IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02247-RBJ

SELCO COMMUNITY CREDIT UNION et al.,

Plaintiffs,

v.

NOODLES & COMPANY,

Defendant.

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

MOTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Noodles & Company ("Noodles") moves to dismiss plaintiffs' consolidated complaint (D.E. 27) in its entirety and with prejudice. The grounds for this motion are set forth in the following memorandum in support.

MEMORANDUM IN SUPPORT

INTRODUCTION

In early 2016, several Noodles stores were victims of a cyberattack in which criminals potentially accessed patrons' payment card data. Plaintiffs are out-of-state credit unions that issue payment cards. They claim expenses associated with reimbursing customers for fraudulent charges plaintiffs allege resulted from their customers using payment cards at Noodles during the cyberattack. Plaintiffs agreed, as part of their contracts with the cards brands (e.g., Visa), to ensure their customers have zero liability for fraudulent charges. They now seek to shift these costs to Noodles through a Colorado negligence claim on behalf of a nationwide class.

The economic loss rule bars plaintiffs' negligence claims. Choice-of-law principles require the Court to apply each plaintiff's home state's law to their claims. The economic loss rule as adopted in each state where each named plaintiff resides bars plaintiffs' negligence claims. And plaintiffs would fare no better under Colorado's economic loss rule. Accordingly, the Court should dismiss the consolidated complaint with prejudice.

STATEMENT OF FACTS

Noodles is a national restaurant chain founded in Denver, Colorado, that accepts credit and debit cards as payment. Plaintiffs issue these cards to their customers, and the extensive payment-card networks allow a customer with a credit union-issued payment card to make a purchase at any domestic or international Noodles restaurant.

A card brand, Visa and MasterCard being the largest, operates a payment-card network. (*See generally* Visa Core Rules and Visa Product and Service Rules, attached as Ex. A; MasterCard Rules, attached as Ex. B.) Financial institutions can join these networks as "issuing" or "acquiring" banks (and in some cases, both). (Compl. ¶ 22.) Plaintiffs are "issuing banks"—they issue payment cards. (*Id.* ¶¶ 11-14, 19.) "Acquiring banks" are on the other side of the transaction—they contract with merchants so that the merchant may accept credit and debit cards as payment, (*id.* ¶ 22), regardless of what bank issued the card. (*See* Visa Rules § 1.5.4.2; MasterCard Rules § 5.10.1.) After a customer swipes a card, the processor routes the transaction through the card brand system to the issuing bank. (Compl. ¶ 22.) If approved, the merchant accepts payment, and its acquiring bank reimburses it (less a fee it pays to accept payment card transactions). (*Id.*) The issuing bank then reimburses the acquiring bank. (*Id.*)

Each card brand governs this process through rules it issues, which plaintiffs describe as "rules and standards" or "Card Operating Regulations." (*Id.* ¶¶ 25, 32.) These rules bind all participants in the payment-card networks through a series of interrelated contracts. Issuing and acquiring banks contract with the card brands, while merchants contract with their acquiring banks. The rules require the participants to maintain certain levels of data security. (*Id.* ¶ 25.) But they also allocate the various parties' rights and obligations in the event of a cyberattack.

Specifically, issuers such as plaintiffs must guarantee their customers zero liability for fraudulent transactions. (Visa Rules § 4.1.13.3; MasterCard Rules § 6.3.) In turn, issuers may seek reimbursement from the card brands for their expenses in doing so. (Visa Rules § 10.10.1.1; MasterCard Sec. Rules & Proc., attached as Ex. C, § 10.2.5.3.) Assessments levied against the breached entity's acquiring bank fund the reimbursements, and the merchant will generally indemnify the acquiring bank. *See Schnuck Markets, Inc. v. First Data Merch. Data Servs. Corp.*, 86 F. Supp. 3d 1055, 1057 (E.D. Mo. 2015).

