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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEE WALTERS, individually and on behalf of all others similarly situated, Plaintiff, v. KIMPTON HOTEL & RESTAURANT GROUP, LLC, Defendant.	CASE NO. 3:16-cv-05387-VC **NOTICE OF MOTION AND MOTION TO DISMISS** Date: March 30, 2017 Time: 10:00 a.m. Dept.: 4, 17th Floor Before: Hon. Vince G. Chhabria

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on March 30, 2017, at 10:00 a.m., before the Honorable Vince G. Chhabria of the United States District Court for the Northern District of California, Courtroom 4 - 17th Floor, 450 Golden Gate Avenue, San Francisco, California, defendant Kimpton Hotel & Restaurant Group, LLC, will, and hereby does, move this Court pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for an order dismissing Plaintiff's First Amended Complaint.

The motion is based upon this notice of motion; the memorandum of points and authorities in support thereof that follows; the pleadings, records, and papers on file in this action; oral argument of counsel; and any other matters properly before the Court.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether plaintiff has alleged an injury-in-fact that is fairly traceable to Kimpton's security breach sufficient to establish his standing to sue under Article III.

2. Whether an implied contract for data security arises from the mere use of a payment card and, if so, whether plaintiff has alleged actual damages sufficient to sustain his implied contract claim.

3. Whether plaintiff has alleged actual damages sufficient to sustain his negligence claim, and whether that claim is barred by the economic loss rule.

4. Whether plaintiff has alleged an economic injury sufficient to sustain his standing under the Unfair Competition Law and adequately pleaded his fraud claim under Rule 9(b).

Dated: February 6, 2017

BAKER & HOSTETLER LLP

By: *<u>/s/ Daniel R. Warren</u>*
DANIEL R. WARREN

Attorneys for Defendant
KIMPTON HOTEL & RESTAURANT GROUP, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Kimpton moved to dismiss the first complaint in this data breach case because plaintiff did not suffer an actual injury. At a conference on December 20, 2016, the Court gave plaintiff the choice either to respond to Kimpton's motion or to amend his complaint to take his "best shot" at showing he has standing to sue. Plaintiff elected to amend. But his new complaint includes only two new data points, neither of which adds anything to plaintiff's standing.

As in his first complaint, plaintiff claims just one unauthorized charge on his payment card, which occurred *before* his only visit to Kimpton during the period affected by the malware attack. Plaintiff now alleges he replaced the card on which the charge appeared. But neither the fraudulent charge nor the effort involved in replacing the card gives plaintiff standing to sue because neither one had anything to do with the security incident at Kimpton.

Also as before, plaintiff claims he faces an "increased risk" of identity fraud, but fails to allege any facts showing this risk is "certainly impending." *See Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1143 (2013). He now attempts to buttress this theory by alleging he spends time monitoring alerts from an identity theft protection service. This new allegation does not help plaintiff either because Article III standing cannot be "manufacture[d]" by taking steps to mitigate an alleged increased risk where that risk could not support standing to begin with. *Id.*

Apart from that, plaintiff's amended complaint merely restates verbatim his other generic standing theories, none of which has merit. He argues he has experienced a "loss of privacy" and a "deprivation of the value" of personal information, but fails to explain how these things could result from the exposure of payment card information. And he says he overpaid for his hotel stay at Kimpton, but does not allege any of the facts necessary to support such a claim.

Plaintiff's case also fails on the merits. As a matter of law, no implied contract for data security arises from the mere fact that plaintiff paid Kimpton by payment card. His negligence claim fails for lack of damages, and would be barred by California's economic loss rule in any event. Finally, he has not met state-law standing requirements to assert his Unfair Competition Law claims and has failed to plead his fraud claim with the particularity required by Rule 9(b).

