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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE EXPERIAN DATA BREACH LITIGATION

Case No. 8:15-cv-01592 AG (DFMx)

Hon. Andrew J. Guilford

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE EXPERIAN DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

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INTRODUCTION

In this consolidated class action, Plaintiffs attempt to plead state and federal claims arising out of an alleged theft of data, consisting largely of names, addresses, and social security numbers, pertaining to T-Mobile customers and subscribers housed on a server that defendant, Experian Information Solutions, Inc. owns. None of the claims this motion challenges alleges facts sufficient to constitute a cause of action against the Experian Defendants.

Most fundamentally, plaintiffs do not allege the date on which the breach occurred. Yet, they speculate that they suffered damages because of Experian's "delay" in providing notice of the breach. But the absence of an alleged date of beach renders these claims infirm. After all, no one was injured by delayed notification if there was no delay in providing notice. Some plaintiffs assert that they were victims of identity theft or fraud, speculating that the attacker must have used the data it stole to commit such crimes. But because plaintiffs do not allege a date of breach, it is unclear whether these alleged injuries occurred before or after the breach. If they occurred *before* the breach, they could not possibly have been caused *by* the breach. Some of the plaintiffs' claims are grounded in fraud, yet none are pleaded with the particularity required by Rule 9(b). Plaintiffs even assert that the theft of data through a data breach can constitute the unlawful "furnishing" of a consumer report under the Fair Credit Reporting Act (FCRA). Yet, our courts are unanimous on the issue: "[D]efendants cannot be held liable under the FCRA for improperly furnishing information where that information was stolen by third parties." *Dolmage v. Combined Insur. Co. of America*, 14 C 3809, 2015 WL 292947, at *4 (N.D. Ill. Jan. 21, 2015). For these, and many other, pleading deficiencies, plaintiffs' case should be dismissed under Rule 12(b)(6).[1]

[1] With the filing of the consolidated complaint ("Cmpt."), Dkt. No. 151, this class action consists of 57 individual plaintiffs from 30 different states. The parties jointly agreed that this motion would focus exclusively upon the claims of the plaintiffs residing in New York, Illinois, Ohio and California. (Dkt. No. 163.)

SUMMARY OF ALLEGATIONS

On October 1, 2015, Experian announced a data breach potentially affecting an estimated 15 million consumers who had subscribed or enrolled in T-Mobile services. (Cmpt., ¶¶ 1, 69-70.) Plaintiffs do not allege when this data breach occurred. Plaintiffs, consisting of T-Mobile customers and subscribers, allege that an unidentified attacker exfiltrated their personal information, consisting largely of names, addresses, and social security numbers. (*Id*., ¶¶ 1, 7–62.)

Plaintiffs assert that the breach injured them in four ways. First, they say that it increased the risk that their personal information will be misused for fraud or identity theft in the future. (*Id*., ¶¶ 5, 93.) Second, they allege that they have had to spend time and money monitoring their financial accounts for, and protecting them against, fraudulent activity. (*Id*., ¶¶ 4, 93.) Third, they claim that they have lost "the opportunity to control how their [personal information] is used." (*Id*., ¶ 93.) Specifically, plaintiffs assert that the "value" of their personal information is lower than it was pre-breach. (*Id*., ¶¶ 198, 231.) Fourth, some, but not all, plaintiffs allege that they experienced either attempted fraudulent activity on their financial accounts, drops in their credit scores, unreimbursed fraudulent charges, phishing calls or texts from apparent hackers, or other misuses of their personal data. (*Id*., ¶¶ 5, 15, 49, 93–94.) Plaintiffs allege that Experian was negligent in safeguarding their personal data from cyber attack, *id*., at ¶¶ 2, 103–04, and that Experian failed to timely disclose that the breach occurred. (*Id*., ¶ 105.)

Plaintiffs purport to sue on behalf of tens of millions of similarly situated Americans, nationwide. (*Id*., ¶¶ 6, 107.) On behalf of the nationwide class, plaintiffs allege that Experian violated the FCRA by "furnish[ing] consumer reports to unauthorized or unknown entities, or computer hackers." (*Id*., ¶ 130.) They allege both willful and negligent violations of the FCRA. (*Id*., ¶¶ 123-42.) Plaintiffs also assert claims for negligence and negligence per se on behalf of the nationwide class. (*Id*., ¶¶ 143-58.) The negligence claims are grounded upon

Experian's alleged breaches of state law duties, along with its alleged duties to protect their information, implement intrusion-detection processes, delete any unnecessary personal information, and disclose that its data-security practices were inadequate. (*Id.*, ¶¶ 144-49, 152.) The negligence *per se* claim is based upon Experian's alleged violation of duties under the FCRA, as well as duties under the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq*. (GLBA), and various state statutes. (*Id.*, ¶¶ 159–75.)

Plaintiffs also purport to sue on behalf of twenty-eight separate statewide subclasses, *id.*, ¶ 108, alleging forty-four state law claims across twenty-eight states. These claims primarily are premised upon alleged violations of state consumer protection statutes and, in some states, state data breach notification statutes. (*Id.*, ¶¶ 176-527.) Plaintiffs also assert negligence and negligence *per se* claims separately on behalf of each of the twenty-eight statewide subclasses, as an alternative to bringing those claims on behalf of the nationwide class. (*Id.*, ¶ 109.)

LEGAL STANDARD

Under Rule 12(b)(6), a complaint must be dismissed when a plaintiff fails to allege facts which, if true, would entitle the complainant to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (claim must be facially plausible in order to survive a motion to dismiss); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007). The pleadings must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. The court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678. Furthermore, Rule 9(b), which applies to claims that involve allegations of fraud, requires that parties "alleging fraud … state with particularity the circumstances constituting fraud." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks omitted). That is, to "satisfy Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged." *Id.*

Dismissal without leave to amend is appropriate if the Court is satisfied that the deficiencies in the complaint could not be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003). Where, as here, the named plaintiffs in a class action fail to satisfy these standards, the complaint should be dismissed in its entirety. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

LEGAL ARGUMENT

None of the claims of the plaintiffs residing in New York, Illinois, Ohio and California states a claim against Experian upon which relief can be granted.

I. THE FCRA CLAIMS ARE INFIRM

Plaintiffs, on a nationwide basis, attempt to plead claims for willful (Count I) and negligent (Count II) violations of the FCRA, alleging that Experian willfully and negligently violated 15 U.S.C. §§ 1681b and 1681e(a) by "providing impermissible access to consumer reports and by failing to maintain reasonable procedures designed to limit the furnishing of consumer reports to the purposes outlined under section 1681b of the FCRA." (Cmpt., ¶¶ 133, 139.) There is one problem with both claims: Theft of data is not "furnishing" a "consumer report" under the FCRA, as *every* court to consider the issue has concluded. *See*, *e.g.*, *Dolmage*, 2015 WL 292947, at *3-4 ("Courts in this District and elsewhere have concluded that defendants cannot be held liable under the FCRA for improperly furnishing information where that information was stolen by third parties.")

By statute, the only parties that can violate 15 U.S.C. §§ 1681b and 1681e(a) are consumer reporting agencies that "furnish" a "consumer report" in a manner that violates the FCRA. *Holmes v. Countrywide Fin. Corp.*, No. 08-cv-00205, 2012 WL 2873892, at *15-16 (W.D.Ky. Jul. 12, 2012) ("The language of § 1681b indicates that when Congress created the protections of the FCRA, it envisioned 'consumer reports' that were 'furnished' to third parties in violation of the statute."). The word "furnish" is not defined under the FCRA. Nonetheless, "courts generally use the term to describe the active transmission of information to

a third-party rather than a failure to safeguard the data." *Dolmage*, 2015 WL 292947, at *3 (emphasis added), *citing Strautins v. Trustwave Holdings, Inc.*, No. 12 C 09115, 2014 WL 960816, at *8 (N.D.Ill. Mar. 12, 2014); *Holmes*, 2012 WL 2873892, at *16 (same). That is why our courts unanimously have held that data that is stolen in a data breach is not "furnishing" of a "consumer report" under the FCRA. *Dolmage*, 2015 WL 292947, at *3-4 ("defendants cannot be held liable under the FCRA for improperly furnishing information where that information was stolen by third parties"); *Willingham v. Global Payments, Inc.*, No. 1:12–CV–01157–RWS, 2013 WL 440702, at *13 (N.D.Ga. Feb. 5, 2013) (because "the data was stolen, not furnished . . . [and] Defendant did not transmit or furnish data to the hackers, [Defendant] . . . did not violate [the FCRA]"); *Strautins*, 2014 WL 960816, at *8 (plaintiff's FCRA allegations insufficient where plaintiff alleged that defendant furnished the data by "means of its negligent or willful failure to safeguard the data" from hackers); *Tierney v. Advocate Health & Hosps. Corp.*, No. 13 CV 6237, 2014 WL 5783333, at *3 (N.D.Ill. Sept. 4, 2014) ("Plaintiffs fail to plausibly allege that Defendant 'furnished' any information to a third party; rather, Plaintiffs allege that computers containing personal information were stolen."); *Holmes*, 2012 WL 2873892, at *15 (dismissing FCRA claim arising out of data breach, holding that data that is stolen is not data that is "furnished" or "transmitted" under the FCRA); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 1012 (S.D.Cal. 2014) ("to the extent that Plaintiffs attempt to allege that their Personal Information was furnished to third parties as a result of the intrusion, this argument has also been rejected").

