IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SELCO COMMUNITY CREDIT UNION, *et al.*, Plaintiffs, v. NOODLES & COMPANY, Defendant.	:	Civil Action No. 16-cv-02247-RBJ

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The data breach giving rise to this lawsuit was the inevitable result of Noodles' inadequate data security measures and approach to data security. Compl. ¶¶6, 52, 54.[1] Despite a long list of highly publicized cyber-attacks that compromised payment card data through vulnerable point-of-sale ("POS") systems and inadequately protected computer networks, Noodles failed to implement certain best practices, ignored warnings about the vulnerability of its computer network, refused to upgrade critical security systems, and failed to conform to applicable industry standards. ¶¶21, 27, 42-45, 55-58., 69-73. Among other failures, Noodles: (1) used outdated POS systems that were notorious for their heightened vulnerability to attack due to the manufacturer's discontinuation of security updates; (2) failed to properly isolate and secure its POS systems; (3) neglected to implement safety inspection protocols that would have identified the data breach; and (4) did not upgrade its POS systems to become EMV technology-compatible, as required by industry standards. ¶¶31-33, 42, 51-52, 55-58.

Noodles exacerbated this harm by failing to timely identify, contain, and provide notice

[1] All "¶" or "¶¶" citations are to the Amended Consolidated Class Action Complaint ("Complaint"), filed on November 30, 2016. ECF No. 27.

of the data breach to financial institutions. ¶¶8, 46-51. Malware remained undetected by Noodles for more than three months, and another six weeks elapsed before Noodles officially confirmed the breach. ¶¶46, 49. Another month elapsed before Noodles admitted the breach had not been contained, meaning that the data breach was ongoing for more than five months. ¶51. Financial institutions that issue payment cards and are responsible for covering fraud charges have suffered significant financial loss resulting from Noodles' inadequate data security approach and, in particular, its unreasonable delay in notifying the public about the breach. ¶¶70-77.

I. STANDARD OF REVIEW

On a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Moreover, the Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Albers v. Bd. of Cnty. Comm'rs of Jefferson Cnty., Colo.*, 771 F. 3d 697, 700 (10th Cir. 2014) (citations omitted).

II. ARGUMENT

A. Under a Choice of Law Analysis, Plaintiffs' Claims Are Not Barred.

First, it is premature to conduct a choice of law analysis. Noodles argues that the law of each Plaintiff's home state applies in this matter. ECF No. 34 ("Br.") at 5. Federal courts regularly decline to conduct fact-intensive choice of law analyses at the motion to dismiss stage, particularly where the extent of the contacts and evidence related to where specific conduct occurred can only be determined through discovery. *See F.D.I.C. v. First Interstate Bank of Denver*, 937 F. Supp. 1461, 1466 (D. Colo. 1996) ("A definitive choice of law determination is

inappropriate and premature at this Rule 12 phase of the case."); *see also Feingold v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 1106653, at * 5 (E.D. Pa. Apr. 3, 2012), *aff'd*, 517 F. App'x 87 (3d. Cir. 2013) (same). Thus, the Court should defer its ruling on choice of law.

Second, even if the Court decides to examine choice of law analysis at this preliminary stage, Colorado law will apply. Noodles admits that, in diversity cases such as the instant action, a court is to apply the forum state's choice of law rules. *See* Br. at 4; *see also Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1532 (10th Cir. 1996). Here, where Colorado is the forum state, it is undisputed that Colorado's choice of law rules apply.

Third, there is no outcome-determinative conflict of law, so Colorado law applies. "When more than one body of law may be applicable to a claim or issue, a court need not choose which body of law to apply unless there is an outcome determinative conflict between the potentially applicable bodies of law." *Iskowitz v. Cessna Aircraft Co.*, 07-CV-00968, 2010 WL 3075476, at *1 (D. Colo. Aug. 5, 2010) (internal citation omitted). If there is no outcome determinative conflict, the forum law is used. *Id.* As described in further detail *infra* Part III.B, each jurisdiction at issue recognizes some form of exception to the economic loss doctrine that would allow the case to move forward. Therefore, there is no outcome determinative conflict for Plaintiffs' negligence claims, and Colorado law should apply.

