Docket Nos. 16-3426, 16-3542

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MATTHEW KUHNS,	**Appeal from the United States District Court for the Eastern District of Missouri**
Plaintiff/Appellant/Cross-Appellee,	
v.	**Case No. 4:15-cv-01537-SPM**
SCOTTRADE, INC.,	**Hon. Shirley Padmore Mensah, United States Magistrate Judge for the Eastern District of Missouri**
Defendant/Appellee/Cross-Appellant.	

DEFENDANT/APPELLEE/CROSS-APPELLANT SCOTTRADE, INC.'S PRINCIPAL AND RESPONSE BRIEF

Thomas E. Douglass
Christopher M. Hohn
Brandi L. Burke
David M. Mangian
THOMPSON COBURN, LLP
One US Bank Plaza
St. Louis, Missouri 063101
314-552-6000

Counsel for Defendant/Appellee/Cross-Appellant Scottrade, Inc.

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This appeal arises from a judgment dismissing Plaintiff/Appellant/Cross-Appellee Matthew Kuhns' ("Kuhns") claims against Defendant/Appellee/Cross-Appellant Scottrade, Inc. ("Scottrade") under Federal Rule of Civil Procedure 12(b)(1) for lack of Article III standing. Kuhns' claims were premised on a November 2013 criminal cyberattack on Scottrade's computer network. The United States District Court for the Eastern District of Missouri ("District Court") followed the majority of courts to address data breach lawsuits and dismissed Kuhns' claims because he did not allege that he suffered any actual harm as a result of the cyberattack and did not allege any facts plausibly establishing that there is a certainly impending or substantial risk that he will suffer future identity theft as a result of the cyberattack.

Because the District Court determined it did not have subject-matter jurisdiction over Kuhns' claims, it did not reach the alternate grounds for dismissal under Federal Rule of Civil Procedure 12(b)(6) raised by Scottrade. Scottrade's protective cross-appeal asks that, to the extent the Court determines Kuhns has standing, the Court affirm dismissal of Kuhns' claims under Rule 12(b)(6) because he does not plausibly state a claim upon which relief may be granted.

Because this case presents an important issue of first impression in this Court, Scottrade requests twenty minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel of record for Scottrade submits the following corporate disclosure statement: Scottrade is an Arizona corporation and is a wholly owned subsidiary of Scottrade Financial Services, Inc. No publicly held company currently owns more than 10% of the shares of Scottrade. On or about October 24, 2016, Scottrade announced it is being acquired by TD Ameritrade, with the acquisition tentatively set to occur on September 30, 2017. TD Ameritrade Holding Corp. is a publicly traded company (Symbol: AMTD).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

Rules

JURISDICTIONAL STATEMENT

Kuhns filed a complaint in the District Court in which he invoked federal diversity jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). *Kuhns v. Scottrade, Inc.*, No. 4:15-cv-1812 (E.D. Mo. Dec. 9, 2015), ECF No. 1, Compl. ¶ 8.[1] On February 9, 2016, the District Court consolidated Kuhns' case with three other similar actions under Federal Rule of Civil Procedure 42(a). SA–2. On February 19, 2016, Kuhns filed a Consolidated Class Action Complaint ("Complaint" or "Compl.") invoking federal diversity jurisdiction under CAFA. Compl. ¶ 7. The District Court entered an order dismissing the Complaint on July 12, 2016, and entered its judgment on August 2, 2016. Kuhns Add. 1; SA–23. Kuhns timely filed his Notice of Appeal from the District Court's July 12, 2016 Memorandum and Order Granting Scottrade's Motion to Dismiss the Complaint. SA–27; Fed. R. App. P. 4(a)(1)(A). Scottrade timely filed its Notice of Cross-Appeal on August 24, 2016. SA–25; Fed. R. App. P. 4(a)(3). This Court has

[1] All references to the Separate Appendix of Appellant Matthew Kuhns are abbreviated as "AA–", followed by the relevant page number(s). The Consolidated Class Action Complaint begins at AA–1, and specific allegations within the Complaint are cited herein as "Compl." followed by the relevant paragraph number(s). Citations to Appellant's Opening Brief are abbreviated as "Kuhns Br." References to the Addendum of Appellant Matthew Kuhns are abbreviated as "Kuhns Add." References to Scottrade's Separate Appendix filed herewith are abbreviated as "SA–", followed by the relevant page number(s).

jurisdiction over Kuhns' appeal and Scottrade's cross-appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court properly dismissed the Complaint on the basis that Kuhns did not allege concrete facts establishing injury in fact under the test articulated by the Supreme Court in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), and confirmed in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), when the cyberattack occurred three years ago and Kuhns does not allege that he has suffered any actual harm as a result of the cyberattack, does not allege that his personal information (or anyone else's) has been used to commit any of the hypothetical harms he alleges could potentially occur as a result of the cyberattack, and does not allege facts establishing that there is a certainly impending or substantial risk that his personal information will be used at some point in the future to commit identity theft.

Most Apposite Cases:

- *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)
- *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013)
- *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925 (8th Cir. 2016)
- *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046 (E.D. Mo. 2009)

2. Whether, in the event the Court determines Kuhns sufficiently alleges concrete facts establishing injury in fact, the Complaint should still be dismissed with prejudice under Federal Rule of Civil Procedure 12(b)(6) because Kuhns fails

to allege facts plausibly suggesting he is entitled to actual damages as a result of the cyberattack, that Scottrade breached the Brokerage Agreement, that the parties had a meeting of the minds sufficient to establish an implied contract exists, that Kuhns conferred a benefit on Scottrade, that a declaratory judgment adjudicating past conduct is appropriate or would serve a useful purpose, or that he suffered an ascertainable loss of money or property in connection with a trade or misrepresentation related to any actual brokerage services provided by Scottrade.

Most Apposite Cases:

- *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
- *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)
- *In re Barnes & Noble Pin Pad Litigation*, No. 12-CV-08617, 2016 WL 5720370 (N.D. Ill. Oct. 3, 2016).
- *Carlsen v. GameStop, Inc.*, 833 F.3d 903 (8th Cir. 2016)

STATEMENT OF THE CASE

Scottrade is a securities brokerage firm based in St. Louis, Missouri, that provides brokerage and other online trading services to its customers. Compl. ¶¶ 16, 34-35. Kuhns is a Florida resident and Scottrade customer.[2] Compl. ¶ 5, 11. Kuhns purported to bring claims for relief against Scottrade premised on a criminal intrusion into Scottrade's secure computer systems that occurred in November 2013 (the "cyberattack"). Compl. ¶ 1. On February 9, 2016, the District Court consolidated Kuhns' case with three other nearly identical putative class actions filed by Andrew Duqum ("Duqum"), Angela Martin ("Martin"), and Stephen Hine ("Hine") (collectively with Kuhns and Richard Obringer ("Obringer"), "Plaintiffs") pursuant to Federal Rule of Civil Procedure 42(a) and Eastern District of Missouri Local Rule 4.03. SA–2. The parties voluntarily consented to the jurisdiction of Magistrate Shirley Mensah in accordance with the provisions of 28 U.S.C. § 636(c). SA–18-19. The District Court entered final judgment dismissing the Complaint with prejudice on August 2, 2016. SA–20.

I. THE COMPLAINT AND KUHNS' GENERAL CONCLUSORY ALLEGATIONS OF INJURY

On February 19, 2016, Plaintiffs filed the Complaint against Scottrade alleging breach of contract (Count I), breach of implied contract (Count II),

[2] Kuhns alleges that he opened an account with Scottrade in 2005. Compl. ¶ 11.

negligence (Count III), unjust enrichment (Count IV), declaratory judgment (Count V), violation of the Missouri Merchandising Practices Act ("MMPA") (Counts VI and VII)[3], violation of the California Customer Records Act (Count VIII), violation of the California Unfair Competition Law (Count IX),[4] and violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA") (Count X).[5] Compl. ¶¶ 107-207.

Kuhns does not allege that *he* suffered any actual harm as a result of the cyberattack. Compl. ¶ 11. Instead, he makes a series of general conclusory allegations of hypothetical harm that he or other putative class members could potentially sustain as a result of the cyberattack at some unknown point in the future. *Id*. ¶¶ 13-15. The claims pertinent to Kuhns and this appeal are based on conclusory allegations that:

> (a) "Scottrade owed a legal duty to Plaintiffs . . . to maintain reasonable and adequate security measures to secure, protect, and safeguard the personal information stored on its network" (*id*. ¶ 3);
>
> (b) Scottrade breached this duty by failing to safeguard and protect Plaintiffs' personal information (*id*. ¶¶ 3-4); and

[3] Count VII is asserted on behalf of Duqum and Obringer only.

[4] Counts VIII and IX are asserted on behalf of Hine only.

[5] Count X is asserted on behalf of Kuhns only.

(c) Kuhns' personal information has been "transferred, sold, opened, read, mined and otherwise used . . . without . . . authorization" (*id.* ¶¶ 9-12).

The Complaint does not allege how Scottrade's systems or security measures were "inadequate," how Scottrade "failed to appropriately safeguard" Kuhns' personal information, or how Scottrade could have prevented the sophisticated cybercriminals from accessing Scottrade's systems.

The Complaint also misconstrues the legal relationship between Scottrade and Kuhns. Kuhns did not pay any money to open his Scottrade account. When Kuhns opened his Scottrade account, he agreed to the terms of the then-current Scottrade Brokerage Account Agreement (the "Brokerage Agreement"). *Id.* ¶ 37. In the Brokerage Agreement,[6] Kuhns agreed to pay Scottrade for brokerage fees and commissions in exchange for financial services—i.e., execution of trades. SA–5 ¶ 7. The Brokerage Agreement also incorporates the Scottrade Brokerage Privacy Statement (the "Privacy Statement"). SA–11; Compl. ¶ 37. The Privacy

[6] The Brokerage Agreement was properly before the District Court as an exhibit to Scottrade's Memorandum in Support of Its Motion to Dismiss because the Brokerage Agreement is necessarily embraced by the Complaint. *See Gorog v. Best Buy Co.*, 760 F.3d 787, 791 (8th Cir. 2014) (affirming district court's reliance on contract submitted in support of Rule 12(b)(6) motion to dismiss because the contract was necessarily embraced by amended complaint); *see also Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) ("In a case involving a contract, the court may examine the contract documents in deciding a motion to dismiss.")

Statement[7] states: "To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings." SA–16; Compl. ¶ 40. Scottrade also has an online privacy policy (Compl. ¶ 42), but it does not apply to Kuhns by its terms because he is a U.S. resident. D. Ct. ECF No. 59-6, at 1 ("If you are a United States resident and have an account with Scottrade Inc. . . . how we collect, use, and share your account information is governed by the Scottrade Privacy Statement."). No fees were assessed by Scottrade or paid by Kuhns for "data security services." SA–5-14 ¶¶ 7, 24, 25, 43, § Add. 3.

