IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

RHONDA L. HUTTON, O.D. AND TAWNY P. KAEOCHINDA, O.D., on behalf of themselves and all others similarly situated, Plaintiffs, v. NATIONAL BOARD OF EXAMINERS IN OPTOMETRY, INC., Defendant.	CASE NO. 1:16-CV003025

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) & 12(B)(6) OR, IN THE ALTERNATIVE, MOTION TO STRIKE PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(f) & 23(d)(1)(D)

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Defendant National Board of Examiners in Optometry, Inc. ("NBEO"), by and through undersigned counsel, hereby submits its Memorandum in Support of its Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) or, in the alternative, Motion to Strike pursuant to Federal Rules of Civil Procedure 12(f) and 23(d)(1)(D).

I. INTRODUCTION

This action addresses an alleged data privacy event relating to the unauthorized access or acquisition of optometrists' personal information. Unlike other data breach class actions that have followed on the heels of the revelations by entities like Home Depot, Target, and others that have been breached, Defendant has not announced that it suffered a data privacy event affecting members of the proposed class. Rather, Plaintiffs' allegations that Defendant suffered a data privacy event are solely based on speculation in social media.

The Plaintiffs have alleged that they received Chase Amazon Visa credit cards that they did not apply for, but fail to allege any actual fraudulent charges or economic harm as a result. As set forth more fully below, Plaintiffs lack standing to sue in the absence of such harm. Moreover, Plaintiffs lack standing to sue as their alleged injuries are not fairly traceable to the alleged data privacy event.

Plaintiffs' negligence claim fails as a matter of law because Defendant has no legally cognizable duty to Plaintiffs, Plaintiffs fail to plead any actual injury or damages, and the economic loss doctrine bars Plaintiffs' claim. Plaintiffs' breach of contract and breach of implied contract claims fail because they fail to allege a meeting of the minds and an intent to enter into a contract, and fail to allege cognizable damages. Plaintiffs' violation of the California Customer Records Act ("CRA") fails because they lack standing and fail to allege that they were injured. In addition, Plaintiffs lack any legal basis to pursue statutory damages under the CRA. Plaintiffs' claim for violation of the California Unfair Competition Law ("UCL") fails because they lack standing, Section 1798.81 is inapplicable to the present matter, they fail to allege any unfair or lawful conduct, and Plaintiffs fail to allege any loss of money or property. Finally, Plaintiff's UCL claim is limited to equitable remedies.

If the Court does not dismiss Plaintiffs' Complaint, Defendant respectfully requests that the Court strike Plaintiffs' class allegations for failure to meet the requirements of Federal Rule of Civil Procedure 23. Finally, Defendant respectfully requests that the Court strike the scandalous and irrelevant allegations in the Complaint that unduly prejudice the Defendant pursuant to Federal Rule of Civil Procedure 12(f).

II. RELEVANT FACTUAL ALLEGATIONS

Defendant collects and stores personal information and financial information of optometrists as part of its administration of optometry exams. Compl. ¶ 1. This information includes name, date of birth, address, Social Security number, and credit card information. Compl. ¶ 1. On or around July 23, 2016, optometrists from around the country began to notice that Chase Amazon Visa credit cards, which they did not apply for, were being opened up in their names. Compl. ¶ 2, 15. These individuals discussed their experiences and concluded, without any evidence or information relating to an intrusion into Defendant's systems, that Defendant had suffered a data privacy breach which compromised their personal information. Compl. ¶ 2, 16. Initially, Defendant stated that it had not suffered a data privacy event. Compl. ¶ 3, 17. However, Defendant stated on August 4, 2016 that it would further investigate the optometrists concerns. Compl. ¶ 3, 17. Plaintiffs have confused Defendant's willingness to investigate as evidence of a data privacy event. To date, Defendant has not determined that it suffered a data privacy event and has not provided notice to optometrists. Compl. ¶ 18.

Plaintiff Hutton is a resident of Kansas and provided her personal information to Defendant in 1998. Compl. ¶ 5. Plaintiff Hutton alleges that she received a Chase Amazon Visa credit card that she did not apply for, but has not suffered any fraudulent charges on that credit card. Compl. ¶ 5. Plaintiff Kaeochinda, a California resident, provided her personal information to Defendant in 2006 through 2008. Compl. ¶ 6. Similarly, Plaintiff Kaeochinda learned that an individual had applied for a Chase Amazon Visa credit card in her name, but has not suffered any fraudulent charges as a result. Compl. ¶ 6.

III. ARGUMENT

A. Plaintiffs Lack Article III Standing to Pursue Their Claims.

1. Plaintiffs have the burden to show that standing exists.

To establish Article III standing, Plaintiffs must show that they seek relief from an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. ___, 133 S. Ct. 1138, 1147 (2013); *Lane v. Holder*, 703 F.3d 668, 671 (4th Cir. 2012). Standing requires an injury-in-fact which is actual or "clearly impending." *Id.* A plaintiff's injury is not "fairly traceable" if "the line of causation . . . is too attenuated" or "highly indirect". *Allen v. Wright*, 468 U.S. 737, 751 (1984). A court should not "take account of allegations in the complaint labeled as fact but that constitute nothing more than 'legal conclusions' or 'naked assertions.'" *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013). The Complaint must "clearly and specifically set forth facts sufficient to satisfy Article III." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

2. Apprehension of future injury without more does not create standing to sue.

The U.S. Supreme Court recently examined whether apprehension of future injury is sufficient to confer standing under Article III in *Clapper v. Amnesty Int'l USA*. In *Clapper*, individuals who feared that they would be targeted for surveillance by the government filed suit claiming that this constituted a present manifestation of future harm. *Id.* at 1145-46. The Court found that future injuries and future damages alone are not sufficient to establish standing under Article III. *Id.* at 1148. "Threatened injury must be *certainly impending* to constitute injury in fact, and … [a]llegations of *possible* future injury are not sufficient." *Id.* at 1147. The Court found plaintiffs' claims for costs incurred to mitigate potential future harm were insufficient to

confer standing and that plaintiffs cannot "manufacture" standing by so pleading. *Id*. at 1151. The *Clapper* opinion held that apprehension of future injury is not sufficient to establish injury-in-fact. *Id.*

In *Chambliss v. Carefirst, Inc.*, the United States District Court for the District of Maryland followed *Clapper's* "certainly impending" standard when assessing whether plaintiffs had standing on claims involving the compromise of personally identifiable information as a result of a data breach. No. RDB-15-2288, 2016 U.S. Dist. LEXIS 70096, *6 (D. Md. May 27, 2016). The court held that the plaintiffs lacked standing since the threat of future injury was not "certainly impending". *Id.* at 10. The court reasoned that the plaintiffs' theory relied solely on the actions of an unknown independent third party and it was not clear if future harm would materialize and when such harm would occur. *Id.* at 9.