Noodles suffered a cyberattack between January 31 and June 2, 2016, and the criminals allegedly compromised some of plaintiffs' customers' payment-card information. (Compl. ¶¶ 1, 11-14.) Plaintiffs allege that they incurred expenses investigating issues related to the cyberattack and reissuing cards or reimbursing fraudulent charges. (*Id.* ¶¶ 11-14.)[1]

ARGUMENT

A. Standard of Review.

To survive Noodles's Rule 12(b)(6) motion, plaintiffs' "complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) (quotation omitted). To determine if plaintiffs meet that standard, the Court may consider the attached card brand rules because plaintiffs reference them in their complaint to establish Noodles's alleged liability. (*See, e.g.*, Compl. ¶¶ 25-28, 30-32, 56); *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) ("[C]ourt may consider documents referred to in the complaint . . . central to the plaintiff's claim.").

[1] All but plaintiff KEMBA Financial Credit Union, which alleges that its harm was "a result of the Wendy's data breach." (Compl. ¶ 12.)

B. Choice of Law.

Plaintiffs argue that Colorado law should apply to their claims and the claims of their entire putative nationwide class. (Compl. ¶¶ 78, 91-96.) The Court need not accept this legal conclusion as true. *See In re Fesenius Granuflo/Naturalyte Dialysate Products Liability Litig.*, 76 F. Supp. 3d 294, 302 (D. Mass. 2015) ("Choice of law determinations are legal questions, distinct from the facts on which I may rely to reach an answer." (citation omitted)).

As the forum state, Colorado conflict-of-law rules apply.[2] "Colorado follows the Restatement (Second) of Conflict of Laws (1971)." *Kipling v. State Farm Mut. Auto. Ins. Co.*, 774 F.3d 1306, 1310 (10th Cir. 2014). For tort actions, the Court must determine which state "has the most significant relationship to the occurrence and the parties under the principles of § 6" by considering: (1) where the injury occurred; (2) where the conduct causing the injury occurred; (3) the domicile, residence, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. *Id.* at 1311.

Evaluating these contacts shows that each plaintiff's home state's law applies. First, plaintiffs admit that their financial injury occurred where they are located: Oregon, Ohio, Indiana, and Iowa. (Compl. ¶ 96.) Case law is in accord. *See Wyers v. Greenberg Traurig, LLP*, 2014 WL 2673594, at *3 (D. Colo. June 13, 2014) (location of monetary injury where injury "felt and realized"); *Pittway Corp. v. Lockheed Aircraft Corp.*, 641 F.2d 524, 528 (7th Cir. 1981) (where plaintiff has principal place of business); *In re Syngenta AG MIR 162 Corn Litig.*, 131 F. Supp. 3d 1177, 1229 (D. Kan. 2015) (same). Factor one points to each plaintiff's home state.

Plaintiffs argue that the next factor—where the "conduct causing the injury occurred"—points to Colorado because "Noodles' acts and omissions discussed herein were orchestrated and

[2] As shown throughout this brief, the negligence law of each of the relevant states differs in material ways, making a choice-of-law analysis necessary.

implemented at its corporate headquarters in Colorado." (Compl. ¶¶ 91-92.) But plaintiffs allege that the card data was stolen not from Colorado, but from each Noodles store's point of sale system through "RAM scraping malware," which they claim steals "that information as it arises" (or as a card is swiped). (*Id.* ¶ 43.) Thus, the conduct causing the injury occurred where each plaintiff's customers used their payment cards. Plaintiffs are small credit unions, so it is likely that their customers dined mostly at Oregon, Ohio, Indiana, and Iowa locations.

The remaining contacts also favor plaintiffs' home states. Noodles's corporate headquarters is in Colorado, but it also has restaurants in each of plaintiffs' home states. Plaintiffs allege no Colorado presence at all. And as noted, plaintiffs' customers likely dined at Noodles locations in the same states in which plaintiffs are headquartered. So if there is a center of the parties' relationship, which is indirect at best, it would be each plaintiff's home state.

