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

REPLY BRIEF OF DEFENDANTS-APPELLEES

Harvey J. Wolkoff
harvey.wolkoff@ropesgray.com
Kathryn E. Wilhelm
kathryn.wilhelm@ropesgray.com
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199
Telephone: (617) 951-7000
Facsimile: (617) 951-7050

John L. Landolfi
jllandolfi@vorys.com
Christopher L. Ingram
clingram@vorys.com
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-6400

David T. Cohen
david.cohen@ropesgray.com
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036
Telephone: (212) 596-9000

Sunil V. Shenoi
sunil.shenoi@ropesgray.com
ROPES & GRAY LLP
191 North Wacker Drive, 32nd Floor
Chicago, IL 60606
Telephone: (312) 845-1315

Stephen P. Safranski
ssafranski@robinskaplan.com
Robins Kaplan LLP
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402
Telephone: (612) 349-8500

Counsel for Supervalu Inc.

Marc A. Al
marc.al@stoel.com
STOEL RIVES LLP
33 South Sixth Street, Suite 4200
Minneapolis, MN 55402
Telephone: (612) 373-8801

Counsel for AB Acquisition LLC and New Albertson's, Inc.

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If this Court determines the Complaint sufficiently establishes standing (which it should not), it should nonetheless affirm the dismissal below on Rule 12(b)(6) grounds, because the parties fully briefed the issues under Rule 12(b)(6) on appeal, and the Complaint is "clearly meritless" under *Carlsen v. GameStop, Inc.*, No. 15-2453, 2016 WL 4363162, at *4 (8th Cir. Aug. 16, 2016). Indeed, under GameStop, and contrary to Plaintiffs' argument,[1] this Court need not remand for the district court to decide in the first instance whether Plaintiffs failed to state a claim. *See GameStop*, 2016 WL at 4363162, at *4 n.2. Nor must this Court accept Plaintiffs' improper and untimely contention that they should be granted leave to amend further. *See* Resp. at 15-16 (citing *Knox v. Kempker*, 297 F. App'x 573 (8th Cir. 2008)).[2] Plaintiffs failed to seek leave to amend during the motion to dismiss briefing and argument below, and they cannot properly do so for the first time here.[3] *See Steele v. City of Bemidji*, 257 F.3d 902, 905 (8th Cir. 2001).

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[1] Resp. at 15. Plaintiffs-Appellants' Response and Reply Brief shall be referred to herein as "Response" and cited as "Resp."

[2] Plaintiffs rely entirely on *Knox*, a one-paragraph decision permitting repleading for a *pro se* prisoner appealing the dismissal of his suit alleging improper placement in administrative segregation. 297 F. App'x at 573. *Knox* provides no support for the proposition that sophisticated putative class action plaintiffs' counsel ought to have the right to replead after failing to request that relief in the first instance.

[3] After the Complaint was dismissed, Plaintiffs filed a motion under Rule 59(e) to alter or amend judgment, which included a request for leave to file a second

At bottom, Plaintiffs' Response fails to rescue the Complaint's fatal flaws. Not one of their claims satisfies Rule 12(b)(6) by plausibly alleging facts that would support a finding of liability under any of Plaintiffs' statutory or common-law theories. Therefore, for the reasons in the Brief of Defendants-Appellees' ("Defs.' Br.") and herein, even if Plaintiffs are adjudged to somehow have standing to bring those claims, Defendants respectfully request that this Court dismiss Plaintiffs' Complaint in its entirety with prejudice.

I. THIS COURT SHOULD ANALYZE CHOICE-OF-LAW IN EVALUATING DEFENDANTS' MOTION TO DISMISS.

"The court may appropriately undertake a choice of law analysis at the motion to dismiss stage where," as here, "the factual record is sufficiently developed to facilitate the resolution of the issue." *In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig.*, MDL 8:11-mn-02000-JMC, 2013 WL 169289 at *2 (D.S.C. Jan. 16, 2013) (citation omitted). *See also* Defs.' Br. at 42–44; *Montich v. Miele USA, Inc.*, 849 F. Supp. 2d 439, 448 (D.N.J. 2012); *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 517 F. Supp. 2d 832, 838–39 (E.D. La. 2007). Plaintiffs fail to explain to which body of law this Court should look to evaluate the sufficiency of their claims (*see* Resp. at 17), but their own Complaint supplies the factual allegations to determine

