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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:
SONY GAMING NETWORKS AND
CUSTOMER DATA SECURITY
BREACH LITIGATION

MDL No.11md2258 AJB (MDD)
As to all member and related cases
ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANTS’ MOTION TO
DISMISS PLAINTIFFS’ FIRST
AMENDED CONSOLIDATED
CLASS ACTION COMPLAINT
(Doc. No. 135)

This action arises out of a criminal intrusion into a computer network system used to provide online gaming and Internet connectivity via an individual’s gaming console or personal computer. Plaintiffs, a nationwide putative consumer class, allege that Sony Computer Entertainment America, LLC (“SCEA”), Sony Online Entertainment, LLC (“SOE”), and Sony Network Entertainment America, Inc. (“SNE”) (collectively, “Sony” or “Defendants”), failed to provide reasonable network security, including utilizing industry-standard encryption, to safeguard Plaintiffs’ personal and financial information stored on Sony’s network.¹

¹ On September 30, 2011, Sony Network Entertainment America, Inc. (“SNEA”) merged into Sony Network Entertainment International, LLC (“SNEI”).

1 Presently before the Court is Sony’s motion to dismiss Plaintiffs’ First Amended
2 Consolidated Class Action Complaint (“FACC”). (Doc. No. 135.) Sony also submitted
3 a request for judicial notice, (Doc. No. 135, Ex. 2), a notice of lodgment of foreign
4 authorities, (Doc. No. 135, Ex. 2), and a notice of supplemental authorities, (Doc. No.
5 137).² Plaintiffs filed an opposition to Sony’s motion to dismiss on May 6, 2013, (Doc.
6 No. 146), and Sony filed a reply on June 20, 2013, (Doc. No. 150). The Court issued a
7 tentative ruling on October 10, 2013, (Doc. No. 157), and held a hearing on the motion
8 on October 18, 2013, (Doc. No. 158). On October 24, 2013, the Court ordered supple-
9 mental briefing on seven of Plaintiffs’ consumer protection claims. (Doc. No. 159.)
10 Sony filed its supplemental brief on November 15, 2013, (Doc. No. 163), Plaintiffs filed
11 their opposition on December 6, 2013, (Doc. No. 164), and Sony filed its reply on
12 December 20, 2013, (Doc. No. 165). On January 7, 2014, Plaintiffs filed a notice of
13 supplemental authority informing the Court of a recent memorandum decision issued by
14 the Ninth Circuit.³ (Doc. No. 166.) For the reasons set forth below, the Court GRANTS
15 IN PART and DENIES IN PART Sony’s motion to dismiss.

16 BACKGROUND

17 **I. Factual Background**

18 Sony develops and markets the PlayStation Portable hand-held device (“PSP”) and
19 the PlayStation 3 console (“PS3”) (collectively, “Console” or “Consoles”). (FACC ¶¶
20 38, 39.) Both Consoles allow users to play games, connect to the Internet, and access
21

22 ² Plaintiffs filed a response to Sony’s notice of supplemental authorities on March
23 20, 2013. (Doc. No. 138.) The document was struck from the record as an improper sur-
24 reply. (*Id.*) Plaintiffs were instructed to include any opposition to Sony’s notice of
25 supplemental authorities in their opposition. (*Id.*) Plaintiffs did not subsequently file an
opposition to these documents. Accordingly, the Court GRANTS Sony’s motion for
judicial notice and considers Sony’s supplemental and foreign authorities in support of
the instant motion.

26 ³ The Court does not specifically address Plaintiffs’ submission of the Ninth
27 Circuit’s memorandum opinion in *In Re Sony PS3 “Other OS” Litigation*. (Doc. No.
28 166, Ex. A.) The Court did not rely on any language included in the district court’s
decision that was subsequently overruled, nor did the Court dismiss Plaintiffs’ UCL,
FAL, and/or CLRA claims (the only rulings pertinent here that were reversed by the
Ninth Circuit).

1 Qriocity, Sony Online Entertainment Services, and the Play Station Network (“PSN”)
2 (collectively, “Sony Online Services”).⁴ (*Id.* at ¶¶ 40-43.) Through the PSN, which is
3 offered to consumers free of charge, users can engage in multi-player online games, (*Id.*
4 at ¶ 27), and for additional one-time fees, the PSN allows users to purchase video games,
5 add-on content (“map packs”), demos, themes, movie trailers, TV shows, and movies
6 (collectively, “Downloads”). Users can also access various prepaid third party services
7 by connecting to Sony Online Services via their Consoles or computers, including
8 Netflix, MLB.TV, and NHL Gamecenter LIVE (collectively, “Third Party Services”).
9 (*Id.* at ¶ 45).

10 Before establishing a PSN, Qriocity, and/or SOE account, Plaintiffs and other
11 consumers were required to enter into a Terms of Service User Agreement with Sony and
12 agree to Sony’s Privacy Policy. (*Id.* at ¶¶ 55-60.) As part of this registration process,
13 Plaintiffs and other consumers were required to provide Sony with personal identifying
14 information, including their names, mailing addresses, email addresses, birth dates,
15 credit and debit card information (card numbers, expiration dates, and security codes),
16 and login credentials (collectively, “Personal Information”).⁵ (*Id.* at ¶ 35.) On April 1,
17 2011, SCEA transferred its online PSN and Qriocity service operations to SNEA,
18 including transferring Plaintiffs’ and other Class members’ Personal Information to
19 SNEA for handling. (*Id.* at ¶ 54.) As a result of the transfer, SNEA required all PSN
20 and Qriocity users to enter into a new Terms of Service User Agreement (“PSN User
21 Agreement”) and Privacy Policy (“PSN Privacy Policy”). (*Id.* at ¶¶ 55, 56.) Plaintiffs
22
23

24 ⁴ The SOE network is an online gaming network distinct from the PSN, as the SOE
25 network is principally accessed via a computer. (Doc. 135 at 4:17-20.) However, certain
26 SOE games can also be played through the PSN. (*Id.*) As of January 25, 2011, the PSN
had over 69 million users worldwide and SOE had over 24.6 million users worldwide.
(FACC ¶¶ 41, 43.)

27 ⁵ Plaintiffs allege that all user Personal Information was stored and maintained by
28 Sony in perpetuity, regardless of whether the user deactivates or terminates their account,
and that Sony continually monitors and records users’ PSN activities, purchases, and
usage. (FACC ¶¶ 50, 51.)

1 who established accounts with SOE had to agree to SOE’s User Agreement (“SOE User
2 Agreement”) and SOE’s Privacy Policy (“SOE Privacy Policy”). (*Id.* at ¶ 60.)

3 On April 16, 2011 or April 17, 2011, Plaintiffs allege that hackers accessed Sony’s
4 Network (computer systems, servers, and databases), thereby stealing the Personal
5 Information of millions of Sony’s customers, including Plaintiffs. (*Id.* at ¶ 65.) Plain-
6 tiffs further allege that even though Sony discovered that PSN and Qriocity user data had
7 been stolen as early as April 17, 2011, Sony did not notify Plaintiffs and other affected
8 consumers at that time. (*Id.* at ¶ 70.) Instead, on April 20, 2011, Sony simply took the
9 PSN and Qriocity systems offline, stating that “[w]e’re aware certain functions of
10 PlayStation Network are down. We will report back here as soon as we can with more
11 information.” (*Id.* at ¶ 71.) Thereafter, the PSN and Qriocity systems remained offline
12 for almost a month while Sony conducted a system audit to determine the cause of the
13 breach. (*Id.* at ¶ 124.) During this time, Plaintiffs and the other Class members were
14 unable to use Sony Online Services, and many were unable to access Third Party
15 Services via their Consoles. (*Id.*)

16 Between April 21, 2011 and April 25, 2011, while Qriocity and the PSN remained
17 offline, Plaintiffs allege that Sony continued to misrepresent the circumstances of the
18 breach. (*Id.* at ¶¶ 73-77.) Specifically, Plaintiffs allege that Sony did not inform the
19 public of the breach until April 26, 2011, when Sony made a public statement that user
20 Personal Information had been compromised, and encouraged those affected to “remain
21 vigilant, to review [their] account statements[,] and to monitor [their] credit reports.”
22 (*Id.* at ¶ 78.) Shortly thereafter, Plaintiffs contend Sony admitted that its failures “may
23 have had a financial impact on our loyal customers. We are currently reviewing options
24 and will update you when the service is restored.” (*Id.* at ¶ 79.) Plaintiffs further allege
25 that Sony conceded that “[s]ome games may require access to PSN for trophy sync,
26 security checks[,] or other network functionality[,] and therefore cannot be played
27 offline.” (*Id.*) On May 2, 2011, Sony also took SOE offline, (*Id.* at ¶ 82), and an-
28 nounced that SOE user Personal Information may have been compromised in the breach,

1 (*Id.* at ¶ 83). This was the first time SOE users were informed that their Personal
2 Information may have been compromised as a result of the intrusion. (*Id.* at ¶ 83.)

3 On April 30, 2011, ten days after Sony took the PSN and Qriocity systems offline,
4 Sony announced that it would compensate PSN and Qriocity users in the United States
5 with free identity theft protection services, certain free downloads and online services,
6 and would consider helping customers who had to apply for new credit cards. (*Id.* at ¶
7 85.) Likewise, on May 12, 2011, ten days after Sony took the SOE network offline,
8 Sony announced that it would compensate SOE users in the United States by offering
9 free identity theft protection services, one month of free service, and certain free in-game
10 bonuses and currency. (*Id.* at ¶ 86.)

11 **II. Procedural History**

12 On August 16, 2011, the Judicial Panel on Multidistrict Litigation transferred
13 certain civil actions from various district courts across the country into one consolidated
14 action before this Court. (Doc. No. 1.) On November 11, 2011, the Court appointed a
15 Liaison Counsel and a Plaintiffs’ Steering Committee (“PSC”) to streamline the process.
16 (Doc. No. 61.) On January 31, 2012, the PSC filed a Consolidated Class Action
17 Complaint (“Consolidated Complaint”), (Doc. No. 78), and on March 16, 2012, Sony
18 moved to dismiss the Consolidated Complaint, (Doc. No. 94). The Court heard oral
19 argument on the motion on September 27, 2012, and granted in part and denied in part
20 Sony’s motion to dismiss the Consolidated Complaint on October 11, 2012. (Doc. No.
21 120.) Plaintiffs filed the operative FACC on December 10, 2012. (Doc. No. 128.) The
22 FACC contains eleven named Plaintiffs from nine different states and alleges fifty-one
23 independent causes of action.⁶ (*Id.*)

24 **III. Named Plaintiffs**

25 Robert M. Bova (“Bova”) resides in Tewksbury, Massachusetts and alleges that he
26 acquired his PS3 in 2008. (FACC ¶ 18.) In or around 2009, Bova created a PSN
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28 ⁶ The FACC adds five additional named Plaintiffs and forty-four additional causes
of action. (*Compare* Doc. No. 78 *and* Doc. No. 128.)

1 account and provided his Personal Information to Sony, including information possibly
2 regarding his Bank of America Visa and TD Bank debit card accounts. (*Id.*) Bova used
3 the PSN through his PS3 to play games and to download additional game content such as
4 “map packs.” (*Id.*) As a result of the intrusion, Bova’s Personal Information was stolen,
5 he was unable to access the PSN during the brief interruption in service, and he pur-
6 chased credit monitoring services at a cost of approximately \$10.00 per month. (*Id.*)
7 Bova does not allege when he purchased credit monitoring services or that he experi-
8 enced any unauthorized charges as a result of the intrusion. (*Id.*)

9 Christian Pierce Kalled (“Kalled”) resides in Wolfeboro, New Hampshire and
10 alleges that he acquired his PS3 in 2009. (*Id.* at ¶ 19.) On or about October 21, 2009,
11 Kalled created a PSN account and provided his Personal Information to Sony, including
12 information possibly regarding his American Express credit card. (*Id.*) Kalled used the
13 PSN through his PS3 to play games, to download game updates, to browse the Internet,
14 and to stream prepaid media content from Netflix. (*Id.*) As a result of the intrusion,
15 Kalled’s Personal Information was stolen, he was unable to access the PSN during the
16 brief interruption in service, and he was unable to access his Netflix account through his
17 PS3. (*Id.*) Kalled does not allege that he experienced any unauthorized charges on any
18 of his accounts as a result of the intrusion. (*Id.*)

19 Scott Lieberman (“Lieberman”) resides in Plantation, Florida and alleges that he
20 acquired his PS3 in early 2007. (*Id.* at ¶ 20.) In or around 2007, Lieberman created a
21 PSN account and provided his Personal Information to Sony, including information
22 regarding his American Express credit card. (*Id.*) Lieberman used the PSN through his
23 PS3 to play games, to download games, and to stream prepaid media content from
24 Netflix. (*Id.*) As a result of the intrusion, Lieberman’s Personal Information was stolen,
25 he was unable to access the PSN during the brief interruption in service, and he was
26 unable to access his Netflix account through his PS3. (*Id.*) Lieberman does not allege
27 that he experienced any unauthorized charges on any of his accounts as a result of the
28 intrusion. (*Id.*)

1 Kyle Johnson (“Johnson”) resides in San Diego, California and alleges that he
2 acquired his PS3 in 2007. (*Id.* at ¶ 21.) In or around 2007, Johnson created a PSN
3 account and provided his Personal Information to Sony, including information regarding
4 his Discover, American Express, and Visa credit card accounts. (*Id.*) Johnson used the
5 PSN through his PS3 to play games, purchase and download games, and stream prepaid
6 media content from Netflix. (*Id.*) As a result of the intrusion, Johnson’s Personal
7 Information was stolen, he was unable to access the PSN during the brief interruption in
8 service, and he was unable to access his Netflix account through his PS3. (*Id.*) In or
9 around October 2011, Johnson alleges two unauthorized charges appeared on his Visa
10 card. (*Id.*) Johnson does not allege whether these charges were later reimbursed. (*Id.*)

11 Arthur Howe (“Howe”) resides in San Diego, California and alleges that he
12 acquired his PS3 in 2008. (*Id.* at ¶ 22.) Howe alleges he created two PSN accounts, one
13 for him and one for his minor son. (*Id.*) In order to register for both accounts, Howe
14 alleges he provided his Personal Information to Sony, including his Union Bank
15 debit/credit card account and a U.S. Bank account. (*Id.*) Howe used the PSN through
16 his PS3 to play games, purchase and download games such as “map packs,” and stream
17 prepaid media content from Netflix. (*Id.*) As a result of the intrusion, Howe’s Personal
18 Information was stolen, he was unable to access the PSN during the brief interruption in
19 service, and he was unable to access his Netflix account through his PS3. (*Id.*) Howe
20 also alleges that he was forced to close two bank accounts and purchased credit monitor-
21 ing services at a charge of approximately \$9.00 per month. (*Id.*) Howe does not allege
22 that he experienced any unauthorized charges on any of his accounts as a result of the
23 intrusion, nor does Howe allege that he was forced to close his banks accounts due to
24 unauthorized charges. (*Id.*)

25 Christopher Munsterman (“Munsterman”) resides in Kansas City, Missouri and
26 alleges that he acquired his PS3 in 2008. (*Id.* at ¶ 23.) In or around 2008, Munsterman
27 created a PSN account and provided his Personal Information to Sony, including
28 information possibly regarding his Commerce Visa Debit card. (*Id.*) Munsterman used

1 the PSN through his PS3 to play games, download games and movies, browse the
2 internet, and stream prepaid media content from Netflix. (*Id.*) As a result of the
3 intrusion, Munsterman’s Personal Information was stolen, he was unable to access the
4 PSN during the brief interruption in service, and he was unable to access his Netflix
5 account through his PS3. (*Id.*) Munsterman does not allege that he experienced any
6 unauthorized charges on any of his accounts as a result of the intrusion. (*Id.*)

7 Adam Schucher (“Schucher”) resides in Surfside, Florida and alleges that he
8 acquired his PS3 in mid-2008. (*Id.* at ¶ 24.) In or around 2008, Schucher created a PSN
9 account and provided his Personal Information to Sony, including information regarding
10 his Citibank Visa credit card. (*Id.*) Schucher used the PSN through his PS3 to purchase
11 and download karaoke songs for *Karaoke Revolution Presents: American Idol*. (*Id.*) As
12 a result of the intrusion, Schucher’s Personal Information was stolen and he was unable
13 to access the PSN during the brief interruption in service. (*Id.*) Schucher does not allege
14 that he experienced any unauthorized charges on any of his accounts as a result of the
15 intrusion. (*Id.*)

16 Rebecca Mitchell (“Mitchell”) resides in East Lansing, Michigan and alleges that
17 she acquired her PS3 in 2009. (*Id.* at ¶ 25.) In or around 2009, Mitchell created a PSN
18 account and provided her Personal Information to Sony, including information regarding
19 her mother’s credit card and her own Visa debit card. (*Id.*) Mitchell used the PSN to
20 play games and download karaoke songs for the PlayStation game *Sing Star*. (*Id.*) As a
21 result of the intrusion, Mitchell’s Personal Information was stolen and she was unable to
22 access the PSN during the brief interruption in service. (*Id.*) Mitchell does not allege
23 that she experienced any unauthorized charges on any of her accounts or her mother’s
24 accounts as a result of the intrusion. (*Id.*)

25 Christopher Wilson (“Wilson”) resides in Dallas, Texas and alleges that he
26 acquired his PS3 in January 2007. (*Id.* at ¶ 26.) In or around 2007, Wilson created a
27 PSN account and provided his Personal Information to Sony, including information
28 regarding his Chase Bank Visa debit card. (*Id.*) Wilson used the PSN to play games and

1 stream prepaid media content from Netflix. (*Id.*) As a result of the intrusion, Wilson’s
2 Personal Information was stolen, and he was unable to access the PSN during the brief
3 interruption in service. (*Id.*) Wilson does not allege that he experienced any unautho-
4 rized charges on any of his accounts as a result of the intrusion. (*Id.*)

5 James Wright (“Wright”) resides in Columbus, Ohio and alleges that he acquired
6 his PS3 in 2008. (*Id.* at ¶ 27.) In or around 2008 or 2009, Wright created a SOE
7 account, a Qriocity account, and PSN account, and provided his Personal Information to
8 Sony, including information regarding his Visa US Bank debit/credit card (*Id.*) Wright
9 used his SOE account to play *DC Universe Online*, his Qriocity account to play music,
10 and his PSN account to play games and stream prepaid media content from Netflix. (*Id.*)
11 As a result of the intrusion, Wright’s Personal Information was stolen and he was unable
12 to access his SOE, Qriocity, and PSN accounts during the brief interruption in service.
13 (*Id.*) Wright does not allege that he experienced any unauthorized charges on any of his
14 accounts as a result of the intrusion. (*Id.*)

15 Timothy B. Whyland (“Whyland”) resides in Baldwinsville, New York and alleges
16 that he acquired his PS3 in 2009. (*Id.* at 28.) In or around 2009, Whyland created a PSN
17 account and provided his Personal Information to Sony, including information regarding
18 his debit card. (*Id.*) Whyland used the PSN to play games and download additional golf
19 courses for *Tiger Woods Golf Masters PGA Tour 2012* and maps for *Battlefield Bad*
20 *Company 2*. (*Id.*) As a result of the intrusion, Whyland’s Personal Information was
21 stolen and he was unable to access his PSN for approximately twenty-one (21) days.
22 (*Id.*) Whyland does not allege that he experienced any unauthorized charges on any of
23 his accounts as a result of the intrusion. (*Id.*)

24 **LEGAL STANDARDS**

25 A complaint must contain “a short and plain statement of the claim showing that
26 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). A motion to dismiss pursuant to
27 Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Fed. R.
28 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). When ruling on a

1 motion to dismiss under Rule 12(b)(6), the court must accept all factual allegations
2 pleaded in the complaint as true, and must construe them and draw all reasonable
3 inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*,
4 80 F.3d 336, 337–38 (9th Cir.1996). In doing so however, the court is not bound to
5 accept “legal conclusions” as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009).

6 To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual
7 allegations; rather, the complaint must plead “enough facts to state a claim to relief that
8 is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim
9 has “facial plausibility when the plaintiff pleads factual content that allows the court to
10 draw the reasonable inference that the defendant is liable for the misconduct alleged.”
11 *Iqbal*, 556 U.S. at 678. “The plausibility standard is not akin to a ‘probability require-
12 ment,’ but it asks for more than a sheer possibility that a defendant has acted unlaw-
13 fully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defen-
14 dant’s liability, it ‘stops short of the line between possibility and plausibility of entitle-
15 ment to relief.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 557). As a result, it is not proper for
16 the court to assume that “the [plaintiff] can prove facts that [he or she] has not alleged or
17 that defendants have violated . . . laws in ways that have not been alleged.” *Associated*
18 *Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526
19 (1983).

20 Complaints alleging fraud must satisfy the heightened pleading requirements of
21 Rule 9(b). Rule 9(b) requires that in all averments of fraud or mistake, the circumstances
22 constituting that fraud or mistake should be stated with particularity. Malice, intent,
23 knowledge, and other conditions of a person’s mind may be alleged generally. A
24 pleading is sufficient under Rule 9(b) if it “state[s] the time, place[,] and specific content
25 of the false representations as well as the identities of the parties to the misrepresenta-
26 tion.” *Misc. Serv. Workers, Drivers & Helpers v. Philco–Ford Corp.*, 661 F.2d 776, 782
27 (9th Cir. 1981) (citations omitted); *see also Vess v. Ciba–Geigy Corp. USA*, 317 F.3d
28 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.

1 1997)). Regardless of the title given to a particular claim, allegations grounded in fraud
2 are subject to Rule 9(b)'s pleading requirements. *Vess*, 317 F.3d at 1103-04; *Kearns v.*
3 *Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *Bros. v. Hewlett-Packard Co.*,
4 No. C-06-02254 RMW, 2006 WL 3093685, at *7 (N.D. Cal. 2006).

5 In interpreting federal law, a transferee court in a multidistrict case should look to
6 the law of its own circuit rather than the law of the transferor courts' circuits. *In re Nat'l*
7 *Century Fin. Enters., Inc., Inv. Litig.*, 323 F. Supp. 2d 861, 876-77 (S.D. Ohio 2004)
8 (citing *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir.
9 1987)); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, No. 00-1898,
10 2005 WL 106936, at *5 (S.D.N.Y. Jan. 18, 2005). Thus, although the parties have cited
11 cases from various circuits discussing Rule 9(b)'s heightened pleading requirements, the
12 Court will analyze federal procedural law in accordance with Ninth Circuit precedent.

13 **DISCUSSION**

14 The fifty-one claims alleged in the FACC can be categorized into nine sub-groups:
15 (1) negligence; (2) negligent misrepresentation; (3) breach of express warranty; (4)
16 breach of implied warranty; (5) unjust enrichment; (6) violation of state consumer
17 protection statutes; (7) violation of the California Database Breach Act; (8) violation of
18 the federal Fair Credit Reporting Act; and (9) partial performance/breach of the covenant
19 of good faith and fair dealing. Sony moves to dismiss the FACC on the basis that
20 Plaintiffs lack standing and that each cause of action fails to state a claim upon which
21 relief can be granted. Each is discussed in turn.

22 **I. Standing**

23 Sony's standing argument is two-fold. First, Sony contends SOE should be
24 dismissed as a named Defendant because Plaintiffs do not have standing to pursue non-
25 Ohio state law claims against SOE on behalf of non-Ohio residents. And second, Sony
26 contends Plaintiffs' amended allegations fail to establish Article III standing in light of
27 the Supreme Court's recent decision in *Clapper v. Amnesty International*, 133 S. Ct.
28 1138 (2013).

1 **A. Standing to Assert Claims Against SOE**

2 First, Sony contends Plaintiffs lack standing to pursue non-Ohio state-law claims
3 on behalf of non-Ohio residents because Plaintiff Wright, an Ohio resident, is the only
4 named Plaintiff that is an SOE network subscriber. Plaintiffs do not rebut that Wright is
5 the only SOE network subscriber, but contend that Wright has standing to pursue claims:
6 (1) on behalf of SOE network subscribers alleging violations of Ohio law; and (2) on
7 behalf of all SOE network subscribers, regardless of their state of residence, for enforce-
8 ment of the settlement agreement and alleged violations of the FCRA. The Court agrees.
9 As stated below, although each of Plaintiffs’ claims under Ohio law and the FCRA are
10 dismissed without leave to amend, Plaintiffs have standing to assert claims against SOE
11 for enforcement of the settlement agreement and/or breach of the covenant of good faith
12 and fair dealing. Accordingly, Sony’s motion to dismiss SOE as a named Defendant is
13 DENIED.

14 **B. Article III Standing**

15 Second, in an argument relegated to a footnote, Sony contends the FACC should
16 be dismissed for lack of Article III standing because Plaintiffs’ amended allegations have
17 once again failed to allege an “injury-in-fact” as a result of the intrusion. (Doc. No. 135
18 at 9 n.12.) The Court’s prior order denied this exact argument, finding that under
19 *Krottner v. Starbucks*, 628 F.3d 1139, 1142 (9th Cir. 2010), Plaintiffs had sufficiently
20 alleged that their “sensitive Personal Information [was] wrongfully disseminated, thereby
21 increasing the risk of future harm,” regardless of whether actual “harm [had] yet oc-
22 curred.” (Doc. No. 120 at 13:17-19.) Sony now urges the Court to reconsider this ruling
23 based on the Supreme Court’s recent decision in *Clapper v. Amnesty International*, 133
24 S. Ct. 1138 (2013). Because Article III standing is an “indispensable part of a plaintiff’s
25 case,” and not merely a pleading requirement, the Court reconsiders its prior ruling.
26 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

27 To establish Article III standing, a plaintiff must plead: (1) injury-in-fact; (2)
28 causation; and (3) redressability. *Lujan*, 504 U.S. at 560–61. The “injury-in-fact”

1 element requires a plaintiff to plead the “invasion of a legally protected interest which is
2 (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypotheti-
3 cal.” *Id.* (citations omitted). Analyzing the “injury-in-fact” requirement, the Supreme
4 Court in *Clapper* considered whether the respondents, who alleged that their work
5 required them to engage in sensitive international communications with individuals
6 potentially targeted under the Foreign Intelligence Surveillance Act (the “Act”), had
7 Article III standing to declare the Act unconstitutional and/or to obtain an injunction
8 against surveillance authorized under the Act. 133 S. Ct. at 1142–43. Respondents
9 argued that they had sufficiently alleged an “injury-in-fact” based on: (1) the objectively
10 reasonable likelihood that their communications would at some point be targeted under
11 the Act; and (2) the fact that they had already taken costly and burdensome measures to
12 protect the confidentiality of their international sources. *Id.* at 1147–54.

13 The Supreme Court rejected both arguments. *Id.* With regard to the first argu-
14 ment, the Supreme Court stated that although it may be “objectively reasonable” that
15 respondents’ communications may at some point be intercepted under the Act, respon-
16 dents had failed to show that the “threatened injury” was “certainly impending.” *Id.* at
17 1147. The Supreme Court noted that a “speculative chain of possibilities . . . based on
18 potential future surveillance” was not enough. *Id.* at 1150. With regard to respondents’
19 second argument, the Supreme Court stated that if parties could base Article III standing
20 on reasonably incurred costs to avoid the risk of future harm, it would “water[] down the
21 fundamental requirements of Article III.” *Id.* at 1151. “If the law were otherwise, an
22 enterprising plaintiff would be able to secure a lower standard for Article III standing
23 simply by making an expenditure based on a nonparanoid fear.” *Id.* Therefore, the
24 Supreme Court held that even though respondents’ measures to avoid surveillance
25 authorized under the Act was not “fanciful, paranoid, or otherwise unreasonable,”
26 respondents could not “manufacture standing merely by inflicting harm on themselves
27 based on fears of hypothetical harm that was not “certainly impending.” *Id.* at 1151.
28

1 Based on the above, Sony argues *Clapper* tightened the “injury-in-fact” analysis
2 set forth by the Ninth Circuit in *Krottner v. Starbucks* and previously relied upon by the
3 Court in its prior order. The Court does not agree. The Ninth Circuit in *Krottner* found
4 Article III standing based on a “credible threat of harm” that was “both real and immedi-
5 ate, not conjectural or hypothetical,” 628 F.3d at 1143. In contrast, the Supreme Court in
6 *Clapper* found that respondents failed to sufficiently allege Article III standing because a
7 speculative chain of possibilities based on potential future surveillance was not enough
8 to plausibly allege a “certainly impending” injury. 133 S. Ct. at 1150. Therefore,
9 although the Supreme Court’s word choice in *Clapper* differed from the Ninth Circuit’s
10 word choice in *Krottner*, stating that the harm must be “certainly impending,” rather than
11 “real and immediate,” the Supreme Court’s decision in *Clapper* did not set forth a new
12 Article III framework, nor did the Supreme Court’s decision overrule previous precedent
13 requiring that the harm be “real and immediate.” To the contrary, the Supreme Court’s
14 decision in *Clapper* simply reiterated an already well-established framework for
15 assessing whether a plaintiff had sufficiently alleged an “injury-in-fact” for purposes of
16 establishing Article III standing. *Id.* at 1147 (“Thus, we have repeatedly reiterated that
17 ‘threatened injury must be certainly impending to constitute injury in fact,’ and that
18 ‘[a]llegations of possible future injury’ are not sufficient.”) (quoting *Whitmore v. Ark.*,
19 495 U.S. 149, 158 (1990)).