The Complaint does not allege that Kuhns (or anyone else) has sustained a concrete injury as a result of the cyberattack. Instead, Kuhns attempts to manufacture injury in fact by generally alleging that as a result of the attack he has suffered and will continue to suffer the following: (a) deprivation of the value of his personal information; (b) diminished value of the brokerage and financial services he paid Scottrade to provide; (c) risk of future identity theft and identity fraud; (d) invasion of privacy; (e) breach of the confidentiality of his personal information; and (f) the financial and/or temporal cost of monitoring his credit, monitoring his financial accounts, and mitigating his damages. Compl. ¶¶ 13-15.

[7] The Privacy Statement was properly before the District Court for the same reason as the Brokerage Agreement. *See* note 6, *supra*.

Kuhns does not allege, however, any facts establishing that his personal information is less valuable, that he tried to sell his personal information on the black market and was unable to do so, that he did not receive the actual brokerage services he paid Scottrade to provide, that he (or anyone else) has suffered actual identity theft or was a victim of fraud, or that he has incurred any costs or spent any time monitoring his accounts as a result of the incident. *See id*. Nor do Kuhns' minimal conclusory allegations establish that there is a certainly impending or substantial risk that he will sustain concrete injury—i.e., identity theft—as a result of the cyberattack at some time in the future.

II. SCOTTRADE'S SUCCESSFUL MOTION TO DISMISS THE COMPLAINT

On March 21, 2016, Scottrade filed a Motion to Dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and an accompanying Memorandum in Support ("Motion to Dismiss"). Scottrade argued that the Complaint is fatally defective because Plaintiffs failed to allege facts sufficient to establish injury in fact under Article III of the Constitution and that alternatively, Plaintiffs' state law claims are insufficient as a matter of law because they failed to allege facts plausibly suggesting they are entitled to actual damages as a result of the cyberattack. The Motion to Dismiss also established that Plaintiffs' state law claims suffer from a myriad of other fatal pleading deficiencies.

On April 11, 2016, Plaintiffs filed their Memorandum in Opposition to Scottrade's Motion to Dismiss (the "Opposition" or "Opp."). D. Ct. ECF No. 67. The Opposition tacitly concedes (by failing to address them) that most of the categories of alleged harm asserted in the Complaint (and argued on appeal here)—including (i) potential costs of credit monitoring and/or mitigating; (ii) deprivation of value of Plaintiffs' personal information; and (iii) invasion of privacy and/or confidentiality—are insufficient to establish injury in fact under Article III. Opp. 6-12. In their Opposition, Plaintiffs rested their case solely on their conclusion that they did not receive "bargained-for data security services" and their allegations regarding the risk of potential future identify theft, thereby forfeiting any right to assert the other alleged injuries as a basis for reversal of the District Court's Judgment in this Court. Kuhns also explicitly disclaimed any claim for negligence against Scottrade. Opp. 13 n.3. Scottrade filed its Reply in Further Support of its Motion to Dismiss on April 25, 2016. D. Ct. ECF No. 74.

III. THE DISTRICT COURT DISMISSED THE CONSOLIDATED COMPLAINT IN ITS ENTIRETY FOR FAILURE TO ALLEGE FACTS SUFFICIENT TO ESTABLISH INJURY IN FACT

On July 12, 2016, the District Court entered a Memorandum and Order granting Scottrade's Motion to Dismiss. Kuhns Add. 1-18. The District Court entered final judgment, in accordance with its Memorandum and Order, dismissing the Complaint with prejudice on August 2, 2016. SA–20. The District Court held

Plaintiffs lacked standing under Article III of the Constitution and concluded that Plaintiffs' minimal conclusory allegations regarding alleged injury as a result of the cyberattack were insufficient to establish injury in fact under the test articulated by the Supreme Court in *Clapper* and confirmed in *Spokeo*. Kuhns Add. 4-18. Because the District Court dismissed the Complaint for lack of standing, it did not address Scottrade's alternative arguments for dismissal under Federal Rule of Civil Procedure 12(b)(6). *Id*. at 18.

Kuhns timely filed his Notice of Appeal on August 11, 2016. SA–21. Duqum, Hine, Obringer, and Martin did not join in Kuhns' Notice of Appeal. *Id*. Nor did they file separate appeals from the District Court's Memorandum and Order or Judgment.

Scottrade timely filed its protective Notice of Cross-Appeal on August 24, 2016. SA–25. Scottrade seeks appellate review of its arguments for dismissal under Rule 12(b)(6) only in the event this Court reverses the District Court's Judgment with respect to standing.

SUMMARY OF THE ARGUMENT

The Court should affirm the District Court's dismissal of Kuhns' claims for lack of Article III standing under Federal Rule of Civil Procedure 12(b)(1). The District Court properly determined that Kuhns lacks standing because he did not allege he sustained any actual harm as a result of the cyberattack, and because his general conclusory allegations of hypothetical future harm were insufficient to establish injury in fact under the test articulated in *Clapper* and confirmed in *Spokeo*. Kuhns Add. 10 ("Plaintiffs do not allege any of the PII stolen in the breach has been used to commit identity theft, fraud, or any other act that has resulted in harm to any plaintiff. Nor do Plaintiffs allege any facts that suggest that the hackers intend to commit identity theft, fraud, or any other act that would result in harm to any plaintiff.").

Kuhns' argument that the District Court "misapplied the Supreme Court's ruling in *Clapper*" is not supported by the District Court's Memorandum and Order, the allegations in the Complaint, or the law. Notwithstanding Kuhns' argument to the contrary, the Supreme Court's decision in *Clapper* did not establish a per se rule that a certainly impending or substantial risk of harm exists when "one's personal information is taken by hackers." Rather, the Supreme Court made clear that plaintiffs, like Kuhns, "cannot rely on speculation about 'the unfettered choices made by independent actors not before the court'" to establish

standing. *Clapper*, 133 S. Ct. at 1150 n.5 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). The District Court followed this standard when it appropriately ruled that Kuhns' general conclusory allegations and conjecture do not establish that he lost the benefit of any bargain, the only basis upon which Kuhns argued he suffered actual injury as a result of the cyberattack. Likewise, the District Court appropriately ruled that such allegations are insufficient to establish that—three years later—there is a certainly impending or substantial risk that he would suffer identity theft at some point in the future.

The facts here are not like *Remijas v. Neiman Marcus Group*, 794 F.3d 688, 693-94 (7th Cir. 2015), or *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967-68 (7th Cir. 2016). The plaintiffs in each of those cases alleged *at least* one fraudulent charge as a result of the breaches. Here, Kuhns does not allege that he—or *anyone*—sustained a fraudulent charge or any of the other hypothetical injuries he claims could possibly result from the cyberattack. Those cases, and *Galaria v. Nationwide Mutual Insurance Co.*, Nos. 15-3386/3387, 2016 WL 4728027, at *3 n.1 (6th Cir. Sept. 12, 2016), are also inapposite because they undertake the same type of speculation regarding the intent of cybercriminals that the Supreme Court said is improper. They also either expressly or impliedly relied on the "objectively reasonable likelihood" standard the Supreme Court rejected in *Clapper*.

The remainder of Kuhns' arguments for reversal of the District Court's Judgment—i.e., alleged monitoring and mitigation costs, loss of value of personal information, and invasions of privacy—were not raised by Kuhns below and are therefore forfeited on appeal. Those arguments also fail on the merits because standing cannot be premised on monitoring costs that were not incurred (Kuhns does not allege he actually spent money monitoring or mitigating), and where there is no certainly impending or substantial risk of future identity theft or harm; Kuhns does not allege that he attempted to sell his information on the black market and could not do so, nor any other facts plausibly suggesting his personal information is less valuable as a result of the cyberattack; and Kuhns does not allege any "real harm" resulting from the cyberattack that would allow the Court to find his allegations of intangible injury—i.e., alleged invasion of privacy—sufficient to confer standing under *Spokeo*.

In the event the Court were to reverse the District Court's decision on standing, it should nonetheless affirm dismissal under Federal Rule of Civil Procedure 12(b)(6) because the Complaint fails to state a claim upon which relief can be granted. Kuhns fails to plead facts plausibly suggesting he is entitled to actual damages as a result of the cyberattack, a required element of each of his state law claims. His breach of express contract claim fails because his allegations of breach are directly contrary to the plain terms of the parties' express contract,

the Brokerage Agreement. Kuhns fails to plead a meeting of the minds sufficient to establish the existence of his alleged implied contract regarding data security. His quasi-contractual claims—implied contract and unjust enrichment—also fail as a matter of law because the parties' relationship is governed by the Brokerage Agreement, which covers the exact subject matter at issue in those claims. The declaratory judgment claim is improper for several reasons, most notably because it seeks a declaration as to past conduct. Kuhns fails to state a claim under the MMPA because he does not allege facts establishing he suffered an ascertainable loss of money or property in connection with the purchase or lease of the brokerage services he received.

ARGUMENT

I. THE STANDARD OF REVIEW FOR DISMISSAL UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

The standard of review of a District Court's dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of standing based on a deficiency in the pleadings is the same standard applied in cases under Federal Rule of Civil Procedure 12(b)(6). *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 520-21 (8th Cir. 2007). A district court's dismissal under either Rule 12(b)(1) or Rule 12(b)(6) is reviewed de novo. *See Wong v. Wells Fargo Bank N.A.*, 789 F.3d 889, 895, 897 (8th Cir. 2015).

The sufficiency of Kuhns' allegations under Rules 12(b)(1) and 12(b)(6) must be construed under the plausibility standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007). *See Stalley*, 509 F.3d at 521. "The plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims"—here, the right to jurisdiction and the right to relief—"rather than facts that are merely consistent with such right." *Id.* at 521; *see also Iqbal*, 556 U.S. at 678. "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555. The court must accept well-pleaded factual allegations, and the reasonable inferences drawn therefrom, as true, but legal conclusions are not afforded a presumption of truth. *See Iqbal*, 556 U.S. at 678;

see also Glickert v. Loop Trolley Transp. Dev. Dist., 792 F.3d 876, 880 (8th Cir. 2015). "'[L]abels and conclusions[,]' . . . 'formulaic recitation[s] of the elements of a cause of action,'" and "'naked assertion[s]' devoid of 'further factual enhancement'" do not satisfy the plausibility standard. *Iqbal*, 552 U.S. at 668 (quoting *Twombly*, 550 U.S. at 555, 557).

