

Honorable James L. Robart

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

VERIDIAN CREDIT UNION, on behalf of itself and a
class of similarly situated financial institutions,

Plaintiff,

v.

EDDIE BAUER LLC,

Defendant.

No. 2:17-cv-00356-JLR

DEFENDANT’S RULE 12(b)(6)
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM

NOTE ON MOTION
CALENDAR: July 7, 2017
**(ORAL ARGUMENT
REQUESTED)**

1 **I. INTRODUCTION**

2 Defendant Eddie Bauer, LLC. (“Eddie Bauer”) moves pursuant to Fed. R. Civ. P.
3 12(b)(6) for an order dismissing with prejudice and without leave to amend Plaintiff Veridian
4 Credit Union’s (“Veridian”) Amended Class Action Complaint (“Amended Complaint”) for
5 failure to state a claim upon which relief can be granted.

6 **II. BRIEF OVERVIEW**

7 Veridian is a credit union that is chartered and headquartered in Iowa, with its principal
8 place of business in Waterloo, Iowa. Dkt. 36 at ¶ 11. Veridian alleges that:

9 Plaintiff brings this class action on behalf of credit unions, banks, and other
10 financial institutions that suffered injury as a result of a security breach from or
11 around January 2, 2016 to July 17, 2016. This breach compromised the names,
12 credit and debit card numbers, card expiration dates, card verification values
13 (‘CVVs’), and other credit and debit card information . . . of thousands of
14 customers at all of Defendant’s approximately 370 American and Canadian retail
15 locations...

16 *Id.* at ¶ 1. The Amended Complaint vaguely alleges Veridian was forced to respond:

17 in *one or more* ways, including but not limited to: (a) notify customers of issues
18 related to the Eddie Bauer Data Breach; (b) cancel or reissue credit and debit
19 cards affected by the Eddie Bauer Data Breach; (c) close and/or open or reopen
20 deposit, transaction, checking or other accounts affected by the Eddie Bauer Data
21 Breach; (d) refund or credit any cardholder to cover the cost of unauthorized
22 transactions relating to the Eddie Bauer Data Breach; (e) respond to a higher
23 volume of complaints, confusion and concern; (f) increase fraud monitoring
24 efforts; *and/or* (g) incur other [*unidentified*] lost revenues as a result of the
25 breach.¹

26 Dkt. 36 at ¶ 8 (emphasis added). Veridian alleges that its injuries were “directly and
27

28 ¹ Veridian should know (especially given that Veridian had ample time to amend its complaint after Eddie Bauer
29 filed its initial motion to dismiss on April 27, 2017 [Dkt. 28]) and thus allege with specificity which of the
30 enumerated actions it actually took. Veridian would be hard-pressed to justify its claims if, for example, it merely
31 “responded to a higher volume of complaints, confusion and concern” and/or “increase[d] its fraud monitoring” but
32 saw no actual fraudulent charges (and thus *no actual fraud losses*). Veridian continues to allege it has been “forced
33 to protect their customers and avoid fraud losses by cancelling and reissuing cards” (Dkt. 36 at ¶ 96; Dkt. 1 at ¶ 59)
34 and that the “cancellation and reissuance of cards resulted in significant damages and losses” (Dkt. 36 at ¶ 97; *id.* at
35 ¶ 59). Veridian has failed to allege, even after amendment, any actual fraud losses and still vaguely claims
36 reimbursement of reissuance costs. It does not allege how many cards it re-issued, when, where the customers were
37 located (Veridian does not allege it reissued any cards to a resident of Washington), or any other facts showing that
38 it re-issued cards outside the normal course of doing business as a payment card-issuing financial institution.
39 Veridian thus tacitly concedes it cannot allege any harm with specificity.

1 proximately caused” by Eddie Bauer’s “failure to implement or maintain adequate data
 2 security measures for *customer* information, including credit and debit card data and
 3 personally identifying information. Defendant failed to take steps to employ adequate
 4 security measures despite well publicized data breaches at large national retail and
 5 restaurant chains in recent months...” *Id.* at ¶ 9.

6 As a basis for the alleged claims, Veridian asserts its contention that Eddie Bauer:
 7 had a duty to Plaintiff...to (a) properly secure payment card magnetic stripe
 8 information at the point of sale and on Defendant’s internal networks; (b) encrypt
 9 Payment Card Data using industry standard methods; (c) use and deploy up to
 10 date EMV technology properly; (d) use available technology to defend its POS
 11 terminals from well-known methods of invasion; and (e) act reasonably to prevent
 the foreseeable harms to Plaintiff and the Class which would naturally result from
 Payment Card Data theft.

12 *Id.* at ¶ 93.². Of course, whether Eddie Bauer had a legal duty as plaintiff hopes is a question of
 13 law for the court. As discussed below, the facts alleged to do not support a tort duty under the
 14 law of Washington or under the law of Veridian’s home state – Iowa. The parties’ respective
 15 rights and duties are better left to the parties’ contractual risk allocation with Visa and
 16 MasterCard. The imposition of tort duties are unwarranted.

17 Based on these allegations, Veridian brings this putative national class action in
 18 Washington, pursuing claims for (1) negligence, (2) negligence *per se*, (3) declaratory and
 19 injunctive relief, (4) violation of Washington’s RCW 19.255.020, and (5) violation of
 20 Washington’s Consumer Protection Act (“CPA”).

21 **III. ARGUMENT**

22 A motion to dismiss is appropriate when the plaintiff has “failed to state a claim upon
 23 which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Allegations in a complaint must be pled
 24 with enough specificity. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007); *Iqbal v. Ashcroft*,
 25 556 U.S. 662, 678 (2009). To survive a Rule 12(b)(6) motion to dismiss, a claim must be more

26 _____
 27 ² Tellingly, Veridian no longer alleges that any “fraudulent transactions [were identified as having] taken place after
 the hackers had used or sold customer data.” *Compare* Dkt. 1 at & 5 with Dkt. 36 at & 3.

1 than “possible” or “conceivable” and instead must be supported by “factual content that allows
 2 the court to draw the reasonable inference that the defendant is liable for the misconduct
 3 alleged.” *Id.* at 663, 678 (citations omitted). “Threadbare recitals of the elements of a cause of
 4 action, supported by mere conclusory statements, do not suffice.” *Id.* at 663.

5 Veridian has failed to allege sufficient facts to support its claims. The Amended
 6 Complaint attempts to allege the same causes of action as the original Complaint, with additional
 7 factual assertions based on information attributed to an unidentified former Information Security
 8 Manager and IT Consultant. Dkt. 36 at ¶¶ 41, 57, 60, 63-66, 68, 70, 74, 81. Veridian’s
 9 negligence *per se*, injunctive and declaratory relief, and RCW 19.255.020 claim are nearly
 10 identical as those alleged in the initial Complaint. Significantly, Veridian had the opportunity to
 11 review Eddie Bauer’s arguments in its initial Motion to Dismiss, and to address those arguments.
 12 Veridian did not cure, presumably because it cannot, the insufficiency of its negligence *per se*,
 13 injunctive and declaratory relief, and violation of RCW 19.255.020 claims. Those claims should
 14 be dismissed with prejudice. Further, the new facts asserted do not overcome the inadequacy of
 15 its negligence and CPA violation claims. These too should be dismissed with prejudice.

16 Veridian filed this suit in Washington in an effort to avoid the unfavorable law of its
 17 home state - Iowa. But applying Washington choice of law rules, the Court should rule that Iowa
 18 law governs and that Veridian has failed to allege viable claims. Should this Court decline to
 19 apply Iowa law and instead apply the law of the forum, Veridian’s claims still fail.

20 **A. Washington’s Choice of Law and Conflict of Law Standards Require**
 21 **Application of Iowa Law to Each of Veridian’s Claims.**

22 A federal court sitting in diversity applies the choice of law rules of the forum state.
 23 *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001). Under Washington law:

24 When a party raises a conflict of law issue in a personal injury case, we apply the
 25 following analytical framework to determine which law applies: (1) identify an
 26 actual conflict of substantive law, (2) if there is an actual conflict of substantive
 27 law, apply the most significant relationship test to determine which state's
 substantive law applies to the case, or, if there is no actual conflict, apply the

1 presumptive law of the forum, (3) then, if applicable, apply the chosen substantive
law's statute of limitations according to RCW 4.18.020.

2 *Woodward v. Taylor*, 184 Wn.2d 911, 919, 366 P.3d 432, 435 (Wash. 2016). This analysis also
3 applies in cases involving torts other than personal injury claims. *Rice v. Dow Chem. Co.*, 124
4 Wn.2d 205, 875 P.2d 1213, 1216 (Wash. 1994).

5 **1. Actual Conflicts Exist Between Washington and Iowa Law Governing**
6 ***Negligence, Negligence Per Se, Injunctive Relief, and Veridian's***
7 ***Statutory Violation Claims.***

8 “To engage in a choice of law determination, there must first be an actual conflict
9 between the laws or interests of Washington and the laws or interests of another state. *Rice*, 875
10 P.2d at 1216. “An actual conflict of law exists where the result of an issue is different under the
11 laws of the interested states.” *Woodward*, 366 P.3d at 435. Here there are actual conflicts
12 between Washington and Iowa law for each of Veridian's claims.

