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

JOHN SOLAK and DENNIS O'ROURKE, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 1:14-cv-2856-WSD
THE HOME DEPOT, INC.,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF HOME DEPOT'S MOTION TO DISMISS THE COMPLAINT

Plaintiffs John Solak and Dennis O'Rourke rushed to file this class action two days after it became public that Defendant Home Depot had been the victim of a data breach by criminals even though Plaintiffs suffered no injury from the breach. *See* Compl., Doc. 1, ¶ 12. It is one of several carbon-copy class actions pending in this District and across the country arising out of the same crime and alleging similar purported consumer "injuries"—principally, the "imminent" and "impending" "increased threat of identity theft and fraud." *Id.* ¶ 21.

Plaintiffs' claims fail as a matter of law and their Complaint should be dismissed with prejudice for three reasons.

First, Plaintiffs lack Article III standing because the crime perpetrated on Home Depot has caused Plaintiffs no actual or imminent injury.

Second, Plaintiffs also lack standing to pursue claims under other state laws on behalf of purported statewide classes spanning across every state, where Plaintiffs neither purchased Home Depot products nor where Plaintiffs reside.

Third, Plaintiffs' claims fail because they cannot plausibly plead any claim for recovery. They have no private right of action to pursue their statutory data-breach claim, and the Georgia statute does not apply to Home Depot. Their negligence claims fail for want of actual injury, and, because any of Plaintiffs' purported injuries are purely economic, the economic-loss doctrine bars their negligence claims too. They cannot plausibly plead either a meeting of the minds or an injury to support their implied contract claims. Their bailment claims founder because there can be no bailment over personal information that Plaintiffs never plausibly expected Home Depot to return. And, when Plaintiffs gave Home Depot their payment cards for purchases, Home Depot received no "unjust benefit" from the transaction that could possibly support an unjust enrichment claim.

For these reasons, the Court should follow the lead of other district courts across the country that have dismissed similar data-breach claims brought by consumers against retailers and dismiss Plaintiffs' Complaint with prejudice.

BACKGROUND

Home Depot is the nation's largest home-improvement retailer. Compl., Doc. 1, ¶ 1. To facilitate customer purchases using a credit card, Home Depot uses a sophisticated point-of-sale data system that collects and transmits financial information to a third party for payment. *Id.* ¶ 9. The data Home Depot allegedly collects includes customers' names, account numbers, credit card expiration date, card verification value, and the PIN for debit cards. *Id.* Plaintiffs also allege that Home Depot generally collects and stores customers' mailing addresses, phone numbers, and email addresses, but they do not allege that Home Depot, in fact, collected and stored Plaintiffs' contact information. *Id.*

In September, Home Depot learned that its payment data system had been breached by a computer hacker. *Id.* ¶ 12. Plaintiffs allege that the criminal intrusion into Home Depot's systems began in April or May of 2014. *Id.* ¶ 11.[1] News of the data breach became public on September 2, 2014, *id.* ¶ 12, and Home Depot confirmed the intrusion on September 8, 2014. *See* The Home Depot Provides Updates on Breach Investigation, at 1 (Sept. 8, 2014), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=63646&p=irol-

[1] The Complaint also alleges that the intrusion began in April or early May of 2013, Compl., Doc. 1, ¶ 1, but that appears to be a typographical error.

newsArticle&ID=1964976 (last visited October 13, 2014).[2]

In the press release confirming the criminal breach of its system, Home Depot also announced that it would provide free identity-protection services, including credit monitoring, for one year to any customer who used a payment card at a Home Depot store in 2014 (from April on). *Id.* Home Depot also announced that customers would not be liable for any fraudulent charges on those cards. *Id.*

Mr. Solak and Mr. O'Rourke filed this class action on September 4, 2014—just two days after news of the criminal breach broke and before Home Depot informed its customers how it planned to address and remedy the breach.[3] Mr. Solak alleges that he used his Chase Visa Slate credit card on August 13, 2014 to make a purchase at a Home Depot store in Johnson City, New York. Compl., Doc.