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amended complaint. JA-132. The district court denied leave to amend because Plaintiffs failed to satisfy the requirements of Fed. R. Civ. P. 59(e) and 60(b). JA-227, -233-34. Plaintiffs did not appeal from that ruling. *See* JA-235.

where Plaintiffs reside and where they swiped their cards at Defendants' store locations. CAC at ¶¶ 16-31. As Plaintiffs admit, the Court must accept these factual allegations in their own Complaint as true. Resp. at 16; *see Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968) ("In testing the legal sufficiency of the complaint the well-pleaded allegations are taken as admitted."). Nevertheless, Plaintiffs would prefer to avoid the choice-of-law analysis dictated by their own allegations. The Court should not permit them to do so.

II. THE COMPLAINT INADEQUATELY PLEADS CLAIMS FOR NEGLIGENCE AND NEGLIGENCE *PER SE*.

A. Plaintiffs Rely on Inappropriate and Distinguishable Authority to Assert Damages.

Plaintiffs must plausibly plead actual damages to survive a motion to dismiss their negligence and negligence *per se* claims. Plaintiffs fail to plead cognizable damages, notwithstanding their *post hoc* efforts to bolster their damages claims in their brief by misstating the facts alleged in the Complaint. *See Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1020 (D. Minn. 2006). In contrast to the data breach cases upon which Plaintiffs rely (*see* Resp. at 19-21), Plaintiffs allege only speculative "injuries." *See Allen v. Schnuck Mkts., Inc.*, No. 15-cv-0061, 2015 WL 5076966, at *3 (S.D. Ill. Aug. 27, 2015) (alleging actual "financial losses caused by fraudulent charges"); *Corona v. Sony Pictures Entm't, Inc.*, No. 14-CV-09600, 2015 WL 3916744, at *3 (C.D. Cal. June 15, 2015) (alleging actual and

widespread misuse of their PII); *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 154 (1st Cir. 2011) (alleging approximately 1,800 cases of unauthorized payment card charges); *In re Target Corp. Customer Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1158-59 (D. Minn. 2014) (alleging fraudulent charges for 41 plaintiffs, restricted or blocked access to bank accounts, and charges and fees stemming from misuse); *Remijas v. Neiman Marcus Grp. LLC*, 794 F.3d 688, 690 (7th Cir. 2015) (noting 9,200 instances of fraudulent charges, and addressing only Article III standing rather than state law); *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1322 (11th Cir. 2012) (alleging that both plaintiffs were victims of identity theft caused by defendant's failures); *In re Adobe Sys. Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1215 (N.D. Cal. 2014) (alleging that stolen data surfaced on the Internet and that data was misused by hackers).[4]

Plaintiffs' reliance on *Galaria v. Nationwide Mut. Ins. Co.*, No. 15-3386, 2016 WL 4728027 (6th Cir. Sept. 12, 2016), an unpublished decision over a vigorous dissent, is similarly misplaced. That case addressed only *Article III standing*, not whether plaintiffs plausibly alleged actual damages for purposes of

[4] *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855 (N.D. Cal 2011) is also inapposite. In *Claridge*, the court permitted the plaintiff's claim based on a deprivation of value theory to proceed due to the novelty of the claim at the time and the lack of relevant precedent. *Id.* at 861. Five years later, neither justification is present in this case. *See, e.g.*, *Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d 1078, 1088-89 (E.D. Cal. Aug. 28, 2015) (rejecting deprivation of value theory in data breach case).

stating a claim under state law. In *Nationwide* it was undisputed that criminals stole plaintiffs' social security numbers, which constitutes far more sensitive information than payment card data. *Nationwide* does not help Plaintiffs here because that court distinguished its result from cases where it is not clear the data at issue was even stolen. *Id.* at *4 (distinguishing *Reilly v. Ceridian*, 664 F. 3d 38 (3d Cir. 2011)).[5]

Plaintiffs further claim that their conclusory and deficient pleading about damages "deserves to be fleshed out in discovery." *See* Resp. at 23. Not so. *Kaylor v. Fields*, 661 F.2d 1177, 1184 (8th Cir. 1981) ("Discovery should follow the filing of a well-pleaded complaint. It is not a device to enable a plaintiff to make a case when his complaint has failed to state a claim."). First, the allegation Plaintiffs point to about the conduct of third-party "illicit websites" is pled "on information and belief." CAC ¶ 9. It refers to what criminals *could do* with information found on such third-party sites; there is no allegation (even on information and belief) about what third-party criminals *have done* with any of the Plaintiffs' information.

