrypt or otherwise safeguard plaintiffs' personal data); *Lovell v. P.F. Chang's China Bistro, Inc.*, No. C14-1152RSL, 2015 WL 4940371, at *3 (W.D. Wash. Mar. 27, 2015) (no plausible facts to infer "that defendant intended to contractually bind itself to a general standard of reasonable care or any particular cybersecurity standard or protocol by accepting payment via a credit or debit card"); *Dittman v. UPMC*, No. GD-14-003285, 2015 WL 4945713 at *6 (Pa. Com. Pl. Civ. May 28, 2015) ("An implied contract is not an agreement imposed on parties to achieve justice . . . . [T]here is no evidence that there has been any meeting of the minds."); *Frezza v. Google Inc.*, No. 12-CV-00237-RMW, 2012 WL 5877587, at *4 (N.D. Cal. Nov. 20, 2012) (holding "even if an implied contract does indeed exist, plaintiffs must sufficiently plead that Google agreed to and then breached a specific obligation"); *see also In re Zappos.com, Inc. Customer Data Sec. Breach. Litig.*, No. 3:12-cv-00325-RCJ-VPC, 2013 WL 4830497, at *3 (D. Nev. Sept. 9, 2013).

Plaintiffs fail to allege any factual allegations concerning a meeting of the minds on the terms of their purported implied contract. Instead, Plaintiffs' *ipse dixit* recitation concludes that:

> Each purchase that involved use of a credit or debit card was made pursuant to mutually agreed upon implied contract terms that Defendants would take reasonable measures to protect the PII of Consumer Plaintiffs and the other Class members and that Defendants would timely and accurately notify Consumer Plaintiffs and the other Class members if and when such information was compromised.

CAC ¶ 138. There are, however, no factual allegations concerning the offer or acceptance of any definite terms concerning these additional services, nor when the contracts were entered into, nor which authorized agent of any Defendant agreed to such terms. Nor are there any factual allegations about a promise to provide Plaintiffs notice of a data compromise. *See, e.g.*, *Longenecker-Wells v. Benecard Servs.*, No. 15-CV-00422, 2015 WL 5576753, at *7 (M.D. Pa. Sept. 22, 2015) (dismissing implied contract claim with prejudice in part because of implausibility that defendants "would ever agree to allow others to bring private actions against them for data breaches committed by unknown third parties").

Therefore, Count IV should be dismissed because Plaintiffs have not alleged a plausible meeting of the minds over the additional services they seek to impose upon their purchase of groceries.

2. Plaintiffs Fail to Allege Any Consideration for the Additional Services Supposedly Promised to Them as Part of their Payment Card Purchases.

The additional services that Plaintiffs allege as "terms" to an alleged implied contract would be applicable only to customers who pay with a credit or debit card. CAC ¶ 138. Yet, Plaintiffs fail to allege any additional consideration paid to

Defendants for those additional services, negating this element of their contract claim. S*ee Katz*, 672 F.3d at 74 (affirming dismissal of implied contract claim in data security case because amended complaint failed to allege that putative class action plaintiff "provided any bargained-for benefit or suffered any bargained-for detriment in exchange for the defendant's supposed promises"); *Scottrade*, 2016 WL 3683001, at *7 (ruling on standing, and dismissing conclusory allegations of implied contract because "they do not allege facts showing that any fee they paid was understood by both parties to be allocated toward the protection of customer data"); *In re LinkedIn User Privacy Litig*., 932 F. Supp. 2d 1089, 1093 (N.D. Cal. 2013) (explaining lack of consideration for provision of data security for one type of customer versus other customers defeated claim of any bargained for level of data security).

3. Plaintiffs Fail to Allege Cognizable Damages.

Plaintiffs have also failed to plead damages to support their implied contract claims. *See Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006) (dismissing breach of contract claim for want of damages); *Alonso*, 2016 WL 1535890, at *6-7 (dismissing implied contract claim with prejudice); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 639 (7th Cir. 2007) (loss of personal information without direct harm is not a compensable damage); *Moyer v. Michaels Stores, Inc.*, No. 14 C 561, 2014 WL 3511500, at *7 (N.D. Ill. July 14, 2014)

(applying Illinois law and dismissing implied contract claim for lack of direct harm); *Holmes v. Countrywide Fin. Corp.*, No. 5:08-cv-00205-R, 2012 WL 2873892, at *13 (W.D. Ky. July 12, 2012) (applying New Jersey law and dismissing contract claims in data security case because "[defendant's] actions did not cause any direct financial harm to [plaintiffs]").