Finally, even assuming *arguendo* that there is an outcome determinative conflict of law here, Colorado law would still apply. For tort claims, Colorado adheres to the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws §145. *See Galena St. Fund, L.P. v. Wells Fargo Bank, N.A.*, 12-CV-00587, 2013 WL 2114372, at *5 (D. Colo. May 15, 2013) (citing *First Nat'l Bank v. Rostek,* 514 P.2d 314, 448-49 (Colo. 1973). The factors to

be considered in determining the most significant relationship are: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; (d) the place where the relationship, if any, between the parties is centered. *See* Restatement (Second) of Conflict §145(2) (1971). Section 145 also requires that certain policy factors be analyzed in determining the importance of each contact. *See id.* §6(2).[2] And these "contacts are to be evaluated according to their relative importance with respect to the particular issue." *See Galena St. Fund*, 2013 WL 2114372, at *5 (internal citation omitted). On balance, these factors weigh in favor of applying Colorado law.

With respect to the first factor (place of injury), class members suffered injury in states across the country and many have branches in multiple states. As such, where the conduct occurred takes on heightened significance. *See* Restatement (Second) of Conflict §145(2) cmt. e ("When the injury occurred in two or more states . . . the place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law."). Because more weight is to be accorded to the location of Noodles' conduct in this case, it is not outcome determinative that members of the Class were injured in their respective home states. *See Kinnett v. Sky's W. Parachute Ctr., Inc.*, 596 F. Supp. 1039, 1041 (D. Colo. 1984).

The location of a plaintiff's injuries carries even less weight in the "most significant relationship" analysis where, as here, the location of the injury was merely fortuitous. ¶96.

[2] These policy factors are (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied.

Noodles maintains "this case is unlike the prototypical 'fortuitous injury' case of a plane from Maine on its way to California crashing in Kansas" and relies on *Elvig v. Nintendo of Am., Inc.*, 696 F. Supp. 2d 1207, 1211 (D. Colo. 2010), which rejected a fortuitous injury argument when there was no reason to assume injury anywhere other than the plaintiff's home state. Br. at 5-6.

Noodles relies on *Elvig* almost entirely, but that case is distinguishable. In *Elvig*, a case involving product liability claims arising out of defective Wii controllers, the court noted at the outset: "When, as here, the case involves ***claims of personal injury***, the location of the injury presumptively provides the controlling law unless some other state has a more significant relationship." 696 F. Supp. 2d at 1210 (emphasis added). On that issue alone, the case is inapposite; here, where no personal injury claims are made, the Restatement (Second) of Conflicts provides more appropriate guidance.

Further, the District Court did not decline to recognize that the plaintiff's injury was fortuitous merely because it did not involve a "prototypical" airplane crash scenario. Instead, plaintiffs alleged only that a person "*might*" take their Wii anywhere due to its small size – an argument the court did not find compelling. The court emphasized this point by specifically noting that the fortuitous injury argument might have been convincing if the plaintiff had actually been injured while travelling outside of her home state. *See Elvig*, 696 F. Supp. at 1211. Noodles posits (without evidence or the benefit of discovery) that "it is likely that [Plaintiffs'] customers dined mostly at Oregon, Ohio, Indiana, Iowa locations" because "Plaintiffs are small credit unions." Br. at 5. But people regularly use payment cards when they travel and may be members of credit unions in states other than where they reside. Noodles' suggested inference is improper and should not be considered at the motion to dismiss stage as "all reasonable

inferences must be drawn in favor of the plaintiff." *Potter Voice Techs. LLC v. Apple, Inc.*, 12-CV-01096, 2013 WL 1325040, at *3 (D. Colo. Mar. 29, 2013). Thus, *Elvig* is not dispositive.

Noodles also ignores *Kozoway v. Massey-Ferguson, Inc.*, 722 F. Supp. 641 (D. Colo. 1989), where the court *accepted* a fortuitous injury argument even where a plaintiff suffered injury in his home state. In *Kozoway*, the plaintiff had been injured by a hay baler purchased in Canada, but manufactured by the defendant in Iowa, where the defendant had its principal place of business and had conducted field tests on the defective hay baler. Importantly, as with the Complaint here, the plaintiff alleged that the acts and omissions that lead to his injuries occurred in the defendant's home state. The court noted "that the presumption favoring the law of the state where the injury occurred can be overcome by applying the principles of the 'most significant relationship' test. *Id.* at 642. Applying that test, the court found that Iowa had the most significant relationship to the underlying claim, because all of "the defendant's allegedly wrongful conduct all occurred in Iowa…it [was] merely fortuitous that the plaintiff's injury happened in Alberta." *Id.* at 643. Given the fortuitousness of the financial injury here and the numerous potential locations of harm, applying Colorado law to Noodles' acts and omissions is appropriate. *See* ¶¶91-93.