13 **Negligence.** In Iowa, “the economic loss rule bars recovery in negligence when the
14 plaintiff has suffered only economic loss.” *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801
15 N.W.2d 599, 503 (Iowa 2011); *see also* Sec. III.B.1, *infra*. Washington, on the other hand, does
16 not recognize the economic loss doctrine, but instead recognizes the independent duty doctrine.
17 *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 243 P.3d 521, 526 (Wash.
18 2010). Under Washington's independent duty doctrine, a plaintiff may be allowed to proceed
19 under a negligence theory for purely economic loss, only if the claim is based on an independent
20 duty the defendant owes plaintiff outside of the context of the contract. *Id.* Assuming *arguendo*
21 that Veridian can establish Eddie Bauer owed Veridian such an independent duty, under some
22 circumstances Veridian might be permitted to proceed with a negligence claim in Washington. In
23 contrast, under Iowa law, the economic loss rule bars Veridian's negligence claim for purely
24 economic losses. An actual conflict therefore exists.

25 **Negligence Per Se.** In Washington, violation of a statute does not constitute negligence
26 *per se*. RCW 5.40.050. Rather, such a violation can be used as evidence of the existence and
27 breach of a duty and breach of that duty. *Id.*; *see also* Sec. III.C.2(b), *infra*. Under Iowa law,

1 violation of a statute may be negligence *per se*, as long as the statute is specific enough to
2 establish a standard of conduct and provides for a private cause of action. *Struve v. Payvandi*,
3 740 N.W.2d 436, 442-43 (Iowa Ct. App. 2007); *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645
4 N.W.2d 632, 635 (Iowa 2002); *see also* Sec. III.B.3, *infra*. Assuming *arguendo* that Veridian is
5 able to establish a violation of a sufficiently specific statute that provides for a private cause of
6 action, Veridian might be able to pursue a negligence *per se* claim under Iowa law. Under
7 Washington law, that negligence *per se* claim would be disallowed as a standalone claim. The
8 results under the two states' laws differ and, therefore, a conflict exists.

9 ***Injunctive Relief.*** Iowa recognizes a standalone claim for injunctive relief. *See* Sec.
10 III.B.5., *infra*; *see also* *Cunningham v. PFL Life Ins. Co.*, 42 F. Supp. 2d 872, 891 (N.D. Iowa
11 1999). Washington, however, has not recognized a standalone injunctive relief claim but
12 recognizes that some causes of action may permit a party to seek injunctive relief. *Hockley v.*
13 *Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123, 1132 (Wash. 1973) (distinguishing the difference
14 between the cause of action—the Washington Consumer Protection Act—and the forms of
15 relief—injunctive and damages). Because one state recognizes a claim for injunctive relief and
16 the other merely recognizes it as a form of relief, a conflict exists.

17 ***Violations of the Washington Statutes.*** Veridian seeks to pursue two claims alleging
18 violations of Washington statutes. There is no Iowa counterpart to Washington's RCW
19 19.255.020. Further, unlike in Washington, Iowa's consumer protection statute permits a class
20 action lawsuit only if the attorney general approves the filing of the lawsuit. Iowa Code § 714H.
21 Actual conflicts exist between the substantive laws of the two states as to the statutory claims.

22 **2. *Iowa Has the Most Significant Relationship With Each Conflicting***
23 ***Claim.***

24 When there is a conflict of substantive law between two potentially applicable states'
25 law, Washington applies the most significant relationship test to determine which law applies.
26 *Woodward*, 366 P.3d at 436. The court "must evaluate the contacts both quantitatively and
27 qualitatively, based upon the location of the most significant contacts as they relate to the

1 particular issue at hand.” *Martin v. Humbert Constr., Inc.*, 114 Wn. App. 823, 61 P.3d 1196,
 2 1199 (Wash. Ct. App. 2003) (citing *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 555 P.2d
 3 997, 1001 (Wash.1976)). The analysis is a two-step process. First, the court examines which
 4 state has the most significant contacts in light of the following:

5 (1) The rights and liabilities of the parties with respect to an issue in tort are
 6 determined by the local law of the state which, with respect to that issue, has the
 7 most significant relationship to the occurrence and the parties under the principles
 8 stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to
 9 determine the law applicable to an issue include:

10 (a) the place where the injury occurred,

11 (b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of
 12 business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

13 Rest. (2d) of Conflicts of Laws, § 145. The court then examines which state has the most
 14 significant interest in applying its law on a particular issue in light of the principles stated in
 15 section 6 of the Restatement. *Johnson*, 555 P.2d at 1000-04. “In large part, the answer to this
 16 question will depend upon whether some other state has a greater interest in the determination of
 17 the particular issue than the state where the injury occurred.” *Id.* at 1002. Following the two part
 18 analysis of the facts in this case demonstrates that Iowa has the most significant relationship to
 19 each of Veridian’s claims.

20 The first factor, and the most significant here, is “where the injury occurred.” Rest. (2d)
 21 of Conflicts of Laws, § 145(2)(a). Veridian is an Iowa-chartered credit union with its
 22 headquarters in Iowa. Dkt. 36 at 11. To the extent it suffered economic loss (if it suffered any
 23 actual economic loss), Veridian suffered the loss in Iowa. That points strongly to application of
 24 Iowa law. Relying on the location of Eddie Bauer’s headquarters in Washington, Veridian
 25 argues, “Washington has an interest in ensuring that its corporate citizens properly secure and
 26 protect payment card data and implement adequate data security measures to detect and prevent a
 27 data breach.” Dkt. 36 at ¶ 112. Veridian argues, “the location where Plaintiffs were injured was
 fortuitous and Eddie Bauer could not have foreseen where the injury would take place, as Eddie

1 Bauer did not know which financial institutions Eddie Bauer customers used and the location of
 2 these financial institutions' headquarters, or principal places of business, at the time of the
 3 breach." *Id.* at ¶ 118. According to its website, Veridian membership is only open to persons
 4 living in or working for a business located in Iowa or six counties in Nebraska.³ Veridian's
 5 argument that the injury location is "fortuitous" is weak. Veridian's principal place of business
 6 is in Iowa, and any loss it incurred as a result of the claims it asserts necessarily occurred at their
 7 headquarters.

8 The second factor is "the place where the conduct causing the injury occurred." Rest. (2d)
 9 of Conflicts of Laws, § 145(2)(b). Veridian alleges a cyber breach by an unidentified attacker.
 10 Dkt. 36 at ¶ 7. The location where the attack was launched is unknown and not alleged. Veridian
 11 is not able to allege that anything related to the cyber attack occurred in Washington. Veridian
 12 argues that Eddie Bauer's executives are located in Washington. *Id.* at ¶ 115. Notably missing
 13 from Veridian's Amended Complaint is any allegation that Eddie Bauer's computer servers that
 14 were attacked are located in Washington.⁴ The Amended Complaint alleges Eddie Bauer failed
 15 to act in several ways, and then seeks to tie this to Washington by alleging that the alleged failure
 16 to act "emanated from Eddie Bauer's headquarters in Washington." Dkt. 36 at ¶ 114.
 17 (Conceptually it is hard to understand how the alleged failure to act "emanated" from a specific
 18 place. The claim apparently is not just that Eddie Bauer "failed to" engage in various acts in
 19 Washington, but failed to do these things anywhere and everywhere – including Iowa.)

20 As to "the domicile, residence, nationality, place of incorporation and place of business
 21 of the parties" (Rest. (2d) of Conflicts of Laws, § 145(2)(c)), Veridian is headquartered,

22 ³ *Who Can Become a Member of Veridian?*, VeridianCU.org, <https://www.veridiancu.org/contact-us/?kbid=8079>
 23 (last visited on April 13, 2017). Eddie Bauer requests this Court take judicial notice of the website. Judicial Notice
 24 of the website is proper because a "court may judicially notice a fact that is not subject to reasonable dispute because
 25 it...can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed.
 26 R. Evid. 201(b)(2). See also Defendant's Request for Judicial Notice and the Declaration of Kathleen A. Nelson
 27 filed concurrently. Further, the contents of the website constitute a party admission and therefore are not hearsay.
 Fed. R. Civ. P. 801(d)(2).

⁴ Indeed, the Amended Complaint includes several references to information from a former IT Security Manager but
 lacks any averments as to where the computer center is located or where the IT Security Manager worked because
 Veridian knows it was another state and not Washington.

1 chartered and serves customers almost exclusively in Iowa⁵ and Eddie Bauer is headquartered in
2 Washington but has retail stores across the United States. Dkt. 36 at ¶¶ 11, 12. This factor does
3 not favor the application of either state’s law.

4 Finally, as to “the place where the relationship, if any, between the parties is centered”
5 (Rest. (2d) of Conflicts of Laws, § 145(2)(d)), the Amended Complaint, in a conclusory fashion,
6 includes a claim that Eddie Bauer and Veridian had a “special relationship” (Dkt. 36 at ¶ 123)
7 but lacks any averments of fact to support this claim.