3. The majority of courts have held that increased risk of identity theft is not an injury-in-fact.

In the vast majority of data breach cases, courts have followed *Clapper* in holding that allegations like Plaintiffs' that they have an increased risk identity theft do not establish the injury-in-fact needed for standing because the apprehension of future harm is not actual harm or imminent injury that is "certainly impending" absent identity theft or attempted identity theft. *Alonso v. Blue Sky Resorts, LLC*, Civ. No. 15-cv-00016, 2016 WL 1535890 (S.D. Ind. Apr. 14, 2016); *Peters v. St. Joseph Serv. Corp.*, 74 F. Supp. 3d 847 (S.D. Tex. 2015); *Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359 (M.D. Pa. 2015); *In re Sci. Applications Int'l (SAIC)Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14 (D.D.C. 2014); *Strautins v. Trustware Holdings, Inc.*, 27 F. Supp. 3d 871 (N.D. Ill. 2014); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646 (S.D. Ohio 2014); *In re Barnes & Noble Pin Pad Litig.*, No. 12-cv-8617, 2013 WL 4759588 (N.D. Ill. Sept.

3, 2013). *See also Reilly v. Ceridian Corp.*, 664 F.3d 38, 41 (3d Cir. 2011) (reaching a similar conclusion before *Clapper*).

The Third Circuit analyzed whether plaintiffs had standing to bring a class action under circumstances similar to the present case. In *Reilly v. Ceridian Corp.*, the plaintiffs alleged that as a result of a data breach suffered by defendant, a hacker accessed plaintiffs' personal information. 664 F.3d at 41. The plaintiffs did not allege that they had been the victim of identity theft or even attempted identity theft. Rather, they claimed that they suffered an injury-in-fact because of an "increased risk" of identity theft, and incurred costs to monitor their credit activity. *Id.*

Applying the well-established principles pronounced by the Supreme Court in *Lujan*, the Third Circuit held that plaintiffs did not have standing because their allegations of possible future injury did not constitute "certainly impending" threatened injury, but rather, "hypothetical speculation" concerning the possibility of future injury. *Id*. at 42. Furthermore, the court stated that plaintiffs' threatened injuries were too speculative to confer standing because those injuries were entirely dependent on the decisions of a third party, *i.e.*, the hacker. *Id.*; *see also SAIC Backup Tape Data Theft Litig.*, 45 F. Supp. 3d at 25 (increased risk of identity theft is not a certainly impending injury because whether identity theft would occur sometime in the future was dependent on the actions of a third party, the thief).

Additionally, the *Reilly* court held that expenses incurred to prevent the threatened injury, such as credit monitoring, could not confer standing because "costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more 'actual' injuries than the alleged 'increased risk of injury.'" *Id.* at 46; *see also, e.g., Peters*, 74 F. Supp.

3d at 856 ("standing cannot be 'manufactured' by the plaintiffs' choice to inflict harm on themselves by making expenditures based on hypothetical future harm").

4. While a minority of courts have concluded that increased risk of identity theft may confer standing, those decisions misapply U.S. Supreme Court precedent.

A minority of courts have found that an increased risk of identity theft may confer standing.[1] In the Seventh Circuit decision, *Remijas v. Neiman Marcus Group, LLC*, the court held that *Clapper's* "certainly impending" standard was not so strict as to exclude allegations of an increased, but not imminent, risk of identity theft. No. 14-3122, 2015 U.S. App. LEXIS 12487 (7th Cir. July 20, 2015). The *Remijas* court stated that the increased risk of future identity theft confers standing because there is a "substantial risk" or "objectively reasonable likelihood" that persons affected by a data breach would become victims of identity theft. *Id.* at *9. *See also Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967-68 (7th Cir. 2016); *Moyer v. Michaels Stores*, No. 14-c-561, 2014 WL 3511500, *5-6 (N.D. Ill. July 14, 2014) (disagreeing with the view that *Clapper* calls for a stricter interpretation of "certainly impending").

It is respectfully submitted that if *Remijas* holds that *Clapper's* "certainly impending" standard is satisfied by allegations of an *increased*, but not *imminent*, risk of identity theft, it is incorrectly decided. Indeed, by holding that the plaintiffs had alleged a sufficient injury-in-fact because of the "objectively reasonable likelihood," or "substantial risk" of identity theft, the *Remijas* court's holding runs directly contract to *Clapper*. In *Clapper*, the Supreme Court explicitly rejected the Second Circuit's ruling that standing could be established by an

[1] *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629 (7th Cir. 2007) held that risk of future harm from a "sophisticated, intentional and malicious" security breach conferred standing. However, *Pisciotta* was decided prior to *Clapper's* holding that threatened injury must be "certainly impending" to constitute injury in fact.

"objectively reasonable likelihood" of future injury. 133 S. Ct. at 1147. Courts have continued to follow *Clapper's* mandate that a risk of future harm must be imminent, notwithstanding the *Remijas* decision. *See Alonso*, 2016 WL 1535890, at *5-6 (declining to apply *Remijas* in data breach class action and stating that *Remijas* was directly "at odds with binding Supreme Court precedent governing standing."); *In re Zappos.com, Inc.*, 108 F. Supp. 3d at 951 (holding that the because plaintiffs had not alleged any instance of identity theft, they could not meet their burden to show that they faced an imminent injury).

The *Chambliss* case cited *supra* at § 2 did not involve the disclosure of Social Security numbers. The court in dicta offered an opinion that where unlawful credit card and Social Security numbers are stolen future harm is not speculative. It is respectfully suggested that the court's statement lacked any factual basis and was gratuitous. 2016 WL 3055299, at *5.

5. Courts have concluded that allegations of decrease value of personal information is insufficient to confer standing.

Courts throughout the country have held that a plaintiff cannot generate standing by alleging that their personal information has lost value as a result of a data breach. *See Chambliss*, 2016 U.S. Dist. LEXIS 70096, at 15; *In re. Sci. Applications*, 45 F. Supp. 3d at 30; *In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588, at *5; *Green v. eBay, Inc.*, Civ. No. 14-1688, 2015 WL 2066531, *5, n. 59 (E.D. La. May 4, 2015); *In re SuperValu, Inc.*, Civ. No. 14-MD-2586, 2016 WL 81792, *7 (D. Minn. Jan. 7, 2016).