20 Therefore, the Court finds both *Clapper* and *Krottner* controlling, and case law in
21 this circuit analyzing the “injury-in-fact” requirement following *Krottner* highly
22 persuasive.⁷ For example, courts in this circuit have routinely denied motions to dismiss
23 based on Article III standing where a plaintiff alleges that his personal information was
24 collected and then wrongfully disclosed, as opposed to alleging that his personal
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27 ⁷ See also *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947–48 (9th
28 Cir. 2002) (holding that “the possibility of future injury may be sufficient to confer
standing on plaintiffs” and concluding that the suit could proceed when the plaintiffs
demonstrated a factual issue about “whether they suffer a substantial risk of harm”).

1 information was collected without his consent.⁸ *Compare In re Facebook Privacy Litig.*,
2 791 F. Supp. 2d 705, 711–12 (N.D. Cal. 2011) (finding plaintiffs’ allegations that their
3 personal information was disclosed as opposed to just collected and retained by defen-
4 dants sufficient for purposes of establishing Article III standing), *Doe 1 v. AOL, LLC*,
5 719 F. Supp. 2d 1102, 1108–09 (N.D. Cal. 2010) (finding plaintiffs’ allegations that their
6 personal information was collected and then disclosed sufficient for purposes of
7 establishing Article III standing), and *San Luis & Delta-Mendota Water Auth. v. U.S.*
8 *Dep’t of the Interior*, 905 F. Supp. 2d 1158, 1171 (E.D. Cal. 2012) (“Although it was not
9 guaranteed that reduced allocations would come to pass, the threat of harm was certainly
10 real, not conjectural or hypothetical.”), with *Yunker v. Pandora Media, Inc.*, No.
11 11-CV-03113 JSW, 2013 WL 1282980, at *3 (N.D. Cal. Mar. 26, 2013) (“Yunker does
12 not allege that he disclosed sensitive financial information, such as a social security
13 number or a credit card number, to Pandora. Further, he has not alleged that anyone has
14 breached Pandora’s servers.”), *Low v. LinkedIn Corp.*, No. 11-cv-01468-LHK, 2011 WL
15 5509848, at *6 (N.D. Cal. Nov. 11, 2011) (distinguishing *Krottner* in that the plaintiff
16 had not alleged that his highly personal information had been stolen and then exposed to
17 the public), and *In re Google, Inc. Privacy Policy Litig.*, No. C 12-01382 PSG, 2012 WL
18 6738343, at *6 (N.D. Cal. Dec. 28, 2012) (dismissing plaintiffs’ claims based on
19 Google’s policy of retaining personal information for lack of Article III standing because
20 there were no allegations plaintiffs’ personal information had been disseminated).

21
22
23 ⁸ Although only persuasive, courts in other circuits have also held that a plaintiff
24 can establish an “injury-in-fact” by alleging a threat of future harm. *See, e.g., Denney v.*
25 *Deutsche Bank AG*, 443 F.3d 253, 264–65 (2d Cir. 2006) (stating that exposure to toxic
26 substances creates a cognizable injury for standing purposes “even though exposure
27 alone may not provide sufficient ground for a claim under state tort law”); *Sutton v. St.*
28 *Jude Med. S.C., Inc.*, 419 F.3d 568, 574–75 (6th Cir. 2005) (holding that Article III
standing was satisfied where a defective medical implement presented an increased risk
of future health problems); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,
204 F.3d 149, 160 (4th Cir. 2000) (en banc) (“Threats or increased risk thus constitutes
cognizable harm.”); *Pisciotta v. Old Nat. Bancorp.*, 499 F.3d 629, 634 (7th Cir. 2007)
 (“[T]he injury-in-fact requirement can be satisfied by a threat of future harm or by an act
which harms the plaintiff only by increasing the risk of future harm that the plaintiff
would have otherwise faced, absent the defendant’s actions.”).

1 Therefore, the Court finds Plaintiffs’ allegations that their Personal Information
2 was collected by Sony and then wrongfully disclosed as a result of the intrusion suffi-
3 cient to establish Article III standing at this stage in the proceedings. (FACC ¶¶ 18-29,
4 119-123, 124-127.) Although Sony argues that Plaintiffs’ allegations are insufficient
5 because none of the named Plaintiffs have alleged that their Personal Information was
6 actually accessed by a third party, neither *Krottner* nor *Clapper* require such allegations.
7 Instead, Plaintiffs have plausibly alleged a “credible threat” of impending harm based on
8 the disclosure of their Personal Information following the intrusion.⁹ *See Cherri v.*
9 *Mueller*, No. 12-11656, 2013 WL 2558207, at *9 (E.D. Mich. June 11, 2013) (stating
10 that after *Clapper*, a plaintiff need only allege a “certainly impending injury that is fairly
11 traceable to” the defendant’s purported conduct to withstand a motion to dismiss).
12 Accordingly, the Court DENIES Sony’s motion to dismiss based on Article III
13 standing.¹⁰

14 **II. Failure to State a Claim Under Rule 12(b)(6)**

15 **A. Negligence Claims**

16 Plaintiffs assert negligence claims under California law (Count 5), Florida law
17 (Count 11), Massachusetts law (Count 14), Missouri law (Count 27), and Ohio law
18 (Count 43). (FACC ¶¶ 196-211, 244-249, 262-270, 355-360, 451-456.) Each claim
19 requires a plaintiff to allege the following four elements: (1) the existence of a legal
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22 ⁹ *Krottner*, 628 F.3d at 1143 (finding an “injury-in-fact” when plaintiffs pled an
23 increased risk of harm following the theft of a laptop that contained their personal data);
24 *Doe I*, 719 F. Supp. 2d at 1109–11 (holding that plaintiffs were injured by defendant’s
25 collection and publication of “highly sensitive personal information,” including credit
card numbers, social security numbers, financial account numbers, and information
regarding plaintiffs’ personal issues, including sexuality, mental illness, alcoholism,
incest, rape, and domestic violence).

26 ¹⁰ Notwithstanding controlling case law in this circuit, and the Court’s previous
27 order, Sony again directs the Court to consider the Third Circuit’s reasoning in *Reilly v.*
28 *Ceridian Corporation*, 664 F.3d 38 (3rd Cir. 2011), wherein the Third Circuit affirmed
the trial court’s dismissal based on lack of Article III standing. Although the Court
acknowledges the Third Circuit’s holding in *Reilly*, the Court once again reiterates that
Reilly is only persuasive authority.

1 duty; (2) breach of that duty; (3) causation; and (4) cognizable injury.¹¹ Sony moves to
2 dismiss each claim on the basis that Plaintiffs have failed to allege a cognizable injury,
3 and even if they had, Plaintiffs have failed to allege that Sony had a legal duty to
4 guarantee the security of Plaintiffs’ Personal Information. The Court first addresses the
5 Florida, Missouri, and Ohio negligence claims, and then addresses the California and
6 Massachusetts negligence claims.¹²

7 1. Florida, Missouri, and Ohio Negligence Claims

8 The Florida, Missouri, and Ohio negligence claims contain identical factual
9 allegations. (FACC ¶¶ 244-249, 355-360, 451-456.) Each claim alleges that because
10 Sony requested, gathered, and promised to secure Plaintiffs’ Personal Information, Sony
11 had a duty to provide reasonable security consistent with industry standards, to ensure
12 Sony Online Services were secure, and to protect Plaintiffs’ Personal Information from
13 theft or misuse. Plaintiffs allege Sony breached this duty by failing to adequately secure
14 its network, and that Plaintiffs suffered “economic injury and property damage” as a
15 result of the intrusion. (*Id.* at ¶¶ 249, 360, 456.) The FACC does not explicitly allege
16 what economic injury and/or property damage Plaintiffs allegedly suffered as a result of
17 the intrusion.

18 Although Plaintiffs are not required to put forth evidence of their alleged injury at
19 this stage in the proceeding, Plaintiffs’ allegations of causation and harm are wholly
20 conclusory, and therefore fail to put the Court or Sony on notice of the specific relief
21 requested. *Iqbal*, 556 U.S. at 663 (“A claim has facial plausibility [under Rule 8] when
22 the pleaded factual content allows the court to draw the reasonable inference that the
23 defendant is liable for the misconduct alleged.”); *In re Polyurethane Foam Antitrust*

24
25 ¹¹ See, e.g., *Paz v. Cal.*, 994 P.2d 975, 980–81 (Cal. 2001); *Meyers v. City of*
26 *Jacksonville*, 754 So. 2d 198, 202 (Fla. 2000); *Jupin v. Kask*, 849 N.E.2d 829, 834–35
(Mass. 2006); *Am. Mortg. Inv. Co. v. Hardin-Stockton Corp.*, 671 S.W.2d 283, 292 (Mo.
1984); *Mussivand v. David*, 544 N.E.2d 265, 270 (Oh. 1989).

27 ¹² Neither party addressed the Court’s tentative ruling at oral argument, which
28 stated that each negligence claim was subject to dismissal without leave to amend based
on Plaintiffs’ failure to allege a cognizable injury and/or based on the economic loss
doctrine.

1 *Litig.*, 799 F. Supp. 2d 777, 792 (N.D. Ohio 2011), *reconsideration denied* (Sept. 15,
2 2011) (stating that conclusory allegations fail to put the defendant on notice of the claims
3 alleged against it). For example, Plaintiffs do not specifically allege what economic
4 injury they allegedly suffered as a result of Sony’s negligence, what property was
5 allegedly damaged, or how the alleged property damage was proximately caused by
6 Sony’s breach. Merely appending a clause incorporating by reference all prior allega-
7 tions is insufficient, especially when Plaintiffs have alleged fifty-one independent causes
8 of action in a complaint spanning over a hundred pages. *See, e.g., Brandon v. City of*
9 *N.Y.*, 705 F. Supp. 2d 261, 268–69 (S.D.N.Y. 2010) (“Such general allegations, without
10 supporting facts other than a clause incorporating an entire complaint by reference, are
11 insufficient to withstand even a motion to dismiss . . .”); *Noel v. Bank of Am.*, No.
12 12-4019-SC, 2012 WL 5464608, at * 3 (N.D. Cal. Nov. 8, 2012) (stating that incorpora-
13 tion by reference language failed to meet Rule 8’s pleading requirements because the
14 plaintiff failed to connect specific allegations to the elements of her claims.) It is the
15 Plaintiffs’ burden—not the Court’s—to identify the specific relief sought for each
16 individual cause of action.

17 Therefore, although the Florida, Missouri, and Ohio negligence claims were not
18 previously dismissed for lack of specificity in the Consolidated Complaint, because these
19 claims appeared for the first time in the FACC, the Court finds its previous order
20 dismissing the California negligence claim sufficiently put Plaintiffs’ counsel on notice
21 that conclusory allegations of causation and harm would not suffice. (Doc. No. 120 at
22 18-20.) This is especially true in light of Plaintiffs’ factual allegations with respect to
23 the Massachusetts negligence claim, which also appeared for the first time in the FACC,
24 as this claim includes specific allegations of causation and harm. As a result, the Court
25 finds Plaintiffs’ counsel, who are sophisticated attorneys well versed in high-profile
26 class-action litigation, were well aware of what was required to state a claim for negli-
27 gence, and further amendment of these claims would prejudice Defendants. *See Emi-*
28 *nence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (“As this circuit

1 and others have held, it is the consideration of prejudice to the opposing party that
2 carries the greatest weight.”). Accordingly, the Court GRANTS Sony’s motion to
3 dismiss the Florida, Missouri, and Ohio negligence claims without leave to amend.

4 **2. California and Massachusetts Negligence Claims**

5 Similar to the Florida, Missouri, and Ohio negligence claims, the California and
6 Massachusetts negligence claims contain identical factual allegations.¹³ (FACC ¶¶ 196-
7 211, 262-270.) Each claim alleges that Sony owed two independent legal duties that
8 were separately breached: (1) the duty to timely disclose the nature of the intrusion,
9 which was breached when Sony delayed in informing Plaintiffs that their Personal
10 Information may have been disclosed to third parties; and (2) the duty to exercise
11 reasonable care in safeguarding Plaintiffs’ Personal Information, which was breached
12 when Sony failed to adopt, implement, and maintain adequate security measures to
13 protect Plaintiffs’ Personal Information. (*Id.* at ¶¶ 197-200, 263-266.) As a result of
14 Sony’s negligence, and with respect to the breach of both duties, Plaintiffs allege they
15 incurred economic damages, including the cost to purchase credit monitoring services,
16 loss of use and value of Sony Online Services, loss of use and value of Third Party
17 Services, and a diminution in value of their Consoles. (*Id.* at ¶¶ 211, 270.) The Court
18 separately addresses Plaintiffs’ allegations of duty and breach.

19 **a. Cognizable Injuries Resulting From Sony’s Duty to Timely** 20 **Disclose the Intrusion**

21 Assuming without deciding that Sony owed Plaintiffs a legal duty to timely
22 disclose the intrusion and the possibility that Plaintiffs’ Personal Information may have
23 been disclosed, the Court finds Plaintiffs have failed to allege a single cognizable injury
24 proximately caused by Sony’s resulting breach. *See Held v. Bail*, 547 N.E.2d 336, 337
25 (Mass. 1989); *Dalkilic v. Titan Corp.*, 516 F. Supp. 2d 1177, 1190 (S.D. Cal. 2007).
26 Although Plaintiffs allege that Plaintiff Johnson received notification of the intrusion on
27

28 ¹³ The California negligence claim also alleges a special relationship between Sony
and the California Class. (FACC ¶¶ 204-210.)

1 April 27, 2013, approximately ten days after the intrusion, and that Plaintiff Howe
2 received notification of the intrusion on April 28, 2013, approximately eleven days after
3 the intrusion, neither of these allegations set forth a plausible claim that the alleged
4 untimely disclosure, and not the intrusion itself, resulted in Johnson or Howe’s alleged
5 injuries. (FACC ¶¶ 21, 22.) *See Berardi v. Menicks*, 164 N.E.2d 544, 546–47 (Mass.
6 1960) (“[I]t is not enough to show the mere possibility of a causal connection; the
7 probability of such a connection must be shown”). The same is true with respect to
8 Plaintiff Bova. Although Plaintiffs did not specify when Bova was notified of the
9 intrusion, the Court infers that Bova had constructive notice of the PSN intrusion on
10 April 26, 2011 (when Sony issued a public statement), and that Bova had constructive
11 notice of the SOE intrusion on May 2, 2011 (when Sony posted a Customer Service
12 Notification on SOE’s website). However, as with Johnson and Howe, Plaintiffs
13 allegations do not set forth a plausible claim for relief on the basis that the delay, and not
14 just the intrusion, caused Bova’s alleged injuries. (*Id.* at ¶¶ 78, 83.) This cannot be left
15 to conjecture or speculation. *See Twombly*, 550 U.S. at 561.

16 Therefore, even though the Court finds Plaintiffs may have alleged a brief delay in
17 the time period between the intrusion and when Sony notified consumers of the intru-
18 sion, the Court finds Plaintiffs have failed to allege that their injuries—credit monitoring
19 services, loss of use and value of the PSN, loss of use and value of Third Party Services,
20 and/or a diminution in value of their Consoles—were proximately caused by Sony’s
21 alleged untimely delay.¹⁴ *See Stollenwerk v. Tri-W. Health Care Alliance*, 254 F. App’x
22 664, 668 (9th Cir. 2007) (“Here, however, proximate cause is supported not only by the
23 temporal, but also by the logical, relationship between the two events.”); *Jorgensen v.*
24 *Mass. Port Auth.*, 905 F.2d 515, 524 (1st Cir. 1990) (stating that Massachusetts law
25 requires that the defendant’s conduct be the “but-for cause” of the plaintiff’s injury).

26
27 ¹⁴ Plaintiffs fail to allege when Howe or Bova purchased credit monitoring
28 services, whether Howe and Bova were aware of Sony’s Welcome Back Package
offering free credit monitoring services, or whether Howe and Bova purchased credit
monitoring services on account of Sony’s alleged untimely delay.

1 Accordingly, the Court GRANTS Sony’s motion to dismiss the California and Massa-
2 chusetts negligence claims based on Sony’s alleged breach of the duty to timely disclose
3 the nature of the intrusion. Because the Court finds further amendment of this claim
4 would be futile, the Court grants Sony’s motion without leave to amend.

5 **b. Cognizable Injuries Flowing From Sony’s Duty to Provide**
6 **Reasonable Network Security**

7 As set forth above, the FACC also alleges that Sony owed Plaintiffs Johnson,
8 Howe, and Bova a duty to exercise reasonable care in safeguarding and protecting their
9 Personal Information. (FACC ¶¶ 197, 263.) Plaintiffs allege this duty included, among
10 other things, the duty to design, implement, maintain, and test Sony’s security system in
11 order to ensure Plaintiffs’ Personal Information was adequately secured and protected.
12 (*Id.*) Plaintiffs allege Sony breached this duty by failing to implement proper procedures
13 to protect Plaintiffs’ Personal Information, and as a result, Plaintiffs incurred economic
14 damages, including the cost to purchase credit monitoring services, loss of use and value
15 of Sony Online Services, loss of use and value of Third Party Services, and/or a diminu-
16 tion in value of their Consoles. Sony moves to dismiss these claims on the basis that
17 Plaintiffs have failed to allege: (1) a legal duty to provide reasonable security; and (2)
18 cognizable injuries not barred by the economic loss doctrine. The Court discusses each
19 in turn.

20 **i. Legal Duty to Provide Reasonable Security**

21 Although neither party provided the Court with case law to support or reject the
22 existence of a legal duty to safeguard a consumer’s confidential information entrusted to
23 a commercial entity, the Court finds the legal duty well supported by both common sense
24 and California and Massachusetts law. *See, e.g., Witriol v. LexisNexis Grp.*, No.
25 C05-02392 MJJ, 2006 WL 4725713, at *8 (N.D. Cal. Feb. 10, 2006); *CUMIS Ins. Soc’y.,*
26 *Inc. v. BJ's Wholesale Club, Inc.*, No. 051158, 2005 WL 6075375, at *4 (Mass. Super.
27 Dec. 7, 2005) *aff’d*, 918 N.E.2d 36 (Mass. 2009); *Yakubowicz v. Paramount Pictures*
28 *Corp.*, 536 N.E.2d 1067, 1070 (Mass. 1989) (“A basic principle of negligence law is that

1 ordinarily everyone has a duty to refrain from affirmative acts that unreasonably expose
2 others to a risk of harm.”). As a result, because Plaintiffs allege that they provided their
3 Personal Information to Sony as part of a commercial transaction, and that Sony failed to
4 employ reasonable security measures to protect their Personal Information, including the
5 utilization of industry-standard encryption, the Court finds Plaintiffs have sufficiently
6 alleged a legal duty and a corresponding breach.

7 **ii. Economic Loss Doctrine**

8 However, the existence of a legal duty and a corresponding breach are not the only
9 elements required to state a claim for negligence—Plaintiffs must also allege apprecia-
10 ble, non-speculative harm proximately caused by Sony’s breach. *See, e.g., Vinci v.*
11 *Byers*, 837 N.E.2d 1140, 1145 (Mass. App. Ct. 2005) (stating that appreciable harm is
12 “injury, loss, or detriment that is capable of being measures or perceived”) (internal
13 citations and quotations omitted); *Int’l Engine Parts, Inc. v. Feddersen & Co.*, 9 Cal. 4th
14 606, 614 (Cal. 1995) (stating that a negligence claim requires appreciable, non-specula-
15 tive, present injury). Here, Plaintiffs allege the following cognizable injuries resulted
16 from Sony’s alleged breach: (1) expenses incurred to purchase credit monitoring services
17 (Howe and Bova); (2) loss of use and value of Sony Online Services (Howe, Johnson,
18 Bova); (3) loss of use and value of Third Party Services (Johnson and Howe); and (4) a
19 diminution in value of Plaintiffs’ Consoles (Johnson, Howe, Bova).¹⁵ (FACC ¶¶ 207,
20 211, 270.) Sony contends each of these injuries are barred by the economic loss doctrine
21 as articulated under Massachusetts and California law.

22 Massachusetts generally prohibits the recovery of purely economic losses in tort
23 absent personal injury or property damage. *Aldrich v. ADD Inc.*, 770 N.E.2d 447,
24 454–55 (Mass. 2002).¹⁶ Although there are exceptions to this general rule, which allow a

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26 ¹⁵ Although Paragraph 270 alleges Bova suffered a cognizable injury in the form of
27 loss of use and value of Third Party Services, Paragraph 18 does not allege Bova
28 subscribed to and/or accessed any Third Party Services via Sony Online Services.

¹⁶ The rationale behind the doctrine is that a “commercial user can protect himself
by seeking express contractual assurances concerning the product (and thereby perhaps
paying more for the product) or by obtaining insurance against losses.” *Bay State–Spray*

1 plaintiff to recover economic losses premised on negligent misrepresentations, Plaintiff
2 Bova alleges an independent negligent misrepresentation cause of action, and his
3 negligence claim is not premised on Sony’s alleged misrepresentations. Therefore, the
4 Court finds the exception inapplicable. (FACC ¶¶ 270, 274.) *See Nota Constr. Corp. v.*
5 *Keyes Assocs., Inc.*, 45 Mass. App. Ct. 15, 20 (Mass. App. Ct. 1998) (“An exception to
6 the doctrine permits recovery for economic losses resulting from negligent misrepresenta-
7 tion.”); *695 Atl. Ave. Co. v. Commercial Const. Consulting, Inc.*, 834 N.E.2d 322 (Mass.
8 Ct. App. 2005) (affirming the trial court’s dismissal of the negligence claim based on the
9 economic loss rule but noting the negligent misrepresentation claim could proceed
10 because it is an exception to the economic loss doctrine). Accordingly, the Court
11 GRANTS Sony’s motion to dismiss the Massachusetts negligence claim based on the
12 economic loss doctrine without leave to amend. *See Hatch v. Dep’t for Children, Youth*
13 *& Their Families*, 274 F.3d 12, 26 (1st Cir. 2001).

14 Similarly, under California law, “[i]n the absence of (1) personal injury, (2)
15 physical damage to property, (3) a ‘special relationship’ existing between the parties, or
16 (4) some other common law exception to the rule, recovery of purely economic loss is
17 foreclosed.” *Kalitta Air, LLC v. Cent. Tex. Airborne Sys., Inc.*, 315 F. App’x 603, 605
18 (9th Cir. 2008) (quoting *J’Aire Corp. v. Gregory*, 598 P.2d 60, 62–63 (Cal. 1979) (setting
19 forth the factors a court must consider when determining whether a special relationship
20 exists between the parties). Put simply, the economic loss doctrine was created to
21 prevent “the law of contract and the law of tort from dissolving one into the other.”
22 *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (Cal. 2004) (internal
23 quotations omitted).

24 Based on the above, Sony moves to dismiss the California negligence claim on the
25 basis that neither Howe nor Johnson have alleged personal injury or property damage as
26 a result of the intrusion, nor have Howe or Johnson alleged a “special relationship” with
27

28 *& Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350, 1354–55 (Mass.
1989).

1 Sony based on the factors articulated by the California Supreme Court in *J'Aire Corp. v.*
2 *Gregory*, 598 P.2d 60 (Cal. 1979). Moreover, even if Plaintiffs could satisfy the *J'Aire*
3 special relationship test, Sony contends the *J'Aire* factors are inapplicable because the
4 duty Sony allegedly violated was specifically referenced in the PSN User Agreement,
5 and therefore, can only form the basis of a contract claim. As a result, Sony contends
6 Plaintiffs' California negligence claim is nothing more than an attempt to plead around
7 their contract with Sony, which clearly disclaims the economic losses Plaintiffs now seek
8 to recover. Although Plaintiffs Johnson and Howe seemingly concede that the California
9 negligence claim seeks to recover purely economic losses—credit monitoring fees, loss
10 of use and value of the PSN, loss of use and value of Third Party Services, and a
11 diminution in value of their Consoles—they nonetheless argue that they can recover
12 these losses based on the *J'Aire* “special relationship” exception.

13 Before turning to the application of the *J'Aire* factors, the Court dispels Sony's
14 contention that their contract with Plaintiffs forecloses tort liability. As stated by the
15 California Supreme Court in *Aas v. Superior Court*, “[a] person may not ordinarily
16 recover in tort for the breach of duties that merely restate contractual obligations.” 24
17 Cal. 4th 627, 643 (Cal. 2004) (superseded by statute on other grounds) (quoting *Freeman*
18 *& Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 107 (Cal. 1995)). Based on this general
19 rule, “courts will generally enforce the breach of a contractual promise through contract
20 law, except when the actions that constitute the breach violate a social policy that merits
21 the imposition of tort remedies.” *Id.* As a result, although a plaintiff will not be able to
22 recover in tort based solely on allegations that a contract was negligently performed, a
23 plaintiff may be able to pursue both contract and tort remedies if the plaintiff alleges that
24 the contractual breach also violated “a duty independent of the contract arising from
25 principles of tort law.” *Aas*, 24 Cal. 4th at 643; *see also Erlich v. Menezes*, 21 Cal. 4th
26 543, 550 (Cal. 1999). Accordingly, because Sony owed Plaintiffs a legal duty to provide
27 reasonable network security (as articulated by the Court above), which was separate and
28 independent from the PSN User Agreement, the Court finds Plaintiffs may pursue both

1 contract and tort remedies, to the extent Plaintiffs’ tort claims are not barred by the
2 economic loss doctrine.¹⁷

3 Under *J’Aire* special relationship exception to the economic loss doctrine, the
4 existence of a “special relationship” is based on a determination of the following six
5 factors:

- 6 (1) the extent to which the transaction was intended to affect the plaintiff,
7 (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that
8 the plaintiff suffered injury, (4) the closeness of the connection between the
9 defendant’s conduct and the injury suffered, (5) the moral blame attached to
10 the defendant’s conduct and (6) the policy of preventing future harm.

11 *J’Aire*, 598 P.2d at 63. All six factors must be considered by the court and the presence
12 or absence of one factor is not decisive. *Kalitta Air*, 315 F. App’x at 605–06.

13 Here, Plaintiffs Johnson and Howe allege a “special relationship” between the
14 parties because: (1) Sony developed Sony Online Services for use with PSPs and PS3s
15 and intended its contract with consumers, which required consumers to provide their
16 Personal Information before registering for such services, to effect Plaintiffs and other
17 class members; (2) if Sony did not reasonably perform its contractual obligations, in light
18 of previous instances of admitted security vulnerabilities, Plaintiffs’ Personal Informa-
19 tion could be disclosed; (3) Plaintiffs suffered injury as a result of the intrusion, includ-
20 ing expenses incurred to purchase credit monitoring services, loss of use and value of
21 Sony Online Services, loss of use of Third Party Services, and a diminution in value of
22 their Consoles; (4) the injuries were a direct result of Sony’s lack of adequate, reason-
23 able, and industry-standard security measures; (5) Sony’s conduct warrants moral blame
24 because Sony promised to secure Plaintiffs’ Personal Information; and (6) holding Sony
25 accountable will require Sony and other companies to provide reasonable, adequate, and
26 industry-standard security measures. (FACC ¶¶ 204-211.)