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STATEMENT OF ALLEGED FACTS

Payment cards used at certain Kimpton locations between February 16 and July 7, 2016 were subject to a malware attack. (Am. Compl. ¶ 2.) The malware was designed to capture "card number, expiration date, and internal verification code," and in some instances, the cardholder's name. (Ex. A.) Plaintiff alleges he used one payment card at Kimpton in December 2015, and a second payment card at Kimpton on May 29, 2016. (Am. Compl. ¶¶ 12-13.) Because the at-risk window did not begin until February, only the May transaction was potentially at risk. (*Id.* ¶¶ 2, 12-13; Ex. A.) Kimpton gave plaintiff and others written notice of the attack. (Am. Compl. ¶ 4.)[1]

ARGUMENT

I. PLAINTIFF LACKS ARTICLE III STANDING.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuna*, 547 U.S. 332, 341-42 (2006) (quotation omitted). To have standing under Article III, a plaintiff must show he "[1] has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and [2] that the injury can be fairly traced to the challenged action and [3] is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). It is plaintiff's burden to "clearly allege facts demonstrating each element" of his standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiff has not met that burden here.

A. Plaintiff's Alleged Unauthorized Charge Is Irrelevant to His Standing.

The unauthorized charge alleged by plaintiff, an on-line purchase of tickets to Disneyland, occurred in April 2016, well before plaintiff's only at-risk transaction at Kimpton. (Am. Compl. ¶ 12.) Plaintiff now alleges he spent time replacing the card on which this charge appeared. (*Id.*)

[1] Although plaintiff relies on his notice letter and says it is attached to his complaint (Am. Compl. ¶¶ 2, 4), it does not appear in the docket, so Kimpton attaches it here as Ex. A. *See In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 20 & n.2 (D.D.C. 2014) (treating data breach notice as part of Rule 12(b)(6) record where complaint "relies on it heavily").

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Even if that could qualify as an injury, plaintiff replaced the card due to the fraudulent charge, which as a matter of timing cannot be traced to the Kimpton incident. Thus, neither the charge nor the time spent replacing the card gives plaintiff standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1993) (claimed injury must relate to "the challenged action of the defendant, and not [] the independent action of some third party not before the court").[2]

B. The Alleged Risk of Future Harm, or Efforts To Mitigate It, Are Not Enough.

Plaintiff also claims he now faces an "increased risk" of identity fraud in the future, and has spent time guarding against this alleged increased risk. (Am. Compl. ¶¶ 13, 46.) Neither of these allegations is sufficient to establish his standing.

1. Plaintiff Has Not Alleged Certainly Impending Identity Fraud.

To begin with, plaintiff vastly overstates the scope of the purported increased risk, going so far as to claim that criminals may use his compromised information to "get medical services" or "commit any other number of other frauds," including "obtaining a job, procuring housing, or even giving false information to police during an arrest." (*Id.* at ¶ 39.)

These allegations are not plausible. It requires more than numbers on a payment card to procure medical services, a job, or a home, and police do not take payment card information during an arrest. As stated in a report cited by plaintiff, "credit or debit card information such as card numbers and expiration dates . . . put affected consumers at risk of [existing] account fraud but not necessarily at risk of fraud involving unauthorized creation of new accounts – the type of identity theft generally considered to have a more harmful direct effect on consumers." (*See* Am. Compl. ¶ 42 (citing United States Government Accountability Office, *Report to Congressional Requesters: Personal Information* 30 (June 2007), *available at* www.gao.gov/new.items/d07737.pdf (last visited Feb. 3, 2017)).) Thus, the only thing a thief can realistically do with stolen payment card data is to make an unauthorized purchase on that card.

[2] Interestingly, Disneyland requires purchasers to provide information that the malware was not designed to capture, including the security code printed on the back of the card and the purchaser's address. (*See* Ex. A.) Thus, while this motion challenges plaintiff's standing on the face of his complaint, a fact-based challenge would likely yield evidence of additional reasons why the Disneyland purchase on plaintiff's card cannot be traced to the Kimpton security incident.

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But plaintiff does not have standing to sue based on *any* of the hypothetical future injuries he has described. As the Supreme Court held in *Clapper*, when it comes to possible future harms, even an "objectively reasonable likelihood" is not enough; instead, "we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." 133 S. Ct. at 1147 (Emphasis in original.)