In *In re Zappos.com, Inc.*, the plaintiffs alleged that they suffered an injury as a result of a data breach due to the devaluation of their personal information. 108 F. Supp. 3d 949, 954 (D. Nev. 2015). The court rejected the plaintiffs' argument and held that allegations of loss of value of personal information were insufficient to establish standing. *Id.* The court reasoned that the plaintiffs had failed to allege any facts explaining how their personal information became less

valuable as a result of the data breach or that they had even attempted to sell their information and were offered a lower price attributable to the data breach. *Id.*

6. The Supreme Court's Decision in *Spokeo, Inc. v. Robins* has not altered the *Clapper* standard.

The Supreme Court's recent decision in *Spokeo, Inc. v. Robins* has not altered the standard set forth in *Clapper*. In *Spokeo, Inc*., the Supreme Court addressed whether the plaintiff could bring a claim under the Fair Credit Reporting Act without any evidence of actual injury. 136 S. Ct. 1540 (2016). The Supreme Court reversed and remanded the Ninth Circuit's decision and stated that it had failed to examine whether the alleged injury was sufficiently "concrete" to confer standing. *Id.* at 1550. The Supreme Court stressed that a plaintiff must establish a "concrete" injury and by reference reaffirmed its *Clapper* decision stating that a risk of real harm may satisfy the requirement of concreteness. Id. at 1548-1549. This decision reiterates that in order to establish an injury-in-fact, a plaintiff must show that he or she suffered an "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

7. Plaintiffs have not met their burden to show that standing exists.

It is the burden of the party invoking federal jurisdiction to establish standing at the pleading stage. *Spokeo, Inc.*, 194 L. Ed. 2d at 643; *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999). To overcome this burden, a plaintiff's complaint must still set forth clear and specific facts that are sufficient to satisfy the Article III requirement. *Id.* A complaint must allege facts that raise a right to relief above the speculative level, and a court should not assume that the plaintiff can provide facts that she has not alleged. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). A court should not "take account of allegations in the complaint labeled as fact but that constitute nothing more than 'legal conclusions' or 'naked assertions.'" *David v.*

Alphin, 704 F.3d 327, 333 (4th Cir. 2013). "Pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. S.C.R.A.P.*, 412 U.S. 669, 688-89 (1973). "A plaintiff must allege that he has or will in fact be perceptibly harmed by the challenged . . . action, not that he can imagine circumstances in which he could be affected by . . . the action." *Id.*

Plaintiffs fail to establish an injury-in-fact that is "certainly impending." Plaintiffs attempt to couch their alleged injuries as those that may constitute sufficient injuries-in-fact to confer standing by inserting language similar to language from *Clapper* and decisions of other courts considering standings in data breach cases. For example, Plaintiffs allege that their data has been "compromised" and that they face "the imminent and certainly impending threat of future additional harm from the increased risk of identity theft and fraud due to [their] Personal Information being sold on the Internet black market and/or misused by criminals." Compl. ¶¶ 5-6. Plaintiffs also allege that this data privacy event has resulted in the diminution of value with no factual allegations to support their statements. Compl. ¶ 67. Finally, Plaintiffs allege that they received credit cards that they did not apply for, but fail to allege that suffered any fraudulent charges as a result or any actual harm. Compl. ¶¶ 5-6. These conclusory statements are nothing more than formulaic recitations that are unsupported by true factual allegations. A plaintiff is required to allege sufficient *factual* allegations in order to establish standing, a standard that the Complaint utterly fails to meet. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009); *Whitmore*, 495 U.S. at 149 (emphasis added).

In addition, cannot establish standing because the allegations of injury do not on their face appear to be fairly traceable to Defendant. Plaintiffs allege that NBEO recently suffered a data breach. Compl. ¶ 1. However, there is no factual basis for this conclusory and naked

assertion. Plaintiffs' allegations that NBEO suffered a data breach are based on nothing more than a group of individuals in a Facebook group determining, without any support, that NBEO suffered a data breach. Compl. ¶ 16. NBEO has not announced that it suffered a data breach. Rather, they have stated that they will investigate whether a potential breach occurred in an effort to alleviate the concerns of the exam-takers. Moreover, Plaintiffs' conclusions overlook the fact that the Chase Amazon Visa credit card scheme goes well beyond the optometry community. Plaintiffs' allegations that NBEO suffered a data breach are hypothetical, conclusory and fail to establish that NBEO suffered any data breach. The injuries alleged by Plaintiffs are not fairly traceable to any action by NBEO as the allegations of a data breach at NBEO are the fabrication of this Facebook group and nothing more. The alleged injuries suffered by Plaintiffs cannot be traced to such an incident and could likely be attributed to one of a number of data breaches suffered by a large number of consumers over the past several years.

Plaintiffs' allegations of injury-in-fact are based on nothing more than a speculative risk contingent on various events dependent on the actions of a third party. Further, the alleged injuries are not "fairly traceable" to any challenged conduct as the challenged conduct is the creation of a group of individuals in a chat room. Such speculative and conclusory allegations are not sufficient under Article III of the U.S. Constitution to plead claims entitling Plaintiffs to sue. Therefore, Plaintiffs' Complaint should be dismissed for lack of standing.

B. Plaintiffs Have Failed to State a Valid Claim for Relief.

Even if this Court determines that Plaintiffs have satisfied the injury-in-fact requirement for Article III standing, it should dismiss Plaintiffs' Complaint in its entirety pursuant to Rule 12(b)(6) because Plaintiffs have failed to state a claim for relief under any of their causes of action.

To withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Plaintiffs must allege facts that raise a right to relief "above the speculative level." *Twombly*, 550 U.S. at 555-56. Alleging "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" is not sufficient. *Id.* at 555; *see also Iqbal*, 556 U.S. at 677-78. This is especially true where, as here, plaintiff seeks to bring a "potentially massive . . . controversy" through class action litigation. *See Twombly*, 550 U.S. at 558.

To satisfy their burden and avoid dismissal, Plaintiffs must allege "sufficient factual matter" to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. In considering a motion to dismiss, the Court "need not accept the legal conclusions drawn from the facts," and "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkts., Inc. v. J.D. Assoc. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000) (citations omitted).

"A federal court sitting in diversity is required to apply the substantive law of the forum state, including its choice-of-law rules." *Francis v. Allstate Ins. Co.*, 709 F.3d 362, 369 (4th Cir. 2013). "In cases sounding in tort, Maryland applies the maxim of lex loci delicti – the law of the place of the harm – to determine the applicable substantive law." *Young v. Swirsky*, No. GLR-14-3626, 2015 WL 6501164, *6 (D. Md. Oct. 26, 2015) (citing *Hauch v. Connor*, 453 A.2d 1207, 1210 (Md. Ct. App. 1983)); *see also Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 511 (4th Cir.1986) ("The place of injury is the place where the injury was suffered, not where the wrongful act took place."). With respect to Plaintiffs' contract claims, for choice-of-law purposes, "a contract is made where the last act necessary to make the contract binding occurs." *Konover Prop. Trust, Inc. v. WHE Assocs., Inc.*, 142 Md.App. 476, 490 (Md. Ct. Spec. App.

2002). Generally, that last act is a party's signature. *See, e.g., Solid Concepts, LLC v. Fallen Soldiers, Inc.*, No. DKC–09–2377, 2010 WL 3123269, at *1 n. 1 (D.Md. Aug. 9, 2010).

Here, Plaintiffs are residents of California and Kansas. Compl. ¶¶ 5-6. Plaintiffs allege that they have suffered damages in the form of unauthorized applications for Chase Amazon Visa credit cards as well as time and expenses spent putting credit freezes in place with credit reporting agencies. Compl. ¶¶ 5-6. Applying lex loci delicti, the harm alleged by Plaintiffs occurred in their states of residence. Thus, Kansas law is applicable to Plaintiff Hutton's tort claim and California law is applicable to Plaintiff Kaeochinda's tort claim. With respect to Plaintiffs' contractual claims, the last acts asserted by Plaintiffs to form the alleged contractual claims with Defendant are the Plaintiff's assent to be bound. Therefore, Kansas law is applicable to Plaintiff Hutton's contractual claims and California law is applicable to Plaintiff Kaeochinda's contractual claims.