27 After considering the six *J’Aire* factors in light of Plaintiffs’ factual allegations,
28 the Court finds Plaintiffs have failed to allege a “special relationship” with Sony beyond

¹⁷ The Court only addresses the *J’Aire* exception because this was the only exception cited by Plaintiffs.

1 those envisioned in everyday consumer transactions, and therefore, negligence is the
2 wrong legal theory on which to pursue recovery for Plaintiffs' economic losses. *See*
3 *Greystone Homes, Inc. v. Midtec, Inc.*, 168 Cal. App. 4th 1194, 1231 (Cal. Ct. App.
4 2008) (“[W]e conclude, as a matter of law, that Midtec did not have a special relation-
5 ship with Greystone sufficient to support a negligence cause of action for economic
6 losses pursuant to *J'Aire.*”). The Court first addresses the degree of certainty that Sony's
7 conduct proximately caused: (1) a loss of use and value of Sony Online Services and a
8 loss of use and value of Third Party Services; (2) costs incurred to purchase credit
9 monitoring services; and (3) a diminution in value of Plaintiffs' Consoles. *See Aas*, 24
10 Cal. 4th at 646 (“Lacking that fundamental prerequisite to a tort claim, it is difficult to
11 imagine what other factors, singly or in combination, might justify the court in finding
12 liability.”).

13 First, with respect to the alleged loss of use and value of Sony Online Services and
14 the alleged loss of use and value of Third Party Services, neither are recoverable in
15 negligence because they were not proximately caused by Sony's alleged failure to
16 provide reasonable network security and/or did not result in a measurable loss. Although
17 the amount of recoverable damages is usually a question of fact, which is a determination
18 not properly before the court on a motion to dismiss, the measure of damages, existence
19 of damages, and whether a plaintiff has sufficiently pled a causal connection between the
20 damage and the alleged harm is a question of law. *See, e.g., Hendricks v. DSW Shoe*
21 *Warehouse Inc.*, 444 F. Supp. 2d 775, 779 (D. Mich. 2006) (citing *Wolff & Munier, Inc.*
22 *v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991); *Phillips v. TLC*
23 *Plumbing, Inc.*, 172 Cal. App. 4th 1133, 1139 (Cal. Ct. App. 2009); *Berardi v. Menicks*,
24 164 N.E.2d 544, 546–47 (Mass. 1960) (stating that “it is not enough to show the mere
25 possibility of a causal connection; the probability of such a connection must be shown”).
26 Therefore, because Plaintiffs acknowledge that Sony did not owe Plaintiffs a legal duty
27 to provide uninterrupted PSN service, it is nonsensical, and defies the bounds of
28 common sense for Plaintiffs to simultaneously seek damages for an interruption in PSN

1 service. (Doc. No. 146 at 33-34.) This disconnect in Plaintiffs’ factual allegations is
2 additionally supported by Plaintiffs’ concession that access to the PSN is free, that
3 Plaintiffs did not purchase premium PSN services, that Plaintiffs could access Third
4 Party Services through other mediums, and that Sony’s disclaimed any right to uninter-
5 rupted PSN access. *See Grawitch v. Charter Commc’ns, Inc.*, No. 4:12CV01990 AGF,
6 2013 WL 253534, at *3 (E.D. Mo. Jan. 23, 2013) (finding the plaintiff had failed to state
7 a pecuniary loss because “the upgraded service was provided for free and not at an
8 increased cost”). Therefore, the Court finds neither of these damages were a foreseeable
9 result of Sony’s alleged breach.

10 Second, with respect to Howe’s ability to recover costs incurred to purchase credit
11 monitoring services, the Court finds Howe has failed to allege why these prophylactic
12 costs were reasonably necessary, and therefore proximately caused by Sony’s alleged
13 breach.¹⁸ In assessing whether credit monitoring services in the context of data breach
14 cases are recoverable in negligence, courts have generally analogized to medical
15 monitoring cases, which require a plaintiff to plead that the monitoring costs were both
16 reasonable and necessary.¹⁹ *See Stollenwerk*, 254 F. App’x at 666; *Pisciotta v. Old Nat.*
17 *Bancorp*, 499 F.3d 629, 639 (7th Cir. 2007). As a result, courts assessing data breach
18 cases have found that where a state allows recovery for medical monitoring damages (as
19 does California), and a plaintiff has sufficiently alleged a threat of identity theft (i.e., the
20 opening of unauthorized accounts), a plaintiff may seek to recover expenses to purchase
21 credit monitoring services. However, as with the recovery of medical monitoring costs,
22 this is a high burden and requires a plaintiff to plead both a logical and temporal

23
24 ¹⁸ Plaintiff Johnson does not allege he purchased credit monitoring services.

25 ¹⁹ “Under the medical monitoring cases, individuals who have been exposed to
26 potentially harmful substances but have no presently detectable illnesses may recover the
27 costs of future medical surveillance by showing ‘through reliable expert testimony,’ (1)
28 the ‘significance and extent of exposure,’ (2) the ‘toxicity of [the contaminant], [and] the
seriousness of the [harm] . . . for which the individuals are at risk,’ and (3) the ‘relative
increase in the chance of . . . [the harm] in those exposed,’ such that (4) ‘monitor[ing] the
effects of exposure . . . is reasonable and necessary.’ ” *Stollenwerk*, 254 F. App’x at 666
(quoting *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987)).

1 connection between the decision to purchase credit monitoring services and the defen-
2 dant's alleged breach. *See Stollenwerk*, 254 F. App'x 664 at 668; *Ruiz v. Gap, Inc.*, 622
3 F. Supp. 2d 908, 915 (N.D. Cal. 2009) *aff'd*, 380 F. App'x 689 (9th Cir. 2010) ("Ruiz
4 cannot meet California's standard for recovery of monitoring costs because he has
5 presented no evidence that there was a significant exposure of his personal information,
6 and he has presented no evidence that he has become a victim of identity theft.").

7 Here, Plaintiff Howe has not met this high burden because has not alleged any
8 instances of identity theft resulting from the intrusion. *See Kahle v. Litton Loan*
9 *Servicing, LP*, 486 F. Supp. 2d 705, 709 (S.D. Oh. 2007) (stating that the recovery of
10 credit monitoring services as a measure of cognizable damages is a question of law to be
11 decided by the court). Although Howe alleges that he was forced to close two bank
12 accounts, Howe does not allege when he closed these accounts, why he closed these
13 accounts, or whether he has ever been a victim of identity theft in the past. (FACC ¶ 22.)
14 These allegations remain unchanged even though Plaintiffs were permitted leave to
15 amend the Consolidated Complaint after Sony's initial motion to dismiss. Therefore, in
16 accordance with analogous medical monitoring cases and data breach cases from other
17 districts, the Court finds Howe has failed to allege that his prophylactic credit monitoring
18 costs were a reasonable foreseeable result of Sony's alleged breach.²⁰

19
20 ²⁰ *See, e.g., Kahle*, 486 F. Supp. 2d at 713 (stating that "without direct evidence
21 that the information was accessed or specific evidence of identity fraud" credit
22 monitoring costs are not recoverable in negligence); *Forbes v. Wells Fargo Bank, N.A.*,
23 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006) (granting summary judgment for the
24 defendant because the plaintiff failed to establish the damages element, stating that credit
25 monitoring fees in the absence of a present threat of identity theft did not suffice);
26 *Shafran v. Harley-Davidson, Inc.*, No. 07 CIV. 01365 (GBD), 2008 WL 763177, at *3
27 (S.D.N.Y. Mar. 20, 2008) ("Courts have uniformly ruled that the time and expense of
28 credit monitoring to combat an increased risk of future identity theft is not, in itself, an
injury that the law is prepared to remedy."); *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1326
(11th Cir. 2012) (finding that the plaintiffs' allegations of identify theft crossed the line
from "possible to probable" because the plaintiffs alleged that prior to the data breach
they had never experienced any instances of identity theft, and always took the utmost
precautions to kept their confidential information private); *Pinero v. Jackson Hewitt Tax*
Serv. Inc., 594 F. Supp. 2d 710, 718 (E.D. La. 2009) ("Numerous courts have held that
expenses related to credit monitoring to guard against future identity theft are not
compensable damages."); *Giordano v. Wachovia Sec., LLC*, No. 06-476 JBS, 2006 WL
2177036, at *3 (D.N.J. July 31, 2006) ("In all three cases, the district courts has held
that, because the plaintiff's injuries were solely the result of a perceived risk of future

1 Third, with respect to damages relating to an alleged diminution in value of
2 Plaintiffs' Consoles, Plaintiffs have once again failed to allege enough facts for the Court
3 to adequately access the plausibility of the claim. *See Balistreri v. Pacifica Police Dep't*,
4 901 F.2d 696, 699 (9th Cir. 1988) (stating that dismissal can be based on the lack of a
5 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
6 theory). As stated in the Court's prior order, without allegations that Plaintiffs are using
7 their Consoles less as a result of the intrusion, or have reported problems with their
8 Consoles after the intrusion, Plaintiffs' allegations of diminution in value fail to allege
9 how Plaintiffs have suffered an appreciable, non-speculative harm. *See Aguilera v.*
10 *Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1015 (9th Cir. 2000). Although the FACC
11 attempts to bolster the allegations in the Consolidated Complaint by alleging that
12 Plaintiffs' Consoles diminished in value as a result of Sony's failure to secure their
13 Personal Information and/or the brief interruption in PSN access, none of these addi-
14 tional allegations support a claim that is "plausible on its face." *Bell Atl. Corp. v.*
15 *Twombly*, 550 U.S. 544, 547 (2007). As stated by countless courts considering this
16 issue, subjective allegations that a product has diminished in value are insufficient. *See,*
17 *e.g., Arcand v. Brother Int'l Corp.*, 673 F. Supp. 2d 282, 301 (D.N.J. 2009) ("In evaluat-
18 ing whether a plaintiff has suffered an ascertainable loss, the Court need not countenance
19 'hypothetical or illusory' losses or the wholly subjective expectations of a consumer.");
20 *See In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1064 (N.D. Cal. 2012)
21 ("Purely economic damages to a plaintiff which stem from disappointed expectations
22 from a commercial transaction must be addressed through contract law; negligence is not
23 a viable cause of action for such claims.").

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26 injury, plaintiff had failed to show a present injury or reasonably certain future injury to
27 support damages for any alleged increased risk of harm."); *Holmes v. Countrywide Fin.*
28 *Corp.*, No. 5:08-CV-00205-R, 2012 WL 2873892, at *14 (W.D. Ky. July 12, 2012)
("Oregon's highest court held that credit monitoring expenses did not fall within the
meaning of 'ascertainable loss' since 'the expenditure [was] not based on any present
harm to plaintiffs' economic interests.' ") (internal citations and quotations omitted).
Although these cases are only persuasive, the elements required to state a claim for
negligence are similar regardless of the jurisdiction.

1 Therefore, at this stage in the proceedings, although Plaintiffs are not required to
2 come forward with evidence to support their allegations, Plaintiffs must set forth a
3 plausible claim for relief. Plaintiffs have not done that here. *See In re iPhone Applica-*
4 *tion Litig.*, 844 F. Supp. 2d at 1064 (“All of the allegations of harm identified in the
5 Amended Consolidated Complaint are either too speculative to support a claim for
6 negligence under California law, or they stem from disappointed expectations from a
7 commercial transaction and thus do not form the basis of a negligence claim.”). Instead,
8 after over two years of motion practice conducted by highly sophisticated counsel,
9 Plaintiffs have alleged nothing more than economic damages relating to “disappointed
10 expectations from a commercial transaction,” all of which “must be addressed through
11 contract law.” *Id.* “[N]egligence is not a viable cause of action for such claims,” and the
12 Court will not allow expensive, potentially burdensome class action discovery to ensue
13 in the absence of a viable cause of action. *See Twombly*, 550 U.S. at 558 (deficiencies in
14 the complaint “should be exposed at the point of minimum expenditure of time and
15 money by the parties and the court” given the prospect of costly discovery); *Grigsby v.*
16 *Valve Corp.*, No. C12-0553JLR, 2012 WL 5993755, at *4–6 (W.D. Wash. Nov. 14,
17 2012) (stating that the *Twombly* pleading standard is particularly demanding in “com-
18 plex, large-scale” data breach class action litigation). Accordingly, the Court finds the
19 third *J’Aire* factor weighs against finding a special relationship between the parties.

20 Plaintiffs’ allegations with respect to the remaining *J’Aire* factors fare no better.
21 With regard to the first factor, the extent to which the transaction was intended to affect
22 the plaintiff, the Court finds Plaintiffs have failed to allege why the transactions at issue
23 were intended to affect Plaintiffs “in a way particular to [them], as opposed to all
24 potential” consumers. *Greystone Homes*, 168 Cal. App. 4th at 1231 (stating that the
25 “*J’Aire* test was not met because the sink sales at issue were like any other sink sale
26 made by the product manufacturer—i.e., the product manufacturer had not specially
27 made the sink for the benefit of the [plaintiffs]”). Therefore, as noted by countless
28 California courts applying *J’Aire*, “[i]f a duty of care to avoid economic injury existed

1 [in every contract], every manufacturer would become an insurer, potentially forever,
2 against economic loss from negligent defects in a product used for its intended purpose.”
3 *Fieldstone Co. v. Briggs Plumbing Prods., Inc.*, 54 Cal. App. 4th 357, 368–69 (Cal. Ct.
4 App. 1997); *see also Ott v. Alfa-Laval Agri, Inc.*, 31 Cal. App. 4th 1439, 1455 (Cal. Ct.
5 App. 1995) (“First, neither the pleadings nor the evidence suggests the 1970 milking
6 system was ‘intended to affect’ the plaintiffs in any way particular to the plaintiffs, as
7 opposed to all potential purchasers of the equipment.”); *Greystone*, 168 Cal. App. 4th at
8 1230–31. Therefore, because Plaintiffs have failed to allege that Sony developed the
9 goods and services at issue for Plaintiffs’ specific benefit, above and beyond what was
10 offered to all consumers, the Court finds this factor weighs against imposing a special
11 relationship between the parties.

12 With regard to the second factor, the foreseeability of harm, the Court finds, as it
13 did above, that Plaintiffs’ injuries were not a foreseeable result of Sony’s alleged
14 negligence. As to the fourth factor, the closeness of the connection between the defen-
15 dant’s conduct and the injury suffered, the Court finds Plaintiffs have sufficiently alleged
16 a connection between Sony’s conduct and the brief interruption in PSN access. Finally,
17 with regard to fifth and sixth factors, the moral blame attached to Sony’s conduct and the
18 policy of preventing future harm, the Court finds Plaintiffs have alleged that Sony knew
19 of its security vulnerabilities and that imposing liability might influence other businesses
20 to take the necessary precautions. Thus, these factors also weigh in favor of Plaintiffs.

21 However, after collectively considering the *J’Aire* factors, the Court finds
22 Plaintiffs have failed to allege a “special relationship” that would allow Plaintiffs to
23 recover purely economic losses unaccompanied by physical injury or property damage.
24 *See, e.g., Carrau v. Marvin Lumber and Cedar Co.*, 93 Cal. App. 4th 281, 295 (2001)
25 (barring recovery for the diminished value of a house in which defective windows were
26 installed under the economic loss rule); *Anthony v. Kelsey-Hayes Co.*, 25 Cal. App. 3d
27 442, 446 (Cal. Ct. App. 1972) (denying loss of bargain damages in negligence).
28 Accordingly, the Court GRANTS Sony’s motion to dismiss the California negligence

1 claims based on the economic loss doctrine without leave to amend. *See Leadsinger,*
2 *Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008).

3 **B. Negligent Misrepresentation /Innocent Misrepresentation/Negligent**
4 **Omission**

5 Plaintiffs assert negligent misrepresentation claims under Florida law (Count 9),
6 Massachusetts law (Count 15), Michigan law (Count 19), New Hampshire law (Count
7 31), Ohio law (Count 42), and Texas law (Count 47), an innocent misrepresentation
8 claim under Michigan law (Count 20), and a negligent omission claim under Missouri
9 law (Count 26). (FACC ¶¶ 234-238, 271-275, 300-304, 305-309, 346-354, 383-387,
10 446-450, 479-483.) Although there are slight differences between the required elements
11 for each claim, each claim essentially requires Plaintiffs to allege that: (1) they relied
12 upon a material misrepresentation made by Sony; and (2) that the misrepresentation
13 resulted in a subsequent pecuniary loss.²¹ Sony contends Plaintiffs have failed in both
14 respects, and independently moves to dismiss the Ohio negligent misrepresentation claim
15 and the Missouri negligent omission claim. The Court first addresses Sony’s individual
16 grounds for dismissing the Ohio and Missouri claims, and then addresses Sony’s global
17 arguments for dismissing the remaining negligent misrepresentation claims.²²

18 **1. Ohio and Missouri Claims**

19 First, Sony contends the Ohio negligent misrepresentation claim should be
20 dismissed because Ohio only recognizes the claim if the alleged misrepresentation was

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22 ²¹ *See, e.g., Baggett v. Electricians Local 915 Credit Union*, 620 So. 2d 784, 786
(Fla. Dist. Ct. App. 1993) (Florida negligent misrepresentation claim); *O’Connor v.*
23 *Merrimack Mut. Fire Ins. Co.*, 897 N.E.2d 593, 600 (Mass. App. Ct. 2008)
(Massachusetts negligent misrepresentation claim); *MacDonald v. Thomas M. Cooley*
24 *Law Sch.*, 880 F. Supp. 2d 785, 799 (W.D. Mich. 2012) *aff’d*, 724 F.3d 654 (6th Cir.
2013) (Michigan negligent misrepresentation claim); *State-William P’ship v Gale*, 425
25 N.W.2d 756, 761 (Mich. Ct. App. 1988) (Michigan innocent misrepresentation claim);
Snierson v. Scruton, 761 A.2d 1046, 1049–50 (N.H. 2000) (New Hampshire negligent
26 misrepresentation claim); *Smith v. Tilton*, 3 S.W.3d 77, 86 (Tex. 1999) (Texas negligent
misrepresentation claim).

27 ²² Neither party addressed the Court’s tentative ruling at oral argument, which
28 stated that each of the misrepresentation and omission claims were subject to dismissal
without leave to amend based on Plaintiffs failure to allege a cognizable injury and/or
because the Ohio claim does not apply to consumer transactions. (Doc. No. 157.)

1 made for the guidance of others in the course of a business transaction. To support this
2 contention, Sony relies on *Doe v. SexSearch.com* and *Thornton v. State Farm Mutual*
3 *Auto Insurance Company*.²³ Although Plaintiffs attempt to distinguish *Doe* and *Thorn-*
4 *ton*, Plaintiffs fail to cite any case law to the contrary and the Court finds their attempts
5 only bolster Sony’s contentions.

6 Under Ohio law, a “defendant is liable for negligent misrepresentation if he: (1)
7 supplies false information (2) for the guidance of others in their business transaction (3)
8 causing pecuniary loss to the plaintiff (4) while the plaintiff justifiably relied upon the
9 information and (5) the defendant failed to exercise reasonable care or competence in
10 obtaining or communicating the information.” *Doe*, 551 F.3d at 418. Here, Plaintiffs
11 fail to satisfy the second element. As set forth in the FACC, Plaintiff Wright alleges that
12 he registered for the PSN and SOE networks to play games and stream prepaid media
13 from Netflix, both of which were presumably for personal and not business purposes.
14 *See, e.g., Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 505 (6th Cir. 2003) (acknowl-
15 edging the distinct nature of a negligent misrepresentation claim under Ohio law);
16 *Thornton*, 2006 WL 3359448, at *16 (“The Ohio Supreme Court is unequivocal that
17 negligent misrepresentation is a business tort related to professional malpractice.”).
18 Accordingly, because Plaintiffs do not allege that Wright registered for the PSN or SOE
19 networks for business purposes, the Court GRANTS Sony’s motion to dismiss the Ohio
20 negligent misrepresentation claim without leave to amend.

21 Second, citing *Moore v. U.S. Bank* and *Lowdermilk v. Vescovo Building & Realty*
22 *Company*, Sony contends the Missouri negligent omission claim should be dismissed
23 because Missouri does not recognize such a claim.²⁴ Although Plaintiffs do not offer an
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25 ²³ *Doe v. SexSearch.com*, 551 F.3d 412, 418 (6th Cir. 2008); *Thornton v. State*
26 *Farm Mut. Auto Ins. Co.*, No. 1:06-cv-00018, 2006 WL 3359448, at *16 (N.D. Ohio
27 Nov. 17, 2006).

28 ²⁴ *Moore v. U.S. Bank, N.A.*, No. 4:07CV205 HEA, 2008 WL 3164936, at *7 (E.D.
Mo. Aug. 4, 2008); *Lowdermilk v. Vescovo Bldg. & Realty Co.*, 91 S.W.3d 617, 630
(Mo. Ct. App. 2002) (“Plaintiffs have not cited any authority that establishes a cause of
action for negligent omission.”).

1 opposition to Sony’s contentions, possibly because Sony’s arguments were relegated to a
2 footnote, the Court finds further briefing on the issue unnecessary. Missouri does not
3 recognize a separate cause of action for negligent omission; rather a plaintiff may plead
4 omissions as the basis for a negligence claim. *See, e.g., Govero v. Standard Oil Co.*, 192
5 F.2d 962, 964 (8th Cir. 1951); *City of Kennett v. Wartsila N. Am., Inc.*, No. 4:05CV114
6 HEA, 2005 WL 3274334, at *3 (E.D. Mo. Dec. 2, 2005). Accordingly, the Court
7 GRANTS Sony’s motion to dismiss the Missouri negligent omission claim without leave
8 to amend. *See In re Gen. Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 174 F.R.D.
9 444, 446 (E.D. Mo. 1997) *aff’d sub nom. Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th
10 Cir. 1999) (stating that a court does not “abuse its discretion in refusing to allow
11 amendment of pleadings to change the theory of a case if . . . no valid reason is shown
12 for the failure to present the new theory at an earlier time”).

13 **2. Remaining Negligent Misrepresentation Claims**

14 In addition to the arguments set forth above, Sony contends the remaining
15 misrepresentation claims should be dismissed because Plaintiffs have failed to: (1)
16 specify the actual misrepresentations upon which they relied; and (2) allege a pecuniary
17 loss resulting from Plaintiffs’ reliance on the actionable misrepresentation. To the extent
18 the Court finds Plaintiffs have sufficiently stated a claim, Sony also contends that the
19 Michigan, New Hampshire, and Texas misrepresentation claims are barred by the
20 economic loss doctrine.

21 **a. Actual Misrepresentations**

22 First, Sony contends the Florida, Massachusetts, Michigan, New Hampshire, and
23 Texas misrepresentation claims should be dismissed because Plaintiffs have failed to
24 allege actionable misrepresentations in compliance with Rule 9(b). Specifically, Sony
25 argues the Florida, Massachusetts, and Texas claims should be dismissed because
26 Plaintiffs have failed to identify what “advertising, packaging, and correspondence” the
27 alleged misrepresentations were contained in, and the Florida and Texas claims should
28 be dismissed because Plaintiffs have failed to identify how the alleged misrepresenta-

1 tions were “reiterated and disseminated by the officers, agents, representatives, servants,
2 or employees of Defendants acting within the scope of their authority.” (FACC ¶¶ 232,
3 272, 384, 480, 235, 480.)

4 Although Sony raises valid arguments, the Court finds Plaintiffs have sufficiently
5 alleged the specific representations they contend were false and/or misleading when
6 made (representations regarding reasonable security and industry-standard encryption),
7 and that these representations were contained in the PSN and SOE User Agreements
8 and/or Privacy Policies, both of which were presented to Plaintiffs at the time they
9 registered for the PSN or SOE network. Therefore, Plaintiffs have sufficiently alleged
10 actionable misrepresentations in compliance with Rule 9(b). However, Plaintiffs
11 allegations regarding the dissemination of these alleged misrepresentations by the
12 officers, employees, and/or representatives of Sony do not satisfy Rule 9(b). Neither the
13 FACC nor Plaintiffs’ opposition supports these allegations with the required specificity.
14 *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007) (“Rule 9(b) does not allow
15 a complaint to merely lump multiple defendants together but ‘require[s] plaintiffs to
16 differentiate their allegations when suing more than one defendant . . . and inform each
17 defendant separately of the allegations surrounding his alleged participation in the
18 fraud.’ ”) (citing *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F. Supp. 1437, 1439 (M.D.
19 Fla. 1998)). Accordingly, the Court finds Plaintiffs have sufficiently alleged actionable
20 misrepresentations in compliance with Rule 9(b), but have failed to sufficiently allege
21 how these misrepresentations were “reiterated and disseminated by the officers, agents,
22 representatives, servants, or employees of Defendants acting within the scope of their
23 authority.”

24 **b. Pecuniary Loss Flowing From Plaintiffs’ Reliance on the**
25 **Alleged Misrepresentations**

26 Sony also contends that Plaintiffs have failed to allege a pecuniary loss flowing
27 from the alleged negligent misrepresentations. The Court agrees. First, with respect to
28 the Florida and Michigan negligent misrepresentation claims, Plaintiffs allege they

1 would not have registered with Sony Online Services or sent their Personal Information
2 to Sony had they known the truth regarding Sony’s network security. (FACC ¶¶ 234-
3 238, 300-304.) However, as stated above, because Plaintiffs’ Personal Information does
4 not have independent monetary value, registration and use of Sony Online Services was
5 provided to consumers free of charge, and none of the Plaintiffs allege that they paid for
6 premium PSN services, the Court finds Plaintiffs have failed to allege a pecuniary loss
7 caused by Sony’s alleged misrepresentations. *See Doe v. Chao*, 540 U.S. 614, 625
8 (2004) (finding that a plaintiff must allege an “actual, quantifiable, pecuniary loss” to
9 state a cause of action in tort); *In Burrows v. Purchasing Power, LLC*, No.
10 1:12-cv-22800-UU, 2012 WL 9391827, at *3 (S.D. Fla. Oct. 18, 2012) (“Personal data
11 does not have an apparent monetary value that fluctuates like the price of goods or
12 services.”); *Sipes v. Kinetra, LLC*, 137 F. Supp. 2d 901, 910 (E.D. Mich. 2001) (requir-
13 ing a resulting damage to the plaintiff). Accordingly, the Court finds the Florida and
14 Michigan negligent misrepresentation claims fail to allege a pecuniary loss.

15 The same is true with respect to the Massachusetts, New Hampshire, and Texas
16 negligent misrepresentations claims and the Michigan innocent misrepresentation claim.
17 (FACC ¶¶ 271-275, 305-309, 383-387, 446-450.) Each claim alleges that Plaintiffs
18 would not have purchased their Consoles, Sony Online Services, and/or registered for
19 Sony Online Services, or paid as much for these products or services, had they known
20 the truth regarding Sony’s network security. However, as set forth above, Sony Online
21 Services was provided free of charge, and none of the Plaintiffs allege they paid for
22 premium PSN services. Moreover, and even more detrimental to Plaintiffs’ claims,
23 although Plaintiffs allege that they would not have purchased their Consoles “but for”
24 Sony’s alleged misrepresentations, Plaintiffs concede that they base their misrepresenta-
25 tion claims on statements contained in the PSN User Agreement and/or the PSN Privacy
26 Policy, both of which were presented to Plaintiffs “after” they purchased their Consoles.
27 Therefore, the Court finds Plaintiffs cannot plausibly allege that the misrepresentations
28 contained in these agreement induced them to purchase their Consoles. Accordingly, the

1 Court finds the Massachusetts, New Hampshire, and Texas negligent misrepresentations
2 claims and the Michigan innocent misrepresentation claim each fail to allege a pecuniary
3 loss.

4 Accordingly, the Court GRANTS Sony's motion to dismiss the Florida, Massa-
5 chusetts, Michigan, New Hampshire, and Texas negligent misrepresentations claims and
6 the Michigan innocent misrepresentation claim. Because the Court's prior order
7 highlighted the deficiencies noted above, dismissal is without leave to amend. *See*
8 *Foman v. Davis*, 371 U.S. 178, 182 (1962) (stating leave to amend need not be given
9 when the party has been given prior opportunities to cure deficiencies).