Plaintiffs' lack of any direct pecuniary harm or allegations of widespread misuse of personal information exposes the inadequacy of their claim in comparison to the rare cases permitting implied contract theories to survive dismissal. *See In re Michaels*, 830 F. Supp. 2d at 531 n.6 (plaintiffs alleged "that criminals have misused their financial information and caused Plaintiffs to lose money from unauthorized withdrawals and/or related bank fees"); *see also Target*, 66 F. Supp. 3d at 1158 (plaintiffs alleged unauthorized charges, lost access to bank accounts, late fees, card-replacement fees, and credit monitoring costs); *Hannaford Bros.*, 659 F.3d at 154 (over 1,800 unauthorized charges admitted to have occurred).

E. Plaintiffs' Claims for Violation of State Consumer Protection Statutes Fail as a Matter of Law. (Count I)

Plaintiffs allege purported violations of various state consumer protection and unfair and deceptive practices laws in California, Idaho, Illinois, Maryland, Minnesota, Missouri, New Jersey, and Pennsylvania. CAC ¶ 100. However,

Plaintiffs cannot maintain these generic claims because they have failed to satisfy basic pleading requirements necessary to support them.[30]

1. Plaintiffs Lack Requisite Injury and Damages.

Plaintiffs must demonstrate *actual* economic loss in order to state a viable claim under the state statutory claims raised.

Under the Idaho Consumer Protection Act, Idaho Code Ann. §§ 48-603, 48-603C ("ICPA"), Plaintiffs have no right to recover unless they sustain an "ascertainable loss" of money or property, and such ascertainable losses must be capable of being discovered, observed, or established. *In re Wiggins*, 273 B.R. 839, 856 (Bankr. D. Idaho 2001). Similarly, the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. § 505/2 ("ICFA"), requires Plaintiffs to demonstrate that they suffered "actual damages," meaning "actual pecuniary loss." *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 739 (7th Cir. 2014) (citing *Kim v. Carter's, Inc.*, 598 F.3d 362, 365 (7th Cir. 2010)); *Neiman*, 794 F.3d at 695; *P.F. Chang's*, 819 F.3d at 968-69.

The Maryland Consumer Protection Act, Md. Code Com. Law § 13-301 ("MCPA"), requires that Plaintiffs "must have suffered an identifiable loss." *Brooks v. Mortg. Inv'rs Corp.*, No. CIV. WDQ-13-1566, 2015 WL 926123, at *5

[30] As noted *supra* at note 27, Plaintiffs' claims under California and Minnesota's consumer protection statutes suffer from the additional defect that no named plaintiff resides in either of these states, and Plaintiffs therefore lack standing to assert claims under those states' laws.

(D. Md. Mar. 3, 2015) (quoting *Legore v. OneWest Bank, FSB*, 898 F. Supp. 2d 912, 920 (D. Md. 2012)). The Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.020 ("MMPA") has the same requirement. *See Johnsen v. Honeywell Int'l Inc.*, No. 4:14CV594 RLW, 2016 WL 1242545, at *2 (E.D. Mo. Mar. 29, 2016). The New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1 ("NJCFA"), adds that Plaintiffs must allege an ascertainable loss, which is a "quantifiable or measurable" loss, and not a "hypothetical or illusory" loss. *See Lee v. US Bank, N.A.*, No. 15-5534, 2016 WL 1117947, at *3 n.1 (D.N.J. Mar. 22, 2016) (internal quotation omitted). And the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. §§ 201-2(4), 201-3 ("PACPL") requires that an "actual [and non-speculative] loss of money or property must have occurred," and this loss must be established from the facts of the case. *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 180 (3d Cir. 2015).

As explained above, Plaintiffs have failed to demonstrate an actual economic loss (*i.e.*, a loss that is ascertainable, identifiable and non-speculative). Rather, Plaintiffs' purported injury is intangible – "exposing their information to third-party hackers." CAC ¶ 102. The economic loss resulting from this alleged damage is speculative and unmeasurable, especially considering Plaintiffs allege no further injuries resulting from the third-party hackers' use of such information. Finally, with respect to damages, the Illinois Uniform Deceptive Trade Practices Act, 815

Ill. Comp. Stat. § 510/3 ("IUDTPA") permits only prospective, injunctive relief to prevent future injury stemming from future misconduct. *Latona v. Carson Pirie Scott & Co.*, No. 96 C 2119, 1997 WL 109979, at *2 (N.D. Ill. Mar. 7, 1997) ("This Illinois statute only provides injunctive relief as a remedy, and a consumer must show a likelihood of harm in the future to become entitled to such relief."); *see also Greisz v. Household Bank (Ill.)*, 8 F. Supp. 2d 1031, 1044 (N.D. Ill. 1998) (same).[31] To seek an injunction against Defendants' data security practices, Plaintiffs would need to allege that such practices are likely to be deficient in the future; the Complaint contains no such allegations.