Here, plaintiffs do not, and cannot, allege that Experian "furnished" any information. Instead, plaintiffs specifically plead that the data at issue was "stolen" by "unauthorized parties." (Cmpt., ¶ 1.) "No coherent understanding of the words 'furnished' or 'transmitted' would implicate [Experian's] action under the FCRA." *Holmes*, 2012 WL 2873892, at *16.

Plaintiffs' backup claim—that Experian, in violation of section 1681e, failed to "maintain reasonable procedures designed to limit the furnishing of consumer reports to the purposes outlined under section 1681b of the FCRA" (*see* Cmpt., ¶ 139)—fails for the same reason: Because the information was stolen, not "furnished," Experian did not "furnish" a "consumer report" and, hence, had no legal obligation under section 1681e to maintain "reasonable procedures" over a "consumer report" that was never furnished. Every court—including this Court—to consider this issue has held that a defendant is not liable for failing to maintain reasonable procedures for furnishing consumer reports unless the defendant *actually furnished* a consumer report. *Moreland v. CoreLogic SafeRent LLC*, SACV 13-470 AG(ANx), 2013 WL 5811357, at *6 (C.D. Cal. April 2013) ("[A] plaintiff bringing a claim that a reporting agency violated the 'reasonable procedures' requirement of § 1681e must first show that the reporting agency released the report in violation of § 1681b.").

This Court's holding in *Moreland* is in accord with every other decision addressing a claim that attacks a company's procedures for furnishing credit information in the absence of an allegation that the company actually furnished information in violation of the FCRA. *See Kennedy v. Chase Manhattan Bank USA, NA*, 369 F.3d 833, 843 (5th Cir. 2004) ("A plaintiff bringing a claim that a reporting agency violated the 'reasonable procedures' requirement of section 1681e must first show that the reporting agency released the report in violation of section 1681b."); *Dolmage*, 2015 WL 292947, at *4 ("[T]o establish a violation of Section 1681e, Plaintiff must plead that Defendant improperly furnished consumer reports to third parties."); *Hinton v. Trans Union, LLC*, 654 F. Supp. 2d 440, 450 (E.D. Va. 2009), *aff'd*, 382 F. App'x 256 (4th Cir. 2010) ("With respect to § 1681e(a), plaintiff 'must first show that the reporting agency released [a] report in violation of § 1681b.'" (quotation omitted)); *Harris v. Database Mgmt. & Mktg., Inc.*, 609 F. Supp. 2d 509, 518 (D. Md. 2009) ("As I have found no violation of

1681b by ChoicePoint, I need not evaluate the reasonableness of ChoicePoint's procedures under Section 1681e.").

In short, "[t]he relevant fact is that the data was stolen, not furnished." *Willingham*, 2013 WL 440702, at *13. That cannot be the basis of a claim under the FCRA because "[t]he story Plaintiffs tell is not one where [Experian] 'transmitted' their private information to unseen parties." *Holmes*, 2012 WL 2873892, at *16. Thus, plaintiffs' claims for "willful" and "negligent" violations of the FCRA should be dismissed. As these claims cannot be cured with leave to amend, the FCRA claims should be dismissed with prejudice.[2]

II. THE NEW YORK CLAIMS

Plaintiff Bassaw alleges claims for negligence and negligence per se, as well as a violation of New York General Business Law, N.Y. Gen. Bus. Law § 349. None of the claims has been, or could be, adequately pleaded.

A. The Negligence Claim Is Infirm

To state a claim for negligence under New York law, a plaintiff must plead the existence of a legal duty, and actual damages proximately caused by breach of that duty. *Hammond v. The Bank of New York Mellon Corp.*, No. 08 CIV 6060, 2010 WL 2643307, at *9 (S.D.N.Y. June 25, 2010). Plaintiff Bassaw does not, and cannot, satisfy either of these elements.

[2] Paragraph 132 of the complaint cites a statement by four Commissioners of the Federal Trade Commission entirely out of context. Far from announcing that the FTC will begin interpreting the FCRA—contrary to its text and every judicial decision construing that text—as imposing general, widespread data-security obligations, the statement discusses a credit-reporting agency's obligation to ensure that those to whom it *voluntarily* furnishes consumer credit data treat that sensitive information with appropriate care, an obligation stemming from the FCRA's requirement that credit agencies "take reasonable measures to ensure that consumer reports are given only to entities using the reports for purposes authorized by the statute." Statement of Commissioner Brill (Federal Trade Commission 2011), available at https://goo.gl/yPZm7K (last visited May 20, 2016). Whatever the merits of the FTC's interpretation of the FCRA in that context, its statement has nothing to do with the theft of personal information.

1. Experian Did Not Owe Bassaw Any Duty

Bassaw alleges that Experian, who hosted T-Mobile's data, owed him a duty to employ proper security procedures to secure his PII. (Cmpt., ¶ 144.) But under New York law, no such duty exists: A defendant who hosts data of institutional clients owes no duty to those clients' customers in the context of a negligence claim for theft of the data. *See Hammond*, 2010 WL 2643307, at *9. Because Experian hosted T-Mobile's data, Experian did not owe any duty to Bassaw and, thus, his negligence claim must be dismissed with prejudice.

2. Bassaw Did Not Sustain Any Actual Damages

Even if Experian owed Bassaw a duty, which it denies, the negligence claim nonetheless fails because Bassaw does not plausibly allege any actual damages proximately caused by that breach of duty. Bassaw claims that, in November 2015, his "credit card had an unauthorized charge[.]" (Cmpt., ¶ 47.) Yet, he admits that the charge was "reimbursed." (*Id*.) As Bassaw was made whole, he suffered no actual damages to support a negligence claim. *Hammond*, 2010 WL 2643307, at *8 (concluding that plaintiffs did not suffer an injury where they were reimbursed for unauthorized charges); *Saxton v. Pets Warehouse, Inc.*, 691 N.Y.S.2d 872, 873 (App. Term 1999) (same); *1633 Assoc. v. Uris Buildings Corp.*, 66 A.D.2d 237, 242 (1st Dept 1979) (where plaintiffs "have been made whole" they have "suffered no damage for which defendant may be held accountable"); *Schussheim v. Commerce Bank*, 863 N.Y.S.2d 871, 873 (2008) (same). Courts evaluating motions to dismiss in the data breach context repeatedly have held that a complaint must plead *unreimbursed* charges in order to withstand a motion to dismiss. *In re Sony Gaming Networks and Customer Data Sec. Breach Litigation*, 903 F. Supp. 2d 942, 963 (S.D. Cal. 2012) ("without specific factual statements that Plaintiffs' Personal Information has been misused, in the form of an open bank account, or unreimbursed charges, the mere danger of future harm, unaccompanied by present damage, will not support a negligence action") (quotation marks and citation

omitted); *In re. Barnes & Noble Pin Pad Litig.*, No. 12-cv-8617, 2013 WL 4759588, at *6 (N.D. Ill. Sept. 3, 2013) ("In order to have suffered an actual injury, [plaintiff] must have had an unreimbursed charge on her credit card").

But even if Bassaw was not reimbursed for the unauthorized credit card charge, the suggestion that this charge was proximately caused by the data breach is implausible. The data breach did not involve stolen credit card numbers. Thus, for his claim to have any degree of plausibility, Bassaw would need to allege facts establishing how a data breach that did not involve stolen credit card numbers could have resulted in a fraudulent charge appearing on his *existing* credit card. *Twombly*, 550 U.S. at 546 (the plausibility requirement "serves the practical purpose of preventing a plaintiff with 'a largely groundless claim' from 'tak[ing] up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value'"). But no such facts are alleged.