In applying the second factor, the place where the injury-causing conduct occurred, Plaintiffs plead that "Noodles' acts and omissions were orchestrated . . . in Colorado", "the tortious and deceptive acts complained of occurred in, and radiated from, Colorado," and "Noodles' point of sale system and IT personnel", who are responsible for the conduct causing the injury, "operate out of, and are located at, Noodles' headquarters in Colorado." ¶¶91-93. Accordingly, this factor weighs heavily in favor of applying Colorado law to Noodles' acts.

The place-of-business prong results in a draw and is therefore not dispositive. Noodles is a Colorado corporation, its principal place of business is in Broomfield, Colorado, and although its heaviest concentration of stores is in Colorado, it has stores throughout the country. *See* ¶15. Plaintiffs are organized under the laws of their respective states and generally have locations in those states, except Veridian Credit Union, which also has two Nebraska branches. Accordingly, the third factor does not further either party's position. Moreover, as the parties have no business relationship that could be centered in a particular place, this factor carries no weight.

As to additional policy considerations, "[a] key reason" for the most significant relationship test is "to provide a 'fair level of predictability and uniformity' in applying choice-of-law principles." *Kozoway*, 722 F. Supp. at 643-44; *see also* Restatement (Second) Conflicts §6(2)(5). "A substantial degree of uniformity and predictability is created when such a domestic corporation knows that the law of the state where it is headquartered, and where its products are manufactured, applies to products liability actions brought by foreign plaintiffs." *Kozoway*, 722 F. Supp. at 644. Here, this policy consideration also weighs in favor of applying Colorado law as Noodles' headquarters are in Colorado. *See id.*; *see also* ¶37.

In its brief, Noodles contends that Colorado has not shown an interest in applying its law to payment card data breaches. Br. at 6. This contention is baseless. In May 2016, the Colorado Cybersecurity Initiative was signed into law, appropriating funds for and creating the National Cyber Security Intelligence Center, thereby making cyber security a "top priority" and Colorado "a stronger hub for the cyber industry." Colo. Rev. Stat. §24-33.5-1901(1)(e). Thus, this policy consideration also weighs in favor of application of Colorado law. *See* Restatement (Second) of Conflict of Laws (b) ("the relevant policies of the forum"). Noodles does not assert that Oregon,

Iowa, Ohio, or Indiana has expressed any other policy interests relevant to this analysis.[3]

Finally, Noodles implies that application of Colorado law would defeat *Plaintiffs'* reasonable expectations under the laws of the states where they reside. Br. at 6. But Plaintiffs here advocate for applying Colorado law, so there is no risk that their expectations will be defeated. Moreover, this policy prong weighs in favor of applying Colorado law, because Colorado corporations should have a reasonable expectation that Colorado law would apply to its negligent acts. *See Kozoway*, 722 F. Supp. at 644 ("[T]here is no injustice to a corporation in applying to it the laws of the state where it has chosen to locate its principle place of business.").

Thus, even assuming an outcome determinative conflict between the laws of Colorado and Plaintiffs' home states, Colorado law should apply to Plaintiffs' claims.

B. Plaintiffs' Negligence Claims Are Not Barred by the Economic Loss Rule.

Every recent court to decide a motion to dismiss a data breach case brought on behalf of financial institutions has declined to apply the economic loss doctrine to dismiss the claims. For example, the economic loss rule does not apply when an independent duty exists under the law such that tort claims are appropriate. *In re The Home Depot, Inc., Customer Data Sec. Breach Litig.*, 2016 WL 2897520, at *3 (N.D. Ga. May 18, 2016); *see also First Choice Fed. Credit Union v. The Wendy's Co.*, No. 16-506, slip op. at 7-8 (W.D. Pa. Feb. 13, 2017) (magistrate's report and recommendation now before district judge). Here, as in those cases, Plaintiffs' claims are not subject to the economic loss rule because Noodles owed them an independent duty of care under tort law, ¶¶72, 98-102, 108, 117, and thus the claims fall outside the rule. *See Town of*

[3] Instead, Noodles notes that Minnesota has expressed a policy interest in this area by passage of the "Plastic Card Security Act." Br. at 6. Its reference to this statute is baffling considering none of the named Plaintiffs are incorporated or have branches in Minnesota.