2. The Complaint Inadequately Pleads Unlawful Conduct.

Plaintiffs also fail to plead with particularity, as required by Rule 9(b), the circumstances constituting fraud under the MMPA, NJCFA, and PACPL.[32]

[31] The Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44, subd. 1(5), (7) and (13) ("MUDTPA"), is also limited to prospective injunctive relief. *Hunter v. Ford Motor Co.*, No. 08-4980, 2010 WL 3385225, at *14 (D. Minn. July 28, 2010) (quoting *I-Systems, Inc. v. Softwares, Inc.*, No. 02-1951 (JRT/FLN), 2004 WL 742082, at *15 (D. Minn. Mar. 29, 2004)).

[32] Claims under the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* ("CCLRA") and California Unfair Competition Law, Cal. Civ. Code § 17200 *et seq.* ("CUCL") are also subject to Rule 9(b)'s heightened pleading requirement. *See, e.g., Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Likewise, Minnesota's MUDTPA and the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69, subd. 1, and Minn. Stat. § 8.31, subd. 3(a) ("MCFA"), require heightened pleading. *Coyne's & Co. v. Enesco, LLC*, 565 F. Supp. 2d 1027, 1044 (D. Minn. 2008); *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 963 (D. Minn. 2000).

Stephens v. Arctic Cat Inc., No. 4:09-CV-02131, 2011 WL 890686, at *7 (E.D. Mo. Mar. 14, 2011) (interpreting the MMPA under Rule 9(b), requiring allegations of "the time, place, and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby"); *Slim CD, Inc. v. Heartland Payment Sys. Inc.*, No. 06-2256, 2007 WL 2459349, at *11 (D.N.J. Aug. 22, 2007) (same as to NJCFA); *Barnes v. Wells Fargo Bank, N.A.*, No. 11-438, 2011 WL 4572590, at *3 (W.D. Pa. Sept. 7, 2011) (same as to PACPL).

Plaintiffs' claim under the ICFA also fails because they identify no "communication containing a deceptive misrepresentation or deceptive omission" from Defendants, as required for a deception claim, *In re Michaels*, 830 F. Supp. 2d at 525, nor do they plausibly allege that Defendants' practices were "unfair" under the statute, *i.e.*, whether Defendants' practices (i) offended public policy, (ii) were immoral, unethical, oppressive, or unscrupulous, or (iii) caused substantial injury to Plaintiffs. *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 961 (Ill. 2002).

3. Reliance and Causation Are Not Pled.

Finally, Plaintiffs do not allege that they "relied" on any deceptive practices as required by the MCPA and PACPL.[33] *Henry v. Aurora Loan Servs., LLC*, No. CV TDC-14-1344, 2016 WL 1248672, at *6 (D. Md. Mar. 25, 2016) (citing *Bank of Am., N.A. v. Jill P. Mitchell Living Tr.*, 822 F. Supp. 2d 505, 533-34 (D. Md. 2011)) (MCPA); *Andress v. Nationstar Mortg.*, LLC, No. 15-1779, 2016 WL 75085, at *4 (E.D. Pa. Jan. 7, 2016) (citing *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 222 (3d Cir. 2008)) (PACPL).

Nor do they allege that Defendants intended to create such "reliance" as required by the ICFA. *See Brooks v. Midas-Int'l Corp.*, 361 N.E.2d 815, 819 (Ill. App. Ct. 1977). Moreover, Plaintiffs have not "demonstrate[d] that each class member read one or more of the advertisements upon which plaintiffs rely and that one or more of the false advertising and material factual concealments which they allege were contained therein constituted a proximate cause of 'an ascertainable loss' of money or property," as required by the NJCFA. *Fink v. Ricoh Corp.*, 839 A.2d 942, 958 (N.J. Super. 2003).