Here, the future harms plaintiff claims to face are not certain to happen at all, but rather depend on at least two speculative events. First, while plaintiff allegedly used his payment card at Kimpton during the security incident, the information on that card might (or might not) have been captured by the malware and exfiltrated from Kimpton's network. And second, even if plaintiff's card information was captured and exfiltrated, the criminals might (or might not) use it to make unauthorized purchases on plaintiff's card at some point in the future. Many millions of people are affected by data breaches each year, the great majority of whom never suffer identity fraud as a result. Indeed, plaintiff alleges no facts suggesting there has been widespread payment card fraud associated with the Kimpton security incident. *Compare Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 690 (7th Cir. 2015) (allowing standing where plaintiffs alleged 9,200 known instances of payment card fraud among a potential class of 350,000 individuals).

Moreover, any conceivable increased risk faced by plaintiff would be eliminated if the payment card he used during the malware attack has since been cancelled. Although plaintiff now alleges he replaced the payment card he used during his December 2015 visit to Kimpton, which was before the security incident began (Am. Compl. ¶ 12), he still has failed to disclose whether he took that same basic step with the payment card he used in May 2016.

For these reasons, many courts have denied standing based on allegations of increased risk arising from data breaches involving payment card information. *See Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, 2016 WL 6523428, at *5 (S.D. Cal. Nov. 3, 2016) (denying standing based on increased risk because stolen information "was limited only to Plaintiff's name, address, and credit card information, and because the credit card has since been cancelled"); *Torres v. The Wendy's Co.*, --- F. Supp. 3d ----, 2016 WL 7104257, at *4 (M.D. Fla. July 15, 2016) ("The majority of courts post-*Clapper* have rejected the threat of future harm in data breach cases as

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sufficient to confer standing absent allegations that the harm is 'certainly impending.'"); *Alonso v. Blue Sky Resorts, LLC*, 179 F. Supp. 3d 857, 863 (S.D. Ind. 2016) (denying standing because plaintiffs "have not alleged nor suffered a concrete, particularized injury," and "cannot demonstrate that any future injury they fear is certainly impending"); *In re SuperValu, Inc.*, 2016 WL 81792, at *5 & n.2 (D. Minn. Jan. 7, 2016) ("In data security breach cases where plaintiffs' data has not been misused following the breach, the vast majority of courts have held that the risk of future identity theft or fraud is too speculative to constitute an injury in fact for purposes of Article III standing."); *Whalen v. Michaels Stores Inc.*, 153 F. Supp. 3d 577, 583 (E.D.N.Y. 2015) ("Simply put, Whalen has not asserted any injuries that are 'certainly impending' or based on a 'substantial risk that the harm will occur.'").

Plaintiff may point to the Ninth Circuit's pre-*Clapper* decision in *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), but that case actually shows what is missing here. The breach in *Krottner* exposed social security numbers and employment information, which unlike a payment card number cannot be cancelled or changed. *Id.* at 1140. And one of the named plaintiffs in *Krottner* alleged his stolen information had been misused as a result of the breach. *Id.* at 1141. It was "[o]*n these facts*" that the *Krottner* court allowed standing. *Id.* at 1143 (emphasis added). Because the facts in this case are very different, *Krottner* should not dictate the outcome here. *See Dugas*, 2016 WL 6523428, at *5 (payment card data "insufficient . . . for a third party to open up a new account in Plaintiff's name or to gain access to personal accounts likely to have the information needed to open such an account (e.g., a social security number)").

Moreover, *Krottner*'s analysis should be re-assessed in light of the Supreme Court's decision in *Clapper*. While some courts have found *Krottner* survives *Clapper* – at least in data breaches outside the payment card context – others have not. *See Duqum v. Scottrade, Inc.*, 2016 WL 3683001, at *5 n.6 (E.D. Mo. July 12, 2016) ("*Krottner* predated *Clapper* and does not address or discuss either the 'certainly impending' standard or the 'substantial risk' standard."); *see also Peters v. St. Josephs Corp.*, 74 F. Supp. 3d 847, 856 n.10 (S.D. Tex. 2015) (collecting cases addressing the issue). Because this payment card case is distinguishable from *Krottner*, the Court need not reach this issue here. Nevertheless, *Krottner*'s continued validity is in question.

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2. Plaintiff's Alleged Mitigation Efforts Also Do Not Support Standing.

