UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Target Corporation Customer Data Security Breach Litigation, This document relates to the Consumer Cases.	MDL No. 14-2522 (PAM/JJK)

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

I. INTRODUCTION

Although plaintiffs assert in their opposition that they were injured as a direct result of Target's actions, they have not and cannot point to specific factual allegations identifying any such injury in their Complaint. Instead, plaintiffs attempt to change the conversation, contending Target takes the position it has no legal duty or obligation for acts of a third-party criminal "under any set of facts." Target's motion, though, focuses on plaintiffs' defective allegations—their attempt to elevate fear of future injury to the imminent injury required by Article III, pursue claims for which there is no private right of action, create obligations out of whole cloth, and gloss over the significant differences in the laws of the fifty states by shoehorning 350 separate state law claims brought by over 100 plaintiffs into a seven claim box. In response, plaintiffs offer a host of arguments that ignore or attempt to explain away dispositive authorities, mischaracterize Target's positions, invite the Court to adopt minority positions, and ask this Court to allow them to proceed based on novel interpretations of state law that have been rejected in prior data breach decisions.

Plaintiffs lack standing, and they have not pled viable claims. The Court should dismiss the Complaint with prejudice.

II. PLAINTIFFS LACK ARTICLE III STANDING.

A. Plaintiffs Lack Standing to Sue for Violations of Laws of States in Which They Do Not Reside.

Plaintiffs do not dispute that none of them resides in Delaware, Maine, Rhode Island, South Carolina, Wyoming, or the District of Columbia. As such, they have no

Article III standing to assert claims under these state laws. (ECF No. 205 ("Mem.") at 6.)

Plaintiffs ask the Court to postpone resolution of this issue until class certification (ECF No. 231 ("Opp'n") at 33), but this exact argument was rejected by Judge Montgomery just eight months ago. *See Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 2014 U.S. Dist. LEXIS 31188, at *30 (D. Minn. Mar. 11, 2014). As Judge Montgomery explained, plaintiffs' argument rests on a misreading of two Supreme Court cases, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999). Those cases "stand [only] for the proposition that, in cases where a court is presented with class certification and Article III standing issues simultaneously, and the class certification issues are dispositive in that they pertain to statutory standing," certification issues may be decided first. *Insulate*, 2014 U.S. Dist. LEXIS 31188, at *32 (quotations and citation omitted). Where, as here, the two issues are not presented simultaneously, the requirement that the named plaintiffs establish standing at the outset streamlines the proceedings by eliminating claims that plaintiffs lack standing to pursue. *Id*. at *33-34. Plaintiffs offer no explanation why the Court should follow contrary decisions,[1] rather than a 2014 opinion from this district.[2]

[1] Plaintiffs identify eleven jurisdictions that take a contrary position, hardly an "overwhelming majority." (Opp'n at 34.) At least four jurisdictions have adopted the view set forth in *Insulate SB.* 2014 U.S. Dist. LEXIS 31188, at *32-33 (collecting cases).

[2] Plaintiffs cite three decisions certifying classes under the laws of fifty states where there was not a named plaintiff from every state. (Opp'n at 35.) All three are orders approving settlements, and there is no indication that the defendants contested this issue, much less that the courts considered it.

B. Plaintiffs Have Not Alleged Facts Showing Any Injuries Are Fairly Traceable to the Intrusion.

Plaintiffs blur the distinction between two different types of information they allege was stolen during the Intrusion: payment card data, which they allege was stolen in real time when customers swiped their cards beginning on November 30 or December 2, 2014 (ECF No. 182 ("Compl.") ¶¶ 151, 159), and customer contact information (Compl. ¶ 180). They have not alleged facts sufficient to show injuries fairly traceable to theft of either type of information.

On alleged theft of payment card data, plaintiffs do not dispute that in order for their alleged injuries to be "fairly traceable" to the Intrusion they must allege they used a payment card at Target after hackers began stealing this data. Instead, they argue that the "breach was a dynamic process involving seven steps spanning three time periods." (Opp'n at 14.) But plaintiffs do not claim that the hackers stole any payment card data at any point in that "dynamic process" prior to November 30. (Compl. ¶ 151; Opp'n at 14 (referring to events that allegedly "occur[ed] from December 2-17").) Having failed to allege specific facts showing that they used a payment card at Target during the time period when hackers were stealing data, they have not alleged any injury "fairly traceable" to the Intrusion.

On alleged theft of customer contact information, plaintiffs misconstrue Target's discussion of their "fail[ure] to specify what information of theirs was stolen." (Opp'n at 14.) As Target pointed out in its opening brief, no named plaintiff makes any particularized factual allegations that he or she provided any personal contact information

whatsoever to Target prior to the Intrusion, much less that it was stolen. (Mem. at 7 n.3.) Plaintiffs accordingly lack standing to pursue claims based on theft of personal contact information.

C. Potential Future Injuries Do Not Create Standing, Nor Do Costs or Time Spent to Mitigate Fear of Future Injury.

Plaintiffs argue that they can satisfy Article III "even where no actual misuse has occurred" because they now face an "increased risk" of future injuries. (Opp'n at 11.) They are mistaken.

In support of their argument, plaintiffs rely on two decisions that predate the Supreme Court's decision in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013). (Opp'n at 11 (citing *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629 (7th Cir. 2007), and *Krottner v. Starbucks Corp.*, 628 F.2d 1139 (9th Cir. 2010)).) The overwhelming majority of data breach decisions have concluded that *Clapper* altered the standard[3] for finding Article III standing and that an "increased risk" of future harm in the wake of a data breach is not sufficient to confer standing. *See, e.g.*, *Strautins v. Trustwave Holdings, Inc.*, 2014 WL 960816, at *5 (N.D. Ill. Mar. 12, 2014) (concluding that *Pisciotta* "cannot [be] square[d]" with *Clapper*); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 656 (S.D. Ohio 2014) ("*Clapper* specifically rejected the idea that an injury is certainly impending if there is an 'objectively reasonable likelihood' it will

[3] Even before *Clapper*, courts of appeal were split as to whether "increased risk" was a viable injury in a data breach case. *See, e.g.*, *Reilly v. Ceridian Corp.*, 664 F.3d 38, 44-45 (3d Cir. 2011) (refusing to follow the "skimpy rationale" of *Pisciotta* and *Krottner* and holding increased risk did not confer Article III standing).

occur, and the same reasoning seems to preclude the Ninth Circuit's even lower 'not merely speculative' standard for injury-in-fact. The increased risk of harm may satisfy those standards, but under *Clapper*, more is required to show an injury is certainly impending.").

