UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

SHANE ENSLIN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,	
Plaintiff,	
v.	
THE COCA-COLA COMPANY; COCA-COLA REFRESHMENTS USA, INC.; KEYSTONE COCA-COLA AND BOTTLING AND DISTRIBUTION CORPORATION; KEYSTONE COCA-COLA BOTTLING COMPANY, INC.; KEYSTONE COCA-COLA BOTTLING CORPORATION; THOMAS WILLIAM ROGERS, III.	**Case No.: 14-CV-06476**
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF
THE COCA-COLA DEFENDANTS' MOTION TO DISMISS

REED SMITH LLP
Mark S. Melodia
Attorney I.D. No. 53515
Nipun J. Patel
Attorney I.D. No. 208130
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103
Ph: (215) 851-8100

Counsel for Defendants The Coca-Cola Company; Coca-Cola Refreshments USA, Inc.; Keystone Coca-Cola and Bottling and Distribution Corporation; Keystone Coca Coca-Cola Bottling Company, Inc.; and Keystone Coca-Cola Bottling Corporation

Dated: February 3, 2015

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I. PRELIMINARY STATEMENT

Defendants The Coca-Cola Company ("TCCC"), Coca-Cola Refreshments USA, Inc. ("CCR"), Keystone Coca-Cola and Bottling and Distribution Corporation, Keystone Coca-Cola Bottling Company, Inc., and Keystone Coca-Cola Bottling Corporation (collectively, the "Keystone Coca-Cola Defendants") (all together, the "Coca-Cola Defendants"),[1] respectfully submit this Memorandum of Law in support of their Motion to Dismiss the Complaint of Plaintiff Shane Enslin ("Enslin" or "Plaintiff"). The Coca-Cola Defendants move under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for immediate dismissal from this action.

To maintain an action in federal court, Plaintiff has the burden to show he has Article III standing. At the pleading stage, Plaintiff must factually allege he suffered an injury-in-fact; that this injury can fairly be traced to some wrongful conduct by the Defendant; and that a decision in Plaintiff's favor would redress the injury. If Plaintiff fails to factually allege even one of these elements, Plaintiff has no standing. As discussed in more detail herein, Plaintiff fails to factually allege cognizable injury and causation of that injury by any of the Coca-Cola Defendants. A controlling decision by the Third Circuit Court of Appeals specifically rejected alleged increased risk of harm as an Article III injury. *Reilly v. Ceridian Corp*., 664 F. 3d 38 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 2395 (2012). *Reilly*, which also arose from the alleged theft of information from an employer, also rejected claims regarding the "need" for future credit monitoring, such as

[1] At the outset, it may be helpful to set out the relationship of the Coca-Cola Defendants to one another, and to Plaintiff Enslin. Plaintiff was an employee of Keystone Coca-Cola Bottling Company, one of the Keystone Coca-Cola Defendants. *See Complaint* at ¶¶ 15-16. During the entire time of Plaintiff's employment, the Keystone Coca-Cola Defendants were owned and operated by Coca-Cola Enterprises, Inc. ("CCE"), an independent bottler and distributor of TCCC's products. *See id.* at ¶ 18. In 2010, the North American operations of CCE were purchased by TCCC and renamed CCR. *See id.* at ¶ 19. CCR, a wholly owned subsidiary of TCCC, is therefore the successor-in-interest to CCE's North American operations, including the Keystone Coca-Cola Defendants. *Id.* at ¶ 20. CCE, which continues to operate as an independent company primarily in Europe, was therefore not a proper defendant. Accordingly, the parties stipulated to the dismissal of CCE without prejudice. *See* (Doc. No. 7).

Plaintiff demands here. As to existing injury, Plaintiff claims to be the victim of identity theft, but he does not allege facts making any monetary injury fairly traceable to a wrongful act by the Coca-Cola Defendants. *See, e.g., Polanco v. Omnicell, Inc.*, 988 F. Supp. 2d 451, 467-71 (D.N.J. 2013) (dismissing several defendants in a post-breach suit for failure to plead Article III causation). Therefore, the Coca-Cola Defendants must be dismissed under Rule 12(b)(1).

Even if Plaintiff had Article III standing to bring this case (he does not), he fails to state a cause of action against the Coca-Cola Defendants. Plaintiff does not allege facts making plausible his recovery against the Coca-Cola Defendants under any theory. For example, Plaintiff states in his Complaint that he himself provided motor vehicle records to his employer. Therefore, Plaintiff has no suit under the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721, *et seq.* ("DPPA") which protects motorists against involuntary disclosure of driver's information obtained from the government. *See, e.g., Hurst v. State Farm Mut. Auto. Ins. Co.*, No. 10-1001, 2012 WL 426018, at *1 (D. Del. Feb. 9, 2012), *aff'd without op.*, (3d Cir. Oct. 24, 2012). Plaintiff's state law claims flounder for failure to plead basic elements, or because dispositive affirmative defenses like Pennsylvania's economic loss doctrine apply to bar recovery on the facts alleged. Therefore, as to the Coca-Cola Defendants, the Complaint is also ripe for dismissal under Rule 12(b)(6). In this analysis, Rule 9(b) requires even closer scrutiny of those causes of action sounding in fraud and/or conspiracy to defraud, and Plaintiff's bare-bones, conclusory fraud and conspiracy claims certainly fall short of this elevated standard as well.

II. STATEMENT OF ALLEGED FACTS AND LEGAL ALLEGATIONS

Plaintiff filed his Complaint on November 12, 2014. (Doc. No. 1). Solely for purposes of this pre-Answer Motion, the Coca-Cola Defendants assume as true all well-pleaded factual allegations contained in the Complaint.

Plaintiff claims he worked for one of the four Keystone Coca-Cola Defendants ("Keystone Coca-Cola Defendant Employer") more than seven years ago. *Complaint* at ¶ 49. He alleges he provided some personal information (for which the Complaint uses the defined term "PII") in the course of his employment application and continuing employment, specifically his Social Security Number, address, bank account information, credit card numbers, driver's license information and motor vehicle records. *Id*. at ¶¶ 32, 49. Plaintiff does not claim he gave any personal information to TCCC, nor that he worked for TCCC.