As explained below, Kuhns' allegations are insufficient to plausibly suggest he has standing or to raise any alleged right to relief above a speculative level.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT FOR LACK OF STANDING UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

A. Kuhns Has Not Met His Burden to Establish Article III Standing.

"Article III standing is a threshold question in every federal court case." *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003). "[T]he 'irreducible constitutional minimum' of standing consists of three elements," which Kuhns bears the burden of establishing. *Spokeo,* 136 S. Ct. at 1547 (quoting *Lujan*, 504 U.S. at 560). Kuhns "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* "To establish injury in fact, [Kuhns] must show that he . . . suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). "A

'concrete' injury must be '*de facto*'; that is, ***it must actually exist***." *Id.* (emphasis added). "For an injury to be 'particularized,' it 'must affect [Kuhns] ***in a personal and individual way***.'" *Id.* (emphasis added) (quoting *Lujan*, 504 U.S. at 560).

This appeal arises from the dismissal of the Complaint. As the only plaintiff among the five who has appealed the District Court's Judgment, Kuhns bears the burden of establishing that *he* individually has a "personal and individual" injury that "actually exist[s]." *See Spokeo*, 136 S. Ct. at 1547-48; *see also Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1050 (E.D. Mo. 2009) ("In class action litigation, the named plaintiff purporting to represent a class must establish that he, personally, has standing to bring the cause of action. If the named plaintiff cannot maintain the action on his own behalf, he may not seek such relief on behalf of the class." (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Hall v. Lhaco, Inc.*, 140 F.3d 1190, 1196-97 (8th Cir. 1998)). He cannot rely on injuries allegedly "suffered by other, unidentified members" of the putative class(es) who he purports to represent. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975). Nor can he rely on allegations in the Complaint relating to injuries allegedly sustained by his co-plaintiffs below, Duqum, Hine, Obringer, or Martin.

This standard limits this Court's review to the only allegation in the Complaint that refers to Kuhns, in particular. Paragraph 11 of the Complaint states:

> At all relevant times, [Kuhns] has been a resident of the State of Florida. Believing that Scottrade would safeguard his personal information, [Kuhns] provided his PII to Scottrade in connection with his brokerage account opened in 2005. Scottrade possessed, and currently possesses, [Kuhns'] PII, which Scottrade was and is required to take reasonable steps to keep confidential. [Kuhns] received an email from Scottrade confirming that his PII was contained on and taken from Scottrade's databases between late 2013 and early 2014. Thereafter, one or more data thieves, and their subsequent customers or others coming into possession of the wrongfully disclosed PII, transferred, sold, opened, read, mined and otherwise used [Kuhns'] PII, without his authorization, to their financial benefit and his financial and other detriment. [Kuhns] has been charged and paid Scottrade fees in connection with his Scottrade account, a portion of which were used for data management and security pursuant to the contractual and other obligations of Scottrade.

Compl. ¶ 11. The Complaint also contains general allegations regarding alleged harm to "Plaintiffs" in paragraphs 13-15. *See id*. ¶ 13 (concluding "Plaintiffs also have suffered . . . economic damages and other injury and harm in the form of the deprivation of the value of their PII"), ¶ 14 (concluding "Plaintiffs received a diminished value of the services they paid Scottrade to provide."), ¶ 15 (listing harms "Plaintiffs" have allegedly suffered as a result of the cyberattack).

The District Court properly determined that these allegations fail to establish Kuhns has injury in fact for purposes of Article III standing.

B. Kuhns Forfeited the Arguments that He Has Standing Based on Alleged Monitoring Costs, Loss of Value of His Personal Information, or Invasion of Privacy by Failing to Raise Them in the District Court.

Kuhns now argues the Court should reverse the District Court's Judgment because he has standing based on, *inter alia*, (i) the potential costs of credit monitoring and/or mitigating (Kuhns Br. 23-24); (ii) the deprivation of value of his personal information (*id.* at 27-29); and (iii) invasion of privacy and/or confidentiality (*id.* at 28-30). But Kuhns did not raise these arguments in the District Court. Opp. 6-12. Instead, his argument turned entirely on his conclusion that he did not receive "bargained-for data security services" and his allegations regarding potential future harm. *See id*.

Accordingly, Kuhns did not preserve his arguments regarding monitoring costs, deprivation in value, or invasion of privacy for appeal, and they are forfeited. *See Wiser v. Wayne Farms*, 411 F.3d 923, 926 (8th Cir. 2005) ("[O]rdinarily this court will not consider arguments raised for the first time on appeal." (quoting *Wever v. Lincoln Cnty., Neb.*, 388 F.3d 601, 608 (8th Cir. 2004)); *Roth v. G.D. Searle & Co.*, 27 F.3d 1303, 1307 (8th Cir. 1994) ("If a party fails to raise an issue for resolution by the district court, however, that issue may not be raised before this court."); *Diercks v. Durham*, 959 F.2d 710, 714 n.4 (8th Cir. 1992) (failure to raise argument to district court precludes review by this Court); *Clarke v. Bowen*, 843 F.2d 271, 273 (8th Cir. 1988) (this Court "must reject" arguments raised "for

the first time on appeal as a basis for reversal"); *see also In re Genetically Modified Rice Litig.*, 835 F.3d 822, 831-32 (8th Cir. 2016) (Court may reverse on basis of argument raised for first time on appeal only when appellant satisfies the stringent plain error standard set forth in *United States v. Olano*, 507 U.S. 725, 732 (1993)).

C. The District Court Did Not Err Because Kuhns Does Not Allege Sufficient Facts to Establish a Certainly Impending Risk of Future Identity Theft.

To establish injury in fact based on allegations of possible future identity theft, Kuhns must allege "*concrete facts*"—not legal conclusions—plausibly establishing that there is a "*substantial risk*" of alleged identity theft or that the alleged identity theft is "*certainly impending*."[8] *See Clapper*, 133 S. Ct. at 1147 & 1150 n.5. Neither Kuhns' conclusory allegations nor the circumstances present in

[8] In *Clapper*, the Supreme Court recognized that it has, in the past, found standing based on a "substantial risk" but questioned whether the "substantial risk" standard is relevant or *distinct* from the "certainly impending" requirement. *See Clapper*, 133 S. Ct. at 1150 n.5; *see also Hughes v. City of Cedar Rapids, Iowa*, No. 15-2703, 2016 WL 6471224, at *1 (8th Cir. Nov. 2, 2016) ("Standing may be based on a 'substantial risk' of harm that prompts plaintiffs to 'reasonably incur costs to mitigate or avoid that harm.'" (quoting *Clapper*, 133 S. Ct. at 1150 n.5)). Notably, in its most recent pronouncement of the injury-in-fact standard in *Spokeo*, the Supreme Court cited *Clapper*'s "certainly impending" requirement, not the "substantial risk" standard relied on by Kuhns. *See Spokeo*, 136 S. Ct. at 1549. Thus, to the extent there is a "substantial risk" standard, it is not distinct from the "certainly impending" requirement. And, in any event, Kuhns' threadbare allegations are insufficient under either standard.

this case plausibly suggest a certainly impending threat or substantial risk that Kuhns will sustain future identity theft as a result of the cyberattack. Accordingly, the District Court did not err in dismissing the Complaint.

Despite the passage of three years since the cyberattack (and the filing of two separate complaints by Kuhns), Kuhns does not allege any facts establishing that *his* personal information was used (or will be imminently used) to commit identity theft, incur fraudulent charges, or otherwise cause him harm. Nor does Kuhns allege that *he* has suffered actual identity theft or that *his* personal information has been published, sold, or otherwise disseminated to third parties, without his permission, by the hackers. Indeed, Kuhns does not allege a ***single instance*** in which ***anyone*** allegedly affected by the cyberattack actually sustained the type of ***hypothetical*** harm he alleges could conceivably arise from a cyberattack. Compl. ¶¶ 26-27. Standing alone, these facts warrant a finding that Kuhns failed to meet his burden to demonstrate that he personally faces a "substantial risk" of future identity theft or that identity theft as a result of the cyberattack is "certainly impending." *See In re SuperValu, Inc.*, No. 14-MD-2586, 2016 WL 81792, at *5 (D. Minn. Jan. 7, 2016) ("Based on the absence of any other allegations that Plaintiffs' PII has been misused, the Court is left to speculate about whether the hackers who gained access to Defendants' payment processing network were able to capture or steal Plaintiffs' PII; whether the hackers or other

criminals will attempt to use the PII; and whether those attempts will be successful."), *appeal filed*, No. 16-2528 (8th Cir. June 2, 2016); *In re Zappos.com, Inc.*, 108 F. Supp. 3d 949, 958-59 (D. Nev. 2015); *Amburgy*, 671 F. Supp. 2d at 1052-53.

The passage of three years since the cyberattack—a fact Kuhns conveniently ignores—also undermines the notion that there is a substantial risk of future identity theft or that identity theft as a result of the cyberattack is certainly impending. *See In re SuperValu*, 2016 WL 81792, at *5 (noting that "[a]s more time lapses without the threatened injury actually occurring, the notion that the harm is imminent becomes less likely" and finding such to be true in a case in which one and a half years had passed since the data security incident); *In re Zappos.com*, 108 F. Supp. 3d at 959 ("The years that have passed without Plaintiffs making a single allegation of theft or fraud demonstrate that the risk is not immediate."); *Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d 1078, 1087 (E.D. Cal. 2015) ("Further, in light of the fact that Plaintiff waited thirty-six months after the Data Breach to file his Complaint, and that now almost four years has elapsed since the Data Breach, Plaintiff has not shown that any alleged risk of future identity theft, identity fraud, and/or medical fraud is imminent."), *appeal filed*, No. 15-17285 (9th Cir. Nov. 19, 2015); *Storm v. Playtime, Inc.*, 90 F. Supp. 3d 359, 367 (M.D. Penn. 2015) ("Indeed, putting aside the legal standard for imminence, a

layperson with a common sense notion of 'imminence' would find this lapse of time, without any identity theft, to undermine the notion that identity theft would happen in the near future.").[9]

These undisputed facts distinguish Kuhns' allegations from those in the cases on which he relies—*Remijas*, *Krottner*, *Hannaford Brothers*, and *P.F. Chang's*—in which courts have found allegations sufficient to confer standing. Those cases involve either allegations of substantial data misuse that actually harmed the plaintiffs (e.g., fraudulent credit card charges) or facts making the allegations of threatened harm significantly more "imminent" or "certainly impending" than Kuhns' allegations in this case (e.g., 9,200 cards fraudulently used). *See P.F. Chang's*, 819 F.3d at 965 (plaintiff incurred multiple fraudulent charges on his credit card following the breach); *Remijas*, 794 F.3d at 692 (plaintiffs alleged that over 9,200 stolen credit cards were fraudulently used within six months of security breach); *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 154 (1st Cir. 2011) (approximately 1,800 cases of fraud within months of breach); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1141 (9th Cir. 2010) (bad actor

[9] Kuhns' own allegations also establish that the hackers did not use the information to his detriment; rather the allegations in the Complaint are that the hackers used the information to operate a stock price manipulation scheme, illegal internet gambling websites, and a bitcoin exchange. Compl. ¶ 74. Kuhns does not allege that these enterprises caused him harm in any way.

actually attempted to open bank account with plaintiff's information following physical theft of laptop); *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 43-44 (3d Cir. 2011) (distinguishing *Krottner* and *Pisciotta v. Old National Bancorp*, 499 F.3d 629 (7th Cir. 2007)); *In re SuperValu*, 2016 WL 81792, at *6 (distinguishing *Remijas* on basis that it involved "factual allegations of substantial data misuse which plausibly suggested that the hackers had succeeded in stealing the data and were willing and able to use it for future theft or fraud"); *Whalen v. Michael Stores, Inc.*, 153 F. Supp. 3d 577, 583 (E.D.N.Y. 2015) (distinguishing *Remijas* on grounds that 9,200 customers experienced fraudulent charges following the breach), *appeal filed*, No. 16-352 (2d Cir. Feb. 5, 2016); *In re Zappos*, 108 F. Supp. 3d at 958-960 (distinguishing *Krottner*).