Plaintiffs invite the Court to follow the decisions in *Sony II*, *Adobe*, and *Moyer*, which concluded that *Clapper* did not alter the relevant standard for Article III standing based on a risk of future injury. But this interpretation of *Clapper* is the minority view (*see* Mem. at 8 (citing cases)), and plaintiffs offer no principled basis for following those decisions, which cannot be squared with *Clapper* and rely on the outdated standards articulated in *Krottner* and *Pisciotta*.

Plaintiffs' attempt to show that their injuries are in fact certainly impending fares no better. Though plaintiffs assert this case "does not involve speculation about the occurrence of some future event" (Opp'n at 12), the Complaint demonstrates otherwise. Plaintiffs merely speculate that third parties will use their data at some uncertain future point and that they will be subject to (unreimbursed) unauthorized charges. Plaintiffs' argument that the hackers have their data and intend to misuse it does nothing to nudge their allegations to certainty. (Opp'n at 10, 12.) That more than half of the 112 named plaintiffs do not allege any unauthorized charges (much less unreimbursed charges) many months after the Intrusion occurred and others state that their debit or credit cards have been canceled (and thus could not be misused) shows otherwise.[4]

[4] Target has not argued that "an offer of one year of free credit monitoring *eliminates* the

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Plaintiffs' additional argument that future harm is certainly impending because some named plaintiffs have alleged actual misuse of their data similarly fails. (Opp'n at 12.) The numerous authorities cited by Target demonstrate that courts have refused to find an increased risk of harm sufficient to satisfy Article III in the face of similar allegations. *Remijas v. Neiman Marcus Grp., LLC*, 2014 U.S. Dist. LEXIS 129574 (N.D. Ill. Sept. 16, 2014) (no standing based on "increased risk" even though plaintiffs alleged that at least 9,200 customers had incurred fraudulent charges); *Galaria*, 998 F. Supp. 2d at 654 (no standing based on "increased risk" even though plaintiffs "alleged their PII was stolen and disseminated"); *In re Barnes & Noble Pin Pad Litig.*, 2013 U.S. Dist. LEXIS 125730, at *4 (N.D. Ill. Sept. 3, 2013) (no standing based on "increased risk" even though plaintiffs alleged "actual fraudulent activity").

With respect to whether mitigation costs give rise to standing, the case relied on by plaintiffs, *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 164 (1st Cir. 2011), pre-dates *Clapper*, in which the Supreme Court held that plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." 133 S. Ct. at 1143. The *Adobe* court's similar holding was based on that court's erroneous conclusion that *Clapper* did not alter the standard for Article III standing based on a risk of future injury.

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risk of future injury." (Opp'n at 19 n.3 (emphasis added).) However, plaintiffs concede that such services alert consumers to potential identity theft (*see id*.), further reducing the risk of future injuries. *Galaria*, 998 F. Supp. 2d at 654-55 (defendant's offer of "a free year of credit monitoring and identity theft protection further supports the Court's conclusion that risk of injury is not certainly impending").

D. Plaintiffs' Allegations of Present Injuries Do Not Create Standing.

1. Unauthorized Charges.

Plaintiffs ignore the numerous authorities holding that in order for unauthorized charges (or fees) to constitute an injury-in-fact, plaintiffs must allege that those charges remain unreimbursed. (Mem. at 10 (collecting cases)); *see also Burton v. MAPCO Express, Inc.*, No. 5:13–cv–00919, 2014 WL 4686479 (N.D. Ala. Sept. 12, 2014) (unauthorized charges must be unreimbursed to confer standing). Plaintiffs do not cite contrary authority.

As Target explained in its opening brief, plaintiffs Melnichuk and Quillian—the only plaintiffs who do allege unreimbursed charges—do not allege facts sufficient to show that those unreimbursed charges are "fairly traceable" to the Intrusion. (Mem. at 11.) Some causal link between the data breach and the unauthorized charges beyond the allegation that the unauthorized charges occurred later in time is required. (*Id*. (citing cases).) In response, plaintiffs merely reassert the same conclusory statements in the Complaint that the charges were a direct result of the Intrusion (Opp'n at 21), but plead no facts showing that to be true.

2. Identity Theft.

Plaintiffs have not shown injuries caused by identify theft. Although plaintiffs assert that Target's wrongdoing allowed plaintiff Dorsch's social security number to be stolen (Opp'n at 23), they do not cite anything in the Complaint to support this assertion. The Complaint alleges only that payment card data, customer names, mailing addresses, phone numbers, and email addresses were stolen (Compl. ¶ 179), and makes no reference

to social security numbers, much less any connection between the Intrusion and plaintiff Dorsch's social security number. As for plaintiff Smart, plaintiffs effectively concede that their allegation is insufficient, pointing instead to various *other* injuries alleged by plaintiff Smart. (Opp'n at 23.) These other alleged injuries (also insufficient) are addressed below.

3. "Loss of Access" to Account Funds.

Plaintiffs contend that a bare "loss of access" to account funds is sufficient to create Article III standing and that they need not allege "something more" (Opp'n at 21-22), yet they cite no law in support. Nor do they distinguish *Barnes & Noble*, which concluded that a loss of access was insufficient to confer standing.

As for the 32 plaintiffs who *do* allege an injury arising specifically from the "loss of access," plaintiffs incorrectly dismiss as "irrelevant" the question of *who* requested cancellation or replacement of their payment cards. (Opp'n at 22.) If plaintiffs caused the "loss of access" by requesting a new payment card, such injuries would be inadequate for the same reasons as other "mitigation" injuries. *Clapper*, 133 S. Ct. at 1143. Plaintiffs' reliance on *F.T.C. v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 607 (D.N.J. 2014), is misplaced as the decision does not address Article III standing or the implications of lost access to accounts.

4. Diminution in Value of Personal or Financial Information.

Plaintiffs ignore numerous authorities that reject their theory that a hypothetical diminution in the value of stolen information confers standing. That such information is valuable to hackers is irrelevant; plaintiffs must allege facts showing the information has

become less valuable *to them* as a result of the Intrusion. (Mem. at 13.) They have not done so.

Contrary to plaintiffs' assertion (Opp'n at 24 n.7), *In re Google Consumer Android Privacy Litigation* is on point. The court did not focus on the *Google* plaintiffs' failure to allege actual harm resulting from unauthorized access to their information, as plaintiffs suggest (Opp'n at 24 n.7); rather, it focused on whether the plaintiffs had alleged facts showing that access to their information had caused harm to the value of the information itself, concluding plaintiffs had not done so. 2013 U.S. Dist. LEXIS 42724, at *14-15 (N.D. Cal. Mar. 26, 2013).