10 **C. Breach of Warranty Claims**

11 Plaintiffs assert breach of warranty claims under Florida law (Count 7), Michigan
12 law (Count 17), Missouri law (Count 24), New Hampshire law (Count 29), New York
13 law (Count 34), Ohio law (Counts 40-41), and Texas law (Count 45). (FACC ¶¶ 222-
14 227, 288-293, 334-339, 404-409, 371-376, 441-445, 467-472, 436-440.) Each claim
15 essentially asserts the same factual basis for relief—Sony made affirmations of fact
16 and/or promises to consumers regarding the adequacy and performance of Sony's
17 network security, and subsequently breached these promises by failing to provide
18 adequate network security to protect Plaintiffs' Personal Information.

19 Sony moves to dismiss each warranty claim on the basis that: (1) the choice-of-law
20 provisions in the PSN and SOE User Agreements, upon which Plaintiffs base their
21 claims, require any and all claims arising out of the agreements to be brought under
22 California law; (2) Plaintiffs have failed to allege a cognizable injury; (3) Plaintiffs have
23 failed to plead reliance; (4) Plaintiffs have failed to demonstrate that an express warranty
24 has been breached; and (5) Plaintiffs cannot recover consequential, incidental, or special
25 damages pursuant to limitation of damages clauses contained in the agreements.

26 Because the Court finds the choice-of-law clauses in the PSN and SOE User Agreements
27 require Plaintiffs to bring their breach of warranty claims under California law, which
28

1 Plaintiffs have not done, the Court does not addresses Sony’s remaining arguments for
2 dismissal.²⁵

3 **1. Choice-of-Law Analysis**

4 Sony contends each breach of warranty claim should be dismissed pursuant to the
5 choice-of-law clauses in the PSN and SOE User Agreements because the agreements
6 specify that any and all claims arising under the agreements must be brought under
7 California law. (Doc. No. 94-2, Ex. A, SNE User Agreement; Doc. No. 135-2, Ex. 1,
8 SOE User Agreement.) Sony further argues judicial estoppel supports this argument
9 because Plaintiffs previously relied on the PSN and SOE User Agreements to support
10 their UCL, FAL, and CLRA claims, and therefore can not now elect to contest the
11 applicability of these agreements. (Doc. No. 78 ¶ 116; FACC ¶ 145). In response,
12 Plaintiffs do not specifically address the applicability of the choice-of-law clauses,
13 rather, Plaintiff argue that judicial estoppel does not bar their claims because they never
14 asserted California breach of warranty claims, and they did not previously “achieve
15 success” with regard to their UCL, FAL, and CLRA claims. The Court finds Plaintiffs’
16 judicial estoppel arguments fail to address the dispositive issue before the Court—the
17 applicability and enforceability of the choice-of-law provisions.

18 In pertinent part, the PSN User Agreement states: “Except as otherwise required
19 by applicable law, this Agreement shall be construed and interpreted in accordance with
20 the laws of the State of California applying to contracts fully executed and performed
21 within the State of California.” (Doc. No. 94-2, Ex. A at 9.) Similarly, the SOE User
22 Agreement states: “This Agreement is governed in all respects by the substantive laws of
23 the State of California and of the United States of America.” (Doc. No. 135-2, Ex. 1 at
24 32.) Therefore, based on the unambiguous language set forth above, the Court finds
25 each of Plaintiffs’ breach of warranty claims is potentially subject to dismissal under the
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28 ²⁵ Only Sony addressed the Court’s tentative ruling at oral argument, requesting
that each warranty claim be dismissed without leave to amend.

1 choice-of-law clauses, subject only to the enforceability of the provisions under applica-
2 ble law. *See, e.g., Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 485 (N.D. Cal. 2011).

3 To determine the enforceability of the choice-of-law clauses in the PSN and SOE
4 User Agreements, the Court employs a two-step process. First, the Court must decide
5 which forum's choice-of-law rules apply; and second, the Court must decide whether the
6 choice-of-law clauses are enforceable in each of the selected forum(s). Under the first
7 determination, courts generally apply the choice-of-law rules of the forum in which the
8 action is currently pending, which in this case would be California. *See Klaxon Co. v.*
9 *Stentor Elec. Mfg., Co.*, 313 U.S. 487, 496 (1941). However, because the JPML
10 transferred the instant litigation to this Court pursuant to 28 U.S.C. § 1407, the Court
11 must apply the choice-of-law rules of each state where the individual actions were
12 originally filed. (Doc. No. 1.) *See, e.g., In re Toyota Motor Corp. Unintended Accelera-*
13 *tion Mktg., Sales Practices, & Prods. Liab. Litig.*, 785 F. Supp. 2d 925, 929 (C.D. Cal.
14 2011) (stating that although the cases in multidistrict litigation are before one court in
15 one jurisdiction, they have been "effectively consolidated for pretrial purposes, the cases
16 retain separate and distinct identities in preparation for their eventual return to their
17 home states."); *In re Nucorp Energy Sec. Litig.*, 772 F.2d 1486, 1492 (9th Cir. 1985).
18 Although this would normally be an arduous task, properly conducted by the parties
19 rather than the Court, the Court finds further briefing on the issue unnecessary. Each of
20 the cases filed by the eleven named Plaintiffs were originally filed in California.²⁶

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23 ²⁶ *Lieberman v. Sony Computer Entm't Am. LLC, et al.*, No. 11-cv-1920 AJB-
24 MDD, originally filed on May 4, 2011 in the Northern District of California as Case No.:
25 11-cv-2197; *Schucher v. Sony Computer Entm't Am. LLC, et al.*, No. 11-cv-1105 AJB-
26 MDD, originally filed on May 19, 2011 in the Southern District of California; *Rebecca*
27 *Mitchell v. Sony Computer Entm't Am. LLC, et al.*, No. 11-cv-1785 AJB-MDD,
28 originally filed on April 27, 2011 in the Central District of California as Case No.: 11-
cv-3601; *Munsterman v. Sony Computer Entm't Am. LLC, et al.*, 11-cv-1179 AJB-MDD,
originally filed on May 31, 2011 in the Southern District of California; *McKewon et al v.*
Sony Network Entm't Am. LLC, et al., No. 11-cv-1911 AJB-MDD, originally filed on
May 3, 2011 in the Northern District of California. Plaintiffs Whyland, Kallad, and
Wright were all added as Plaintiffs for the first time at the filing of the FACC on
December 10, 2012. (Doc. No. 128.)

1 Accordingly, the Court employs California choice-of-law rules to determine the
2 enforceability of the provisions.

3 **a. Enforceability Under California Law**

4 In deciding whether to enforce a contractual choice-of-law provision, California
5 applies the Restatement (Second) Conflict of Laws Section 187, “which reflects a strong
6 public policy favoring enforcement of such provisions.” *ABF Capital Corp. v. Osley*,
7 414 F.3d 1061, 1065 (9th Cir. 2005) (quoting *Hambrecht & Quist Venture Partners v.*
8 *Am. Med. Int’l, Inc.*, 38 Cal. App. 4th 1532, 1544 (Cal. Ct. App. 1995)). Under Section
9 187, a court must first determine: “(1) whether [California] has a substantial relationship
10 to the parties or the transaction, or (2) whether there is any other reasonable basis for the
11 parties’ choice-of-law.” *ABF Capital Corp.*, 414 F.3d at 1066; *see also Nedlloyd Lines*
12 *B.V. v. Super. Ct.*, 3 Cal. 4th 459, 465 (Cal. 1992). If the court finds either condition has
13 been met, California law will apply unless it is contrary to a fundamental policy of the
14 state selected by the aggrieved party. *Nedlloyd*, 3 Cal. 4th at 466.

15 Here, although neither party analyzed whether the choice-of-law clauses in the
16 PSN and SOE User Agreements are enforceable under Section 187, the allegations set
17 forth in the FACC are sufficient to enable the Court to make this determination without
18 further briefing. The FACC alleges that: (1) SCEA is a Delaware limited liability
19 company with its principal place of business in Foster City, California, (FACC ¶ 30); (2)
20 SNEA is a Delaware corporation that conducts business in California, (*Id.* at ¶ 31); (3)
21 SNEI is a Delaware limited liability company with its principal place of business in Los
22 Angeles, California, (*Id.* at ¶ 32); and (4) SOE is a Delaware limited liability company
23 that has its principal place of business in Terman Court, San Diego, (*Id.* at ¶ 33).
24 Therefore, because three of the four Sony Defendants (SCEA, SNEI, and SOE) have
25 their principal place of business in California and the remaining Sony Defendant (SNEA)
26 conducts business in the state of California, the Court finds California has a substantial
27 relationship to the parties. *See, e.g., Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318,
28 1323 (9th Cir. 2012) (“A substantial relationship exists where one of the parties is

1 domiciled or incorporated in the chosen state.”); *PAE Gov’t Servs., Inc. v. MPRI, Inc.*,
2 514 F.3d 856, 860 (9th Cir. 2007) (finding Virginia had a substantial relationship to one
3 of the parties because the party had its principal place of business in Virginia).

4 Finding the first condition met, i.e., that California has a substantial relationship to
5 the parties, the Court next determines whether California express warranty law is
6 contrary to a fundamental policy of Florida, Michigan, Missouri, New York, New
7 Hampshire, Ohio, or Texas express warranty law. The Court finds no conflict. In order
8 to assert a claim for breach of warranty under California, Florida, Michigan, Missouri,
9 New York, New Hampshire, Ohio, or Texas law a plaintiff must allege that: (1) the seller
10 made a promise; (2) the buyer relied upon the seller’s promise; (3) the seller’s promise
11 later turned out to be false; and (4) the plaintiff suffered injury as a result.²⁷ Each state
12 also requires a buyer to provide notice to the seller before bringing a breach of warranty
13 claim.²⁸

14 Therefore, based on the above, the Court finds the choice-of-law clauses in the
15 PSN and SOE User Agreements enforceable and each of the warranty claims not alleged
16 under California law should be dismissed. Moreover, because Plaintiffs did not bring
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18 ²⁷ See, e.g., *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (Cal.
19 Ct. App. 1986); Cal. Uniform Commercial Code § 2313; *Dunham-Bush, Inc. v. Thermo-*
20 *Air Serv., Inc.*, 351 So. 2d 351, 353 (Fla. Dist. Ct. App. 1977); *Kenkel v. Stanley Works*,
21 665 N.W.3d 490, 496 (Mich. 2003); *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*,
22 322 S.W.3d 112, 122 (Mo. 2010); *Haag v. Hyundai Motor Am.*, No. 12-CV-6521L, 2013
23 WL 4812344, at *2 (W.D.N.Y. Sept. 10, 2013); *Kelleher v. Marvin Lumber & Cedar*
24 *Co.*, 152 N.H. 813, 853 (N.H. 2005); *Abele v. Bayliner Marine Corp.*, 11 F. Supp. 2d
25 955, 961 (N.D. Ohio 1997); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 587 (Tex.
26 App. 1987).

27 ²⁸ See, e.g., *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 380 (Cal. 1974)
28 (“The requirement of notice of breach is . . . designed to allow the defendant opportunity
for repairing the defective item, reducing damages, avoiding defective products in the
future, and negotiating settlements.”); *Moss v. Walgreen Co.*, 765 F. Supp. 2d 1363,
1368 (S.D. Fla. 2011) (requiring that the buyer provide the seller with pre-suit notice of
the breach); *Am. Bumper & Mfg. Co. v. Transtechnology Corp.*, 652 N.W.2d 252, 255
(Mich. Ct. App. 2002) (same); *Renaissance Leasing, LLC*, 322 S.W.3d at 122 (same);
Quinn v. Walgreen Co., No. 12 CV 8187(VB), 2013 WL 4007568, at *8 (S.D.N.Y. Aug.
7, 2013) (same); *Hookset Sch. Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 132 (D.N.H.
1984) (same); *Radford v. Daimler Chrysler Corp.*, 168 F. Supp. 2d 751, 754 (N.D. Ohio
2001) (same); *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 199 (Tex. App.
2003) (same).

1 express warranty claims under California law, did not address Sony’s contentions that a
2 California breach of express warranty claim would nonetheless fail as a matter of law,
3 and explicitly alleged that California law should be applied to each of their claims
4 pursuant to the PSN and SOE User Agreements (FACC ¶ 145), the Court GRANTS
5 Sony’s motion to dismiss each of the express warranty claims without leave to amend.
6 *See* Civ. L.R. 7.1.f.3.b (“The opposition shall contain a brief and complete statement of
7 all reasons in opposition to the position taken by the movant, an answering memorandum
8 of all points and authorities, and copies of all documentary evidence which the party in
9 opposition relies.”); *Missud v. Oakland Coliseum Joint Venture*, No.12-02967 JCS, 2013
10 WL 3286193, at *11 (N.D. Cal. June 27, 2013) (dismissing claim without leave to amend
11 on the basis that further amendment would be futile in light of the opposing parties
12 failure to address the moving parties’ arguments).

13 **D. Breach of Implied Warranty**

14 Plaintiffs’ breach of implied warranty claims can be categorized into two sub-
15 groups—common law claims and statutory claims. Plaintiffs assert common law implied
16 warranty claims under Florida law (Count 8), Michigan law (Count 18), Missouri law
17 (Count 25), and New York law (Count 35), (FACC ¶¶ 228-233, 294-299, 340-345, 410-
18 415), and statutory implied warranty claims under Massachusetts law (Count 12), New
19 Hampshire law (Count 30), and Texas law (Count 46), (*Id.* at ¶¶ 250-255, 377-382, 473-
20 478). Each common law implied warranty claim alleges that Sony impliedly represented
21 and warranted that Sony Online Services provided adequate network security, when in
22 fact, Sony knew its network security was inadequate and vulnerable to intrusion. (*Id.* at
23 ¶¶ 229-230, 295-296, 341-342, 411-412.) Similarly, each statutory implied warranty
24 claim alleges that by creating, marketing, and selling PS3s, PSPs, and Sony Online
25 Services, Sony impliedly represented and warranted that Sony Online Services and/or the
26 Network were merchantable, fit for their intended purposes, and provided adequate
27 security for Plaintiffs’ Personal Information. (*Id.* at ¶¶ 252, 378, 474.)
28

1 Sony moves to dismiss each implied warranty claim on the basis that: (1) Plaintiffs
2 have not alleged a cognizable injury; (2) the common law claims fail because there is an
3 express agreement between the parties governing the exact warranties at issue; (3) the
4 statutory claims fail because network services are not “goods” as defined under the
5 Uniform Commercial Code (“UCC”); and (4) the implied warranties were expressly
6 disclaimed and/or expressly limited by clear and conspicuous language in the PSN User
7 Agreement.²⁹ (Doc. No. 135 at 26-30.) The Court finds Sony’s second, third, and fourth
8 arguments fatal to Plaintiffs’ claims, and therefore does not address Sony’s remaining
9 argument.³⁰

10 1. Common Law Implied Warranties

11 First, Sony contends each common law implied warranty claim should be dis-
12 missed because implied terms are disfavored under common law where the parties have a
13 written agreement that covers the exact terms at issue. Therefore, Sony argues the
14 Florida, Michigan, Missouri, and New York implied warranty claims should be dis-
15 missed because they are based on the same factual allegations as Plaintiffs’ Florida,
16 Michigan, Missouri, and New York express warranty claims. (*Compare* FACC ¶¶ 229,
17 295, 341, 411 *with* ¶¶ 223, 289, 335, 405.) Assuming without deciding that Plaintiffs
18 would be permitted to pursue their implied warranty claims in the alternative to their
19 breach of express warranty claims, as set forth below, the Court finds Plaintiffs’ common
20 law implied warranty claims are subject to dismissal based on the disclaimer in the PSN
21 User Agreement and the PSN Privacy Policy. (Doc. No. 94, Ex. A at 9, PSN User
22 Agreement; Doc. No. 94, Ex. C at 4, PSN Privacy Policy.)

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25 ²⁹ Sony argued in its reply brief that Plaintiffs’ implied warranty claims were also
26 subject to dismissal based on the choice-of-law provision in the PSN User Agreement.
27 However, because Sony’s motion to dismiss did not present this contention the argument
28 is not properly before the Court. *See United States v. Romm*, 455 F.3d 990, 997 (9th Cir.
2006).

³⁰ Neither party addressed the Court’s tentative ruling at oral argument, which
stated that the implied warranty claims were subject to dismissal without leave to amend
based on the disclaimer in the PSN User Agreement. (Doc. No. 157.)

1 **2. Disclaimer of Implied Warranties**

2 Second, as a general rule, statutory and common law implied warranties can be
3 disclaimed by conspicuous language in a contract presented to the consumer at the time
4 of the transaction.³¹ Here, before registering for the PSN, each Plaintiff was required to
5 consent to the PSN User Agreement and the PSN Privacy Policy. (FACC ¶¶ 40, 56, 57.)
6 In pertinent part, the PSN User Agreement contained the following disclaimer:

7 **16. WARRANTY AND DISCLAIMER AND LIMITATION OF**
8 **LIABILITY**

9 No warranty is given about the quality, functionality, availability or perfor-
10 mance of Sony Online Services or any content or service offered on or
11 though Sony Online Services. All services and content are provided “AS
12 IS” and “AS AVAILABLE” with all fault. SNEA does not warrant that the
13 service and content will be uninterrupted, error-free or without delays. In
14 addition to the limitations of liability in merchantability, warranty of fitness
15 for a particular purpose and warranty of non-infringement, SCEA assumes
16 no liability for any inability to purchase, access, download or use any
17 content, data, or service.

18 (Doc. No. 94, Ex. A at 9.) Although not labeled as a disclaimer, the PSN Privacy Policy
19 contained similar admonitory language regarding the adequacy of Sony’s network
20 security:

21 **Accuracy & Security**

22 We take reasonable measures to protect the confidentiality, security, and
23 integrity of the personal information collected from our website visitors . . .
24 Unfortunately, there is no such thing as perfect security. As a result,
25 although we strive to protect personally identifying information, we cannot
26 ensure or warrant the security of any information transmitted to us through
27 or in connection with our websites, that we store on our systems or that is
28 stored on our service providers’ systems.

23 ³¹ See, e.g., *Belle Plaza Condo. Ass'n, Inc. v. B.C.E. Dev., Inc.*, 543 So. 2d 239, 240
24 (Fla. Dist. Ct. App. 1989) (“Moreover, it is equally clear that B.C.E. properly disclaimed
25 by a bold and conspicuous disclaimer any and all express or implied warranties.”);
26 *Rokicsak v. Colony Marine Sales & Serv., Inc.*, 219 F. Supp. 2d 810, 815 (E.D. Mich.
27 2002) (stating that Michigan law allows for the disclaimer of implied warranties); *Am.*
28 *Auto. Ins. Co. v. Omega Flex, Inc.*, No. 4:11CV00305 AGF, 2013 WL 2628658, at *16
(E.D. Mo. June 11, 2013) (same); *Kraft v. Staten Island Boat Sales, Inc.*, 715 F. Supp. 2d
464, 473 (S.D.N.Y. 2010) (same); N.H. Rev. Stat. Ann. § 382-A:2-316, comments
 (“[Section 2-316] . . . seeks to protect a buyer from unexpected and un-bargained
 language of disclaimer by denying effect to such language when inconsistent with
 language of express warranty and permitting the exclusion of implied warranties only by
 conspicuous language or other circumstances which protect the buyer from surprise.”);
 Tex. Bus. & Com. Code Ann. § 2.316 (same).

1 (Doc. No. 94, Ex. C at 4.) Based on the above, both parties agree that Florida, Michigan,
2 Missouri, New York, New Hampshire, and Texas law each allow a party to waive
3 implied warranties, but waiver of implied warranties is prohibited under Massachusetts
4 law.³²

5 **a. Florida, Michigan, Missouri, New York, New Hampshire,**
6 **and Texas Implied Warranty Claims**

7 Although the parties agree that Florida, Michigan, New York, New Hampshire,
8 and Texas law permit the waiver of implied warranties, the parties disagree over whether
9 the waiver was effective because it was made at the time Plaintiffs registered for the PSN
10 and not at the time Plaintiffs purchased their Consoles. To the extent the waiver is
11 ineffective, the parties also disagree over whether the limitation of damages provision is
12 unconscionable. (Doc. No. 94, Ex. A at 9.)

13 After a review of the parties' respective arguments, the Court finds the waiver
14 effective. Plaintiffs' contentions that the waiver was ineffective because it was made at
15 the time Plaintiffs registered for the PSN and not at the time Plaintiffs purchased their
16 Consoles is nonsensical, and representative of Plaintiffs' continued attempts to bootstrap
17 the purchase of a PSP or PS3 with registration for free PSN access. The FACC clearly
18 alleges that Sony breached both common and statutory implied warranties by represent-
19 ing and warranting that Sony Online Services and/or the Network would provide
20 adequate security for Plaintiffs' Personal Information, when in fact, Sony knew its
21 security was inadequate. (FACC ¶¶ 229, 295, 341, 378, 411, 474.) Thus, although
22 Plaintiffs try to allege that the disclaimer in the PSN User Agreement and/or the PSN
23 Privacy Policy was ineffective because it was not made at the time Plaintiffs purchased

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25 ³² Massachusetts is an exception to this general rule, enacting a provision that
26 renders void any attempt to disclaim an implied warranty of merchantability or fitness
27 for a particular purpose with regard to consumer goods. *See* Mass. Gen. Laws § 2-316A;
28 *Jacobs v. Yamaha Motor Corp., USA*, 649 N.E.2d 758, 761 (Mass. 1995) (“Any
language by which a manufacturer of consumer goods seeks to exclude or modify an
implied warranty of merchantability or of fitness for a particular purpose, or to limit the
consumer’s remedies for breach of those warranties, is unenforceable.”). Plaintiffs did
not specifically address Sony’s contentions that the common law claims could be
waived.

1 their Consoles, each implied warranty claim explicitly alleges that Sony Online Services
2 and/or the Network—not Plaintiffs’ Consoles—failed to function as warranted. (*Id.*)
3 This inconsistency in the FACC is further supported by the fact that Plaintiffs continue
4 to rely on representations and warranties contained in the PSN User Agreement and the
5 PSN Privacy Policy to support their claims, both of which were presented to Plaintiffs
6 after they purchased their Consoles and before registering for free PSN access. There-
7 fore, the Court finds the disclaimer effective because it was made at the time Plaintiffs
8 bargained for free PSN access. *See Bowdoin v. Showell Growers, Inc.*, 817 F.2d 1543,
9 1545, 1546 n.11 (11th Cir. 1987) (observing that courts generally hold pre-sale disclaim-
10 ers effective and collecting cases from state courts that conclude a post-sale disclaimer is
11 not effective).

12 Finding the disclaimer applicable, the Court now examines the language of the
13 disclaimer to determine the reach and effect of the disclaimer. As stated above, the PSN
14 User Agreement states that “[a]ll services and content are provided ‘AS IS’ and ‘AS
15 AVAILABLE’ with all faults.”³³ (Doc. No. 94, Ex. A at 9.) The disclaimer also states
16 that “any implied warranty of merchantability, warranty of fitness for a particular
17 purpose[,] and warranty of non-infringement” was expressly disclaimed. (*Id.*) Similarly,
18 the PSN Privacy Policy states that Sony does not “ensure or warrant the security of any
19 information” transmitted to Sony over the network. (Doc. No. 94, Ex. C at 6.)

20 Therefore, based on the disclaimer and admonitory language in the PSN User
21 Agreement and the PSN Privacy Policy, the Court finds the language clear and conspicu-
22 ous. Read in conjunction, both documents explicitly disclaimed any and all claims
23 arising under the implied warranty of merchantability, disclaimed any and all claims
24 arising under the implied warranty of fitness for a particular purpose, stated in all caps
25 that Sony Online Services would be provided “AS IS” and “AS AVAILABLE,” and
26 informed consumers that Sony was not warranting the security of consumer personal
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28 ³³ The Court does not consider the SOE User Agreement and SOE Privacy Policy because Plaintiffs did not bring an implied warranty claim under Ohio law.

1 information transmitted to Sony via the network. *See, e.g., Rudy's Glass Constr. Co. v.*
2 *E. F. Johnson Co.*, 404 So. 2d 1087, 1090 (Fla. Dist. Ct. App. 1981) (finding disclaimer
3 set forth in a separate paragraph titled "Disclaimer of Warranties" and in a larger or
4 contrasting font conspicuous); *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*, 509 F.2d
5 1043, 1047 (6th Cir. 1975) (applying Michigan law); *Chase Resorts, Inc. v.*
6 *Johns-Manville Corp.*, 476 F. Supp. 633, 638 (E.D. Mo. 1979) *aff'd*, 620 F.2d 203 (8th
7 Cir. 1980); *Commc'ns Grps., Inc. v. Warner Commc'ns, Inc.*, 527 N.Y.S.2d 341, 346
8 (N.Y. Civ. Ct. 1988); *Dana Commercial Credit Corp. v. Hanscom's Truck Stop, Inc.*, 679
9 A.2d 570, 571 (N.H. 1996); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Elec.*
10 *Corp.*, 844 F.2d 1174, 1183 (5th Cir. 1988) (applying Texas law). Accordingly, based
11 on the disclaimer in the PSN User Agreement and the PSN Privacy Policy, the Court
12 GRANTS Sony's motion to dismiss the Florida, Michigan, Missouri, New York, New
13 Hampshire, and Texas implied warranty claims without leave to amend.

14 **b. Massachusetts Implied Warranty Claim**

15 Finally, although the Massachusetts implied warranty claim cannot be disclaimed,
16 the claim is nonetheless subject to dismissal under the UCC. *See* Mass. Gen. Law § 2-
17 316A. Under Section 2 of the UCC, the implied warranty of merchantability and fitness
18 for a particular purpose only applies to "transactions in goods." Mass. Gen. Law § 2-
19 102. The UCC defines "Goods" as "all things . . . which are movable at the time of
20 identification to the contract for sale." Mass. Gen. Law § 2-105(1). The rendition of
21 services is not covered by Section 2. *See White v. Peabody Constr. Co.*, 434 N.E.2d
22 1015, 1021 (Mass. 1982). However, if a contract involves the sale of both goods and
23 services, the court must consider whether the predominant factor, thrust, or purpose of
24 the contract is: (1) "the rendition of [a] service, with goods incidentally involved (e.g.,
25 contract with artist for painting);" or (2) "is a transaction of sale, with labor incidentally
26 involved (e.g., installation of a water heater in bathroom)." *Bonebrake v. Cox*, 499 F.2d
27 951, 960 (8th Cir. 1974).

1 Here, Plaintiffs allege that by “creating, marketing, and selling PS3s, PSPs, and
2 Sony Online Services,” Sony “impliedly represented and warranted that the Network was
3 merchantable, fit for its intended purposes, and provided adequate security.” (FACC ¶
4 252.) Plaintiffs then define the “Network” as Sony’s computer systems, servers, and
5 databases. (*Id.* at ¶ 4.) Therefore, based on Plaintiffs’ own allegations, Plaintiffs allege
6 that the “Network,” i.e., Sony’s computer systems, servers, and/or databases were not
7 merchantable or fit for their intended purposes—not Plaintiffs’ Consoles. Thus, because
8 network services are not subject to the UCC because they are not physically “movable at
9 the time of identification to the contract,” nor could PSN access be considered a good
10 because it was offered free of charge, the Court finds Plaintiffs’ claim is barred by the
11 UCC.³⁴ Mass. Gen Law. § 2-105(1). Moreover, although Plaintiffs attempt to argue that
12 this was a mixed transaction, because the purchase of a Console was a necessary
13 prerequisite to obtain free PSN services, the Court is not persuaded. To the extent this
14 was a mixed transaction, the trust or purpose of the contract was to provide free PSN
15 access, with goods, i.e., the Console, incidentally involved. *See, e.g., Bonebrake*, 499
16 F.2d at 960; *Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp.*, 179 F.3d 523, 530
17 (7th Cir. 1999) (“As the party seeking the benefit of the UCC, Whiting bears the burden
18 of establishing that the predominant thrust of the transaction was for goods and only
19 incidentally for services.”).