1. Plaintiffs do not state a negligence claim.

Under both California and Kansas law, Plaintiffs must allege that Defendant: (1) owed a legally cognizable duty to Plaintiffs; (2) breach of that duty; (3) that there is a causal connection between the duty breached and the injury to Plaintiffs; and (4) that Plaintiffs incurred damages as a result. *Paz v. California*, 994 P.2d 975, 980-81 (Cal. 2001); *See also Wicina v. Strecker*, 747 P.2d 167, 170 (Kan. 1987). Plaintiffs' claims for negligence fail to meet this pleading standard because (1) Plaintiffs have failed to allege a legally cognizable duty of care; and (2) Plaintiffs have failed to allege an injury or resulting damages.

a. Plaintiffs have not alleged that Defendant owed them a legally cognizable duty in tort.

First, Plaintiffs have brought a common law negligence action but do not plead the existence of a duty of care that is recognized at common law. Plaintiffs allege in conclusory

fashion that Defendant had a duty to safeguard and protect their information, timely disclose the alleged compromise, and destroy their information. Compl. ¶ 47-49. These statements are not supported by factual allegations, and are not enough to establish that Defendant owed Plaintiffs a common law duty. *See Twombly*, 550 U.S. at 570. On the contrary, Defendant does not owe a duty Plaintiffs, who if they were harmed were victimized by unknown third party thieves. *Pirozzi v. Apple, Inc.*, No. 12-cv-01529 YGR, 2012 WL 6652453, *8 (N.D. Cal. Dec. 20, 2012); ("A defendant generally owes no duty to protect another from the conduct of third-parties.") (citing *Tarasoff v. Regents of Univ. of Calif.*, 17 Cal. 3d 425, 435 (Cal. 1976). *D.W. v. Bliss*. 112 P.3d 232, 239 (Kan. 2005) (absent a special relationship, there is no tort duty to control the conduct of a third-party to prevent harm to another). Without the existence of a duty of care, there can be no breach. *Pirozzi*, 2012 WL 6652453, at *8; *Irvin v. Smith*, 31 P.3d 934, 942 (Kan. 2001).

Here, Plaintiffs have failed to establish that Defendant owed them a duty of care. Further, Plaintiff Hutton has failed to establish that a special relationship exited between her and Defendant as required under Kansas law to establish a duty of care. *See* Restatement (Second) of Torts §§ 314, 316-320 (1965)(noting that a special relationship exists between an employers and an endangered or hurt employee, parent and child, master and servant, possessor of land and licensees, persons in charge of one with dangerous propensities, and persons with custody of another). Courts throughout the country have held that no common law duty of care exists in the context of data breaches. *See Worix v. MedAssets, Inc.*, 869 F. Supp. 2d 893, 897 (N.D. Ill. 2012) (rejecting plaintiffs' argument that defendant had a common law duty to reasonably handle and safeguard patient medical information); *Dolmage v. Combined Ins. Co. of Am.*, 14-C-3809, 2015 WL 292947, *6 (N.D. Ill. Jan. 21, 2015) (dismissing plaintiff's negligence claim because

there is no common law duty to protect personal information); *Cooney v. Chi. Pub. Schs.*, 943 N.E.2d 23, 29 (Ill. App. Ct. 2010) (affirming trial court's dismissal of plaintiff's negligence claim because plaintiff's claims did not amount to a common law duty to protect personal information); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08-civ-6060, 2010 WL 2643307, (S.D. N.Y. 2010) (same); *Willingham v. Global Payments, Inc.*, No. 12-CV-01157, 2012 WL 440702, *19 (N.D. Ga. Feb. 5, 2013).

b. Plaintiffs have not pled any present, actual injury.

Plaintiffs have not pled any actual, present injury. To be viable under California and Kansas law, a negligence claim must allege an actual injury and resulting damages. *Hill v. Corr. Corp. of Am.*, No. 02-3238-JAR, 2005 WL 1862405, *8 (D. Kan. Aug. 3, 2005) (no claim where the only damages asserted is conjectural harm, speculative harm, or threat of future injury); *Aas v. Super Ct.*, 24 Cal.4th 627, 646 (Cal. 2000) (stating that a plaintiff must prove an "appreciable, non-speculative, present injury), *superseded by statute on another ground*, Cal. Civ. Code §§ 895, *et seq.*

Plaintiffs do not allege that there is any ongoing, present harm, such as an open bank account or unreimbursed charges. Rather, Plaintiff Hutton alleges that she received a credit card that she did not apply for, but does not allege that any fraudulent charges occurred as a result. Compl. ¶ 5. Similarly, Plaintiff Kaeochinda alleges that someone applied for a credit card in her name, but does not allege any fraudulent charges. Compl. ¶ 6. Neither alleges that they suffered any economic harm. Further, Plaintiffs' alleged injuries are entirely speculative and relate to the risk of future harm. *See* Comp. ¶¶ 5-6 (alleging imminent and certainly impending threat of future additional harm and increased threat of identity theft). Courts throughout the country have routinely found that such alleged damages are insufficient to support a negligence claim. *See In*

re iPhone Application Litig., 844 F. Supp. 2d 1040, 1064 (N.D. Cal. 2012) (finding that "increased, unexpected, and unreasonable risk to the security of sensitive personal information" is not enough to sustain a claim for negligence"); *Ruiz v. Gap*, 622 F. Supp. 2d 908, 913 (N.D. Cal. 2009) (holding that increased risk of future identity theft "does not rise to the level of appreciable harm necessary to assert a negligence claim under California law"); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 613 F. Supp. 2d 108, 133 (D. Me. 2009) (dismissing plaintiffs' claims where they failed to allege improper charges had not been reimbursed); *Paul v. Providence Health System-Oregon*, 273 P.3d 106, 110 (Or. 2012) (holding that the threat of future harm to credit or well-being is insufficient as an allegation of damages for a negligence claim); *Williams v. Manchester*, 888 N.E.2d 1, 13 (Ill. 2008) (holding that an elevated risk of identity theft does not constitutes actual damages). Nor do Plaintiffs' allegations of steps taken to protect themselves against future identity theft satisfy the requirement of a cognizable injury. *Doe v. Henry Ford Health Sys.*, 865 N.W.2d 915, 921 (Mich. Ct. App. 2014) (dismissing negligence claim for failure to show a present, actual injury and that the cost of credit monitoring services did not constitute an injury); *Hendricks v. DSW Shoe Warehouse, Inc.*, 444 F. Supp. 2d 775, 782 (W.D. Mich. 2006) (stating that purchase of credit monitoring does not constitute actual damages or a cognizable loss); *Forster & Crosby, Inc.*, 580 F. Supp. 2d 273, 284 (S.D.N.Y. 2008) ("courts have uniformly ruled that the time and expense of credit monitoring to combat an increased risk of future identity theft is not, in itself, an injury that the law is prepared to remedy.") (quoting *Shafran v. Harley Davidson, Inc.* No. 07-Civ-01365, 2008 U.S. Dist. LEXIS 22494, *6 (S.D.N.Y. Mar. 20, 2008)).