8 The Court must next consider each state’s interest in applying its law to Veridian’s
9 claims, to determine if any of those interests outweigh the significant contacts between
10 Veridian’s claims and Iowa, by considering the following:

- 11 (a) the needs of the interstate and international systems,
12 (b) the relevant policies of the forum,
13 (c) the relevant policies of other interested states and the relative interests of those
14 states in the determination of the particular issue,
15 (d) the protection of justified expectations,
16 (e) the basic policies underlying the particular field of law,
17 (f) certainty, predictability and uniformity of result, and
18 (g) ease in the determination and application of the law to be applied.

19 Rest. (2d) of Conflicts of Laws § 6.

20 Washington is Eddie Bauer’s home state. Washington seeks to protect Washington
21 citizens. Veridian makes no claim that it reissued even one credit or debit card to a Washington
22 resident. Veridian alleges it has “hundreds of checking, saving, and deposit customers located in
23 Washington State.” Dkt. 36 at ¶ 11. Veridian does not allege that any of its Washington
24 customers used credit or debit cards at Eddie Bauer during the window of the cyber attack.
25 Washington has less interest than Iowa in protecting an Iowa-chartered and headquartered credit
26 union that claims to have suffered economic loss that, if incurred at all, was in Iowa.

27 Iowa, on the other hand, has a substantial interest in applying its law to protect its
citizens. *See* Dkt. 36 at ¶ 1. In the interest of applying the law where the injury occurred and

⁵ While also allowing persons working in six counties in Nebraska to become members

1 allowing Iowa to protect its own citizens, the Court should apply Iowa law, not Washington law..

2 **3. Determining Which State’s Law Applies at This Stage Conserves**
 3 **Resources and Simplifies the Proceedings.**

4 Veridian may urge the Court to shy away from engaging in a conflict of law analysis at
 5 the motion to dismiss stage. Avoiding the issue now would lead to an inefficient use of judicial
 6 resources (and, if Veridian urges discovery, could involve substantial unnecessary costs to the
 7 parties). On the other hand, if this Court now addresses which state’s law applies, then the claims
 8 will naturally be more focused for both the parties and the Court. This Court has not shied away
 9 from addressing choice of law issues at the motion to dismiss stage in other actions.⁶

10 **B. Iowa Law Mandates Dismissal of Veridian’s Claims.**

11 **1. Veridian’s Negligence Claims Are Barred by the Economic Loss Rule.**

12 Iowa law “bars recovery in negligence when the plaintiff has suffered only economic
 13 loss.” *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 503 (Iowa 2011) (“*Annett*”);
 14 *see Audio Odyssey Ltd. V. United States*, 243 F. Supp. 2d 951, 961 (S.D. Iowa 2003) (“[T]he
 15 ‘pure economic loss’ doctrine . . . bars recovery in negligence claims absent physical harm.”).⁷
 16 Because Veridian alleges only economic loss,⁸ its negligence and negligence *per se* claims
 17 should be dismissed under Iowa’s economic loss rule.

18 In *Annett*, plaintiff trucking company had entered into an agreement with a credit card
 19 issuer to provide its employees with cards to make fuel purchases. 801 N.W.2d at 501. Plaintiff
 20 agreed to assume responsibility for unauthorized or fraudulent use of the credit cards by its
 21 employees. *Id.* Defendant gasoline retailer, pursuant to a contract with the issuer, handled
 22 transactions involving the issuer’s cards and leased one of the issuer’s terminals. *Id.* Using one of

23
 24 ⁶ See, e.g., *Carideo v. Dell, Inc.*, 706 F. Supp. 2d 1122, 1129 (W.D. Wash. 2010); *Edifecs Inc. v. TIBCO Software, Inc.*, 756 F. Supp. 2d 1313, 1318 (W.D. Wash. 2010)

25 ⁷ The economic loss rule is not confined to “situations where the defendant was supplying a product.” *Annett*, 801 N.W.2d at 506.

26 ⁸ Purely economic losses may be recoverable “in actions asserting claims of professional negligence against attorneys and accountants[,] negligent misrepresentation[,] and in actions when the duty of care arises out of a principal-agent relationship.” *Annett Holdings*, 801 N.W.2d at 504. Plaintiff does not allege facts demonstrating any
 27 of these exceptions apply here, nor could it.

1 these credit cards, plaintiff's employee made unauthorized cash withdrawals. *Id.* The employee
 2 got caught and was convicted of theft. *Id.* Plaintiff sued, claiming defendant negligently provided
 3 money to the trucking employee and thus was liable to plaintiff for its economic losses resulting
 4 from the employee's theft. *Id.* at 502. Because plaintiff claimed pure economic loss, the court
 5 held the claim was barred by the economic loss rule. *Id.* at 504. Veridian similarly alleges
 6 exclusively economic loss. Dkt. 36 at ¶¶ 8, 96-98. Its negligence and negligence *per se* claims
 7 are precluded.⁹

8 **2. Veridian Fails to Allege Other Elements to State a Claim for Negligence.**

9 "The elements for a cause of action for negligence are: (1) the existence of a duty to
 10 conform to a standard of conduct for the protection of others; (2) failure to conform to that
 11 standard; (3) a reasonably close causal connection . . . and (4) damages." *Smith v. Shaffer*, 395
 12 N.W.2d 853, 855 (Iowa 1986).¹⁰ Veridian fails to allege facts to support a negligence claim.

13
 14 **(a) As a Matter of Law, Eddie Bauer did not owe a duty to
 15 Veridian.**

16 "The threshold element for a negligence action is a duty or standard of care owed by the
 17 actor to the victim." *Knake*, 492 N.W.2d at 417. Whether a duty exists is a question of law.
 18 Courts consider three factors: (1) the relationship between the parties; (2) the reasonable
 19 foreseeability of harm to the person who is injured; and (3) public policy considerations. *Kolbe v.*
 20 *State*, 661 N.W.2d 142, 146 (Iowa 2003).¹¹ These factors weigh against finding a duty here.

21
 22 ⁹ Despite the fact that there is no direct contractual privity alleged between the parties, Veridian admits Eddie Bauer
 23 has a relationship with payment card networks (like Visa and MasterCard) who, in turn, have relationships with card
 24 issuing banks or credit unions like Veridian. Dkt. 36 at ¶¶ 19, 20. "When parties enter into a chain of contracts, even
 25 if the two parties at issue have not actually entered into an agreement with each other, courts have applied the
 'contractual economic loss rule' to bar tort claims for economic loss, on the theory that tort law should not supplant
 a consensual network of contracts." *Annett*, 801 N.W.2d at 504. A "consensual network of contracts" is exactly what
 Veridian alleges here, and its negligence and negligence *per se* claims must be dismissed.

26 ¹⁰ *Knake v. King*, 492 N.W.2d 416, 417 (Iowa 1992) ("Negligence is generally defined as conduct that falls below
 the standard established by law for the protection of others against unreasonable risk of harm.").

27 ¹¹ *See DePape v. Trinity Health Sys.*, 242 F. Supp. 2d 585, 605 (N.D. Iowa 2003) ("Ultimately, though, the existence
 of a duty is a policy decision, based on the relevant circumstances, that the law should protect a particular person
 from a particular type of harm.").

1 **Relationship between the parties.** Veridian’s allegations boil down to its contention that
 2 Eddie Bauer had a duty to “use reasonable care” to protect and safeguard Veridian’s customers’
 3 payment card information from unauthorized access by cyber criminals. Dkt. 36 at ¶¶ 120-122.
 4 This conclusion is not supported by Iowa law. “The general rule is that a person has no duty to
 5 prevent a third person from causing harm to another.” *Davis v. Kwik-Shop, Inc.*, 504 N.W.2d
 6 877, 878 (Iowa 1993). A duty may arise under some circumstances if “(a) a special relation
 7 exists between the actor and the third person which imposes a duty upon the actor to control the
 8 third person’s conduct, or (b) a special relation exists between the actor and the other which
 9 gives to the other a right to protection.” *Id.*; *Dettman v. Kruckenberg*, 613 N.W.2d 238, 251
 10 (Iowa 2000) (“In those situations where the injured party alleges a failure to act on the part of the
 11 defendant, the law ordinarily requires the existence of a special relationship between the injured
 12 party and the alleged negligent party before a legal duty will be found to exist.”). Neither
 13 exception applies in this action.
 14

15 Veridian still has not alleged any facts establishing a relationship between Eddie Bauer
 16 and the cyber criminal responsible for the data breach at issue here. *See generally* Amended
 17 Complaint.¹² Veridian’s attempt to allege a special relationship between itself and Eddie Bauer
 18 also falls flat. In addition to describing the “four major steps” for “[p]rocessing a payment card
 19 transaction” (Dkt. 36 at ¶ 20), which involve Eddie Bauer as the merchant and Veridian as the
 20 “issuer” that authorizes the transaction (*id.* at ¶¶ 19-20), Veridian now merely concludes a
 21 special relationship exists between Eddie Bauer and itself because “financial institutions
 22 entrusted Eddie Bauer with Payment Card Data [and] Eddie Bauer was in a position to ensure
 23
 24