Plaintiff's attempt in his amended complaint to bootstrap his way into standing by alleging he spends time monitoring his identity theft protection service also fails. (Am. Comp. ¶ 13.) As the Supreme Court held in rejecting a similar theory in *Clapper*, "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." 133 S. Ct. at 1151. Thus, courts "[i]n data breach cases . . . consistently hold that the cost to mitigate the risk of future harm does not constitute an injury in fact unless the future harm being mitigated against is itself imminent." *In re SuperValu, Inc.*, 2016 WL 81792, at *7 (D. Minn. Jan. 7, 2016) (collecting cases); *see also, e.g., In re Science Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 26 (D.D.C. 2014) (rejecting standing based upon preventative measures taken following breach; "[T]he Supreme Court has determined that proactive measures based on 'fears of future harm that is not certainly impending' do not create an injury in fact, even where such fears are not unfounded.").

Moreover, plaintiff does not need an identity theft protection service to alert him of charges being made on his payment card in any event. Instead, he merely needs to check his account on line – something many people do as a matter of course. Plaintiff's identity theft protection service may well alert him of new accounts being opened in his name, but as discussed above, that is not a risk that plaintiff actually faces as a result of the Kimpton security incident.

C. Plaintiff's Other Alleged Injuries-In-Fact Are Also Insufficient.

Plaintiff also submits a litany of other supposed injuries in his amended complaint that were suffered either by him or by other members of his putative class. (*See* Am. Compl. ¶ 47(a)-(k).) These allegations are virtually identical to those set forth in the initial complaint, and they do not support plaintiff's standing to bring this action.

1. Injuries to absent putative class members.

As an initial matter, plaintiff does not state which of these injuries actually happened to *him*. Instead, he appears to rely on the notion that some or all these injuries might have been suffered by other putative class members. But alleged injuries of absent class members have no relevance here. *Spokeo*, 136 S. Ct. at 1547 n.6 ("[N]amed plaintiffs who represent a class must

allege and show that they personally have been injured, not that injury has been suffered by other unidentified members of the class to which they belong."); *Park-Kim v. Daikin Industries, Ltd.*, 2016 WL 1069035, at *5 (C.D. Cal. Mar. 17, 2016) (granting motion to dismiss where "the FAC consistently conflates the lead plaintiff's allegations with those of the putative class members").

2. Loss of privacy.

Plaintiff claims "loss of privacy" because payment card information was "disseminat[ed] into the public domain." (Am. Compl. ¶ 47(e).) But plaintiff does not allege facts showing *his* payment card information was disseminated anywhere. He does not allege the malware used in the Kimpton security incident captured his data. Nor does he allege any unauthorized charges on his payment card after his May 29, 2016 visit to Kimpton. Moreover, plaintiff does not explain how exposure of the account number, expiration date, and internal verification code associated with his payment card could amount to an invasion of his privacy in any event. Thus, courts have found plaintiffs lack standing to assert loss of privacy claims, both in payment card cases and in other cases involving more extensive information. *See Duqum,* 2016 WL 3683001, at *8 (names, addresses, phone numbers, social security numbers, and work history); *In re SuperValu, Inc.*, 2016 WL 81792, at *8 (payment card information); *In re Zappos.com, Inc. Cust. Data Security Breach Litig.*, 108 F. Supp. 3d 949, 962 n.5 (D. Nev. 2015) (names, account numbers, email addresses, billing and shipping addresses, and phone numbers); *Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359, 368 (M.D. Pa. 2015) (full legal names, addresses, bank account data, social security numbers, and dates of birth).

3. Overpayment.

Plaintiff next claims he or other putative class members "overpaid" for products and services at Kimpton because of the alleged data breach, as "a portion of the price paid for such products and services . . . was for the costs" of data security. (Am. Compl. ¶ 47(h).) But plaintiff does not allege any facts showing that he and Kimpton bargained for data security or that some portion of the price he paid might have been allocated to data security. Instead, plaintiff's overpayment theory consists of the same sort of conclusory assertion that several other courts have rejected as "too flimsy to support standing." *In re SAIC*, 45 F. Supp. 3d at 30; *see also In re*