Weighing Colorado's minimal contacts against those of plaintiffs' home states requires applying each plaintiff's home state's law. In particular, because plaintiffs' injuries occurred entirely in one state, that factor is most important. Restatement § 145 cmt. e (injury location "plays an important role in the selection of the state of the applicable law . . . [where] the injury occurred in a single, clearly ascertainable state"). Moreover, where, as here, the main issue is whether one party owes another a tort duty, and if so, what that standard of care is, "[t]he applicable law will usually be the local law of the state where the injury occurred." Restatement § 159 ("Duty Owed Plaintiff"); *see also* Restatement § 157 ("Standard of Care").

Plaintiffs try to minimize this contact by arguing that where they were injured is "fortuitous" because Noodles did not know which specific financial institutions would be injured and where these entities would be located. But the location of an injury is not "fortuitous" simply because the defendant does not know where the injury will result (or that injury would result at all). This case is unlike the prototypical "fortuitous injury" case of a plane from Maine on its way to California crashing in Kansas. The plane could have just as easily crashed in any number of states. In contrast, plaintiffs' injuries were allegedly suffered exactly where an economic injury is expected to be suffered—their home states. *See Elvig v. Nintendo of Am., Inc.*, 696 F. Supp. 2d 1207, 1211 (D. Colo. 2010) (rejecting argument where "there is no indication that [plaintiff] suffered her injury while traveling").

Coupling the § 145 contacts with the interest/policy factors of § 6 confirms that Colorado law cannot be uniformly applied in this putative nationwide class action. For torts, which are primarily designed to compensate victims of wrongful conduct, the state where the injury occurred and where the plaintiff resides has the strongest interest in applying its law to the plaintiff's claims. *See id.* at 1213 (uniformly applying the defendant's home state law "would defeat reasonable expectations of [plaintiffs] under the laws of the states where they reside"); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 591-92 (9th Cir. 2012) ("[E]very state has an interest in having its law applied to its resident claimants." (quotation omitted)).

Nor has Colorado shown interest in applying its law to payment card data breaches. But other states whose laws would apply to putative class member claims have expressed that policy interest. *See In re Target Corp. Cust. Data Sec. Breach Litig.*, 64 F. Supp. 3d 1304, 1310 (D. Minn. 2014) (discussing Minnesota's "Plastic Card Security Act"). So applying Colorado "law to every potential out-of-state claimant would frustrate the policies of each claimant's state." *Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 209 (3d Cir. 2013); *see also Maloney v. Microsoft Corp.*, 2011 WL 5864064, at *10 (D.N.J. Nov. 21, 2011) (unpublished) (interests of interstate comity "clearly favor the application of" each prospective class member's home state law).

For these reasons, the law of each plaintiff's home state applies to its negligence claims.

C. Plaintiffs' Negligence Claims Fail Under Their Home-States' Laws.

Plaintiffs' negligence claims run squarely into the economic loss rule. Indeed, several courts have held that the economic loss rule bars negligence claims brought by issuing banks against merchants who were the victim of payment card system hacking incident. *See In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 498-99 (1st Cir. 2009); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 178 (3d Cir. 2008); *Banknorth, N.A. v. BJ's Wholesale Club, Inc.*, 442 F. Supp. 2d 206, 213 (M.D. Pa. 2006); *Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, 918 N.E.2d 36, 47 (Mass. 2009). Here, each state's economic loss rule has its own nuances, and for the reasons discussed below, each bars plaintiffs' negligence claims.

1. SELCO's claims fail under Oregon's economic loss rule.

Under Oregon law, "one ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property." *Harris v. Suniga*, 180 P.3d 12, 15 (Or. 2008). The Oregon Supreme Court's "case law is clear that *economic losses* . . . are recoverable in negligence only if the defendant is subject to a heightened standard of care, such as one arising out of a special relationship." *Abraham v. T. Henry Const., Inc.*, 249 P.3d 534, 540 (Or. 2011). This rule bars SELCO's claims.