[5] In an attempt to demonstrate cognizable injury, Plaintiffs direct this Court to the very press releases they disclaimed in their opening brief. *Compare* Resp. at 22-23 (citing JA-62) *with e.g.*, Pls.' Br. at 11, 19-20. Plaintiffs now rely on the press releases for language they believe bolsters their claim that Plaintiffs are exposed to risk. Yet, Plaintiffs ignore language in that very press release disclosing "[Supervalu] has not determined that any such cardholder data was in fact stolen by the intruder, and it has no evidence of any misuse of any such data, but is making this announcement out of an abundance of caution." JA-62. Plaintiffs' attempt to benefit by cherry-picking language should not be sanctioned.

Id. This pleading deficiency – at once conclusory and hypothetical – simply does not satisfy Plaintiffs' burden. *See Glassman v. Computervision Corp.*, 90 F.3d 617, 629 (1st Cir. 1996) ("[I]t is plaintiffs' responsibility to plead factual allegations, not hypotheticals."). Nor do Plaintiffs explain why this pleading deficiency could not have been cured during the intervening year between June 2014 (when the intrusions were alleged to commence) and June 2015 (when Plaintiffs last amended their Complaint). *See* JA-3. Second, notwithstanding Plaintiffs' claim to the contrary, Defendants have no informational advantage whatsoever about what third-party criminals might do in the event they successfully extracted data from Defendants' electronic systems. That information is plainly not "peculiarly within [Defendants'] possession and control." *Cf.* Resp. at 24 (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)).

B. None of the Narrow Exceptions to the Economic Loss Doctrine Applies.

The economic loss doctrine bars Plaintiffs' negligence and negligence *per se* claims in all relevant states. The very cases upon which Plaintiffs rely demonstrate that the "independent duty" exception is limited to instances of professional malpractice or incompetence – a circumstance obviously inapplicable here. *See Kerr v. Fed. Emergency Mgmt. Agency*, 113 F.3d 884, 886 (8th Cir. 1997) (examining possibility of independent duty where insurance agent failed to timely process a claim); *Bilt-Rite Contractors, Inc. v. Architectural Studio*, 866 A.2d 270,

288 (Pa. 2005) (professional malpractice related to construction); *Saltiel v. GSI Consultants, Inc.*, 788 A.2d 268, 279–80 (N.J. 2002) (athletic field designer allegedly failed to exercise professional competence); *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 636 N.E.2d 503, 514 (Ill. 1994) (professional accountant malpractice; holding "[t]he evolution of the economic loss doctrine shows [it] is applicable to the service industry only where the duty of the party performing the service is defined by the contract that he executes with his client"). Further, Maryland requires both an independent duty and a special relationship—or "intimate nexus"—to find an exception to the economic loss rule. *See Jacques v. First Nat'l Bank of Md.*, 515 A.2d 756, 759–60 (Md. 1986).

An ordinary merchant-customer relationship such as the one pled here has repeatedly been held not to trigger the limited "special relationship" exception under Idaho, Missouri, or Maryland law. *See* Defs.' Br. at 47. And notwithstanding *Target*'s application of the exception under Pennsylvania law, the Third Circuit recently applied that same state's economic loss doctrine to bar a data breach suit by customers and employees of a prescription administration company, even though plaintiffs were required to provide their personal information to the company "as a prerequisite to employment or use of [the company's] services."

Longenecker-Wells v. Benecard Servs., Inc., No. 15-3538, -- Fed. Appx. --, 2016 WL 4474701, at *1 (3d Cir. Aug. 25, 2016).[6]

Plaintiffs raise a number of policy reasons why the economic loss doctrine should not bar their negligence claims, but none of the reasons they identify is sound. *See* Resp. at 25 (attempting to discount the economic loss doctrine as a "court-made rule"), 27 ("[T]he principles behind the economic loss rule do not support its application."). Moreover, Plaintiffs cite no support for their proposed exception to the economic loss doctrine based on a purported "*independent* duty to safeguard" customer data. *Id*. at 28. This Court should not craft an exception to the economic loss doctrine under the laws of six states out of whole cloth. No exception to the economic loss doctrine applies in the instant case.

