IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re: The Home Depot, Inc., Customer Data Security Breach Litigation This document relates to: ALL FINANCIAL INSTITUTION CASES	**MDL No. 14-02583-TWT**

REPLY BRIEF IN FURTHER SUPPORT OF HOME DEPOT U.S.A., INC. AND THE HOME DEPOT, INC.'S MOTION TO DISMISS THE FINANCIAL INSTITUTION PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT

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INTRODUCTION

The Banks' Opposition brings into sharp focus the extraordinary nature of their claims. The Banks are sophisticated financial institutions asking the Court to shift to Home Depot expenses they allegedly incurred as a result of their commercial decisions following a criminal's theft of data from Home Depot. This is even more remarkable considering that the Banks seek to recover alleged fraud losses incurred by cardholders that could not have occurred were it not for the Banks' own lack of security measures, which resulted in information not stolen from Home Depot being made available to third party criminals (such as PIN numbers). *See* Dkt. 93 ¶ 204. Even more astounding, the Banks are seeking to recover for losses they agreed to bear in becoming issuers – a risk for which they are compensated through the fees they extract from merchants in every bank card transaction.

The Banks guarantee the security of their cards and accounts, but rather than take any responsibility for their role in the losses they allege here, they seek to shift full accountability to Home Depot. The Banks even go one step further by asking this Court to turn a blind eye to the mechanism available to them through the risk allocating agreements they entered with the Card Brand Networks. This complex mechanism run by the card brands provides a recovery to the Banks for certain of

the alleged losses the Banks seek to recover here, including some losses that are not sufficient to confer Article III standing and could never be recovered here.

The fundamental fact remains that the Banks lack standing. The Court should also decline the Banks' invitation to be the first court in Georgia (state or federal) to create the non-existent duties and obligations the Banks seek to impose here. The defects with each of their claims are fatal, and nothing in their Opposition supports a different result. Home Depot's Motion to Dismiss ("MTD") should be granted and the Banks' Complaint dismissed with prejudice. *See* Dkt. Nos. 114 and 114-1.

ARGUMENT AND CITATION TO AUTHORITIES

I. THE BANKS LACK ARTICLE III STANDING.

A. The Banks Have Not Sufficiently Alleged Specific, Particularized Injuries Required for Article III Standing.

1. The individual Banks fail to plead specific injuries.

The Banks concede that general injuries have been alleged collectively on behalf of all Banks and that no Bank has alleged its own specific injuries. Opposition, Dkt. 131 ("Opp.") at 10. The Banks' allegations of their collective "injuries," "without specific mention of any individual member's injury – surely '"stops short of the line between possibility and plausibility."' *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)); *see*

also Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n, 226 F.3d 1226, 1229 (11th Cir. 2000).

The Banks incorrectly cite *Adobe* and *SCRAP* as authorizing a relaxed pleading standard with respect to injury. Opp. at 10. In *In re Adobe Systems, Inc. Privacy Litig.*, 66 F. Supp. 3d 1197 (N.D. Cal. 2014), the complaint contained particularized allegations of injury. The court held that plaintiffs "are required to plead enough facts in support of their claims" but rejected the argument that the injury allegations were insufficient simply because they were placed in the wrong complaint paragraph – an argument not advanced by Home Depot. *Id.* at 1226-27. Likewise, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973), which was decided 34 years before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), only held that standing should not be denied to "persons who are in fact injured simply because many others are also injured." Here, the Complaint's fatal shortcoming is that no Bank has alleged specific injury.

2. Alleged consumer injuries do not give the Banks standing.

The Banks rely exclusively on cases involving consumers whose personal information was actually stolen in a data breach. These cases are inapplicable. For example, in *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1323 (11th Cir. 2012), the plaintiffs' social security numbers had been stolen, and the Eleventh Circuit

considered "[w]hether a party claiming actual identity theft resulting from a data breach has standing to bring suit." *Id.* at 1323. In *Adobe*, 66 F. Supp. 3d at 1214-17, the trial court found standing because the plaintiffs' own personal data, which included names, e-mail and mail addresses, telephone numbers, passwords, credit card numbers, and expiration dates, was compromised, and the risk that their data would be misused "is immediate and very real." The Banks' claims are far different than these consumers' claims, as the cited cases involved the theft of information like social security numbers and dates of birth – information the Banks do not allege was stolen here. *See* Dkt. 129 at 12-13.