Alma v. AZCO Constr., Inc., 10 P.3d 1256, 1263-64 & n.10 (Colo. 2000).

As discussed *supra*, Colorado law properly governs determination of this dispute; however, even applying Plaintiffs' home state laws, none of the jurisdictions at issue apply the economic loss rule to bar a plaintiff's claims when the defendant owes an independent duty.

1. The Colorado Economic Loss Rule Does Not Bar Plaintiffs' Claims.

Colorado adopted the economic loss rule in *Town of Alma*. That rule holds that "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." *Id.* at 1264. In explaining the rule, the Colorado Supreme Court noted "the question . . . turns on the determination of the source of the duty. . . . A breach of a duty *arising independently* of any contract duties between the parties, however, may support a tort action." *Id.* at 1262. This formulation of an "independent duty" counsels a conclusion that the economic loss rule does not apply in this instance. Noodles' duties to Plaintiffs arise out of the common law and the FTC Act, not the contracts, rules, and standards invoked by Plaintiffs as proof that Noodles was aware that it had adopted a duty of care related to obtaining, processing, and protecting Plaintiffs' customers' personal and financial information.

Noodles cites *BRW* to argue that this is a situation involving "interrelated contracts," and that as a result, the economic loss rule applies. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004). In doing so, Noodles notes the allegations in the complaint related to "rules and standards" set by financial institutions and credit card processing companies. ¶¶22, 25, 56. But Noodles ignores the allegations related to the duty owed to Plaintiffs, including duties owed to them outside of any chain of contracts involving card brands, issuing banks, or credit card

processing companies:

- a duty to Plaintiffs and the Class to use and exercise reasonable and due care in obtaining and processing Plaintiffs' customers' personal and financial information." ¶98.
- a duty to provide adequate security to protect their mutual customers' personal and financial information." ¶99.
- a common law duty to prevent the foreseeable risk of harm to others, including the Plaintiffs and the Class." ¶100.
- a duty to use reasonable data security measures also arose under §5 of the FTC Act, which prohibits "unfair . . . practices in or affecting commerce," including, as interpreted and enforced by the FTC, the unfair practice of failing to use reasonable measures to protect Payment Card Data by businesses such as Noodles." ¶102.

These duties neither arise from a contract nor are imposed by a contract. *Accord Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 962 (10th Cir. 2009). The portions of the Visa and MasterCard rules cited by Noodles do not impose reasonable duties of care on it, or a common law duty to prevent foreseeable risks of harm. Neither do they impose requirements such as those under §5 of the FTC Act. As Noodles concedes, §5 generally prohibits "unfair . . . practices affecting commerce" and says nothing specific about a merchant's particular data security obligations. Br at 9; ¶108. These duties are separate and apart from any contractual duties owed to Plaintiffs indirectly by Noodles. In addition, Plaintiffs do not contract with Noodles and are not in a position to "reliably allocate risks and costs during their bargaining," because they are not parties to those contracts. *Cf. BRW*, 99 P.3d at 72. Noodles agrees that no contractual privity exists between the parties. Br. at 10. The rule should not be applied here.

Noodles cites numerous Colorado cases decided at summary judgment and beyond, which only highlights the need for discovery into the duties undertaken by Noodles, its conduct in relation to Plaintiffs, and the facts underlying the relationships between the parties and other players identified as part of the "interrelated contracts." *See S K Peightal Eng'rs, LTD v. Mid Valley Real Estate Sols. V, LLC*, 342 P.3d 868, 877 (Colo. 2015) (remanding to trial court for

factual determination on whether interrelated contracts between multiple parties even implicate the rule). As such, at the very least, this issue should not be decided on a Motion to Dismiss.