20 Accordingly, based on the disclaimer in the PSN User Agreement, the admonitory
21 language in the PSN Privacy Policy, and Plaintiffs’ failure to show that their Massachu-
22 setts statutory implied warranty claim falls within the purview of the UCC, the Court
23 GRANTS Sony’s motion to dismiss the Florida, Michigan, Missouri, New York, New
24 Hampshire, Texas, and Massachusetts implied warranty claims without leave to amend.
25 *See Pedigo v. Cnty. of L.A.*, 24 F. App’x 779, 785 (9th Cir. 2001) (“[A] district court
26 does not abuse its discretion in denying leave to amend where the proposed amendment
27

28 ³⁴ As stated by Sony, and never once rebutted by Plaintiffs, the PSN is a free service and none of the Plaintiffs allege that they purchased premium PSN services.

1 would be futile or where the amended complaint would not withstand a motion to
2 dismiss.”).

3 **E. Unjust Enrichment Claims**

4 Plaintiffs assert unjust enrichment claims under Florida law (Count 10), Massa-
5 chusetts law (Count 13), Michigan law (Count 21), Missouri law (Count 23), New
6 Hampshire law (Count 32), New York law (Count 36), Ohio law (Count 39), and Texas
7 law (Count 48). (FACC ¶¶ 239-243, 256-261, 310-313, 329-333, 388-392, 416-420,
8 432-435, 484-488.) Each cause of action essentially alleges that Plaintiffs conferred
9 benefits on Sony by purchasing, registering with, and/or sending their Personal Informa-
10 tion to Sony Online Services, and that Sony was unjustly enriched in retaining revenues
11 derived from these benefits. (*Id.* at ¶¶ 240-241, 257, 259, 311-312, 330-331, 389-390,
12 433-434, 485-486.) Sony moves to dismiss each claim on the basis that: (1) Plaintiffs
13 cannot assert claims for unjust enrichment claims because an express contract governs
14 the same subject matter at dispute between the parties; and (2) Plaintiffs have failed to
15 allege a benefit conferred upon Sony that was wrongly retained.³⁵

16 In response, Plaintiffs contend their unjust enrichment claims are properly plead in
17 the alternative to their breach of contract claims. The Court, however, does not agree.
18 Under Florida, Massachusetts, Michigan, Missouri, New Hampshire, New York, Ohio,
19 and Texas law a plaintiff may not recover for unjust enrichment where a “valid, express
20 contract governing the subject matter of the dispute exists.” *Coghlan v. Wellcraft*
21 *Marine Corp.*, 240 F.3d 449, 454 (5th Cir. 2001) (applying Texas law).³⁶ Here, neither

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23 ³⁵ Neither party addressed the Court’s tentative ruling at oral argument, which
24 stated that each unjust enrichment claim was subject to dismissal without leave to amend
based on the existence of a valid contract between the parties. (Doc. No. 157.)

25 ³⁶ *See, e.g., Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697
26 (Fla. Dist. Ct. App. 2008) (stating that an “unjust enrichment claim is precluded by the
27 existence of an express contract concerning the same subject matter”); *Platten v. HG*
28 *Bermuda Exempted Ltd.*, 437 F.3d 118, 130 (1st Cir. 2006) (“Massachusetts law does not
allow litigants to override an express contract by arguing unjust enrichment.”); *Belle Isle*
Grill Corp. v. City of Detroit, 666 N.W.2d 271, 280 (Mich. Ct. App. 2003) (same);
Howard v. Turnbull, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010) (same); *Wilcox Indus.*
Corp. v. Hansen, 870 F. Supp. 2d 296, 308 & n.3 (D. N.H. 2012) (same); *Metro. Elec.*
Mfg. Co. v. Herbert Constr. Co., 583 N.Y.S.2d 497, 498 (N.Y. App. Div. 1992) (same);

1 party contests the validity of the PSN/SOE User Agreements and the PSN/SOE Privacy
2 Policies, and Plaintiffs rely on these exact agreements to support their allegations.
3 Therefore, because Plaintiffs do not argue that the agreements are somehow invalid or
4 otherwise unenforceable, Plaintiffs are not permitted to plead unjust enrichment as an
5 alternative to breach of contract claims.³⁷ Accordingly, the Court GRANTS Sony’s
6 motion to dismiss the Massachusetts, Texas, Florida, Missouri, New Hampshire, New
7 York, Ohio, and Michigan law unjust enrichment claims without leave to amend. *See*
8 *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003) (discussing futility
9 of amendment when considering whether to grant leave to amend).

10 **F. Consumer Protection Claims**

11 Plaintiffs assert consumer protection claims under the California Unfair Competi-
12 tion Law (“UCL”) (Count 1), the California False Advertising Law (“FAL”) (Count 2),
13 the California Consumer Legal Remedies Act (“CLRA”) (Count 3), the Florida Decep-
14 tive and Unfair Trade Practices Act (“FDUTPA”) (Count 6), the Michigan Consumer
15 Protection Act (“MCPA”) (Count 16), the Missouri Merchandising Practices Act
16 (“MMPA”) (Count 22), the New Hampshire Consumer Protection Act (“NHCPA”)
17 (Count 28), the New York Deceptive Practices Act (“NYDPA”) (Count 33), the Ohio

18
19 *Randolph v. New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1387 (6th Cir. 1975)
20 (applying Ohio law).

21 ³⁷ An unjust enrichment claim may only be pled in the alternative to a breach of
22 contract claim where one party asserts that the contract governing the dispute is invalid
23 or the contract does not cover the subject matter at issue. *See, e.g., In re Managed Care*
24 *Litig.*, 185 F. Supp. 2d 1310, 1337-38 (S.D. Fla. 2002); *Newman & Schwartz v. Asplundh*
25 *Tree Expert Co.*, 102 F.3d 660, 663 (2d Cir. 1996) (allowing unjust enrichment claim to
26 be pled in the alternative to a breach of contract claim under New York law because the
27 defendant disputed whether plaintiff, a non-party to the contract, was an intended
28 third-party beneficiary of the contract); *Ajuba Int’l, LLC v. Saharia*, 871 F. Supp. 2d 671,
692 (E.D. Mich. 2012) (allowing alternative pleading under Michigan law because it was
unclear if any of the contracts covered the subject matter at issue and the defendants
contested the validity of the contract); *Miami Valley Mobile Health Servs., Inc. v.*
ExamOne Worldwide, Inc., 852 F. Supp. 2d 925, 939 (S.D. Ohio 2012) (allowing
alternative pleading under Ohio law because the validity of the contract was not
conceded by defendants and it was possible that the court could later find one or more of
the contracts invalid); *Manicini Enters., Inc. v. Am. Exp. Co.*, 236 F.R.D. 695, 699 (S.D.
Fla. 2006) (allowing alternative pleading under Florida law because the existence of an
express contract between the parties had not yet been established).

1 Consumer Sales Practices Act (“OCSPA”) (Count 37), the Ohio Deceptive Trade
2 Practices Act (“ODTPA”) (Count 38), and the Texas Deceptive Trade Practices Act
3 (“TDTPA”) (Count 44). On October 24, 2013, the Court ordered supplemental briefing
4 on the FDUTPA, MCPA, MMPA, NHCPA, NYDPA, OCSPA, and the TDTPA causes of
5 actions. (Doc. No. 159.) Because consumer protection claims are a “creature of the state
6 in which they are fashioned,” the Court separately addresses the sufficiency of each
7 claim. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012).

8 **1. California Consumer Protection Claims**

9 Plaintiffs’ first three causes of action allege Sony violated California’s consumer
10 protection statutes—the UCL, the FAL, and the CLRA. (FACC ¶¶ 146-185.) Courts
11 often analyze these statutes together because they share similar attributes. *See, e.g.*,
12 *Paduano v. Am. Honda Motor Co.*, 169 Cal. App. 4th 1453, 1468–73 (Cal. Ct. App.
13 2009) (analyzing UCL and CLRA claims together); *Anunziato v. eMachines, Inc.*, 402 F.
14 Supp. 2d 1133, 1137 (C.D. Cal. 2005) (analyzing UCL and FAL together). The UCL
15 prescribes business practices that are “unlawful, unfair or fraudulent,” Cal. Bus. & Prof.
16 Code § 17200, the FAL prohibits the dissemination of any advertising “which is untrue
17 or misleading,” Cal. Bus. & Prof. Code § 17500, and the CLRA declares specific acts
18 and practices in the sale of goods or services to be unlawful, including making affirma-
19 tive misrepresentations or omissions regarding the “standard, quality, or grade” of a
20 particular good or service, Cal. Civ. Code § 1770(a). Under the UCL and FAL a plaintiff
21 may only recover restitution and injunctive relief, whereas a plaintiff’s recovery under
22 the CLRA is not so limited. *See In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130
23 (Cal. Ct. App. 2009) (UCL and FAL); Cal. Civ. Code § 1780(a)(1) (stating that the
24 CLRA allows actual and punitive damages). Sony moves to dismiss the UCL, FAL, and
25 CLRA claims on the basis that: (1) Plaintiffs do not have standing; (2) Plaintiffs have
26 failed to plead unlawful, unfair, deceptive, or unconscionable conduct; (3) Plaintiffs have
27 failed to plead any basis for restitution or injunctive relief under the UCL and FAL; and
28 (4) the CLRA is inapplicable to the transactions at issue. Each is discussed in turn.

1 were disclosed to third parties without their consent. Plaintiffs also allege that they lost
2 money or property under the CLRA because their Consoles diminished in value as a
3 result of: (1) Sony’s failure to secure their Personal Information; (2) the brief interrup-
4 tion in PSN services; and (3) the diminished value of products and services that could
5 not be accessed during the brief interruption in PSN service. Although the Court does
6 not readdress Plaintiffs’ previously dismissed contentions that their Personal Information
7 has independent monetary value, (Doc. No. 120 at 21:11-16), under the unusual circum-
8 stances presented here, the Court finds Plaintiffs’ amended allegations have satisfied the
9 standing requirement under the UCL, FAL, and CLRA based on Sony’s alleged omis-
10 sions at the point of purchase of Plaintiffs’ Consoles.

11 As an initial matter, neither party disputes that the PSN was offered to Plaintiffs
12 free of charge or that Plaintiffs registered for the PSN after acquiring their Consoles.
13 Nonetheless, the parties ardently dispute whether Plaintiffs have sufficiently alleged a
14 loss of money or property and/or harm that was “caused by” Sony’s alleged unfair
15 business practices or deceptive conduct. Throughout the FACC, Plaintiffs contend that
16 access to the PSN and the corresponding ability to access the Internet via their Consoles
17 was a key feature of Plaintiffs’ Consoles, and that had Sony disclosed that the PSN was
18 not reasonably secure and/or that Sony did not use industry-standard encryption to
19 secure Plaintiffs’ Personal Information, Plaintiffs would not have purchased their
20 Consoles and/or would not have paid as much for their Consoles.³⁸ In response, Sony
21 contends that Plaintiffs cannot plausibly allege that they relied on Sony’s alleged
22 misrepresentations because each of the alleged representations were contained in the

23
24 ³⁸ The FACC alleges that Sony represented and/or omitted material information
25 regarding the security of the PSN at the time Plaintiffs purchased or otherwise acquired
26 their Consoles. (FACC ¶¶ 18-28, 29; Doc. No. 146 at 19-20.) Plaintiffs further allege
27 that had they known that Sony did not utilize reasonable, adequate, or industry-standard
28 security measures to protect Plaintiffs’ Personal Information transmitted to Sony before
registering for the PSN, Plaintiffs, acting as reasonable consumers, would not have
purchased their PS3s, would not have paid the same amount for their PS3s, and/or would
not have provided their Personal Information to Sony. (FACC ¶ 29; Doc. No. 146 at
19:12-18.) Plaintiffs support these contentions by alleging that access to the PSN,
although a free service, was a key feature of PS3s, and a major factor in Plaintiffs’
decision to purchase a PS3. (FACC ¶¶ 40, 41, 167.)

1 PSN User Agreement and/or the PSN Privacy Policy, both of which were presented to
2 Plaintiffs after they purchased their Consoles. As a result, Sony argues the alleged
3 misrepresentations and/or deceptive conduct could not have plausibly caused Plaintiffs
4 harm.

5 Although the Court agrees with Sony, that Plaintiffs cannot plausibly rely on
6 alleged misrepresentations contained within the PSN User Agreement and/or the PSN
7 Privacy Policy, as these representations were presented to Plaintiffs after they purchased
8 their Consoles, Sony’s arguments fail to address Plaintiffs’ fraudulent omission conten-
9 tions. As set forth by the California Supreme Court in *Kwikset v. Superior Court*, 51
10 Cal. 4th 310, 323 (Cal. 2011), economic injury may result from unfair competition if a
11 plaintiff: “(1) surrender[s] in a transaction more, or acquire[s] in a transaction less[] than
12 he or she otherwise would have; (2) [has] a present or future property interest dimin-
13 ished; (3) [is] deprived of money or property to which he or she has a cognizable claim;
14 or (4) [is] required to enter into a transaction, costing money or property, that would
15 otherwise have been unnecessary.” As a result, to the extent a consumer has “paid more
16 for a product than he or she otherwise might have been willing to pay if the product had
17 been labeled accurately,” the consumer has lost money or property regardless of whether
18 the court “might objectively view the products as functionally equivalent.” *Id.* at 329.
19 This reasoning holds true whether the plaintiff’s claim is based on affirmative misrepre-
20 sentations or omissions. *See, e.g., Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal.
21 App. 4th 824, 835 (Cal. Ct. App. 2006) (stating that omissions are actionable under the
22 CLRA if the omission is “contrary to a representation actually made. . . [or] a fact the
23 defendant was obliged to disclose”); *Tait v. BSH Home Appliances Corp.*, No.
24 10–00711, 2011 WL 3941387, at *2 (C.D. Cal. Aug. 31, 2011).

25 Therefore, although this is not a false advertising case, which was acknowledged
26 by Plaintiffs at the October 18, 2013 motion hearing, *In re Tobacco II*, 46 Cal. 4th 298,
27 328 (Cal. 2009), is nonetheless instructive—a plaintiff alleging standing under the UCL,
28 FAL, and CLRA need only allege that the defendant’s conduct, whether it be an affirma-

1 tive misrepresentation or an actionable omission, was an “immediate” cause and not the
2 “sole” cause of the plaintiff’s injury. As a result, because Plaintiffs have alleged that
3 Sony omitted material information regarding the security of Sony Online Services, and
4 that this information should have been disclosed to consumers at the time consumers
5 purchased their Consoles, the Court finds Plaintiffs have sufficiently alleged a loss of
6 money or property “as a result” of Sony’s alleged unfair business practices. *See, e.g.,*
7 *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093 (Cal. 1993) (stating that omitted informa-
8 tion is material if a plaintiff can allege that “had the omitted information been disclosed,
9 one would have been aware of it and behaved differently”); *Falk v. Gen. Motors Corp.*,
10 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007) (stating that materiality is viewed from the
11 prospective of the reasonable consumer); *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913,
12 921 (N.D. Cal. 2012) (stating that the plaintiff satisfied the causation requirement by
13 pleading that he would not have purchased the product and or would have asked for a
14 timely refund had he known certain material facts). Accordingly, the Court DENIES
15 Sony’s motion to dismiss the UCL, FAL, and CLRA claims based on Plaintiffs’ failure
16 to allege standing.

17 **b. Failure to Allege Unlawful, Unfair, or Deceptive Conduct**

18 Second, even if Plaintiffs have standing to assert claims under the UCL, FAL, and
19 CLRA, Sony contends each claim should be dismissed because Plaintiffs have failed to
20 allege unlawful, unfair, or deceptive conduct in compliance with Rule 9(b). Under Rule
21 9(b), allegations sounding in fraud “must state with particularity the circumstances
22 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Where claims allege a “unified
23 course of fraudulent conduct and rely entirely on that course of conduct as the basis of
24 that claim, . . . the claim is said to be ‘grounded in fraud’ or to ‘sound in fraud,’ and the
25 pleading . . . as a whole must satisfy the particularity requirement of Rule 9(b).” *Kearns*,
26 567 F.3d at 1126 (applying Rule 9(b) standard to uphold dismissal of UCL and CLRA
27 claims that Ford Motor Company and its “co-conspirator” dealerships knowingly
28 misrepresented to the public that certain vehicles were “safer and more reliable”).

1 Here, Plaintiffs' UCL, FAL, and CLRA claims each allege the same factual basis
2 for relief.³⁹ Plaintiffs contend that: (1) Sony failed to take reasonable precautions and/or
3 use industry-standard encryption to protect Plaintiffs' Personal Information, (FACC ¶¶
4 149, 163, 178); (2) Sony was aware that its security systems were inadequate and failed
5 to rectify these shortcomings, (*Id.* at ¶¶ 149, 163, 175); (3) Sony misrepresented that
6 access to the PSN was a feature of PSPs and PS3s, (*Id.* at ¶¶ 151, 164, 180); (4) Sony
7 misrepresented that online connectivity and the corresponding ability to connect to Sony
8 Online Services and Third Party Services was a feature of PSPs and PS3s, (*Id.* at ¶¶ 152,
9 165, 180); (5) Sony's omitted material information regarding the security of the PSN,
10 (*Id.* at ¶¶ 155, 163, 175); and (6) Sony's conduct was unlawful because it violated the
11 FAL, CLRA, DBA, and Sony's own Privacy Policies, (*Id.* at ¶ 153). Plaintiffs also
12 allege that Sony's acts, omissions, and misrepresentations induced Plaintiffs to purchase
13 their Consoles, register for the PSN, provide their Personal Information to Sony, and
14 purchase content from the Playstation Store. (*Id.* at ¶¶ 156, 166, 179). Accordingly, the
15 Court finds each claim "sounds in fraud" and Plaintiffs must plead their misrepresenta-
16 tion and omission claims under the UCL, FAL, and CLRA with particularity under Rule
17 9(b).⁴⁰ *Kearns*, 567 F.3d at 1126.

18 **i. Fraud-Based Affirmative Misrepresentations**

19 A plaintiff alleging fraudulent misrepresentations under the UCL, FAL, and
20 CLRA must allege that he was exposed to the particular representation claimed to be
21 deceptive. *See, e.g., Baltazar v. Apple, Inc.*, No. CV-10-3231-JF, 2011 WL 588209, at
22 *3-4 (N.D. Cal. Feb. 10, 2011); *Minnick v. Clearwire US, LLC*, 683 F. Supp. 2d 1179,
23

24 ³⁹ Plaintiffs allege Sony violated the following enumerated sections of the CLRA
25 §§ 1770(a)(5), (7), (9), (14), and (16). (FACC ¶ 176.)

26 ⁴⁰ At the October 18, 2013 motion hearing, Plaintiffs contended that not all of their
27 California consumer protection claims sounded in fraud. The Court does not agree.
28 Each of Plaintiffs' consumer protection claims alleges that Sony omitted or
misrepresented material facts regarding the adequacy of its network security, and that
Sony was aware that its network security was inadequate. Moreover, as stated in the
Court's prior order, Plaintiffs previously agreed with Sony that their consumer claims
were subject to Rule 9(b)'s particularity requirements. (Doc. No. 120 at 25:8-13.)

1 1188 (W.D. Wash. 2010). This requires the plaintiff to identify the “ ‘the time, place,
2 and content of the alleged fraudulent misrepresentation[]; the identity of the person
3 engaged in the fraud; and the circumstances indicating falseness’ or ‘the manner in
4 which [the] representations were false and misleading.’ ” *Genna v. Digital Link Corp.*,
5 25 F. Supp. 2d 1032, 1038 (N.D. Cal. 1997) (quoting *In re GlenFed Sec. Litig.*, 42 F.3d
6 1541, 1547–58 n.7 (9th Cir. 1994)). Under all three statutes, conduct is deemed decep-
7 tive or misleading if the conduct is likely to deceive a reasonable consumer. *See*
8 *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Although this
9 determination is generally fact intensive, courts have granted motions to dismiss under
10 the UCL, FAL, and CLRA on the basis that the alleged misrepresentations were not
11 false, misleading, or deceptive as a matter of law. *See, e.g., Freeman v. Time, Inc.*, 68
12 F.3d 285, 290 (9th Cir. 1995) (stating that when the flyer was read as a whole, including
13 the qualifying language, the plaintiff’s allegation that a particular statement was decep-
14 tive was dispelled); *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1398 (E.D. Cal. 1994)
15 (stating that “statements, in context, are not misleading. It is clear from the exemplar
16 that no reasonable addressee could believe that the mailing announced that the addressee
17 was already the winner . . .”).

18 Here, Plaintiffs allege that Sony: (1) misrepresented that access to the PSN was a
19 feature of PSPs and PS3s; (2) misrepresented that online connectivity and the corre-
20 sponding ability to access Sony Online Services and Third Party Services was a feature
21 of PSPs and PS3s; (3) misrepresented the characteristics and quality of Sony’s network
22 security; (4) misrepresented that Sony uses “reasonable measures to protect the confiden-
23 tiality, security, and integrity of the personal information collected from [its] website
24 visitors;” and (5) misrepresented that Sony maintains security measures “to protect the
25 loss, misuse, and alteration of” consumer Personal Information. (FACC ¶¶ 151-152,
26 164-165, 177, 180.) Sony contends each of Plaintiffs’ misrepresentation claims should
27 be dismissed because Plaintiffs have failed to plead actionable misrepresentations and/or
28 causation.

1 As stated in the Court’s prior order, Plaintiffs’ first two contentions are without
2 merit. No reasonable consumer would believe that Sony’s representations regarding the
3 network were meant to promise continued and uninterrupted access to Sony Online
4 Services and/or that Sony was providing uninterrupted access to the PSN. (Doc. No. 120
5 at 26-27.) However, notwithstanding the Court’s prior order, Plaintiffs continue to
6 advance these same misrepresentation contentions in the FACC. For example, the FACC
7 points to two Internet links where Plaintiffs allege Sony misrepresented that PSN access
8 and online connectivity were features of the PS3.⁴¹ However, neither of these links
9 represent that Sony promised continuous and uninterrupted service, and the first link
10 (regarding PSN access) directs consumers to the PSN User Agreement and the PSN
11 Privacy Policy, both of which inform consumers that Sony “does not warrant that the
12 service and content will be uninterrupted, error-free, or without delays.” (Doc. No. 94-2,
13 Ex. A at 9.) Therefore, although Sony represented that access to the PSN and online
14 connectivity were features of Sony Consoles, Sony also informed consumers that
15 continuous PSN access and/or Internet connectivity was not guaranteed without
16 interruption. Accordingly, similar to *Freeman v. Time*, wherein the Ninth Circuit held
17 that the defendant’s alleged misrepresentations were not misleading as a matter of law,
18 here the PSN User Agreement clearly stated that access to the PSN and online connectiv-
19 ity may be interrupted. 68 F.3d at 290.

20 However, the Court finds Plaintiffs’ final two contentions are sufficiently plead.
21 Plaintiffs allege that Sony misrepresented that it would take “reasonable steps” to secure
22 Plaintiffs’ Personal Information, and that Sony Online Services use[d] industry-standard
23 encryption to prevent unauthorized access to sensitive financial information.” (Doc. No.
24 94-2, Ex. B at 6.) Although Sony seeks to combat these allegations by stating that Sony
25 disclaimed any right to so-called “perfect security,” the Court agrees with Plaintiffs that
26 whether or not Sony’s representations regarding “reasonable security” were deceptive, in
27

28 ⁴¹ See <http://us.playstation.com/ps3/features/ps3featuresnetwork.html> and
http://us.playstation.com/ps3/features/ps_ps3_connectivity.html.

1 light of Sony’s additional representations regarding “industry-standard” encryption, are
2 questions of fact not suitable for disposition on a motion to dismiss. Thus, because Sony
3 made competing, potentially ambiguous representations, the Court cannot find the
4 representations were are not deceptive as a matter of law. *See Lavie v. Procter &*
5 *Gamble Co.*, 105 Cal. App. 4th 496, 508 (Cal. Ct. App. 2003) (“A perfectly true state-
6 ment couched in such a manner that it is likely to mislead or deceive the consumer, such
7 as by failure to disclose other relevant information,” is actionable). This determination is
8 more properly adjudicated after discovery regarding Sony’s use or non-use of industry-
9 standard encryption. Accordingly, the Court GRANTS Sony’s motion to dismiss the
10 UCL, FAL, and CLRA claims based on affirmative misrepresentations regarding
11 Plaintiffs’ ability to access the PSN and connect to the Internet, and DENIES Sony’s
12 motion to dismiss Plaintiffs’ claims based on affirmative misrepresentations contained
13 within the PSN User Agreement and the PSN Privacy Policy regarding “reasonable
14 security” and “industry-standard encryption.” (FACC ¶¶ 149-150, 155, 163, 175.)

15 **i. Fraud-Based Omissions**

16 In addition to affirmative misrepresentations, the FACC now alleges fraud-based
17 omission claims under the UCL, FAL, and CLRA. To be actionable under all three
18 California consumer protections statutes, an omission must be “contrary to a representa-
19 tion actually made by the defendant, or an omission of a fact the defendant was obliged
20 to disclose.” *Daugherty*, 144 Cal. App. 4th at 835. A duty to disclose may arise: (1)
21 when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defen-
22 dant had exclusive knowledge of material facts not known to the plaintiff; (3) when the
23 defendant actively conceals a material fact from the plaintiff; or (4) when the defendant
24 makes partial representations but also suppresses some material fact. *Falk*, 496 F. Supp.
25 2d at 1094–95 (citing *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 337 (Cal. Ct. App.
26 1997)).

27 Here, Plaintiffs allege that Sony: (1) failed to tell consumers that it did not have
28 reasonable and adequate safeguards in place to protect consumers’ confidential informa-

1 tion; (2) failed to immediately notify members of the California subclass that the
2 intrusion had occurred; and (3) omitted material facts regarding the security of its
3 network, including the fact that Sony failed to install and maintain firewalls and utilize
4 industry-standard encryption. Sony does not separately address Plaintiffs' fraud-based
5 omission claims. Rather, Sony contends Plaintiffs' omission claims fail because Sony
6 clearly disclosed the possibility of an intrusion. However, as discussed above with
7 respect to statutory standing under the UCL, FAL, CLRA, the Court finds Plaintiffs'
8 fraud-based omission claims are sufficiently plead. Accordingly, the Court DENIES
9 Sony's motion to dismiss Plaintiffs' claims under the UCL, FAL, and CLRA based on
10 fraudulent omissions.

11 **c. Restitution and Injunctive Relief Under the UCL and FAL**

12 Third, Sony contends the UCL and FAL claims should be dismissed because
13 Plaintiffs have failed to allege any basis for restitution and/or injunctive relief—the only
14 two remedies allowed under the UCL and FAL. Although the Court previously dis-
15 missed Plaintiffs' restitution claims with prejudice, Plaintiffs' amended allegations have
16 persuaded the Court to reconsider its prior ruling. (Doc. No. 120 at 29:4-30:3.) As set
17 forth above, the FACC now clarifies that Plaintiffs seek restitution based on the fact that
18 Sony benefitted financially from the sale of PSPs and PS3s, which was made possible
19 and enhanced by Sony's fraudulent omissions. (Doc. 146 at 27:7-8.) Therefore, to the
20 extent Plaintiffs' can prevail on their fraud-based omission claims, the Court finds
21 Plaintiffs may be able to recover the purchase price of their Consoles or a portion
22 thereof. Accordingly, the Court DENIES Sony's motion to dismiss Plaintiffs' claims for
23 restitution under the UCL and FAL.

24 However, with regard to Plaintiffs' claims for injunctive relief under the UCL and
25 FAL, the Court previously dismissed these claims for failure to allege the specific relief
26 sought. (Doc. No. 120 at 29:25-30:3.) Plaintiffs' acknowledged this deficiency at the
27 September 27, 2012 motion hearing, stating that amendment would allow Plaintiffs to
28 correct the pleading error. Plaintiffs have failed to do so. Accordingly, the Court

1 GRANTS Sony’s motion to dismiss Plaintiffs’ claims for injunctive relief without leave
2 to amend. *See Sisseton-Wahpeton Sioux Tribe of Lake Traverse Indian Res., N.D. &*
3 *S.D. v. United States*, 90 F.3d 351, 355–56 (9th Cir. 1996) (stating that a district court
4 does not abuse its discretion to dismiss a complaint without leave to amend if a plaintiff
5 was previously given an opportunity to correct noted deficiencies).