Plaintiff alleges that sometime between 2007 and 2013, personal information he provided to the Keystone Coca-Cola Defendant Employer was stored on a laptop in the possession of CCE. *Complaint* at ¶ 2. Plaintiff alleges that this laptop was stolen from CCE by Thomas William Rogers, III (with several Doe defendants who allegedly attempted to steal Plaintiff's identity, the "Criminal Defendants"). *Id.* at ¶¶ 24-27. Plaintiff does not allege any relationship between the Criminal Defendants and CCE besides perpetrator and victim. Plaintiff does not allege the Criminal Defendants stole anything from TCCC.

Following this theft, Plaintiff claims he received written notice from CCR regarding the theft. *Complaint* at ¶ 46, Ex. A. This notification also offered Plaintiff one year of credit monitoring at no cost to him. *Complaint* at ¶ 47. Following this notice in 2014, Plaintiff claims he was the victim of several alleged attempts at identity theft. *Id.* at ¶¶ 51-59. Plaintiff does not allege that these attempts at identity theft were directed at credit card or bank accounts whose information he had provided to his employer. It appears from his pleadings that all such attempts were reimbursed, cancelled, or thwarted. *Id*. The only unreimbursed out-of-pocket expense that Plaintiff alleges was $17 charged by his bank when he chose to cancel his checking account. *Id.* at ¶ 51. Plaintiff also alleges that his credit rating suffered, but does not explain how or why that

could be given that his own pleadings show he was successful in getting allegedly improper charges reversed. *Complaint* at ¶ 56. Plaintiff alleges that the Criminal Defendants used his personal information to obtain employment in his name, but does not link that alleged crime to any financial injury on his part. *Id.* at ¶ 59.

In all, Plaintiff asserts nine (9) counts against all Defendants:

Count One: Violation of the DPPA: Plaintiff claims that "[i]n order to be employed by the Coke Defendants, the Plaintiff and the Class were required to submit driver's records, including, but not limited to, their driver's licenses, and provide authorization to obtain driver's records, and/or driver's histories." *Id.* at ¶ 77. Plaintiff claims that he provided the Keystone Coca-Cola Defendant Employer his driver's records as a requirement of employment. *Id.* at ¶¶ 15-16. Per Plaintiff, the Coca-Cola Defendants "knowingly retained" his personal information after it was needed. *Id.* at ¶ 81. Plaintiff asserts that by means of this retention, the Coca-Cola Defendants "disclosed this information to the Criminal Defendants." *Id.*

Count Two: Negligence: Plaintiff claims the Coca-Cola Defendants breached "their duty of care to Plaintiff" "to ensure that [his] PII was not used for improper purposes by failing to provide adequate protections to the PII. . ." and allowing it to be allegedly accessed by unnamed third parties. *Id.* at ¶¶ 88-89.

Count Three: Negligent Misrepresentation/Fraud: Plaintiff asserts the Coca-Cola Defendants engaged in "negligent misrepresentation/fraud" "relating to the receipt, storage, maintenance and privacy of [his] PII, as well as the time, place and manner of the unauthorized access to and theft of [the] PII." *Id.* at ¶ 93. Plaintiff – who asserts that he is a resident of Pennsylvania – also relies on state laws from around the country governing notice of data

security breaches. He asserts that the Coca-Cola Defendants' alleged failure to comply with those state statutes amounts to fraud. *Complaint* at ¶¶ 94-100.

Count Four: Breach of Contract: Plaintiff alleges he and members of the putative class had employment contracts with the Coca-Cola Defendants. Plaintiff alleges these contracts promised the exchange of labor for "salary, benefits, and secure PII." *Id.* at ¶ 106. Plaintiff alleges that by failing to prevent the alleged theft of personal information from CCE, the Coca-Cola Defendants breached these contracts.

Count Five: Breach of Implied Contract: Plaintiff asserts the Coca-Cola Defendants' alleged failure to keep his personal information secure also amounts to a breach of implied contracts between him and them. *Id.* at ¶¶ 110.

Count Six: Breach of the Covenant of Good Faith and Fair Dealing: Plaintiff asserts that the Coca-Cola Defendants' alleged failure to keep his personal information secure constitutes a breach of the covenant of good faith and fair dealing inherent in all contracts. *Id.* at ¶¶ 117.

Count Seven: Unjust Enrichment: Plaintiff alleges the Coca-Cola Defendants were unjustly enriched by obtaining "benefits from the theft of Plaintiff's and the Class' PII." *Id.* at ¶ 128. Plaintiff alleges that the Coca-Cola Defendants enjoyed a "savings in costs" by failing to protect and encrypt the laptops. *Id*. at ¶ 127.

Count Eight: Bailment: Plaintiff alleges that the Coca-Cola Defendants failed in their duties as bailees to "properly destroy or safeguard the PII of the Plaintiff." *Id.* at ¶ 133.

Count Nine: Conspiracy: Plaintiff alleges that, "beginning at least as early as July 2006 and continuing thereafter until at least January 23, 2014," the Coca-Cola Defendants conspired with unnamed "co-conspirators" to misrepresent and defraud the Plaintiff by allegedly

allowing his personal information to be accessed and delaying timely notification of same. *Complaint* at ¶¶ 135-37.

Plaintiff seeks to represent a putative class of more than 70,000 "current and former employees, contractors and vendors of Coke" information about whom was allegedly stolen. *Id.* ¶ at 67. Plaintiff seeks twenty-five (25) years of credit monitoring, actual damages, punitive damages, treble damages, statutory damages, and an award of attorneys' fees. *See Complaint*, pp. 36-37 (*ad damnum* clause).

III. LEGAL ANALYSIS

A. Plaintiff Does Not Have Constitutional Standing, Requiring Dismissal of All Claims

Article III limits federal court jurisdiction to actual "cases or controversies." U.S. CONST. art. III, § 2. One element of this "bedrock requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

To have Constitutional standing, a Plaintiff must factually allege:

> (1) injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be dressed by a favorable decision.