3. Claims of fraud losses are not ripe for determination.

The Banks accuse Home Depot of ignoring their fraud losses (Opp. at 10), but this is not true. As set forth in Home Depot's opening brief, *none* of the Banks' claims for recovery is ripe, and the Banks' Complaint should be dismissed as a result. MTD at 48-50. There is a Card Brand Recovery Process available to the Banks, and until that process is complete, no Bank can identify or plausibly allege specific fraud losses that will remain unreimbursed.

The Banks' Opposition does not dispute the availability of the Card Brand Recovery Process, or that it is not yet complete. Rather, they argue that the very process they agreed to in joining the Card Brands may not provide for complete

recovery and is not binding. Accordingly, they ask the Court to ignore its existence. Opp. at 48-49. When the Banks argue that the Card Brand Recovery Process may not afford complete recovery, they focus on their ability to recover certain operating costs following the breach. But, as discussed below, many of those costs are "self-inflicted injuries" and thus not compensable under Article III. Moreover, because the process allows for recovery of some costs that do not give rise to standing, the Banks may very well have an overall recovery under the Card Brand Recovery Process that is even greater than the sum of any legitimately claimed Article III injuries – but that can only be determined when the process is over.

This point underscores Home Depot's ripeness argument – until this process plays out, no Bank can plausibly allege that it has unreimbursed expenses sufficient to confer standing. With this process ongoing, there is no reason to move forward with the litigation here. *See Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997) ("The [ripeness] doctrine seeks to avoid entangling the courts in the hazards of premature adjudication.") (internal quotations omitted). Thus, even if the Court were to find that the Banks have alleged fraud losses sufficient to confer standing *if they were ripe*, the Court should nonetheless dismiss the Complaint because they are not.

B. Alleged Mitigation Losses Do Not Confer Standing.

Under *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1147 (2013), "[t]o establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" (quoting *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010)). The only conceivable instance when mitigation costs can confer standing is when they are incurred to protect against future injury that is certainly impending or there is a substantial risk of future injury. *See id.* at 1150, n.5. The Banks' standing argument focuses on the requirement of an injury-in-fact, but the Complaint's allegations fail to establish that the Banks incurred costs to protect against a future injury that was either certainly impending or substantially at risk.

Since the Supreme Court's decision in *Clapper*, numerous district courts have dismissed consumer data breach cases – the type of cases on which the Banks rely[1] – for lack of standing despite allegations that mitigation costs were incurred to stave off "certainly impending" injuries. *See, e.g.*, *In re Zappos.com, Inc.*, No. 3:12-cv-00325, 2015 WL 3466943, at *10 (D. Nev. June 1, 2015) ("[C]osts incurred to prevent future harm is not enough to confer standing . . . 'even when such efforts are

[1] In *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 498 (1st Cir. 2009), cited by the Banks, the court did not rule that financial institutions had Article III standing but instead dismissed the negligence claim under the economic loss rule.

sensible'") (quoting *Clapper*, 133 S. Ct. at 1150-51); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 658 (S.D. Ohio 2014) (Plaintiffs "cannot create standing by choosing to make expenditures in order to mitigate a purely speculative harm"). The basis for such decisions is that hypothetical future injuries resulting from third party criminal activity following a data breach are based on a "speculative chain of possibilities" and are not "certainly impending," as standing requires. *See Clapper*, 133 S. Ct. at 1150; *Zappos*, 2015 WL 3466943, at *10; *Nationwide*, 998 F. Supp. 2d. at 657-58. The Banks have not pled facts sufficient to show that they incurred mitigation costs to prevent certainly impending injury. Even under the "substantial risk" standard, the Banks "bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm. [They] cannot rely on speculation about the unfettered choices made by independent actors not before the court." *Clapper*, 133 S. Ct. at 1150. Any assertion of possible future harm arising from independent criminal third parties is therefore insufficient to establish standing under the "substantial risk" test as well.