C. Foreseeability Alone Does Not Create a Duty to Protect from Third Party Harm.

Plaintiffs' invitation to fashion a new common law duty should be rejected. Judicial creation of Plaintiffs' proffered "duty" to avert cyberattacks would be particularly inappropriate here, because it would circumvent the will of state legislatures that have already weighed competing interests and concluded that

[6] Plaintiffs erroneously imply that Defendants have waived arguments on appeal, but fail to identify any specific argument allegedly made below and omitted before this Court. *See* Resp. at 29, n.7. Plaintiffs' claim is unfounded. As in the district court, Defendants argued that the economic loss doctrine bars Plaintiffs' negligence claims and that no exception to the doctrine applies. Defs.' Br. at 46-47. Defendants are under no duty to anticipate or divine all of Plaintiffs' responses or arguments and preemptively address them in their opening brief.

Defendants' obligations were limited, at most, to notification. *See Dittman v. UPMC*, No. GD-14-003285, 2015 WL 4945713, at *4-5 (C.P. Allegheny May 28, 2015) (dismissing negligence claim in data breach case for failure to allege duty where state legislature promulgated limited statute); *Cooney v. Chicago Pub. Sch.*, 943 N.E.2d 23, 28 (Ill. App. Ct. 2010) (same).[7]

Moreover, Plaintiffs concede that they must plead a "special relationship" to establish that Defendants had a duty to protect them from third-party criminal acts, which Plaintiffs have failed to do. *See* Resp. at 32; *see also Simmons v. Homatas*, 925 N.E.2d 1089, 1099 (Ill. 2010) ("[A] special relationship is required in order to impose a duty on the defendant to protect others from the criminal acts of a third party."); *Valentine v. On Target, Inc.*, 727 A.2d 947, 950 (Md. 1999) ("[A] private person is under no special duty to protect another from the criminal acts by a third person, in the absence of statutes, or of a special relationship."); *Vittengl v. Fox*, 967 S.W.2d 269, 275 (Mo. Ct. App. 1998) ("[A]bsent a special relationship or special circumstances, a party has no duty to protect another person from the

[7] *See also* Illinois Personal Information Protection Act, 815 Ill. Comp. Stat. § 530 *et seq.* (2014) (requiring post-breach notification and secure disposal of information); Pennsylvania Breach of Personal Information Notification Act, 73 Pa. Const. Stat. § 2301 *et seq.* (2014) (notification only); Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.1500 (2014) (notification only); Idaho Code Ann. § 28-51-105 (2014) (notification only); N.J. Stat. Ann. § 56:8-161 *et seq.* (2014) (notification and secure destruction of materials).

deliberate criminal attack of a third party."). [8] A mere merchant-customer relationship is insufficient to impose such a duty. *See Meadows v. Friedman R.R. Salvage Warehouse, Div. of Friedman Bros. Furniture Co.*, 655 S.W.2d 718, 721 (Mo. Ct. App. 1983) (noting that the relationship between a customer and the owner of a business is not among the special relationships that gives rise to a duty to protect). Plaintiffs cite inapposite cases outside the data breach context that do not support their argument, given that several did not even discuss third-party criminal acts, and all but one found there was no special relationship.[9]

The data breach cases Plaintiffs cite also fail to support their theory. The opinion addressing Target's motion to dismiss the financial institutions' claims did not find a duty to protect plaintiffs from third-party criminals, but rather sustained a "direct" negligence claim arising from the issuing banks' "allegation that Target purposely disabled one of the security features that would have prevented the harm." *In re Target Corp. Customer Data Sec. Breach Litig.*, 64 F. Supp. 3d

[8] It is entirely appropriate for the Court to decide the absence of a special relationship at the motion to dismiss stage, notwithstanding Plaintiffs' citations to irrelevant states' law stating the contrary. *See, e.g., Muthukumarana v. Montgomery Cty.*, 370 Md. 447, 473 (2002) (negligence action, holding that existence of a special relationship was a question of law appropriately decided on motion to dismiss).

[9] Plaintiffs' citations to Minnesota law regarding whether the lack of a special relationship should be applied to bar their claim now or later are inapposite, since Plaintiffs do not contend that Minnesota law applies here.

1304,1309 (D. Minn. 2014).[10] Plaintiffs allege no such "direct" act of negligence here. Of the remaining data breach cases Plaintiffs cite, those that did address a "special relationship" demonstrate that it requires a much more dependent and sustained association than a merchant-customer relationship. *See Corona*, 2015 WL 3916744 at *5 (employer and employee); *Bell v. Mich. Council 25 of Am. Fed'n of State, Cnty., & Mun. Emps., AFL-CIO, Local 1023*, No. 246684, 2005 WL 356306 at *5 (Mich. Ct. App. Feb. 15, 2005) (union and members).