Danvers Motor Co., Inc. v. Ford Motor Co., 432 F.3d 286, 290-91 (3d Cir. 2005). If a plaintiff lacks even one element, he lacks standing, and the case must be dismissed.

"Federal Rule of Civil Procedure 12(b)(1) requires a court to grant a motion to dismiss if the court lacks subject-matter jurisdiction to hear a claim." *Brawner v. Educ. Mgt. Corp.*, No. 11-6131, 2012 WL 3064019, at *4 (E.D. Pa. July 27, 2012), *aff'd*, 513 Fed. App'x. 148 (3d Cir. 2013). "Challenges to subject-matter jurisdiction under Rule 12(b)(1) may be either facial or factual." *Id.* "Facial attacks, like those presented in this case, contest the sufficiency of the

pleadings, and the trial court must accept the complaint's allegations as true." 2012 WL 3064019 at *4 (citation omitted). However, it is the plaintiff's burden, at the pleading stage, to establish standing. *Reilly, supra,* 664 F.3d at 41. A plaintiff's complaint must contain factual allegations demonstrating each element of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiff's Complaint fails to do so here.

(i) As to Alleged Past Identity Theft, Plaintiff Fails to Allege Facts Which Would Satisfy the Causation Requirement of Article III

Plaintiff alleges instances of identity theft, but fails to state facts which would tie such identity theft to any alleged wrongful action by any Coca-Cola Defendant. A federal court may "act only to redress injury that fairly can be traced to the challenged action of the defendant[.]" *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 41-42 (1976).

The Third Circuit has "described this requirement as akin to 'but for' causation." *Edmonson v. Lincoln Nat. Life Ins. Co.*, 725 F.3d 406, 418 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014). As an initial matter, Plaintiff does not allege that TCCC ever collected personal information about him, stored such personal information, or had custody of it at the time it was stolen. Therefore, Plaintiff does not provide factual allegations that TCCC took any action *but for* which Plaintiff would not have suffered the alleged identity theft. For lack of causation, Plaintiff has no Article III standing to sue TCCC.

In *Polanco, supra,* the District Court of New Jersey dismissed several defendants from a data security breach case for lack of Article III causation. 988 F. Supp. 2d at 467-71. Several hospitals had contracted with a vendor, and in the process provided that vendor with patient information. The vendor suffered the theft of an encrypted laptop. The plaintiff, whose daughter had obtained care at one of the hospitals that used this vendor, received a notice. Plaintiff

brought a class action against not only the hospital her daughter went to but also against the other hospitals whose information was contained on the same laptop. The court noted:

> The fact "[t]hat a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Lewis v. Casey*, 518 U.S. 343, 356 (1996) (citations omitted). Moreover, "plaintiff may not maintain an action on behalf of a class against a specific defendant if the plaintiff is unable to assert an individual cause of action against that defendant[,]" "[w]hether for reasons of lack of standing ... or for lack of Rule 23(a)(3) typicality[.]" *See Haas v. Pittsburgh Nat. Bank*, 526 F.2d 1083, 1086 n. 18 (3d Cir. 1975) (citations omitted).

Polanco, 988 F. Supp. 2d at 467-71. For example, "[a]s alleged, the Amended Complaint demonstrates that [defendant] Sentara was not involved in any way in this specific chain of events. Neither Plaintiff, nor her daughter, were ever patients of any Sentara hospital. Sentara never possessed Plaintiff's information in the first instance, and therefore could not have transmitted it to Omnicell from which it was later compromised." *Id*. at 470. Therefore, the plaintiff had no Article III standing to sue Sentara.

Likewise, because Plaintiff here does not allege that TCCC collected or even possessed the personal information in question, Plaintiff's claims against TCCC should be dismissed, *inter alia*, for failure to factually allege Article III causation.

Plaintiff does allege that the Keystone Coca-Cola Defendant Employer collected his personal information in connection with his employment that ended more than seven (7) years ago. Plaintiff also alleges that this information was stored in a laptop which was stolen sometime from 2007 to 2013. *Complaint* at ¶ 1. These allegations provide no factual basis to assume the alleged incidents of identity theft in 2014 had anything to do with his years-ago employment. Plaintiff, like all Americans, lives in a nation facing an epidemic identity theft problem. As recently reported, "[i]dentity theft continues to top the Federal Trade Commission's

national ranking of consumer complaints, and American consumers reported losing over $1.6 billion to fraud overall in 2013[.]" Federal Trade Commission, *FTC Announces Top National Consumer Complaints for 2013*, (Feb. 27, 2014), http://www.ftc.gov/news-events/press-releases/2014/02/ftc-announces-top-national-consumer-complaints-2013.[2]

By simply stating that Plaintiff provided some information to his employer more than eight years ago, and that such information was contained in a laptop stolen from CCE sometime between 2007 and 2013, Plaintiff does not fairly trace his alleged injury to any wrongful conduct by any of the Coca-Cola Defendants.

In addition, Plaintiff alleges acts of identity theft which could not possibly be completed with the information he alleges was stolen from CCE. Plaintiff alleges that "[o]n or about July 7, 2014, the Criminal Defendants used a newly-reissued, password-protected credit card to purchase goods and/or services in the Republic of Ireland." *Complaint* at ¶ 106. Plaintiff does not factually allege how the theft of information at least seven years old could possibly have caused the Criminal Defendants to gain such access to a card issued in 2014. Plaintiff alleges that he suffered attempted identity theft with respect to his store credit card accounts at retailers

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[2] In one data security breach alone, that associated with the Target Corporation in late 2013, criminals obtained debit and credit card information on 40 million American consumers. Majority Staff Report for Chairman Rockefeller, *A "Kill Chain" Analysis of the 2013 Target Data Breach*, United States Senate Committee on Commerce, Science, and Transportation (Mar. 26, 2014). Those criminals also stole from Target names, addresses, phone numbers, and e-mail addresses for up to 70 million consumers. The non-profit group the Privacy Rights Clearinghouse maintains a Chronology of Data Breaches. *See* Privacy Rights Clearinghouse, http://www.privacyrights.org/data-breach/ (last visited Feb. 3, 2015). In the more than seven years since Plaintiff terminated his employment, the Chronology lists 386 data breaches at financial institutions nationwide.