The Banks also fail to address whether their alleged mitigation costs are "fairly traceable" to any actions by Home Depot as standing requires. *Id.* Any costs for canceling and reissuing payment cards (including cards that had not incurred fraud charges), changing or closing accounts, notifying customers, investigating

potentially fraudulent activity, and increasing fraud monitoring "on potentially impacted accounts" (Compl. ¶¶ 4, 187, 214, 221) are not fairly traceable to the data breach because the Banks "had a similar incentive to engage in many of the countermeasures" listed above absent the criminal attack against Home Depot. *Id*. at 1152 (citation omitted). As Home Depot argued previously – and the Banks failed to refute – the Banks would have incurred most if not all of these expenses in the ordinary course of business; the timing simply changed due to the Banks' decisions as to how to mitigate risk in the wake of a data breach. MTD at 11.

The Banks' authority only emphasizes that these voluntarily incurred costs are not fairly traceable to the data breach. Opp. 12-13. The basis for standing in *Adobe* was "the risk that [the consumers'] personal data [e.g., passwords] will be misused by the hackers." 66 F. Supp. 3d at 1214. *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151 (1st Cir. 2011) does not discuss Article III standing but instead examines whether a customer whose information had been compromised could recover certain costs under Maine's negligence law. And in *Remijas v. Neiman Marcus*, the Seventh Circuit found standing for consumer data breach victims because there was an "objectively reasonable likelihood" that *consumers* would suffer "identity theft or credit-card fraud." 794 F.3d 688, 693 (7th Cir. 2015). But despite this holding, the

Seventh Circuit did not explain how the theft of card data alone without social security numbers or birthdates could lead to identity theft.[2]

The Consumer Plaintiffs in this MDL acknowledge the card data alone would not cause identity theft but would require involvement of other third party criminal acts, including the Banks revealing PIN numbers. Dkt. 93 ¶ 204. This alone renders the Banks' cited authority inapposite. And in the consumer cases cited by the Banks, the injuries were not just "certainly impending;" they had already happened. Here, many of the Banks' alleged injuries resulted from prophylactic measures taken to guard against losses that may well never occur. As such, they "are not fairly traceable" to Home Depot, and standing is lacking. *Clapper*, 133 S. Ct. at 1151.

C. Claims Based on Lost Value to Cards and Account Numbers Fail to Satisfy Article III's Requirement of Injury-In-Fact.

The Banks concede they have not alleged how their customers' payment cards have value to the Banks (*see* Opp. at 14-15) yet contend they are not required to allege anything more than that the cards have value. But *Iqbal/Twombly* require the Banks to make plausible claims, and a claim of lost card value is not plausible. Indeed, the best the Banks can do is to allege that the cards have value "on the black

[2] Even after the *Neiman Marcus* decision, courts continue to dismiss data breach class actions for lack of standing. *See Fernandez v. Leidos*, - F. Supp. 3d -, 2015 WL 5095893 (E.D. Cal. Aug. 28, 2015).

market." *Id.* at 14. The fact that a criminal may be able to earn money by selling stolen payment cards does not mean that the cards have value to the Banks. And that is the only issue that matters here.

The Banks cite non-card data, consumer cases holding that there can be a loss in the value of a consumer's personal information. Opp. at 14. But because the "consumer's personal information" is not alleged to be owned by the Banks, it stands to reason that the Banks cannot recover for an alleged loss in value of that information.

II. THE BANKS' NEGLIGENCE CLAIMS FAIL.

A. Negligence Claims are Barred by the Economic Loss Rule.

In arguing that Georgia's economic loss rule ("ELR") is inapplicable "[o]n its face" because the Banks are not a party to a contract with Home Depot (Opp. at 16), the Banks ignore controlling Georgia law cited by Home Depot showing that a contract is not a prerequisite to the ELR's application. *See, e.g.*, *Gen. Elec. Co. v. Lowe's Home Ctrs.*, 608 S.E.2d 636, 637-39 (Ga. 2005) (ELR barred recovery despite lack of contract between parties).

The Banks also incorrectly argue that Home Depot "fundamentally misreads Georgia's" ELR in contending that the ELR bars recovery in tort for economic losses absent physical injury or property damage. Opp. at 18. But this is precisely how the

ELR operates. *See Gen. Elec. Co.*, 608 S.E.2d at 637 (economic losses are recoverable in tort only if those losses "result[] from injury to his person or damage to his property"). The cases the Banks cite are inapposite as each turned on the independent duty exception to the ELR, which is inapplicable here for the reasons set forth below. *See* Opp. at 16-17.