2. Plaintiffs' Negligence Claims Survive Regardless of Choice of Law.

Even if the Court concludes Colorado law does not apply on a Motion to Dismiss, the economic loss rule does not bar Plaintiffs' negligence claims in Oregon, Ohio, Indiana, or Iowa.

Oregon: Noodles claims that under Oregon law, only negligence claims where the defendant is subject to a heightened standard of care avoid application of the economic loss rule. *Abraham v. T. Henry Constr., Inc.*, 249 P.3d 534, 540 (Or. 2011). This is untrue. Oregon courts also hold that the economic loss rule does not apply when an independent duty of care exists, the same as Colorado. *Decker v. GEMB Lending, Inc.*, 2012 WL 5304144, at *12 (D. Or. Sept. 13, 2012). While Oregon does not allow that independent duty of care to arise from a federal statute like the FTC Act, Plaintiffs' other factual allegations cited above support independent duties under Colorado law, and thus Oregon's economic loss rule is inapplicable.

Ohio: As Noodles concedes, Ohio holds that the economic loss rule is not applicable if recovery of damages is based "upon a tort duty independent of contractually created duties." *Pavlovich v. Nat'l City Bank*, 435 F.3d 560, 569 (6th Cir. 2006) (quotation omitted). Like Colorado law, information about the "rules and standards governing the basic measures that merchants must take to ensure consumers' valuable data is protected" issued by financial institutions and credit card processing companies are not the duties outlined by KEMBA in the Negligence count, and the rules and standards are not contracts entered into between KEMBA and Noodles. ¶¶25, 72, 98-102, 108, 117. Ohio law prohibits a tort claim when there is a contract action under which the parties are governed. *Ebenisterie Beaubois Ltee v. Marous Bros. Constr.*,

2002 WL 32818011, at *10-11 (N.D. Ohio Oct. 17, 2002). Here, there is no contract between the parties, only allegations that delineate separate duties owed to Plaintiffs by Noodles. *See Corporex Dev. & Constr. Mgmt. v. Shook, Inc.*, 835 N.E.2d 701, 705 (Ohio 2005). They are, as a result, arising from "an independent cause of action under Ohio law sounding in tort." *Solid Gold Jewelers v. ADT Sec. Sys.*, 600 F. Supp. 2d 956, 960 (N.D. Ohio 2007).

Indiana: The principles underlying the economic loss rule in Indiana include "(1) to maintain the fundamental distinction between tort law and contract law; (2) protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk." *KB Home Ind., Inc. v. Rockville TBD Corp*., 928 N.E.2d 297, 303-304 (Ind. Ct. App. 2010) (citations omitted). None of these principles is implicated in a situation where, as here, a plaintiff sues a defendant for breaching an independent duty *KB Home* declined to extend the economic loss doctrine to a situation analogous to the one before this Court, where the parties did not contract with each other, where the plaintiff did not seek "to circumvent any contractual, statutory, or other limits on the nature or scope of its permissible recovery against" any party with which is does have a contractual relationship, and where both factors made the situation fundamentally one of tort and not contract. *Id.* at 305.

Here, MidWest's claims are analogous to those in *Novak v. Ind. Family & Soc. Servs. Admin*., 2011 WL 1224813, at *8 (S.D. Ind. Mar. 30, 2011) rather than *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Lindard, P.C.*, 929 N.E.2d 722 (Ind. 2010). In *Marion County*, the library seeking to recover was "connected with the Defendants through a network or chain of contracts," which, as explained above, is not the case here. *Id.* at 741. In *Novak* court

made clear that "the economic loss doctrine has no application to a circumstance where the Plaintiff has not purchased a service or product from the Defendant and is not seeking damages for which the allocation of risk has been predetermined in some fashion by the parties involved." *Novak*, 2011 WL 1224813, at *8.

Iowa: In order to avoid applicability of the economic loss rule, Iowa law requires at a minimum that the damage for which recovery is sought . . . extend beyond the product itself' in order for tort principles to apply. *Employers Mut. Cas. Co. v. Collins & Aikman Floor Coverings, Inc.*, 2004 WL 840561, at *17 (S.D. Iowa Feb. 13, 2004). Here, as contemplated in *Employers Mutual*, the data breach was a "sudden or dangerous occurrence . . . resulting from a genuine hazard" in the form of the breach, from which Noodles failed to protect Veridian. *Id.* This formulation is the same as the "independent duty" analysis in Colorado.