When examining a motion to dismiss, a district court may take judicial notice of public facts without converting the motion to a motion for summary judgment. *Lum v. Bank of Am.*, 361 F.3d 217, 222 n. 3 (3d Cir. 2004), *abrogated in part on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2006) ("In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.").

like Best Buy and Macy's. *Complaint* at ¶ 53-56. But Plaintiff does not allege that he provided these store credit card numbers to the Keystone Coca-Cola Defendant Employer pre-2007, nor does he allege any reason why such an employer would possibly ask for his store credit card numbers. These disconnects between the information allegedly stolen and the alleged identity theft events require dismissal on Article III grounds for lack of causation. *See In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, No. MDL 2360, 2014 WL 1858458, at *11-12 (D.D.C. May 9, 2014) (hereafter, "SAIC"). *SAIC* arose after the alleged loss of tapes containing personal information, including medical information. Six of the fifty-three named plaintiffs alleged that their respective personal information was used for fraudulent purposes. The Court dismissed five such claims for lack of standing because the information alleged to be breached was not sufficient by itself to commit the frauds alleged.

> In a society where around 3.3% of the population will experience some form of identity theft—regardless of the source—it is not surprising that at least five people out of a group of 4.7 million happen to have experienced some form of credit or bank-account fraud. *See* Kristin Finklea, Cong. Research Serv., R40599, *Identity Theft: Trends and Issues 1* (2014), available at http://goo.gl/bCsTEg (10.2 million Americans, out of around 308.7 million total, experienced identity theft in 2010). As that information was not on the tapes, though, Plaintiffs cannot causally link it to the SAIC breach.

SAIC, 2014 WL 1858458 at *11-12. In this case, Plaintiff does not – and cannot – allege that payment card information in connection with a card issued in 2014 was contained in the file of his employment which ended seven years earlier. Plaintiff does not allege that his employer required him to provide the credit card numbers of any compromised card, including those connected with store cards. He does not allege that compromised information included any PIN

or access code as required to access his financial accounts, nor even that the financial accounts in question were the same in 2007 as in 2014.[3]

Plaintiff's claims that his identity was used to obtain employment, and that his credit score has dropped, each fail the Article III causation test twice. As noted above, Plaintiff fails to allege facts which would make such events fairly traceable to any Coca-Cola Defendant. But in addition, Plaintiff fails to allege either event caused Plaintiff any cognizable harm. *See, e.g., Divenuta v. Bilcare, Inc.*, 2011 WL 1196703, at *8 (E.D. Pa. Mar. 30, 2011) ("even if Divenuta could prove that his credit score declined as a result of Bilcare's alleged breach, to recover damages Divenuta would still have to demonstrate that the decline in his credit resulted in a 'tangible pecuniary loss'") (citing *Johnson v. Four States Enters., Inc.*, 355 F. Supp. 1312, 1318 (E.D. Pa. 1972) ("[L]oss of credit, standing alone, is not proof of damage, unless the loss of credit connects itself with some tangible pecuniary loss of which the loss of credit was the cause")). Plaintiff's vague and conclusory statements regarding his credit and use of his identity for employment do not include any factual allegations which would make plausible his recovery in a civil case from the Coca-Cola Defendants.

(ii) Speculative Exposure to Future Harm is Not an "Injury" Sufficient to Create Article III Standing

In *Reilly, supra*, the Third Circuit summarized the Article III injury requirement:

> An injury-in-fact must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is distinct and palpable, as distinguished from merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. Allegations of possible future injury

[3] Plaintiff's identity theft claims also lack a temporal link to the theft of the laptops from CCE. *Cf. Stollenwerk v. Tri-W. Health Care Alliance*, 254 F. App'x 664, 667 (9th Cir. 2007). In *Stollenwerk*, the court reversed a grant of summary judgment for defendant, in part because the alleged identity theft had occurred just six weeks after the theft of the unencrypted laptop. By contrast, Plaintiff here claims that laptops containing personal information were stolen from CCE up to seven years before his identity theft issues started. *Complaint* at ¶ 2.

> are not sufficient to satisfy Article III. Instead, a threatened injury must be certainly impending, and proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. A plaintiff therefore lacks standing if his injury stems from an indefinite risk of future harms inflicted by unknown third parties.

Reilly, *supra*, 664 F.3d at 42 (quotation marks and citations omitted). In *Reilly*, as here, a criminal intruder gained unauthorized access to information stored by a company. This information allegedly included "personal and financial information belonging to Appellants and approximately 27,000 employees at 1,900 companies." *Id*. at 40. The persons in question were notified via a breach letter, which informed them that the "information accessed included your first name, last name, social security number and, in several cases, birth date and/or the bank account that is used for direct deposit." *Id*. The plaintiffs in *Reilly* had not suffered any completed financial harm, but brought a class action based "on speculation that the hacker: (1) read, copied, and understood their personal information; (2) intends to commit future criminal acts by misusing the information; and (3) is able to use such information to the detriment of Appellants by making unauthorized transactions in Appellants' names." *Id*. at 42.

The Third Circuit found that such speculation did not give rise to Article III standing. In so doing, the Court cited specifically to two United States Supreme Court cases, *Lujan, supra,* and *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983). These decisions make clear that even where an individual is at some heightened risk of a future injury, or has experienced a specific harm in the past, Article III standing may not be established to protect against that risk. Stated differently, Plaintiff's risk of future harm is not an injury, just as Plaintiff's past monetary "injuries" are not fairly traceable to the Coca-Cola Defendants. Each claim fails Article III standards for its own reasons.

In *Lujan*, organizations dedicated to wildlife conservation and other environmental causes challenged a Department of the Interior action. This action would endanger wildlife in certain designated areas. The United States Supreme Court found that the groups presented no Article III injury. While some members of the organizations had visited the areas in the past, and may return in the future, "[s]uch 'some day' intentions--without any description of concrete plans, or indeed even any specification of when the some day will be--do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan, supra,* 504 U.S. at 564.