Cmty. Health Sys., Inc. Data Sec. Litig., 2016 WL 4732630, at *7 (N.D. Ala. Sept. 12, 2016) (rejecting overpayment theory because "Plaintiffs did not allege that they paid anything specific for [data] protection . . . or that Plaintiffs received any information about data protection other than a HIPAA Notice"); *Remijas v. Neiman Marcus Grp., LLC*, 2014 WL 4627893, at *4-5 (N.D. Ill. Sept. 16, 2014) (no standing based on overpayment because "a vital limiting principle to this theory of injury is that the value-reducing deficiency is always intrinsic to the product at issue").[3]

4. Deprivation of value.

Plaintiff also claims his or other putative class members' payment card information suffered a "deprivation of [] value." (Am. Compl. ¶ 47(g).) But "as a matter of common sense a theory of diminished economic value would depend on the existence of a market for the information." *See Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 725 (N.D. Cal. 2014). While plaintiff alleges that stolen payment card data may be "sold on the black market" (Compl. ¶ 26), he cannot claim that this has affected the value of this information to him. *See Khan v. Children's Nat'l Health Sys.*, 188 F. Supp. 3d 524, 533 (D. Md. 2016) (rejecting deprivation of value theory of standing because plaintiff "does not [] explain how the hackers' possession of that information has diminished its value, nor does she assert that she would ever actually sell her own personal information."); *Whalen*, 153 F. Supp. 3d at 581-82 ("Simply stated, Whalen has failed to allege how her credit card information or PII because less valuable after the Security Breach."); *In re SAIC*, 45 F. Supp. 3d at 30 ("As to the value of their personal [] information, Plaintiffs do not contend that they intended to sell this information on the cyber black market in the first place, so it is uncertain how they were injured by this alleged loss.").

5. Untimely notification.

Plaintiff also claims he was injured by an alleged "untimely and inadequate notification of the Data Breach." (Am. Compl. ¶ 47(c).) But he offers no reason why the September 9, 2016 notice he received from Kimpton was too late. Nor does he allege that this timing caused him any injury. *See Dugas*, 2016 WL 6523428, at *7 (denying standing because "it is entirely unclear

[3] The Seventh Circuit in *Remijas*, while reversing on other grounds, found the overpayment theory of standing to be "dubious." 794 F.3d at 694.

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how any of the injuries identified by Plaintiff have been caused or compounded by Defendants' alleged failure to promptly notify Plaintiff or other class members of the Starwood breach"); *Green v. eBay, Inc.*, 2015 WL 2066531, at *3 n.25 (E.D. La. May 4, 2015) (rejecting standing based on alleged delay where plaintiffs did not allege intervening misuse).

6. Deprivation of state statutory rights.

Finally, plaintiff alleges standing based on an alleged deprivation of statutory rights under the California Unfair Competition Law (UCL). (Am. Compl. ¶ 47(j).) But the alleged violation of a state statute is not relevant here because "standing in federal court is a question of federal law, not state law." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013). Moreover, "Article III standing requires a concrete injury [] in the context of a statutory violation," even where a federal statute is concerned. *Spokeo,* 136 S. Ct. at 1549. Plaintiff has not alleged the violation of a federal statute, and has not established a concrete injury in any event.

II. PLAINTIFF'S CLAIMS ALSO FAIL UNDER RULE 12(B)(6).

Plaintiff's allegations are also insufficient to state a claim for breach of implied contract, negligence, or violation of the UCL. *See Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014) (to survive motion to dismiss, plaintiff must "nudge [his] claims across the line from conceivable to plausible") (quotation omitted).

A. Plaintiff's Implied Contract Claim Fails.

Plaintiff's implied contract claim fails because he has not alleged the essential elements of consideration, mutual assent, and cognizable damages. *See T & M Solar & Air Conditioning, Inc. v. Lennox Int'l Inc.*, 83 F. Supp. 3d 855, 872 (N.D. Cal. 2015); *Porges v. RQ Const., Inc.*, 79 F. App'x 957, 958 (9th Cir. 2003).