[2] At the Rule 12(b)(6) stage, a court may consider matters of which "a court may take judicial notice." *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (internal quotation marks omitted). Home Depot requests that the Court take judicial notice of the September 8, 2014 press release, which was issued after the Complaint was filed. *See Buckley v. DirecTV, Inc.*, 276 F. Supp. 2d 1271, 1275 n.4 (N.D. Ga. 2003) (taking judicial notice of a Department of Justice press release at the Rule 12(b)(6) stage).

[3] This is one of more than a dozen similar cases related to the Home Depot data breach now pending throughout the country. On September 15, 2014, Plaintiffs filed a Motion for Consolidation and Transfer Under 28 U.S.C. § 1407 with the Judicial Panel on Multi-District Litigation, seeking to have two other actions consolidated with this case and transferred to this Court. On September 19, 2014, Plaintiffs filed an Amended Motion for Consolidation and Transfer with the MDL Panel, seeking to have ten other actions consolidated with this case and transferred to this Court. The transfer motion remains pending.

1, ¶ 20. He claims that the breach of Home Depot's payment data systems "harmed [him] by having his financial and personal information compromised and [that he] faces the imminent and certainly impending threat of future additional harm from the increased threat of identity theft and fraud"—because his personal financial data *could* be "sold on the Internet black market" or "misused by criminals." *Id.* ¶ 21. But Mr. Solak does not allege that his identity has, in fact, been stolen or that he has even had any fraudulent charge on his credit card, which he would not be liable for in any event. Nor does he allege that he has done anything to protect himself from this possibility—*e.g.*, by asking Chase to issue a new card or by obtaining credit monitoring.

Mr. O'Rourke alleges that on August 27, 2014, he used his USAA debit card to make a purchase at a Home Depot store in Bensalem, Pennsylvania. *Id.* ¶ 22. He further alleges that on or about September 2, 2014, his debit card "was unlawfully used to make a fraudulent purchase in an amount of $49.95," but Mr. O'Rourke does not allege that he had to pay for that allegedly fraudulent charge or that the fraudulent charge was related to the Home Depot breach. *Id.* ¶ 23. Mr. O'Rourke also claims that his personal information associated with his debit card "was compromised in and as a result of the Home Depot data breach," and that he "was harmed by having his financial and personal information compromised." *Id.*

Like Mr. Solak, he alleges that he "faces the imminent and certainly impending threat of future additional harm from the increased threat of identity theft and fraud due to his financial and personal information being sold on the Internet black market and/or misused by criminals." *Id.* But, again, Mr. O'Rourke does not allege that his identity has actually been stolen, nor does he allege that he took any steps to protect himself from that possibility.

Despite the fact that Mr. Solak and Mr. O'Rourke are residents of New York and Pennsylvania, respectively, *id.*¶¶ 2–3, and made their purchases there, they seek to bring claims on behalf of separate statewide classes in and under the respective data-breach statutes of 37 other states and the District of Columbia. *Id.* ¶ 24. Plaintiffs, however, do not bring claims under either a New York or Pennsylvania data-breach statute. *Id.*; *see also id.* ¶ 46. Plaintiffs also pursue statewide class claims for negligence, breach of implied contract, bailment, and unjust enrichment under *every* state's laws—despite the fact that they do not allege to have made any purchases outside of their home states. *Id.* ¶ 25.

At bottom, Plaintiffs allege that Home Depot is liable under these various theories for two basic reasons: (1) Home Depot purportedly failed to adequately protect its customer data and prevent such criminal activity; and (2) Home Depot improperly delayed notifying its customers of the breach to its system. As will be

shown, neither of these allegations gives rise to a valid claim under any theory.

STANDARD OF REVIEW

Home Depot moves to dismiss the complaint for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). Although the Court should take the allegations of the complaint as true in reviewing such motions, *see McMaster v. United States*, 177 F.3d 936, 940 (11th Cir. 1999), it must not accept "legal conclusions" as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Plaintiffs bear the burden of proof that subject-matter jurisdiction exists. *See Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1273 (11th Cir. 2000). That burden includes pleading sufficient factual information to support a finding of Article III standing. *See Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1323 (11th Cir. 2012) (Article III standing is a component of subject-matter jurisdiction).

Under Rule 12(b)(6), the Court should dismiss the action when the plaintiff fails to plead sufficient factual allegations "to raise [his] right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* Claims have "facial plausibility"

only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING.