C. Plaintiffs State a Claim for Negligence *Per Se*.

Noodles makes several arguments that Plaintiffs' negligence *per se* claim should be dismissed. Br. at 9.[4] First, it claims Oregon law only allows negligence *per se* claims based on statutory law from the state, not on a federal law such as Section 5 of the FTC Act. Second, and again based on Oregon law, Noodles argues §5 does not impose an independent duty on it because the statute does not address the effect of a failure to carry out a duty. For the choice-of-law reasons stated earlier, the Court should reject both challenges. Colorado law applies under the choice of law principles Oregon's *per se* limitations do not apply here.[5]

[4] Noodles does not cite state-specific negligence *per se* law from Ohio, Indiana, or Iowa. Br. at 9-12.

[5] If Oregon law does apply, an outcome determinative conflict as to the negligence *per se* claim only does exist. This does not affect the lack of outcome determinative conflict for the rest of Plaintiffs' claims.

Moreover, other courts, in evaluating similar claims, have determined that negligence *per se* claims can be based on §5. *See, e.g. Wendy's*, slip op. at 7-8; *Home Depot*, 2016 WL 2897520, at *4 (refusing to dismiss negligence *per se* claim in a data breach case based on violation of § 5); *Bans Pasta, LLC v. Mirko Franchising LLC*, 2014 WL 637762, at *13-14 (W.D. Va. Feb. 12, 2014) (plaintiff adequately pleaded negligence per se based on FTC rule).

Contrary to Noodles' argument (Br. at 13-14), §5 imposes a clear duty and standard of care, as the Third Circuit held in another data breach case. *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 250, 255 (3d Cir. 2015) (holding that §5 sufficiently "informs parties that the relevant inquiry here is a cost-benefit analysis" "that considers a number of relevant factors").

Finally, Noodles contends that the financial institutions are not within a class protected from economic harm by §5, claiming it only protects consumers and competitors, not issuing banks. Br. at 15. Again, courts have rejected this argument. *See Home Depot*, 2016 WL 2897520, at *4; *see also FTC Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 625 (D.N.J. 2014). The Supreme Court agrees. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 248 (1972) (the element of "consumer injury" includes harm to businesses).The Court should deny Noodles' motion to dismiss Plaintiffs' negligence *per se* count.

D. Plaintiffs State a Valid Claim for Equitable Relief.

Plaintiffs seek equitable relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201, *et seq*. There must be '"a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Plaintiffs allege there is a continuing controversy relating to the scope of Noodles ongoing data security obligations and the

inadequacy of its current practices. ¶¶9, 11-15, 75, 77, 116-17. Plaintiffs further allege there is a real, immediate, and substantial risk of another data breach and resultant future harm and, if another breach occurs, their legal remedies will be inadequate. ¶¶119-21. Thus, Plaintiffs seek a declaration that Noodles failed to use reasonable security measures and that, to comply with its legal obligations, Noodles must implement specified additional security measures to protect payment card data. ¶¶117-18. While Noodles is correct that a naked declaratory judgment claim, untethered to any live controversy, states no cause of action, Plaintiffs' claim is the prototypical declaratory judgment claim based on a clear dispute over the parties' rights. *See MPVF Lexington Partners, LLC v. W/P/V/C, LLC*, 2016 WL 8234667, at *5 (D. Colo. Sept. 13, 2016).[6] Such allegations are sufficient at the pleading stage. *See Wendy's*, slip op. at 9-10; *Home Depot*, 2016 WL 2897520, at *4-5; *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 999 (S.D. Cal. 2014).

Dated: March 3, 2017

Respectfully submitted,
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[6] Noodles does not address the factors that courts consider in deciding whether to exercise their declaratory judgment authority. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994). Here, an action would serve a useful purpose in clarifying the legal relations and to settle the controversy. *See id*. Noodles waives any contrary argument, having failed to raise it in its opening brief. *See, e.g., Gutierrez v. Cobos*, 841 F.3d 895, 902 (10th Cir. 2016).

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

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