In *Lyons,* plaintiff Adolph Lyons brought a suit against the city of Los Angeles based on an allegation of police abuse. Lyons claimed to have been stopped by city police officers for a traffic violation; that without provocation the officers put him in a chokehold; and that as a result of the chokehold he had suffered severe bodily damage. In addition to claiming entitlement to monetary compensation, Lyons sought injunctive relief. The Supreme Court reversed the Court of Appeals and district court's holding that Lyons had constitutional standing to seek such injunctive relief. *Id.* at 105, 107-108 (rejecting the argument that Lyons had standing based on the "odds" that he may be "stopped for a minor traffic violation to be subject to the strangleholds;" "Rather than an 'odds' test, the Court reads standing to ***require certainty***") (emphasis added).

After considering this prior United States Supreme Court precedent, the Third Circuit in *Reilly* applied the standing analysis in the post-breach context:

> In this increasingly digitized world, a number of courts have had occasion to decide whether the "risk of future harm" posed by data security breaches confers standing on persons whose information may have been accessed. *Most courts have held that such plaintiffs lack standing because the harm is too speculative. See Amburgy v. Express Scripts, Inc.*, 671 F.Supp.2d 1046, 1051-53 (E.D. Mo. 2009); *see also Key v. DSW Inc.*, 454 F.Supp.2d 684, 690 (S.D. Ohio 2006). *We agree with the holdings in those cases.*

Reilly, *supra,* 664 F.3d at 43 (emphasis added).

In this case, Plaintiff's belief that he may be the subject of attempted identity theft sometime in the next 25 years is no more an injury than the fact that Sierra Club members intended to someday revisit the threatened woodlands at issue. The fact that Plaintiff alleges he has been a victim of identity theft no more provides him Article III standing for relief against future potential harm than did Lyons' contention that he had been the victim of an illegal chokehold. *Reilly*, *Lujan*, and *Lyons* require rejection of increased risk of future harm as a basis for Article III standing.

(iii) Expenses Incurred Combatting Exposure to Future Harm Do Not Constitute "Injury" Sufficient to Create Article III Standing

Plaintiff's *ad damnum* clause seeks twenty-five (25) years of credit monitoring, bank monitoring, credit restoration services, and identity theft insurance for Plaintiff and the entire class. Plaintiff does not allege that he himself has paid for a day of any such services. In fact, Plaintiff admits that the data breach notification letter he received offered him a year of credit monitoring at no cost to him. *Complaint* at ¶ 47. Therefore, Plaintiff can only be claiming an "injury" in the hypothetical need to buy monitoring services and insurance in the future.

However, as the United Supreme Court has found, plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013). In *Clapper*, plaintiffs were "attorneys and human rights, labor, legal, and media organizations whose work allegedly requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad." *Id*. at 1144. In challenging a government surveillance program, plaintiffs alleged that "the threat of surveillance will compel them to travel abroad in order to have in-person conversations. In addition, [plaintiffs] declare that they have undertaken 'costly and burdensome measures' to

protect the confidentiality of sensitive communications." *Id*. at 1145-46. The United States Supreme Court found that plaintiffs had no Article III standing, in so doing reversing the Second Circuit Court of Appeals:

> The Second Circuit's analysis improperly allowed respondents to establish standing by asserting that they suffer present costs and burdens that are based on a fear of surveillance, so long as that fear is not "fanciful, paranoid, or otherwise unreasonable." This improperly waters down the fundamental requirements of Article III. Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. . . . If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear.

Clapper, supra, 133 S. Ct. at 1138.

Likewise, *Reilly* also rejected the alleged "need" for credit monitoring:

> Finally, we 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.

Reilly, supra, 664 F.3d at 38, 46.[4]

In *Holmes v. Countrywide Fin. Corp*., brought by Plaintiff's counsel on behalf of another client, the court held under Kentucky, New Jersey, and national law that: (a) "the disfavor for

[4] Citing to *Randolph v. ING Life Ins. & Annuity Co*., 486 F. Supp. 2d 1, 8 (D.D.C. 2007) ("[T]he 'lost data' cases . . . clearly reject the theory that a plaintiff is entitled to reimbursement for credit monitoring services or for time and money spent monitoring his or her credit."); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1050 (E.D. Mo. 2009)(holding plaintiff lacked standing even though he allegedly spent time and money to protect himself from risk of future injury); *Hammond v. Bank of N.Y. Mellon Corp.*, No. 08-6060, 2010 WL 2643307, at *4, *7 (S.D.N.Y. 2010) (noting that plaintiffs "out-of-pocket expenses incurred to proactively safeguard and/or repair their credit" and the "expense of comprehensive credit monitoring" did not confer standing); *Allison v. Aetna, Inc.*, No. 09-2560, 2010 WL 3719243, at *5 n. 7 (E.D. Pa. 2010) (rejecting claims for time and money spent on credit monitoring due to a perceived risk of harm as the basis for an injury in fact).

injuries related to risk of identity theft bleeds over to thwart most attempts to recover payments for credit monitoring;" (b) "[c]onstruing the reach of state law and the requirement to show a compensable injury, case after case has discarded claims by litigants to collect damages for the electronic monitoring of their financial accounts and credit history;" and (c) "[c]ourts considering risk-of-identity-theft cases uniformly reject attempts to recover for the time the plaintiffs spent self-monitoring financial accounts and credit history." No. 08-00205, 2012 WL 2873892, at *6, 7, 11 (W.D. Ky. July 12, 2012).

Mr. Haviland, and Plaintiff, should not obtain any different result now. The precedent of the United States Supreme Court and the Third Circuit is controlling: Plaintiff cannot establish Article III standing on the basis of risk of future harm, nor on the basis of hypothetical future expenditures to address such future risk of harm.

B. Plaintiff Fails to State a Cause of Action

Even if Plaintiff had Article III standing to proceed (he does not), Plaintiff fails to state a cause of action. To defeat a Rule 12(b)(6) motion to dismiss, the Complaint must contain more than "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ethypharm S.A. France v. Abbott Labs.*, 707 F.3d 223, 231 n. 14 (3d Cir. 2013). Every one of the nine causes of action asserted by Plaintiff flunks this basic inquiry.