1. Consideration.

Plaintiff claims that when Kimpton accepted his payment card information, it "agreed to safeguard and protect [payment card information] and to timely and accurately notify Plaintiff and Class Members if their data had been breached and compromised." (Am. Compl. ¶ 62.) But under California law, "[a] promise to perform a preexisting legal duty is not supported by consideration." *US Ecology, Inc. v. State of Cal.*, 92 Cal. App. 4th 113, 129 (2001); *see also*

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Bailey v. Breetwor, 206 Cal. App. 2d 287, 291-92 (1962) (no consideration due to "a pre-existing legal duty to perform the contract"). As plaintiff points out, California law already requires Kimpton and other entities to "implement and maintain reasonable security procedures" and to "disclose a breach of the security of the system following discovery." (*See* Am. Compl. ¶¶ 82-83 (citing Cal. Civ. Code §§ 1798.81.5(b), 1798.82(a)).) Thus, plaintiff has failed to adequately allege consideration here. *See Start v. Apple Computer, Inc.*, 1996 WL 161630, at *2-3 (N.D. Cal. Mar. 29, 1996) (dismissing contract claim because "Apple is already legally obligated not to discriminate under federal and state law"); *In re Bray's Estate*, 230 Cal. App. 2d 136, 142 (1964) (no consideration where employee already bound to render faithful service; "Under the definition of consideration in the Civil Code, section 1605, doing what one is already legally bound to do cannot be consideration.").

2. Mutual assent.

Plaintiff alleges the essential element of mutual assent arises from the fact that he "made and paid for purchases of Kimpton services and products" with a payment card. (Am. Compl. ¶ 62.) But the mere use of a payment card does not carry with it an implied guarantee of absolute data protection or even any particular level of data security. *See Lovell v. P.F. Chang's China Bistro, Inc.*, 2015 WL 4940371, at *3 (W.D. Wash. Mar. 27, 2015) ("[N]either the circumstances nor common understanding [of a payment card transaction] give rise to an inference that the parties mutually intended to bind defendant to specific cybersecurity obligations."). The *Lovell* court further explained that "[t]o the extent plaintiff expected" a certain level of data security based on his use of a payment card to consummate the transaction, "such unilateral and subjective expectations do not give rise to enforceable contracts." *Id.*

Plaintiff tries to create a meeting of the minds here by extensively quoting from a privacy policy on Kimpton's website. (Am. Compl. ¶ 15.) But plaintiff does not allege he ever visited Kimpton's website or that he read or even was aware of this policy at the time of his transaction with Kimpton. *See Krottner v. Starbucks Corp.*, 406 Fed. App'x 129, 131 (9th Cir. 2010) (alleged statements in documents did not support implied contract for data security when plaintiffs "do not allege that they read or even saw the documents, or that they understood them

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as an offer"). Moreover, the statements quoted by plaintiff do not contain any representations regarding data security or Kimpton's technologies and procedures for preventing criminal cyberattacks. Instead, the statements on which plaintiff relies are addressed to the separate issue of how Kimpton may use and disclose customer information. (*See* Am. Compl. ¶ 15 ("Types of Personal Information We Collect," and "How We Use Information").)

3. Damages.

Finally, plaintiff's implied contract claim also fails for lack of cognizable damages. As explained above, plaintiff's fears regarding future harm, and his alleged efforts to mitigate it, are not sufficient for standing purposes. But even courts that have allowed standing to sue based on an alleged threat of future injuries have gone on to hold that these allegations are *not* enough to make out a claim for contract damages. *See In re Barnes & Noble Pin Pad Litig.*, 2016 WL 5720370, at *5 (N.D. Ill. Oct. 3, 2016) (applying California law; dismissing implied contract claim for lack of damages); *Ruiz v. Gap, Inc.*, 622 F. Supp. 2d 908, 917-18 (N.D. Cal. 2009) (no contract damages based on allegation that plaintiffs "spent time and/or money . . . to protect themselves" from risk of identity theft). As the court held in *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012), "Nominal damages, speculative harm, or threat of future harm do not suffice to show legally cognizable injury."

Plaintiff's other damages theories are equally unavailing. *See In re LinkedIn User Priv. Litig.*, 932 F. Supp. 2d 1089, 1094 (N.D. Cal. 2013) (rejecting overpayment damages for breach of data security promises because "[t]he economic loss Plaintiff alleges – not receiving the full benefit of his bargain – cannot be the 'resulting damages' of this alleged breach"); *In re Barnes & Noble Pin Pad Litig.*, 2016 WL 5720370, at *5 (rejecting overpayment and diminution in value as valid theory of contract damages; "*Remijas* specifically cast doubt on whether such harms would be sufficient even to establish standing, much less to establish out of pocket losses").