25 _____
 26 ¹² *See Davis v. Kwik-Shop, Inc.*, 504 N.W.2d 877-79 (Iowa 1993) (finding that a grocery store owner does not owe a
 27 duty to a “plaintiff for injuries suffered on an adjoining business’ property at the hands of assailants who had earlier
 been on the grocery store’s premises” because no special relationship existed between the grocery store owner and
 the assailant)

1 that its systems were sufficient to protect against the harm to financial institutions from a data
2 breach” (*id.* ¶ 123). The Amended Complaint does not allege Veridian had any contractual
3 agreement with Eddie Bauer, that it relied on anything from Eddie Bauer to permit its customers
4 to use their credit or debit cards at Eddie Bauer stores, or that it had any connection with Eddie
5 Bauer, other than the fact that Veridian’s customers may have shopped at Eddie Bauer stores.
6 This does not rise to “special relationship” status. Not only does Veridian fail to allege a special
7 relationship arising out of the particular facts of *this* case (*Kolbe v. State*, 625 N.W.2d 721, 730
8 (Iowa 2001) (emphasis added)), Veridian’s allegations in the Amended Complaint are
9 insufficient to allege a special relationship existed between the parties at all.
10

11 *Dettmann v. Kruckenberg* is highly instructive on this issue. In *Dettmann*, two teenagers
12 stole beer from an unattended beer delivery truck, consumed the beer and, while driving home,
13 collided with plaintiff’s daughter’s car, killing her. 613 N.W.2d 238, 241 (Iowa 2000). Plaintiff
14 claimed the driver of the truck “had a duty to prevent the theft of beer from the beer truck by
15 [defendants] and [his] failure to properly secure the beer trailer from theft was negligence that
16 was a proximate cause of the accident.” *Id.* at 251. Applying Iowa law, the court found “no
17 special relationship existed between [the driver] and members of the driving public,” and no duty
18 existed, because no similar theft from a truck had ever occurred before, the theft occurred in a
19 rural, low-crime area, and the driver was “entitled to assume [the teenagers] would obey the law
20 and not steal beer from the truck.” *Id.* (citing *Roadway Express, Inc. v. Piekenbrock*, 306 N.W.2d
21 784, 786 (Iowa 1981) (“[O]ne may assume others will obey the law.”)). Just as the facts in
22 *Dettman* “show[ed] that no special relationship existed between [the driver] and members of the
23 driving public” (613 N.W.2d at 251), the Amended Complaint here is devoid of facts
24 demonstrating Eddie Bauer had a special relationship with Veridian or any other financial
25
26
27

1 institution.¹³ Veridian does not allege Eddie Bauer has experienced a prior similar data breach or
 2 was a more likely target than any other retailer. Like the driver in *Dettmann*, Eddie Bauer was
 3 entitled to assume that others would obey the law and refrain from gaining unauthorized access
 4 into its computer system to steal customers' payment card information. "[T]he mere coincidence
 5 that [Veridian] shares customers with [Eddie Bauer] is insufficient to infer that a relationship
 6 existed between [them]. This is a significant factor that weighs against the existence of a duty."
 7 *Citizens Bank of Pa. v. Reimbursement Techs.*, 609 F. App'x 88, 92 (3d Cir. 2015).

8
 9 **Foreseeability of harm.** Veridian's conclusion that the injury it incurred was foreseeable
 10 given Eddie Bauer's alleged "failure to use reasonable measures to protect Payment Card Data"
 11 (Dkt. 36 at ¶ 121) is unsupported by facts. The Amended Complaint avers that "[o]ver the last
 12 several years, numerous data breaches have occurred at large retailers and restaurants
 13 nationwide, including The Home Depot, Target, Kmart, Wendy's, P.F. Chang's, and many
 14 others." Dkt. 36 at ¶ 18. This is analogous to the *Dettman* plaintiff's contention that "the theft,
 15 possession and consumption of beer by minors . . . [was] within the scope of the original risk
 16 related to [the defendant's] failure to properly secure the beer trailer from theft." 613 N.W.2d at
 17 251. That crime occurs is not sufficient to make a criminal cyber attack foreseeable as against a
 18 particular retailer who has experienced no similar attack. This weighs against a finding of duty.

19
 20 **Public policy considerations.** Even if the Court finds the harm to Veridian was
 21 foreseeable, public policy considerations militate against imposing a tort duty on retailers like
 22 Eddie Bauer and holding them liable to financial institutions to safeguard electronically stored
 23

24 ¹³ See *Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 354 (Iowa 1991) (finding a bartender (who ordered a drunk
 25 driver to leave the bar's parking lot) owed no duty to plaintiffs' daughters (who were killed and injured when their
 26 car was struck by the drunk driver after leaving the parking lot) because "there was no special relationship between
 27 [the bartender] and [the driver] which imposed a duty upon [the bartender] to control [the driver's conduct]" and
 "there was no special relationship between [the bartender] and [plaintiffs' daughters] which gave the latter a right to
 protection"); *Ewoldt v. City of Iowa City*, 438 N.W.2d 843, 845 (Iowa App. 1989) (holding a police officer has no
 duty to take a mentally ill person into custody in order to protect either that person or other members of the public
 who were endangered by that person).

1 personal or financial information, “particularly when those [financial] institutions are unrelated
 2 third parties that are only derivatively connected to the company suffering the breach through
 3 their [relationships with their mutual customers].” *Citizens*, 609 F. App’x at 93.¹⁴ Allocation of
 4 losses of this type is better left to contractual risk allocation in agreements between (1) credit
 5 unions and card companies like Visa and MasterCard and (2) retailers and those card companies.
 6 There is no public policy reason to wade into the pool of commercial relationships among
 7 sophisticated financial institutions, card companies, and merchants and impose tort duties.
 8 Contractual allocation of the risk of loss fosters predictability and commerce. Imposing a tort
 9 duty that would disturb the contractual risk allocation system in place is unwarranted.
 10

11 Weighing these factors, the Court should rule that Eddie Bauer owed no tort duty to
 12 Veridian to protect or safeguard it from the wrongful acts of a cyber criminal and that Veridian’s
 13 negligence and negligence *per se* claims fail as a matter of law.

14 **(b) Veridian fails to adequately allege causation.**

15 The causation element of a negligence claim requires a plaintiff to prove the defendant’s
 16 conduct was a substantial factor in bringing about plaintiff’s harm. *Smith*, 395 N.W.2d at 857. “If
 17 an actor’s conduct . . . is a substantial factor but is superseded by later forces or conduct, then the
 18 actor’s conduct does not constitute the legal cause of the plaintiff’s harm.” *Id.* Even if Eddie
 19 Bauer had a duty to protect Veridian’s customers’ payment card information and breached that
 20

21
 22 ¹⁴ See also *Dittman v. UPMC*, 2017 Pa. Super. LEXIS 13, at *9-10 (Pa. Sup. Ct. Jan. 12, 2017) (holding that finding
 23 a legal duty to safeguard confidential employee information is unnecessary because “[t]here are still statutes and
 24 safeguards in place to prevent employers from disclosing confidential information,” especially “when there is no
 25 true way to prevent data breaches altogether.”); *Digital Fed. Credit Union v. Hannaford Bros Co.*, 2012 Me. Super.
 26 LEXIS 30, at *7 (Me. Super. Ct. Mar. 14, 2012) (imposing “an extra-contractual duty upon merchants to issuing
 27 banks participating in the Visa system . . . would impose potentially boundless liability in tort and would
 fundamentally restructure everyday consumer transactions.”); *In re Heartland Payment Sys.*, 2011 U.S. Dist. LEXIS
 34953, at *86 (S.D. Tex. Mar. 31, 2011) (“Issuers such as the Financial Institution Plaintiffs, and acquirers, such as
 KeyBank, are bound through their contracts with Visa and MasterCard. . . . The Visa and MasterCard regulations
 provide dispute-resolution and compensation rules when data breaches result in losses to insurers. The contractual
 obligations and compensation system, not tort law, are the Financial Institution Plaintiffs’ only means of seeking
 compensation for economic losses.”).

1 duty by failing to implement proper security measures to protect such information from being
 2 stolen, it was the independent decision of a third party cyber criminal to attack Eddie Bauer's
 3 system that was the actual cause of any loss. Dkt. 36 at ¶¶ 121, 126. To the extent Veridian
 4 alleges Eddie Bauer breached a duty by failing to comply with PCI DSS standards (*id.* ¶ 49), and
 5 such breach resulted in hackers being able to steal payment card information, Veridian concedes
 6 this causal link is dubious. The Amended Complaint admits "mere compliance with the PCI
 7 DSS in insufficient to establish reasonably strong data security practices" and that "[e]very
 8 company that has been spectacularly hacked in the last three years has been PCI complaint" (*id.*
 9 ¶ 50). Alleging that the "PCI is not sufficient to protect against breaches" eviscerates Veridian's
 10 claim that any failure to comply with the PCI DSS standards caused Veridian's alleged harm.
 11 The conduct of the cyber attacker supersedes any alleged breach by Eddie Bauer. The causation
 12 element is not met based on what Veridian alleges here. *Smith v. Shaffer*, 395 N.W.2d 853, 856-
 13 57 (Iowa 1986) (where plaintiffs' decedents were traveling in a pickup truck that collided with a
 14 car stolen and driven by an intoxicated minor, court held the trial court was correct to dismiss
 15 plaintiffs' claim against the minor's parents, noting that "[i]t was not the parents' failure to
 16 supervise but rather their children's' independent decision to become intoxicated, steal a car, and
 17 recklessly operate it which caused the accident").