To establish Article III standing, a plaintiff must plausibly demonstrate that he has suffered an injury that is (1) "concrete, particularized, and actual or imminent"; (2) "fairly traceable to the challenged action"; and (3) "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted). Plaintiffs cannot meet that burden.

A. Plaintiffs' Alleged Injuries Do Not Confer Standing.

Plaintiffs allege that the breach of the Home Depot data system has exposed them to "the imminent and certainly impending" "increased threat of identity theft and fraud." Compl., Doc. 1, ¶¶ 21, 23. As the majority of courts to address similar consumer data-breach claims have held, this purported future "injury" is insufficient to confer Article III standing.[4] *See U.S. Hotel & Resort Mgmt., Inc. v.*

[4] *See, e.g.*, *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011); *Remijas v. Neiman Marcus Grp., LLC*, No. 14 C 1735, 2014 WL 4627893, at *3–*4 (N.D. Ill. Sept. 16, 2014); *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, __ F. Supp. 2d. __, 2014 WL 1858458, at *6–*7 (D.D.C. May 9, 2014); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 651–52 (S.D.

Onity, Inc., No. 13-1499, 2014 WL 3748639, at*5 (D. Minn. July 30, 2014) (observing that "a majority of the courts" have found Article III standing lacking for claims of future injury resulting from a data breach). This Court should follow those well-reasoned decisions.

The Supreme Court has "repeatedly reiterated that threatened injury must be certainly impending to constitute injury-in-fact, and that [a]llegations of possible future injury are not sufficient" to confer standing. *Clapper*, 133 S. Ct. at 1147 (internal quotations marks omitted). Although Plaintiffs describe their threatened injury as "certainly impending," Compl., Doc. 1, ¶¶ 21, 23, no facts are alleged to support this characterization, and it is well-established that "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). Plaintiffs, instead, must plausibly allege a sufficient factual basis to support Article III standing.

Plaintiffs' allegation that they face a "certainly impending" threat is not supported by facts showing how likely Plaintiffs are to become fraud victims as a

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Ohio 2014); *In re Barnes & Noble Pin Pad Litig.*, No. 12-8617, 2013 WL 4759588, at *4–*5 (N.D. Ill. Sept. 3, 2013); *Willingham v. Global Payments, Inc.*, No. 12-1157, 2013 WL 440702, at *6 (N.D. Ga. Feb. 5, 2013); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1053 (E.D. Mo. 2009).

result of the Home Depot breach, much less facts showing how much such likelihood both increased as a result of the breach and can be fairly traced to it. Indeed, Plaintiffs offer no allegations at all to quantify or substantiate this supposed likelihood of future risk. *See Galaria*, 998 F. Supp. 2d at 654–55 (holding no injury-in-fact where plaintiffs alleged that "consumers who receive a data breach notification had a fraud incidence rate of 19% in 2011 [because] [a]n injury can hardly be said to be 'certainly impending' if there is less than a 20% chance of it occurring") (citation omitted). They recount individualized doomsday scenarios of identity thieves selling their financial and personal information on the black market, Compl., Doc. 1, ¶ 19, but they do not allege that either Plaintiff has actually been the victim of identity theft. *Cf. Resnick*, 693 F.3d at 1322–24 (finding standing for plaintiffs who were victims of identity theft, including having an unauthorized address change and fraudulent accounts opened); *Willingham*, 2013 WL 440702, at *5 (allegations of fraudulent charges are not sufficient to allege identity theft).

Indeed, Plaintiffs have not even alleged that they have taken any steps to protect their consumer information from this supposedly impending threat, including by purchasing credit monitoring services (that Home Depot offered for free days after Plaintiffs filed suit). Nor do they allege that they have asked their

credit-card companies to reissue new cards or that they incurred any costs whatsoever to protect their identities. Of course, even if they had taken steps to address their concerns, such self-help measures would not confer standing on Plaintiffs, for the Supreme Court recently explained that plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper*, 133 S. Ct. at 1143. And here, where steps that would not even require expenditures were available to Plaintiffs, the fact that neither Plaintiff has taken any steps to protect himself from this "certainly impending" threat underscores how implausible the conclusory allegations of threat actually are.