Bassaw also claims to have "spent approximately 3 hours addressing issues arising from the Data Breach, including addressing the fraudulent activity and checking his accounts and credit report for fraudulent activity, *see* Cmpt., ¶ 47, even though "[c]ourts 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." *Shafran v. Harley-Davidson, Inc.*, No. 07 Civ. 01365(GBD), 2008 WL 763177, at *3 (S.D.N.Y. Mar. 20, 2008); *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 46 (3d Cir. 2011). The complaint also generally alleges that all plaintiffs face an increased, imminent risk of fraud and identity theft, and have lost the value of their PII, *see* Cmpt., ¶ 419, even though courts applying New York law have held that (1) an "increased risk of identity theft is not, in itself, an injury that the law is prepared to remedy," *Shafran*, 2008 WL 763177, at *2, and (2) the loss of value of PII is not a cognizable injury. *Whalen v. Michael Stores Inc.*, No. 14-CV-7006 (JS)(ARL), 2015 WL 9462108, at *4 (E.D.N.Y. Dec. 28, 2015).

But even if Bassaw's allegations were deemed sufficient to satisfy pleading requirements, and were found to have sufficiently alleged a cognizable injury, the negligence claim is barred by New York's economic loss doctrine. New York law prohibits a party from recovering purely economic losses in tort. *Bristol-Myers Squibb, Indus. Div. v. Delta Star*, 206 A.D.2d 177, 181 (4th Dept 1994) ("The economic loss rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort."); *American Fin. Int'l Group-Asia LLC v. Bennett*, No. 05-cv-8988, 2007 WL 1732427, *3 (S.D.N.Y. June 14, 2007) (economic loss doctrine bars negligence claim where no contract existed between the parties). *Schiavone Constr. Co. v. Elgood Mayo Corp.*, 436 N.E.2d 1322, 1323 (N.Y. 1982).

In an analogous case, the Southern District of New York dismissed negligence claims asserted on behalf of a putative class of individual customers. *Labajo v. Best Buy Stores, L.P.*, 478 F. Supp. 2d 523, 532 (S.D.N.Y. 2007). In *Labajo*, the plaintiff alleged that defendants had acted negligently in forwarding her payment card information and opening an account for a magazine subscription with automatic renewal. Noting that the plaintiff had not alleged physical injury or property damage, the Court held that New York's economic loss doctrine required dismissal of her negligence claim. *Id*. So too here, Bassaw has not alleged any physical injury or property damage, but seeks to recoup purely economic losses.

While New York recognizes an independent-duty exception to its economic loss rule, that exception is inapplicable. It applies only in two very limited circumstances—where: (1) the parties' relationship was "so close as to approach that of privity," or (2) the defendant "created a duty to protect the plaintiff." *In re Facebook Inc., IPO Sec. and Derivative Litig.*, 986 F.Supp.2d 428, 461 (S.D.N.Y. 2013) (internal quotation marks omitted). Bassaw does not, and cannot, allege that Experian "created a duty to protect [him]." Nor, does he allege a privity relationship with Experian. In *Facebook*, for example, the court found that a

securities exchange has a privity-like relationship with members of the investing public because the exchange "was aware of, promoted, and profited from the widespread public interest in the Facebook IPO and accepted the trade orders for processing and execution." *Id.* at 461. Likewise, in *In re Target Corp. Customer Data Security Breach Litig.*, 66 F. Supp. 3d 1154 (D. Minn. 2014), the plaintiffs sufficiently had alleged a "quasi-contractual, privity-like relationship" between Target and its card holders. *Id.* at 1175. But in both *Facebook* and *Target*, plaintiffs gave their information *to the defendant* and had a *direct relationship* with them. Experian, by contrast, did not have any relationship, much less a privity relationship, with Bassaw. For this independent reason, the negligence count fails.

B. The Negligence Per Se Claim Is Infirm

Bassaw's claim of negligence per se—grounded upon alleged violations of the FCRA (discussed above), a violation of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801, regulations promulgated under GLBA (16 C.F.R. § 314.4), the Interagency Guidelines Establishing Information Security Standards, 12 C.F.R. pt. 225, App. F, and a violation of New York's General Business Law—fails for the same reason why the negligence claim fails: (1) Bassaw does not allege to have sustained any damages proximately caused by a breach of statutory duty, *see Lugo v. St. Nicholas Assocs.*, 2 Misc. 3d 212, 218 (N.Y. S.Ct. 2003), *aff'd*, 795 N.Y.S.2d 227 (2005) (Even "if the violation of [a] statute is proved, . . . the plaintiff must still establish the statutory violation was a proximate cause of injury."); and (2) Bassaw seeks purely economic damages, which are barred by New York's economic loss rule. *Bristol-Myers*, 206 A.D.2d at 181.

The claim fails for several additional reasons. As demonstrated above, Experian did not violate the FCRA. Thus, this statute cannot serve as a basis for negligence per se. *Martin v. Herzog*, 126 N.E. 814, 815-816 (N.Y. 1920). *Elliott v. City of N.Y.*, 95 N.Y.2d 730, 734 (2001). An alleged violation of the GLBA also cannot serve as a basis for a negligence per se claim. "[N]o private right of action

exists for an alleged violation of the GLBA," and the GLBA does not supply any standard of care or conduct. *Dunmire v. Morgan Stanley DW, Inc.*, 475 F.3d 956, 960 (8th Cir. 2007). Rather, the GLBA "expresses the goal that financial institutions respect the privacy, security, and confidentiality of customers," *Wells Fargo Bank, N.A. v. Jenkins*, 293 Ga. 162, 164 (2013), and provides that "[i]t is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. § 6801(a). As the Georgia Supreme Court concluded, "[w]hile this is a clear Congressional policy statement, it is just that. It does not provide for certain duties or the performance of or refraining from any specific acts on the part of financial institutions, nor does it articulate or imply a standard of conduct or care, ordinary or otherwise." *Wells Fargo*, 293 Ga. at 164. Indeed, subsection (b) of 15 U.S.C. § 6801 confirms that subsection (a) is not intended to provide a standard of care by financial institutions as it expressly authorizes federal agencies, "[i]n furtherance of the policy in subsection (a) [of § 6801]," to "establish appropriate standards for the financial institutions subject to their jurisdiction relating to administrative, technical, and physical safeguards." § 6801(b). And, because the GLBA does not articulate a standard of care or conduct, it cannot be violated. *Wells Fargo*, 293 Ga. at 164.

The regulations plaintiffs cite also do not provide a standard of care or conduct. Those Guidelines essentially provide that financial institutions should implement a plan with the goal of protecting customer information. The Guidelines speak in terms of "developing" "reasonable" safeguards. 16 C.F.R. § 314.1. They thus do not go any further than the Act itself. *See* Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. Rev. 255, 266-270 (2005). "[T]he standards agencies have already adopted . . . are typically flexible in nature, equivocal as to what must be done, and generally unsuited to

defining the conduct expected of a reasonably prudent financial institution." *Id.* at 269. Thus, "[l]ike the GLBA itself, the [regulations] offer no clear guidance as to precisely what precautions financial institutions must implement to protect data security." *Id.* And, more importantly, given that Bassaw claims that theft was the cause of his injuries, a fact finder would not be able to "determine that [Experian] failed to comply with the GLB Act." *Guin v. Brazos Higher Educ. Serv. Corp.*, No. Civ. 05-668, 2006 WL 288483, at *4 (D. Minn. Feb. 7, 2006).

More basically, however, under New York law, a violation of a federal regulation cannot serve as a basis for a negligence per se claim. *Elliot*, 95 N.Y.2d at 734 ("[T]he elevation of a violation of an ordinance, or administrative rule or regulation, to a negligence per se standard, would 'substantially recast' the common law of the State[.]"); *Bauer v. Female Acad. of the Sacred Heart*, 97 N.Y.2d 445, 453 (N.Y. 2002) (same). But even if an alleged violation of a regulation could be a valid predicate for negligence per se under New York law, plaintiffs may not simply list a series of regulations, and flatly assert that they have been violated. (Cmpt., ¶¶ 161-169.) Such conclusory allegations are insufficient. *Twombly*, 550 U.S. at 546.[3]

C. <u>The New York General Business Law Claim Is Infirm</u>

A plaintiff under, section 349, "must prove" three elements: "[F]irst, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chem. Bank*, 731 N.E. 2d 608, 611 (N.Y. 2000). Bassaw does not, and cannot, allege facts to support any of these elements.

He does not allege that Experian mislead him vis-à-vis the security of his PII. Nor could he: T-Mobile, not Bassaw, contracted with Experian to warehouse data.