20 **3. Veridian's Negligence Per Se Claim Fails.**

21 **(a) Section 5 of the Federal Trade Commission Act ("FTC Act")**
 22 **does not establish a specific standard of conduct.**

23 Veridian claims Eddie Bauer violated section 5 of the FTC Act, which prohibits "[u]nfair
 24 methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or
 25 affecting commerce." 15 U.S.C. § 45. In Iowa, "[g]enerally, violation of a statutory duty is
 26 negligence *per se.*" *Struve v. Payvandi*, 740 N.W.2d 436, 442-43 (Iowa Ct. App. 2007). But "to
 27

1 establish a violation the statute must have enough specificity to establish a standard of conduct.”
 2 *Id.* (citing *Griglione v. Martin*, 525 N.W.2d 810, 812 (Iowa 1994)). “The benefit of requiring an
 3 absolute and specific standard in a statute before imposing negligence *per se* is that those who
 4 have a duty under the statute can conform their behavior accordingly.” *Id.* at 443.

5 Such specificity is absent here. “Congress intentionally left development of the term
 6 ‘unfair’ to the [Federal Trade] Commission [(“FTC”)] rather than attempting to define ‘the many
 7 and variable unfair practices which prevail in commerce.’” *Atl. Ref. Co. v. FTC*, 381 U.S. 357,
 8 367 (1965) (quoting S. Rep. No. 592, 63d Cong., 2d Sess., 13). Section 5 is inherently vague by
 9 design and does not establish, for purposes of a negligence *per se* claim, a sufficiently “absolute
 10 and specific standard” to which Eddie Bauer was obligated to adhere.

11
 12 **(b) Section 5 of the FTC Act does not provide for a private cause**
 13 **of action.**

14 Even if section 5 of the FTC Act established an “absolute and specific standard,” a
 15 negligence *per se* claim based on a violation of that statutory duty is only available when the
 16 statute either explicitly or implicitly provides for a private cause of action. *Meinders v.*
 17 *Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 635 (Iowa 2002). Section 5 of the FTC Act does
 18 neither. Under section 5, only the FTC is expressly empowered to prevent persons, partnerships,
 19 and corporations from using unfair acts. 15 U.S.C. § 45(a)(2). In the absence of a provision
 20 explicitly creating a *private* cause of action, courts will imply a cause of action from a statute
 21 only if all four of the following factors are satisfied:
 22

- 23 (1) Is the plaintiff a member of the class for whose benefit the statute was
 24 enacted? (2) Is there any indication of legislative intent, explicit or implicit, to
 25 either create or deny such a remedy? (3) Would allowing such a cause of action
 26 be consistent with the underlying purpose of the legislation? (4) Would the private
 cause of action intrude into an area over which the federal government or a state
 administrative agency holds exclusive jurisdiction?

27 *Kolbe v. State*, 625 N.W.2d 721, 726-27 (Iowa 2001). Veridian is not a member of the class for

1 whose benefit section 5 of the FTC Act was enacted. In enacting section 5, “Congress . . .
2 charged the FTC with protecting *consumers* as well as *competitors*.” *FTC v. Sperry &*
3 *Hutchinson Co.*, 405 U.S. 233, 244 (1972) (emphasis added); 15 U.S.C. § 45(n) (an act or
4 practice cannot be declared unfair unless it “causes or is likely to cause substantial injury to
5 *consumers*” (emphasis added)). Veridian is a financial institution, not a retailer that competes
6 with Eddie Bauer or a consumer. Veridian is not a member of the class the FTC Act was
7 intended to protect. The negligence *per se* claim fails.
8

9 **4. Veridian Fails to State a Claim for Declaratory Relief.**

10 To state a claim for declaratory relief, Veridian must allege an “actual controversy” by
11 showing “there is a substantial controversy, between parties having adverse legal interests, of
12 sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Adams v.*
13 *Am. Family Mut. Ins. Co.*, 2014 U.S. Dist. LEXIS 187681, at *16-17 (S.D. Iowa July 15, 2014)
14 (citations and internal quotations omitted). The “primary purpose” of declaratory relief is “to
15 avoid accrual of avoidable damages to one not certain of his rights and to afford him an early
16 adjudication without waiting until his adversary should see fit to begin suit, after damages had
17 accrued.” *Id.* at *29 (citations and internal quotations omitted).
18

19 While Veridian claims its alleged losses (Dkt. 36 at ¶ 97) will “continue to accrue” (*id.* ¶
20 98), “any damages payable to [Veridian] would simply be those that were caused by the [data
21 breach].” *Adams*, 2014 U.S. Dist. LEXIS 187681, at *31. The alleged harm to Veridian, which
22 relates to *past conduct*, has already occurred, and no possible declaratory judgment “would
23 enable either party to change its conduct to avoid damages that have not yet accrued.” *Id.* at *30.
24 Nor would the relief Veridian seeks “clarify rights in a way that would alter either the parties’
25 relationship or either party’s conduct *moving forward*.” *Id.* at *32 (emphasis added). “Under such
26 circumstances, the propriety of exercising jurisdiction under the Declaratory Judgment Act is
27

1 questionable at best.” *Id.* Veridian seeks a declaration that “(a) Eddie Bauer continues to owe a
2 legal duty to secure its customers’ personal and financial information . . . and to notify financial
3 institutions of a data breach . . . (b) Eddie Bauer continues to breach this legal duty . . . (c) Eddie
4 Bauer’s ongoing breaches of its legal duty continue to cause Plaintiff harm.” Dkt. 36 at ¶ 139.
5 Veridian essentially seeks a declaration that it has a meritorious negligence claim. This is not a
6 proper exercise of jurisdiction under the Declaratory Judgment Act. *Butler v. Dowd*, 979 F.2d
7 661, 673 (8th Cir. 1992) (“In this case, there was no actual controversy left to resolve through
8 declaratory relief when that issue was submitted to the district court. The Plaintiffs’ only
9 requested declaratory relief mirrored what the jury was told it must find in order to hold the
10 defendant liable.”). Veridian’s declaratory relief claim should be dismissed.

12 **5. *Plaintiff’s Request for Injunctive Relief Must Be Dismissed.***

13 To obtain injunctive relief, Veridian must show “some substantial likelihood that past
14 conduct alleged to be illegal will recur.” *Butler*, 979 F.2d at 674 (citations omitted). Veridian
15 alleges no facts to support its conclusory allegation that “[t]he risk of another such breach is real,
16 immediate, and substantial.” Dkt. 36 at ¶ 141. It is inherently implausible to suggest that Eddie
17 Bauer has not taken steps to protect itself from another breach. In the absence of allegations
18 demonstrating Eddie Bauer is plausibly and *substantially likely* to suffer from another data
19 breach by a criminal, Veridian’s claim for injunctive relief must be dismissed.

22 **6. *Veridian’s Claims for Washington Statutory Violations Must Be Dismissed.***

23 Because Veridian’s home state (Iowa) has the most significant relationship to Veridian’s
24 claims (*see* Sec. III.A.2, *supra*), Iowa’s consumer protection laws apply, not Washington’s. *Coe*
25 *v. Philips Oral Healthcare Inc.*, 2014 U.S. Dist. LEXIS 146469, at *9 (W.D. Wash. Oct. 10,
26 2014). Application of Washington’s law to non-residents like Veridian is therefore inappropriate,
27

1 and such claims must be dismissed. *Glenn v. Hyundai Motor Am.*, 2016 U.S. Dist. LEXIS
 2 181318, at *27-28 (C.D. Cal. June 24, 2016) (applying California’s choice of law rules and
 3 finding plaintiffs’ claims must be governed by the consumer protection laws of their home states
 4 and dismissed plaintiffs’ California consumer protection claims); *see also Thornell v. Seattle*
 5 *Serv. Bureau*, 2016 U.S. Dist. LEXIS 76794, at *12 (W.D. Wash. June 13, 2016) (granting
 6 motion to dismiss claims based on Washington law because Texas had the most significant
 7 relationship to plaintiff’s claims and Texas law did not “recognize a cause of action based on the
 8 facts alleged”). There is no Iowa counterpart to Washington’s RCW 19.255.020. That claim must
 9 be dismissed for the same reasons discussed in Section III.C.3 below.
 10

11 **C. Applying Washington Law, Veridian’s Claims Still Must Be Dismissed.**

12 **1. Veridian’s Negligence Per Se Claim Fails Because It Is Not Permitted**
 13 **Under Washington Law.**

14 Since 1986, Washington has not recognized a common law action of negligence *per se*,
 15 except in specific circumstances that do not apply here.¹⁵ RCW 5.40.050. Under RCW 5.40.050,
 16 “[a] breach of a duty imposed by statute, ordinance, or administrative rule shall not be
 17 considered negligence per se, but may be considered by the trier of fact as evidence of
 18 negligence.” While there are four exceptions¹⁶ under which a violation of a statute may
 19 constitute negligence *per se*, none of these exceptions apply here. Washington simply does not
 20 permit a negligence *per se* cause of action on these facts.¹⁷
 21

22 **2. Veridian’s Negligence Claim Cannot Stand Because Veridian Cannot**
 23 **Establish All Necessary Elements.**

24 ¹⁵ This was explicitly argued in Eddie Bauer’s first Motion to Dismiss, yet Veridian continues to allege a negligence
 25 *per se* claim.