Similarly, the Sixth Circuit's recent, unpublished split opinion in *Galaria*—upon which Kuhns extensively relies—does not control the outcome here. In *Galaria*, the Sixth Circuit determined the plaintiffs' allegations regarding potential future injury were sufficient to establish a substantial risk of harm because "[w]here a data breach targets personal information, a reasonable inference can be drawn that the hackers will use the victims' data for the fraudulent purposes alleged in Plaintiffs' complaints." *Galaria*, 2016 WL 4728027, at *3. But the Supreme Court has explicitly rejected this very type of speculation as an acceptable basis to support standing. *See Clapper*, 133 S. Ct. at 1150 ("We decline

to abandon our usual reluctance to endorse standing theories ***that rest on speculation about the decisions of independent actors***." (emphasis added)). That sort of "speculation prevents the Court from finding an increased risk of fraud and identity theft is 'certainly impending' or that there is a 'substantial risk' the harm will occur." *In re SuperValu*, 2016 WL 81792, at *5 (quoting *Clapper*, 133 S. Ct. at 1147, 1150 n. 5)*; see also Storm*, 90 F. Supp. 3d at 368; *In re Zappos.com*, 108 F. Supp. 3d at 958. Such reasoning is also flawed because it would automatically grant Article III standing to any person who allegedly has his or her personal information compromised, no matter if the facts establish, as here, that there is no certainly impending or substantial risk of future identity theft.[10]

The Sixth Circuit also did not discuss the effect of the passage of time on its "reasonable inference" conclusion. That distinguishes *Galaria* from this case, in which Kuhns did not file the Complaint until almost *two years* after the

[10] Even if such speculation were appropriate, it is not necessary here, where Kuhns alleges the hackers supposedly used the information to operate a stock price manipulation scheme. Compl. ¶ 74. Kuhns does not allege that his individual information was used by the hackers in any stock manipulation scheme or in any other way. Nor does he allege that he ***individually*** suffered damages or injury as a result of the hackers' supposed stock manipulation scheme. Moreover, none of Kuhns' allegations support a "reasonable inference" that the hackers, who are in custody, intend to use his information for identity theft at some unknown point in the future.

cyberattack.[11] The idea that the Court should draw a "reasonable inference" that there is a certainly impending or substantial risk of future identity theft in *November 2016* based on a cyberattack occurring in *November 2013* when no identity theft has been alleged to have yet occurred and the hackers have been in custody for some time defies logic.[12] Indeed, "[a]lthough imminence is a 'somewhat elastic concept,' it requires 'that the injury proceed with a ***high degree of immediacy***, so as to reduce the possibility of deciding a case in which no injury

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[11] The data breach in *Galaria* occurred on October 23, 2012, and was disclosed to the plaintiffs in a letter dated November 16, 2012. *See Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 650 (S.D. Ohio 2014). The plaintiffs filed their complaints on January 28, 2013 and February 8, 2013—less than four months after the breach. *Galaria v. Nationwide Mut. Ins. Co.*, 2:13-CV-00118 (S.D. Ohio Feb. 8, 2013), ECF No. 1; *Hancox v. Nationwide Mut. Ins. Co.*, No. 2:13-CV-00257-MHW-TPK (S.D. Ohio Jan. 28, 2013), ECF No. 1. That differs significantly from the circumstances here, where the cyberattack occurred in November 2013 (Compl. ¶ 59), and Kuhns did not file suit until December 9, 2015.

[12] The Seventh Circuit's holdings in *P.F. Chang's* and *Remijas* are inapposite on this point. In both of those cases, plaintiffs alleged the hackers had already used the information taken during the breach to commit identity theft and fraud. *P.F. Chang's*, 819 F.3d at 965; *Remijas*, 794 F.3d at 1141. Thus, there was no need to speculate that the hackers intended to and did use the stolen information to commit identity theft and fraud. The same is actually true of *Galaria* because one of the named plaintiffs alleged in a proposed amended complaint that he suffered three unauthorized attempts to open credit cards in his name. 2016 WL 4728027, at *3 n.1. While the Sixth Circuit did not base its reversal on the allegations in the proposed amended complaint, those allegations make its "reasonable inference" conclusion similar to those in *P.F. Chang's* and *Remijas*. *See also Galaria*, 2016 WL 4728027, at *4 (finding *P.F. Chang's* and *Remijas* "in line" with its conclusion).

would have occurred at all.'" *In re SuperValu*, 2016 WL 81792, at *3 (emphasis added) (quoting *Lujan*, 504 U.S. at 565 n.2).

Furthermore, the District Court did not err in distinguishing *Remijas* and *P.F. Chang's* because those cases rely on a standard that was expressly rejected by the Supreme Court in *Clapper*. The Supreme Court held in *Clapper* that the "'objectively reasonable likelihood' standard is inconsistent with our requirement that 'threatened injury must be certainly impending to constitute injury in fact.'" 133 S. Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). In *Remijas*, the Seventh Circuit held that the plaintiffs' allegations of future identity theft or credit card fraud were sufficient to confer standing because they established "there is an '***objectively reasonable likelihood'*** that such an injury will occur." *Remijas*, 794 F.3d at 693 (emphasis added). The Court in *P.F. Chang's* cited and relied on this same reasoning from *Remijas* in reaching its decision on standing. *P.F. Chang's*, 819 F.3d at 966. In other words, the Seventh Circuit's reliance on the "objectively reasonable likelihood" standard as the basis for determining that a threat of future identity theft is sufficient to confer standing was critical to the outcome of *P.F. Chang's* and *Remijas*. The District Court therefore appropriately recognized that the Seventh Circuit's reliance on a standard expressly rejected by the Supreme Court made the *P.F. Chang's* and *Remijas* cases less persuasive than those cases applying the correct standard (cited by Scottrade)

on the issue of whether Kuhns' allegations of future identity theft were sufficient to confer standing. Kuhns Add. 12.[13]

The vast majority of courts addressing the issue have held that conclusory allegations regarding the risk of future identity theft are insufficient to establish injury in fact. *See, e.g.*, *Reilly*, 664 F.3d at 42-45 (no standing when plaintiffs alleged hackers accessed their personal information, including bank account and social security numbers, but did not allege any instances of misuse of data); *In re SuperValu*, 2016 WL 81792, at *7 (no standing when plaintiff alleged one fraudulent charge on credit card statement); *In re Zappos.com*, 108 F. Supp. 3d at 958-60 & n.3 (no standing when two plaintiffs alleged their email accounts were accessed by a third party using same passwords stolen in data breach, and third party sent unauthorized advertisements to others from the accounts); *In re Horizon Healthcare Servs., Inc. Data Breach Litig.*, No. 13-1418, 2015 WL 1472483, at *4-7 (D.N.J. Mar. 31, 2015) (no standing based on future risk of harm when plaintiffs did not allege any post-breach misuse of compromised data), *appeal filed*, No. 15-2309 (3d Cir. June 1, 2015); *Peters v. St. Joseph Servs. Corp.*, 74 F. Supp. 3d 847,

[13] Kuhns' reliance on the Sixth Circuit's conclusory statement in *Galaria* for the proposition that citing and relying on a standard expressly rejected by the Supreme Court is "not critical to the reasoning or outcome" of *P.F. Chang's* or *Remijas* is misplaced. Kuhns Br. 21 (quoting *Galaria*, 2016 WL 4728072, at *4 n.2). The Sixth Circuit offers absolutely no analysis or explanation for how or why it reached this clearly erroneous conclusion.

850-51, 855-56 (S.D. Tex. 2015) (no standing when plaintiff alleged hackers accessed her personal information, including her credit card number, and someone attempted one fraudulent use of her credit card; risk of future harm not imminent when harm may occur at some unknown time in the future or not at all).[14]

The allegations in this case are even *less* compelling than those present in cases in which courts have refused to find standing based on allegations of future identity theft. Here, three years after the cyberattack, Kuhns makes no allegations whatsoever that any of the personal information allegedly accessed by the cybercriminals has been or is currently being used to commit identity theft. Nor does Kuhns provide any concrete facts plausibly suggesting there is an imminent risk that he will suffer identity theft at some point in the future as a result of the cyberattack.

"[T]here must be a point at which a future threat can no longer be considered certainly impending or immediate, despite its still being credible; otherwise, an 'objectively reasonable likelihood' of harm would be enough to establish

[14] *See also Fernandez*, 127 F. Supp. 3d at 1086*; Storm*, 90 F. Supp. 3d at 366-67; *In re Science Applications Int'l Corp. (SAIC) Backup Tape Date Theft Litig.*, 45 F. Supp. 3d 14, 25-27 (D.D.C. 2014); *Hammond v. The Bank of N.Y. Mellon Corp*., No. 08-CIV-6060, 2010 WL 2643307, at *7-8 (S.D.N.Y. June 25, 2010); *Allison v. Aetna, Inc.*, No. 09-CV-2560, 2010 WL 3719243, at *5-6 (E.D. Penn. Mar. 9, 2010).

standing." *In re Zappos.com*, 108 F. Supp. 3d at 958.[15] The years that have passed without Kuhns (or anyone else) making a single allegation of identity theft as a result of the cyberattack demonstrates that any alleged risk of identity theft is not imminent or immediate. The degree of Kuhns' speculation is heightened further by the fact that his alleged risk of future identity theft is based entirely on the decisions or capabilities of independent actors—i.e., the cybercriminals. *See id.* at 959 (citing *Clapper*, 133 S. Ct. at 1150). In sum, the possibility that the alleged identity theft could occur in the as-of-yet undetermined future, asserted some three years after the cyberattack, relegates Kuhns' claimed injuries to the realm of speculation.