Since Plaintiffs fail to allege a non-speculative and present injury, their negligence claim does not meet the federal pleading standard and should be dismissed.

c. Plaintiffs' negligence claim is barred by the economic loss doctrine.

Plaintiffs allege various economic damages arising from Defendant's alleged negligence. *See* Compl. ¶ 59. Under the economic loss doctrine, economic damages can only support a claim for negligence when there is some form of physical harm, such as personal injury or property damages. *See In re Google Android Consumer Privacy Litig*, No. 11-MD-02264-JSW, 2013 WL 1283236, *12-13 (N.D. Cal. Mar. 26, 2013) (dismissing negligence claims based on the economic loss doctrine); *Suhr v. Aqua Haven, LLC*, No. 11-1165-EFM, 2013 WL 3778928, *4 (D. Kan. July 18, 2013) (same); *See also In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 531 (N.D. Ill. 2011) (same); *In re Heartland Payment Sys., Inc., Customer Data Sec. Breach Litig.*, 834 F. Supp. 2d 566, 590 (S.D. Tex. 2011) (same); *In re Zappos.com*, Civ. No. 12-cv-00325, 2016 WL 2637810, *6 (D. Nev. May 6, 2016) (same); *Willingham v. Global Payments, Inc.*, 12-cv-01157, 2013 WL 440702, *18 (N.D. Ga. Feb. 5, 2013) (same). Here, Plaintiffs do not allege any physical harm, personal injury, or property damage. Therefore the economic loss doctrine bars their claims for negligence.

2. Plaintiffs fail to state a claim for breach of contract

To state a claim for breach of contract under California and Kansas law, Plaintiffs must allege (1) the existence of a contract between the parties; (2) performance by the Plaintiffs; (3) breach by the Defendant; and (4) damage as a result of the breach. *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012)*; See also Ice Corp. v. Hamilton Sundstrand Inc.*, 444 F. Supp. 2d 1165, 1169 (D. Kan. 2006).

a. Plaintiffs fail to allege the existence of a contract between the parties.

Plaintiffs' breach of contract claim fails to allege the existence of a contract between the parties since Plaintiffs do not allege a meeting of the minds as to the essential terms of the alleged contract. In order to form a contract, there must be a meeting of the minds as to all essential terms of the contract. *See Chaganti v. I2 Phone Intern, Inc.*, 635 F. Supp. 2d 1065, 1071 (N.D. Cal. 2007) ("In order for a contract to form, there must be a meeting of the minds with an intent to be bound by a legally enforceable agreement" and "[t]he parties must clearly articulate the terms of the agreement".); *August Bank & Trust v. Broomfield*, 643 P.2d 100, 107 (Kan. 1982) ("In order for parties to form a binding contract, there must be a meeting of the minds as to all essential terms).

Here, Plaintiffs allege that Defendant's privacy statement which states that "NBEO has implemented a variety of encryption and security technologies and procedures to protect information stored on their systems from unauthorized access" constitutes a contract between the parties. This conclusory allegation fails to establish that the parties reached a meeting of the minds on all essential terms of a contract. The privacy statement is simply information from Defendant that they have implemented security and encryption technologies. Courts throughout the country have held that online privacy policies do not form contracts because they are simply general statements. *See Dyer v. Nw. Airlines Corps.*, 334 F. Supp. 2d 1196, 1200 (D. N.D. 2004); *In re Nw. Airlines Privacy Litig.*, No. 04-126, 2004 WL 1278459, *6 (D. Minn. June 6, 2004). Moreover, Plaintiffs fail to allege that they even saw and relied on such statements. In addition, the allegations set forth by Plaintiffs do not suggest that Defendant owed any contractual duty to Plaintiffs. Rather, Defendant simply stated some measures they have taken to protect information. Finally, Plaintiffs fail to allege any performance as required to establish a

contract. Plaintiffs' allegation that the parties entered into a contract is without merit. Therefore, Plaintiffs' cause of action for breach of contract should be dismissed for failure to plead the existence of a contract.

b. Plaintiffs have failed to plead actual damages arising from the purported breach of contract.

Plaintiffs' breach of contract claim fails because they do not allege actual damages. "A breach of contract without damages is not actionable." *Patent Scaffolding Co. v. William Simpson Const. Co.* 256 Cal. App. 2d 506, 511 (Cal. 1967); *See also Ice Corp*, 444 F. Supp. 2d at 1169. A "[p]laintiff must establish 'appreciable and actual damages.'" *Low*, 900 F. Supp. 2d at 1028. "Nominal damages, speculative harm, or threat of future harm do not suffice to show legally cognizable injury." *Id.* As set forth in detail above (*see* Section III,B,1,(b), *supra*), Plaintiffs do not plead actual damages. Therefore, Plaintiffs' breach of contract claim should be dismissed for failure to allege actual damages.

3. Plaintiffs fail to state a claim for breach of implied contract.

a. Plaintiffs fail to allege an intent to enter into an implied contract by Defendant.

A cause of action for breach of implied contract has the same elements as a cause of action for breach of contract: mutual assent or offer and acceptance, consideration, legal capacity and lawful subject matter. *Northstar Financial Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1050-51 (9th Cir. 2015); *See also Mai v. Youtsey*, 646 P.2d 475, 479 (Kan. 1982) (stating that a plaintiff must show mutual intent in order to establish an implied contract). Plaintiffs must do more than just state an implied contract existed, they must allege facts from which one can plausibly infer a meeting of the minds on the contract terms. *Twombly*, 550 U.S. at 550.

Here, Plaintiffs' conclusory allegations are insufficient to establish that Defendant intended to enter into an implied contract with Plaintiffs. Plaintiffs simply state that they assumed Defendant would adequately protect their information and that the parties entered into a mutually agreed-upon implied contract, but fail to allege any facts to support this conclusory statement. *See* Compl. ¶¶ 71, 74. Plaintiffs' allegations fail to encompass any intent on behalf of Defendant to enter into an implied contract.

b. Plaintiffs fail to allege cognizable damages.

To allege a claim for breach of implied contract, Plaintiffs must allege that they suffered actual monetary damages as a result of the alleged breach. *Aguilera v. Pirelli Amstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir. 2000); *Scott v. Strickland* 691 P.2d 45, 50 (Kan. Ct. App. 1984). As previously discussed, Plaintiffs have failed to allege any actual damages as a result of the alleged incident. Further, Plaintiffs' allegations relating to hypothetical future injuries are insufficient for the purpose of alleging damages. *See, e.g., Pisciotti v. Old Nat'l Bancorp.*, 499 F.3d 629, 639 (7th Cir.); *Holmes v. Countrywide Fin. Corp.*, No. 08-CV-00205, 2012 WL 2873892, *13 (W.D. Ky. July 12, 2012). Accordingly, Plaintiffs' breach of implied contract claim should be dismissed for failure to allege actual damages.