(i) Count One, Alleging Violations of the Driver's Privacy Protection Act, Must Be Dismissed

Plaintiff fails to state a cause of action against the Coca-Cola Defendants under the DPPA for two separate reasons. First, the DPPA does not apply where an individual voluntarily

provides his personal information to a third party, as Plaintiff alleges he did by providing driving record information to the Keystone Coca-Cola Defendant Employer.

"The DPPA is structured such that § 2721(a) provides the general prohibition on the release and use of motor vehicle information, and § 2721(b) enumerates fourteen specific exceptions to the general prohibition." *Pichler v. UNITE*, 542 F.3d 380, 394-95 (3d Cir. 2008). The DPPA creates liability when three elements are met: (1) the defendant knowingly obtains, discloses, or uses personal information; (2) from a motor vehicle record; and (3) for a purpose not permitted. *See* 18 U.S.C. § 2724(a). Despite the Complaint's several references to alleged over-retention, nothing in the DPPA requires or prohibits retention of records in any specific manner or for any period of time.

To be considered as a motor vehicle record, the document in question must be issued by a DMV. In this case, the information in question did not issue from a DMV. Instead, Plaintiff affirmatively states he provided it to his employer. The Complaint does not allege that any of the Coca-Cola Defendants performed a search with any state DMV or that they caused a DMV search to be made by a third party to obtain Plaintiff's "personal information." Where, as here, a defendant does not obtain a plaintiff's "personal information" from a state motor vehicle agency or reseller, but instead, obtains that information directly from the plaintiff, any subsequent disclosure of that "personal information" is not a DPPA violation. *See, e.g., Hurst*, 2012 WL 426018 at *1.

In *Hurst*, plaintiff sued his insurance carrier, State Farm, as well as several of its counsel and agents. This was one of several suits this plaintiff brought against State Farm. In relevant part, plaintiff alleged that State Farm violated the DPPA by wrongfully disclosing certain motor vehicle record information to defense counsel for one of State Farm's co-defendants in another

suit. The District Court rejected this claim. The DPPA covers information from state agencies, and State Farm is not a state agency. *Id*. Where information is provided by the plaintiff himself, the DPPA does not apply.[5] Because Plaintiff does not allege that any Coca-Cola Defendant obtained information from any DMV or reseller, Plaintiff's DPPA claim fails as a matter of law.

Second, even if the Coca-Cola Defendants had obtained any information from the State DMV or a reseller (which Plaintiff does not allege), to recover under the DPPA Plaintiff would still need to state facts making plausible a "knowing disclosure" by the Coca-Cola Defendants. The term "disclosure" under the DPPA requires "voluntary action." *Senne*, *supra*, 695 F.3d at 603 (citing to *Pichler*, supra, 542 F.3d at 396). Plaintiff does not allege that any Coca-Cola Defendant took any voluntary action to disclose this information. Instead, he affirmatively alleges that this personal information was on a laptop *stolen* from CCE by the Criminal Defendants. Plaintiff's own allegations establish that his DPPA claim must be dismissed as a matter of law.

Plaintiff's DPPA theory is nearly identical to the one advanced by Plaintiff's counsel in the *Holmes v. Countrywide Fin. Corp*. case. There, financial information about the plaintiff was stolen from a financial institution. The plaintiff alleged that by "allowing" that theft to take

[5] *Accord Ocasio v. Riverbay Corp*., No. 06-4655, 2007 WL 1771770, at *6 (S.D.N.Y. June 19, 2007) ("Where, as here, a defendant does not obtain a plaintiff's 'personal information' from a state motor vehicle agency, but instead, obtains that information directly from the plaintiff, any subsequent disclosure of that 'personal information' is not a DPPA violation."); *O'Brien v. Quad Six, Inc.*, 219 F. Supp. 2d 933 (N.D. Ill. 2002) (dismissing DPPA case brought against nightclub by patron who provided photo ID and wound up on third party mailing lists) (" the statute does not regulate information an individual discloses about oneself"); *Lake v. Neal*, No. 07-2742, 2008 WL 4442603, at *3 (N.D. Ill. Sept. 29, 2008) (dismissing DPPA action against voting board for disclosure of information acquired from voter's proffered driver's license) ("In the instant case plaintiff repeatedly overlooks the fact that he voluntarily disclosed his personal information… After that, he was not entitled to protection under the DPPA), *aff'd*, 585 F.3d 1059 (7th Cir. 2009), *cert. denied*, 560 U.S. 906 (2010).

place, the defendants had "furnished" consumer reporting information in violation of the federal Fair Credit Reporting Act. The court rejected that argument:

> Though "furnish" is not defined in the relevant statutory provisions, a common sense understanding of the word underscores why Countrywide cannot be held to account under the FCRA. The SAC's allegations do not describe a scenario where Countrywide "furnished" anyone with Plaintiffs' financial information. On the contrary, Plaintiffs repeatedly characterize the pertinent events as an elaborate and sophisticated theft by Rebollo… The story Plaintiffs tell is not one where Countrywide "transmitted" their private information to unseen parties. Rather, the SAC is clear that Rebollo was a ne'er-do-well who independently stole Countrywide's customer information and engaged in a scheme to sell it to his criminal associates. No coherent understanding of the words "furnished" or "transmitted" would implicate Countrywide's action under the FCRA.

2012 WL 2873892 at *16. Likewise, DPPA case law and common sense reject Plaintiff's attempt to characterize the theft of information by the Criminal Defendants from CCE as making a knowing disclosure. Because the DPPA does not apply to information voluntarily provided, and because Plaintiff pleads facts directly inconsistent with a knowing disclosure, Plaintiff's DPPA claims must be dismissed as a matter of law.

Lastly, even if Plaintiff stated any cause of action under the DPPA as to the Keystone Coca-Cola Defendant Employer (he does not), he states no claim against TCCC. Even taking Plaintiff's factual allegations as true, TCCC never had custody or control over the relevant information.