Mr. O'Rourke does allege that on September 2, 2014—the day the Home Depot breach became public and two days before he filed this lawsuit—his debit card was "used to make a fraudulent purchase in [the] amount of $49.95." Compl., Doc. 1, ¶ 23. But Mr. O'Rourke does not allege that the purportedly fraudulent charge caused him any actual injury—*i.e.*, he does not claim that his bank would not reimburse him for the charge—or that the fraudulent charge was the result of the Home Depot breach. Nor does Mr. O'Rourke allege that he, personally, is out of pocket $49.95 as a result.[5] When a plaintiff, as is the case here, has "not alleged

[5] Mr. O'Rourke's failure to allege that he has suffered any actual loss on the

that any of the fraudulent charges were unreimbursed," there can be no "concrete" injury-in-fact for Article III standing. *Remijas*, 2014 WL 4627893, at *3 (dismissing for lack of standing in data-breach case).

In a strikingly similar scenario—where the data-breach plaintiff alleged that he had incurred nearly $300 in fraudulent charges—the Northern District of Alabama recently expressed serious concerns over whether a data-breach plaintiff could plausibly plead injury-in-fact: "If [plaintiff] cannot plausibly allege and ultimately prove actual damages (for example, an allegation that the charges on his account were not forgiven, and he had to pay for the charges)," then the case must be dismissed for lack of Article III standing. *Burton v. MAPCO Exp., Inc.*, __ F. Supp. 3d __, 2014 WL 4686479, at *4 (Sept. 12, 2014).[6] Magistrate Judge King reached the same conclusion when she recommended dismissal of similar claims on standing grounds last year in this District, explaining that "without some further

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fraudulent charge is unsurprising because both Visa and Mastercard promise their customers zero liability for fraudulent charges. *See* Visa's Zero Liability Policy, *available at* http://usa.visa.com/personal/security/zero-liability.jsp (last visited October 13, 2014); Mastercard's Zero Liability Protection, *available at* http://www.mastercard.us/zero-liability.html (last visited October 13, 2014).

[6] The *Burton* court gave the plaintiff "one final opportunity" to satisfy Article III, 2014 WL 4686479, at *5, but two weeks later, plaintiff moved to voluntarily dismiss his complaint. *See Burton v. MAPCO Express, Inc.*, No. 5:14-cv-00806, Doc. 41 (N.D. Ala. Sept. 26, 2014); *id.*, Doc. 43 (N.D. Ala. Oct. 1, 2014).

factual allegation, such as that [p]laintiff was not reimbursed for those charges [of $600 and $300] or that she incurred fees or other expenses or financial consequences because of such charges," plaintiff could not sufficiently plead injury-in-fact. *Willingham*, 2013 WL 440702, at *6.

There are other Article III problems for Mr. O'Rourke. But for the timing of the charge, he has not pled any facts that would plausibly establish that this alleged fraudulent charge is "fairly traceable" to the Home Depot data breach. *See Resnick*, 693 F.3d at 1327 (allegations of "*purely* temporal connections are often insufficient to establish causation") (emphasis in original; internal quotation marks omitted). He has not alleged, for example, that he has had no other incidents of fraudulent charges or that he is otherwise vigilant in monitoring for such occurrences—facts that would support an inference that the recent fraudulent charge can be traced to the criminal data breach and not some other source. *Cf. Stollenwerk v. Tri-West Health Care Alliance*, 254 F. App'x 664, 667 (9th Cir. 2007) (plaintiff alleged that he had not previously been the victim of identity theft).

Mr. O'Rourke's simplistic allegation that he incurred a single fraudulent charge two days before he filed suit (and for which he apparently incurred no personal loss) is simply insufficient to support a plausible inference that he has suffered an injury or faces a "certainly impending" threat of actual identity theft or

injury. Mr. Solak's allegations of injury are even more sparse and conclusory, for he has not suffered any allegedly fraudulent charge. In other words, nothing has happened to Mr. Solak as a result of the data breach. The Court therefore should dismiss the Complaint because both named Plaintiffs lack Article III standing.