4. Plaintiffs fail to plead a violation of the California Customer Records Act.

a. Plaintiffs do not have standing to pursue their claim.

Plaintiffs have failed to allege that they have standing under the CRA. Cal. Civ. Code § 1798.84, the remedies provision of the CRA, provides that "[a]ny customer *injured* by a violation of this title may institute a civil action to recover damages." Cal. Civ. Code § 1798.84(b) (emphasis added). The California Court of Appeals has held that this injury requirement applies "regardless of the remedies [a plaintiff] seek[s]." *Boorstein v. CBS*

Interactive, Inc., 222 Cal. App. 4th 456, 466-67 (Cal. Ct. App. 2013). Where a plaintiff fails to allege a cognizable injury, the plaintiff "lacks statutory standing" to bring a claim under Section 1798.84 "regardless of whether [the] allegations are sufficient to state a violation of the [statute]." *Id.* at 467 (dismissing claim at pleadings stage for failure to allege an injury under Cal. Civ. Code § 1798.84(b)); *see also Murray v. Time Inc.*, 554 F. App'x 654, 655 (9th Cir. 2014) (same).

Here, Plaintiffs fail to allege that they suffered an injury as a result of a violation by Defendant. Plaintiffs' allegations of harm are based on a speculative and baseless conclusion that Defendant suffered a data breach and violated the CRA as a result. This conclusion was reached by a group of social media members with no knowledge of the details relating to Defendant's security systems or any evidence of intrusion. Compl. ¶ 16. The injuries alleged by Plaintiffs are not fairly traceable to any action by NBEO as the alleged data breach is the fabrication of this Facebook group and nothing more. Plaintiffs' conclusions overlook that the Chase Amazon Visa credit card scheme has affected individuals outside the optometry community that have no relation whatsoever to Defendant. As a result, Plaintiffs' allegations of harm suffered fail to establish the statutory standing required to pursue a violation of the CRA claim.

In addition, Plaintiffs' allegations that they suffered damages as a result of Defendant's alleged failure to provide timely notice do not constitute an injury sufficient to establish statutory standing. Plaintiffs are required "to allege that the damages *flowed from the delay*, and not just that the damages flowed from the intrusion." *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 1010 (S.D. Cal. 2014) ("*Sony II*") (citing cases). (granting motion to dismiss and dismissing claims for same reason with prejudice). Here,

Plaintiffs fail to allege any facts demonstrating how they were injured by Defendant's purported delay. *See* Compl. ¶ 87. In fact, Plaintiffs' allegations of damage relate solely to the alleged breach. *See* Compl. ¶ 87. Therefore, Plaintiffs' allegations relating to Defendant's alleged violation of Section 1798.82 should be dismissed for lack of statutory standing.

Finally, Plaintiff Hutton does not have statutory standing to pursue a claim for violation of the CRA. The intent of the CRA is to protect California residents in their role as customers. *Corona v. Sony Pictures Entm't, Inc.*, 14-CV-09600, 2015 WL 3916744, *7 (C.D. Cal. June 15, 2015); *See also* Cal. Civ. Code § 1798.81.5 ("It is the intent of the Legislature to ensure that personal information about California residents is protected."). Further, each of the provisions of the CRA that Plaintiffs seek to enforce are limited to California residents. *See also* Cal. Civ. Code § 1798.81.5(b); Cal. Civ. Code § 1798.82. In *Antman v. Uber Techs., Inc.*, the court dismissed plaintiff's CRA claim for failure to establish statutory standing because the plaintiff did not allege that he was a California resident. 15-cv-01175, 2015 WL 6123054, *12 (N.D. Cal. Oct. 19, 2015.). Plaintiff Hutton is a resident of Lawrence, Kansas. Compl. ¶ 5. Therefore, the CRA is inapplicable to her as she is not a resident of California and her CRA claim should be dismissed for lack of statutory standing.

b. Plaintiffs attempt to apply Cal. Civ. Code § 1798.81 which is not applicable to the present matter.

Plaintiffs' allegations that Defendant violated Cal. Civ. Code § 1798.81 by improperly retaining their information is misplaced. *See* Compl. ¶ 86. This allegation is misguided as section 1798.81 "applies only to situations where a business intends to discard personal information." *Frezza v. Google Inc.*, 12-CV-00237, 2012 WL 5877587, *5 (N.D. Cal. Nov. 20, 2012) (noting that the statute is only triggered when the records are no longer maintained by the business.). In *Frezza*, the court dismissed plaintiffs' allegations that the defendant violated

section 1798.81 for retaining their information because the statute only applied to the proper disposal of records. *Id.* Like *Frezza,* Plaintiffs allege that Defendant violated section 1798.81 by improperly retaining their information. *See* Compl. § 86. Therefore, Plaintiffs' cause of action for violation of the CRA pursuant to Cal. Civ. Code § 1798.81 should be dismissed as Plaintiffs' claims do not relate to any disposal of their records.

c. Plaintiffs' request for statutory damages lacks any legal basis.

Plaintiffs request all remedies available under Cal. Civ. Code § 1798.84. Plaintiffs may not recovery any statutory damages pursuant to § 1798.84(c) for willful, intentional, or reckless violations of section 1798.83 as Plaintiffs' request is without any legal basis. Cal. Civ. Code § 1798.83 is referred to as the "shine the light law." *Boorstein,* 222 Cal. App. 4th at 459. This "law requires businesses that share customers' personal information with third parties for direct marketing to disclose, upon a consumer's request, the names and addresses of third parties who have receive personal information and the categories of personal information revealed." *Id.* (citing Cal. Civ. Code § 1798.83(a)). Here, Plaintiffs do not allege a shine the light violation. Plaintiffs do not allege that Defendant shared their personal information for direct marketing and that Defendant failed to disclose it. Accordingly, Plaintiffs' request for statutory damages should be dismissed.

5. Plaintiffs fail to state a claim for Unlawful and Unfair Business Practices under California and Professions Code § 17200, *et seq.*

a. Plaintiff Hutton may not pursue a § 17200 cause of action.

Plaintiff Hutton, a Kansas resident, may not pursue a section 17200 ("UCL") cause of action because she is not a resident of California. "Neither the language of the UCL nor its legislative history provides any basis for concluding the Legislature intended the UCL to operate extraterritorially." *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011) (dismissing UCL

cause of action pursued by out-of-state plaintiffs for work performed outside of California). "Accordingly, the presumption against extraterritoriality applies to the UCL in full force." *Id.* The UCL may only be "invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California." *Northwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 224 (Cal Ct. App. 1999). Here, Plaintiff Hutton, a nonresident of California, fails to allege that she was harmed by any wrongful conduct occurring in California. Accordingly, the UCL is inapplicable to her and her claim should be dismissed.

b. Plaintiffs' claim that Defendant violated the UCL unlawful prong fails because Plaintiffs have not pled a viable claim that Defendant violated another law.