[3] Finally, as shown below, Bassaw's allegation that Experian violated the New York General Business Law is infirm for several independent reasons. Thus, it too cannot serve as the basis for a negligence per se claim.

(Cmpt., ¶ 70.) Any statements Experian would have made regarding data privacy and security practices—statements that Bassaw does not allege to have ever read or seen—"do not constitute an unlimited guaranty that [personal] information could not be stolen or that computerized data could not be hacked." *Abdale v. N. Shore Long Island Jewish Health Sys., Inc.*, 49 Misc. 3d 1027, 1039 (N.Y. Sup. Ct. 2015). Nor does Bassaw allege to have "suffered injury as a result of the deceptive act." *Stutman*, 731 N.E. 2d at 611; *Franklin Elec. Publishers, Inc. v. Unisonic Prods. Corp.*, 763 F. Supp. 1, 5 (S.D.N.Y. 1991). Instead, each of Bassaw's alleged injuries were caused by a data thief's unlawful intrusion into an Experian server, not because of a "deceptive act" on Experian's part vis-à-vis Bassaw. Regardless, as demonstrated above, Bassaw fails to allege facts establishing that he suffered any damages. Thus, the section 349 claim is infirm.

III. THE ILLINOIS CLAIMS

Plaintiffs Kuklinski, Yoo, Barbashov and Alcorn (the Illinois Plaintiffs) assert claims for negligence and negligence per se under Illinois state law. (Cmpt., ¶¶ 30-33; 109; 143-175.) They also allege that Experian violated the Illinois Consumer Fraud Act, 815 Ill. Comp. Stat. 505/1, and the Illinois Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. § 510/2. (*Id.*, ¶¶ 319-329.) None of the claims of the Illinois Plaintiffs has merit.

A. The Negligence Claims Are Infirm

The negligence and negligence per se claims fail for the most basic of reasons: The Illinois Plaintiffs allege only economic losses. (*Id.*, ¶¶ 31-33.) Thus, their negligence claims are barred by Illinois' economic loss rule. *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 528 (N.D. Ill. 2011) (data breach class action holding that Illinois' economic loss rule "bars a plaintiff from recovering for purely economic losses under a tort theory of negligence"). *In re Michaels* was subsequently followed in *In re Target Corp.*, which dismissed negligence claims under Illinois' economic loss rule, and found that *In re Michaels*

"exhaustively surveyed the Illinois economic loss rule." 66 F. Supp. 3d at 1174. The claims fail for three additional reasons.

Experian did not owe a duty to the Illinois Plaintiffs. *See Hammond*, 2010 WL 2643307, at *9. *Hammond* held that, under Illinois law, a defendant that did not have any dealings with the plaintiff in a data theft case did not owe the plaintiff any duty, *see id.*, which is exactly the case here. But even if Experian owed the Illinois Plaintiffs a duty, they fail to allege facts establishing damages proximately caused by breach to support a negligence or negligence per se claim. *See Hammond*, 2010 WL 2643307, at *10. Kuklinski claims that, on September 13, 2015, he received "disturbing text messages from an apparent hacker stating that payment of over $3,000 was due for an account that was not his own." (Cmpt., ¶ 30.) Yet, because he does not allege a date of breach, it is entirely possible that he received that text *before* the data breach even occurred (and, hence, the data breach could not have been the cause of the text message). Yoo alleges that, in November 2015, his "bank informed him of attempted fraudulent charges on his credit card." (Cmpt., ¶ 31.) But just like Bassaw, Yoo does not allege facts plausibly establishing how a data breach that did not involve stolen credit card numbers could have resulted in a fraudulent charge appearing on his *existing* credit card. *Twombly*, 550 U.S. at 546. Kuklinski, Yoo, Barbashov and Alcorn allege to have spent time "addressing issues arising from the Data Breach, including checking [] accounts and credit report[s] for fraud," *see* Cmpt., ¶¶ 30-33, even though this is not recoverable as damages. *Michaels*, 830 F. Supp. 2d at 526. Alcorn allegedly subscribed for credit monitoring, *see* Cmpt., ¶ 33, even though Experian offered her credit monitoring services for free. *Id.*, ¶ 95. Regardless, that cost is not recoverable as damages, either. *Michaels*, 830 F. Supp. 2d at 526.

The negligence per se claim independently fails for the same reason why Bassaw's claim fails: Experian did not violate any statute or regulation. As shown in Section II (B), *supra*, Experian did not violate the FCRA or the GLBA or the

regulations related to the GLBA. And, as shown in Section III (B) and (C), *infra*, Experian did not violate any Illinois statute. Thus, the claim must be dismissed. *See Cuyler v. United States*, 362 F.3d 949, 952 (7th Cir. 2004).

B. The Consumer Fraud Act Claim Is Infirm

The Consumer Fraud Act Claim should be dismissed on multiple grounds.

First, the claim is grounded upon Experian's alleged "fail[ure] to disclose the Data Breach to Illinois Subclass members in a timely and accurate manner, in violation of the duties imposed by 815 Ill. Comp. Stat. § 530/10(a)." (Cmpt., ¶ 320(g).) In order to prevail on a claim under section 530/10(a), a plaintiff must show he was injured by the delay in notification itself. *See* § 530/20 (explaining that a violation of § 530/10 is a basis for suing under the Consumer Fraud Act); *Zekman v. Direct Am. Mkters., Inc.,* 695 N.E.2d 853, 860 (Ill. 1998) (Consumer Fraud Act requires injury). But plaintiffs have not alleged that any of their claimed injuries were caused by any *delay* in notice from Experian. Indeed, because Plaintiffs do not allege a date of breach, they cannot plausibly allege that Experian delayed in notifying them of the breach.

Second, more fundamentally, section 530/10(a) does not even apply to plaintiffs. Instead, that provision only applies to a "data collector that *owns or licenses* personal information concerning an Illinois resident." *See* § 530/10(a) (emphasis added). Experian does not "own or license" any of the data that was stolen, and the complaint does not allege otherwise. Subsection (b) of section 530/10 provides that "any data collector that maintains or stores, *but does not own or license*, computerized data that includes personal information"—*i.e.*, entities like Experian—"shall notify the *owner or licensee* of the information of any breach." Thus, "the statute as a whole treats an 'owner or licensee' differently from an 'Illinois resident' in connection with disclosure obligations." *Worix v. MedAssets, Inc.*, 869 F.Supp.2d 893, 898 (N.D. Ill. 2012). Plaintiffs only have brought a claim under subsection (a), which on its face does not apply to Experian.

And, had plaintiffs pursued a claim under subsection (b), they would have fared no better as T-Mobile, not plaintiffs, was the owner of the stolen information, and hence T-Mobile, not plaintiffs, was the only entity entitled to notice under section 530/10(b).

Third, while the Act creates two types of claims, one for "unfair" conduct and one for "deceptive" conduct, *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960 (2002), plaintiffs do not "advance any allegations of unfair conduct that are distinct from [their] allegations of fraudulent misrepresentations and omissions." *In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 848 (S.D. Ohio 2012); *see also, e.g.*, *Greenberger v. GEICO Gen. Ins. Co.*, 631 F.3d 392, 399 (7th Cir. 2011). Furthermore, because the claim is grounded entirely in fraud, accusing Experian of various misrepresentations and concealments in various privacy notices, *see* Cmpt., ¶¶ 76-77; 81, Rule 9(b) applies. Yet, plaintiffs fail to plead the claim with the particularity required of Rule 9(b). For instance, they do not allege that they read or heard any of the alleged misrepresentations; nor do they allege when they were even made; nor do they allege that they relied upon any of them to their detriment; nor do they allege that they knew Experian was housing T-Mobile data; and, so on. As the claim does not remotely come close to complying with Rule 9(b), it should be dismissed. *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003).

Fourth, an element of the Consumer Fraud Act is proximate causation between the fraudulent conduct and a plaintiff's alleged injuries. *De Bouse v. Bayer*, 922 N.E.2d 309, 316 (Ill. 2009). Yet, where, as here, there has not been any alleged communications between plaintiffs and defendants, the Illinois Supreme Court has held that a plaintiff cannot demonstrate proximate cause under the Act. *Id*. ("If there has been no communication with the plaintiff, there have been no statements and no omissions"; thus, Plaintiffs "cannot prove proximate cause."). Plaintiffs point to various statements Experian allegedly made, but plaintiffs do not

allege to have reviewed those statements or relied upon them. Thus, they have failed to plead proximate causation.