[33] Reliance is also required under the CCLRA and CUCL. *See Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 946 (S.D. Cal. 2007); *accord Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (CCLRA); *id.* (citing *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009)) (CUCL).

F. Plaintiffs Fail to Plead Cognizable Claims under State Data Breach Notification Statutes. (Count II)

The Complaint alleges violations of the "data breach notification statutes" of Idaho, Illinois, Maryland, Minnesota, and New Jersey (CAC ¶¶ 117-118), but Plaintiffs withdrew their claims under Minnesota and Idaho law in the district court because those statutes lack a private cause of action. D-ADD-8. Plaintiffs' claims under the laws of Illinois, Maryland, and New Jersey are also deficient, and should be dismissed.

1. Plaintiffs Cannot Seek Relief Pursuant to Statutes that Lack a Private Cause of Action.

New Jersey's statute does not provide for a private cause of action, and therefore does not permit Plaintiffs' claims. *Holmes*, 2012 WL 2873892, at *13 (New Jersey's notice statute "does not provide a private right of action for citizens to enforce its provisions.").

To the extent the remaining states, Illinois and Maryland, permit private enforcement through their consumer-protection statutes, Plaintiffs improperly plead their claims for violation of the data breach notification statutes as separate and distinct causes of action from the consumer-protection violations enumerated in Count I. *See* CAC Count II. As demonstrated above, Plaintiffs cannot establish a violation of those consumer-protection laws.

2. Plaintiffs Fail to Allege Any Harm from Any Purported Delay or Inadequate Notification.

In order to support a claim under the data breach notification statutes, Plaintiffs must establish that they suffered damages as a result of the alleged delay or inadequate notice, distinct from any harm caused by the intrusion itself. However, Plaintiffs offer only conclusory allegations, unsupported by facts demonstrating that Plaintiffs suffered any injury as a result of some purported delay. *See* CAC ¶¶ 11, 116.

Nor have Plaintiffs pled any basis for seeking equitable or injunctive relief under the statutes. *See* CAC, Prayer for Relief ¶ 5. Even if Plaintiffs had properly pled claims under Illinois and Maryland law—which they have not—those states only permit the Attorney General, not consumers, to seek injunctive relief. 815 Ill. Comp. Stat. 505/7(a); Md. Code Ann. § 13-406. These statutes provide equitable relief in the form of an injunction, whereby the Defendants would be required to provide notice of any data breach. However, this injunctive relief cannot help Plaintiffs because Defendants have already provided notice of the two criminal intrusions. *See* CAC ¶¶ 4-6. Moreover, an injunction to prevent a future violation of the data breach statutes is inappropriate as the requisite factual foundations here are far too speculative and uncertain.

3. Plaintiffs Fail Adequately to Allege that Defendants Violated the Notification Statutes.

Plaintiffs do not allege *facts* sufficient to state a claim that Defendants violated any of the three data breach notification statutes. Under Maryland and Illinois law, an obligation to notify consumers would arise only if Defendants actually "discovered" or were "notified" of an "unauthorized acquisition" of Plaintiffs' personal information. Md. Code. Ann., Com. Law §§ 14-3504(a)(1), (b)(1); 815 Ill. Comp. Stat. §§ 530/5, 530/10(a). Similarly, an obligation arose under New Jersey's statute only if Defendants actually "discovered" or were "notified" that Plaintiffs' personal information (not merely Defendants' computer networks) "was, or is reasonably believed to have been accessed by an unauthorized person." N.J. Stat. Ann. §§56:8-161, 163(a). Defendants' press releases, which Plaintiffs expressly incorporate into the Complaint, confirm that there was no such discovery or notification, and none is adequately pleaded. *See supra* at 19-20. Nor do Plaintiffs plead, as required by Maryland's statute, that Defendants determined that "misuse of" Plaintiffs' "personal information has occurred or is reasonably likely to occur." Md. Code Ann., Com. Law § 14-3504(b)(2).

Even if a notification obligation arose, Plaintiffs fail to allege that Defendants delayed the notification in violation of the statute. Plaintiffs allege that one month elapsed between the first intrusion and public notification; but they fail

to allege when Defendants discovered the Intrusions (much less when they discovered the supposed theft or unauthorized access resulting from the Intrusions). Because Defendants can only notify once they have actual knowledge of the Intrusions, Plaintiffs' allegations are deficient in that they fail to allege Defendants "unreasonably delayed" notification *after* such discovery. *See* CAC ¶ 43. *See also* 815 Ill. Comp. Stat. § 530/10(b); Md. Code Ann., Com. Law § 14-3504(c)(1); N.J. Stat. Ann. § 56:8-163(a).