To sustain a claim under the unlawful prong of the UCL, Plaintiffs must allege facts that would demonstrate that Defendant's conduct violated another law. *In re Google, Inc. Privacy Policy Litig.*, 58 F. Supp. 3d 968, 984 (N.D. Cal. 2014). Here, Plaintiffs allege that the predicated violations for their unlawful prong claims are violations of the Customer Records Act. Compl.¶ ¶ 96-97. Further, Plaintiffs allege that Defendant violated the unlawful prong by failing to comply with a reasonable standard of care. Compl. ¶ 97. Plaintiffs' claim pursuant to the unlawful prong should be dismissed because an alleged violation of reasonable care does not constitute an unlawful action. Finally, Plaintiffs' claim should be dismissed because they have failed to state a claim under the Customer Medical Records Act.

c. Plaintiffs' claim that Defendant violated the UCL unlawful prong fails because Plaintiffs have not pled a viable claim that Defendant violated another law.

An unfair business practice is "one that either offends an established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to users." *McDonald v. Coldwell Banker*, 543 F.3d 498, 605 (9th Cir. 2008). When determining whether an act or

practice is unfair a court should consider "the impact of the practice or act on its victim, balanced against the reasons, justifications and motives of the alleged wrongdoers." *Wilson v. Hynek*, 207 Cal. App. 4th 999, 1008 (Cal. Ct. App. 2012).

Here, there is no act or practice by Defendant to evaluate. Plaintiffs' unfairness claim is based entirely on an alleged data breach that has no factual basis. It is the result of speculation and bare assertions by a group of individuals in a social media group. These bare assertions do not support their claim. *See Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1951. Moreover, even if Defendant had suffered the alleged data breach, the alleged wrongdoer would be the third-party criminal that accessed Plaintiffs' information, not the Defendant. The Complaint gives no plausible reason to infer that Defendant's conduct violated the unfairness provision of the UCL.

d. Plaintiffs fail to allege any loss of money or property.

A plaintiff must have suffered "injury in fact" and "lost money or property as a result of the alleged unfair competition to pursue a claim under the UCL. *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 862 (N.D. Cal. 2011). The UCL requires Plaintiffs to plead a heightened degree of injury under the UCL which goes beyond the federal standing requirements. *Id.* at 862-63. In order to constitute "lost money," a plaintiff must have "parted, deliberately or otherwise, with some *identifiable sum* formerly belonging to him or subject to his control." *Id.* at 862. To establish "lost property" a plaintiff must have "parted with some particular item of property he formerly owned or possessed; it has ceased to belong to him, or has passed beyond his control or ability to retrieve it." *Id.*

Here, Plaintiffs have failed to establish that they have lost any money or property as a result of Defendant's alleged unfair act. Plaintiffs have failed to allege any lost money as a result

of the alleged misconduct in the form of fraudulent charges that caused them to part with any identifiable sum. Moreover, Plaintiffs' allegations that their information was compromised and that compromise places them at an increased threat of identity theft and fraud does not constitute lost money or property. *See Claridge*, 785 F. Supp. 2d at 863 (rejecting plaintiffs argument that loss of PII constituted lost money or property and dismissing plaintiffs' UCL claim in data breach class action). Accordingly, Plaintiffs' UCL claim should be dismissed for fairly to meet the UCL's heightened injury requirement.

e. Plaintiffs are limited to equitable relief under the UCL.

Prevailing plaintiffs are limited to injunctive relief and restitution under the UCL. *Cel-Tech Comm., Inc. v. Los Angeles Cellular Telephone Co.*, 973 P.2d 527, 560 (Cal. 1999). Plaintiffs may not receive damages or attorney's fees. *Id.* "[A]n individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." *Korea Supply Co. v. Lockhead Martin Corp.*, 63 P.3d 937, 947 (Cal. 2003).

Here, Plaintiffs seek restitution for costs incurred with the data breach, disgorgement of all Defendants' profits, and attorneys' fees and costs. Compl. ¶¶ 101, 103. As addressed in *Cel-Tech Comm.*, Plaintiffs may not recover attorneys' fees and costs. *See Cel-Tech Comm., Inc.*, 973 P.2d at 560. In addition, Plaintiffs may not recover for restitution or disgorgement as an individual may recover only for monies given to the defendant or benefits which plaintiff has an interest. That is not the relief requested by Plaintiffs. Instead, Plaintiffs seek to recover for money that they spent and also seek to recover for all profits that Defendant has made in connection with its business. Such damages are not recoverable under the UCL.

C. If the Complaint is Not Dismissed, Plaintiffs' Class Allegations Should Be Stricken From the Complaint.

Pursuant to Federal Rule of Civil Procedure 12(f), "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matters." Fed. R. Civ. P. 12(f). Rule 23(d)(1)(D) permits litigants to file motions to strike class action complaints based on the pleadings, and further allows courts to issue orders in putative class actions that "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D). This rule furthers the dictate of Federal Rule of Civil Procedure 23(c)(1)(A), which allows a court to determine the issue of class certification at an "early practicable time" after litigation has been filed. Fed. R. Civ. P. 23(c)(1)(A). In order to maintain a class action, Plaintiffs must satisfy all the requirements of Rule 23(a) as well as one of the requirements of Rule 23(b). *Gariety v. Grant Thorton,* 368 F.3d 356, 362 (4th Cir. 2004).

If Defendants' Motion to Dismiss is not granted in full, this Court should strike the class allegations for the reasons stated herein.

1. Plaintiffs cannot satisfy the requirements of Rule 23(a).

As provided by Rule 23(a), the prerequisites for certification are as follows: "(1) the class is so numerous that joinder of all members is impracticable"; "(2) there are questions of law or fact common to the class"; "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and "(4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). While not addressed in Rule 23(a), an essential element under Rule 23 is that the class must be adequately defined and clearly ascertainable. *Piotrowski v. Wells Fargo Bank, N.A.*, No. DKC-11-3758, 2015 WL 4602591, *3 (D. Md. July 29, 2015)

2. Plaintiffs' proposed class is not adequately defined.

A class is adequately defined if the "court can readily identify the class members in reference to objective criteria." *EQT Production Co. v. Adair*. 764 F.3d 347, 358 (4th Cir. 2014). "If the class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials', then a class action is inappropriate." *Id.* (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *See also* 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (3d ed. 2005) ("[T]he requirement that there be a class will not be deemed satisfied unless . . . it is administratively feasible for the court to determine whether a particular individual is a member.").

The United States District Court for the District of Nevada has addressed this issue in the *In re Zappos.com* data breach class action. In *In re Zappos.com*, the court granted defendants' motion to strike the proposed class of "[a]ll persons whose personally identifiable information (PII) was obtained by hackers from Zappos.com, without authorization, and compromised during the Data Breach . . .". Civ. No. 12-cv-00325, 2016 WL 2637810, *8 (D. Nev. May 6, 2016). The court found that the proposed class was "far too broad" as it included any person whose PII was compromised during the data breach, whether or not the person was a victim of actual fraud following the breach. *Id.*

Like *In re Zappos.com*, Plaintiff's proposed class definition is far too broad. Plaintiff seeks to represent a class of "[a]ll exam-takers of NBEO-administered exams whose Personal Information was compromised as a result of the data breach discovered in July 2016." *See* Compl. ¶ 35. This proposed class includes all individuals whose PII was affected by the alleged data breach regardless of whether or not the individual has suffered actual harm. The proposed class is inappropriate because it requires individualized inquiries to identify class members.