Fifth, even if plaintiffs could establish proximate causation, the claim still could not move forward: Plaintiffs have not alleged an actual injury, which is another required element of this claim. *See Cooney v. Chicago Pub. Schs.,* 943 N.E.2d 23, 31 (Ill. 2010); *In re Michaels Stores*, 830 F. Supp. 2d at 526 ("Only a person who suffers *actual* damage may bring an action under the [Consumer Fraud Act]."). Some of the Illinois Plaintiffs allege injury based upon credit monitoring expenses and the risk of future harm, even though the costs of credit monitoring and risk of future harm are not cognizable under the Act. *Worix v. MedAssets, Inc.*, 857 F. Supp. 2d 699, 706 (N.D. Ill. 2012); *In re Michaels*, 830 F. Supp. 2d at 526; *Williams v. Manchester,* 888 N.E.2d 1, 13 (Ill. 2008); *Cooney*, 943 N.E.2d at 31. Some of the Illinois Plaintiffs allege *attempted* fraudulent activities, but none of them allege any injury arising from those *attempts*, or any facts establishing that the fraudulent activity occurred before or after the breach. Thus, those allegations do not plausibly support a claim against Experian. *Iqbal*, 556 U.S. at 679.

All of the Illinois Plaintiffs allege supposed injury to their interest in their confidentiality and privacy, as well as time and expense related to monitoring their accounts, even though these alleged "injuries" are not actionable, either. *See In re Barnes & Noble Pin Pad Litig.*, 2013 WL 4759588, at *5; *Sterk v. Best Buy Stores, L.P.*, No. 11 C 1894, 2012 WL 5197901, at *6 (N.D. Ill. Oct. 17, 2012); *Maglio v. Advocate Health and Hospitals Corp.*, 40 N.E.3d 746, 754-55 (Ill. App. 2015). Finally, the Illinois Plaintiffs allege that their personal information lost value, but that sort of alleged degradation is insufficient "unless a plaintiff has the ability to sell his own information and a defendant sold the information." *In re Barnes & Noble*, 2013 WL 4759588, at *5. Here, the Illinois Plaintiffs do not allege that their personal information was sold, or that they could sell it, or that Experian sold it. *See Sterk*, 2012 WL 5197901, at *6. Because plaintiffs do not allege actual injury,

their claim must be dismissed.

C. The Uniform Deceptive Trade Practices Act Claim Is Infirm

The Illinois Uniform Deceptive Trade Practices Act also requires a plaintiff to plead and prove an actual injury, *see Zekman*, 695 N.E.2d at 860; *Michaels*, 830 F. Supp. 2d at 526, which as demonstrated above, the Illinois Plaintiffs fail to do. The claim thus fails.

The claim also fails because injunctive relief is the only remedy that is available under the Act, and plaintiffs are not entitled to that type of relief. 815 Ill. Comp. Stat. Ann. § 510/3. To begin with, the Illinois Plaintiffs do not specify what sort of injunctive relief they seek in relation to their Illinois claim. Regardless, to obtain an injunction, a party "must prove" that "no adequate remedy at law exists." *Bogner v. Villiger*, 796 N.E.2d 679, 685–86 (Ill. App. Ct. 2003); *Neuros Co. v. KTurbo, Inc.*, No. 08-cv-5939, 2013 WL 1706368, at *3 (N.D. Ill. Apr. 17, 2013) (holding as much under the Deceptive Practices Act). The Illinois Plaintiffs seek damages under a bevy of other statutes (both state and federal). And, while it may seem like a Catch-22 to dismiss plaintiffs' legal claims as meritless and then dismiss their equitable claims on the theory that they have an adequate legal remedy, that is a bind plaintiffs created for themselves: "Where the claims pleaded by a plaintiff may entitle her to an adequate remedy at law, equitable relief is unavailable." *See Rhynes v. Stryker Corp.*, 2011 WL 2149095, at *4 (N.D. Cal. May 31, 2011). Plaintiffs thus have an adequate remedy at law, which precludes this equitable claim. *Neuros*, 2013 WL 1706368, at *3.

IV. THE OHIO CLAIMS

Darius Clark asserts claims for negligence and negligence per se under Ohio state law. (Cmpt., ¶¶ 109; 143-175.) He also alleges that Experian violated the Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.02(A), and the Ohio Deceptive Trade Practices Act. (*Id.*, ¶¶ 429-441.) None of the claims has merit.

A. The Negligence Claims Are Infirm

Clark's claims for negligence and negligence per se cannot move forward for the same reasons why the negligence claims of the New York and Illinois plaintiffs fail to state a claim: Because "[n]one of the named Plaintiffs had any direct dealings with [Experian]," *Hammond*, 2010 WL 2643307, at *9, Experian did not owe Clark any duty of care under Ohio law, thus precluding a negligence claim. *Id*. And, although Ohio law recognizes the doctrine of negligence per se, Experian did not violate any statute or regulation. *See* Section II (B), *supra*; Section IV (B) & (C), *infra*. Thus, it is inapplicable. *Hernandez v. Martin Chevrolet, Inc.*, 649 N.E.2d 1215, 1216 (Ohio 1995). Regardless, both claims also are barred under Ohio's economic loss doctrine, which directs that "a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 835 N.E.2d 701, 704 (Ohio 2005); *Sagraves v. Lab One, Inc.*, 316 Fed.Appx. 366, 369 (6th Cir. 2008).

Clark also did not suffer any actual damages, which independently bars both claims. He asserts that, "[i]n or around September 2015, [he] received several phishing calls in which the caller knew his mailing address and the last four digits of his Social Security number and claimed Plaintiff Clark owed taxes to the IRS." (Cmpt., ¶ 49.) Yet, Clark does not allege whether those calls occurred before or after the breach, which renders those allegations implausible. Regardless, Clark alleges that he confirmed with the IRS that he did not owe any taxes and these were fraudulent phishing calls. (*Id*.) Clark also asserts that he "has spent approximately $20 placing credit freezes on his credit report, and approximately $20 per month on credit monitoring," *see id*., even though Experian offered him free credit monitoring services. (Cmpt., ¶ 94.) These items are not actual damages, and are non-recoverable. *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 686–91 (S.D. Ohio 2006) (no injury where consumers alleged they had to cancel their credit cards, close their

checking accounts, and order new checks); *Kahle v. Litton Loan Servicing, LP*, 486 F. Supp. 2d 705, 710 (S.D. Ohio 2007) (holding that monitoring costs are not a cognizable injury). As Clark does not allege to have suffered any actual damages proximately caused by the data breach, his negligence claims fail for this independent reason. *Wolf v. Lakewood Hosp.*, 598 N.E.2d 160, 164 (Oh. App. 1991) (negligence claim barred where plaintiff did not suffer actual damages).

B. The Ohio Consumer Sales Practices Act Claim Is Infirm

The Ohio Consumer Sales Practice—which provides, in pertinent part, that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a *consumer transaction*" *see* Ohio Rev. Code § 1345.02(A) (emphasis added)—is inapplicable on its face: Clark does not, and cannot, allege a "consumer transaction" between himself and Experian. *Richards v. Beechmont Volvo*, 711 N.E.2d 1088, 1090 (Ohio App. 1998) (to bring a claim under this statute, a plaintiff must allege that the defendant's acts "concern a matter that is or is likely to be material to a consumer's decision to *purchase* the product or service involved" (emphasis added)). This requirement is confirmed by the Act's remedies: "[T]he consumer may, in an individual action, *rescind* the transaction." § 1345.09(A) (emphasis added). Rescission begets the existence of a transaction, which Clark does not allege to have had with Experian.

The claim also fails because Clark does not, and cannot, allege that he relied upon any Experian "deceptive act or practice." *Lilly, Jr. v. Hewlett-Packard Co.*, No. 05-cv-465, 2006 WL 1064063, at *5 (S.D. Ohio Apr. 21, 2006) (to bring a claim under the Act premised upon affirmative conduct, a plaintiff must allege that he "saw or was . . . aware of the alleged misrepresentations at any time before or during the purchase of the [allegedly defective product]"). Clark identifies a handful of statements Experian supposedly made, *see* Cmpt., ¶¶ 76, 77, 431(c), (e), but he does not allege when those statements were made, much less that he read or relied upon those statements. "[E]xposure" to deceptive statements "without

reliance . . . necessarily block[s] recovery." *Amato v. GM*, 11 Ohio App. 3d 124, 127–28 (1982). Clark's allegation that Experian omitted material information is irrelevant. Omissions are actionable only if they "concern a matter that is or is likely to be material to a consumer's decision to *purchase* the product or service involved." *Temple v. Fleetwood Enters.*, 133 Fed. Appx. 254, 265–66 (6th Cir. 2005) (citing *Richards v. Beechmont Volvo*, 127 Ohio App.3d 188, 190 (1998)). Again, Clark did not purchase anything from Experian.