D. Controlling Precedent Bars Plaintiffs' Negligence *Per Se* Claim.

Plaintiffs fail to address Eighth Circuit case law, cited in Defendants' opening brief, holding 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 v. Back Yard Burgers Inc.*, 91 F.3d 1184, 1187 (8th Cir. 1996). That rationale applies equally to Plaintiffs' negligence *per se* claim, as illustrated by overwhelming precedent rejecting negligence *per se* claims premised on alleged violations of statutes that lack a private cause of action under the relevant states' negligence law. *Vind v. McGuire*, No. A13-0591, 2013 WL 6152312, at *4 (Minn. Ct. App. Nov. 25, 2013); *In re Prof'l Fin. Mgmt., Ltd.*,

[10] Nor do the Plaintiffs and Defendants have the same relationship as the one between the plaintiff financial institutions and defendant Target. The *Target* consumer case did not substantively address the issue of duty. *See Target*, 66 F. Supp. 3d at 1170-71.

692 F. Supp. 1057, 1065 (D. Minn. 1988); *Bradley v. Ray*, 904 S.W.2d 302, 314 (Mo. Ct. App. 1995); *Reynolds v. Am. Hardware Mut. Ins. Co.*, 115 Idaho 362, 365 n.2 (1988). Accordingly, Plaintiffs' reliance on cases reaching the opposite conclusion under irrelevant Georgia and Virginia state law does not support their position. *See* Resp. at 35.

Plaintiffs also mischaracterize New Jersey case law to overstate the viability of the negligence *per se* doctrine. *See* Resp. at 38. In *Alloway*, the New Jersey Supreme Court unequivocally held that "the finding of a [violation of a federal regulation] does not ipso facto constitute a basis for assigning negligence as a matter of law; that is, it does not constitute negligence *per se*." *Alloway v. Bradlees, Inc.*, 723 A.2d 960, 967 (N.J. 1999). Accordingly, Plaintiffs' reliance on the outdated and abrogated *Meder* decision is entirely misplaced. *See Slack v. Whalen*, 327 N.J. Super. 186, 195 (App. Div. 2000) ("[T]his court decided *Meder* before the Supreme Court issued its opinion in *Alloway*. A careful reading of *Alloway* makes it clear that the Court rejected *Meder*'s attempt to impose a duty of care on an owner/contractor based solely on a finding that OSHA regulations had been violated.").

Finally, Defendants note that Plaintiffs again rely on cases applying state laws that are not relevant here, this time California and Florida. *See* Resp. at 37.

III. PLAINTIFFS' IMPLIED CONTRACT CLAIM FAILS BECAUSE THEY ALLEGE NO DEFINITE "MEETING OF THE MINDS"

Plaintiffs concede that their implied contract claim rests on an "implicit" offer to implement unspecified data security measures. Resp. at 40. Plaintiffs do not allege that they received, considered, or even discussed any data security measures when they made their purchases. Nor was any additional consideration paid for data security services: Plaintiffs would have tendered the same amount for their groceries had they paid in cash, where such data security services are unnecessary. Consequently, no implied contract for data security measures exists.

A contractual term will not be implied where a complaint fails to allege sufficient factual allegations to establish a definite meeting of the minds over the term's existence. *Longenecker-Wells v. Benecard Servs.*, 2016 WL 4474701, at *3 ("Though intent can be gleaned from the parties' 'ordinary course of dealing[s],' 'naked assertions devoid of further factual enhancement' fail to state an actionable claim." (alteration in original, citations omitted)). Simply that a plaintiff provides a company with personal information does "not create a contractual promise to safeguard that information, especially from third party hackers." *Id.* There, as here, plaintiffs failed to allege that the company made any data security representations to the plaintiffs. *Id.*

Moreover, mutual assent is required; one party's subjective belief is insufficient. *Lovell v. P.F. Chang's China Bistro, Inc.*, No. C14-1152, 2015 WL

4940371, at *3 (W.D. Wa. Mar. 27, 2015) ("Plaintiff alleges no facts suggesting that he requested or that defendant made additional promises regarding loss prevention, and neither the circumstances nor common understanding give rise to an inference that the parties mutually intended to bind defendant to specific cybersecurity obligations."). Failure to plead facts surrounding both parties' intent leaves no basis "from which one could plausibly 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." *Id.* at *3.