Economic losses are "financial losses such as indebtedness incurred and return of monies paid, *as distinguished from damages for injury to person or property*." *Harris*, 180 P.3d at 16; *see also Onita Pac. Corp. v. Trs. of Bronson*, 843 P.2d 890, 896, n.6 (1992) (same). This is exactly what SELCO seeks to recover here: "costs to cancel and reissue cards compromised in the data breach, costs to refund fraudulent charges, costs to investigate fraudulent charges, costs for customer fraud monitoring, and costs due to lost interest and transaction fees due to reduced card usage." (Compl. ¶ 11; *see id.* at ¶ 76.) These are economic losses. *See Paul v. Providence Health Sys.-Oregon*, 240 P.3d 1110, 1115 (Or. Ct. App. 2010) (damages for "costs of credit-monitoring services, notification, and fraud alerts, and possible future costs of repair of identity theft" are economic); *Wells Fargo v. U.S. Bank,* 2007 WL 270430, at *3 (D. Or. Jan. 25, 2007) (same, where the "only loss at issue [ ] is fungible money"). *See also In re TJX*, 564 F.3d at 498 (loss of credit card data not property damage); *Sovereign Bank*, 533 F.3d at 176 (same).

Thus, SELCO's complaint should be dismissed unless Noodles is subject to a heightened standard of care. Oregon "courts have developed a body of case law demonstrating that a heightened duty of care can arise from two sources: either from statute . . ., or by virtue of a 'special relationship' between the parties." *Bell v. Pub. Emps. Ret. Bd.*, 247 P.3d 319, 323 (Or. Ct. App. 2010) (citations omitted).

First, Noodles and SELCO are not in a special relationship. The types of relationships subject to a heightened standard of care are "attorney-client, architect-client, agent-principal, and similar relationships where the professional owes a duty of care to further the economic interests of the 'client.'" *Roberts v. Fearey*, 986 P.2d 690, 692 (Or. Ct. App. 1999). In other words, Oregon law allows a plaintiff to seek economic damages in tort when it "relinquishes control over matters, usually financial, and entrusts them to the other party" who "is authorized to exercise independent judgment in order to further the other party's interests." *Hettle v. Constr. Contractors Bd.*, 316 P.3d 344, 351 (Or. Ct. App. 2013) (quotation omitted).

SELCO does not allege any facts to support the conclusion it is in a special relationship with Noodles, instead hinging its negligence claim on foreseeability. (*See* Compl. ¶ 100.) But "a plaintiff must first show the *existence* of a special relationship in which the defendant had some obligation to pursue the plaintiff's economic interests. Only then does [the] foreseeability analysis come into play." *Roberts*, 986 P.2d at 692-93 (citation omitted).

At most, the relationship between SELCO and a merchant like Noodles is an arms-length business relationship far afield from the professional/client relationship that Oregon courts subject to a heightened standard of care. For these reasons, courts have rejected the position that a merchant and issuing bank are in a "special" or "fiduciary" relationship. *See, e.g.*, *Cmty. Bank of Trenton v. Schnuck Markets, Inc.*, 2016 WL 5409014, at *10 (S.D. Ill. Sept. 28, 2016); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 427 F. Supp. 2d 526, 534 (M.D. Pa. 2006).

Second, SELCO only cites § 5 of the FTC Act to support its negligence and negligence per se claims. (Compl. ¶¶ 33, 74.) But SELCO must identify an Oregon—not federal—statute. *See Decker v. GEMB Lending, Inc.*, 2012 WL 5304144, at *12 (D. Or. Sept. 13, 2012) (there is no "authority[] that a federal statute, rather than a state statute, could provide the independent duty necessary to recover solely economic damages on a common-law negligence claim"); *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 420-21 (9th Cir. 2011) (same).