B. Plaintiffs Lack Standing to Sue for Violations of Other States' Laws.

Plaintiffs are residents of New York and Pennsylvania, respectively, and allegedly purchased products from Home Depot in their home states. *See* Compl., Doc. 1, ¶¶ 2–3. Yet, in Count I, they do not assert claims under any New York or Pennsylvania data-breach statutes, *id.* ¶¶ 24, 46; instead, they raise claims under the data-breach statutes of 37 other states in which they do not reside or claim to have engaged in any transactions. *Id.* ¶¶ 20–24. And, in Counts II through V, they seek to recover under the laws of *every* state for absent class members. *Id.* ¶ 25.

Plaintiffs lack standing to assert any claims under the laws of states in which they do not reside and have suffered no injury. *See Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987) ("[A] claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."); *see also In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009) ("Where, as here, a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal.");

Amburgy, 671 F. Supp. 2d at 1056–57 (holding Missouri plaintiff could not invoke other state's data breach notification statutes). Neither Plaintiff resides in, or has suffered any alleged injury in, the 37 states under which they seek relief in Count I, nor in the 48 other states in which they seek relief under Counts II through V. Plaintiffs simply had no contacts with these states. Accordingly, Plaintiffs do not have standing to pursue individual claims under those disparate state laws.

Plaintiffs cannot cure their lack of standing by raising claims on behalf of absent class members who would have standing under those state laws.[7] Article III's "individual injury requirement is not met by alleging that injury has been suffered by other, unidentified members of the class." *Griffin*, 823 F.2d at 1483 (internal quotation marks omitted); *see also Laird v. Tatum*, 408 U.S. 1, 14 n.7 (1972) ("a litigant 'has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others'"). For class claims to proceed, "the district court must determine that at least one *named class representative* has Article III standing to raise each class subclaim." *Prado-Steiman ex. rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (emphasis added). And a "named plaintiff cannot acquire standing to sue by bringing his action on behalf of others

[7] Home Depot disputes that any putative class member could state a claim under the data-breach statutes or the common-law claims identified in the Complaint, but it does not address such hypothetical claims here because the named plaintiffs do not have standing to pursue such claims.

who suffered injury which would have afforded them standing had they been named plaintiffs." *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981) (internal quotation marks omitted); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996). The Court therefore should dismiss all claims under the laws of all states (other than New York and Pennsylvania) for which Plaintiffs have no standing to pursue.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR RELIEF.

Even if Plaintiffs had standing to pursue their claims (and they do not), the Complaint should still be dismissed for failure to state a claim.[8] There is no private right of action under Georgia's data-breach statute, which does not apply to either Plaintiff in any event. And Plaintiffs cannot stretch their common-law claims to fit their theory, for they cannot plausibly plead the elements of those claims.

A. Plaintiffs Cannot State a Claim for Relief under Georgia's Data Breach Statute Because There is No Private Right of Action, and It Does Not Apply to Home Depot or the Plaintiffs.

Because Plaintiffs have not pursued data-breach claims under either New York or Pennsylvania law, the only conceivable basis for their own statutory data-breach claim would be the law of Georgia, where Home Depot is headquartered. Although Home Depot does not concede that Georgia's statute applies to Plaintiffs,

[8] Although New York, Pennsylvania, or Georgia law likely applies to the Plaintiffs' respective common-law claims, *see Willingham*, 2013 WL 440702, at *19, *27, the Court need not decide that question because these laws are largely the same.

that claim fails as a matter of law regardless.[9] There is no private right of action under Georgia's data-breach statute, and the statute does not apply to Home Depot.

Nothing in Georgia's data-breach statute provides for a private right of action. The statute, which aims to help consumers combat identity theft by requiring expeditious notification by any "data collector" or "information broker" of a breach in the security of its system, O.C.G.A. § 10-1-912(a), says nothing about its enforcement. "[T]he absence of language . . . creating a private right of action strongly indicates the legislature's intention that no such cause of action be created by said statute." *State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, Inc.*, 312 Ga. App. 756, 761, 719 S.E.2d 597, 601 (2011) (internal quotation marks omitted). Nothing on the face of the statute demonstrates the General Assembly intended to create a private cause of action. *See Anthony v. Am. Gen. Fin. Servs., Inc.*, 287 Ga. 448, 455, 697 S.E.2d 166, 172 (2010) ("[T]he indication that the legislature meant to impose a [private cause of action] . . . must be found in the provisions of the statute at issue, not extrapolated from the public policy the statute generally appears to advance.").