G. The Complaint Does Not Adequately Plead a Claim for Unjust Enrichment. (Count VI)

"The substantive law of unjust enrichment is consistent across all jurisdictions: Plaintiffs must plead that [Defendants] 'knowingly received or obtained something of value which [they] in 'equity or good conscience' should not have received." *Target*, 66 F. Supp. 3d at 1177 (quotation and alterations omitted); CAC ¶ 83 n.11 (citing same). *See also E-Shops Corp.* 678 F.3d at 666. However, the Complaint fails to allege any unrecompensed benefit that Defendants received through Plaintiffs' purchase of goods from the Defendants.[34]

[34] Plaintiffs' unjust enrichment theory fails for the additional reason that the Complaint does not allege that there is no adequate remedy at law, a fundamental requirement to obtain equitable relief. *See, e.g.*, *Arena Dev. Gr., LLC v. Naegele Commns., Inc.*, No. 06-2806, 2008 WL 1924179, at *5 (D. Minn. Apr. 29, 2008) (dismissing unjust enrichment claim where damages sought were same as those sought through remedies available at law). Likewise, to the extent Plaintiffs postulate that their damages arise from some contract, "a court cannot grant relief under unjust enrichment for conduct governed by the contract." *Roth v. Life Time*

Plaintiffs allege that they paid Defendants money "for the purchase of goods." CAC ¶ 151. Yet, there is no allegation that Plaintiffs either failed to receive or otherwise returned the purchased goods without a refund. Plaintiffs' claim must fail "because they failed to allege that they conferred any benefit upon [the merchant] outside of the contracts they formed to purchase goods." *In re Zappos.com, Inc.*, MDL No. 2357, 2016 WL 2637810, at *7 (D. Nev. May 6, 2016) (dismissing unjust enrichment claim in data breach MDL); *see also Hughes v. Chattem, Inc.*, 818 F. Supp. 2d 1112, 1124-25 (S.D. Ind. 2011) (dismissing unjust enrichment claim where goods were purchased and kept by plaintiffs because "there is nothing inherently unjust about Plaintiffs paying for [goods] they allegedly purchased and consumed"); *In re Sony PS3 "Other OS" Litig.*, 551 F. App'x 916, 923 (9th Cir. 2014) (affirming dismissal of unjust enrichment claim); *Tyler v. Michaels Stores, Inc.*, 840 F. Supp. 2d 438, 451-52 (D. Mass. 2012) (no unjust enrichment claim for disclosure of personal information).

Similarly, Plaintiffs' "would not have shopped" theory also fails because Plaintiffs do not allege that they stopped shopping at the Defendants' stores after notice of either criminal intrusion. *See* CAC ¶ 155. Indeed, Plaintiffs admit that they did not stop shopping at the Defendants' stores after August 14 because

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Fitness, Inc., No. CV 15-3270 (JRT/HB), 2016 WL 3911875, at *3 (D. Minn. July 14, 2016); *Ferreira v. Sterling Jewelers, Inc.*, 130 F. Supp. 3d 471, 487 (D. Mass. 2015).

Plaintiffs all claim to have been affected by the second criminal intrusion – which occurred *after* notice of the first intrusion was provided. *Id.* ¶ 6. In fact, Plaintiffs Rocke and Gross expressly admit to shopping in Defendants' stores well after notice of the first intrusion was provided.[35] *Id.* ¶ 17 (alleging she shopped on August 30, September 7, September 14 and September 21), ¶ 30 (alleging he shopped on September 17). Consequently, because Plaintiffs have failed to state a cognizable claim for unjust enrichment, Count VI should have also been dismissed under Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the January 7, 2016 Order and Judgment of the district court.

Respectfully submitted,

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[35] Moreover, half of the named plaintiffs fail to state the dates on which they shopped at Defendants' locations at all, making it impossible to conclude that their claims with respect to the "would not have shopped" theory are even appropriate. *See* CAC ¶¶ 23-29, 31.

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Dated: August 12, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 16,456 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

3. Pursuant to Rule 28A(h)(2) of the Eighth Circuit Rules of Appellate Procedure, the undersigned counsel certifies that this brief and the accompanying addendum have been scanned for viruses and are virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2016, I electronically filed the foregoing Brief of Defendants-Appellees with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

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