In any event, § 5 does not impose an independent duty on Noodles. Even if the statute imposes a duty, if it "does not expressly address the effect of *the failure* to carry out that duty," or "indicate to whom the duty is owed," it will not establish an independent duty sufficient for a plaintiff to recover economic damages. *SFG Income Fund, LP v. May*, 75 P.3d 470, 474 (Or. Ct. App. 2003). As SELCO acknowledges, § 5 generally prohibits "unfair . . . practices affecting commerce" and says nothing about a merchant's data security obligations. (*See* Compl. ¶ 108.)

2. KEMBA's claims fail under Ohio's economic loss rule.

Under Ohio law, "the well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 835 N.E.2d 701, 704 (Ohio 2005); *see also Long v. Time Ins. Co.*, 572 F. Supp. 2d 907, 912 (S.D. Ohio 2008) (same). Thus, Ohio precludes recovery of economic losses in negligence either "where there is no privity or a sufficient nexus that could serve as a substitute for privity or where recovery of such damages is not based upon a tort duty independent of contractually created duties." *Pavlovich v. Ntl. City* Bank, 435 F.3d 560, 569 (6th Cir. 2006) (quotation omitted). KEMBA cannot meet either requirement.

First, the bank is not in contractual privity with Noodles and does not claim to be. Nor is there a "sufficient nexus" for a privity substitute, such as under the Restatement of Torts § 552, which permits certain third parties to sue professional information providers for negligence. *See Corporex*, 835 N.E.2d at 705 (discussing economic losses permitted in *Haddon View Inv. Co. v. Coopers & Lybrand*, 436 N.E.2d 212 (Ohio 1982)).

Second, the only duties KEMBA cites arise from contracts, not "an independent cause of action under Ohio law sounding in tort." *Solid Gold Jewelers v. ADT Sec. Sys., Inc.*, 600 F. Supp. 2d 956, 960 (N.D. Ohio 2007). Plaintiffs allege that "financial institutions and credit card processing companies have issued rules and standards governing the basic measures that merchants must take to ensure consumers' valuable data is protected." (Compl. ¶ 25.) KEMBA alleges that these rules and standards bind Noodles and uses those standards throughout its complaint to argue Noodles was negligent. (*See id.* ¶¶ 25-28, 56.) Because KEMBA relies on duties that are created by contract, Ohio's economic loss rule bars its negligence claim.

3. Indiana's economic loss rule bars MidWest's claims.

Like Ohio, Indiana precludes tort liability for purely economic loss that is unaccompanied by any property damage or personal injury. *Indianapolis-Marion Cnty. Pub.*

Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 726-27 (Ind. 2010). Indiana's economic loss rule "reflects that the resolution of liability for purely economic loss caused by negligence is more appropriately determined by commercial rather than tort law." *Id.* at 729.

Although Indiana has recognized "appropriate exceptions," to the economic loss rule such as "lawyer malpractice, breach of a duty of care owed to a plaintiff by a fiduciary, breach of a duty to settle owed by a liability insurer to the insured, and negligent misstatement," *id.* at 736, as in Oregon, a heightened standard of care is reflected in each relationship, which does not exist here. In fact, MidWest has not even argued that it is in a special relationship with Noodles.

4. Veridian's claims fail under Iowa's economic loss rule.

Under Iowa law, "the economic loss rule bars recovery in negligence when the plaintiff has suffered only economic loss" that does not arise out of a personal injury or damage to property. *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 503 (Iowa 2011). Though Iowa's rule does not require privity, it has considered and rejected "remote" negligence claims for purely economic loss such as plaintiff's claim here. *Id.* at 504.

Specifically, in *Annett*, the Iowa Supreme Court rejected a plaintiff's attempt to circumvent a network of underlying commercial contracts to bring a negligence claim against a remote party within that network: "[w]hen parties enter into a chain of contracts, even if the two parties at issue have not actually entered into an agreement with each other," Iowa's "contractual economic loss rule" bars tort claims for economic loss on the theory that tort law should not supplant a consensual network of contracts. *Id.* In support, the Court cited approvingly to *Cumis Insurance Society,* cited above, which applied the economic loss rule to bar credit unions' negligence claims against a retailer for losses incurred when the retailer's storage of credit card data allegedly allowed thieves to access and fraudulently use it. *See id.* at 502.