Therefore, Plaintiffs' class allegations should be stricken as Rule 23's implied requirement of ascertainability has not been met.

a. Plaintiffs' proposed class fails to meet the commonality requirement.

Rule 23(a)(2) requires that the claims of members of the proposed class present common questions of law or fact. *EQT Prod. Co. v. Adair*, 764 F.3d at 359. "'A common class question is one that can be resolved for each class member in a single hearing,' and does not 'turn[ ] on a consideration of individual circumstances for each class member.'" *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 337 (D. Md. 2012). (quoting *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (internal quotations omitted). Commonality requires that the members of the class have suffered the same injury. *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Here, Plaintiffs seek to represent a class of *all* individuals whose information was compromised by the alleged data breach. *See* Compl. ¶ 35. This class consists of individuals who may have suffered no injury. Therefore, highly individualized inquiries would be required to determine which class members had suffered actual harm as a result of the alleged breach and to determine the extent of such harm. In addition, injuries suffered by these individuals would greatly vary and would require individualized inquiry for each class member. For those that have suffered an injury, highly individualized inquiries would be necessary to determine whether such injuries were actually attributable to the alleged data breach or to some other event. Therefore, Plaintiffs' class allegations should be stricken due to her failure to meet Rule 23(a)(2)'s commonality requirement.

b. Plaintiffs' proposed class fails to meet the typicality requirement.

Typicality requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). The typicality and commonality inquiry are closely related and tend to merge. *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. at 337. Typicality requires that the plaintiff "be part of the class and possess the same interests and suffer the same injury as the class members." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998).

As discussed above, Plaintiffs' proposed class is overbroad and includes individuals who were not harmed by the alleged breach. In addition, Plaintiffs have failed to allege that they have has suffered an actual injury. If any individuals have experience actual injury as a result of the alleged data breach, Plaintiffs' experience would not be typical of the experience of those class members. As a result, Plaintiffs' proposed class fails to meet the typicality requirement of Rule 23(a)(3) as members of the proposed class do not have the same or similar injuries. Therefore, Plaintiffs' class allegations should be stricken.

3. Plaintiffs cannot satisfy the requirements of Rule 23(b)(3).

The predominance requirement of Rule 23(b)(3) is far more demanding than Rule 23(a)'s commonality requirement. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997). Rule 23(b)(3) requires that Plaintiffs show that common questions "predominate over any questions affecting only individual members" and that class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy". *Thorn*, 445 F.3d at 329.

Here, individualized issues predominate over common issue with respect to causation and damages. The following individualized inquiries would need to be addressed on a class member by class member basis for each putative class member: (i) whether the class member suffered

harm as a result of the alleged data breach; (ii) if so, whether the injury is attributable to the alleged data breach or another data breach or incident; (iii) if so, what damages has the individual suffered as a result. These individualized inquiries predominate over common issues. Therefore, Plaintiff's class allegations should be stricken for failure to satisfy Rule 23(b)(3).

D. If the Complaint Is Not Dismissed, Plaintiffs' Immaterial, Impertinent, and Scandalous Allegations Should be Stricken from the Complaint.

Pursuant to Federal Rule of Civil Procedure 12(f), "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matters. Fed. R. Civ. P. 12(f). Before a motion to strike will be granted the allegations must be both immaterial and prejudicial. *Hare v. Family Publications Services, Inc.*, 342 F. Supp. 678, 685 (D. Md. 1972). Courts are granted considerable discretion to address motions to strike especially where allegations in the complaint would cause prejudice latter in the litigation. *See Xerox Corp. v. ImaTek, Inc.*, 220 F.R.D. 241, 243 (D. Md. 2003); *See also* 5A Charles Alan Miller, Arthur R. Miller and Edward H. Cooper, § 1382 (1986).

Plaintiffs' Complaint includes numerous "allegations" that have no relation to their causes of action, much of which would be inadmissible hearsay if Plaintiffs sought to present them to a jury outside the Complaint. See Compl. ¶¶ 20-23, 25-31, 33. These paragraphs serve no purpose but to confuse the issues, place an undue burden on Defendant to respond to these allegations, and improperly influence the fact-finder. *See Xerox Corp.* 220 F.R.D. at 243 (granting defendant's motion to strike allegations as the allegations held no relevancy and appeared to constitute an attempt to "muddy the waters."). The inclusion of this language seeks to instill in the fact finder a fear that he or she may be victim of a data breach and improperly influence that fact finder to decide this matter on personal fear of harm, rather than the facts of this incident. Specifically, the Complaint contains numerous allegations referencing breaches

suffered by other entities, commentary and warnings from various outside sources and publications regarding a general likelihood of cyber intrusions and identity theft. *See* Compl. ¶¶ 21-23, 30, 31. For example, the Complaint contains general allegations that the Federal government, the Social Security Administration, the U.S. Government Accountability Office, and the Department of Justice issued warnings about cyber security threats. *See* Compl. ¶¶ 26, 30-31. The Complaint also quotes a report from Privacy Rights Clearinghouse. *See* Compl. ¶ 22. Paragraphs 20-23, 25-31, 33 in Plaintiffs' Complaint contain no relation to their causes of action. These paragraphs contain only irrelevant references to general warnings as well as an opinion by an outside publication that is completely unconnected to this case. Defendant is unduly prejudiced by these allegations since they have no relation to this case.

Under no set of circumstances will these allegations assist the finder of fact. They serve only to complicate the issues before the Court, and prejudices Defendant's ability to respond to Plaintiffs' allegations and defend the case on the merits. Therefore, these paragraphs which serve no purpose but to confuse the issues, place an undue burden on Defendant to respond to these allegations, and improperly influence the fact-finder should be stricken from Plaintiffs' Complaint pursuant to Rule 12(f).

IV. CONCLUSION

Plaintiffs have no actual or "certainly impending" injury. Moreover, the alleged injuries are not fairly traceable to the alleged data privacy event. Plaintiffs' alleged injuries are not sufficiently concrete to give rise to a case or controversy under Article III of the U.S. Constitution or to support Plaintiffs' alleged causes of action. In addition, Plaintiffs' causes of action are insufficient as Plaintiffs have not alleged the required elements of each. For all the

foregoing reasons, Defendant respectfully requests that Plaintiffs' Complaint be dismissed with prejudice.

In the alternative, the class allegations in the Complaint should be dismissed for failure to meet the requirements of Rule 23(a) and Rule 23(b). Finally, the immaterial, impertinent and scandalous allegations in the Complaint should be stricken as they are unconnected to the allegations in this Complaint and unduly prejudice Defendant.

Dated: October 22, 2016

Respectfully submitted,

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