5. "Overcharge" and "Would Not Have Purchased" Injuries.

Plaintiffs reject the *Remijas* court's determination that overcharge and "would not have purchased" theories of injury are viable only where the alleged value-reducing deficiencies are intrinsic to the product purchased, but they do not address the court's analysis. *Remijas* concluded that where, as here, a plaintiff alleges she paid a premium for retail goods based on adequate security measures, the value that the plaintiff claims she did not receive, or that would have dissuaded her from making her purchase if she had known she would not receive, must be inherent to the product itself. *Remijas*, 2014 U.S. Dist. LEXIS 129574, at *13. That is to say, the plaintiff must complain about a defect in the product itself, not the conditions in the store at the time she purchased the product. Without such a limitation, plaintiffs' theories of injury would create standing to assert nearly any claim, no matter how implausible the connection between the product and the value-reducing deficiency.

Adobe, *Sony*, *LinkedIn*, and *Grigsby*, the cases relied on by plaintiffs, are consistent with the *Remijas* court's analysis. Those cases involved products or services with an intrinsic data security component. (Mem. at 16; ECF No. 208-1 at 2 (online gaming service with stored payment card information to allow purchase and download of video games over time).)

Plaintiffs' attempt to distinguish *Barnes & Noble* on the ground that the plaintiffs in that case alleged a different overpayment theory fares no better. (Opp'n at 27 n.9.) There, the plaintiffs asserted the near-identical allegation asserted here: that "[a] portion of the services purchased from Barnes & Noble by Plaintiffs and Class members necessarily included compliance with industry-standard measures with respect to the collection and safeguarding of PII, including their credit and debit card information," and they had therefore "overpaid for the products purchased from Barnes & Noble" because they were "denied privacy protections that they paid for and were entitled to receive." Consolidated Class Action Compl., No. 1:12-cv-08617 (N.D. Ill. Mar. 25, 2013), ECF No. 39 ¶ 67.

Finally, though plaintiffs rely on *In re LinkedIn User Privacy Litigation* and *Adobe* to support their argument that they have satisfied *Twombly*'s plausibility standard for their "would not have purchased" injuries, they have not pled anything close to the specific facts found sufficient in those cases, such as allegations that Target made specific representations to the plaintiffs concerning data security or any particularized facts concerning the decision-making or value of data security to any specific plaintiff. (Mem. at 16.)

6. "Stress, Nuisance, and Annoyance."

Plaintiffs' opposition recites the same conclusory allegations set forth in the Complaint regarding their alleged stress, nuisance, and annoyance injuries (Opp'n at 29 (citing Complaint ¶¶ 2(e), 261(e)), but fails to allege any particularized facts for any plaintiff in support of such injuries. Plaintiffs also fail to identify any particularized "costs and loss of productivity associated with addressing the consequences of the breach" suffered by any specific named plaintiffs. (Opp'n at 28-29.) Nothing in *Wyndham*, on which plaintiffs' rely, suggests this is sufficient. *See* 10 F. Supp. 3d at 623 (addressing FTC authority and whether FTC had stated a claim under FTC Act, but not addressing Article III standing).

7. Theft of Personal or Financial Information.

Plaintiffs fail to identify any law showing that the theft of their information itself constitutes injury. Plaintiffs' case law is inapposite, as those cases solely involve property for which one party had exclusive possession, such as physical property. (Opp'n at 27-28.)

E. The Alleged "Invasion" of Plaintiffs' Legal Rights Does Not Confer Standing.

Plaintiffs' contention that an allegation of any statutory or common law claim confers standing is incorrect. (Opp'n at 15-16.) Rather than establishing a blanket rule, plaintiffs' cited authorities provide only that specific statutory language in California's Invasion of Privacy Act, the Wiretap Act, or the Fair and Accurate Credit Transactions Act is sufficient to confer Article III standing in the absence of an actual injury. None of

these cases involves the particular statutes at issue here.

Plaintiffs' sole authority for the proposition that an alleged common law claim confers standing, *Katz v. Pershing*, concerned *prudential* standing, not Article III standing, s*ee* 672 F.3d 64, 72 (1st Cir. 2012), and has no bearing here. Moreover, *Katz* relied on an eighty year-old Supreme Court opinion that no longer reflects the applicable test for Article III standing. *See Carlough v. Amchem Prods., Inc*., 834 F. Supp. 1437, 1447 (E.D. Pa. 1993) (*Alabama Power* test was "jettisoned" in 1970).

F. Plaintiffs Lack Standing to Seek Injunctive Relief.

Plaintiffs concede that to seek injunctive relief they must allege they "face[] a threat of ongoing or future harm" and that the threatened injury is "certainly impending." (Opp'n. at 29-30.) They make no attempt to show, however, how the Complaint satisfies those requirements and reiterate instead conclusory allegations. Plaintiffs ignore the fact that such future harm hinges on speculation as to the future acts of third-party criminals. (Mem. at 18.)[5] Plaintiffs do not cite any authority for their assertion that statutory authorization for injunctive relief or the Court's own equitable powers to fashion appropriate relief should supplant the requirements of Article III.

[5] Plaintiffs' reliance on *Sony II* with regard to injunctive relief is misplaced. That decision addressed whether there was a basis for injunctive relief under Michigan's Consumer Protection Act, not Article III. 996 F. Supp. 2d 942, 998 (S.D. Cal. 2014).

III. THE COURT SHOULD DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM.

A. Plaintiffs Fail to State a Claim for Violation of State Unfair and Deceptive Acts and Practices Laws.

1. Plaintiffs Cannot Pursue UDAP Claims Under the Laws of States Where They Do Not Reside.

As shown above, plaintiffs lack standing to pursue claims under the laws of states in which none of them resides. Even if they had standing, plaintiffs' attempt to convert *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), into a vehicle for applying these laws is unsuccessful. None of the named plaintiffs here alleges any contact with Delaware, Maine, Rhode Island, South Carolina, Wyoming, or the District of Columbia, let alone connections that would make the application of those states' laws constitutionally permissible. This case is therefore fundamentally different from *Allstate*, where the plaintiff had numerous contacts with the state whose laws she sought to invoke. Similarly, though plaintiffs argue that *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), and *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), should be disregarded because they are class certification opinions, (Opp'n at 37), plaintiffs ignore the actual principle articulated in those cases; namely that because state UDAP laws vary (a fact that plaintiffs do not dispute), courts must respect these differences rather than apply one state's UDAP laws to another state's residents. (Mem. at 19.)