(ii) Count Two, Negligence, Must Be Dismissed

(a) Plaintiff's Claims In Negligence (and Negligent Misrepresentation) Are Barred by Pennsylvania's Economic Loss Doctrine

The economic loss doctrine provides that no cause of action exists for negligence that results solely in economic damages unaccompanied by physical or property damage. *Adams v. Copper Beach Townhome Comtys, L.P.*, 816 A.2d 301, 305 (Pa. Super. Ct. 2003). "[T]he

Economic Loss Doctrine is concerned with two main factors: foreseeability and limitation of liability." *Id.* at 307.

The Third Circuit applied the economic loss doctrine to bar fraud-related losses that plaintiff financial institutions attempted to recover following a breach of payment card data.

> Sovereign first claims that the district court erred in assessing its losses in purely economic terms, because it also incurred a loss of property, *i.e*,. money, because of BJ's alleged negligence. The argument is meritless. Not surprisingly, Sovereign cites no authority to support its contention that its financial loss negates the economic loss doctrine. Indeed, the argument would totally eviscerate the economic loss doctrine because any economic loss would morph into the required loss of property and thereby furnish the damages required for a negligence claim… thus, the district court correctly held that Sovereign's negligence claim against BJ's was barred by the economic loss doctrine.

Sovereign Bank v. BJ's Wholesale Club, Inc., 533 F.3d 162, 177-78 (3d Cir. 2008).

Plaintiff has not alleged any physical harm, either to his person or physical property (which cannot include money). He cannot bring a negligence (or negligent misrepresentation) claim.

(b) Plaintiff Fails to State a Cause of Action For Negligence

Under Pennsylvania law, the elements of negligence are: "(1) a duty, recognized by law, requiring the actor to conform to a certain standard with respect to the injured party; (2) a failure of the actor to conform to that standard; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage to the interests of another." *Fritz v. Glen Mills Sch.*, 894 A. 2d 172, 176 (Pa. Commw. Ct. 2006), *appeal denied*, 909 A. 2d 1291 (Pa. 2006).

"Whether a duty exists is ultimately a question of fairness. The inquiry involves weighing of the relationship of the parties, the nature of the risk and the public interest in the proposed solution." *Roche v. Ugly Duckling Car Sales, Inc.*, 2005 Pa. Super. 225, ¶ 7, 879 A. 2d 785, 790 (2005). Plaintiff does not factually allege any relationship between himself and TCCC.

Therefore, he does not allege any facts giving rise to a duty, and does not state any negligence claim against TCCC.

Additionally, "a duty arises only when one engages in conduct which foreseeably creates an unreasonable risk of harm to others." *Roche*, *supra*, 879 A. 2d at 790. In *Roche*, "a police officer… sustained serious injuries when he was hit by a car owned by Ugly Duckling and stolen by juveniles from the property of Garden Spot where it had been parked[.]" *Id*. at 786. The car in question was left by Ugly Duckling in an unfenced lot. The key to the car was left under the paper mat of a pick-up truck, and the key to that pick-up truck was left in its gas cap. The juveniles obtained the truck key, the car key, and the car, and seriously injured the police officer.

The trial court found that Ugly Duckling had no duty to the police officer:

> In support of his argument that Ugly Duckling should have foreseen the thefts by juveniles, Plaintiff cites common sense, the nature of Ugly Duckling's business, the fact that Ugly Duckling gave directions to its buyers to secure vehicles after purchase, the testimony of Mr. Monico's supervisor who expected that vehicles purchased from an auction be in a secure area with the doors locked until they could be transported, and Mr. Monico's testimony that he was aware of an occasion where keys were stolen from Garden Spot. However, none of this evidence supports Plaintiff's contention that Ugly Duckling knew or should have known that the Hondas would be stolen by juveniles who would drive them in an incompetent or careless manner.

Id. (affirming summary judgment for defendant on negligence). Likewise, Plaintiff has not factually alleged anything to make the theft of laptops from CCE and subsequent misuse of information in any way foreseeable to the Coca-Cola Defendants.

Plaintiff also has failed to plead actual injury and/or causation. To recover under Pennsylvania negligence law Plaintiff must allege (and then prove) facts establishing proximate causation. "It is not enough that a negligent act may be viewed, in retrospect, to have been one of the happenings in the series of events leading up to an injury." *Eckroth v. Pennsylvania Elec., Inc.*, 12 A. 3d 422, 427 (Pa. Super. Ct. 2010), *appeal denied*, 21 A. 3d 678 (Pa. 2011). Instead,

Pennsylvania law adopts the RESTATEMENT (SECOND) OF TORTS § 433 (1965) with respect to proximate causation:

> **§ 433. Considerations Important in Determining Whether Negligent Conduct is Substantial Factor in Producing Harm.**
> The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:
> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
> (c) lapse of time.

REST. 2D. TORTS § 433.

Plaintiff has not alleged any action taken by TCCC. Plaintiff does not allege that any Coca-Cola Defendant committed any criminal act against him. Plaintiff claims the laptops may have been stolen as early as 2007 but alleges identity theft starting in 2014. Plaintiff has not alleged any facts making plausible his recovery against any Coca-Cola Defendant with respect to fraud losses.

(iii) Count Three, Negligent Misrepresentation and Fraud, Must Be Dismissed

(a) Plaintiff Fails to State a Negligent Misrepresentation Claim

A negligent misrepresentation claim requires proof of: "(1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known of its falsity; (3) with an intent to induce another to act on it and; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation." *Morilus v. Countrywide Home Loans, Inc.*, 651 F. Supp. 2d 292, 306 (E.D. Pa. 2008). Moreover, "[a] negligent misrepresentation claim must be based on some duty owed by one party to another." *Id.*

Plaintiff has not factually alleged any relationship between himself and TCCC which would make plausible that TCCC had any duty of disclosure towards him.

Plaintiff generically alleges:

> The Coke Defendants have made false statements and material misrepresentations to Plaintiff and the Class relating to the receipt, storage, maintenance and privacy of their PII, as well as the time, place and manner of the unauthorized access to and theft of their PIT. Their communications also involved material omission about the actual facts pertaining to the theft of the laptops which facts were necessary for Plaintiff and the Class to take timely and appropriate steps to protect themselves from the theft of their PII.