Nor, does Clark allege that Experian was on notice that anything it did was unfair or deceptive. "To bring a claim on behalf of a putative class, a plaintiff must identify in his or her complaint the rule or case that satisfies Section 1345.09(B)'s notice requirement." *In re Porsche Cars*, 880 F. Supp. 2d at 868. That subsection requires that either "the violation is an act or practice that was declared to be deceptive or unconscionable by a rule adopted by the [Ohio] Attorney General before the consumer transaction on which the action is based," or "if the violation is an act or practice that was determined by a court to violate the [Sales Practice Act] and the court's decision was available for public inspection," by the Ohio Attorney General under Ohio Revised Code § 1345.05(A)(3). *Gascho v. Glob. Fitness Holdings, LLC*, 863 F. Supp. 2d 677, 692 (S.D. Ohio 2012). As Clark fails "to identify a rule or case in [his] complaint that satisfies Section 1345.09(B), dismissal of the claim as a class action is proper." *In re Porsche Cars*, 880 F. Supp. 2d at 869.

Even if Clark could overcome the foregoing pleading deficiencies, his claim under the Ohio Consumer Sales Practice still could not move forward: Clark does not allege a legally cognizable injury. He claims that he received several phishing calls and changed his phone number to avoid them, *see* Cmpt. ¶ 49, but that is not a cognizable injury. *Key*, 454 F. Supp. 2d at 686–91 (no injury where consumers alleged they had to cancel their credit cards, close their checking accounts, and order new checks). He claims that he spent time and money monitoring his

accounts for fraudulent activity. (Cmpt., ¶ 49.) That too is not a cognizable injury. *Kahle*, 486 F. Supp. 2d at 710. He claims that he faces increased risk of fraud and identity theft, even though such alleged "harm" does not satisfy Ohio's injury requirement. *Key*, 454 F. Supp. 2d at 690. And, he asserts a "loss in value" of his personal information, *see* Cmpt., ¶ 432, even though it is not a cognizable injury, either. *See Sony*, 903 F. Supp. 2d at 966; *see also Corona v. Sony Pictures Entm't, Inc.*, 2015 WL 3916744, at *4 (C.D. Cal. June 15, 2015); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 660 (S.D. Ohio 2014) (Plaintiffs "failed to allege any facts explaining how their [personal information] became less valuable to them (or lost all value) by the data breach.").

Finally, Clark alleges that "Experian failed to disclose the Data Breach to the Ohio Subclass members in a timely and accurate manner, in violation of the duties imposed by Ohio Rev. Code § 1349.19(B)." (Cmpt., ¶ 431(g).) Section 1349.19 concerns *changing utility companies*. Regardless, Clark does not allege any duty imposed by the Ohio Code to notify individuals of a data breach. Nor does he allege any delay in providing notice (as he does not even allege a date of breach).

C. The Ohio Deceptive Trade Practices Act Claim Is Infirm

The Ohio Deceptive Trade Practices Act claim falls flat. Individual consumers, like Clark, are not "persons" under the Act because "a person who seeks recovery under the Deceptive Trade Practices Act must also be engaged in some type of commercial activity, as that is how the term 'person' is used." *Gascho*, 863 F.Supp.2d at 698 (while the statute's definition of "person" includes an "individual," it is limited to "persons engaging in some type of 'business, vocation, or occupation.'"). A "contrary interpretation would be nonsensical." *Id.*; *accord Hamilton v. Ball*, 7 N.E.3d 1241, 1253 (Ohio App. 2014) ("consumers lack standing to file suit under the [Act]"); *Dawson v. Blockbuster, Inc.*, No. 86451, 2006 WL 1061769, at *4 (Ohio App. Mar. 16, 2006) (same); *Phillips v. Philip Morris Companies Inc.*, 290 F.R.D. 476, 484 (N.D. Ohio 2013) (same); *Robins v.*

Global Fitness Holdings, LLC., 838 F. Supp. 2d 631, 649–50 (N.D. Ohio 2012) (same); *Chamberlain v. Am. Tobacco Co.*, No. 96-cv-02005, 1999 WL 33994451, at *18 (N.D. Ohio Nov. 19, 1999) (same); *Glassner v. R.J. Reynolds Tobacco Co.*, No. 99-cv-0796, 1999 WL 33591006, at *6 (N.D. Ohio Jun. 29, 1999) (same); *Holbrook v. Louisiana–Pacific Corp.*, 533 Fed.Appx. 493, 497–98 (6th Cir. 2013) (affirming a decision holding as much).[4]

Regardless, the Act requires an actual injury, *see Strama v. Allstate Ins.*, No. 14 BE 8, 2015 WL 3946373, at *9 (Ohio Ct. App. June 17, 2015), and Clark does not allege to have suffered one. Instead, he asserts that he incurred credit monitoring costs and increased risk of fraud. (Cmpt., ¶ 49, 432.) Neither one is a cognizable injury. *Kahle*, 486 F. Supp. 2d at 710 (holding monitoring costs are not cognizable injury); *Key*, 454 F. Supp. 2d at 690 (denying claims based on speculative harm).

V. THE CALIFORNIA CLAIMS

Plaintiffs Gonzales, Crump, Brazzle, Merry, Ojeda, Bohannon, Johnson and Ciano (the California Plaintiffs) assert claims for negligence and negligence per se under California state law. They also allege that Experian violated California's Customer Record's Act, California's Consumer Legal Remedies Act (CLRA), and Section 17200 of California's Business & Professions Code (the UCL). None of the claims of the California Plaintiffs has merit.

[4] One court decided the opposite way. *Bower v. IBM*, 495 F. Supp. 2d 837, 842–44 (S.D. Ohio 2007). But *Bower* failed to consider the statute's context (commercial activity). *Gascho*, 863 F. Supp. 2d at 698. It also overlooked the fact that Ohio courts look to the Lanham Act when adjudicating claims under the Act. *Chandler & Assoc. v. Am.'s Healthcare Alliance*, 709 N.E.2d 190, 195 (Ohio App. 1997). Individual consumers lack standing to sue under the Lanham Act. *Made in the USA Found. v. Phillips Foods, Inc.*, 365 F.3d 278, 280 (4th Cir. 2004) (collecting cases). Thus, *Bower* reached the wrong conclusion.

A. The Negligence Claims Are Infirm

Neither the negligence nor negligence per se claim withstands scrutiny. To begin with, both claims are barred by the economic loss rule. *Target*, 66 F. Supp. 3d at 1172 ("Plaintiffs' California negligence claims [arising out of Target data breach] are dismissed on the basis of the economic loss rule."); *Sony*, 996 F. Supp. 2d at 967 (same). Although California recognizes a "special relationship" exception to the economic loss rule, *see J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979), it does not apply here, particularly inasmuch as there is no "relationship"—contractual or otherwise—between Experian and the California Plaintiffs. *Sony*, 996 F. Supp. 2d at 967. Indeed, the plaintiff / cardholders in *Target*, who have a direct relationship Target, could not overcome the economic loss rule. *Target*, 66 F. Supp. 3d at 1172. The economic loss rules requires dismissal of both claims with prejudice.

Even in the absence of the economic loss rule, the negligence claims still could not proceed. Negligence per se is not even a separate claim, but rather an evidentiary doctrine that allows a plaintiff to satisfy his burden of proving the duty and breach elements of a negligence claim by presenting proof the defendant violated a statute. *Millard v. Biosources, Inc.*, 156 Cal. App. 4th 1338, 1353 n.2 (2007). But as demonstrated above, Experian did not violate the FCRA or the GLBA (or the related regulations). *See* Section II(B), *supra*. And as shown below, Experian did not violate any California law.