2. Plaintiffs Have Not Pled Injury.

Plaintiffs' attempt to evade the express requirement that they plead economic injury under the UDAP laws of 26 states fails for several reasons.

First, plaintiffs lack support for their argument that courts have construed fifteen of these laws (which require "ascertainable losses") to include non-pecuniary damages. Plaintiffs cite authorities concerning only six of the fifteen laws at issue. (Opp'n at 38-39 (citing decisions interpreting UDAP laws of Connecticut, Idaho, Kentucky, New Jersey, Oregon, and Tennessee).)[6] With regard to these six laws, the authorities cited for New Jersey, Idaho, Oregon, and Connecticut address only the issue of when a loss of money or property is "ascertainable," not whether non-pecuniary losses qualify as a "loss of money or property" required to pursue those claims. *See Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 794-95 (N.J. 2005) (explaining alleged diminution in value "is too speculative to satisfy the [New Jersey] CFA requirement of a demonstration of a quantifiable or otherwise measurable loss as a condition of bringing a CFA suit."); *In re Wiggins*, 273 B.R. 839, 857 (Bankr. D. Idaho 2001) (explaining amounts at issue "are all tangible out-of-pocket expenses which are capable of being discovered, observed, or established, and constitute ascertainable losses for purposes of the ICPA."); *Feitler v. Animation Celection, Inc.*, 13 P.3d 1044, 1050 (Or. Ct. App. 2000) (failure to provide entire art collection and thus provide "exclusivity" was an ascertainable loss because it would have required plaintiff to spend funds to complete the collection); *Serv. Rd. Corp. v. Quinn*, 698 A.2d 258, 265 (Conn. 1997) (explaining loss of prospective customers caused by defendant's unfair trade practice was an ascertainable loss).

Turning to Tennessee, the holding in *Discover Bank v. Morgan* actually supports

[6] Plaintiffs' appendix contains no additional authorities on this point.

Target's position. 363 S.W.3d 479, 497 (Tenn. 2012) (To recover damages under Tennessee's Consumer Protection Act based on a loss of credit, "the loss of credit must have caused actual harm to the aggrieved party, such as lost profits or added costs."). As for Kentucky, the *Craig & Bishop, Inc. v. Piles* court did not address non-pecuniary injuries and analyzed instead the lower court's conclusion regarding duplicative damages. 247 S.W.3d 897, 907 (Ky. 2008).

Second, plaintiffs argue that, of the nine statutes that do not use the term "ascertainable loss," seven require liberal construction and that Target's interpretation of these statutes is "cramped." (Opp'n at 39.) The statutory language, however, could not be clearer. (Mem. at 20; ECF No. 207-1 ("Def.'s App'x Ex. A").) For example, Wisconsin's UDAP statute creates a claim for "any person suffering *pecuniary* loss."[7] Wis. Stat. § 100.20 (emphasis added). No amount of liberal construction will read non-pecuniary losses into the term "pecuniary loss," and plaintiffs offer no authorities to suggest otherwise.[8] Similarly, plaintiffs ignore authorities set forth in Target's appendix that support Target's interpretation.[9] *See, e.g.*, *Kim v. Carter's, Inc*., 598 F.3d 362, 365

[7] The other statutes in this category are Cal. Civ. Code § 1750; Cal. Bus. & Prof. Code § 17200; Haw. Rev. Stat. Ann. § 480-2(A); 815 Ill. Comp. Stat. Ann. § 505/2; Me. Rev. Stat. Ann. tit. 5, § 207; Mich. Comp. Laws Ann. § 445.903; N.M. Stat. Ann. §§ 57-12-2, 3; and Tex. Bus. & Com. Code Ann. § 17.46. As shown in Target's appendix, each of these statutes contains statutory language that is contrary to plaintiffs' suggested interpretation or has been interpreted that way by prior courts.

[8] The decision in plaintiffs' appendix, *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233 (Wis. 2005), interprets Wis. Stat. § 100.18(1), which is not the statute alleged in the Complaint. (Compl. ¶ 262(ww).)

[9] Plaintiffs' complaint that Target "offer[ed] no analysis of these individual states'

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(7th Cir. 2010) (The Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) "requires that a plaintiff suffer actual pecuniary loss."); (Def.'s App'x Ex. A).[10]

Third, plaintiffs argue that the remaining two of the nine statutes (Alabama's and Nebraska's) that do not use the term "ascertainable loss" must be "construe[d] in accordance with federal law," (Opp'n at 38), but they do not identify any federal law that would allow them to state a claim to recover non-pecuniary injuries.

Finally, plaintiffs do not dispute that the economic injury requirement imposes a higher bar than Article III.

3. Plaintiffs Fail to Allege a Duty to Disclose for Their "Deceptive Act" UDAP Claims.

Plaintiffs argue that they are not required to plead every element of common law fraud and then explain that those elements are not the same as those required to plead omission-based "deceptive" act UDAP claims. (Opp'n at 42.) But Target never claimed that the elements were identical, only that a duty to disclose was required to plead omission-based "deceptive" act UDAP claims in certain states (which plaintiffs do not dispute).

On the argument Target did advance—plaintiffs' failure to allege a duty to disclose—plaintiffs assert only that Target's purported knowledge that the data was

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provisions," (Opp'n at 39), is refuted by the extensive case law cited in Target's appendix.

[10] Target cited the wrong *Sony* decision as an example of the dismissal of state UDAP laws. (Mem. at 20.) Plaintiffs do not dispute that the *Sony* ***II*** decision dismissed Florida, Michigan, New Hampshire, New York, and Texas UDAP claims.

sensitive and that its system was not foolproof is somehow sufficient to create a duty. They do not cite authority supporting their position, much less the laws of any of the states for which they attempt to plead claims. This is plainly insufficient.[11]

4. Plaintiffs Cannot Pursue UDAP Claims Under Statutes That Permit Only Injunctive Relief.

Plaintiffs do not dispute that six of the UDAP statutes at issue authorize only injunctive relief. As discussed above, plaintiffs' opposition makes clear that they have not pled any basis on which they could pursue injunctive relief. Therefore, claims under these statutes should be dismissed.

5. Plaintiffs Concede That They Cannot Proceed with UDAP Claims That Do Not Create a Private Right of Action.

Plaintiffs have withdrawn their claims under Delaware's Uniform Deceptive Trade Practices Act and Oklahoma's Deceptive Trade Practices Act. (Opp'n at 43.) They effectively concede that their claim under Wisconsin's Unfair Trade Practices Act should be dismissed as well by failing to address the fact that the Complaint does not identify any orders issued by the Wisconsin Department of Agriculture that would prohibit Target's alleged conduct. (Mot. at 23.)