The District Court did not err in dismissing Kuhns' claims for lack of standing because Kuhns did not allege "concrete facts" sufficient to plausibly suggest a certainly impending risk of future identity theft as a result of the cyberattack. *See Twombly*, 550 U.S. at 555 (plaintiff's allegations must establish right to relief beyond speculation); *Miller v. Redwood Toxicology Lab., Inc.*, 688

[15] The plaintiffs in *Clapper* argued that they had standing to challenge the constitutionality of the Foreign Intelligence Surveillance Act ("FISA") because their communications would likely be acquired by the government under that act. 133 S.Ct. at 1142-43. They engaged in the exact type of communication that could be monitored under FISA, making their allegations of future harm quite *credible*, but the Supreme Court determined the alleged future harm was not *certainly impending*, and thus, that they did not have standing. *Clapper*, 133 S. Ct. at 1148-50.

F.3d 928, 934 n.5 (8th Cir. 2012) ("While 'a court should construe the complaint liberally in the light most favorable to the plaintiff,' and 'general factual allegations of injury resulting from the defendant's conduct may suffice,' it is still necessary to include some 'well-pleaded factual allegations' to support the claim." (citations omitted) (quoting *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008); *Lujan*, 504 U.S. at 561; *Iqbal*, 556 U.S. at 679)); *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009) ("While general factual allegations of injury might suffice to establish standing in some instances, general allegations of *possible* or *potential* injury do not."). Accordingly, the Court should affirm the District Court's dismissal of Kuhns' claims under Federal Rule of Civil Procedure 12(b)(1).

D. The District Court Did Not Err in Determining Kuhns' Allegations Regarding Monitoring Costs Were Insufficient to Establish Injury in Fact.

Kuhns forfeited this argument because he did not raise it in the District Court. Opp. 6-12; *see Wiser*, 411 F.3d at 926; *Roth*, 27 F.3d at 1307; *Diercks*, 959 F.2d at 714 n.4; *Clarke*, 843 F.2d at 273. To the extent it is not forfeited, it also fails on the merits for two reasons.

First, Kuhns does not allege that he purchased financial monitoring services or incurred expenses to mitigate potential identity theft after the cyberattack. The representation in his brief that he "spent time and money monitoring his credit" (Kuhns Br. 3) is not supported by the Complaint. The only allegation in the

Complaint regarding monitoring costs is the generic conclusory statement that "Plaintiffs" have "suffered . . . the financial and/or temporal cost of monitoring their credit, monitoring their financial accounts, and mitigating their damages." Compl. ¶ 15. Kuhns' failure to allege facts establishing he personally incurred costs distinguishes this case from *Galaria*, *Neiman Marcus*, *P.F. Chang's*, and *Anderson* and makes it impossible for him to premise standing in this case on monitoring or mitigation costs.

Second, the Supreme Court has expressly held that a plaintiff can only establish injury in fact based on the alleged cost of monitoring or mitigating potential future harm if he establishes a certainly impending risk that the alleged potential future harm—identity theft here—will occur. *See Clapper*, 133 S. Ct. at 1150 n.5, 1151 ("In some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. . . . But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending."); *see also Reilly*, 664 F.3d at 46 ("[W]e conclude that Appellants' alleged time and money expenditures to monitor their financial information do not establish standing, because costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more 'actual' injuries than the alleged 'increased risk of injury' which

forms the basis for Appellants' claims." (citing *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 8 (D.D.C. 2007))).[16] Because the District Court properly determined Kuhns' allegations regarding the risk of potential future identity theft were insufficient to establish standing (see Section I.C, *supra*), it did not err in also holding that Kuhns' allegations regarding monitoring and mitigating were insufficient.

E. The District Court Did Not Err in Rejecting Kuhns' Lost Benefit of the Bargain Theory.

The only monies Kuhns paid to Scottrade were brokerage fees and commissions in exchange for financial services—i.e., execution of trades—that Scottrade provided, typically at $7 per trade. SA–5 ¶ 7; Compl. ¶ 34. No money changed hands at account opening, and no fees were assessed by Scottrade, paid to Scottrade, or allocated by Scottrade for "data security services." Kuhns does not allege otherwise. Nor does Kuhns allege any facts plausibly suggesting that a "portion" of the brokerage fees he paid to execute trades were for "data management and data security." Thus, the District Court correctly determined that

[16] *See also In re Zappos.com*, 108 F. Supp. 3d at 960-62; *In re SAIC*, 45 F. Supp. 3d at 26 ("The cost of credit monitoring and other preventive measures, therefore, cannot create standing."); *Brit Ins. Holdings N.V. v. Krantz*, No. 1:11-cv-948, 2012 WL 28342, at *9 (N.D. Ohio Jan. 5, 2012); *Hammond*, 2010 WL 2643307, at *7-8; *Amburgy*, 671 F. Supp. 2d at 1049, 1053; *Giordano v. Wachovia Secs., LLC*, No. 06-CV-476, 2006 WL 2177036, at *4 (D.N.J. July 31, 2006).

Kuhns did not allege a cognizable injury in fact based on the "lost benefit of his bargain." *See In re SuperValu*, 2016 WL 81792, at *8 ("This theory is consistently rejected in data breach cases where plaintiffs have not alleged that the value of the goods or services they purchased was diminished as a result of the data breach." (citing *In re Zappos.com*, 108 F. Supp. 3d at 962 n. 5; *Fernandez*, 127 F. Supp. 3d at 1089; *Remijas*, 794 F.3d at 694-95)); *see also Braitberg v. Charter Commc'ns., Inc.*, 836 F.3d 925, 931 (8th Cir. 2016) (holding that plaintiff lacked Article III standing under theory that defendant's failure to protect personal information caused diminution in value of purchased services because plaintiff suffered no "concrete and particularized harm" and thus did not plausibly allege "any effect on the value of the services that he purchased").

Even the Seventh Circuit cases cited and relied on by Kuhns reject his "benefit of the bargain" argument. *See P.F. Chang's*, 819 F.3d at 968 (suggesting loss of benefit of bargain is not sufficient to establish standing when plaintiffs do not allege product purchased is defective or dangerous); *Remijas*, 794 F.3d at 694-95 (calling benefit of the bargain theory "dubious" and "problematic" because "Plaintiffs do not allege any defect in any product they purchased; they assert instead that patronizing Neiman Marcus inflicted injury")

This Court's opinion in *Carlsen v. GameStop, Inc.*, 833 F.3d 903 (8th Cir. 2016), does not change these facts or require a reversal of the District Court's

Judgment because Kuhns does not plausibly allege he is a party to a breached contract. In *Carlsen*, the plaintiff sued GameStop, alleging that GameStop breached its terms of service by disclosing the plaintiff's personally identifiable information to Facebook in violation of its express representation that it "does not share personal information with anyone" in its incorporated privacy policy. *Id.* at 907. This Court held that the plaintiff had standing to sue because he was a party to a breached contract. *Id.* at 909. There are no such facts in this case—the allegations in the Complaint do not support a conclusion that Kuhns is a party to a breached contract with Scottrade.

As explained herein, Kuhns' conclusions that he paid Scottrade for "data security," that he paid "for the account," or that he "bargained for and expected to receive data security" are not supported by *any* facts. Compl. ¶¶ 45-46. Kuhns further fails to allege facts plausibly establishing Scottrade breached the terms of the Brokerage Agreement. *See* Section III.B, *infra*. The Brokerage Agreement does not guarantee Kuhns' personal information from all forms of attack. *See id.* The facts establish that Kuhns agreed to and did pay Scottrade $7.00 to execute trades, and that is exactly what Scottrade did. There is no breach, and therefore *Carlsen* is inapplicable.

F. The District Court Did Not Err in Finding Kuhns' Allegations Regarding the Diminished Value of His Private Information Insufficient to Establish Standing.

Kuhns forfeited this argument because he did not raise it in the District Court. Opp. 6-12; *see Wiser*, 411 F.3d at 926; *Roth*, 27 F.3d at 1307; *Diercks*, 959 F.2d at 714 n.4; *Clarke*, 843 F.2d at 273. To the extent it is not forfeited, it also fails on the merits.

Courts around the country have uniformly rejected attempts by plaintiffs in data security cases to manufacture standing by alleging deprivation of the value of their personal and financial information. *See, e.g.*, *In re SuperValu*, 2016 WL 81792, at *7; *In re Zappos.com*, 108 F. Supp. 3d at 954; *Green v. eBay Inc.*, No. 14-1688, 2015 WL 2066531, at *5 n.59 (E.D. La. May 4, 2015); *In re Google Android Consumer Privacy Litig.*, No. 11-MD-02264 JSW, 2013 WL 1283236, at *4 (N.D. Cal. Mar. 26, 2013); *In re SAIC*, 45 F. Supp. 3d at 30; *Yunker v. Pandora Media, Inc.*, No. 11-CV-03113, 2013 WL 1282980, at *4 (N.D. Cal. Mar. 26, 2013); *In re Google, Inc. Privacy Policy Litig.*, No. C 12-01382, 2012 WL 6738343, at *5 & n.50 (N.D. Cal. Dec. 28, 2012). Even the Seventh Circuit in *Remijas* refused to recognize standing based on such an "abstract injury." *See* 794 F.3d at 695-96.

These courts reason that "[e]ven assuming that Plaintiffs' data has value on the black market, Plaintiffs do not allege any facts explaining how their personal

information became less valuable as a result of the breach or that they attempted to sell their information and were rebuffed because of a lower price-point attributable to the security breach." *In re Zappos.com*, 108 F. Supp. 3d at 954; *see also In re SuperValu*, 2016 WL 81792, at *7 ("Assuming without deciding that Plaintiffs' PII had monetary value, Plaintiffs have failed to allege any facts explaining how their PII became less valuable as a result of the Data Breach. Plaintiffs have not alleged that they tried to sell their PII but were not able to do so or were forced to accept a lower price."); *In re SAIC*, 45 F. Supp. 3d at 30 ("Plaintiffs do not contend that *they* intended to sell this information on the cyber black market in the first place, so it is uncertain how they were injured by this alleged loss. Even if the service members did intend to sell their own data—something no one alleges—it is unclear whether or how the data has been devalued by the breach.").