IV. PLAINTIFFS FAIL TO STATE CLAIMS UNDER THE STATE CONSUMER PROTECTION STATUTES.

Plaintiffs rely exclusively upon the FTC Act to support their claims under the state consumer protection statutes. *See* Resp. at 41-43. But there is no private right of action under the FTC Act. *See, e.g.*, *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973); *Morrison*, 91 F.3d at 1187.

Plaintiffs' misplaced focus on the FTC Act does not ameliorate the fatal defects in their Complaint under each state statutory claim alleged. Plaintiffs do not dispute that they must plead "actual economic loss" under the laws of Maryland, Idaho, Illinois, Missouri, New Jersey, and Pennsylvania. *See Legore v. OneWest Bank, FSB*, 898 F. Supp. 2d 912, 919-20 (D. Md. 2012); *In re Wiggins*, 273 B.R. 839, 856 (D. Idaho 2001); *Kim v. Carter's, Inc.*, 598 F.3d 362, 365 (7th Cir. 2010);

Plubell v. Merck & Co., Inc., 289 S.W.3d 707, 711-12 (Mo. Ct. App. 2009); *Weinberg v. Sprint Corp.*, 173 N.J. 233, 250 (2002); *Benner v. Bank of Am., N.A.*, 917 F. Supp. 2d 338, 359-60 (E.D. Pa. 2013). Yet, the Complaint fails to identify any actual pecuniary losses incurred by a Plaintiff caused by the Defendants. *See* CAC ¶¶ 16-31.

Plaintiffs also do not address the requirement that such claims must be pled with particularity under Minnesota, Missouri, New Jersey, and Pennsylvania's laws. *See Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 963 (D. Minn. 2000); *Coyne's & Co. v. Enesco, LLC*, 565 F. Supp. 2d 1027, 1044 (D. Minn. 2008); *Stephens v. Arctic Cat Inc.*, No. 4:09-CV-02131, 2011 WL 890686, at *7 (E.D. Mo. Mar. 14, 2011); *Slim CD, Inc. v. Heartland Payment Sys., Inc.*, No. 06-2256, 2007 WL 2459349, at *11 (D.N.J. Aug. 24, 2007); *Barnes v. Wells Fargo Bank, N.A.*, No. 11-438, 2011 WL 4572590, at *3 (W.D. Pa. Sept. 7, 2011).

Plaintiffs ignore Minnesota's clear law that affords only *prospective* relief, and fail to show how they are likely to be injured in the future, as required for the injunctive relief available under that law. *See Hunter v. Ford Motor Co.*, No. 08-4980, 2010 WL 3385225, at *14 (D. Minn. July 28, 2010). Nor do Plaintiffs identify any "communication" by Defendants that is required for a deception claim under Illinois law. *See In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 525 (N.D. Ill. 2011). Plaintiffs also do not allege that any Plaintiff saw or read any

advertisement by Defendants upon which Plaintiffs relied, as required in New Jersey. *See Fink v. Ricoh Corp.*, 839 A.2d 942, 958 (N.J. Super. 2003).

Indeed, Plaintiffs fail to allege any facts establishing "reliance" necessary under California, Maryland, and Pennsylvania law. *See Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 946 (S.D. Cal. 2007); *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009); *Bank of Am., N.A. v. Jill P. Mitchell Living Trust*, 822 F. Supp. 2d 505, 532 (D. Md. 2011); *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001). Plaintiffs also fail to meet Illinois's requirement that Defendants must have intended to create Plaintiffs' reliance. *See Brooks v. Midas-Int'l Corp.*, 361 N.E.2d 815, 819 (Ill. App. Ct. 1977). Any notion that Plaintiffs' would not have used their payment cards at Defendants' stores as Plaintiffs' now argue (Resp. at 43) is refuted by their own admission to the continued use of their credit and debit cards at Defendants' stores after notice of the first intrusion was provided. *See* CAC ¶¶ 4-5, 17, 30.

V. THE COMPLAINT FAILS TO PLEAD COGNIZABLE CLAIMS UNDER THE ILLINOIS, MARYLAND AND NEW JERSEY BREACH NOTIFICATION STATUTES.