[11] Plaintiffs' assertion that the Indiana Deceptive Consumer Sales Act permits their omission-based claims relies on statutory language that did not exist prior to July 1, 2014. *See* 2014 Ind. Legis. Serv. P.L. 65-2014 (S.E.A. 394) (adding language to statute). Plaintiffs offer no basis for retroactive application. (Opp'n at 41 n.28.) Omission claims were not actionable under the prior version of the Indiana Deceptive Consumer Sales Act. (Mem. at 22 n.14; Def.'s App'x Ex. A at 18 n.2.)

6. Plaintiffs Cannot Pursue Class Claims for Violation of Certain UDAP Laws.

Plaintiffs' contention that the express class prohibition in the UDAP laws of Alabama, Georgia, Louisiana, Mississippi, and South Carolina[12] are preempted by Rule 23 rests on a misapplication of *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

The majority of federal courts have determined that the concurring opinion issued by Justice Stevens in *Shady Grove* is the controlling one because it was the narrowest opinion that embodied the position of at least five justices. *Davenport v. Charter Commc'ns, LLC*, 2014 WL 3818377, at *6 (E.D. Mo. Aug. 4, 2014) ("[T]he majority of federal courts to consider the issue have found that Justice Stevens' opinion controls.") (collecting cases); *In re Hardieplank Fiber Cement Siding Litig.*, 2013 U.S. Dist. LEXIS 98277, at *46-47 (D. Minn. July 15, 2013) (Davis, C.J.); *see also Stalvey v. Am. Bank Holdings, Inc.*, 2013 U.S. Dist. LEXIS 161634, at *11 (D.S.C. Nov. 13, 2013) ("This court treats Justice Stevens' opinion to be controlling for the purpose of this analysis.").[13]

Justice Stevens' opinion explains that a class action prohibition contained within a UDAP law is a substantive part of the law that bars class claims in federal court. *Shady*

[12] Plaintiffs do not address identical prohibitions that bar their class claims under Montana or Tennessee law, requiring dismissal of claims based on those UDAP laws. (Opp'n at 43.)

[13] Plaintiffs rely on *In re Hydroxycut Marketing & Sales Practices Litigation*, which is an outlier decision concluding that Justice Stevens' concurrence did not control. It has not been followed outside of California and has been rejected by at least one court. *In re Auto. Parts Antitrust Litig.*, 2014 U.S. Dist. LEXIS 90738, at *146 (E.D. Mich. July 3, 2014) (refusing to follow *Hydroxycut* because court was "not persuaded" by its holding).

Grove, 559 U.S. at 431-36; *see also, e.g.*, *Stalvey*, 2013 U.S. Dist. LEXIS 161634, at *13 (holding plaintiff could not bring class action for violation of South Carolina UDAP statute because class action prohibition included in the statute is a substantive provision that is not trumped by Rule 23). Plaintiffs make no attempt to address Justice Stevens' opinion, nor do they address the *Zappos.com* court's dismissal of an Alabama UDAP statute claim because "private class actions are not permitted for violations of this statute." *In re Zappos.com, Inc.*, 2013 U.S. Dist. LEXIS 128155, at *22 (D. Nev. Sept. 9, 2013).

Plaintiffs contend that several cases "tacitly acknowledge" that the Kentucky UDAP statute authorizes class actions (Opp'n at 44), but none of those cases considered whether a class action is authorized and therefore cannot trump the decision cited by Target holding expressly to the contrary.[14] (Def.'s App'x Ex. A at 20.)

Finally, with respect to plaintiffs' claims under the Utah and Ohio UDAP statutes, plaintiffs do not identify any act substantially similar to Target's alleged conduct that has been declared deceptive by a court in a final judgment or by the state attorney general as required to pursue those claims. (Mem. at 23-24.)[15]

[14] It is well-settled that a case cannot stand for a proposition the court did not consider. *See, e.g.*, *Gonzales v. Harrington*, 2012 WL 3939348, at *3 (N.D. Cal. Sept. 10, 2012).

[15] Plaintiffs ignore the concession by plaintiffs' counsel in *Sony II* that they could not find a substantially similar Ohio decision as well as the discussion in Target's opening brief explaining why the allegations in their Complaint regarding Ohio law are insufficient. (Mem. at 24 n.17.)

B. Plaintiffs Fail to State a Claim for Violation of State Data Breach Statutes.

1. Plaintiffs Cannot Assert Claims Under Data Breach Statutes for States in Which No Plaintiff Resides.

Plaintiffs do not dispute, and thus concede, that Target had no obligation to provide them with notice pursuant to the data breach statutes in Delaware, Rhode Island, South Carolina, Wyoming, or the District of Columbia in which no plaintiff resides. Those claims should be dismissed.

2. Plaintiffs Cannot Assert Claims Under Data Breach Statutes That Do Not Provide a Private Right of Action.

Of the twenty-nine[16] data breach statutes that do not provide a private right of action (Mem. at 26), plaintiffs concede that there is no private right of action under three of them (Florida, Oklahoma, and Utah) and have withdrawn those claims. (Opp'n at 46 n.31.) Plaintiffs also concede there is no private right of action under an additional nine[17] of the twenty-nine data breach statutes but argue that the statutes may be enforced via state UDAP laws. (Opp'n at 45-46.) Only six of these statutes (Alaska, Illinois, Maryland, Montana, New Jersey, and North Carolina) are potentially enforceable as UDAP violations, however.[18] Section 51-30-07 of the North Dakota Century Code, (ECF

[16] Target's opening brief listed thirty statutes but included Hawaii's statute erroneously. Target did, however, identify Hawaii's data breach statute as having a private cause of action in its appendix.

[17] Plaintiffs do not identify the nine statutes in their opposition and their appendix identifies only eight such laws.

[18] Target did not "fail to account" for these statutes, (Opp'n at 45 n.29), which were discussed in Target's appendix.

No. 232-2 ("Pls.' App'x Ex. B") at 4), makes a violation of that state's data breach statute a violation of its UDAP law *for purposes of attorney general enforcement.* Similarly, Section 646A.624(3) of the Oregon Revised Statutes concerns the enforcement power of the director of the Department of Consumer and Business Services, so there is no reason to infer that Oregon's legislature meant to create a private cause of action.

Regardless of whether any of these data breach statutes *may* be pled as a UDAP violation, plaintiffs have not done so, nor could they.[19] Plaintiffs' Count II is labeled "Violations of State Data Breach Statutes." There is no reference to UDAP statutes in this count, nor is there any reference to violation of those state data breach statutes in their UDAP claim.