This is exactly the reasoning employed by the District Court to reject Kuhns' deprivation of value argument in this case. Kuhns Add. 17. While Kuhns alleges his personal information has value,[17] he does not allege any facts plausibly suggesting that his personal information has less value because of the cyberattack

[17] Courts have also rejected the proposition that personal information has independent monetary value. *See, e.g.*, *Remijas*, 794 F.3d at 695; *Low v. LinkedIn Corp.*, No. 11-CV-01468, 2011 WL 5509848, at *4-5 (N.D. Cal. Nov. 11, 2011) (holding allegations that plaintiffs' personal information had independent economic value were "too abstract and hypothetical to support Article III standing").

or that he has been foreclosed from capitalizing on the alleged value of his personal information because of the cyberattack. He also does not allege that he tried to sell his information on the black market. These failures are fatal to his claims. *See Braitberg*, 836 F.3d at 931 ("But without a plausible allegation that Charter's mere retention of the information caused any concrete and particularized harm to the value of that information, Braitberg has not adequately alleged that there was any effect on the value of the services that he purchased from Charter.").

These failures also make Kuhns' reliance on *In re Anthem* misplaced. The court in *In re Anthem* concluded only that loss of value of personal information can constitute a cognizable injury under the New York consumer fraud statute; it did not hold that such an injury is sufficient for purposes of Article III standing. *See In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 991, 993-95 (N.D. Cal. 2016). Even if true, it does not change the fact that Kuhns did not sufficiently allege "concrete facts" plausibly suggesting he has actually suffered such an injury—i.e., loss of value of his personal information. While Kuhns may not have to assign a precise value to his loss at the pleading stage, he must still provide more than mere "labels and conclusions" establishing that he has actually suffered the injury he claims. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

G. The District Court Did Not Err in Rejecting Kuhns' Invasion of Privacy Argument.

Kuhns forfeited this argument because he did not raise it in the District Court. Opp. 6-12; *see Wiser*, 411 F.3d at 926; *Roth*, 27 F.3d at 1307; *Diercks*, 959 F.2d at 714 n.4; *Clarke*, 843 F.2d at 273. To the extent it is not forfeited, it also fails on the merits.

The District Court's determination that Kuhns' allegations regarding invasion of privacy were insufficient to establish a concrete injury for purposes of the injury-in-fact requirement (Kuhns Add. 18) is consistent with other courts that have also held that loss of privacy and breach of confidentiality are too "abstract" to establish Article III standing in data breach cases. *Remijas*, 794 F.3d at 695; *see also In re SuperValu*, 2016 WL 81792, at *8 ("Plaintiffs have not alleged facts showing that the loss of privacy and confidentiality resulted in a concrete injury."); *In re Zappos.com*, 108 F. Supp. 3d at 962 ("Even if Plaintiffs adequately allege a loss of privacy, they have failed to show how that loss amounts to a concrete and particularized injury.").

Kuhns' argument that his allegations are sufficient because *Spokeo* made invasion of privacy a concrete, de facto injury in fact is misplaced. The Supreme Court in *Spokeo* held that intangible injuries can be concrete for purposes of the injury-in-fact requirement, but only when there is "real harm." *Spokeo, Inc.*, 136 S. Ct. at 1549-50 (plaintiff cannot satisfy demands of Article III by alleging bare

procedural violation that results in "no harm"—e.g., disclosure of an incorrect zip code); *see also Braitberg*, 836 F.3d at 925 (interpreting *Spokeo* to require a "concrete injury" that "must actually exist" and must be "real," not "abstract."). Here, Kuhns argues the alleged harm resulting from the disclosure of his personal information—i.e., invasion of privacy—arises from an alleged breach of the Brokerage Agreement. Kuhns Br. 29. But the Brokerage Agreement does not guarantee Kuhns' personal information from all forms of attack. *See* Compl. ¶ 37 (Brokerage Agreement incorporates Privacy Statement); SA–16 (the Privacy Statement provides only that Scottrade uses security measures that comply with federal law—including computer safeguards and secured files and buildings—to protect its customers' personal information). Accordingly, Kuhns cannot and did not allege a "real harm" sufficient to create a concrete injury under *Spokeo* based on an alleged invasion of privacy.

The cases cited by Kuhns are inapposite for the same reason. Both *Nickelodeon* and *Yershov* find a concrete injury sufficient to confer standing based on an alleged violation of the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710(b)(1), a federal statute which prohibits the disclosure of personally identifying information relating to a viewer's consumption of video-related services. *See In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 267, 274 (3d Cir. 2016) (finding standing when plaintiffs alleged defendants disclosed

information regarding their children's internet usage and video consumption in violation of the VPPA); *Yershov v. Gannet Satellite Info. Network, Inc.*, No. CV 14-13112, 2016 WL 4607868, at *8 (D. Mass. Sept. 2, 2016) (finding standing when plaintiff alleged defendant disclosed information regarding video clips watched by plaintiff to Adobe in violation of the VPPA). There is no such statute at issue here, and the Brokerage Agreement does not provide the basis for a legally protected right to privacy in the information Kuhns shared with Scottrade. Moreover, Kuhns does not allege any facts demonstrating that he has suffered any actionable damages or injury due to the alleged loss of privacy or the breach of confidentiality of his personal information. Therefore, Kuhns has not established a concrete injury sufficient to meet the injury-in-fact requirement under *Spokeo* based on an alleged invasion of privacy. *See In re SuperValu*, 2016 WL 81792, at *8; *In re Zappos.com*, 108 F. Supp. 3d at 962 n.5.[18]

III. IF THE COURT DETERMINES PLAINTIFF HAS STANDING, IT SHOULD AFFIRM DISMISSAL OF THE COMPLAINT UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

The District Court did not reach Scottrade's alternative bases for dismissal of the Complaint under Federal Rule of Civil Procedure 12(b)(6) because it

[18] The Third Circuit in *Nickelodeon* also premised its decision on a misreading of *Spokeo*, which in fact held that allegation of a "bare procedural violation [of a statute], divorced from any concrete harm" could not satisfy the injury-in-fact requirement of Article III. *See Spokeo*, 136 S. Ct. at 1549.

dismissed the Complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). To the extent this Court determines the District Court's dismissal under Rule 12(b)(1) was improper (it was not), it should nonetheless affirm the District Court's dismissal of the Complaint under Rule 12(b)(6) because the parties briefed the issues below and Plaintiff's claims are "clearly meritless" as a matter of law. *See Carlsen*, 833 F.3d at 910 ("When a district court erroneously dismisses under Rule 12(b)(1) a claim that is 'clearly meritless,' an appellate court may affirm under Rule 12(b)(6)." (citing *Boock v. Shalala*, 48 F.3d 348, 353 (8th Cir. 1995); *Johnson v. Mott*, 376 F. App'x 641 (8th Cir. 2010) (per curiam))); *see also Wycoff v. Menke*, 773 F.2d 983, 986 (8th Cir. 1985) ("It is now well established that this court has the 'power to affirm the judgment below on any ground supported by the record, whether or not raised or relied on in the District Court.'" (quoting *Reeder v. Kan. City Bd. of Police Comm'rs*, 733 F.2d 543, 548 (8th Cir. 1984))). It does not matter that a dismissal under Rule 12(b)(6) would be with prejudice; Scottrade filed a protective cross-appeal, which enables the Court to enlarge Scottrade's rights and lessen the rights of Plaintiff. *See Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).

A. Each of Kuhns' State Law Claims Fails as a Matter of Law Because Kuhns Fails to Adequately Plead Facts Suggesting He Is Entitled to Actual Damages.[19]

Each of Kuhns' state law claims requires that he plead and prove the existence of actual damages. *See Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1325 (11th Cir. 2012) (breach of contract under Florida law); *Grawitch v. Charter Commc'ns, Inc.*, 750 F.3d 956, 960 (8th Cir. 2014) (breach of contract under Missouri law); *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1334-35 (S.D. Fla. 2007) (unjust enrichment); *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (Mo. 1950) (unjust enrichment); Fla. Stat. § 501.211(2) (FDUTPA); Mo. Rev. Stat. § 407.025(1) (MMPA). Kuhns argued below that he met the actual damages requirement under each of those theories by alleging that he paid Scottrade a fee for financial services, "a portion of which w[as] used for data management and security . . . ." Compl. ¶ 10. Kuhns' conclusory allegations are insufficient under *Twombly* and *Iqbal*.

The actual damages requirement under state law is a substantial hurdle distinct from and in addition to the injury-in-fact requirement of Article III. *See Brooks Grp. & Assocs., Inc. v. LeVigne*, No. CIV. 12-2922, 2014 WL 1490529, at

[19] Under any choice of law analysis, either the law of the State of Florida—where Kuhns resides—or the State of Missouri—where Kuhns filed his lawsuit, this Court sits, and Scottrade is headquartered—provides the applicable substantive law. Scottrade addresses both states' laws where applicable.

*8 n.48 (E.D. Pa. Apr. 15, 2014) ("'Actual damages' means something more than harm that 'satisfies the injury-in-fact and causation requirements of Article III standing.'"); *see also, e.g.*, *Doe v. Chao*, 540 U.S. 614, 624-25 (2004) ("That is, an individual subjected to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act."). Under *Twombly*, Kuhns must allege facts—not conclusions—plausibly suggesting he is entitled to actual damages as a result of the cyberattack. *See* 550 U.S. at 555, 569; *see also Iqbal*, 556 U.S. at 678-79.