Likewise, the Banks are wrong that "Home Depot's position is unsupported by the three cases it cites." Opp. at 18. As a preliminary matter, the Banks incorrectly cast Home Depot as urging a blanket rule that "economic losses cannot be recovered in a tort action." *Id.* Home Depot argues no such thing. More problematic is the Banks' suggestion that the three cases cited are distinguishable because the Banks have alleged property damage and have thereby rendered the ELR inapplicable. *See id.* at 18-19. But under Georgia law, "damage to property that is actionable in tort despite the . . . [ELR] is that which arises from accident or *other physical injury*." *Huddle House, Inc. v. Two Views, Inc.*, No. 1:12-CV-03239-RWS, 2013 WL 1390611, at *5 (N.D. Ga. Apr. 4, 2013) (emphasis added). In data breach cases, numerous courts have held that the very types of injuries that the Banks assert here – such as the cost of replacing payment cards – do not constitute property damage for purposes of the ELR. *See, e.g.*, *PSECU v. Fifth Third Bank*, 398 F. Supp. 2d 317, 330 (M.D. Pa. 2005); *see* MTD at 15-16.

The Banks rely on the ELR's independent duty and accident exceptions, but both are inapplicable. The independent duty exception is inapplicable because the Banks do not identify a specific independent duty that Home Depot allegedly violated. Indeed, the Banks' 100-plus page Complaint contains but a single, conclusory reference to an independent duty in connection with their negligence claim. Compl. ¶ 205. For the reasons set forth in Section II.B, no such independent duty exists.

The Banks' novel attempt to rely upon the accident exception should also be rejected. No Georgia court has applied the accident exception outside the products liability-related context, let alone in a data breach case. In fact, the Georgia Supreme Court's articulation of the exception makes clear that it is limited to the products liability context: "An 'accident' should be defined as a sudden and calamitous event which, although it may only cause damage to *the defective product itself*, poses an unreasonable risk of injury to other persons or property." *Vulcan Materials Co. v. Driltech, Inc.*, 306 S.E.2d 253, 257 (Ga. 1983) (ruptured hydraulic system started fire that engulfed machine) (emphasis added); *see Argonaut Midwest Ins. Co. v. McNeilus Truck & Mfg., Inc.*, 1:11-cv-3495, 2013 WL 489141, at *4-*5 (N.D. Ga. Feb. 8, 2013) (defective repair of truck that then caught fire). An outlier decision

from Arizona applying Arizona law cannot override the clear Georgia authority limiting the exception to the product liability context.[3] Opp. at 18.

B. Home Depot Does Not Owe the Banks a Legal Duty.

Georgia law does not recognize the purported duty upon which the Banks base their negligence claim. The Banks overreach by arguing that Georgia law recognizes an omnipresent duty in all circumstances to prevent all "foreseeable" and "unreasonable" harm. Opp. at 22. The holding in *Bradley Center, Inc. v. Wessner*, 296 S.E.2d 693 (Ga. 1982), for example, is narrow and limited. The court affirmed the general rule that there is no duty to control third parties from harming others but found an exception (1) because of the special relationship that existed between the mental health hospital and its patient and (2) because the hospital had the ability to exercise control over the patient to prevent the resulting criminal act. *Id.* at 696. Here, the Banks do not allege that Home Depot had a special relationship with the hackers, and they do not allege that Home Depot had control over them.

The Banks are also incorrect that the foreseeability of criminal conduct alone is sufficient to create a legal duty. The Banks tout *Edmund v. Cowan*, 386 S.E.2d 39 (Ga. Ct. App. 1989), but the concept of ***superior*** knowledge was implicit in the

[3] The Banks' negligence claims fail regardless of which state's law applies. For the reasons set forth in the opening brief, and with full reservation of the right to later challenge choice of law, this Reply focuses on Georgia Law. *See* MTD at 14, n.4.

court's articulation of foreseeability. There, the father's knowledge that his son was a felon previously convicted of carrying a concealed weapon – knowledge that the plaintiff-victim did not have – rendered it foreseeable that allowing his son access to a pistol would result in "generally injurious consequences." *Id*. at 41.[4] This is in sharp contrast to the Banks here, which are sophisticated commercial entities that elected to issue payment cards with full knowledge of the risk of a data breach. *See Norby v. Heritage Bank*, 644 S.E.2d 185, 190-91 (Ga. Ct. App. 2007) (negligence claim arising from third-party criminal conduct barred where plaintiff had "equal knowledge of the danger"). Indeed, the whole purpose of the Card Brand Recovery Process is to provide a contractual remedy for the well-known risk of a breach.[5]