Plaintiffs' request that the Court create a private right of action for the remaining eighteen statutes should be rejected. The mere fact that the statutes are consumer protection laws does not, as plaintiffs suggest, authorize courts to usurp the legislature's authority to decide how those statutes may be enforced. *See, e.g., Katz v. Pershing, LLC*, 806 F. Supp. 2d 452, 458-59 (D. Mass. 2011) (explaining the Massachusetts legislature bestowed enforcement authority on the attorney general and chose simultaneously not to create a private cause of action, indicating that private enforcement was not intended).[20]

[19] Plaintiffs cannot show the requisite injury for such UDAP statutes as demonstrated above.

[20] Likewise, it proves nothing that state legislatures did not expressly forbid a private cause of action or clarify that the attorney general had exclusive enforcement authority. (Opp'n at 47.) State legislatures could have created an express private cause of action, but they chose not to do so.

Moreover, plaintiffs do not provide any statutory authority to support their contention that a private right of action should be recognized for these statutes. The only statute they discuss is Minnesota's data breach statute. Plaintiffs point to the private right of action in Minn. Stat. § 8.31 subd. 3a (the Minnesota UDAP statute), but Minn. Stat. § 325E.6 (the Minnesota data breach statute) refers only to *attorney general enforcement* under Minn. Stat. § 8.31. Thus, only those subdivisions of Minn. Stat. § 8.31 that concern attorney general enforcement are applicable to the data breach statute. That Minn. Stat. § 13.055, which concerns government data breach notification obligations, contains a private cause of action is irrelevant,[21] as that section appears in part of a different law governing government data practices. In any event, plaintiffs do not provide any statutory authority under the laws of the other seventeen states.

Plaintiffs' reliance on dicta in a footnote in *Havens Realty v. Coleman*, 455 U.S. 363 (1982), for the proposition that a statute (there, the Fair Housing Act (FHA)) granting a state official authority to sue should not be read as denying a private right of action is unpersuasive. (Opp'n at 48-49.) In that footnote, the Supreme Court rejected the argument that a private right of action in the FHA does not extend to "pattern or practice" claims because the authority given to the attorney general to enforce the statute expressly refers to "pattern or practice" claims and the private right of action does not. *Havens Realty*, 455 U.S. at 381 n.23; *see also Fort v. White*, 383 F. Supp. 949 (D. Conn. 1974),

[21] If anything, the existence of a private cause of action in Section 13.055 shows that the Minnesota legislature knows how to create a private cause of action, and it did not do so here.

cited in *Havens Realty*, 455 U.S. at 381 n.23 (holding same). Plaintiffs do not assert that any of the eighteen data breach statutes that do not contain a private right of action contain similar provisions or, indeed, offer any analysis of this issue. As discussed above, the mere fact that plaintiffs could theoretically pursue UDAP claims based on violations of certain data breach statutes does not mean the data breach laws themselves provide a private right of action.

Finally, the *Lexmark* decision does not help plaintiffs (Opp'n at 49), because the statute at issue there *did* contain a private cause of action, and the Supreme Court considered only whether the plaintiff was within the statutory definition of persons authorized to sue. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014).

3. Plaintiffs Cannot Assert Claims Under Any of the Remaining Data Breach Statutes Because They Do Not Allege Damages Flowing from Defective Notice and Are Not Entitled to Injunctive Relief.

Plaintiffs' assertion that they need not plead damages flowing directly from the purportedly delayed notice (as opposed to the Intrusion itself) (Opp'n at 50), ignores the language of the statutes and applicable case law. (ECF No. 207-2 ("Def.'s App'x B"); Mem. at 26-27.) Plaintiffs have not alleged when they shopped at Target, much less that they did so in the narrow window of time between when Target confirmed that payment card data had been stolen and when it informed the public that a theft had occurred.

Finally, plaintiffs do not address and therefore concede that they have not pled any facts that would allow them to pursue injunctive relief under these statutes. (Mem. at 27.)

C. Plaintiffs Fail to State a Claim for Negligence.

1. Plaintiffs' Negligence Claims Fail Due to Lack of Cognizable Damages.

Plaintiffs do not dispute that they must allege that they suffered some appreciable, non-speculative damage to pursue a negligence claim. Plaintiffs argue they have met this requirement by alleging damages "arising from the actual theft and misuse of their private information" such as unauthorized charges to their cards. (ECF No. 232-3 ("Pls.' App'x. Ex. C"); Opp'n at 54.) But more than half of the plaintiffs do not allege this, much less that any charges were unreimbursed. The remaining plaintiffs' allegations of "injury" fail for the same reasons they fail under Article III, discussed above. (Section II.D, *supra*.)

Plaintiffs' reliance on *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855 (N.D. Cal. 2011), and *Anderson v. Hannaford Bros.*, 659 F.3d 151 (1st Cir. 2011), for the proposition that the theft of personal information or resulting mitigation costs constitutes cognizable damages is misplaced: both predate *Clapper* and are contrary to the majority interpretation of *Clapper* discussed above, finding that such "losses" do not satisfy Article III or constitute negligence damages. (Opp'n at 54-55.)

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

Plaintiffs assert that every state recognizes an "independent duty" exception to the economic loss rule. (Opp'n at 55-56.) But in twelve[22] of the twenty states at issue, such

[22] Under the laws of Delaware, Indiana, Hawaii, Kansas, Missouri, Ohio, Utah, and Wyoming, the economic loss rule does not bar plaintiffs' negligence claims absent some contractual duty.

an exception either does not exist or does not apply here, for example because the exception applies only to professional malpractice claims (Illinois, New York) or parties in a fiduciary, confidential, or agency relationship (Massachusetts). (Appendix to Def.'s Reply in Support of Motion to Dismiss, Exhibit A.) Even if such an exception *could* apply here, plaintiffs have not pled facts or shown in their opposition that such a duty exists under those state laws.

Plaintiffs argue they have shown the independent duty exception applies because five states (California, Massachusetts, Pennsylvania, Nevada, and Ohio) purportedly recognize a legal "duty to safeguard." (Opp'n at 56 (referring to discussion at 51-53).) Even if such a duty to consumers exists, plaintiffs make no attempt to show that it would be within the scope of the independent legal duty exception. In fact, prior data breach decisions explain that such a duty does not prevent application of the economic loss rule under the laws of three of the five states plaintiffs discuss: California, Massachusetts,[23] and Pennsylvania. *Sony II*, 996 F. Supp. 2d 942, 967-73 (S.D. Cal. 2014) (finding a "duty to safeguard" under California and Massachusetts law but dismissing due to economic loss rule); *Sovereign Bank v. BJ's Wholesale Club*, 533 F.3d 162, 176 (3d Cir. 2008) (acknowledging duty but affirming dismissal due to economic loss rule). Target has not moved on the basis of the economic loss rule with regard to Nevada claims.[24]

[23] Absent from plaintiffs' opposition is any acknowledgment of *In re TJX*, which affirmed dismissal of Massachusetts negligence claims on the basis of the economic loss rule. (Mem. at 29.)