[9] Plaintiffs do not have standing to pursue a claim under O.C.G.A. § 10-1-912. O.C.G.A. § 10-1-912(a) requires an "information broker" or "data collector" to give notice of a "breach in the security of the data to any resident *of this state*." O.C.G.A. § 10-1-912(a) (emphasis added). Neither Plaintiff is a resident of Georgia, and therefore neither would have standing to pursue a claim under Georgia's data-breach statute, even if such statute allowed a private right of action.

Even if there were a private right of action, Home Depot is neither a "data collector" nor an "information broker," and therefore the statute does not apply. A "data collector" includes "any state or local agency or subdivision thereof," O.C.G.A. § 10-1-911(2), and Home Depot is plainly not a government actor. It is also not an "[i]nformation broker," because it is not an "entity who, for monetary fees or dues, engages in whole or in part in the business of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning individuals for the primary purpose of furnishing personal information to nonaffiliated third parties." *Id.* § 10-1-911(3). To the extent Home Depot collects or transmits personal information, it does not do so "for monetary fees or dues"; it does so incident to selling products to the public. It does not collect personal information for the "primary purpose" of transmitting that information to third parties. On its face, the statute does not apply to Home Depot.

B. Plaintiffs' Negligence Claims Fail Because They Cannot Plead an Injury and the Economic Loss Rule Bars Their Claims.

No matter which state's law applies to Plaintiffs' common-law negligence claims,[10] they fail for two reasons: (1) for the same reason Plaintiffs have no

[10] As explained below, New York, Pennsylvania, and Georgia all require actual loss or injury as an element of a negligence claim. *See Caronia v. Philip Morris USA, Inc.*, 22 N.Y. 3d 439, 446 (2013); *Keffer v. Bob Nolan's Auto Serv., Inc.*, 59 A.3d 621, 638 (Pa. Super. 2012); *Bruce v. Georgia-Pacific, LLC*, 326 Ga.

standing to bring these claims, they cannot plead an injury resulting from Home Depot's alleged negligence; and (2) the economic-loss doctrine, which limits a consumer to contractual remedies when the only loss they seek to recover is economic and not physical, bars their claims.

First, for the same reason Plaintiffs lack standing, they cannot plead an injury sufficient to state a negligence claim. "A basic tenet of tort law is that the plaintiff cannot recover without proof of actual injury or damage." *Peterman v. Techalloy Co., Inc.*, 29 Pa. D. & C. 3d 104, 107 (Ct. Com. Pl. 1982) (dismissing claim where plaintiff pleaded only an "increased risk" of harm). "The mere breach . . . of duty . . . causing nominal damages, speculative harm, or the threat of future harm not yet realized does not suffice to create a cause of action for negligence." *Id.*; *see Caronia*, 22 N.Y.3d at 446. Put simply, "[a]n injury to a person or damage to property is required for a tort to be actionable." *MCI Commc'ns Servs. v. CMES, Inc.*, 291 Ga. 461, 464, 728 S.E.2d 649, 652 (2012).

Plaintiffs have alleged no actionable injury, and the purported threat of speculative, future harm is insufficient to impose tort liability.[11] *See Caronia*, 22

App. 595, 596, 757 S.E.2d 192, 194 (2014).

[11] Even if Plaintiffs had suffered an injury to support a negligence claim, they have failed to plead that that purported injury is somehow connected with

N.Y.3d at 446; *Peterman*, 29 Pa. D. & C. 3d at 107. The only alleged "injury" Mr. Solak has identified is the "harm[]" of "having his financial and personal information compromised," which allegedly leads to "the imminent and certainly impending . . . threat of identity theft and fraud." Compl., Doc. 1, ¶ 21. He has suffered no actual, present cognizable injury. And Mr. Solak's fear of future injury is entirely speculative, for it depends on the future acts of multiple third parties—from criminal hackers who could misuse or sell his financial information, to the ultimate unauthorized end users (if any) of that information. *Cf. Clapper*, 133 S. Ct. at 1150 (court is "reluctant to endorse" standing theories that "rest on speculation about the decisions of independent actors"). Although Mr. O'Rourke alleges similar speculative, future injuries, Compl., Doc. 1, ¶ 22, he also claims to have incurred a "fraudulent purchase in an amount of $49.95," *id.* ¶ 23. But what Mr. O'Rourke does not allege is more important: He does not claim that he has had to pay that allegedly fraudulent charge. Mr. O'Rourke's "failure . . . to plead that [he was] not reimbursed or that the charges were not removed" is fatal to his