Here, Kuhns concludes only that he "overpaid" Scottrade for "brokerage and financial services" because a "portion of the brokerage and financial service fees [he] paid [were] for data management and security." Compl. ¶¶ 11, 14. But he does not provide any *facts* establishing that the brokerage fees he paid pursuant to the Brokerage Agreement were for "data management and data security" or that he paid extra for those services. As explained above, the brokerage fees paid by Kuhns were for the execution of trades (SA–5 ¶ 7), and there are no allegations in the Complaint that Kuhns did not receive the exact trades or other brokerage services he paid for. Indeed, the entire basis for Kuhns' alleged lost benefit of the bargain damages is the conclusion that he did not receive data management and data security protections that were *never* promised. These allegations are insufficient to meet the plausibility standard of *Twombly*. *See Grawitch*, 750 F.3d

at 959-60 (allegations plaintiffs were damaged based on "the difference in the cost and value of the services they paid for, and the useable service they received" insufficient to sustain breach of contract and MMPA claims under Missouri law because "[t]he complaint . . . does not allege that the plaintiffs paid extra for the 30 Mbps download speed"); *Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999) (damages based on conclusory allegations of overpayment for vehicles at time of purchase too speculative and therefore insufficient to state claim under Missouri and Florida consumer protection statutes and for breach of contract).[20]

The Northern District of Illinois' recent decision in *In re Barnes & Noble Pin Pad Litigation* is directly on point. In that data breach case, the plaintiffs brought claims for breach of implied contract, violation of the Illinois Consumer Fraud Act, invasion of privacy, violation of the California Security Breach Notification Act, and violation of the California Unfair Competition Law based on

[20] Simply alleging Kuhns paid for brokerage services is insufficient to establish actual damages. *See, e.g.*, *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 181 (Fla. Dist. Ct. App. 2010) (evidence of plaintiff's payments to defendant for defective boat did not establish "actual damages" for purposes of the FDTUPA). Kuhns must allege that Scottrade "charge[d] a separate, additional fee" for the data security services. *See Binkley v. Am. Equity Mortg., Inc.*, 447 S.W.3d 194, 195-96 (Mo. 2014) (en banc) (upholding summary judgment to defendant on plaintiffs' MMPA and unjust enrichment claims, even though plaintiffs paid defendant for mortgage services, because plaintiffs did not pay separate, direct fee for portion of the services that was unlawful); *Schriener v. Quicken Loans, Inc.*, 774 F.3d 442, 445 (8th Cir. 2014) (applying *Binkley* at the motion to dismiss stage).

an alleged data breach. *See In re Barnes & Noble Pin Pad Litigation*, No. 12-CV-08617, 2016 WL 5720370, at *1, *4 (N.D. Ill. Oct. 3, 2016). The court dismissed the plaintiffs' contract and statutory claims under Rule 12(b)(6) because their minimal conclusory allegations of harm were insufficient to plausibly allege actual damages. *Id*. at *5-9. There, the plaintiffs did not allege that they suffered any lost money, lost property, or out-of-pocket losses as a result of the data breach or the alleged delay between the time plaintiffs were notified of the breach and the time they contend they should have been notified. *See id*. Kuhns' conclusory allegations of harm in this case are even more attenuated than those the court dismissed as insufficient in *In re Barnes & Noble*. *Compare id*. at *2 (alleging one plaintiff suffered an allegedly fraudulent charge on her credit card after the data breach), *with* Compl. (no allegations of any specific harm to Kuhns, fraudulent charges, lost money, money spent on mitigation or monitoring, etc.).

For these reasons, the Court should dismiss Kuhns' state law claims with prejudice for failure to plausibly allege facts sufficient to state a claim under Missouri and Florida law. *See In re Barnes & Noble*, 2016 WL 5720370, at *5-9; *see also Pisciotta*, 499 F.3d at 639-40 (applying Indiana law) (holding that increased risk of future identity theft is not the type of "harm that the law is prepared to remedy"); *Moyer v. Michaels Stores, Inc.*, No. 14 C 561, 2014 WL 3511500, at *6-7 (N.D. Ill. July 14, 2014) (applying Illinois law) (dismissing

claims for breach of implied contract and violation of the Illinois Consumer Fraud Act in data breach case because plaintiffs did not plead the type of actual economic damage necessary to state those claims under Illinois law); *Holmes v. Countrywide Fin. Corp.*, No. 5:08-CV-00205, 2012 WL 2873892, at *12-17 (W.D. Ky. July 12, 2012) (applying Kentucky and New Jersey law) (dismissing claims in data breach context for failure to plead actual damages); *Ponder v. Pfizer, Inc.*, 522 F. Supp. 2d 793, 797 (M.D. La. 2007) (applying Louisiana law) (dismissing data security incident claim on grounds that plaintiff's complaint "[did] not allege that he suffered any actual damages—that someone actually used the disclosed information to his detriment"); *Hendricks v. DSW Shoe Warehouse, Inc.*, 444 F. Supp. 2d 775, 780-82 (W.D. Mich. 2006) (applying Michigan law) (dismissing data security claim under Rule 12(b)(6) on basis that purchase of credit monitoring constitutes neither actual or cognizable loss).

B. Kuhns Fails to State a Claim for Breach of Express Contract (Count I) Because He Does Not Allege Scottrade Breached the Brokerage Agreement.

Kuhns alleges that Scottrade breached the Brokerage Agreement by failing to provide secured files and failing to comply with federal law. Compl. ¶ 111. These allegations are insufficient to state a claim for breach of the Brokerage Agreement under Missouri and Florida law. *See Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. 2010) (en banc) (elements of breach of contract claim);

Knowles v. C. I. T. Corp., 346 So. 2d 1042, 1043 (Fla. Dist. Ct. App. 1977) (per curiam) (same). The Privacy Statement—which is incorporated into the Brokerage Agreement—states that Scottrade uses "security measures that comply with federal law," including "computer safeguards and secured files and buildings," to protect its customers' personal information. SA–16; Compl. ¶ 37. Using "secured files," however, does not mean that Scottrade agreed to insure against all potential threats. Indeed, such language does not appear anywhere in the Brokerage Agreement or the incorporated Privacy Statement, and Kuhns *does not* allege any facts supporting his conclusion. In short, Kuhns cannot state a claim for breach of contract because the Brokerage Agreement unambiguously does not include the contractual protections Kuhns alleges Scottrade breached. *See Carlsen*, 833 F.3d at 912 (dismissing breach of contract claim because "the protection Carlsen argues GameStop failed to provide was not among the protections for which he bargained by agreeing to the terms of service, and GameStop thus could not have breached its contract with Carlsen").

Kuhns also cannot maintain a claim for breach of contract based on an alleged failure of Scottrade to use "security measures that comply with federal law." The Complaint does not contain any allegations plausibly suggesting Scottrade did not use security measures that comply with a specific federal law. Paragraph 111 of the Complaint is a generic conclusory catchall that doesn't

identify *any* specific federal law or allege *any* facts supporting how Scottrade's security measures did not comply with a specific federal law. Compl. ¶ 111. Kuhns' allegations regarding Section 45(a) of the Federal Trade Commission Act are not incorporated into his breach of contract claim. Compl. ¶¶ 107, 161, 175. Moreover, Section 45(a) is an unfair competition law enforceable only by the FTC;[21] it does not say anything about the standards for security measures used by private companies to protect personal information. *See* 15 U.S.C. § 45(a).

C. Kuhns Fails to State a Claim for Breach of Implied Contract (Count II) Because the Parties' Relationship Is Governed by the Brokerage Agreement and He Fails to Allege a Meeting of the Minds.

Kuhns' breach of implied contract claim fails as a matter of law because the parties' relationship is governed by the parties' express contract, the Brokerage Agreement, and because the allegations in the Complaint do not sufficiently allege a meeting of the minds.

The Complaint clearly alleges that Kuhns' relationship with Scottrade is governed by a fully integrated express contract (i.e., the Brokerage Agreement and

[21] *See Cmty. Bank of Trenton v. Schnuck Markets, Inc.*, No. 15-CV-01125-MJR, 2016 WL 5409014, at *12 (S.D. Ill. Sept. 28, 2016) (holding Section 45 of the Federal Trade Commission Act does not give rise to independent duty to protect customer personal information (citing *Baum v. Great W. Cities, Inc. of N. M.*, 703 F.2d 1197, 1209 (10th Cir. 1983); *Meyer v. Bell & Howell Co.*, 453 F. Supp. 801, 802 (E.D. Mo. 1978))).

incorporated Privacy Statement) covering the very subject matter of his claims (i.e., Scottrade's obligations regarding protection of Kuhns' personal information). Compl. ¶¶ 37-38, 108. The Brokerage Agreement, through the incorporated Privacy Statement, explicitly sets forth the parties' agreement regarding the protection of Kuhns' personal information. SA–15-17; Compl. ¶ 37. Thus, Kuhns cannot assert—alternatively or not—a claim for breach of implied contract against Scottrade. *See Lowe v. Hill*, 430 S.W.3d 346, 349 (Mo. Ct. App. 2014) ("It is a well-settled principle of law that implied contract claims arise only where there is no express contract."); *Kovtan v. Frederiksen*, 449 So. 2d 1, 1 (Fla. Dist. Ct. App. 1984) (per curiam) ("It is well settled that the law will not imply a contract where an express contract exists concerning the same subject matter.").

Even if the Brokerage Agreement did not encompass Kuhns' claim (it does), Kuhns must still allege facts sufficient to establish that he and Scottrade mutually agreed to form an implied contract whereby Scottrade agreed to safeguard and protect Kuhns' information from being compromised (*see* Compl. ¶ 117) and to use industry leading measures to safeguard and protect Kuhns' personal information (*see id.* ¶ 121). *See Kosher Zion Sausage Co. of Chi. v. Roodman's, Inc.*, 442 S.W.2d 543, 546 (Mo. Ct. App. 1969) ("The agreement between the parties arises from their intention implied or presumed from their acts where there are circumstances which, according to the ordinary course of dealing and the

common understanding of men, show a mutual intent to contract." (quoting *Roper v. Clanton*, 258 S.W.2d 283, 288 (Mo. Ct. App. 1953))); *Stein v. Marquis Yachts, LLC*, No. 14-24756, 2015 WL 1288146, at *4 (S.D. Fla. Mar. 20, 2015) ("Under Florida law, a contract implied in fact requires the same elements as an express contract, including a mutual intent to contract."). Kuhns pleads no such facts; nor could he, as the purportedly implied agreement is expressly contradicted by the terms of the Brokerage Agreement. Kuhns' allegations describe at best his unilateral understanding—not a mutual implied contract with Scottrade. *See Krottner*, 406 F. App'x at 131 (dismissing implied contract claim in data security case because plaintiff did not allege facts sufficient to establish mutual assent to any implied contract).[22]

D. Kuhns Waived His Negligence Claim (Count III).

In his Opposition to Scottrade's Motion to Dismiss, Kuhns unequivocally stated that he is not pursuing a negligence claim against Scottrade. Opp. 13 n.3 ("Plaintiffs Duqum, ***Kuhns***, and Obringer are not pursuing negligence claims." (emphasis added)), 23 n.8. Thus, Kuhns waived his negligence claim, and it

[22] Unilateral statements as to the safety of Kuhns' information on Scottrade's website or in Scottrade's Online Privacy Policy do not create any contractual obligations. *See In re Zappos.com*, No. 3:12-CV-00325-RCJ-VPC, 2013 WL 4830497, at *3 (D. Nev. Sept. 9. 2013); *see also Roller v. Am. Modern Home Ins. Co.*, 484 S.W.3d 110, 114 (Mo. Ct. App. 2015). Moreover, Kuhns fails to allege that he ever saw or read Scottrade's alleged statements regarding data security.

should be dismissed with prejudice. *See Wood v. Milyard*, 132 S. Ct. 1826, 1832 & n.4 (2012) (noting that "[a] waived claim or defense is one that a party has knowingly and intelligently relinquished" and suggesting that such claims, once waived, are excluded from the case without exception). In the event the Court determines Kuhns did not concede his negligence claim, it should still be dismissed with prejudice because it is barred by the Missouri economic loss doctrine[23] and because the failure to perform a contractual obligation cannot be the basis for a tort claim under Missouri or Florida law.[24]

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[23] *Crowder v. Vandendeale*, 564 S.W.2d 879, 881 (Mo. 1978) (en banc); *Wilbur Waggoner Equip. & Excavating Co. v. Clark Equip. Co.*, 668 S.W.2d 601, 603 (Mo. Ct. App. 1984). The Complaint does not allege any facts establishing that Kuhns suffered personal injury or property damage as a result of the data security incident. Compl. ¶¶ 127-143.