[24] Plaintiffs also offer no authorities to support their "foreseeable victim" or "special relationship" theories, (*see* Opp'n at 52-53), with regard to any states other than

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Plaintiffs' attempt to graft a negligence *per se* claim onto their Complaint does not save the claim from dismissal. (Opp'n at 52.) Regardless of whether undefined "industry standards" or Minn. Stat. § 325E.64 could supply a duty for purposes of pleading a negligence *per se* claim, plaintiffs do not plead such a claim in the Complaint. Even if they had, Minn. Stat. § 325E.64 only permits enforcement by certain "financial institutions" and is inapplicable here. *Alumhaugh v. Union Pac. R.R. Co.*, 322 F.3d 520, 524 (8th Cir. 2003) ("For a negligence *per se* claim to succeed, it must be shown that the legislature intended to create a private right of action in favor of the class of persons to which the plaintiff belongs for violation of the statute."); *see also In re Medtronic, Inc. Sprint Fidelis Leads Prods. Liab. Litig.*, 592 F. Supp. 2d 1147, 1163 (D. Minn. 2009) (Kyle, J.) (explaining that the "negligence *per se* doctrine . . . is not a magic transforming formula that automatically creates a private right of action for the civil enforcement, in tort law, of every statute") (citation omitted). Furthermore, plaintiffs offer no basis for finding a negligence *per se* claim under any state law other than Minnesota.

Finally, plaintiffs' attempts to distinguish data breach decisions dismissing negligence claims on the basis of the economic loss rule are unpersuasive. (Opp'n at 56-57.) For instance, plaintiffs contend that *Willingham v. Global Payments, Inc.* is distinguishable because the plaintiffs there sued the merchant's payment processor, rather than the merchant itself, (*id.* at 56), but that distinction did not impact the courts' application of Georgia's economic loss rule. 2013 U.S. Dist. LEXIS 27764, at *63-64

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Minnesota—a state where Target does not claim the economic loss rule applies.

(N.D. Ga. Feb. 5, 2013). Similarly, plaintiffs argue that in *Sovereign Bank v. BJ's Wholesale Club, Inc.*, the economic loss rule applied because "the VISA operating agreement governed the exact conduct at issue," (Opp'n at 57), but, in fact, the Third Circuit did not mention, much less base its decision on, the existence of a VISA operating agreement. 533 F.3d at 175-78 (3d Cir. 2008). Plaintiffs claim that *Sony II* misapplied California law by first finding a "duty to provide reasonable network security" but then refusing to find that an independent duty exception applied. (Opp'n at 57.) In fact, the *Sony II* court engaged in an exhaustive, seven-page analysis of whether such a duty was sufficient to satisfy California's independent duty exception and concluded that it was not. *Sony II*, 996 F. Supp. 2d at 967-73.

Plaintiffs contend that Illinois' independent duty exception encompasses any legal duty and that *Michaels* misinterpreted applicable law in concluding that the exception was limited to professional malpractice claims. (Opp'n at 58.) However, plaintiffs cite cases showing the exact opposite. *Gondeck v. A Clear Title & Escrow Exch., LLC,* 2014 WL 2581173, at *12 (N.D. Ill. June 9, 2014) (rejecting argument that independent duty exception applied because "[t]he relationship (if it could even be called that) between [the parties] was not a professional relationship, and did not entail the provision of services"); *Rasgaitis v. Waterstone Fin. Grp., Inc.*, 985 N.E.2d 621, 637 (Ill. App. Ct. 2013) (affirming dismissal of negligence claims because none of the economic loss rule exceptions applied).

D. Plaintiffs Fail to State a Claim for Breach of Implied Contract.

Plaintiffs appear to agree (and certainly do not dispute) that in order to proceed on this claim they must allege that Target did or said something demonstrating an objective manifestation to enter into the purported implied agreement. (Opp'n at 60.) Plaintiffs' reliance on *Hannaford Brothers* and *Michaels* is therefore puzzling. Those decisions abandoned this requirement entirely and found instead that the mere act of accepting a payment card, without more, somehow manifested the requisite act or statement. These decisions are inconsistent with Target's extensive showing that an objective manifestation of intent is required under every applicable state law (ECF No. 207-4 ("Def.'s App'x Ex. D")), and should not be followed.[25]

Plaintiffs' recitation of portions of Target's privacy policy does not suffice as no plaintiff alleges he or she read the policy, nor does plaintiffs' vague reference to "all of the circumstances surrounding their purchases" or Target's "legal obligations imposed by [unspecified] law."[26] (Opp'n at 61-62.) Finally, the existence of Minn. Stat.

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[25] *Hannaford Brothers* misapplied Maine law, relying on *Seashore Performing Arts Ctr. v. Town of Old Orchard Beach*, 676 A.2d 482, 484 (Me. 1996), which explained that a court must find evidence that "both parties intended" an implied agreement. The issue was not considered by the First Circuit on appeal. *Michaels* followed *Hannaford Brothers* without analysis. In any event, these decisions apply only to Maine and Illinois claims.

[26] Plaintiffs do not dispute that courts have found much more specific allegations than those here insufficient to plead the requisite act or statement. (Mem. at 31-32, citing *Krottner*; *Zappos*.) Rather than address the holding of *Zappos*, plaintiffs take a quote from that decision out of context to suggest that there was no implied contract claim at issue there. (Opp'n at 61.) That is not true. The *Zappos* plaintiffs *did* allege such a claim, *see* Consolidated Amended Class Action Complaint, *In re Zappos*, No. 3:12-cv-00325 (D. Nev. Nov. 12, 2012), ECF No. 58 at Count V (alleging claim for "Breach of

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§ 325E.64—a statute that plaintiffs (as consumers) lack standing to enforce—does not create an implied contract between plaintiffs and Target.

With respect to claims under Alaska and Pennsylvania law, plaintiffs appear to concede that the existence of an express contract with Target bars implied contract claims brought by the Alaska and Pennsylvania plaintiffs (who are all REDCard debit card holders). They assert that plaintiffs who are REDCard holders have not asserted an implied contract claim (Opp'n at 62 n.39) (notwithstanding the actual text of the Complaint, which does not carve out these claims). (Compl. ¶¶ 241, 313.)