26 ¹⁶ (1) [e]lectrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons
 engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of
 disease. . . or (4) driving while under the influence of intoxicating liquor or any drug”

27 ¹⁷ While Veridian may allege that the violation of a statute constitutes evidence of negligence, it nevertheless must
 establish the proposed statute satisfies certain elements, as discussed *infra*.

1 To state a claim for negligence, a plaintiff is required to show: “(1) the existence of a
 2 duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the
 3 proximate cause of the injury.” *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 914 P.2d 728,
 4 731 (Wash. 1996). Veridian’s negligence claim should be dismissed because (a) Veridian is
 5 unable to allege facts demonstrating that Eddie Bauer owed Veridian a duty under common law,
 6 and (b) Eddie Bauer owes no duty to Veridian evidenced by a statute.

7
 8 **(a) Veridian’s negligence claim fails to establish Eddie Bauer owed
 Veridian a duty under common law.**

9 Applying Washington law, “[t]he existence of a duty is a question of law and depends on
 10 mixed considerations of logic, common sense, justice, policy, and precedent.” *Snyder v. Med.*
 11 *Serv. Corp.*, 145 Wn.2d 233, 35 P.3d 1158, 1164 (Wash. 2001) (citation omitted). “The concept
 12 of duty is a reflection of all those considerations of public policy which lead the law to conclude
 13 that a ‘plaintiff’s interests are entitled to legal protection against the defendant’s conduct.’”
 14 *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 759 P.2d 447, 452 (Wash. 1988). “Using [its] judgment,
 15 [the Court] balance[s] the interests at stake.” *Affiliated FM Ins. Co.*, 243 P.3d at 526.

17 Veridian merely concludes that it is within the class of people Eddie Bauer must protect
 18 against a potential data breach. However, “when a duty arises from statute or the common law of
 19 torts, it is usually owed by one class of persons to another class of persons.” *Schooley v. Pinch’s*
 20 *Deli Mkt.*, 80 Wn. App. 862, 912 P.2d 1044, 1046-47 (Wash. Ct. App. 1996), *aff’d*, 134 Wn.2d
 21 468 (1998). For example, with respect to common law duties:

23 To say that a landowner owes a duty of ordinary care to a business invitee, but not
 24 to licensees or trespassers, is to say that one class of people (landowners) owes a
 25 duty of ordinary care to a second class of people (business invitees), but not to a
 26 third or fourth class of people (licensees, trespassers). *See Tincani*, 124 Wn.2d at
 27 138; *Memel v. Reimer*, 85 Wn.2d 685, 538 P.2d 517 (1975). To say that a social
 host owes a duty of ordinary care not to serve alcohol to minors, but no duty to
 adults, is to say that a class of people (social hosts) owes a duty to a second class
 of people (minors), but not to a third class of people (adults). *See Hansen*, 118

1 Wn.2d 476, 824 P.2d 483; *Burkhart v. Harrod*, 110 Wn.2d 381, 755 P.2d 759
 2 (1988) . . . To say that a common carrier owes the highest degree of care to its
 3 passengers is to say that one class of people (common carriers) owes a duty to
 4 another class of people (passengers). See *Benjamin v. City of Seattle*, 74 Wn.2d
 5 832, 447 P.2d 172 (1968); *Murphy v. Montgomery Elevator Co.*, 65 Wn. App.
 6 112, 828 P.2d 584 (1992). See also Clarence Morris, *Duty, Negligence and*
Causation, 100 U. Pa. L. Rev. 189, 200-06 (1952) (discussing "class
 foreseeability" with or without a statute)...

7 *Schooley*, 912 P.2d at 1047 n.13.

8 Veridian is not within the class to whom Eddie Bauer owes a duty. A sophisticated
 9 financial institution, such as Veridian, is aware of the risk of potential fraud losses when it issues
 10 credit and debit cards and has the ability to (and undoubtedly did) take into consideration such
 11 contractual risk allocation in the agreements it entered into with Visa and MasterCard. Veridian
 12 alleges that Eddie Bauer should have been aware of the potential for third party criminal to hack
 13 its system based on the “numerous data breaches” that have occurred over the past years. Dkt. 36
 14 at ¶ 18. These well publicized data breaches were just as known to Veridian as they were to Eddie
 15 Bauer. Financial institutions, such as Veridian, agree to assume, share, or mitigate various risks
 16 through contractual agreements with the other parties involved in the complex financial
 17 transaction that occurs when a financial institution’s member uses his or her card at a retailer
 18 such as Eddie Bauer. Dkt. 36 at ¶ 19.

19 Veridian’s recourse is to take advantage of the loss allocation methods provided for in its
 20 contracts. Veridian seeks to trample over the bargained for risk allocation in those contracts and
 21 instead seeks to impose tort obligations based on Veridian’s bare allegation that Eddie Bauer
 22 owed it a duty to protect against the criminal attack of a third-party. Veridian seeks to impose a
 23 duty on Eddie Bauer based primarily on Eddie Bauer’s alleged failure to adhere to the “industry
 24 standards” which Veridian identifies as the PCI DSS standards. Dkt. 36 at ¶¶ 82-88; 126.

25 Veridian concedes, “[e]very company that has been spectacularly hacked in the last three years
 26
 27

1 has been PCI compliant Obviously, based on that evidence, while a good step in the right
2 direction, PCI is not sufficient to protect against breaches.” *Id.* at ¶ 50. Significantly, even if the
3 PCI DSS standard is the duty Veridian seeks to impose on Eddie Bauer, compliance with PCI
4 DSS does not insulate a company like Eddie Bauer from being victimized by third party
5 criminals, as admitted in the Amended Complaint. PCI DSS compliance simply does not result
6 in a security system impenetrable by hackers.

7
8 The principles of “logic, common sense, justice, policy, and precedent” (*Snyder*, 35 P.3d
9 at 1164) do not lead to Veridian’s desired result, and there are no “considerations of public
10 policy which lead the law to conclude that a plaintiff’s interests are entitled to legal protection
11 against the defendant’s conduct.” *Taylor*, 759 P.2d at 452.

12 Veridian alleges Eddie Bauer’s data protection program allowed a third party to gain
13 unauthorized access to customer payment card information. The general rule at common law is
14 that a private person does not have a duty to protect others from the criminal acts of third
15 parties.” *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 802 P.2d 1360, 1364 (Wash.
16 1991). Washington requires the existence of a “special relationship between the defendant and
17 the plaintiff” in order for a “defendant in a negligence action . . . to owe a duty to protect the
18 plaintiff from foreseeable harm by a third party.” *Id.*

19
20 Veridian, in a conclusory fashion, asserts that because its customers shop at Eddie Bauer,
21 Eddie Bauer and Veridian have a special relationship in which Veridian entrusts Eddie Bauer to
22 protect the information of Veridian’s customers. . Sec. III.B.2.(a), *supra*. In Washington, a duty
23 imposed by a special relationship arises where: (a) a special relationship exists between the
24 [defendant] and the third person which imposes a duty upon the [defendant] to control the third
25 person’s conduct, or (b) a special relation exists between the [defendant] and the other which
26
27

1 gives the other a right to protection. *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 929 P.2d 420,
 2 423 (Wash. 1997). Veridian's claim is based on the "relationship" between it and Eddie Bauer.
 3 A duty only arises through a special relationship when it is "protective in nature, historically
 4 involving an affirmative duty to render aid." *Hutchins*, 802 P.2d at 1366. These relationships
 5 are limited to when a party's wellbeing is entrusted to another. Veridian identifies no
 6 Washington law recognizing a special relationship in the context of protecting credit card data.¹⁸
 7 Without this, Eddie Bauer does not owe Veridian a duty to protect it from the criminal hacker's
 8 infiltration and theft of payment card information.
 9

10 **(b) Veridian's negligence claim fails to establish Eddie Bauer owed**
 11 **Veridian a duty based on a violation of the FTC Act.**

12 Veridian claims Section 5 of the FTC Act imposes a duty on Eddie Bauer. Veridian fails
 13 to allege facts demonstrating that the FTC Act is intended to protect credit unions and other
 14 financial institutions from data breaches against retailers. Section 5 of the FTC Act therefore
 15 cannot support the existence of a duty owed by Eddie Bauer to Veridian under Washington law.

16 Statutory requirements can be considered evidence of a duty, if the statute's:

17 purpose is found to be exclusively or in part (a) to protect a class of persons which
 18 includes the ones whose interest is invaded, and (b) to protect the particular
 19 interest which is invaded, and (c) to protect that interest against the kind of harm
 20 which has resulted, and (d) to protect that interest against the particular hazard
 21 from which the harm results.