6 **d. Applicability of the CLRA**

7 Finally, Sony contends Plaintiffs’ CLRA claim should be dismissed because it is
8 inapplicable to the transactions at issue—registration for free PSN services. The Court
9 previously dismissed the CLRA claim with leave to amend on these exact grounds,
10 finding that the claim was specifically linked to Plaintiffs’ registration for the PSN,
11 which is neither a good nor a service under the CLRA. However, as acknowledged
12 above, the FACC now alleges liability under the CLRA based on omissions that occurred
13 at the point of purchase of Plaintiffs’ Consoles. (FACC ¶ 176.) *Daugherty*, 144 Cal.
14 App. 4th at 835 (stating that a “claim may be stated under the CLRA in terms constitut-
15 ing fraudulent omissions”); *Herron v. Best Buy Co.*, 924 F. Supp. 2d 1161, 1175 (E.D.
16 Cal. 2013) (stating that fraudulent omission claims apply equally to claims under the
17 CLRA). Therefore, although the Court still finds Plaintiffs’ CLRA claim cannot proceed
18 based on affirmative misrepresentations, because those relate solely to the PSN, the
19 CLRA claim may proceed on the basis that Sony omitted material information regarding
20 the security of the PSN at the time Plaintiffs purchased their Consoles. Accordingly, the
21 Court DENIES Sony’s motion to dismiss the CLRA claim.

22 **2. Florida Deceptive and Unfair Trade Practices Act**

23 Count 6 is brought by Plaintiffs Lieberman and Schucher and alleges violation of
24 the FDUTPA. (FACC¶¶ 212-221.) The FDUTPA prohibits “[u]nfair methods of
25 competition, unconscionable acts or practices, and unfair or deceptive acts or practices in
26 the conduct of any trade or commerce.” Fla. Stat. § 501.204(1); *see also Delgado v. J.W.*
27 *Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602, 605-06 (Fla. 1997) (discussing the
28 purpose of the FDUTPA in light of its legislative history). Plaintiffs allege Sony

1 violated the FDUTPA by falsely representing the security of Sony Online Services and
2 request injunctive relief, declaratory relief, actual damages, and attorneys' fees and costs.
3 *See Fla. Stat. § 501.211(1) (injunctive and declaratory relief), § 501.211(2) (actual*
4 *damages and attorney's fees and court costs), § 501.2105 (attorney's fees). Sony moves*
5 *to dismiss the FDUTPA claim on the basis that Plaintiffs have failed to allege: (1) actual*
6 *loss caused by Sony's conduct; and (2) unfair or deceptive acts or practices entitling*
7 *Plaintiffs to declaratory or injunctive relief. (Doc. No. 163 at 1-6.)*

8 **a. Actual Damages Caused by Sony's Deceptive and Unfair**
9 **Conduct**

10 As an initial matter, Sony contends the FDUTPA claim should be dismissed
11 because Plaintiffs have not alleged actual damages caused by Sony's deceptive or unfair
12 conduct. The Court agrees. To state a claim under the FDUTPA, a consumer must
13 allege: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages."
14 *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006), *review denied*,
15 962 So.2d 335 (Fla. 2007); *see also Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1338
16 n.25 (11th Cir. 2012).⁴² Florida courts have defined "actual damages" as the "difference
17 in the market value of the product or service in the condition in which it was delivered
18 and its market value in the condition in which it should have been delivered according to
19 the contract of the parties." *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. Dist. Ct.
20 App. 1984) (internal citations omitted); *Butland*, 951 So. 2d at 869. "Nominal damages,
21 speculative losses, or compensation for subjective feelings of disappointment" are not
22 recoverable under the FDUTPA, *Butland*, 951 So. 2d at 873, nor may a Plaintiff recover
23 "consequential damages," *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451, 454 (Fla.
24 Dist. Ct. App. 1985).

25
26 ⁴² Section 501.211(a) states: "In any action brought by a person who has suffered a
27 loss as a result of a violation of this part, such person may recover actual damages, plus
28 attorney's fees and court costs as provided in s. 501.2105. However, damages, fees, or
costs are not recoverable under this section against a retailer who has, in good faith,
engaged in the dissemination of claims of a manufacturer or wholesaler without actual
knowledge that it violated this part."

1 Here, Plaintiffs Lieberman and Schucher seek to recover: (1) the purchase price of
2 their Consoles and/or the amount they overpaid for their Consoles; (2) monthly premi-
3 ums paid for Third Party Services during the time Plaintiffs were unable to access these
4 services via their Consoles; and (3) the value of their Personal Information that was
5 wrongfully disclosed. As explained below, none of these injuries are “actual damages”
6 recoverable under the FDUTPA. *Fitzpatrick v. Gen. Mills, Inc.*, 263 F.R.D. 687, 695
7 (S.D. Fla. 2010), *vacated on other grounds*, 635 F.3d 1279 (11th Cir. 2011) (stating that
8 although “subjective evidence of reliance” is not required, a plaintiff still must allege
9 that “an objective reasonable person would have behaved” differently but for the alleged
10 deceptive or unfair conduct).

11 First, although Plaintiffs’ supplemental brief contends that Plaintiffs suffered
12 actual damages in the form of the purchase price of their Consoles, because they
13 bargained for secure access to the PSN at the time they purchased their Consoles, the
14 FACC does not support these contentions. (Doc. No. 164 at 5-7.) Rather, the FACC
15 merely alleges that Plaintiffs were aggrieved by Sony’s deceptive and unfair conduct “in
16 that they registered with, and sent their Personal Information[] to Sony Online Services
17 after exposure to Defendants’ false and misleading representations regarding the security
18 of Sony Online Services.” (FACC ¶ 218.) Nowhere does the FDUTPA claim allege that
19 Plaintiffs would not have purchased their Consoles but for Sony’s alleged deceptive or
20 unfair conduct. *See, e.g., Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d
21 Cir. 1988) (“[I]t is axiomatic that the complaint may not be amended by the briefs in
22 opposition to a motion to dismiss.”).

23 Moreover, even if the Court were to entertain Plaintiffs’ unpled contentions, which
24 it will not, Plaintiffs have failed to allege that an “objective reasonable person would
25 have behaved” differently absent the alleged deceptive or unfair conduct. *Fitzpatrick*,
26 263 F.R.D. at 695. For example, although Plaintiffs allege that Sony misled consumers
27 as to the security of Sony Online Services, and that this deceptive conduct induced
28 consumers to purchase their Consoles, or to purchase Consoles at an inflated price,

1 Plaintiffs concede that the alleged misrepresentations were contained in the PSN User
2 Agreement and/or the PSN Privacy Policy—both of which were presented to consumers
3 after they purchased their Consoles. As a result, Plaintiffs have failed to plausibly allege
4 that the purchase price of their Console was an “actual damage” caused by Sony’s
5 deceptive or unfair conduct. *Cf. Smith v. Wm. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336,
6 1339–40 (S.D. Fla. 2009) (allowing plaintiff to recover on a benefit of the bargain theory
7 because the plaintiff alleged that they relied on the defendant’s representations, and as a
8 result of the alleged misleading representations, the defendant was able to charge a price
9 premium for the product).

10 Second, Plaintiffs allege that they suffered actual injury because they paid monthly
11 premiums for Third Party Services and were unable to access these services during the
12 brief interruption in PSN access. However, similar to the reasons sets forth above, these
13 allegations fail to set forth a plausible claim for relief. Plaintiffs did not advance these
14 damage theories in the FACC (with respect to the FDUTPA claim), nor would such
15 allegations suffice had they been properly pled. For example, as stated by the court in
16 *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451, 454 (Fla. Dist. Ct. App. 1985),
17 which considered on appeal whether the plaintiff had been awarded the proper measure
18 of damages against a termite inspection company who issued a favorable report when no
19 inspection had in fact been made, consequential damages are not permitted under the
20 FDUTPA. Therefore, just as the plaintiff in *Urling* could not recover the cost of
21 repairing extensive termite damage following the issuance of a fabricated termite report,
22 here Plaintiffs are not permitted to recover monthly premiums paid to Third Party
23 Services. *See, e.g., Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 263 (Fla. Dist.
24 Ct. App. 2004) (stating that the FDUTPA only permits a consumer to recover the
25 “diminished value” of the good or service received, consequential damages are not
26 recoverable); *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1140 (Fla. Dist. Ct. App.
27 2008) (finding that recovery of repair and replacement costs are not recoverable under
28 the FDUPTA); Fla. Stat. § 501.212(3); *In re Crown Auto Dealerships, Inc.*, 187 B.R.

1 1009, 1018 (Bankr. M.D. Fla. 1995) (holding claimants entitled to no recovery where
2 they failed to establish that they suffered actual damages as a result of the misrepresenta-
3 tions about the vehicles; claimants subjective feelings of disappointment are insufficient
4 to form a basis of actual damages). The same could be said for any recovery based on
5 the brief interruption in PSN access, as the PSN was provided free of charge and Sony
6 clearly disclaimed any right to uninterrupted access. (Doc. No. 94-2, Ex. A at 9.)

7 Finally, although Plaintiffs' third contention is supported by the FACC, in that the
8 FACC alleges that Plaintiffs would not have sent their Personal Information to Sony had
9 they known the truth regarding Sony's network security, these allegations fail to allege
10 "actual damages" under the FDUTPA. As stated by the court in *Burrows v. Purchasing*
11 *Power, LLC*, No. 1:12-cv-22800-UU, 2012 WL 9391827, at *3 (S.D. Fla. Oct. 18, 2012),
12 which considered whether the disclosure of the plaintiff's personal information without
13 his consent gave rise to a claim under the FDUTPA, "[p]ersonal data does not have an
14 apparent monetary value that fluctuates like the price of goods or services." As a result,
15 to the extent Plaintiffs are alleging an entitlement "to the value of their Personal Informa-
16 tion," but have not alleged a monetary loss relating to the disclosure of their Personal
17 Information, these allegations fail under Florida law. *See Himes v. Brown & Co. Secs.*
18 *Corp.*, 518 So. 2d 937, 938 (Fla. Dist. Ct. App. 1987) (finding no recovery under
19 FDUTPA for misleading and false advertisement where plaintiff sustained no
20 out-of-pocket losses); *Macias v. HBC of Fla., Inc.*, 694 So. 2d 88, 90 (Fla. Dist. Ct. App.
21 1997) (stating that to be entitled to any relief under FDUTPA the consumer must plead
22 and prove he was aggrieved by the unfair and deceptive act.).

23 Therefore, the Court finds Plaintiffs have failed to allege "actual damages"
24 flowing from Sony's alleged deceptive or unfair misrepresentations, nor would further
25 amendment correct these deficiencies. Accordingly, the Court GRANTS Sony's motion
26 to dismiss the FDUTPA claim seeking actual damages without leave to amend. *See, e.g.,*
27 *Sisseton-Wahpeton Sioux Tribe*, 90 F.3d at 356 (stating that the district court did not err
28 in denying leave to amend because the plaintiff acknowledged that the claim was similar

1 to claims previously asserted); *Int'l Star Registry of Ill. v. Omnipoint Mktg., LLC*, 510 F.
2 Supp. 2d 1015, 1024 (S.D. Fla. 2007).

3 **b. Deceptive or Unfair Conduct Warranting Declaratory and**
4 **Injunctive Relief Under the FDUTPA**

5 Next, Sony moves to dismiss the declaratory and injunctive relief claims on the
6 basis that Plaintiffs have failed to allege deceptive or unfair conduct under the FDUTPA.
7 Specifically, Sony contends Plaintiffs have failed to: (1) allege deceptive or unfair
8 conduct with particularity under Rule 9(b); (2) plausibly allege how Sony's representa-
9 tions were deceptive in light of the admonitory language in the PSN Privacy Policy; (3)
10 show how Sony violated Fla. Stat. § 500.04 and 21 U.S.C. § 343 because both statutes
11 pertain to misbranded food; and (4) allege how Sony's conduct was unfair in light of the
12 fact that Plaintiffs have not alleged a single instance of identity theft or unreimbursed
13 charges. The Court only addresses Sony's second and fourth contentions.⁴³

14 Under the FDUTPA, a deceptive practice is one that is "likely to mislead"
15 consumers, *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. Dist. Ct. App. 2000), and
16 an unfair practice is one that "offends established public policy" or is "immoral, unethi-
17 cal, oppressive, unscrupulous or substantially injurious to consumers," *Samuels v. King*
18 *Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 499 (Fla. Dist. Ct. App. 2001) (quoting
19 *Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F.2d 287, 293 (7th Cir. 1976)). A plaintiff need
20 not allege an entitlement to "actual damages" in order to seek injunctive and/or declara-
21 tory relief under the FDUTPA, and must only allege a violation of the statute. *See, e.g.*,
22 Fla. Stat. § 501.211(1) ("[A]nyone aggrieved by a violation of this part may bring an
23 action to obtain a declaratory judgment that an act or practice violates this part and to
24 enjoin a person who has violated, is violating, or is otherwise likely to violate this
25 part."); *Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc.*, 123 So. 3d 1149,
26 1152 (Fla. Dist. Ct. App. 2012).

27
28 ⁴³ Plaintiffs did not address Sony's third contention and it appears these statutes
were erroneously included in the FACC.

1 Therefore, although Sony contends that the representations in the PSN User
2 Agreement and the PSN Privacy Policy could not have plausibly been deceptive or unfair
3 in light of admonitory language in the PSN Privacy Policy, which disclaimed any right to
4 so-called “perfect security,” Plaintiffs have refashioned their allegations to escape
5 dismissal. As exemplified in the FACC and Plaintiffs’ opposition, Plaintiffs do not
6 allege that Sony’s representations were deceptive because Sony promised perfect
7 security (which was clearly disclaimed), Plaintiffs allege Sony violated the FDUTPA
8 because Sony warranted that it would take “reasonable security” measures, including
9 utilizing “industry-standard encryption”, but failed to do so. (FACC ¶¶ 3, 57, 62, 88,
10 97.) Thus, as discussed above, Plaintiffs have raised an issue of fact as to whether
11 Sony’s representations, when viewed as a whole, were deceptive.⁴⁴ *See Siever v.*
12 *BWGaskets, Inc.*, 669 F. Supp. 2d 1286, 1293 (M.D. Fla. 2009) (“Whether particular
13 conduct constitutes such an unfair or deceptive trade practice is a question of fact.”).⁴⁵
14 Accordingly, because declaratory and injunctive relief under the FDUTPA are available
15 in the absence of actual damages, the Court DENIES Sony’s motion to dismiss Plaintiffs’
16 injunctive and declaratory relief claims under the FDUTPA.

17 3. Michigan Consumer Protection Act

18 Count 16 is brought by Plaintiff Mitchell and alleges violation of the MCPA.
19 (FACC ¶¶ 276-287.) The MCPA prohibits “[u]nfair, unconscionable, or deceptive
20 methods, acts, or practices in the conduct of trade or commerce[.]” Mich. Comp. Laws
21 Ann. § 445.903(1). A plaintiff can pursue a claim under the MCPA based on fraud,
22 deception, or breach of express or implied warranties. *See Parsley v. Monaco Coach*
23 *Corp.*, 327 F. Supp. 2d 797, 807 (W.D. Mich. 2004). Here, Plaintiffs allege Sony

24
25 ⁴⁴ This is true even though the PSN Privacy Policy states that “we cannot ensure or
26 warrant the security of any information transmitted to us through [the PSN]” (Doc.
27 No. 94-2, Ex. B at 6.)

28 ⁴⁵ The Court also finds Sony’s contentions regarding the interpretations of the FTC
unavailing. The FACC properly alleges numerous and systematic vulnerabilities that
Sony was allegedly aware of before the intrusion. Therefore, taking Plaintiffs’
allegations as true, which the Court must on a motion to dismiss, Plaintiffs have
sufficiently alleged deceptive or unfair conduct under the FDUTPA.

1 violated the MCPA by “misleading the consuming public into believing that their
2 Personal Information would be safe upon transmission to Defendants[,] when in fact[,]
3 Defendants knew that their security systems were woefully inadequate.” (FACC ¶ 281.)
4 Although not labeled as such in the FACC, Plaintiffs contend this conduct is grounded in
5 both fraud and breach of express and implied warranties. Plaintiffs allege Sony violated
6 the following sections of the MCPA:

7 (c) Representing that goods or services have sponsorship, approval, characteris-
8 tics, ingredients, uses, benefits, or quantities that they do not have or that a person
9 has sponsorship, approval, status, affiliation, or connection that he or she does not
10 have . . .

11 (e) Representing that goods or services are of a particular standard, quality,
12 or grade, or that goods are of a particular style or model, if they are of
13 another . . .

14 (bb) Making a representation of fact or statement of fact material to the
15 transaction such that a person reasonably believes the represented or sug-
16 gested state of affairs to be other than it actually is . . . [and]

17 (cc) Failing to reveal facts that are material to the transaction in light of
18 representations of fact made in a positive manner.

19 Mich. Comp. Laws § 445.903(1)(c), (e), (bb), (cc). Sony moves to dismiss the MCPA
20 claim on the basis that Plaintiffs have failed to allege: (1) actual damages caused by a
21 violation of the statute; and (2) a violation of the statute warranting declaratory or
22 injunctive relief.

23 **a. Actual Damages Under the MCPA**

24 Plaintiffs seek the following actual damages under the MCPA: (1) the disclosure
25 of their Personal Information and a corresponding loss in privacy; (2) the purchase price
26 of their Consoles or a portion thereof; and (3) the inability to access Sony Online
27 Services during the brief interruption in PSN access. (FACC ¶ 282.) Sony contends
28 none of these damage allegations suffice because: (1) Plaintiffs have failed to plead
reliance on the alleged misrepresentations in compliance with Rule 9(b); and (2) Sony
Online Services was offered free of charge and Sony clearly disclaimed any right to
uninterrupted access. Plaintiffs do not dispute that the potential risk of future identity
theft resulting from the loss of personal information is not a cognizable injury under

1 Michigan law. *Hammond v. The Bank of N.Y. Mellon Corp.*, No. 08 CIV. 6060 RMB
2 RLE, 2010 WL 2643307, at *1, 8 (S.D.N.Y. June 25, 2010); *Hendricks v. DSW Shoe*
3 *Warehouse, Inc.*, 444 F. Supp. 2d 775, 782 (W.D. Mich. 2006). Therefore, the Court
4 only addresses whether Plaintiffs have sufficiently pled reliance on Sony’s alleged
5 misrepresentations, thereby entitling Plaintiffs to recover the purchase price of their
6 Consoles and/or any damage relating to the inability to access Sony Online Services
7 during the brief interruption in PSN access.

8 As an initial matter, the parties dispute whether Plaintiffs are required to plead
9 actual reliance on the alleged misrepresentations, and to the extent actual reliance is
10 required, whether reliance must be pled with particularity under Rule 9(b). Sony
11 contends that pursuant to Mich. Comp. Laws Ann. Section 445.911(3), and countless
12 Michigan courts interpreting the MCPA, Plaintiffs must allege actual reliance on Sony’s
13 alleged deceptive conduct with specificity under Rule 9(b). In response, Plaintiffs argue
14 that actual reliance is not required, and to the extent reliance is required, Plaintiffs have
15 sufficiently alleged that Mitchell relied on Sony’s alleged misrepresentations. The Court
16 agrees with Sony on both points.

17 First, although Plaintiffs attempt to rely on *Dix v. American Bankers Life Assur-*
18 *ance Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987), and *Gasperoni v. Metabolife,*
19 *International Inc.*, No. 00-71255, 2000 WL 33365948 (E.D. Mich. Sept. 27, 2000), for
20 the proposition that reliance can be demonstrated by pleading that a “reasonable person
21 would have relied on the representation,” both *Dix* and *Gasperoni* fail to address the
22 pertinent issue before the Court—whether a named plaintiff in a putative class action
23 must allege actual reliance. As a result, the Court finds *Dix* and *Gasperoni* fail to
24 support Plaintiffs’ contentions, and cases discussing *Dix* and *Gasperoni* confirm that
25 although class allegations can be based on what a reasonable person would have relied
26 upon, a named plaintiff bringing a putative class action under the MCPA must still allege
27 actual reliance. *See, e.g., Kussy v. Home Depot USA Inc.*, No. 06-12899, 2006 WL
28 3447146, at *5–7 (E.D. Mich. Nov. 28, 2006); *In re OnStar Contract Litig.*, 278 F.R.D.

1 352, 378 (E.D. Mich. 2011) (stating that there is “no dispute” that individuals asserting
2 MCPA claims “must establish reliance”); *Williams v. Scottrade, Inc.*, No. 06–10677,
3 2006 WL 2077588, at *7 (E.D. Mich. July 24, 2006) (dismissing a plaintiff’s MCPA
4 claim premised on allegations of fraud because the plaintiff failed to identify the specific
5 statements on which he relied); *Mayhall v. A.H. Pond Co.*, 341 N.W.2d 268, 270 (Mich.
6 1983) (stating that the MCPA requires a plaintiff “to have sustained a loss as a condition
7 for bringing an action to recover damages [because] . . . the Legislature . . . has incorpo-
8 rated . . . the common-law requirement of injury”). Accordingly, the Court finds
9 Plaintiffs must allege that Mitchell actually relied on Sony’s alleged misrepresentations.

10 Second, although Plaintiffs are correct, that Rule 9(b) is inapplicable to MCPA
11 claims based on breach of warranty rather than fraud, as stated above, the Court dis-
12 missed Plaintiffs’ breach of express and implied warranty claims under Michigan law.
13 *See Michels v. Monaco Coach Corp.*, 298 F. Supp. 2d 642, 651 (E.D. Mich. 2003);
14 *Sautner v. Fleetwood Enters., Inc.*, No. 05-73252, 2007 WL 1343806, at *6 (E.D. Mich.
15 May 8, 2007) (“If there is no basis for a breach of warranty claim, it follows, then, that
16 there is no basis for a MCPA claim based on the alleged breach.”). Therefore, the Court
17 finds Plaintiffs’ allegations must be plead with particularity under Rule 9(b).

18 Based on the above, the Court finds Plaintiffs have failed to sufficiently allege that
19 Mitchell actually relied on Sony’s alleged deceptive conduct in compliance with Rule
20 9(b). With regard to Plaintiffs’ allegations that they paid for their Consoles “after being
21 exposed” to Sony’s alleged misrepresentations, this argument has already been disposed
22 of by the Court. Each of the alleged misrepresentations identified by Plaintiffs are either
23 contained in the PSN User Agreement and/or the PSN Privacy Policy, both of which
24 were presented to Plaintiffs after they purchased their Consoles and before registering
25 for the PSN. This is only further supported by the fact that Plaintiffs have conceded that
26 they purchased their Consoles before reviewing the language in either agreement.
27 Accordingly, even though the Court must accept Plaintiffs’ allegations as true, including
28 the fact that Mitchell “relied” on Sony’s alleged misrepresentations in purchasing her

1 Console, Plaintiffs’ other allegations clearly contradict these conclusory allegations of
2 reliance. *See Regan v. Washtenaw Cnty. Rd. Comm’rs*, 667 N.W.2d 57, 65 (Mich. 2003)
3 (“We accept as true the allegations in the plaintiff’s complaint to the extent that affida-
4 vits or other documents submitted by the movant do not specifically contradict them.”).
5 As a result, Plaintiffs can not recover the purchase price of their Consoles, or a portion
6 thereof, as actual damages under the MCPA.

7 The Court also finds Plaintiffs have failed to state a claim for actual damages
8 relating to the brief interruption in Sony Online Services. As advanced by Sony and
9 previously recognized by the Court, Sony Online Services were provided to Plaintiffs
10 free of charge, Plaintiff Mitchell did not pay for premium services, and Sony clearly
11 disclaimed any right to continuous and uninterrupted service. Thus, even though
12 Plaintiffs correctly point out that a “frustration of a plaintiff’s expectations” can consti-
13 tute a “loss” under the MCPA, Mitchell’s expectation of uninterrupted service was not
14 reasonable, nor could Mitchell have had an “expectation” of uninterrupted service.
15 *Mayhall*, 341 N.W.2d at 272; (Doc. No. 94-2, Ex. A at 9) (“SNEA does not warrant that
16 the service and content will be uninterrupted, error-free or without delays.”). As a result,
17 Plaintiffs can not recover actual damages resulting from a brief interruption in Sony
18 Online Services under the MCPA. Accordingly, the Court finds Plaintiffs have failed to
19 sufficiently allege a legal entitlement to actual damages under the MCPA based on either
20 the purchase of their Consoles or the brief interruption in Sony Online Services.
21 Because further amendment of this claim would be futile, the Court GRANTS Sony’s
22 motion to dismiss the MCPA claim seeking actual damages without leave to amend.

23 **b. Declaratory and Injunctive Relief**

24 Sony also moves to dismiss Plaintiffs’ claims for injunctive and declaratory relief
25 on the basis that Plaintiffs have neither alleged a violation of the MCPA, nor have
26 Plaintiffs alleged why such relief is necessary. The Court does not agree. First, under
27 the MCPA a plaintiff can seek declaratory and/or injunctive relief in the absence of
28 actual damages. Therefore, taking the allegations set forth in the FACC as true, to the

1 extent Plaintiffs have alleged that Sony misrepresented the security of its network,
2 including the fact that it utilized industry-standard encryption to secure Plaintiffs'
3 Personal Information, Plaintiffs have set forth a viable claim under Sections
4 445.903(1)(c), (e), (bb), and (cc). Moreover, Sony's reliance on *Workmon v. Publishers*
5 *Clearing House*, 118 F.3d 457, 458 (6th Cir. 1997), is misplaced. In *Workmon*, the Sixth
6 Circuit affirmed the district court's dismissal of the MCPA claim on the basis that no
7 reasonable consumer would believe that they won a ten million dollar sweepstakes in
8 light of admonitory language included in the flyer. *Id.* at 458–59 (stating that the
9 “MCPA and Michigan case law provide no remedy for a trade practice that is confusing
10 only to an unreasonable person”). Here, however, considering the language in the PSN
11 User Agreement and the PSN Privacy Policy as a whole, it is entirely plausible that a
12 reasonable consumer might have been deceived by Sony's representations of reasonable
13 security, industry-standard encryption, and the corresponding disclaimer of perfect
14 security.

15 Accordingly, because Plaintiffs have alleged that Sony's network security is still
16 inadequate, the Court DENIES Sony's motion to dismiss the injunctive and declaratory
17 relief claims under the MCPA. (FACC ¶ 285) (“Defendants continue to misrepresent the
18 adequacy of their security systems and will continue to so unless retained by Court
19 order.”).

20 **4. Missouri Merchandising Practices Act**

21 Count 22 is brought by Plaintiff Munsterman and alleges violation of the MMPA.
22 (FACC ¶¶ 314-328.) The MMPA was enacted “to preserve fundamental honesty, fair
23 play, and right dealings in public transactions,” *Scott v. Blue Springs Ford Sales, Inc.*,
24 215 S.W.3d 145, 160 (Mo. Ct. App. 2006), and prohibits “deception, fraud, false
25 pretense, false promise, misrepresentation, unfair practice or concealment, suppression,
26 or omission of any material fact in connection with the sale or advertisement of any
27 merchandise in trade or commerce.” Mo. Rev. Stat. § 407.020(1). To state a claim
28 under the MMPA, a plaintiff must allege: (1) the purchase of merchandise; (2) for

1 personal, family, or household purposes; and (3) an ascertainable loss of money or
2 property as a result of an act or practice declared unlawful under the MMPA. *See Hess*
3 *v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo. 2007); *Owen v. Gen.*
4 *Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008) (stating that the MMPA requires a
5 casual connection between the ascertainable loss and the alleged unfair or deceptive
6 practice). The MMPA defines merchandise as “objects, wares, goods, commodities,
7 intangibles, real estate or services.” *Edmonds v. Hough*, 344 S.W.3d 219, 223 (Mo. Ct.
8 App. 2011), *reh'g and/or transfer denied* (May 24, 2011), *transfer denied* (Aug. 30,
9 2011); Mo. Rev. Stat. § 407.010(4).