Finally, plaintiffs do not dispute that they must allege damages caused by the alleged breach of the implied contract. Their failure to do so is another defect requiring dismissal of their breach of implied contract claims.

E. Plaintiffs Fail to State a Claim for Breach of Contract.

Nothing in plaintiffs' opposition contradicts the fact that the contract relied on by plaintiffs requires only that Target "use security measures that compl[ied] with federal law." (Compl. ¶ 324.) Plaintiffs argue that whether or not Target complied with federal law is a legal conclusion that they are not required to plead. (Opp'n at 63.) That argument misses the point. Plaintiffs contend that Target breached this contract provision and it is incumbent on them to plead *facts* showing how Target's security measures failed to comply with federal law. They have not done so. Moreover, plaintiffs do not dispute

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Implied Contract"), and the quoted language reflects the court's conclusion that the plaintiffs had not alleged sufficient facts to show the existence of an implied contract.

that a failure to plead damages provides independent grounds to dismiss this claim.

F. Plaintiffs Fail to State a Claim for Bailment.

Plaintiffs do not cite a single case in which a court has recognized a claim for bailment in a data breach case and attempt to downplay the dismissal of bailment claims in *every* prior data breach decision to consider the issue, contending the Court should look instead to two California decisions concerning *conversion*. (Opp'n at 65 n.40.) The mere fact that conversion may apply to intangible property under California law does not mean the same is true for bailment claims under the laws of California or any other state.

Plaintiffs argue that exclusive possession is not required to create a bailment with regard to intangible personal property (Opp'n at 64), but they cite no authorities in which that was the case. Plaintiffs' authorities are cases where the bailee took exclusive possession of a physical object containing the intangible data, or where the bailee took exclusive possession of the data by denying access to the bailor. *Bridge Tower Dental, P.A. v. Meridian Computer Ctr., Inc.*, 272 P.3d 541, 542 (Idaho 2012) (plaintiff transferred exclusive possession of his hard drive (and the data included thereon) to the defendant for repair); *Shmueli v. Corcoran Grp.*, 802 N.Y.S.2d 871, 878 (Sup. Ct. N.Y. County 2005) (defendant took exclusive possession of plaintiff's computerized and hard copy lists of client contacts by changing plaintiff's computer access code and taking her hard copy list); *David Barr Realtors, Inc. v. Sadei*, 1998 WL 333954, at *3 (Tex. App. June 25, 1998) (defendant took exclusive possession of plaintiff's computers, and the

programs on those computers, by removing them from plaintiff's apartment).[27] None of these cases suggests a bailment is created where, as here, the prospective bailor retains the intangible personal property.

Finally, though plaintiffs assert that Target's alleged duty to destroy payment data substitutes for the requirement of an agreement to return the property (Opp'n at 65), they cite no authority for that novel proposition.

G. Plaintiffs Fail to State a Claim for Unjust Enrichment.

1. Plaintiffs Fail to Allege a Plausible Theory of Unjust Enrichment.

Plaintiffs fail to distinguish the established case law that defeats their unjust enrichment claim. For instance, contrary to plaintiffs' assertion that the "[p]laintiffs in [*Zappos.com*] did not allege that a portion of their payment was intended to go towards data security" (Opp'n at 67), the *Zappos.com* plaintiffs made the precise allegation plaintiffs make here: "Zappos should not be permitted to retain that portion of the retail sales price paid by [plaintiffs] that Zappos supposedly used to pay for the administrative costs of electronic data management services and cyber security services." Consolidated Am. Class Action Compl., *In re Zappos.com*, No. 3:12-cv-00325-RCJ-VPC (D. Nev. Nov. 12, 2012), ECF No. 58, ¶ 162. The *Zappos.com* court rejected this theory.[28]

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[27] In *Afremov v. Amplatz*, 2010 WL 2035732, at *4 (Minn. Ct. App. May 25, 2010), the court refused to decide whether a bailment was created where the defendant transferred all of its litigation data to the plaintiff for storage.

[28] Plaintiffs contend that Target "ignore[s]" *AvMed v. Resnick*, where the Eleventh Circuit reversed a dismissal of a "would not have purchased" unjust enrichment claim. (Opp'n at 67.) That decision is distinguishable. It is far more plausible that the cost of an

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With regard to their "would not have purchased" theory, plaintiffs point to distinctions without a difference in some of the cases relied on by Target and do not even attempt to distinguish others. (Opp'n at 67-68.) Plaintiffs argue that *In re Sony PS3* is distinguishable because those plaintiffs failed to "allege sufficient facts as to the terms and conditions on which they paid" the defendant in that case (*Id.* at 68), but they make no attempt to explain how their own allegations contain any more detail. Similarly, plaintiffs claim that *Hughes v. Chattem* is distinguishable because there, the plaintiffs "fail[ed] to allege extraordinary circumstances." (*Id.*) Plaintiffs do not explain how Target's alleged misconduct—which resulted in every plaintiff receiving the product they paid for—constitutes "extraordinary circumstances."[29] They do not cite any cases supporting their view that they can allege unjust enrichment after receiving the benefit of the bargain.

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ongoing service such as the health insurance sold by AvMed, which necessitates the storage of sensitive medical information and social security numbers, would include a data security component (i.e., the alleged value-reducing deficiency is intrinsic per *Remijas*). Indeed, *AvMed* made specific contractual promises to that effect to each plaintiff. Second Am. Class Action Compl., No. 1:10-cv-24513-JLK (S.D. Fla. Apr. 25, 2011), ECF No. 31, ¶ 21.

[29] By comparison, *Hughes* found there were no such "extraordinary circumstances" in a case where the defendant was alleged to have misrepresented its product as safe even though it contained a chemical that could cause "stomach upsets and ulcers, convulsions, kidney and liver damage, and even death." 818 F. Supp. 2d 1112, 1115, 1125 (S.D. Ind. 2011).

2. Plaintiffs' Alaska, California, and Pennsylvania Unjust Enrichment Claims Fail.

Plaintiffs concede that the existence of an express contract precludes unjust enrichment claims by the Alaska and Pennsylvania plaintiffs but argue that these plaintiffs should be allowed to plead unjust enrichment claims in the alternative. Similarly, plaintiffs note that some California courts *have* recognized unjust enrichment as an independent cause of action. Even assuming plaintiffs could proceed on these claims, those claims fail for the same reasons as plaintiffs' other unjust enrichment claims.

IV. CONCLUSION

For these reasons, and those in Target's opening brief, Target respectfully requests that the Court grant its motion to dismiss the Complaint without leave to amend.

Date: November 20, 2014.

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