Plaintiffs implicitly concede their claims under the data breach notification statutes of Minnesota, Idaho, and Missouri cannot survive, but persist in their claims under the laws of Illinois, Maryland, and New Jersey. Resp. at 44. None of those claims survives scrutiny under Rule 12(b)(6).

Plaintiffs err in suggesting that New Jersey provides a private right of action directly through its breach notification statute. The court in *Holmes v. Countrywide Fin. Corp.* was clear in its analysis that the New Jersey notice statute "does not provide a private right of action for citizens to enforce its provisions." No. 5:08-CV-00205, 2012 WL 2873892, at *13 (W.D. Ky. July 12, 2012).[11] Moreover, New Jersey proscribes only "willful[], knowing[], or reckless[]" violations of the statute, which are not plausibly alleged here. N.J. Stat. Ann. § 56:8-166.

Furthermore, in insisting that claims under Illinois, Maryland or New Jersey's breach notification statutes can be brought via those states' consumer protection statutes, Plaintiffs misstate Defendants' argument. Plaintiffs attempt to plead a cause of action that does not exist as a stand-alone action in those states. CAC ¶¶ 104-118 (Count II). Consequently, violations of the notification statute are but one element of a statutory consumer protection claim, and Plaintiffs have failed to state a claim satisfying the elements under those statutes. *See*, *e.g.*, *supra* Section IV (lack of "actual economic loss" fatal under Illinois, Maryland and New Jersey statutes).

[11] While the court in *Target* permitted claims under the New Jersey statute to proceed, the court reached its conclusion without specifically analyzing New Jersey law. *See* 66 F. Supp. 3d at 1167. *Holmes*, where New Jersey law was the sole law at issue on this claim, is the better authority.

Plaintiffs also fail to state a claim under Illinois, Maryland, or New Jersey breach notification statutes because they fail to allege that they suffered any damages as a result of the purported delay that is distinct from any harm caused by the intrusion itself. *See* Resp. 18-25 (citing CAC ¶¶ 9, 18, 31, 133). The Complaint admits that notice was provided less than one month after the first intrusion. CAC ¶ 111. Plaintiffs now argue that they spent extra time and money to "refresh their recollections" and to "ascertain their exposure" due to the timing the public notices were provided. Resp. 47-48. Not only are such purported assertions absent from the Complaint, such harm is speculative at best and insufficient as a matter of law. *See, e.g.*, *Maglio v. Advocate Health & Hosps. Corp.*, 40 N.E.3d 746, 750 (Ill. App. Ct. 2015) (affirming dismissal of notice of breach claim because plaintiffs' mitigation activities were not cognizable damages); *Chambliss v. CareFirst, Inc.*, No. RDB-15-2288, 2016 WL 3055299, at *5 (D. Md. May 27, 2016) (dismissing notice of breach claim, in part because mitigation costs insufficient).[12] In fact,

[12] Plaintiffs' criticism that "Defendants' announcements invited, if not instructed, Plaintiffs to take measures to determine their exposure" is remarkable. Resp. at 48. The very notice of breach statute Plaintiffs invoke under Maryland law expressly requires such notices to include "a statement that an individual can obtain information from [the consumer reporting agencies, the Federal Trade Commission, and the Office of the Attorney General] about the steps the individual can take to avoid identity theft." Md. Code Ann., Com. Law § 14-3504(g)(4)(ii); *see also* Ill. Comp. Stat. Ann. 530/10(a). Additionally, Plaintiffs now criticize Defendants for not providing Plaintiffs with individual notice (Resp. at 48); yet, Plaintiffs do not allege they provided Defendants with mailing addresses or other contact information when they made their grocery purchases.

Plaintiffs do not plead when Defendants discovered the supposed theft or any other necessary facts showing an "unreasonable delay" in notifying consumers. See 815 Ill. Comp. Stat. § 530/10(a); N.J. Stat. Ann. § 56:8-163(a); Md. Code Ann., Com. Law § 14-3504(b)(2).

Finally, the Response erroneously claims that Defendants' knowledge of the intrusions is irrelevant to whether they violated the statutes. Resp. at 48-49. By the statutes' plain terms, an obligation to notify consumers only arose if Defendants actually "discovered" or were "notified" of "unauthorized acquisition" (*i.e.*, theft) of Plaintiffs' personal information. Md. Code Ann., Com. Law § 14-3504(b)(1); 815 Ill. Comp. Stat. §§ 530/5, 530/10(a).[13] Defendants' press releases, which Plaintiffs expressly incorporate into the Complaint and rely on in their briefing before this Court, confirm there was no such discovery or notification of theft, and none is adequately pleaded. *See* JA-62, -70, -74, -82; *see also supra* Section II.A. at n.4.