As in *Annett* and *Cumis*, a chain of sophisticated commercial contracts allocating various risks underlie Veridian's negligence claim. And by Veridian's own repeated admission, the source of Noodles's alleged duties is the "rules and standards" set forth in its contract with its acquiring bank. (*See* Compl. ¶¶ 22, 25, 28, 56; *see also* Visa Rules § 1.10.4.1; MasterCard Sec. Rules & Proc. § 10.1.) Still, Veridian tries to bypass its agreements with the card brands and reallocate the costs associated with fraudulent payment card transactions to Noodles, a remote party within the network of contracts. Iowa's economic loss rule thus bars Veridian's claim.[3]

D. Colorado's Economic Loss Rule Also Bars Plaintiffs' Negligence Claims.

Even if the Court were to apply Colorado's economic loss rule to the plaintiffs' claims, the result would be identical. Colorado's economic loss rule focuses on the alleged duty's source. "[A] party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004).

But this does not mean that the plaintiff must have a contract claim against the defendant, or even that the parties must have contractual privity. *BRW* rejected that position, holding "that the economic loss rule applies when the claimant seeks to remedy only an economic loss that arises from interrelated contracts." *Id. See also Sterling Const. Mgmt., LLC v. Steadfast Ins. Co.*, 2010 WL 3720064, at *2 (D. Colo. Sept. 12, 2010) (same); *JDB Med., Inc. v. The Sorin Grp., S.p.A.*, 2008 WL 10580039, at *6 (D. Colo. June 11, 2008) (same).

This is exactly what plaintiffs attempt to do here. As they allege, "[g]iven the extensive network of financial institutions involved in these transactions and the sheer volume of daily

[3] Iowa has recognized three exceptions to its economic loss rule—professional negligence actions against attorneys and accountants, negligent misrepresentation claims, and duties arising out of principal-agent relationships, *Annett*, 801 N.W.2d at 504—but none of these apply here.

transactions using credit and debit cards, it is unsurprising that financial institutions and credit card processing companies have issued rules and standards governing the basic measures that merchants must take to ensure consumers' valuable data is protected." (Compl. ¶ 25.) Those "rules and standards" are applicable to Noodles through its contract with its acquiring bank. (*See id.* ¶¶ 22, 28, 56; *see also* Visa Rules § 1.10.4.1; MasterCard Sec. Rules & Proc. § 10.1.)

The damages plaintiffs allege are likewise a direct result of their contractual relationship with the card brands where they agree to hold their customers harmless for fraudulent transactions on payment cards in most circumstances. (*See* Visa Rules § 4.1.13.3; MasterCard Rules § 6.3.) And, finally, while plaintiffs fail to acknowledge it in their complaint, these rules also provide a process through which issuing banks may be reimbursed for the very losses plaintiffs seek. (Visa Rules § 10.11.1.1; MasterCard Sec. Rules & Proc. § 10.2.5.3.) In other words, plaintiffs' alleged harm is the result of a series of determinations by several sophisticated commercial entities about how the risk of fraudulent transactions should be allocated in the payment card networks. This framework is an exemplar of when the economic loss rule applies.

The rule's purpose is "to enforce expectancy interests of the parties so that they can reliably allocate risks and costs during their bargaining" and "to encourage the parties to build the cost considerations into the contract because they will not be able to recover economic damages in tort." *BRW*, 99 P.3d at 72. Similarly, the Tenth Circuit applied the rule to "relationships [ ] governed by a set of interrelated contracts between sophisticated commercial entities, all of which had the opportunity to allocate risk and loss through negotiation of their separate contracts." *Standard Bank, PLC v. Runge, Inc.*, 443 F. App'x 347, 353 (10th Cir. 2011).