None of the Banks' cited cases yields a different result. In *In re Sony Gaming Networks v. Customer Data Security Breach Litigation.*, 996 F. Supp. 2d 942 (S.D. Cal. 2014), *AvMed,* 693 F.3d at 1317, *In re Zappos.com, Inc.,* No. 3:12-cv-00325-RCJ-VPC, 2013 WL 4830497 (D. Nev. Sept. 9, 2013) (later dismissed for lack of standing), and *In re Hannaford Bros. Co. Customer Data Security Breach Litigation,*

[4] *Corbitt v. Walgreen Co.*, No. 7:14-cv-17, 2015 WL 1726011 (M.D. Ga. Apr. 15, 2015) is distinguishable because the harm did not result from third-party criminal conduct but the defendant's act of reporting criminal conduct to the police. Georgia law recognizes a duty when reporting someone suspected of criminal conduct.

[5] *Bishop v. Shorter Univ., Inc.*, No. 4:15-cv-00033 (N.D. Ga. June 4, 2015), is inapposite because, *inter alia*, it did not involve claims by financial institutions but claims by student-patients who entrusted their health information to their university.

613 F. Supp. 2d 108 (D. Me. 2009), consumers had direct relationships with the defendants and had entrusted them with confidential information. The relevance of *Banknorth, N.A. v. BJ's Wholesale Club, Inc.*, 394 F. Supp. 2d 283 (D. Me. 2005) is minimal as it did not address Georgia law. Moreover, contrary to the Banks' characterization, the case did not expressly recognize the existence of a legal duty but allowed the issue to go to the jury.

Finally, the Banks' attempt to bootstrap the existence of a duty to Section 5 of the FTC Act and industry standards should be rejected. None of the cases Plaintiffs cite supports this proposition – in fact, none even discusses Section 5. First, the language the Banks attribute to *Pulte Homes v. Simerly*, 746 S.E.2d 173 (Ga. Ct. App. 2013), is from another case – *McLain v. Mariner Health Care*, 631 S.E.2d 435 (Ga. Ct. App. 2006). But the court's holding in *McLain* was driven by the fact that the plaintiff's conduct involved clear statutory violations (sufficient to support a negligence per se claim). Second, notwithstanding the District of Minnesota's willingness to impose a duty on Target based on commercial and industry standards (i.e., the Visa and MasterCard Card Operating Regulations), this Court has refused to do just that. *See Willingham v. Global Payments, Inc.*, No. 1:12-cv-01157, 2013 WL 440702, at *19 (N.D. Ga. Feb. 5, 2013). Third, the Banks' reliance on *Rowe v. Akin & Flanders, Inc.*, 525 S.E.2d 123, 126 (Ga. Ct. App. 1999),

is off-point because the duty at issue – a construction duty – was implied by law. Here, there is no such duty implied by law that flows between the parties, which means that the negligence claim fails as a matter of law.

C. The Banks' Negligence Per Se Claim Should be Dismissed.

No court has recognized a claim for negligence per se based on Section 5's unfair-practices prong. The two decisions the Banks cite are readily distinguishable as both involved alleged violations of specific, detailed regulations promulgated by the FTC relating to franchisees. *See Bans Pasta, LLC v. Mirko Franchising, LLC*, No. 7:13-cv-00360-JCT, 2014 WL 637762, at *12 (W.D. Va. Feb. 12, 2014) (negligence per se claim based on FTC Franchise Rule, 16 C.F.R. §§ 436.1 *et seq.*); *Legacy Acad., Inc. v. Mamilove, LLC*, 761 S.E.2d 880 (Ga. Ct. App. 2015) (same).

1. The Banks' reliance on FTC interpretations and guidelines cannot save their negligence per se claim.

The Banks attempt to re-cast their Complaint to focus on FTC interpretations and guidelines that purportedly "requir[e] businesses to maintain reasonable data security practices." Opp. at 29. This argument fails because Plaintiffs' negligence per se claim is devoid of references to any specific FTC interpretation or guideline that Home Depot allegedly violated. Compl. ¶¶ 216-22. *See McGinnis v. Am. Home Mortg. Servicing, Inc.*, No. 5:11-cv-284, 2012 WL 426022, at *7 (M.D. Ga. Feb. 9, 2012) (specific statutory provision must be identified to survive dismissal).