VI. THE COMPLAINT DOES NOT PLAUSIBLY ALLEGE A CLAIM FOR UNJUST ENRICHMENT.

Plaintiffs cannot maintain a claim for unjust enrichment because they have retained the goods originally purchased – there is no unrecompensed benefit. *In re*

[13] Similarly, an obligation arose under New Jersey's statute only if Defendants actually "discovered" or were "notified" that Plaintiffs' personal information "was, or is reasonably believed to have been accessed by an unauthorized person." N.J. Stat. Ann. §§ 56:8-161, 163(a).

Zappos.com, Inc., No. 3:12-cv-00325, 2013 WL 4830497, at *5 (D. Nev. Sept. 9, 2013) (dismissing unjust enrichment claim because "[a]lthough Plaintiffs allege having bestowed the benefit of their purchase of goods, it appears undisputed that Defendant provided Plaintiffs a benefit in return (providing the goods) such that there is no unrecompensed benefit conferred"), *reconsidered on other grounds* 2016 WL 4521681 (D. Nev. Aug. 29, 2016).

Plaintiffs rely on *Target* (Resp. at 51-53), but gloss over the fact it rejects any "overcharge" theory (which theory is absent from the Complaint). *See* 66 F. Supp. 3d at 1177-78 ("overcharge" theory does not lie where merchant charges all shoppers same price, regardless of payment method; distinguishing *Resnick v. AvMed* on that basis); *see also GameStop*, 2016 WL 4363162, at *6 (dismissing unjust enrichment claim under Rule 12(b)(6) where no additional consideration alleged for subscribers' data security protections; nor was defendant's agreement to provide same alleged). *Target* also does not support Plaintiffs' "boycott" theory. Unlike in *Target*, the Complaint does not allege that Plaintiffs stopped shopping at Defendants' stores after notice of the first intrusion was provided. *See* CAC ¶¶ 4-5, 17, 30.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiffs' Complaint with prejudice under Rule 12(b)(6) should the Court find Plaintiffs sufficiently pled standing.

Respectfully submitted,

ROPES & GRAY LLP

BY: /s/ Harvey J. Wolkoff

Harvey J. Wolkoff (#02199)
Kathryn E. Wilhelm
800 Boylston Street
Boston, MA 02199
Phone: (617) 951-7000
Harvey.Wolkoff@ropesgray.com
Kathryn.Wilhelm@ropesgray.com

David T. Cohen
1211 Avenue of the Americas
New York, NY 10036
Phone: (212) 596-9000
David.Cohen@ropesgray.com

Sunil Shenoi
32nd Floor, 191 North Wacker Drive
Chicago, IL 60606
Phone: (312) 845-1200
Sunil.Shenoi@ropesgray.com

ROBINS KAPLAN LLP

Stephen P. Safranski (#331326)
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
Phone: (612) 349-8500
SSafranski@robinskaplan.com

Attorneys for Defendant-Appellee Supervalu Inc.

VORYS, SATER, SEYMOUR AND PEASE LLP

John L. Landolfi
Christopher L. Ingram
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-6400
jllandolfi@vorys.com
clingram@vorys.com

Attorneys for Defendants-Appellees AB Acquisition LLC and New Albertson's, Inc.

STOEL RIVES LLP

Marc A. Al (247923)
33 South Sixth Street, Suite 4200
Minneapolis, MN 55402
Phone: (612) 373-8801
marc.al@stoel.com

Local Counsel for Defendants-Appellees AB Acquisition LLC and New Albertson's, Inc.

Dated: September 29, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C) because this brief contains 5,103 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Harvey J. Wolkoff
Harvey J. Wolkoff
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199
Telephone: (617) 951-7000
harvey.wolkoff@ropesgray.com

Attorney for Appellee Supervalu Inc.

Dated: September 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2016, I electronically filed the foregoing Reply 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.

/s/ Harvey J. Wolkoff
Harvey J. Wolkoff
ROPES & GRAY LLP
800 Boylston Street
Boston, MA 02199
Telephone: (617) 951-7000
harvey.wolkoff@ropesgray.com

Attorney for Appellee Supervalu Inc.

Dated: September 29, 2016