The negligence claim further fails because "[n]one of the [California] Plaintiffs had any direct dealings with [Experian]" and, hence, Experian did not owe them any duty. *Hammond*, 2010 WL 2643307, at *9 (holding as much under California law). Instead, "Plaintiffs had relationships (only) with institutional clients of Defendant," namely T-Mobile. *Id.* at *9. Plaintiffs gave their information to T-Mobile, which then hired Experian to store the data. Because of that separation, Experian owed no duty to Plaintiffs. *Id.*

Moreover, "[i]t is fundamental that a negligent act is not actionable unless it results in injury to another." *Fields v. Napa Milling Co.*, 330 P.2d 459 (Cal. App. 1958). That is, speculative harm or the mere threat of future harm is insufficient to constitute actual loss. *Jordache Enters., Inc. v. Brobeck, Pheger & Harrison*, 958 P.2d 1062 (Cal. 1998). Yet, each of the California Plaintiffs plead injuries that are wholly speculative and non-recoverable:

- Gonzales. Gonzales claims that, in December 2015, when attempting to purchase a vehicle, he "discovered several hard inquiries on his credit report, which had caused his credit score to drop approximately 30 points." He does not allege *when* these inquiries happened—*i.e.*, before or after the breach. Nor does he claim to have suffered any damages as a result of this alleged "drop"—*e.g.*, a higher interest rate. He asserts that he "anticipates" that he will have "to spend thousands of dollars to hire someone to repair his credit," but does not allege that he *actually incurred* those costs. He claims that he spent $30.00 purchasing "credit reports from all three bureaus" and incurred time "addressing the fraudulent activity and monitoring his financial accounts and credit report," none of which is recoverable. *Corona*, 2015 WL 3916744, at *4; *Sony*, 903 F. Supp. 2d at 962–63.

- Crump. Crump admits that she "never received a notification letter from Experian regarding the Data Breach," thus conceding that her personal information was not taken in the attack. Nonetheless, she asserts that, in "April 2015, [she] was notified that someone attempted to impersonate her to obtain a fraudulent T-Mobile account." Crump does not allege whether the impersonator was successful, and Crump was actually damaged. More basically, she does not allege that this attempted fraud occurred after the breach had occurred. Like Gonzales, she claims to have incurred non-recoverable time "addressing the fraudulent activity and

monitoring her financial accounts and credit report."

- Brazzle. Brazzle claims that, in "November 2015, [her] bank notified her of over $100 in fraudulent charges on her debit card associated with her primary checking account." She does not allege that when these charges occurred—*i.e.*, before or after the breach. She too claims to have incurred non-recoverable time "addressing the fraudulent activity and monitoring her financial accounts and credit report."
- Merry. Merry claims that on "January 8, 2016, [she] [] discovered that a fraudulent withdrawal was attempted on her [bank] account and it had been frozen." She does not claim to have suffered any loss—just that the fraudulent withdrawal was "attempted." Regardless, the suggestion that this attempted bank withdraw was proximately caused by the data breach is implausible: The data breach did not involve stolen bank account numbers. Thus, for her claim to have any degree of plausibility, Merry needed to allege facts establishing how a data breach that did not involve stolen bank account numbers could have resulted in an attempted fraudulent withdraw from her bank account. *Twombly*, 550 U.S. at 546. No such facts are alleged. Like the other California Plaintiffs, she claims to have incurred non-recoverable time "addressing the fraudulent activity and monitoring her financial accounts and credit report."
- Ojeda. Ojeda claims that, in November 2015, he discovered "unauthorized charges on his bank statement." He does not claim when these charges occurred—*e.g.*, before or after the breach. Nor does he allege that these charges have gone unreimbursed. Like Merry, he does not allege any facts establishing how a data breach that did not involve stolen bank account numbers could have resulted in an unauthorized charge on his bank account. *Twombly*, 550 U.S. at 546. He too claims to have incurred non-recoverable time "addressing the fraudulent activity and monitoring his financial

accounts and credit report."

- Bohannon. Bohannon asserts that, in "November 2015, [he] began receiving calls that someone was attempting to use his PII to open lines of credit at banks and retail stores." *None* were successful. He claims that these "inquiries" appeared "on his credit report and affected his credit score," although he does allege any facts supporting how his credit score was affected (and what damages, if any, he sustained as a result). He also claims that in "December 2015, [he] suffered a fraudulent charge of approximately $800 for bitcoins on his checking account," yet he does not allege to have been unreimbursed for these charges. He claims that, in "February 2016, police notified [him] that they had arrested an individual carrying three fraudulent credit cards opened in his name." He does not claim to have suffered any damages as a result. He too claims to have incurred non-recoverable time "addressing the fraudulent activity and monitoring his financial accounts and credit report."
- Johnsons. The Johnsons assert that, in October 2015, "Mr. Johnson received a call from [his] bank indicating that someone had run his credit outside of California." He does not allege any damages as a result. Nor does he allege when this credit event occurred—*i.e.*, before or after the breach. The Johnsons also claim to have incurred non-recoverable time "addressing the fraudulent activity and monitoring [their] financial accounts and credit report."
- Ciano. Ciano alleges to have incurred non-recoverable time "addressing the fraudulent activity and monitoring his financial accounts and credit report."

As none of the California Plaintiffs pleads facts plausibly establishing actual damages arising from the data breach, the negligence claims should be dismissed for this independent reason. *Corona*, 2015 WL 3916744, at *4 (dismissing

negligence claim arising out of a data breach; "[t]o the extent Plaintiffs allege future risk in harm that has not yet occurred, those allegations do not support a claim for negligence, as they fail to allege a cognizable injury"); *Sony*, 996 F. Supp. 2d at 966 (dismissing negligence claim because plaintiffs failed to plead "appreciable, non-speculative harm proximately caused by Sony's breach").

B. The Customer Records Act Claim Is Infirm

The Customer Records Act requires that a business "disclose a breach of the security of the system following discovery or notification of the breach . . . in the most expedient time possible and without unreasonable delay." Cal. Civ. Code § 1798.82. In the event that a "customer"—defined as "an individual who provides personal information to a business for the purpose of purchasing or leasing a product or obtaining a service from the business" (*see* § 1798.82)—is injured by a violation of the Act, section 1798.84 provides a private right of action. The claim must be dismissed because none of the California Plaintiffs is a "customer" of Experian.

By their own admission, plaintiffs never provided their personal information to Experian; instead, they provided it to T-Mobile. And plaintiffs never obtained a service from Experian though which they provided their personal information that was later disclosed in a data breach. But even the California Plaintiffs had standing under the Act, they must allege that they were injured by *delayed* notification. *Boorstein v. CBS Interactive, Inc.*, 222 Cal. App. 4th 456, 467 (2013) (a "violation of the statute, without more, is insufficient"). But the California Plaintiffs do not allege any delayed notification damages. Indeed, they do not allege a date of breach so as to be able to establish that there was a delay in providing notice.[5]

[5] Furthermore, "[u]nless the violation [of the Act] is willful, intentional, or reckless," a defendant "may assert as a complete defense" that it provided the relevant information within 90 days of learning it failed to fulfill its obligations. § 1798.84(d). Plaintiffs do not contend that Experian was willful, intentional, or reckless in allegedly delaying its notification. *See Sony*, 903 F. Supp. 2d at 973; Nor, do they allege when the breach occurred or claim that there was a delay of

For all of these reasons, the Customer Records Act should be dismissed.

C. The CLRA Claim Is Infirm

The CLRA proscribes "misrepresentations" made to "consumers" in connection with a "transaction" for "personal, family, or household purposes." Cal. Civ. Code §§ 1761, 1770. In addition to not complying with Rule 9(b), *see Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) ("we have specifically ruled that Rule 9(b)'s heightened pleading standards apply to claims for violations of the CLRA and UCL"), the California Plaintiffs do not allege to have entered into a "transaction" with Experian, much less one for "personal, family, or household purposes." Nor do they identify any misrepresentation Experian made, let alone one that they relied upon. As the Ninth Circuit recently reiterated, where a plaintiff does "not allege that she read and relied on a specific misrepresentation by [the defendant], she fail[s] to plead her fraud claims with particularity as required by Rule 9(b)." *Haskins v. Symantec Corp.*, No. 14-16141, 2016 WL 3391237, at *1 (9th Cir. June 20, 2016); *see also, e.g.*, *Withers v. eHarmony, Inc.*, 2011 WL 8156007, at *2–3 (C.D. Cal. Mar. 4, 2011) (holding a CLRA claim fails where plaintiff did not read any of the defendant's representations before subscribing to defendant's online dating service); *Brownfield v. Bayer Corp.*, No. 09-cv-00444, 2009 WL 1953035, at *4-6 (E.D. Cal. July 06, 2009) ("Plaintiffs must allege with particularity when they viewed the Ads and that they relied on the Ads in making their purchase."). Even if the California Plaintiffs could overcome these hurdles (and they cannot), the CLRA requires that a plaintiff plead and prove a "tangible increased cost or burden to the consumer." *Meyer v. Sprint Spectrum L.P.*, 200 P.3d 295, 301 (Cal. 2009). But as demonstrated above, none of the Plaintiffs alleges facts plausibly establishing a tangible injury. Thus, the claim fails.