The Banks' reliance on sporadic references to FTC guidelines elsewhere in the Complaint only weakens their argument because they acknowledge that those guidelines do not carry the force of law. Specifically, paragraphs 179-83 refer to guidelines but acknowledge that those guidelines are mere recommendations. Compl. ¶ 183. Georgia law, as well as the law of most (if not all) states, requires a negligence per se claim to be based on a statute, regulation, or ordinance that carries the force of law – not a recommendation. *See* O.C.G.A. § 51-1-6 (negligence per se applies only where "*the law* requires a person to perform an act . . . .") (emphasis added); *Morris v. Bouchard*, No. 1:06-cv-2535, 2007 WL 1100465, at *4 (N.D. Ga. Apr. 11, 2007) ("If a federal regulation does not have the force and effect of law under federal law, it simply is not the law within the meaning of" Georgia's negligence per se statute) (report and recommendation); *S. Ry. Co. v. Allen*, 77 S.E.2d 277, 286 (Ga. Ct. App. 1953). The Banks' reliance on *Wells Fargo Bank, N.A. v. Jenkins*, 744 S.E.2d 686 (Ga. 2013) is also misplaced. That court never suggested that recommendations are sufficient to support a negligence per se claim.

2. The Banks' reliance on *Wyndham* is misplaced.

The Banks rely on the district court's ruling in *F.T.C. v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602 (D.N.J. 2014), that an FTC enforcement action does not

violate constitutional notice principles. *Id.* at 620-21.[6] They ask the Court to apply this ruling on the FTC's authority in a wholly different context, contending that industry "standards and policies provide ample means to measure whether Home Depot violated the FTC's standard." Opp. at 30. To state this argument is to reject it. First, this argument implicitly recognizes that Section 5 contains no concrete or particularized standards. Under well-established law, this dooms the Banks' negligence per se claim. *See* Section II.C.3, *infra*. Second, adopting the Banks' argument would impute the force of law to industry standards and corporate privacy policies. But as noted above, only *laws* can support a negligence per se claim.[7]

3. Section 5's unfair-practices prong does not impose a clear and concrete duty or standard of conduct.

The Banks miss their mark arguing that Section 5's unfair-practices prong provides a sufficiently concrete duty or standard of conduct to support a negligence per se claim. Opp. at 31. The Banks ignore the numerous authorities cited by Home Depot and instead point to *Teague v. Keith*, 108 S.E.2d 489, 491-92 (Ga. 1959), for the proposition that "[w]here a statute provides a general rule of conduct, although

[6] The Banks filed a "Notice of Two Recent Decisions" identifying the Third Circuit's decision in the *Wyndham* case and the *Target* court's recent class certification decision. Dkt. 133. Neither opinion supports the Banks' Opposition.

[7] *St. Mary's Hosp. v. Radiology Professional Corp.*, 421 S.E.2d 731, 737 (Ga. Ct. App. 1992), is not "directly on-point." Unlike here, that case involved a violation of hospital bylaws the hospital was legally required to promulgate and follow.

only amounting to a requirement to exercise ordinary care, the violation thereof is . . . negligence per se. . . ." But Section 5's unfair-practices prong is not tantamount to "ordinary care" or negligence. Rather, "[t]he Supreme Court has, on more than one occasion, recognized that the standard of unfairness is by necessity, an elusive one, which defies such a limitation." *Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354, 1367 (11th Cir. 1988) (internal quotation marks and citations omitted). And any persuasive value of *Teague* was diminished, if not eliminated, by the Georgia Supreme Court's 2013 *Jenkins* opinion where the court held that a negligence per se claim requires a "breach of a legal duty with some ascertainable standard of conduct." 744 S.E.2d at 688. Congress intentionally left Section 5 amorphous. The Third Circuit's recent decision in *F.T.C. v. Wyndham Worldwide Corp.*, - F.3d -, 2015 WL 4998121 (3d Cir. Aug. 24, 2015), confirms that the very materials the Banks focus on – guidelines and consent orders – fail to identify any specific cybersecurity requirements of Section 5. *Id.* at *14-*15, n.21-22. As such, Section 5 fails to impose the ascertainable standard of conduct necessary to support a negligence per se claim.