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Home Depot's alleged breach of either its duty to secure their personal information or to timely notify its customers of the criminal data breach. *See In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 965 (S.D. Cal. 2014) ("*Sony II*") (dismissing negligence claims "based on Sony's alleged breach of the duty to timely disclose the nature of the intrusion" where no "allegations set forth a plausible claim that the alleged untimely disclosure, and not the intrusion itself, resulted in [plaintiffs'] alleged injuries").

claimed injury. *See Willingham*, 2013 WL 440702, at *7; *cf. Falkenberg v. Alere Home Monitoring, Inc.*, No. 13-341, 2014 WL 5020431, at *4 (N.D. Cal. Oct. 7, 2014) (dismissing data-breach action where plaintiffs had "not alleged any loss of property" and not "establish[ed] what money was lost").

Second, the economic-loss doctrine bars Plaintiffs' claims in any event. Under that well-established tort doctrine, "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage." *Excavation Techs., Inc. v. Columbia Gas Co. of Pa.*, 936 A.2d 111, 115 n.7 (Pa. Super. 2007) (internal quotation marks omitted); *see also City of Cairo v. Hightower Consulting Eng'rs, Inc.*, 278 Ga. App. 721, 728–29, 629 S.E.2d 518, 525 (2006); *Suffolk Laundry Servs., Inc. v. Redux Corp.*, 238 A.D.2d 577, 578 (N.Y. App. Div. 1997). If Plaintiffs' only loss is a pecuniary one, as Plaintiffs allege it is here, "courts adhere to the rule that purely economic interests are not entitled to protection against mere negligence." *Bates & Assocs., Inc. v. Romei*, 207 Ga. App. 81, 83, 426 S.E.2d 919, 922 (1993).

Plaintiffs have not alleged personal injury or physical injury to their property. At best, they claim a fear of future economic loss resulting from the potential misuse of their personal information. Compl., Doc. 1, ¶¶ 21–22. That is simply not the kind of injury that a negligence claim can remedy. Other courts

have dismissed similar data-breach negligence claims for this same reason, and this Court should too. *See Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 175–77 (3d Cir. 2008); *Sony II*, 996 F. Supp. 2d at 966–73; *Willingham*, 2013 WL 440702, at *17 (Georgia law).

C. Plaintiffs' Breach of Implied Contract Claims Fail Because There Was No Meeting of the Minds and No Injury.

A contract, whether implied or express, is "an agreement founded upon a meeting of the minds . . . [that] is inferred, as a fact from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Teets v. Chromalloy Gas Turbine Corp.*, 83 F.3d 403, 407 (Fed. Cir. 1996) (internal quotation marks omitted). No allegations support such an inference; Plaintiffs have not identified anything that Home Depot has said or done to manifest an intent to enter into an agreement to protect their payment card data. Plaintiffs have done no more than recite the elements of an implied contract and allege that they exist here. Compl., Doc. 1, ¶¶ 58–66. Such conclusory allegations do not survive *Iqbal* and *Twombly*.

The breach of implied contract claims also fail for the same reason as the rest: Plaintiffs have not pleaded an injury, an essential element of any contract claim. *See Bates v. JPMorgan Chase Bank, NA*, __ F.3d __, 2014 WL 4815564, *3–*4 (11th Cir. Sept. 30, 2014) (dismissing contract claim where damages were

lacking); *see also Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007) (dismissing implied contract claim in data-breach case for lack of injury).

D. Plaintiffs' Bailment Claims Fail Because There Can Be No Bailment over "Personal and Financial Information."

Plaintiffs claim that the act of providing their payment cards to Home Depot created a bailment that Home Depot breached by not sufficiently safeguarding their "personal and financial information." Compl., Doc. 1, ¶¶ 69–75. Courts in every prior data-breach case to consider a similar claim have concluded that providing payment information in a purchase transaction does not create a bailment. *See In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 974–75 (S.D. Cal. 2012); *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1126 (N.D. Cal. 2008); *Richardson v. DSW, Inc.*, No. 05 C 4599, 2005 U.S. Dist. LEXIS 26750, at *11–*12 (N.D. Ill. Nov. 3, 2005). The result should be no different here.