B. Plaintiff's Negligence Claim Should Also Be Dismissed.

Without offering a single well-pleaded fact in support, plaintiff asserts that Kimpton was "grossly negligent" and "departed from all reasonable standards of care" in allowing the security incident to occur. (Am. Compl. ¶ 77.) Even if these rote conclusions were deemed to pass

muster, plaintiff's negligence claim would still fail for lack of alleged damages. "California has long held that '[i]t is fundamental that a negligent act is not actionable unless it results in injury to another.'" *Ruiz v. Gap, Inc.*, 380 Fed. App'x 689, 691 (9th Cir. 2010) (quoting *Fields v. Napa Milling Co.*, 164 Cal. App. 2d 442 (1958)); *see also United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal.3d 586, 597 (1970) ("Harm is an essential element to negligence actions. Mere threat of future harm, not yet realized, is not enough.").

Thus, in *Krottner*, while plaintiffs were deemed to have standing to assert a negligence claim, the court nonetheless dismissed for failure to allege damages. *See Krottner*, 406 Fed. App'x at 131. The court explained: "The mere danger of future harm, unaccompanied by present damage, will not support a negligence action." *Id.*; *see also, e.g., Ruiz,* 622 F. Supp. 2d at 913 (allegation that plaintiffs "spent time and/or money . . . to protect themselves" from risk of identity theft not sufficient to plead negligence damages); *Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 639 (7th Cir. 2007) (allowing standing for negligence claim but dismissing the claim on its merits; "Without more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy.").

Plaintiff's negligence claim is also barred by the economic loss rule. Under California law, "recovery of purely economic loss is foreclosed" in negligence unless the plaintiff can allege: "(1) personal injury, (2) physical damage to property, (3) a special relationship existing between the parties, or (4) some other common law exception to the rule." *Dugas*, 2016 WL 6523428, at *12. Here, plaintiff purports to have suffered "economic injury," but does not allege any personal injury or property damage, or that he and Kimpton had anything other than an ordinary commercial relationship. (Compl. ¶ 47(k).) *See Dugas*, 2016 WL 6523428, at *12 (economic loss doctrine barred negligence claim under California law based on data breach of hotel's payment card system); *see also In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1172 (D. Minn. 2014) (same; also applying California law); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 973 (S.D. Cal. 2014) (same).

C. Plaintiff's UCL Claims Should Also Be Dismissed.

Finally, plaintiff asserts three UCL claims against Kimpton, for alleged unlawful, unfair, and fraudulent business practices. (Am. Compl. ¶¶ 80-98.) Plaintiff alleges Kimpton maintained inadequate data security, failed to provide adequate notice of the security incident, and engaged in "fraudulent and deceptive acts and practices . . . by omitting, suppressing, and concealing the material fact of the inadequacy of the privacy and security protections[.]" (*Id.* ¶ 95.) These claims should be dismissed for lack of standing under state law. Moreover, plaintiff has failed to plead fraud with particularity under Rule 9(b) or to allege the essential element of reliance.

1. Plaintiff has not alleged an economic injury.

As set forth in Part I above, plaintiff lacks standing to bring this case in general under Article III. But he also lacks standing to assert his UCL claims under state law. To have standing under the UCL, plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Ct.*, 51 Cal.4th 310, 322 (2011) (emphasis in original).

Plaintiff does not meet these requirements here. He alleges no unauthorized charges on his payment card after his only visit to Kimpton that occurred during the affected period, and he does not identify any other kind of out-of-pocket loss. *See Dugas*, 2016 WL 6523428, at *11 (dismissing UCL claim for failure to allege actual economic injury following payment card breach; "In order to establish standing under the UCL, a plaintiff's claim must involve lost money or property."); *In re Barnes & Noble Pin Pad Litig.*, 2016 WL 5720370, at *8 (same).