4. <u>The Banks are not members of the class Section 5's unfair-practices prong is intended to protect</u>.

The Banks' negligence per se claim also fails because they are not members of the class that Section 5's unfair-practices prong seeks to protect. As originally

enacted, the FTC Act did not proscribe "unfair . . . practices," only "unfair methods of competition." The "unfair . . . practice" prong the Banks cite here was added through amendment in 1938. *See* 52 Stat. 111, to § 5. The amendment "thus made it clear that Congress, through § 5, charged the FTC with protecting *consumers* as well as competitors." *F.T.C. v. Sperry*, 405 U.S. 233, 244 (1972) (emphasis added).

The Banks' futilely cite to a footnote in the very Supreme Court opinion that directly refutes their position. Opp. at 32. And none of the other cases the Banks cite are on point. As noted above, *Bans Pasta* and *Legacy Academy* involved claims by franchisees against franchisors under specific FTC franchise rules. And the enforcement actions the Banks cite are irrelevant because they expressly involved harm to consumers, focused on Section 5's unfair competition (not practices) prong, or involved a company operating in its capacity as a consumer. *See* Opp. at 32, n.10. These Banks are not consumers and were not acting in the capacity of consumers.

III. THE EQUITABLE RELIEF CLAIMS MUST BE DISMISSED.

The Banks have not properly alleged the real, immediate, and substantial risk of another data breach needed for a declaratory judgment or for injunctive relief as a remedy under The Declaratory Judgment Act.[8] They must allege "a substantial

[8] The Banks do not dispute Home Depot's argument that they may not pursue a stand-alone claim for "injunctive relief" or that an injunction is an improper remedy for claims sounding in negligence. MTD at 34-35.

likelihood that [they] will suffer future injury: a 'perhaps' or 'maybe' chance is not enough." *Malowney v. Fed. Collection Deposit Grp.*, 193 F. 3d 1342, 1347 (11th Cir. 1999); *Castaneira v. Perdue*, No. 1:10-CV-3385-TWT, 2010 WL 5115193, at *2 (N.D. Ga. Dec. 9, 2010) (Thrash, J.).[9] Legal conclusions and a recitation of the the claims' elements are not entitled to a presumption of truth in a motion to dismiss. *Iqbal*, 129 S. Ct. at 1951. While the Banks vaguely allege in the most conclusory form imaginable that they "will suffer irreparable injury and lack an adequate legal remedy in the event of another data breach at Home Depot" and "[t]he risk of another such breach is real, immediate, and substantial," they have not pled the plausible "substantial likelihood" of harm that the Supreme Court and Eleventh Circuit require. Compl. ¶ 282. Likewise, conclusory allegations "that Home Depot['s] data security measures . . . remain inadequate" and that the "risk of another such breach is real, immediate, and substantial" (Compl. ¶¶ 279, 282) are not supported by factual allegations in the Complaint. Because the Banks have not met the pleading requirements for their equitable relief claims, the claims should be dismissed.[10]

[9] The Banks do not dispute Home Depot's argument that their equitable relief claims may not be based on past action. MTD at 37-38.

[10] Home Depot acknowledges that injunctive relief is available under certain state statutory claims that the Banks assert. But injunctive relief under the state statutes has the same requirements as a general injunctive relief request.

The Banks also have not properly alleged that legal remedies will be inadequate, a requirement for both declaratory and injunctive relief. "[L]oss of good will" and reputational damage, the two "irreparable" injuries that the Banks identify (Opp. at 36), are widely recognized as damages that may be recovered for negligence. *See Stewart & Stevenson Servs., Inc. v. Pickard*, 749 F.2d 635 (11th Cir. 1984). The *In re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1308 (S.D. Fla. 2003) ruling that "whether money damages will prove to be an adequate remedy at law cannot be determined" at this stage is wrong. This Court recognizes that such a determination is proper on a motion to dismiss. *In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig.*, No. 1:13-md-2495-TWT, 2015 WL 114285, at *2 (N.D. Ga. Jan. 8, 2015) (Thrash, J.). "Monetary damages would sufficiently compensate" the Banks for any losses allegedly suffered as the result of a data breach. *Id.*