[24] *See State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 140 (Mo. 1987); *Wages v. Young*, 261 S.W.3d 711, 715 (Mo. Ct. App. 2008); *Titan Constr. Co. v. Mark Twain Kan. City Bank*, 887 S.W.2d 454, 459 (Mo. Ct. App. 1994); *Elec. Sec. Sys. Corp. v. S. Bell Tel. & Tel. Co.*, 482 So. 2d 518, 519 (Fla. Dist. Ct. App. 1986) ("Since a breach of contract, alone, cannot constitute a cause of action in tort, the trial court properly dismissed the negligence count.") The allegations in the Complaint make clear that the alleged duty to guaranty the security of Kuhns' personal information is defined by the Brokerage Agreement (Compl. ¶ 108) and that Scottrade's alleged "failure to protect" is an alleged contractual breach (*id.* ¶ 111).

E. Kuhns Fails to State a Claim for Unjust Enrichment (Count IV) Because the Parties' Relationship Is Governed by the Brokerage Agreement and He Fails to Allege Facts Suggesting He Conferred a Benefit on Scottrade.

Kuhns' unjust enrichment claim fails for two primary reasons. *First*, Kuhns cannot seek recovery of fees paid to Scottrade via unjust enrichment because the express terms of his Brokerage Agreement govern his rights and obligations regarding payment of fees. *Howard v. Turnball*, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010); *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. D. Ct. App. 2008) (per curiam). Where that is the case, as here (*see* section II.C, *supra*), a claim for unjust enrichment cannot lie.

Second, Kuhns does not allege facts establishing that he conferred a benefit on Scottrade. *See Howard*, 316 S.W.3d at 436 ("To establish the elements of an unjust enrichment claim, the plaintiff must prove that (1) he conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances."); *Ocean Commc'ns, Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. Dist. Ct. App. 2007). The only fees allegedly paid by Kuhns to Scottrade were for "brokerage and other financial services" (a $7 discount fee to execute a trade). Compl. ¶ 14. Kuhns does not allege that Scottrade failed to provide the "brokerage or other financial services" for which he paid. Nor does Kuhns allege any facts establishing that a specific portion of the fees he paid pursuant to the Brokerage

Agreement were allocated to data security. *See Carlsen*, 833 F.3d at 912 (dismissing unjust enrichment claim for failure to allege a "benefit conferred in exchange for protection of PII" where plaintiff failed to "allege that any specific portion of his subscriber fee went toward data protection").

F. Kuhns Fails to State a Claim for Declaratory Relief (Count V).

The Court should dismiss Kuhns' claim for declaratory relief because (1) it does not present a justiciable "case or controversy," (2) it improperly seeks to adjudicate past conduct, and (3) a judgment on Kuhns' claim will serve no useful purpose.

i. There is no justiciable "case or controversy."

The federal Declaratory Judgment Act cannot be used to declare the validity of a defense or certain elements of a claim because "[s]uch a suit does not merely allow the resolution of a 'case or controversy' in an alternative format . . . but rather attempts to gain a litigation advantage by obtaining an advance ruling" on those issues. *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998). The Court should dismiss Kuhns' declaratory judgment claim pursuant to *Calderon* because, as explained in this brief, each of Kuhns' claims fails as a matter of law, and because "[a]ny judgment in this action . . . would not resolve the entire case or controversy as to any one of [Kuhns' claims], but would merely determine a collateral legal

issue governing certain aspects of their pending or future suits." *Id.*; *see also Coffman v. Breeze Corp.*, 323 U.S. 316, 324-25 (1945).

ii. Kuhns improperly seeks to adjudicate past conduct.

The Declaratory Judgment Act was designed to enable parties to clarify their rights before they act. *Koch Eng'g Co. v. Monsanto Co.*, 621 F. Supp. 1204, 1206 (E.D. Mo. 1985). For that reason, "[a] declaratory judgment is inappropriate solely to adjudicate past conduct." *Del. State Univ. Student Hous. Found. v. Ambling Mgmt. Co.*, 556 F. Supp. 2d 367, 374 (D. Del. 2008) (quoting *Gruntal & Co., Inc. v. Steinberg*, 837 F. Supp. 85, 89 (D.N.J. 1993)). "Nor is declaratory judgment meant simply to proclaim that one party is liable to another." *Corliss v. O'Brien*, 200 F. App'x 80, 84-85 (3d Cir. 2006) (citing *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1553-54 (Fed. Cir. 1994) (en banc)).

Here, Kuhns asks the Court to declare that Scottrade had a duty to safeguard his personal information in 2013; that Scottrade breached this alleged duty in 2013; and that as a direct and proximate cause of this alleged breach, Kuhns sustained damages and injury in 2013. Compl. ¶ 151. Kuhns does not offer any allegations regarding Scottrade's current practices or identify any current conduct or alleged loss that can be allegedly stopped or avoided through the exercise of the declaratory judgment remedy. Nor does he request a declaration of the parties' ongoing rights under the Brokerage Agreement. Compl. ¶¶ 148-151. Thus, there is

no basis for Kuhns' declaratory judgment claim, and it should be dismissed with prejudice. *See Koch Eng'g Co.*, 621 F. Supp. at 1207-08 (granting motion to dismiss declaratory judgment claim on basis that the claim, which sought to adjudicate past conduct related to a breach of contract, did not meet purposes of Declaratory Judgment Act); *Bd. of Regents for Nw. Mo. State Univ. v. MSE Corp.*, No. 90-0125-CV-W-9, 1990 WL 212098, at *5 (W.D. Mo. Nov. 20, 1990) (dismissing declaratory judgment claim because plaintiff did "not demonstrate[] a need for declaration of its rights in order to avoid loss or damage sufficient to warrant declaratory relief").

iii. Kuhns' declaratory relief claim is duplicative and a declaratory judgment would serve no useful purpose.

Kuhns' claim for declaratory relief is duplicative of his contract claims. Indeed, Kuhns will not be able to prevail on his claims in Counts I and II without proving the very things—i.e., breach, causation, and damages—he requests the Court to declare in Count V. For that reason, Kuhns' request for a declaration in Count V is duplicative and will not serve a useful purpose in clarifying and settling the legal disputes between the parties. *See Morningstar, LLC v. Hardee's Food Sys., Inc.*, No. 4:08CV794, 2009 WL 36406, at *4 (E.D. Mo. Jan. 6, 2009) (dismissing declaratory judgment claim that was duplicative of other counts because it would serve no useful purpose). Rather, requiring a court to adjudicate Kuhns' claim for declaratory relief "would serve as a 'needless waste of judicial

resources.'" *Id.* (quoting *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 536 F. Supp. 2d 1191, 1199 (C.D. Cal. 2008)). The Court should exercise its considerable discretion and dismiss Count V with prejudice.

G. Kuhns Fails to State a Claim Under the MMPA (Counts VI)[25] Because He Does Not Allege He Was Injured in Connection with a Trade or Misrepresentation.

Kuhns' MMPA claim fails as a matter of law because he does not allege that he was injured *in connection with* the purchase or lease of any merchandise. *See* Mo. Rev. Stat. § 407.025(1) (any person who "purchases or leases merchandise" and who "suffers an ascertainable loss of money or property" as a result of an unlawful or deceptive trade practice may bring a private cause of action under the MMPA to recover damages); *Ziglin v. Players MH L.P.*, 36 S.W.3d 786, 790 (Mo. Ct. App. 2001) ("The language of [the MMPA] is plain and unambiguous. 'A private cause of action is given only to one who purchases and suffers damages.'") (quoting *Jackson v. Charlie's Chevrolet, Inc.*, 664 S.W.2d 675, 677 (Mo. Ct. App. 1984)); *see also Amburgy*, 671 F. Supp. 2d at 1057.

Kuhns does not allege he sustained injury as a result of a trade or misrepresentation related to any actual brokerage services. Nor does he allege that he purchased or leased his Scottrade account. Rather, Kuhns alleges that he

[25] Count VII is an MMPA claim asserted only on behalf of Plaintiffs Duqum and Obringer, who are not parties to this appeal. Compl. ¶¶ 166-178; SA–21.

voluntarily provided his personal information to Scottrade when he opened his brokerage accounts and that his alleged injury resulted from a criminal intrusion into Scottrade's computer systems. Thus, he cannot establish the fundamental prerequisites to a claim under the MMPA. *See* Mo. Rev. Stat. § 407.025(1); *Ziglin*, 36 S.W.3d at 790; *see also Amburgy*, 671 F. Supp. 2d at 1057-58 (dismissing MMPA claim in data security case based on nearly identical allegations, in part, because plaintiff failed to allege "that his loss was in relation to his purchase or lease of any merchandise").[26]

H. The Claims for Violations of the California Customer Records Act (Count VIII) and Violations of the California Unfair Competition Law (Count IX) Are Not at Issue in this Appeal.

The claims for violation of the California Customer Records Act and Violation of the California Unfair Competition Law are asserted on behalf of Plaintiff Stephen Hine. Compl. ¶¶ 179-200. Hine did not appeal dismissal of the Complaint. SA–21. Therefore, these claims—which were dismissed with prejudice—are not before the Court in this appeal and should not be revived even if the Court were to reverse the District Court's dismissal under Rule 12(b)(1).

[26] Kuhns' failure to plead "ascertainable loss"—i.e., actual damages—is addressed as part of Section II.A, *supra.*

CONCLUSION

For the foregoing reasons, Defendant/Appellee/Cross-Appellant Scottrade respectfully requests that the Court affirm the District Court's dismissal of Plaintiff's Complaint in its entirety for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), or alternatively, that the Court affirm dismissal of Plaintiff's Complaint in its entirety with prejudice under Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ *Thomas E. Douglass*

Thomas E. Douglass, 23019MO
Christopher M. Hohn, 44124MO
Brandi L. Burke, 66579MO
David M. Mangian, 61728MO
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000
tdouglass@thompsoncoburn.com
chohn@thompsoncoburn.com
bburke@thompsoncoburn.com
dmangian@thompsoncoburn.com

Attorneys for Defendant Scottrade, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) because it contains 14,485 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman typeface, font size 14. This brief also complies with Eighth Circuit Local Rule 28A(h) in that it has been scanned for viruses and found to be virus-free.

/s/ Thomas E. Douglas

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on this November 17, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Thomas E. Douglass