22 *Young v. Caravan Corp.*, 99 Wn.2d 655, 663 P.2d 834, 837-38 (Wash. 1983).¹⁹

23 ¹⁸ Examples of special relationships include: a school district toward a pupil, *McLeod v. Grant Cty. Sch. Dist.*, 42
 24 Wn.2d 316, 255 P.2d 360, 362-65 (Wash. 1953); an innkeeper to his or her guests, *Miller v. Staton*, 58 Wn.2d 879,
 25 365 P.2d 333, 335 (Wash. 1961) (duty of innkeeper to protect guests from criminal activity of other guests); a
 26 common carrier to its passengers, *Hutchins*, 802 P.2d at 1366; an employer to his or her employees, *Bartlett v.*
 27 *Hantover*, 9 Wn. App. 614, 513 P.2d 844, 849 (Wash. Ct. App. 1973) ("employer has a duty to make reasonable
 provision against foreseeable dangers of criminal misconduct to which the employment exposes the employee"),
rev'd in part on other grounds, 84 Wn.2d 426, 526 P.2d 1217 (1974); a hospital to its patients; and a business
 establishment toward its customers. See *Hutchins*, 802 P.2d at 1366 (citing examples from *Prosser & Keeton* § 56,
 at 383).

¹⁹ As a threshold issue, Section 5 of the FTC Act plainly provides no private right of action. See *Carlson v. Coca-*
Cola Co., 483 F.2d 279, 280 (9th Cir. 1973); See also Section III.B.3.(b), *supra*. Veridian cannot bring a claim under

1 Veridian fails to allege facts to establish the elements required to impose a duty based on
 2 the FTC Act. First, the “unfair...practice” prong of the FTC Act was added to Section 5 to
 3 “make it clear that Congress, through § 5, charged the FTC with protecting consumers as well as
 4 competitors. *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). Veridian is neither a
 5 consumer nor competitor of Eddie Bauer. As discussed above, Veridian is not within the class
 6 the FTC Act was enacted in part or in whole to protect.

7
 8 The FTC Act is not intended to protect against the data breaches or monetary damages as
 9 alleged in the Amended Complaint. Veridian claims Eddie Bauer had a “duty to use reasonable
 10 data security measures” and that its failure to do so violated the FTC Act. Dkt. 36 at ¶ 124.²⁰
 11 “Congress enacted § 5 of the Federal Trade Commission Act to combat in their incipency trade
 12 practices that exhibit a strong potential for stifling competition.” *FTC v. Texaco*, 393 U.S. 223,
 13 225 (1968). “The purpose of the statute is protection of the public, not punishment of a
 14 wrongdoer.” *Gimbel Bros., Inc. v. Fed. Trade Com.*, 116 F.2d 578, 579 (2d Cir. 1941). Eddie
 15 Bauer’s alleged inadequate security is not a trade practice that has a “strong potential for stifling
 16 competition.” A Tenth Circuit District Court recently rejected the same theory Veridian alleges
 17 here, ruling that the FTC Act can not be used as the basis to impose a duty on retailer following a
 18 data breach. *Cnty. Bank of Trenton v. Schnuck Mkts.*, No. 15-cv-01125-MJR, 2017 U.S. Dist.
 19 LEXIS 66014, at *11 (S.D. Ill. May 1, 2017). Because the FTC Act is not intended to protect
 20 credit unions and other financial institutions from data breaches, a violation of the FTC Act
 21 cannot be used as evidence of a duty and breach of duty by Eddie Bauer.
 22
 23

24 the FTC Act, when it has no right to do so, by veiling it as a negligence claim.

25 ²⁰ Further, the Washington CPA, as discussed in Sec. III.C.5., *infra.*, is the Washington counterpart to the FTC Act,
 26 and Veridian cannot established any violation of the Washington CPA. Under the same analysis, therefore, Veridian
 27 cannot establish a FTC Act violation as a matter of law. Plaintiff also vaguely refers to state “statutes based upon
 the FTC Act that also create a duty on the part of Eddie Bauer. Dkt. 36 at ¶ 79. Presumably, Plaintiff is arguing the
 Washington CPA can be the basis of a duty under a negligence claim. For the same reasons the FTC Act does not
 impose a duty, the Washington CPA does not. Further, as discussed, Eddie Bauer has not violated the Washington
 CPA, and therefore, it cannot be a basis of imposing a duty on Eddie Bauer.

1 **3. *Veridian Does Not Allege Facts Establishing a Violation of RCW***
2 ***19.255.020.***

3 RCW 19.255.020, provides in relevant part:

4 If a processor or business fails to take reasonable care to guard against
5 unauthorized access to account information that is in the possession or under the
6 control of the business or processor, and the failure is found to be the proximate
7 cause of a breach, the processor or business is liable to a financial institution for
8 reimbursement of reasonable actual costs related to the reissuance of credit cards
9 and debit cards that are incurred by the financial institution to mitigate potential
10 current or future damages to its credit card and debit card holders that reside in
11 the state of Washington as a consequence of the breach. . .

12 RCW 19.255.020(3)(a). [Emphasis added]. Significantly, Veridian fails to allege that it reissued
13 even a single credit or debit card to a Washington resident. Eddie Bauer pointed out this defect
14 in its initial motion to dismiss. Even with an amended complaint, Veridian is unable to allege
15 that it reissued a credit card or debit card to any Washington resident.

16 “When the plain language is unambiguous—that is, when the statutory language admits
17 of only one meaning—the legislative intent is apparent, and [courts] will not construe the statute
18 otherwise.” *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318, 320 (Wash. 2003). Based on the plain
19 language of the statute, liability under this statute can exist only if Veridian can meet at least four
20 elements: (1) a business or processor fails to take reasonable care to guard against a breach, (2)
21 account information was in the possession or under the control of the business or processor, (3)
22 the business or processor’s failure is found to be the proximate cause of a breach, and (4) the
23 financial institution reissued cards to credit or debit card holders that reside in the state of
24 Washington as a result of the breach. *See* RCW 19.255.020.

25 At most, Eddie Bauer could only be held liable to reimburse Veridian for the costs
26 associated with reissuing cards to Washington residents. Veridian fails to allege it reissued even
27 a single credit or debit card to a resident of Washington. Veridian fails to plead a viable violation
28 of RCW 19.255.020 and the claim should be dismissed.

1 **4. *Veridian Cannot Assert an Independent Claim for Injunctive and***
 2 ***Declaratory Relief.***

3 Veridian’s claim for injunctive relief fails under Washington law because, assuming it
 4 can state any viable claim, it has adequate remedies at law. Veridian alleges only speculative
 5 future harm that does not support a claim for declaratory relief.

6 Washington does not recognize a standalone injunctive relief claim, but clearly
 7 recognizes that some causes of action may permit a party to seek injunctive relief.²¹ Injunctive
 8 relief is an equitable remedy that “should not be lightly indulged in, but should be used sparingly
 9 and only in a clear and plain case.” *Kucera v. DOT*, 140 Wn.2d 200, 995 P.2d 63, 68 (Wash.
 10 2000). “Accordingly, injunctive relief will not be granted where there is a plain, complete,
 11 speedy and adequate remedy at law.” *Id.*

12 Veridian cannot assert a standalone cause of action for injunctive relief. Even in the
 13 highly unlikely event that Eddie Bauer is the victim of a new data breach, monetary damages
 14 afforded under the law would adequately address any potentially viable claim Veridian would be
 15 entitled to pursue. Veridian’s claim that “monetary damages . . . do not cover the full extent of
 16 injuries suffered by Plaintiff and the Class, which include . . . reputational damage” (Dkt. 36 at ¶
 17 141) is merely conclusory and unsupported by factual allegations. Veridian fails to plausibly
 18 explain how it may suffer “reputational damage” as a result of a hypothetical future cyber attack
 19 against Eddie Bauer. The claim for injunctive relief should be dismissed.
 20 21

22 To seek declaratory relief “a plaintiff must establish standing by showing ‘that there is a
 23 substantial controversy, between parties having adverse interest, of sufficient immediacy and
 24

25

 26 ²¹ *Hockley*, 510 P.2d at 1132 (holding that injunctive relief, in addition to monetary damages, may be available
 27 under the Washington Consumer Protection Act, distinguishing the difference between the cause of action—the
 Washington Consumer Protection Act—and the forms of relief—injunctive and damages); *Nye v. Univ. of Wash.*,
 163 Wn. App. 875, 260 P.3d 1000, 1003 (Wash. Ct. App. 2011) (plaintiff sought injunctive relief as well as damages
 as a form of relief under a breach of contract claim and not as a standalone claim).

1 reality to warrant issuance of a declaratory judgment.” *Scott v. Pasadena Unified Sch. Dist.*, 306
 2 F.3d 646, 658 (9th Cir. 2002). A declaratory judgment is “not ripe for adjudication if it rests
 3 upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at
 4 all.’” *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (quoting *Texas v.*
 5 *United States*, 523 U.S. 296, 300 (1998)). Declaratory relief is unwarranted here.