10 Plaintiffs allege Sony violated the MMPA by “failing to disclose that the security
11 of Plaintiffs’ Personal Information on Sony Online Services was inadequate,” and that
12 Sony had a “legal duty” to disclose this information to consumers. (FACC ¶ 320-321.)
13 Sony moves to the dismiss the MMPA claim on the basis that Plaintiffs have failed to
14 allege: (1) an ascertainable loss of money or property caused by Sony’s alleged miscon-
15 duct; (2) the purchase or lease of merchandise; (3) a deceptive or unfair practice; and (4)
16 an entitlement to declaratory or injunctive relief. The Court disagrees.

17 As a general matter, Sony erroneously characterizes the MMPA claim as one
18 based solely on affirmative misrepresentations, rather than a claim based on misrepresen-
19 tations and omissions—an error fatal to most if not all of Sony’s contentions. Therefore,
20 although Sony argues that Plaintiffs have not alleged the purchase of merchandise
21 flowing from a violation of the MMPA, because Plaintiffs purchased their Consoles prior
22 to being presented with the alleged misrepresentations, Sony’s arguments fail to account
23 for Plaintiffs’ allegations that Sony omitted material information regarding the security
24 of its network at the point of sale of the Consoles. Thus, the Court finds Plaintiffs have
25 sufficiently alleged that Plaintiff Munsterman would not have purchased his Console if
26 Sony had disclosed the truth regarding the security of its network. *See Sunset Pools of*
27 *St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883, 886 (Mo. Ct. App. 1994) (“Courts of this
28

1 state apply the benefit of the bargain rule to determine the damages in cases of fraud or
2 deceit where the parties have not elected to rescind the contract and seek restitution.”).

3 Next, the parties dispute whether Plaintiffs have alleged an ascertainable loss of
4 money or property as a result of an act or practice declared unlawful under the MMPA.
5 Mo. Rev. Stat. § 407.020 (stating that an act is deemed unlawful if it is unfair or
6 deceptive). Similar to Sony’s first contention, however, this dispute is easily dispelled.
7 Plaintiffs’ MMPA claim is premised in part on Sony’s alleged material omissions
8 regarding the security of its network, omissions that allegedly induced Plaintiffs to
9 purchase their Consoles. *See Owen*, 533 F.3d at 922 (stating that MMPA claims can be
10 based on material omissions); *Hess*, 220 S.W.3d at 774 (“Proof of omission or conceal-
11 ment of a material fact under the [MMPA] . . . plainly requires less proof than was
12 required to prove the comparable elements of . . . common law fraud claim.”). Thus,
13 because Plaintiffs have alleged that Sony’s omissions were deceptive and/or unfair
14 because Sony misled consumers into believing that their Personal Information was
15 secure, the Court finds Plaintiffs have sufficiently alleged a loss of money or property as
16 a result of an act or practice declared unlawful under the MMPA. *See, e.g., Ward v. W.*
17 *Cnty. Motor Co.*, 403 S.W.3d 82, 84 (Mo. 2013).⁴⁶

18 Finally, although Sony argues that Plaintiffs may not pursue equitable relief under
19 the MMPA because they have not suffered actual damage, as stated above, this conten-
20 tion lacks merit. *See Mo. Ann. Stat. § 407.025; Freeman Health Sys. v. Wass*, 124
21 S.W.3d 504, 509 (Mo. Ct. App. 2004) (stating that “only after a claimant has success-
22 fully brought suit for actual damages under section 407.025, may the court consider
23 awarding attorney’s fees, punitive damages, and other ‘equitable relief.’ ”). Accordingly,
24 the Court DENIES Sony’s motion to dismiss the MMPA.

25
26 ⁴⁶ Sony reliance on *Padberg v. DISH Network LLC*, No. 11-04035-CV-C-NKL,
27 2012 WL 2120765 (W.D. Mo. June 11, 2012) is unavailing. The court in *Padberg* found
28 no causation because the deception was remedied by express terms in the contract.
Padberg, 2012 WL 2120765, at *5–6. Here, however, the language of the PSN User
Agreement is potentially deceptive because Sony warranted “reasonable security” and
“industry-standard encryption.” To the extent Sony did not utilize reasonable security
the disclaimer of “perfect disclaimer” is potentially deceptive.

1 **5. New Hampshire Consumer Protection Act**

2 Count 28 is brought by Plaintiff Kallad and alleges violation of the NHCPA.
3 (FACC ¶¶ 361-370.) The NHCPA prohibits the use of “any unfair or deceptive act or
4 practice in the conduct of any trade or commerce.” N.H. Rev. Stat. § 358–A:2. Similar
5 to the CLRA, the NHCPA provides a non-exhaustive list of prohibited practices,
6 including several prohibitions codifying common law unfair competition. *See* N.H. Rev.
7 Stat. § 358–A:2(II) (“Causing likelihood of confusion or of misunderstanding as to the
8 source, sponsorship, approval, or certification of goods or services”); N.H. Rev. Stat. §
9 358–A:2(III) (“Causing likelihood of confusion or of misunderstanding as to the source,
10 sponsorship, approval, or certification of goods or services”); N.H. Rev. Stat. §
11 358–A:2(V) (“Representing that goods or services have sponsorship [or] . . . approval
12 that they do not have or that a person has a sponsorship, approval, status, affiliation, or
13 connection that he does not have”). However, regardless of whether a practice is
14 included in the NHCPA’s enumerated unlawful practices, conduct can violate the
15 NHCPA if it “attain[s] a level of rascality that would raise an eyebrow of someone inured
16 to the rough and tumble of the world of commerce.” *Barrows v. Boles*, 687 A.2d 979,
17 986 (N.H. 1996).

18 Plaintiffs allege Sony violated the NHCPA by misrepresenting the adequacy of
19 Sony’s network security and by representing that PS3s, PSPs, and Sony Online Services
20 had specific security characteristics, uses, and benefits, when Sony knew they did not.
21 (FACC ¶¶ 366, 370.) Plaintiffs allege they suffered actual and statutory damages as a
22 result of Sony’s deceptive conduct because the misrepresentations induced them to
23 purchase their Consoles and/or register for Sony Online Services. (*Id.* at ¶ 367.)
24 Plaintiffs also seek declaratory and injunctive relief under Section 358-A:10. (*Id.* at ¶
25 369.) Sony moves to dismiss the NHCPA claim on the basis that Plaintiffs have failed to
26 allege: (1) actual damages under Section 358-A:10-a(I); (2) unfair conduct; (3) causa-
27 tion; and (4) any basis for injunctive relief. The Court discusses each in turn.

28

1 First, contrary to Sony’s contentions, the NHCPA “does not require a showing of
2 actual damages for the claimant to be awarded the statutory minimum and attorneys’
3 fees.” *Becksted v. Nadeau*, 926 A.2d 819, 824 (N.H. 2007); N.H. Rev. Stat. §
4 358–A:10(I).⁴⁷ This principle is well established by New Hampshire’s highest courts and
5 will not be disrupted here. *See, e.g., Carter v. Lachance*, 766 A.2d 717, 720 (N.H. 2001)
6 (stating that “[t]he statutory minimum award of \$1,000 is not based upon actual damages
7 suffered, but is a penalty imposed upon” those who violate the statute); *Becksted v.*
8 *Nadeau*, 926 A.2d 819, 824 (N.H. 2007) (“Contrary to the trial court’s ruling, we have
9 previously held that RSA § A:10 does not require a showing of actual damages for the
10 claimant to be awarded the statutory minimum and attorney’s fees.”). Accordingly, as
11 stated below, because the Court finds Plaintiffs have stated a plausible claim under the
12 NHCPA, the Court DENIES Sony’s motion to dismiss the NHCPA claim seeking
13 statutory damages.

14 Second, Sony contends Plaintiffs have failed to allege unlawful conduct under the
15 NHCPA. As set forth in the FACC, Plaintiffs allege Sony violated three of the fourteen
16 enumerated unfair or deceptive practices outlined in the NHCPA. These include:

17 V. Representing that goods or services have sponsorship, approval, charac-
18 teristics, ingredients, uses, benefits, or quantities that they do not have or
19 that a person has a sponsorship, approval, status, affiliation, or connection
20 that such person does not have;

21 VII. Representing that goods or services are of a particular standard, quality,
22 or grade, or that goods are of a particular style or model, if they are of
23 another; and

24 IX. Advertising goods or services with intent not to sell them as advertised.

25 N.H. Rev. Stat. § 358-A:2(V), (VII), (IX). In addition to the enumerated provisions set
26 forth above, Plaintiffs allege Sony’s violated the NHCPA because Sony’s conduct
27 violated the “rascality test.” In opposition, Sony contends none of these allegations set
28 forth a plausible claim for relief because no reasonable consumer would have been

⁴⁷ “Any person injured by another’s use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper.” N.H. Rev. Stat. § 358-A:10(I).

1 deceived by Sony’s representations regarding “reasonable security.” In addition, to the
2 extent Plaintiffs base their NHCPA claim on acts or practices not specifically enumer-
3 ated in the NHCPA, Sony contends Plaintiffs have failed to allege that the conduct
4 “attain[s] a level of rascality that would raise an eyebrow,” or that Sony had the required
5 degree of knowledge or intent. *State v. Moran*, 861 A.2d 763, 765 (N.H. 2004). At this
6 stage in the proceeding, however, the Court does not agree.

7 As stated by the New Hampshire Supreme Court in *Beer v. Bennett*, 993 A.2d 765,
8 768 (N.H. 2010) “even if [] individual representations could be read as literally true, [an]
9 advertisement could still violate the [NHCPA] if it created an overall misleading impres-
10 sion.” In *Beer*, the New Hampshire Supreme Court considered whether the trial court
11 properly awarded the plaintiff \$16,197.00 in damages after the plaintiff purchased a car
12 from a private seller. *Id.* at 767. The plaintiff alleged that the defendant violated the
13 NHCPA because the defendant represented that the car had “pretty vigorous perfor-
14 mance,” when in fact, the car was inoperable due to a number of missing parts. *Id.* In
15 affirming the trial court’s ruling, the New Hampshire Supreme Court noted that the
16 defendant’s conduct met the “rascality test, and therefore violated the NHCPA,” because
17 the defendant “made representations [] knowing that he lacked sufficient knowledge to
18 substantiate them.” *Id.* at 769.

19 Here, Plaintiffs allege Sony affirmatively represented that it would take “reason-
20 able security measures” to protect Plaintiffs’ Personal Information, when in fact, Sony
21 knew that its security systems were both inadequate and vulnerable to attack. Therefore,
22 in contrast to the cases cited by Sony, which contained clear disclaimers of the alleged
23 misrepresentations, at this stage in the proceedings, the Court cannot find that the
24 language in the PSN User Agreement and/or the PSN Privacy Policy did not create an
25 “overall misleading” impression as a matter of law. *Beer*, 993 A.2d at 768; *Cf. Davis*
26 *Frame Co. v. Reilly*, No. CIV. 05-CV-160-SM, 2006 WL 435454, at *6–7 (D.N.H. Feb.
27 22, 2006) (finding no violation of the NHCPA because contract disclosed that customers
28 might have to pay the full cost); *L’Esperance v. HSBC Consumer Lending, Inc.*, No.

1 11-CV-555-LM, 2012 WL 2122164, at *21 (D.N.H. June 12, 2012) (finding no decep-
2 tion under the NHCPA because monthly payments were clearly disclosed in the plain-
3 tiff’s loan agreements).

4 Third, Sony argues Plaintiffs’ class action allegations should be dismissed because
5 Plaintiffs have not alleged an injury to unnamed class members that was “caused by”
6 Sony’s deceptive or unlawful conduct. Sony relies on N.H. Rev. Stat. Section 358-A:10-
7 a(I) to support this proposition. Under N.H. Rev. Stat. Section 358-A:10-a(I):

8 Persons entitled to bring an action under RSA 358-A:10 may, if the unlaw-
9 ful act or practice has caused similar injury to numerous other persons,
10 institute an action as representative or representatives of a class of persons
11 who are residents of this state or whose cause of action arose within this
12 state against one or more defendants as individuals or as representatives of a
13 class or against one or more such defendants having a principal place of
business within this state, and the petition shall allege such facts as will
show that these persons or the named defendants specifically named and
served with process have been fairly chosen and adequately and fairly
represent the whole class, to recover actual damages as provided for in RSA
358-A:10.

14 Based on the language of Section 358-A:10-a(I) and Section 358-A:10(I), which provide
15 for the recovery of “actual damages or \$1,000,” Sony contends statutory damages are
16 disallowed in the absence of actual damages in the class action context. The Court
17 agrees.

18 Although the New Hampshire Supreme Court has interpreted the NHCPA to allow
19 plaintiffs to recover statutory damages in the absence of actual damages, the NHCPA
20 still requires a named plaintiff instituting a representative action to allege that class
21 members were personally harmed as a result of the defendant’s unlawful conduct. *See*
22 *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 149 (E.D.N.Y. 2012) (“Nevertheless, the
23 NHCPA still requires that the Plaintiffs show that the class members were personally
24 harmed in some way by the Defendant’s unlawful conduct.”). Therefore, because
25 Plaintiffs have failed to allege actual damages resulting from Sony’s alleged material
26 misrepresentations, the Court GRANTS Sony’s motion to dismiss the class action
27
28

1 allegations under the NHCPA without leave to amend. *See Birdsall v. Coolidge*, 93 U.S.
2 64, 64 (1876) (defining actual damages).⁴⁸

3 Finally, because the FACC seeks to enjoin Sony’s “wrongful acts and practices,”
4 which includes Kalled’s individual allegations under the NHCPA that have not been
5 dismissed, the Court DENIES Sony’s motion to dismiss Plaintiffs’ NHCPA claims
6 seeking injunctive relief. N.H. Rev. Stat. § 358-A:10 (“Injunctive relief shall be
7 available to private individuals under this chapter without bond, subject to the discretion
8 of the court.”).

9 **6. New York Deceptive Practices Act**

10 Count 33 is brought by Plaintiff Whyland and alleges violation of the NYDPA.⁴⁹
11 (FACC ¶¶ 393-403.) In order to state a claim under the NYDPA, “a plaintiff must show:
12 (1) that the act, practice or advertisement was consumer-oriented; (2) that the act,
13 practice or advertisement was misleading in a material respect; and (3) that the plaintiff
14 was injured as a result of the deceptive practice, act or advertisement.” *Pelman v.*
15 *McDonald's Corp.*, 237 F. Supp. 2d 512, 525 (S.D.N.Y. 2003); *see also* N.Y Gen. Bus.
16 Law § 349 (“Deceptive acts or practices in the conduct of any business, trade or com-
17 merce or in the furnishing of any service in this state are hereby declared unlawful.”).
18 An act, practice, or advertisement is considered misleading if it is “likely to mislead a
19 reasonable consumer acting reasonably under the circumstances.” *Oswego Laborers’*
20 *Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (N.Y. 1995).

21 Plaintiffs allege Sony violated the NYDPA by misleading consumers into believ-
22 ing that their Personal Information would be safe upon transmission to Sony, when Sony
23 knew that its security systems were woefully inadequate. (FACC ¶ 397.) Plaintiffs

25 ⁴⁸ Plaintiffs have failed to allege actual damages under the NHCPA because they
26 have not alleged material misrepresentations at or prior to the purchase of their Consoles,
27 have not alleged actual instances of identify theft or unauthorized charges, and cannot
28 recover damages relating to a brief interruption in PSN access because uninterrupted
service was clearly disclaimed in the PSN User Agreement. (Doc. No. 94-2, Ex. A at 9.)

⁴⁹ Count 33 only alleges a violation of Section 349 (Deceptive Acts and Practices)
and not Section 350 (False Advertising).

1 allege they were injured as a result of these material misrepresentations because they: (1)
2 suffered a loss of privacy and/or a loss of value of their Personal Information; and (2)
3 paid for PSPs, PS3s, Sony Online Services and/or registered for Sony Online Services
4 after exposure to Sony’s materially misleading representations. (*Id.* at ¶ 398.) Sony
5 moves to dismiss the NYDPA claim on the basis that Plaintiffs have not alleged: (1)
6 actual injury caused by Sony’s material misrepresentations; (2) a deceptive act, practice,
7 or advertisement; and (3) any basis for injunctive relief. The Court finds Sony’s first
8 contention dispositive and therefore does not address the remaining grounds for dis-
9 missal. *See Fibermark, Inc. v. Brownville Specialty Paper Prods., Inc.*, 419 F. Supp. 2d
10 225, 242 (N.D. N.Y. 2005); *Franklin Elec. Publishers, Inc. v. Unisonic Prods. Corp.*,
11 763 F. Supp. 1, 5 (S.D.N.Y. 1991) (“[P]laintiff claims damages based on defendants’
12 alleged violation of the New York Consumer Protection Law . . . but it has not alleged
13 injury to consumers . . . and thus has not stated a claim under the statute.”).

14 With regard to damages, Sony contends Plaintiffs cannot state a claim under the
15 NYDPA because they have not alleged actual injury caused by Sony’s material misrepre-
16 sentations. Pursuant to Section 349(h), “any person who has been injured by reason of
17 any violation of this section may bring an action . . . to enjoin such unlawful act or
18 practice, an action to recover his actual damages or fifty dollars, whichever is great, or
19 both.” N.Y. Gen. Bus. Law § 349(h). New York courts interpreting this statutory
20 language have held that even though a plaintiff need not prove justifiable reliance on the
21 alleged deceptive conduct, a plaintiff must still allege “that the defendant engaged in a
22 material deceptive act or practice that caused actual, although not necessarily pecuniary
23 harm.” *Oswego Laborers' Local 214 Pension Fund*, 647 N.E.2d at 745; *see also Bose v.*
24 *Interclick, Inc.*, No. 10 CIV. 9183 DAB, 2011 WL 4343517, at *8–9 (S.D.N.Y. Aug. 17,
25 2011). Therefore, as further discussed below, although Plaintiffs attempt to plead actual
26 injury resulting from a loss of privacy and/or allegations that they purchased their
27 Consoles as a result of Sony’s material misrepresentations, neither is sufficient under
28 New York law.

1 First, with regard to Plaintiffs’ allegations that they suffered a loss of privacy
2 and/or a loss in value of their Personal Information, each of cases relied upon by
3 Plaintiffs are distinguishable. None of the cases dealt with a loss of privacy resulting
4 from a data breach and each of the cases dealt with intentional conduct on behalf of the
5 defendant. For example, in *Meyerson v. Prime Realty Sers., LLC*, 796 N.Y.S.2d 848,
6 851 (N.Y. App. Div. 2005), the court held that the plaintiff-tenant stated a viable claim
7 against the defendant-landlord based on allegations that the landlord deceived the tenant
8 into believing that the tenant had to disclose her Social Security Number prior to
9 renewing her lease. Similarly, in *Anonymous v. CVS Corp.*, 728 N.Y.S.2d 333 (N.Y.
10 App. Div. 2001), the court found that the plaintiffs had sufficiently alleged an injury
11 under the NYDPA by alleging that the defendant pharmacy was intentionally disclosing
12 the plaintiffs’ medical information without their consent. And finally, in *Bose v.*
13 *Interclick, Inc.*, No. 10 CIV. 9183 DAB, 2011 WL 4343517, at *2 (S.D.N.Y. Aug. 17,
14 2011), the court found that an advertising company potentially violated the NYDPA
15 because it used “flash cookies” and “history sniffing” to back up a user’s previously
16 deleted cookies to intentionally track their browsing history. Therefore, even though
17 each of these cases holds that an underlying privacy violation can form the basis of a
18 NYDPA claim, none of these cases holds that information unintentionally disclosed by
19 the defendant following a data breach is sufficient to state an injury under the NYDPA.

20 As a result, the Court finds the cases relied upon by Plaintiffs unavailing and the
21 data breach cases cited by Sony highly instructive. *See, e.g., Pisciotta v. Old Nat.*
22 *Bancorp*, 499 F.3d 629, 639 (7th Cir. 2007) (“Without more than allegations of increased
23 risk of future identity theft, the plaintiffs have not suffered a harm that the law is
24 prepared to remedy.”); *Willey v. J.P. Morgan Chase, N.A.*, No. 09 CIV. 1397(CM), 2009
25 WL 1938987, at *9 (S.D. N.Y. July 7, 2009) (“The risk that plaintiff’s data may be
26 misused because it has been lost is not a cognizable harm” under the NYDPA); *Shafran*
27 *v. Harley-Davidson, Inc.*, No. 07 CIV. 01365 (GBD), 2008 WL 763177, at *3 (S.D.N.Y.
28 Mar. 20, 2008) (“Plaintiff’s alleged injuries are solely the result of a perceived and

1 speculative risk of future injury that may never occur.”); *Hammond v. The Bank of N.Y.*
2 *Mellon Corp.*, No. 08 CIV. 6060 RMB RLE, 2010 WL 2643307, at *13 (S.D.N.Y. June
3 25, 2010) (“Thus, it is not surprising that the United States District Courts in New York,
4 California, Illinois and Michigan (applying state law) have each found that the increased
5 risk of identity theft (in the future) is not a cognizable claim.”). Accordingly, although
6 Plaintiffs allege that *Pisciotta*, *Willey*, *Shafran*, and *Hammond* are each distinguishable
7 because they involved plaintiffs who alleged nothing more than an increased risk of
8 identity theft rather than a loss of privacy, the Court does not agree. The plaintiffs in
9 *Pisciotta*, *Willey*, *Shafran*, and *Hammond* each alleged a loss of privacy resulting from
10 the disclosure of their personal information.

11 Second, Plaintiffs’ allegations that they were injured as a result of paying for their
12 Consoles and/or registering for Sony Online Services are also without merit. (FACC ¶
13 398.) As stated above, Plaintiffs’ misrepresentation allegations are based on representa-
14 tions contained within the PSN User Agreement and/or the PSN Privacy Policy, both of
15 which were presented to Plaintiffs after they purchased their Consoles. Therefore, even
16 though justifiable reliance is not required under the NYDPA, Plaintiffs cannot plausibly
17 allege an injury relating to the purchase of their Consoles based on representations
18 presented to Plaintiffs after they purchased their Consoles. *See Stutman v. Chem. Bank*,
19 95 N.Y.2d 24, 30 (N.Y. 2000) (requiring a causal link between the alleged injury and
20 deceptive conduct). Moreover, even if Rule 9(b) does not apply to Plaintiffs’ NYDPA
21 claim, Plaintiffs’ allegations that Sony’s conduct was deceptive must be based on Sony’s
22 misrepresentations, and not purely on “reasonable consumer expectations.” (Doc. No.
23 164 at 26:9-12.) As a result, the Court finds Plaintiffs have failed to allege an injury
24 based on the purchase price of their Consoles (no causation), or an injury based on
25 registration for Sony Online Services (a free service that clearly disclaimed any right to
26 uninterrupted service), and that Plaintiffs’ only alleged injury is the alleged deceptive
27 conduct itself, which New York courts have consistently rejected as insufficient under
28 the NYDPA. *See Baron v. Pfizer, Inc.*, 840 N.Y.S.2d 445, 448 (N.Y. 2007).

1 Accordingly, because Plaintiffs have failed to allege an injury caused by a
2 violation of the statute, the Court GRANTS Sony’s motion to dismiss the NYDPA
3 claim.⁵⁰ Because further amendment of this claim would be futile, the Court dismisses
4 the claim without leave to amend. *See McLaughlin v. Anderson*, 962 F.2d 187, 195 (2d
5 Cir. 1992) (finding not abuse of discretion for court to dismiss without leave to amend).

6 **7. Ohio Consumer Protection Statutes**

7 Plaintiffs assert two consumer protection claims under Ohio law: (1) violation of
8 the OCSPA (Count 37); and (2) violation of the ODTPA (Count 38). (FACC ¶¶ 421-
9 431.) Each is discussed in turn.

10 **a. The Ohio Consumer Sales Practices Act**

11 The OCSPA “prohibits unfair, deceptive, and unconscionable practices in
12 consumer sales transactions,” and permits both individual claims and representative
13 actions. *Marrone v. Philip Morris USA, Inc.*, 850 N.E.2d 31, 33 (Ohio 2006) (citing
14 Ohio Rev. Code §§ 1345.02, 1345.03); *City of Findlay v. Hotels.com*, 441 F. Supp. 2d
15 855, 862 (N.D. Ohio 2006). Under Section 1345.09(B), a consumer can bring a claim on
16 behalf of a class if “the defendant’s alleged violation of the [OCSPA] is substantially
17 similar to an act or practice previously declared to be deceptive by one of the methods
18 identified in” § 1345.09(B). *Marrone*, 850 N.E.2d at 33. The requisite notice under
19 Section 1345.09(B) must be in the form of: “(1) a rule adopted by the Ohio Attorney
20 General; or (2) a judicial decision involving substantially similar conduct.” *McKinney v.*
21 *Bayer Corp.*, 744 F. Supp. 2d 733, 743 (N.D. Ohio 2010). After the Court requested
22 supplemental briefing on the OCSPA claim, Plaintiffs conceded that they were unable to
23 locate an act “substantially similar to an act or practice previously declared to be decep-
24 tive” by the Ohio Attorney General or an Ohio state court. (Doc. No. 164 at 26:16-25.)
25 As a result, the Court GRANTS Sony’s motion to dismiss the OCSPA claim without
26 leave to amend.

27
28 ⁵⁰ Plaintiffs did not address Sony’s contentions that injunctive relief under the NYDPA is disallowed in the absence of actual injury.

1 **b. Ohio Deceptive Trade Practices Act**

2 Count 38 alleges violation of the ODTPA. (FACC ¶¶ 426-431.) Sony moves to
3 dismiss the ODTPA claim on the basis that the statute does not grant consumers standing
4 to sue. Sony cites *In re Oreck Corp. Halo Vacuum & Air Purifiers Marketing and Sales*
5 *Practices Litigation*, No. 12-CV-2317, 2012 WL 6062047, at *11 (C.D. Cal. Dec. 3,
6 2012), and *Gascho v. Global Fitness Holdings, LLC*, 863 F. Supp. 2d 677, 699 (S.D.
7 Ohio 2012), to support this proposition, both of which held that only commercial entities
8 have standing to sue under the ODTPA. Plaintiffs cite *Bower v. International Business*
9 *Machines, Inc.*, 495 F. Supp. 2d 837 (S.D. Ohio 2007), in opposition.

10 Although the parties have presented the Court with conflicting case law, *Bower*
11 represents a minority position not followed by a majority of Ohio’s intermediate
12 appellate courts. *See In re Oreck Corp.*, 2012 WL 6062047, at *11 (“Ohio district courts
13 have criticized and declined to follow the decision in *Bower*.”). Therefore, because the
14 Ohio Supreme Court has not addressed whether consumers have standing to bring suit
15 under the ODTPA, and the “vast majority of federal courts and all lower state courts to
16 address the issue have concluded that relief under the [ODTPA] is not available to
17 consumers,” the Court finds Plaintiffs lack standing under the ODTPA. *Phillips v. Philip*
18 *Morris Companies*, 290 F.R.D. 476, 2013 WL 1182233, at *6 (N.D. Ohio 2013 Mar. 21,
19 2013); *see also West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (stating that the
20 court must consider decisions of intermediate appellate state courts unless it is convinced
21 by other persuasive data that the highest court of the state would decide otherwise);
22 *Robins v. Global Fitness Holdings*, 838 F. Supp. 2d 631, 649–50 (N.D. Ohio 2012)
23 (collecting cases and stating that the *Bower* opinion fails to acknowledge that Ohio
24 courts look to the Lanham Act when adjudicating claims under the ODTPA); *In re*
25 *Porsche Cars N. Am.*, 880 F. Supp. 2d 801, 874–75 (S.D. Ohio 2012) (offering four
26 different reasons for rejecting *Bower*). Accordingly, the Court GRANTS Sony’s motion
27 to dismiss the ODTPA claim without leave to amend.

28 //

1 **8. Texas Deceptive Trade Practices Act**

2 Count 44 is brought by Plaintiff Wilson and alleges violation of the TDTPA.
3 (FACC ¶¶ 457-466.) In order to state a claim under the TDTPA, the plaintiff must allege
4 that: (1) he is a consumer; (2) the defendant engaged in false, misleading, or deceptive
5 acts; and (3) that the defendant’s conduct was the producing cause of the plaintiff’s
6 damages. *See* Tex. Bus. & Com. Code § 17.50(a); *Martin v. Ford Motor Co.*, 914 F.
7 Supp. 1449 (S.D. Tex. 1996).