Nor can plaintiffs argue that an "independent duty" exists under the FTC Act or the common law. This is so because "independence is not shown simply because a duty also exists outside the contract. Instead, two conditions must be met: first, the duty must arise from a source other than the relevant contract; and second, the duty must not be a duty also imposed by the contract." *Makoto USA, Inc. v. Russell*, 250 P.3d 625, 627 (Colo. App. 2009) (quotation omitted). *See also Pernick v. Computershare Trust Co., Inc.*, 136 F. Supp. 3d 1247, 1270 (D. Colo. 2015) (duty "is not independent of a contract that memorializes it" (quotation omitted)).

Plaintiffs specifically allege that the standards incorporated into Noodles's contracts required Noodles to maintain the reasonable security of payment card data and use those standards throughout their complaint to argue Noodles was negligent. (*See* Compl. ¶¶ 25-28, 56.) This is the same duty to maintain "reasonable" security measures that plaintiffs seek to impose through the common law. The economic loss rule bars this claim.

E. Plaintiffs' Negligence Per Se Claims Fail For Additional Reasons.

Because plaintiffs identify no statute on which they could base a negligence per se theory under any of the applicable state's laws, their negligence per se claim should be dismissed. Plaintiffs cite only § 5 of the FTC Act to support their negligence per se theory. (*See* Compl. ¶¶ 108-13.) But "[f]or a statute to create a duty of care to support a negligence *per se* theory, it must fix the standard of care with certainty." *Fleshman v. Wells Fargo Bank, N.A.*, 27 F. Supp. 3d 1127, 1138 (D. Or. 2014); *see also Winger v. CM Holdings, L.L.C.*, 881 N.W.2d 433, 447 (Iowa 2016); *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 275 (Ind. 2003); *Sheldon v. Kettering Health Network*, 40 N.E.3d 661, 674 (Ohio Ct. App. 2015); *Silva v. Wilcox*, 223 P.3d 127, 135 (Colo. App. 2009). As noted above, § 5 proscribes "unfair" conduct generally and permits the FTC to enforce that proscription on a case-by-case basis. It does not fix a legal standard of conduct.

Furthermore, Congress did not enact § 5 with the intent to protect issuing banks from the type of economic harm plaintiffs assert. *See Winger*, 881 N.W.2d at 447 ("[V]iolation of a statute is not negligence per se unless the plaintiff [is] a member of the class the statute is designed to protect and the harm is one the enactment is designed to protect."); *see also Cantrell v. Morris*, 849 N.E.2d 488, 498 (Ind. 2006); *Crawford v. State, Div. of Parole & Cmty. Servs.*, 566 N.E.2d 1233, 1240 (Ohio 1991); *Bittle v. Brunetti*, 750 P.2d 49, 55 (Colo. 1988); *McAlpine v. Multnomah Cnty.*, 883 P.2d 869, 873 (Or. Ct. App. 1994). Section 5 is designed to protect consumers and competitors, not issuing banks. *See F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

F. Count III Is Not an Independent Cause of Action.

Plaintiffs' claim for "Declaratory and Injunctive Relief" fails with their other claims as it is not an independent cause of action. *See CCPS Transp., LLC v. Sloan*, 611 F. App'x 931, 933 (10th Cir. 2015) ("[H]owever they are pleaded, different remedial requests do not make for different claims."); *Savant Homes, Inc. v. Collins*, 2015 WL 899302, at *11 (D. Colo. Feb. 27, 2015) ("[D]eclaratory judgment is a form of relief rather than an independent cause of action.").

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs' complaint with prejudice.

Dated this 17th day of January, 2017

BAKER & HOSTETLER LLP

/s/ Xakema L. Henderson
Paul G. Karlsgodt
pkarlsgodt@bakerlaw.com
Xakema L. Henderson
xhenderson@bakerlaw.com
Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Memorandum in Support of Motion to Dismiss was filed and served via the Court's electronic case filing system on this 17th day of January, 2017, on all counsel of record.

Xakema L. Henderson