2. Plaintiff has not alleged fraud with particularity.

Plaintiff's claims under the UCL in Count V should also be dismissed because he has not pleaded fraud with particularity, as required under Rule 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) ("It is established law, in this circuit and elsewhere, that Rule 9(b)'s particularity requirement applies to state-law causes of action."); *see also Kearns v. Ford Motor Company*, 567 F.3d 1120, 1124-25 (9th Cir. 2009) (same).

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Plaintiff accuses Kimpton of (1) "representing and advertising that it would maintain adequate data privacy and security practices and procedures to safeguard California Class Members' Private Information from unauthorized disclosure, release, data breaches, and theft," and (2) "representing and advertising that it did and would comply with the requirements of relevant federal and state laws pertaining to the privacy and security of California Class Members' Private Information." (Am. Compl. ¶ 94.) But the only specific statements of Kimpton that plaintiff cites to support these accusations are contained in Kimpton's privacy policy. (*Id.* ¶ 15.) As noted above, the privacy policy does not even address data security, but rather how Kimpton will use and disclose customer information. *See In re Premera Data Security Breach Litig.*, --- F. Supp. 3d ---, 2016 WL 4107717, at *6 (D. Or. Aug. 1, 2016) ("If plaintiffs want to allege that Premera committed fraud through affirmative misrepresentation, Plaintiffs must clearly and explicitly allege each specific misrepresentation that Plaintiffs contend Premera fraudulently made, along with all of the other matters required under Rule 9(b) for pleading an allegation of fraud through affirmative misrepresentation.").

Plaintiff's purported omission claim fares no better. He fails to identify any particular fact regarding data security that Kimpton allegedly should have disclosed. Instead, all he does is broadly accuse Kimpton of purported concealment (*see* Am. Compl. ¶¶ 6, 95), without alleging the actual content of any omitted fact Kimpton allegedly should have told him, when this information should have been disclosed, and Kimpton's purported knowledge regarding its alleged data security "inadequacies" at any particular point in time. This is not sufficient to state an omission claim. *See Kearns,* 567 F.3d at 1124 ("Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the *particular misconduct* . . . so that they can defend against the charge and not just deny that they have done anything wrong.") (emphasis added); *see also In re Premera*, 2016 WL 4107717, at *8 (dismissing omission claim based on alleged failure to disclose purported "inadequate data security practices"; "If Plaintiffs want to allege that Premera committed fraud through omission, Plaintiffs must clearly and explicitly allege what Premera omitted[.]"); *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009) (holding that under *Kearns* "to plead the

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circumstances of omission with specificity, *plaintiff must describe the content of the omission* and where the omitted information should or could have been revealed") (emphasis added); *Erickson v. Boston Scientific Corp.*, 846 F. Supp. 2d 1085, 1093 (C.D. Cal. 2011) (same).

3. Plaintiff has not alleged actual reliance.

Finally, plaintiff has not adequately alleged actual reliance. *See Kwikset*, 51 Cal. 4th at 326 ("reliance is the causal mechanism of fraud") (quotation omitted). Plaintiff's failure to allege he ever saw, read, or otherwise was exposed to Kimpton's claimed misrepresentations dooms his affirmative misrepresentation claim. *See id.* at 327 n.10 ("a UCL fraud plaintiff must allege he or she was motivated to act or refrain from action based on the truth or falsity of a defendant's statement"); *see also, e.g., Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1363 (2010) (dismissing misrepresentation claim where the plaintiff did not allege "[he] relied on [] Sharp's Web site representations" before hospital visit, or even that "[he] ever visited Sharp's Web site").

And plaintiff's conclusory assertion of purported reliance to support his omission claim (Am. Compl. ¶ 17) is not sufficient. Plaintiff notably does not allege he ever saw any statement made by Kimpton regarding data security. And a purely affirmative duty to disclose does not exist under California law outside the context of a threat to public safety, which is not at issue here. *See Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 665 (N.D. Cal. 2016) (dismissing omission claim where plaintiff "does not allege any omission of known dangers to the safety of customers"). Were it otherwise, "[t]he range of alleged actions that could expose a company to liability under the UCL or CLRA would be limitless." *Hall v. Sea World Entnmt., Inc.*, 2015 WL 9659911, at *7 (S.D. Cal. Dec. 23, 2015).

III. CONCLUSION

The Court should grant Kimpton's motion to dismiss.

Dated: February 6, 2017

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