8 Plaintiffs contend Sony violated the TDTPA by misrepresenting the security of
9 Sony Online Services, advertising Sony Online Services with the intent not to sell the
10 services as warranted, breaching express and implied warranties, and engaging in
11 unconscionable conduct.⁵¹ (FACC ¶¶ 460, 463.) Plaintiffs allege they were injured as a
12 result of Sony’s conduct because they purchased their Consoles and/or registered for
13 Sony Online Services after exposure to the alleged misrepresentations. (*Id.* at ¶ 463.)
14 Sony moves to dismiss the TDTPA claim on the basis that Plaintiffs have failed to
15 allege: (1) an actual injury caused by Sony’s conduct; (2) that Plaintiffs are consumers as
16 defined under the TDTPA; (3) a violation of the statute; and (4) any right to injunctive
17 and/or declaratory relief. (Doc. No. 163 at 26-30.) The Court finds Plaintiffs have failed
18 to allege an actual injury caused by Sony’s unlawful conduct and therefore does not
19 address Sony’s remaining contentions.

20 With respect to damages, Sony contends Plaintiffs have failed to allege an actual
21 injury caused by Sony’s unlawful conduct. To prevail under the TDTPA, a plaintiff must
22 prove that the defendant’s misrepresentation or unlawful conduct was the “producing
23 cause of [his] economic damages or damages for mental anguish.” Tex. Bus. & Com.
24 Code § 17.50(a); *see also Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 117 (Tex.
25 2004). Texas courts interpreting the statute have held that “producing cause” language
26 requires the defendant’s act to be both the “cause-in-fact” and a “substantial factor” in

27
28 ⁵¹ Plaintiffs’ opposition to Sony’s supplemental brief represented that their TDTPA
claims were based only on misrepresentations and unconscionable conduct, and not on
breach of warranty.

1 the plaintiff's alleged injuries. *See, e.g., Main Place Custom Homes, Inc. v. Honaker,*
2 192 S.W.3d 604, 616 (Tex. App. 2006); *Prudential Ins. Co. v. Jefferson Assocs.,* 896
3 S.W.2d 156, 161 (Tex. 1995); *Union Pump Co. v. Allbritton,* 898 S.W.2d 773, 775 (Tex.
4 1995). Although there may be more than one producing cause, the plaintiff must show
5 that the defendant's conduct was a "contributing cause" of the plaintiff's alleged injury.
6 *Main Place Custom Homes,* 192 S.W.3d at 616. Where a plaintiff bases his claim on
7 misrepresentations, the plaintiff must also allege that he relied on the defendant's
8 misrepresentations to his detriment. *See* Tex. Bus. & Com. Code § 17.50(a)(1)(B).

9 Here, the FACC alleges Plaintiff Wilson suffered actual injury as a result of
10 Sony's unlawful conduct because he purchased his Console and/or registered for Sony
11 Online Services "after" exposure to Sony's material misrepresentations. (FACC ¶ 463.)
12 Plaintiffs attempted to bolster these allegations in their opposition to Sony's supplemen-
13 tal brief by stating that in addition to the injuries stated above, they are also more
14 vulnerable to cyber stalking/phishing, and lost access to Sony Online Services during the
15 brief interruption in PSN access. However, neither of these allegations were pled in the
16 FACC, and even if they were, they would not suffice under the TDTPA. *See N. Port*
17 *Firefighters' Pension--Local Option Plan v. Temple-Inland, Inc.,* 936 F. Supp. 2d 722,
18 740 (N.D. Tex. 2013). As recognized by Sony and unrebutted by Plaintiffs, Texas does
19 not allow a plaintiff to recover under the TDTPA for the mere risk of future identity theft
20 or speculative injuries. *See Martin v. Home Depot USA, Inc.,* 369 F. Supp. 2d 887, 890
21 (W.D. Tex. 2005) (discussing the actual injury requirement); *Higbie Roth Const. Co. v.*
22 *Houston Shell & Concrete,* 1 S.W.3d 808, 814 (Tex. App. 1999) ("[plaintiff] seeks
23 compensation for future damages, possible loss of coverage, and possible additional
24 damages. These damages are conjectural, uncertain, and therefore not actionable under
25 the [TDTPA]."). As a result, the Court only addresses whether Plaintiffs have suffi-
26 ciently pled an actual injury stemming from the purchase of their Consoles and/or
27 registration for Sony Online Services.

28

1 First, with respect to Plaintiffs’ allegations that they suffered an actual injury in
2 the form of the purchase price of their Consoles, Plaintiffs are unable to satisfy the
3 causation requirement. Throughout the FACC, Plaintiffs concede that they purchased
4 their Consoles before registering for Sony Online Services, and that the alleged misrep-
5 resentations were contained in the PSN User Agreement and/or the PSN Privacy
6 Policy—two agreements Plaintiffs were required to assent to before registering for the
7 network and after purchasing their Consoles. As a result, it is factually impossible for
8 Sony’s alleged misrepresentations to have been the “producing cause” of Plaintiffs’
9 decision to purchase their Consoles. *See Bartlett v. Schmidt*, 33 S.W.3d 35, 39 (Tex.
10 App. 2000) (stating that “the plaintiff must show that there is some unbroken causal
11 connection between the allegedly deceptive act and the actual damages suffered”); *Elliott*
12 *v. Kraft Foods N. Am., Inc.*, 118 S.W.3d 50, 57 (Tex. App. 2003) (“An act or defect that
13 is not a producing cause cannot, as a matter of law, constitute a proximate cause.”).

14 Moreover, contrary to Plaintiffs’ contentions, whether a cause of action under the
15 TDTPA is based on misrepresentations or unconscionable conduct, the plaintiff is still
16 required to show that the defendant’s unlawful conduct was the “producing cause” of the
17 plaintiff’s injury. *See Tex. Bus. & Com. Code* § 17.50(a); *Daugherty v. Jacobs*, 187
18 S.W.3d 607, 616 (Tex. App. 2006) (“As with false, misleading, or deceptive acts, it is
19 not enough that consumers merely prove unconscionable action or course of action, they
20 must also prove those actions were the producing cause of actual damages.”). Therefore,
21 the Court finds Plaintiffs’ allegations of injury relating to the purchase of their Consoles
22 fails as a matter of law.⁵²

23 Second, Wilson’s allegation that he suffered an actual injury because he registered
24 for Sony Online Services is also without merit. As stated above, registration and use of
25 Sony Online Services was free, and Wilson does not allege that he purchased premium
26

27 ⁵² Plaintiffs’ reliance on *Pirozzi v. Apple, Inc.*, No. 12-CV-01529-JST, 2013 WL
28 4029067, at *6 (N.D. Cal. Aug. 5, 2013) is similarly unavailing. The plaintiff in *Pirozzi*
asserted claims under the UCL, FAL, CLRA only after having read the defendant’s
alleged misrepresentations.

1 PSN services. Moreover, although not alleged in the FACC, to the extent Plaintiffs
2 allege they were injured as a result of the brief interruption in PSN access, or the
3 inability to access Third Party Services via their Consoles, Sony clearly disclaimed any
4 right to uninterrupted and continuous PSN access. *See Robinson v. Match.com, LLC*,
5 No. 3:10-CV-2651-L, 2012 WL 5007777, at *11 (N.D. Tex. Oct. 17, 2012) *aff'd sub*
6 *nom. Malsom v. Match.com, LLC.*, No. 12-11123, 2013 WL 5495666 (5th Cir. Oct. 3,
7 2013). Accordingly, the Court GRANTS Sony's motion to dismiss the TDTPA claim on
8 the basis that Plaintiffs cannot plausibly allege an actual injury.⁵³ Because further
9 amendment would be futile Sony's motion is granted without leave to amend. *See*
10 *Bittinger v. Wells Fargo Bank NA*, 744 F. Supp. 2d 619, 626 (S.D. Tex. 2010).

11 **G. California Database Breach Act**

12 Plaintiffs' fourth cause of action alleges Sony violated the California Database
13 Breach Act ("DBA") by failing to notify Plaintiffs of the intrusion in the most expedient
14 manner possible and without unreasonable delay. (FACC ¶¶ 186-195.) Plaintiffs seek
15 injunctive relief, attorneys' fees, and economic damages (fees incurred to obtain credit
16 monitoring services, loss of use and value of Sony Online Services, loss of use and value
17 of Third Party Services, and a diminution in value of their Consoles) as a result of the
18 violation. (*Id.* at ¶¶ 193-195.) Sony moves to dismiss the DBA claim on the basis that
19 Plaintiffs have failed to allege: (1) why notice of the intrusion within the 90-day safe
20 harbor provision set forth in Section 1798.84(d) was unreasonable; (2) how Sony's
21 conduct was willful, intentional, and/or reckless in violation of Section 1798.83; and (3)
22 how Plaintiffs' economic damages flow from the purported unreasonable delay.

23 California Civil Code Section 1798.82 sets forth the parameters of the DBA,
24 including what is required to state a violation of the statute. In pertinent part, Section
25 1798.82 states:

26
27
28 ⁵³ Injunctive and declaratory relief are only available in the event the plaintiff prevails. Tex. Bus. & Com. Code § 17.50(b)(2) ("In a suit filed under this section, each consumer who prevails may obtain. . . an order enjoining such acts or failure to act").

1 Any person or business that conducts business in California, and that owns
2 or licenses computerized data that includes personal information, shall
3 disclose any breach of the security of the system following discovery or
4 notification of the breach in the security of the data to any resident of
5 California whose unencrypted personal information was, or is reasonably
6 believed to have been, acquired by an unauthorized person. The disclosure
7 shall be made in the most expedient time possible and without unreasonable
8 delay, consistent with the legitimate needs of law enforcement, as provided
9 in subdivision (c), or any measures necessary to determine the scope of the
10 breach and restore the reasonable integrity of the data system.

11 Cal. Civ. Code § 1798.82(a). Here, neither party contests that Sony conducts business in
12 California, that Sony owns/licenses computerized data that includes Plaintiffs' Personal
13 Information, and that Plaintiffs' Personal Information may have been exposed as a result
14 of the intrusion. Therefore, in order to comply with the DBA, Sony was required to
15 notify consumers of the intrusion "in the most expedient time possible and without
16 unreasonable delay." *Id.* Although Sony contends they complied with the DBA based
17 on the 90-day safe harbor provision set forth in Section 1798.83(d), as correctly noted by
18 Plaintiffs, the safe harbor provision only applies to the sale of information to marketers
19 without disclosure, and is therefore inapplicable here. As a result, whether or not the
20 ten-day delay was unreasonable is a factual determination not properly decided by the
21 Court on a motion to dismiss.

22 Nonetheless, even though the length of the delay is a factual question to be
23 resolved by the trier of fact, whether Plaintiffs have sufficiently pled an entitlement to
24 damages or injunctive relief is a legal question to be determined by the Court. With
25 respect to the recovery of actual damages, Section 1798.84(b) states that "[a]ny customer
26 injured by a violation of this title may institute a civil action to recover damages."
27 Although case law interpreting Section 1798.84(b) is limited, unreported California
28 cases and courts in other jurisdictions analyzing statutes mirroring the DBA have held
that a plaintiff must allege actual damages flowing from the unreasonable delay (and not
just the intrusion itself) in order to recover actual damages. *See, e.g., Boorstein v. Men's
Journal, LLC*, No. CV12-771 DSF (Ex), 2012 WL 2152815, at *2 (C.D. Cal. June 14,

1 2012); *Grigsby v. Valve Corp.*, No. 2:12-CV-00553-JLR, at *1–2 (Mar. 18, 2013)
2 (“*Grigsby II*”).⁵⁴

3 For example, in *Grigsby II*, an unreported case out of the Western District of
4 Washington, the court concluded that the words “injured by a violation” required the
5 plaintiff to allege that the damages flowed from the delay, and not just that the damage
6 flowed from the intrusion.⁵⁵ (Doc. No. 146, Ex. A.) In pertinent part, the *Grigsby II*
7 court stated:

8 Valve argues that Mr. Grigsby’s allegations concerning injury are insuffi-
9 cient. The court agrees. With respect to a claim under RCW 19.255.010, it
10 is not enough for Mr. Grigsby to have been injured by the hacking incident.
11 The statute does not penalize companies that simply suffer a security breach
12 or fail to prevent an unauthorized third-party from acquiring their custom-
13 ers’ personal information; rather, the statute penalizes companies that fail to
14 disclose such incidents in the manner prescribed by the statute to affected
15 state residents. *See* RCW 19.255.010(1); *see also* RCW 19.255.101(10)
16 (providing for a private right of action and injunctive relief). Thus, Mr.
17 Grigsby must allege facts supporting the claim that he was injured due to
18 the interval between the hacking incident and Valve’s notice of the incident
19 and not just that he was injured by the hacking incident alone. Mr. Grigsby
20 has failed to do so, and the court therefore finds his claim lacking in this
21 respect as well.

22 (Doc. No. 146, Ex. A at 12:6-17.) The same conclusion can be reached in the instant
23 case. Here, Plaintiffs have failed to allege how the ten-day delay caused Howe to incur
24 expenses for credit monitoring services, when these credit monitoring services were
25 purchased, how the loss of use and value of Sony Online Services and Third Party
26 Services were caused by the delay (and not the intrusion), and how Plaintiffs’ Consoles
27 diminished in value as a result of the delay.

28 Accordingly, the Court GRANTS Sony’s motion to dismiss the DBA claims
seeking economic damages under § 1789.84(b). However, because Plaintiffs may pursue
their injunctive relief claims under § 1798.84(e), which affords relief when a “business

⁵⁴ In *Boorstein v. Men’s Journal*, the plaintiff brought a claim under the DBA
alleging that the defendant failed to provide him with the required disclosures when it
sold him a magazine. 2012 WL 2152815, at *1–5. The court dismissed the claim for
failure to allege that the plaintiff suffered an injury as a result of the violation. *Id.*
Grigsby II is an unreported case attached as Exhibit A to Doc. No. 146.

⁵⁵ The Washington statute mirrors the DBA.

1 violates, proposes to violate, or has violated” the DBA, the Court DENIES Sony’s
2 motion to dismiss the DBA claim seeking injunctive relief.

3 **H. Violation of the Federal Fair Credit Reporting Act**

4 Plaintiffs assert two causes of action under the federal Fair Credit Reporting Act,
5 15 U.S.C. § 1681 (“FCRA”). Count 49 alleges willful violation of the FCRA and Count
6 50 alleges negligent violation of the FCRA. (FACC ¶¶ 489-498, 499-504.) Sony moves
7 to dismiss both claims on the basis that: (1) Defendants are not consumer reporting
8 agencies as defined under the Section 1681a(f); and (2) Plaintiffs have failed to allege a
9 plausible basis for relief.⁵⁶ The Court finds Sony’s first contention dispositive.

10 **1. Consumer Reporting Agencies**

11 First, Sony contends Plaintiffs’ FCRA claims should be dismissed because
12 Plaintiffs have not alleged which Defendants are consumer reporting agencies or how
13 any of the Defendants fit the definition of a consumer reporting agency. Although
14 Plaintiffs attempt to combat Sony’s contentions by arguing that each Defendant is a
15 consumer reporting agency because they assembled the personal information of consum-
16 ers for the purpose of furnishing information to third parties, including, by and between
17 the various Sony Defendants, Plaintiffs’ allegations stretch the statutory definition
18 beyond its plain meaning.

19 Congress enacted the FCRA to regulate “consumer reporting agencies” that
20 accumulate consumer credit histories and then regularly make that information available
21 to third parties via “consumer reports.” *Holmes v. Countrywide Fin. Corp.*, No.
22 08-CV-00205, 2012 WL 2873892, at *15 (W.D. Ky. July 12, 2012) (citing 15 U.S.C. §
23 1681). As defined by the FCRA, a “consumer reporting agency” is:

24 [A]ny person which, for monetary fees, dues, or on a cooperative nonprofit
25 basis, regularly engages in whole or in part in the practice of assembling or
26 evaluating consumer credit information or other information on consumers
for the purpose of furnishing consumer reports to third parties, and which

27 ⁵⁶ Neither party addressed the Court’s tentative ruling at oral argument, which
28 stated that both FCRA claims were subject to dismissal without leave to amend because
none of the Defendants are “consumer reporting agencies” as defined under Section
1681a(f). (Doc. No. 157.)

1 uses any means or facility of interstate commerce for the purpose of prepar-
2 ing or furnishing consumer reports.

3 15 U.S.C. § 1681a(f). Courts construing Section 1681a(f) have restricted the definition
4 of “consumer reporting agency” to include only those agencies that furnish “consumer
5 reports” for “consumer purposes.” *Willingham v. Global Payments, Inc.*, No.
6 1:12-CV-01157-RWS, 2013 WL 440702, at *13 (N.D. Ga. Feb. 5, 2013) (recommending
7 dismissal of FCRA claims in a data breach case where the plaintiffs failed to demonstrate
8 that the defendant met the definition of a “consumer reporting agency” under the statute).
9 As a result, entities that utilize consumer reports for “business, commercial[,] or profes-
10 sional purposes” are not considered consumer reporting agencies under the FCRA.
11 *McCready v. eBay, Inc.*, 453 F.3d 882, 889 (7th Cir. 2006) (quoting *Ippolito v. WNS,*
12 *Inc.*, 864 F.2d 440, 452 (7th Cir. 1988)); *FTC v. Gill*, 265 F.3d 944, 948 (9th Cir. 2001)
13 (“Consumer reporting agencies [under the FCRA] . . . like Trans Union, Experian, and
14 Equifax must exercise care in accurately and completely reporting credit information.”);
15 15 U.S.C. § 1681a(d)(1).

16 Here, the FACC does not contain any allegations suggesting that Sony regularly
17 compiles and distributes consumer reports as defined under the FCRA. Rather, Plaintiffs
18 merely recite the language of the statute in an attempt to come within the confines of the
19 FCRA, or stretch the statutory language beyond its intended purpose. For example,
20 although Plaintiffs allege that Sony furnished reports to “third parties” by disseminating
21 Plaintiffs’ Personal Information by and between the Sony Defendants, such conduct is
22 clearly excluded under the FCRA when it occurs between entities related by common
23 ownership. *See* 15 U.S.C. § 1681a(d)(2)(ii) (excluding from the definition of “consumer
24 report” any communication of transaction information “among persons related by
25 common ownership or affiliated by corporate control”). Moreover, to the extent
26 Plaintiffs attempt to allege that their Personal Information was furnished to third parties
27
28

1 as a result of the intrusion, this argument has also been rejected.⁵⁷ *See, e.g., Willingham*
2 *v. Global Payments, Inc.*, No. 1:12-CV-01157-RWS, 2013 WL 440702, at *13 (N.D. Ga.
3 Feb. 5, 2013); *Holmes*, 2012 WL 2873892, at *16 (“No coherent understanding of the
4 words “furnished” or “transmitted” would implicate Countrywide’s action under the
5 FCRA.”). Accordingly, the Court GRANTS Sony’s motion to dismiss both FCRA
6 claims without leave to amend.

7 **I. Partial Performance and Breach of the Covenant of Good Faith and**
8 **Fair Dealing**

9 Plaintiffs’ final cause of action seeks partial performance and breach of the
10 covenant of good faith and fair dealing regarding a settlement agreement (“Settlement
11 Agreement”) allegedly entered into by and between Sony and Plaintiffs’ counsel.
12 (FACC ¶¶ 505-515.) Plaintiffs allege the Settlement Agreement was entered into
13 between the parties soon after the instant litigation commenced, and required the parties
14 to negotiate attorney’s fees, costs, and expenses, in addition to including the Canadian
15 and Israeli cases in the settlement. (*Id.* at ¶¶ 506, 509.) Plaintiffs allege that after the
16 Canadian cases joined in the Settlement Agreement and Sony waived the requirement
17 that the Israeli cases join, Sony failed to negotiate attorney’s fees, costs, and expenses
18 with Plaintiffs and separately settled with the Canadian plaintiffs. (*Id.* at ¶¶ 510-512.)
19 As a result, Plaintiffs seek partial performance of the Settlement Agreement, including
20 attorney’s fees, costs, and expenses incurred in the litigation thus far. (*Id.* at ¶ 515.)

21 Sony moves to dismiss the claim on the basis that Plaintiffs confuse settlement
22 discussions with an executed settlement agreement. Sony contends that because
23 Plaintiffs do not allege facts showing that an agreement was in fact executed (and by
24 whom), the date the agreement was allegedly executed, or that an executed agreement
25

26 ⁵⁷ The two cases cited by Plaintiffs are distinguishable. *See, e.g., Rowe v. UniCare*
27 *Life & Health Ins. Co.*, No. 09 C 2286, 2010 WL 86391, at *2–4 (N.D. Ill. Jan. 5, 2010)
28 (stating that whether or not the defendant was a consumer reporting agency was not at
issue); *Ori v. Fifth Third Bank*, 674 F. Supp. 2d 1095, 1097–98 (E.D. Wis. 2009)
(finding that the defendant reseller was a consumer reporting agency under the FCRA
based on a specific provision in the statute applying to resellers).

1 was ever delivered from one party to another, Plaintiffs have failed to state a viable cause
2 of action. Moreover, to the extent that there was an actual settlement agreement
3 executed between the parties, Sony contends the continued prosecution of this case is
4 tantamount to an abandonment of the Settlement Agreement.⁵⁸

5 Based on the arguments set forth above, the crux of the disagreement between the
6 parties focuses on whether an executed agreement actually exists, and if it does not, the
7 extent to which an “agreement to negotiate” can form the basis of Plaintiffs’ claim.
8 Although the Court is perplexed as to why Plaintiffs did not file a motion to enforce the
9 Settlement Agreement (to the extent there is an executed settlement agreement between
10 the parties), Plaintiffs’ claim could be based on an alleged breach of an “agreement to
11 negotiate.” As explained by the California Court of Appeal in *Copeland v. Baskin*
12 *Robbins USA*, 96 Cal. App. 4th 1251, 1257, 1260 (Cal. Ct. App. 2002), which distin-
13 guished an agreement to agree (not actionable) from an agreement to negotiate (poten-
14 tially actionable), a party can be liable based on an “agreement to negotiate” where the
15 failure to reach an “ultimate agreement resulted from a breach of that party’s obligation
16 to negotiate or to negotiate in good faith.”

17 Here, Plaintiffs allege that the Settlement Agreement required the parties to
18 negotiate attorney’s fees, costs, and expenses in good faith, and that Sony failed and
19 refused to negotiate such expenses with Plaintiffs as required under the agreement.
20 Plaintiffs further allege that Sony separately settled with the Canadian plaintiffs in direct
21 contravention of the Settlement Agreement. Therefore, to the extent there is an executed
22 document requiring Sony to negotiate attorney’s fees, costs, and expenses, and Sony
23 failed to do so, or negotiated with Plaintiffs in bad faith, Plaintiffs have stated a claim for
24 relief. Accordingly, at this stage in the proceedings, the Court DENIES Sony’s motion
25 to dismiss Plaintiffs’ final cause of action alleging partial performance and breach of the
26 implied covenant of good faith and fair dealing.

27
28 ⁵⁸ Neither party addressed the Court’s tentative ruling at oral argument, which
stated that Plaintiffs’ partial performance/breach of the covenant of good faith and fair
dealing claim was subject to dismissal with leave to amend. (Doc. No. 157.)

1 **CONCLUSION**

2 For the reasons set forth above, the Court GRANTS IN PART and DENIES IN
3 PART Defendants’ motion to dismiss the FACC. (Doc. No. 135.) Defendants are
4 instructed to file an answer to the FACC no later than **February 22, 2014**, and contact
5 Magistrate Judge Dembin’s chambers to schedule a Case Management Conference and
6 the necessary Rule 26 requirements no later than **February 4, 2014**. Accordingly, the
7 following causes of action have been dismissed without leave to amend:

- 8 1. California Negligence Claim (Count 5);
- 9 2. Florida Negligence Claim (Count 11);
- 10 3. Massachusetts Negligence Claim (Count 14);
- 11 4. Missouri Negligence Claim (Count 27);
- 12 5. Ohio Negligence Claim (Count 43);
- 13 6. Florida Negligent Misrepresentation Claim (Count 9);
- 14 7. Massachusetts Negligent Misrepresentation Claim (Count 15);
- 15 8. Michigan Negligent Misrepresentation Claim (Count 19);
- 16 9. New Hampshire Negligent Misrepresentation Claim (Count 31);
- 17 10. Ohio Negligent Misrepresentation Claim (Count 42);
- 18 11. Texas Negligent Misrepresentation Claim (Count 47);
- 19 12. Michigan Innocent Misrepresentation Claim (Count 20);
- 20 13. Missouri Negligent Omission Claim (Count 26);
- 21 14. Florida Breach of Warranty Claim (Count 7);
- 22 15. Michigan Breach of Warranty Claim (Count 17);
- 23 16. Missouri Breach of Warranty Claim (Count 24);
- 24 17. New Hampshire Breach of Warranty Claim (Count 29);
- 25 18. New York Breach of Warranty Claim (Count 34);
- 26 19. Ohio Breach of Warranty Claims (Counts 40, 41);
- 27 20. Texas Breach of Warranty Claim (Count 45);
- 28 21. Florida Breach of Implied Warranty Claim (Count 8);

- 1 22. Michigan Breach of Implied Warranty Claim (Count 18);
- 2 23. Missouri Breach of Implied Warranty Claim (Count 25);
- 3 24. New York Implied Warranty Claim (Count 35);
- 4 25. Massachusetts Implied Warranty Claim (Count 12);
- 5 26. New Hampshire Implied Warranty Claim (Count 30);
- 6 27. Texas Implied Warranty Claim (Count 46);
- 7 28. Florida Unjust Enrichment Claim (Count 10);
- 8 29. Massachusetts Unjust Enrichment Claim (Count 13);
- 9 30. Michigan Unjust Enrichment Claim (Count 21);
- 10 31. Missouri Unjust Enrichment Claim (Count 23);
- 11 32. New Hampshire Unjust Enrichment Claim (Count 32);
- 12 33. New York Unjust Enrichment Claim (Count 36);
- 13 34. Ohio Unjust Enrichment Claim (Count 39);
- 14 35. Texas Unjust Enrichment Claim (Count 48);
- 15 36. UCL and FAL Claims based on misrepresentations regarding uninterrupted
- 16 PSN and Internet access and Plaintiffs' ability to seek injunctive relief
- 17 (Counts 1, 2);
- 18 37. FDUTPA Claim seeking actual damages (Count 6);
- 19 38. MCPA Claim seeking actual damages (Count 16);
- 20 39. Class Action Claims under the NHCPA (Count 28);
- 21 40. NYDPA Claim (Count 33);
- 22 41. OCSPA Claim (Count 37);
- 23 42. ODTPA Claim (Count 38);
- 24 43. TDTPA Claim (Count 44);
- 25 44. DBA Claim seeking economic damages (Count 4); and
- 26 45. FCRA Claims (Counts 49, 50).


27 //
28 //

1 The following causes of action have survived dismissal and may proceed:

- 2 1. UCL and FAL Claims based on misrepresentations and omissions regarding
3 reasonable network security and industry-standard encryption and Plaintiffs'
4 ability to seek restitution under the statutes (Counts 1, 2);
- 5 2. CLRA Claim based on misrepresentations and omissions regarding reason-
6 able network security and industry-standard encryption;
- 7 3. FDUTPA Claim requesting declaratory and injunctive relief (Count 6);
- 8 4. MCPA Claim requesting declaratory and injunctive relief (Count 16);
- 9 5. MMPA Claim seeking damages and equitable relief (Count 22);
- 10 6. NHCPA Claim seeking damages and injunctive relief (Count 28);
- 11 7. DBA Claim requesting injunctive relief (Count 4);
- 12 8. Partial Performance/Breach of Covenant of Good Faith and Fair Dealing
13 (Count 51).

14
15
16 IT IS SO ORDERED.

17 DATED: January 21, 2014

18 
19

Hon. Anthony J. Battaglia
U.S. District Judge