"Personal and financial information" cannot be the subject of a bailment. Under the laws of New York, Pennsylvania, and Georgia, a bailment can only exist over the delivery of *tangible* property that the owner expects to be *returned—e.g.*, a valet for your car or a coat check. *See* O.C.G.A. § 44-12-40 (bailment involves "delivery of goods or property"); *Charlie v. Erie Ins. Exch.*, __ A.3d __, 2014 WL 4258817, at *6 (Pa. Super. Aug. 29, 2014) (bailment involves delivery of "personal property"); *Forte v. Westchester Hills Golf Club, Inc.*, 426 N.Y.S.2d 390, 391–92

(City Ct. 1980) (similar). Plaintiffs do not—and cannot—plausibly allege that they gave their "personal and financial information" to Home Depot with the expectation that Home Depot would return it to them at some point in time. Plaintiffs' conclusory allegation that they expected their data "return[ed]," Compl., Doc. 1, ¶ 75, defies common sense. These claims also fail as a matter of law.

E. Plaintiffs' Unjust Enrichment Claims Fail Because Home Depot Did Not Unjustly Receive Any "Benefit" From Plaintiffs.

Plaintiffs have not and cannot plead an essential element of an unjust enrichment claim: that the defendant actually obtained a benefit from a plaintiff without paying for it. *See Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215 (2007) (elements of unjust enrichment claim); *Pennsylvania v. Ortho-McNeil-Janssen Pharms., Inc.*, 52 A.3d 498, 512 (Pa. Commw. 2012) (same); *GMAC Mort., LLC v. Pharis*, 328 Ga. App. 56, 61, 761 S.E.2d 480, 484 (2014) (same). Plaintiffs claim that part of what they paid for when they bought goods or services from Home Depot was "the administrative and other costs of providing reasonable data security and protection to Plaintiffs and members of the Class." Compl., Doc. 1, ¶ 82. But Plaintiffs do not plead any facts to support that conclusory assertion—*i.e.*, they do not allege that customers who paid with a credit or debit card paid *more* than did customers who paid with cash. For Plaintiffs' "unjust enrichment" theory to work, they must plausibly allege some form of actual "overpayment."

And they have not.

To the extent Plaintiffs' unjust enrichment claims are based on a "would not have purchased" theory, courts have rejected this theory because Plaintiffs received the product and thus obtained the benefit of the bargain. *See, e.g.*, *In re Sony PS3 "Other OS" Litig.*, 551 F. App'x 916, 922 (9th Cir. 2014); *In re Sharpe*, 391 B.R. 117, 169-70 (N.D. Ala. 2008); *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1236–37 (S.D. Fla. 2007). As one court explained, the "would not have purchased" theory is "too little too late—[plaintiffs] have already received the benefit from [the product], even if they now claim that they do not want that bargain." *Prohias*, 490 F. Supp. 2d at 1236. There was simply nothing "unjust" about the benefits Plaintiffs and Home Depot, respectively, received when Plaintiffs purchased goods using a payment card at Home Depot and paid the same amount as cash customers. This claim too should be dismissed as a matter of law.

* * *

After Home Depot was the victim of criminal hacking, Plaintiffs raced to the courthouse to file this Complaint. The Complaint's deficiencies reflect much more than just a rush to file; they reflect legal shortcomings in Plaintiffs' theory of the case. Neither Plaintiff has suffered any injury that could support a claim for relief or confer Article III standing. The Complaint should be dismissed with prejudice.

Respectfully submitted, this 13th day of October, 2014.

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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 Motion was prepared on a computer using the Times New Roman font (14 point).

Respectfully submitted, this 13th day of October, 2014.

/s/ Phyllis Sumner
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CERTIFICATE OF SERVICE

The undersigned counsel for Defendant Home Depot, Inc. hereby certifies that a true and correct copy of the foregoing was filed on October 13, 2014 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. I further certify that a true and correct copy of the foregoing was served by U.S. Mail, postage prepaid, this 13th day of October, 2014, on the following:

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