Finally, the Association Plaintiffs have not established standing and fail to address Home Depot's argument that the equitable relief they seek requires the participation of 100% of their members. The Complaint asks the Court to rule that (1) the alleged breach injured all association members and (2) all members suffered monetary damages that Home Depot must reimburse. Compl. ¶ 280. These findings cannot be made without examining the facts of each association member. The association plaintiffs' claim in *In re Managed Care*, 298 F. Supp. 2d at 1307-08,

appears different than the one these Association Plaintiffs have asserted as it did not require a damages determination. This Court, however, must determine whether the Banks "were forced to pay for fraudulent transactions as a result of the Home Depot data breach" and whether they "are legally entitled to recover the costs they incurred from Home Depot." Compl. ¶ 280. These individualized determinations preclude the Association Plaintiffs' standing to pursue equitable claims.

IV. THE BANKS' STATE STATUTORY CLAIMS FAIL.

The Banks' Opposition does not cure defects in the state law claims, which should be dismissed because: (1) the Banks's allegations do not confer standing; (2) the FTC Act does not identify any specific, concrete requirements;[11] and (3) the Banks fail to plead at least one element of each statute as set forth below:[12]

- **Alaska.** Data breach liability is part of Alaska's statutory scheme – the legislature has created liability for failure to notify after a data breach but not for failing to prevent the breach in the first place. *See* Alaska Stat. Ann. § 45.50.471. The legislative decision not to provide liability for failing to prevent the data breach itself proves that there is no ACPA violation here.

[11] The Banks do not challenge Home Depot's argument that they have failed to allege a deceptive act or practice.

[12] Exhibit A to the Opposition provides some supporting case law but fails to address the deficiencies Home Depot highlights for each statute in its Motion to Dismiss.

- **California.** The Banks fail to meet either the unfair or unlawful prong of the UCL. Their claim under the unfairness prong cites conclusory allegations in the Complaint that do not state a claim. Compl. ¶ 233. They do not allege that Home Depot violated any of the additional statutes identified in their Opposition. And the cases the Banks rely upon do not refute the argument that the Banks must adequately allege a violation of the CRA in order to support a UCL claim.

- **Connecticut.** The failure to act does not violate the CUTPA unless a specific duty to act has been imposed on the defendant. *See Downes-Patterson Corp. v. First Nat'l Supermarkets, Inc.*, 780 A.2d 967, 976 (Conn. App. Ct. 2001). The Banks have not identified a specific, concrete duty, and their attempt to convert their allegations of negligence into intentional conduct fall flat.

- **Florida.** The Banks' claim under FDUTPA should be dismissed because corporations can only state a claim under the statute when they are acting as a consumer – *i.e.*, when a plaintiff business directly obtained goods or services from the defendant – which the Banks do not allege. *See, e.g.*, *Kertesz v. Net Transactions, Ltd.*, 635 F. Supp. 2d 1339, 1350 (S.D. Fla. 2009).

- **Minnesota.** The MPSCA claim is based on allegations that "certain consumer data" was stored longer than allowed. Opp. at 45. MPSCA retention periods do not

apply to all consumer data, and the Banks do not allege that Home Depot stored protected data – like financial PII – for the required period. *See* Compl. ¶ 89.

- **Washington.** The CPA claim rests entirely on allegations that Home Depot violated Wash. Rev. Code Ann. § 19.255.020. Compl. ¶¶ 273-277. Under that statute, however, businesses that are certified PCI-DSS compliant within one year of the alleged breach, like Home Depot, are exempt.[13]

CONCLUSION

For the reasons set forth above, the Court should grant Home Depot's Motion and dismiss the Banks' claims with prejudice.

Respectfully submitted this 25th day of September, 2015.

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[13] Home Depot maintains its initial arguments that the Banks have failed to state a claim under Illinois or Massachusetts law. MTD 40-43.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1D, the undersigned certifies that the foregoing complies with the font and point selections permitted by L.R. 5.1B. This document was prepared on a computer using the Times New Roman font (14 point).

Respectfully submitted, this 25th day of September, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on September 25, 2015 with the Court and served electronically through the CM-ECF (electronic case filing) system to all counsel of record registered to receive a Notice of Electronic Filing for this case.

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