(continued…)

over 90 days before Experian provided notification. Nor, do they allege that the notice Experian provided was inaccurate or incomplete.

D. The UCL Claim Is Infirm

The UCL proscribes three methods of competition—unlawful, unfair and fraudulent. Cal. Bus. & Prof. Code § 17200 *et seq*. The California Plaintiffs try, unsuccessfully, to allege a violation of each of these prongs.

1. Plaintiffs Lack Standing

To have standing to pursue a claim under any of the UCL's prongs, a plaintiff must plead and prove that they suffered an "economic injury [that] was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011) (italics in original). "[T]he phrase 'as a result of' connotes an element of *causation* (i.e., [plaintiff] lost money *because of* [defendants'] unfair competition)." *Id*. at 326, quoting *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1349 (2009) (italics in original). None of the California Plaintiffs alleges facts plausibly establishing an "economic injury," much less one that was "caused by" Experian.

Each of the California Plaintiffs alleges (1) an increased, imminent risk of fraud and identity theft; (2) loss of time and expenses related to monitoring their financial accounts for fraudulent activity; and (3) loss of value of their personal information. Yet, none of those alleged "harms" is sufficient to confer standing under the UCL. *Schmier v. U.S. Court of Appeals*, 279 F.3d 817, 821 (9th Cir. 2002) ("hypothetical, speculative or other 'possible future' injuries do not count in the standing calculus"); *Sony*, 903 F. Supp. 2d at 966 (the time and expenditure associated with monitoring one's credit "do not suffice as injury under the UCL"); *see also Ruiz v. Gap, Inc.*, No. 07–5739–SC, 2009 WL 250481 at *3–4 (N.D.Cal. Feb. 3, 2009), *aff'd*, 380 Fed.Appx. at 692 (stating that time and money spent to monitor and repair their credit is not the "kind of loss of money or property necessary for standing to assert a claim under section 17200"); *Sony*, 903 F.Supp.2d at 966 ("money spent on mitigation of [risk of future identity theft or fraud], and property value in one's information, do not suffice as injury under the UCL"); *In re*

iPhone Application Litig., No. 11-MD-02250, 2011 WL 4403963, at *14 (N.D. Cal. Sept. 20, 2011) ("Numerous courts have held that a plaintiff's 'personal information' does not constitute money or property under the UCL."). Some of the California Plaintiffs allege fraudulent charges on their accounts and a drop in credit score, yet as demonstrated above, none alleges facts plausibly establishing that such incidents are the result of the T-Mobile data breach. The California Plaintiffs thus lack standing under the UCL, and the Court should so find.

2. Plaintiffs Lack A Remedy

A plaintiff suing under the UCL is entitled only to restitution or injunctive relief. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003) ("While the scope of conduct covered by the UCL is broad, its remedies are limited."). Because none of the California Plaintiffs lost anything to Experian, there is nothing for Experian to return to them in the form of restitution. *Kwikset*, 51 Cal. 4th 336 (plaintiff must show "both that money or property have been *lost by a plaintiff*, on the one hand, and that it have been *acquired by a defendant*, on the other"). In other words, "[r]estitution under the UCL is only available where the sum at issue can clearly be traced to particular funds or property in the defendant's possession." *EchoStar Satellite Corp. v. NDS Group PLC*, No. SA CV 03-0950, 2008 WL 4596644, *9 (C.D.Cal. Oct. 15, 2008). Here, the California Plaintiffs merely allege consequential damages, which are not recoverable under the UCL. *Sony*, 903 F. Supp. 2d at 970 ("Sony did not benefit financially from the Data Breach, nor did Sony receive monies paid by Plaintiffs for Third Party Services. Moreover, because '[c]ase law is clear that the loss of use and loss of value . . . are not recoverable as restitution because they provide no corresponding gain to a defendant,' Plaintiffs cannot use such a basis to support a claim for restitution." (Citations omitted.)).[6]

[6] The California Plaintiffs claim to seek disgorgement, but nonrestitutionary disgorgement is not available under the UCL. *Nat'l Rural Telecoms. Co-op. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1086 (C.D. Cal. 2003).

Nor, are the California Plaintiffs entitled to an injunction. They affirmatively plead an entitlement to damages under various state statutes and the common law, thus conceding that they have an adequate remedy at law. *National Rural Telecoms.*, 319 F. Supp. 2d at 1079 (the money the plaintiffs were attempting to recover simply constituted expectation damages, not restitution). *Rhynes*, 2011 WL 2149095, at *4 ("Where the claims pleaded by a plaintiff *may* entitle her to an adequate remedy at law, equitable relief is unavailable."); *Asghari v. Volkswagen Grp. of America, Inc.*, 42 F. Supp. 3d 1306, 1324 (C.D.Cal. 2013) ("it is plain that [Plaintiffs are] seeking to dress up [their] unsuccessful damages claim as one for restitution under the UCL"); *Adams v. I-Flow Corp.*, No. CV 09-0-550, 2010 WL 1339948, at *7 (C.D. Cal. Mar. 30, 2010) (same).

3. The Fraud Prong Claim Is Inadequately Pleaded

A claim under the UCL's fraud prong, whether based upon misrepresentations or omissions, must be alleged with particularity under Rule 9(b), *see Haskins*, 2016 WL 3391237, at *1; *Kearns*, 567 F.3d at 1126-27; *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), which Plaintiffs have not done. They assert that Experian engaged in fraud, but the complaint merely reproduces statements Experian allegedly made in various privacy notices, *see* Cmpt., ¶¶ 76–77, 79–80, which none of the California Plaintiffs allege to have seen, read or relied upon. This is fatal. *Brownfield*, 2009 WL 1953035, at *4-6 ("Plaintiffs must allege with particularity when they viewed the Ads and that they relied on the Ads in making their purchase."); *Johns v. Bayer Corp.*, No. 09CV1935, 2010 WL 476688, at *5 (S.D. Cal. Feb. 9, 2010) ("[Plaintiff] cannot expand the scope of h[er] claims to include . . . advertisements relating to a product that [s]he did not rely upon."); *Daniel v. Ford Motor Co.*, No. 2:11-02890, 2013 WL 2474934, at * 5 (E.D. Cal. June 7, 2013) (same); *Ehrlich v. BMW of N. A., LLC*, 801 F. Supp. 2d 908, 919-920 (C.D. Cal. 2010) (same). Moreover, where, as here, "a plaintiff sues multiple defendants, 'Rule 9(b) does not

allow a complaint to merely lump multiple defendants together but require(s) plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Adams v. I-Flow Corp.*, No. CV09-09550, 2010 WL 1339948, at * 5 (C.D. Cal. Mar. 30, 2010).

4. The Unlawful Prong Claim Is Not Adequately Alleged

The "unlawful" prong of the UCL "'borrows' violations of other laws and treats them as unlawful practices." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Thus, to state an "unlawful" prong claim, the California Plaintiffs had to identify an act or practice on Experian's part that is "forbidden by law." *Progressive West Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 287 (2005). Yet, as demonstrated above, the predicate laws underpinning the California Plaintiffs' "unlawful" prong claim—the FCRA, the GLBA, the CLRA, and the Customer Records Act—were not violated by Experian. Thus, the "unlawful" prong claim cannot proceed. *Nool v. HomeQ Servicing*, 653 F. Supp. 2d 1047, 1056 (E.D. Cal. 2009) ("The viability of a claim under the [UCL unlawful prong] depends on the viability of an underlying claim of unlawful conduct.").

5. The Unfair Prong Claim Is Not Adequately Alleged

The California Plaintiffs' "unfair" prong UCL claim rests solely upon a legal conclusion—that Experian's actions were "immoral, unscrupulous, unethical, oppressive, deceitful and offensive." (Cmpt., ¶ 195.) While there is a three-way split in authority on the definition of "unfair" conduct in consumer actions, *see Boschma v. Home Loan Center, Inc.*, 198 Cal. App. 4th 230, 252-253 (2011), what is clear is that, under all three tests, plaintiffs' bare legal conclusion is insufficient to state an "unfair" prong UCL claim. *Twombly*, 550 U.S. at 555.

CONCLUSION

The consolidated complaint represents a failed attempt by litigants to convert an unfortunate incident into a cause of action. Not only does the complaint fail to plead basic facts to establish an injury, but it ignores the basic elements to state a claim under the legal theories it attempts to advance. Because none of the claims can be cured with amendment, this case as to the plaintiffs in New York, Illinois, Ohio and California should be dismissed with prejudice.

Dated: July 14, 2016

JONES DAY

By: */s/ Richard J. Grabowski*
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