6 Veridian seeks a judgment that Eddie Bauer “continues to owe a legal duty” and
 7 “continues to breach this legal duty,” which “continue to cause Plaintiff harm.” Dkt. 36 at ¶ 138.
 8 First, as discussed above, under Washington law Eddie Bauer owes no such duty. *See* Sec.
 9 III.C.1-2, *supra*. Second, Veridian’s claim relies on the premise that, in the future, Eddie Bauer
 10 may be liable to Veridian for harm. This is only true if Eddie Bauer is the subject of a
 11 hypothetical successful future cyber attack, Veridian’s members were customers at Eddie Bauer
 12 who were affected by this hypothetical next attack, and Veridian is harmed as a result of the
 13 breach. These are all contingencies not ripe for declaratory judgment. This claim is not viable.

14
 15
 16 **5. Veridian Cannot Establish Its Washington Consumer Protection Act
 Cause of Action as a Matter of Law**

17 Veridian fails to allege an unfair or deceptive act, which is required to establish a cause
 18 of action under the Washington Consumer Protection Act (“CPA”).

19 Washington’s CPA prohibits “[u]nfair methods of competition and unfair or deceptive
 20 acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. “To prevail in a
 21 private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2)
 22 occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person’s business
 23 or property, and (5) causation.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d
 24 885, 889 (Wash. 2009). Failure to satisfy even one element is fatal to a CPA claim. *Hangman*
 25 *Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531, 539-40
 26
 27

1 (Wash. 1986). “Because the [CPA] does not define ‘unfair’ or ‘deceptive,’ [the Washington
 2 Supreme Court] has allowed the definitions to evolve through a gradual process of judicial
 3 inclusion and exclusion.” *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249, 256
 4 (Wash. 1989) (internal quotations omitted). Generally, “a practice is unfair or deceptive if it has
 5 the capacity to deceive a substantial portion of the public . . . Neither intent to deceive nor actual
 6 deception is required.” *Dwyer v. J.I. Kislak Mortg.*, 103 Wn. App. 542, 13 P.3d 240, 243 (Wash.
 7 Ct. App. 2000). “Whether a particular act or practice is ‘unfair or deceptive’ is a question of
 8 law.” *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288, 297 (Wash.
 9 1997). Veridian fails to plead either a qualifying deceptive or unfair practice.

11 **(a) Veridian does not assert Eddie Bauer engaged in a deceptive**
 12 **act that caused Veridian’s alleged injury.**

13 “Deception exists if there is a representation, omission or practice that is likely to mislead
 14 a reasonable consumer.” *Panag*, 204 P.3d at 895 (internal quotations omitted). “In determining
 15 whether an act is ‘deceptive’ under the CPA, the court looks not to the defendant's intent, but to
 16 whether the act has the capacity to materially deceive a substantial portion of the public.” *Smale*
 17 *v. Celco P'ship*, 547 F. Supp. 2d 1181, 1188 (W.D. Wash. 2008). Generally, a “knowing failure
 18 to reveal something of material importance is ‘deceptive’ within the CPA.” *Indoor*
 19 *Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 170 P.3d 10, 18 (Wash.
 20 2007) (internal quotations omitted). Here, there is no allegation that Eddie Bauer stated, acted, or
 21 otherwise publicly represented that it adhered to, complied with, or maintained its customers’
 22 data in any specific manner. Veridian does not allege that Eddie Bauer made any express
 23 representations, let alone any statements with the potential to deceive the public. Without some
 24 outward act, there is no deceptive act. Accepting debit and credit cards is not an affirmation by
 25 Eddie Bauer that it guarantees the protection of its customers’ payment card information against
 26 all threats.

27 Veridian alleges “Eddie Bauer’s failure to inform Plaintiff . . . of its inadequate security

1 practices and failure to comply with the PCI DSS and industry standards, constitute deceptive
 2 acts and practices.” Dkt. 36 at ¶ 160. Veridian makes no claim that Eddie Bauer advertised data
 3 security or lured customers into the store on the premise that it practiced better data security than
 4 other retailers. Nor were issuing banks lured into authorizing transactions on the basis that Eddie
 5 Bauer’s data security was the best in the retail industry. Veridian does not allege that it prohibits
 6 its members from using credit or debit cards at retailers based on their security protocol.
 7 Whether Eddie Bauer failed to inform Veridian of its security system it is not a deceptive act
 8 because Eddie Bauer did nothing that has the capacity to deceive Veridian. There are no facts
 9 alleged demonstrating Eddie Bauer has engaged in a “deceptive” act under the Washington CPA.

10 **(b) Veridian has not asserted Eddie Bauer Engaged in an unfair**
 11 **act that caused Veridian’s alleged injury.**

12 The term “unfair” is not defined in the CPA. Nor has its definition been well-developed
 13 in Washington case law. Washington courts generally adopt the FTC Act’s interpretation of
 14 “unfair.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179, 1187 (Wash. 2013).
 15 “Current federal law suggests a ‘practice is unfair [if it] causes or is likely to cause substantial
 16 injury to consumers which is not reasonably avoidable by consumers themselves and not
 17 outweighed by countervailing benefits.’” *Id.* (quoting 15 U.S.C. § 45(n)). Other factors
 18 considered by Washington courts include:

19 (1) whether the practice, without necessarily having been previously considered
 20 unlawful, offends public policy as it has been established by statutes, the common
 21 law, or otherwise—whether, in other words, it is within at least the penumbra of
 22 some common-law, statutory, or other established concept of unfairness; (2)
 whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it
 causes substantial injury to consumers (or competitors or other businessmen).

23 *Rush v. Blackburn*, 190 Wn. App. 945, 361 P.3d 217, 224-25 (Wash. Ct. App. 2015) (internal
 24 quotations omitted). “According to the [FTC], the most important of the above criteria for
 25 establishing unfairness is unjustified consumer injury.” *Blake v. Fed. Way Cycle Ctr.*, 40 Wn.
 26 App. 302, 698 P.2d 578, 583 (Wash. Ct. App. 1985)

27 Veridian alleges, “Eddie Bauer’s policies and practices relating to its sub-standard

1 security measures for the use and retention of its customers' financial information violate the
2 CPA because they are both unfair and deceptive" Dkt. 36 at ¶ 154. Veridian contends Eddie
3 Bauer's alleged failure to "implement and maintain reasonable security measures to protect
4 financial information and failure to comply with industry standards and the PCI DSS" and
5 "failing to put a reasonable notification policy in place," and failing to implement EVC chip
6 readers constitute violations of the CPA. *Id.* at ¶¶ 157, 158, 161. None of these allegations fit the
7 definition of an "unfair" act.

8 First, the alleged injury to consumers (i.e. the theft of their financial information by a
9 third party) is a risk consumers can avoid. A consumer can choose to not use a credit or debit
10 card and instead use cash at any Eddie Bauer store to eliminate the risk that their financial
11 information may be vulnerable to a third party. Because a consumer can reasonably avoid the
12 "injury" or risk, there can be no an unfair practice under the CPA.

13 Further, being the victim of a cyber attack is not "within at least the penumbra of some
14 common-law, statutory, or other established concept of unfairness." There is nothing "immoral,
15 unethical, oppressive, or unscrupulous" about the actions of Eddie Bauer, and Veridian fails to
16 allege Eddie Bauer's actions rise to that level. Assuming for the sake of analysis that Veridian's
17 allegations are true, that Eddie Bauer had an insufficient protection system in place does not, in
18 and of itself, cause "substantial injury to consumers." Rather, only if that allegedly system is
19 attacked and information stolen can an injury occur. The injury Veridian complains of is not the
20 type of injury contemplated by the CPA. Because Veridian has not pled an essential element of a
21 CPA claim—an unfair or deceptive practice—Veridian's claim should be dismissed.

22 **IV. CONCLUSION**

23 For the foregoing reasons, Veridian's case should be dismissed with prejudice and
24 without leave to amend.

1 DATE: June 15, 2017

LEWIS BRISBOIS BISGAARD & SMITH LLP

2
3 /s/ Kathleen A. Nelson
Kathleen A. Nelson, WSBA No. 22826

4
5 /s/ Sarah E. Demaree
Sarah E. Demaree, WSBA No. 49624

6
7 /s/ Jon P. Kardassakis
Jon P. Kardassakis, CSBA No. 90602

8
9 /s/ Dyanne J. Cho
Dyanne J. Cho, CSBA No. 306190

10 1111 Third Avenue, Suite 2700
11 Seattle, Washington 98101
12 Phone 206.436.2020
13 Fax 206.436.2030
14 E-mail: kathleen.nelson@lewisbrisbois.com
sarah.demaree@lewisbrisbois.com
dyanne.cho@lewisbrisbois.com
jon.kardassakis@lewisbrisbois.com
15 Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Chase C. Alvord
calvordtousley.com

Kim D. Stephens
kstephens@tousley.com

Erin G. Comite
ecomite@scott-scott.com

Stephen J. Teti
steti@scott-scott.com

Gary F. Lynch
glynch@carlsonlynch.com

Kevin W. Tucker
ktucker@carlsonlynch.com

Joseph P. Guglielmo
jguglielmo@scott-scott.com

Karen H. Riebel
khriegel@locklaw.com

Kate M. Baxter-Kauf
kmbaxter-kauf@locklaw.com

Dated: June 15, 2017.

/s/Christy Wolf
Christy Wolf, Legal Secretary