Complaint at ¶ 93. However, Plaintiff does not identify a single statement of fact made by any of the Coca-Cola Defendants which he alleges to be untrue. Plaintiff does not allege a single statement of fact which the Coca-Cola Defendants had a duty to disclose and did not. Plaintiff does not allege any action he took in reasonable reliance on such alleged factual misrepresentations or omissions, nor any injury caused to him.

Plaintiff alleges he lives in Pennsylvania. The relevant statute in Pennsylvania is the Breach of Personal Information Notification Act, 73 Pa. C.S. §§ 2301, *et seq*. The Pennsylvania statute requires that "[a]n entity that maintains, stores or manages computerized data that includes personal information shall provide notice of any breach of the security of the system" and that "the notice shall be made without unreasonable delay." 73 Pa. C.S. § 2303(a). The statute does not require that the notice contain information regarding the time, manner, and place of unauthorized access. Moreover, the Pennsylvania data security breach statute provides that the "Office of Attorney General shall have exclusive authority to bring an action under the Unfair Trade Practices and Consumer Protection Law for a violation of this act." 73 Pa. C. S. § 2308. Plaintiff has no authority to bring suit to enforce this Act.

Plaintiff also has no standing to bring suit as to Defendant's compliance with the data security breach notification statutes in other states. As established above, bringing a putative class action does not enlarge standing. Lastly, this negligent misrepresentation claim is barred as a matter of law by Pennsylvania's economic loss doctrine, for the reasons set forth above.

(b) Plaintiff Fails to State a Fraud Claim Under Rule 9(b)

In Count Three, in addition to negligent misrepresentation, Plaintiff also alleges fraud. Fraud or intentional misrepresentation, requires proof of the following elements: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of [of the representation's] falsity or recklessness as to whether [the representation] is true or false; (4) with the intent of misleading another into relying on [the representation]; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." *Gibbs v. Ernst*, 647 A. 2d 882, 889 (Pa. Super. Ct. 1994).

Under Rule 9(b), allegations concerning fraud are held to a standard higher than that imposed by Rule 8. When examining claims of fraud, a court must decide if plaintiff has plead with particularity the circumstances of the alleged fraud "in order to place defendants on notice of the precise misconduct with which they are charged, and to safeguard against spurious charges of immoral and fraudulent behavior." *Coleman v. Commonwealth Land Title Ins. Co.*, 684 F. Supp. 2d 595, 609 (E.D. Pa. 2010).

To satisfy the particularity requirement, Plaintiff must "either plead the date, time, and place of the alleged fraud, or inject precision into the allegations by some alternative means." *Dimare v. Metlife Ins. Co.*, 369 F. App'x 324, 329 (3d Cir. 2010). Additionally, "where multiple defendants are involved, the complaint should inform each defendant of the nature of his alleged participation in the fraud." *Tredennick v. Bone*, 323 F. App'x. 103, 105 (3d Cir. 2008); *Cinalli v.*

Kane, 191 F. Supp. 2d 601, 609 (E.D. Pa. 2002) (dismissing unfair trade practices claims for failure to allege fraud specifically against each defendant).

Plaintiff does not meet any of these requirements. Plaintiff generically lumps all of the Coca-Cola Defendants together as making vague "misrepresentations" concerning the alleged theft of the laptops, "security of the PII they obtained from Plaintiff and the Class," and "when they learned of the unauthorized access to the PII." *Complaint* at ¶ 94. Plaintiff does not state when any of the alleged misrepresentations took place. Plaintiff does not factually allege any act he took on reliance of such alleged misrepresentations, much less what injury that caused.

(iv) Count Four, Breach of Contract, Must Be Dismissed

To maintain a claim for breach of contract, Plaintiff must plead sufficient facts to establish the following elements: (1) the existence of a contract, including its essential terms; (2) the breach of a duty imposed by the contract; and (3) resultant damages. *See CoreStates Bank, N.A. v. Cutillo*, 723 A. 2d 1053, 1058 (Pa. Super. Ct. 1999).

Plaintiff identifies no relevant contract between himself and TCCC. Plaintiff generally alludes to an employment contract between himself and the Keystone Coca-Cola Defendants, but does not allege any terms by which he was promised that his personal information would be encrypted, nor made impervious to theft. Plaintiff does not allege any consideration he provided in exchange for data security, as opposed to the labor he provided for employment. Plaintiff does not allege any cognizable injury caused by a breach of this alleged employment agreement.

(v) Count Five, Breach of Implied Contract, Must Be Dismissed

A contract implied in fact is one where the parties "assent to the formation of a contract, but instead of being expressed in words," the intention to incur obligation is "inferred from the conduct of the parties in light of surrounding circumstances including a course of conduct." *Highland Sewer and Water Auth. v. Forest Hills Mun. Auth.*, 797 A. 2d 385, 390 (Pa. Commw.

Ct. 2002). Plaintiff's implied breach of contract claim hence fails for the same reasons as his express breach of contract claim. Plaintiff does not factually allege any course of conduct between himself and TCCC. Plaintiff does not factually allege any course of conduct between himself and any of the Keystone Coca-Cola Defendants other than employment. To say that every employer has a *per se* duty to encrypt all employee data would not be enforcing an implied contract term but creating an entirely new set of legal obligations.

(vi) Count Six, Breach of Covenant of Good Faith and Fair Dealing, Must Be Dismissed

Under Pennsylvania law, Plaintiff may not maintain causes of action for both breach of contract and breach of the covenant of good faith and fair dealing. "A breach of the covenant of good faith is nothing more than a breach of contract claim and separate causes of action cannot be maintained for each, even in the alternative." *Rambo v. Greene,* No. 040803894, 2005 WL 579943, at *2 (C. P. Phila. Cty. Feb. 28, 2005). *See also Meyer v. Cuna Mut. Grp.*, No. 03-602, 2007 WL 2907276, at *14 (E.D. Pa. Sept. 28, 2007), *aff'd*, 648 F.3d 154 (3d Cir. 2011) ("A party is generally precluded from maintaining a claim for breach of the implied duty of good faith and fair dealing separate and distinct from the underlying breach of contract claim."); *SI Title Agency, Inc. v. Evaluation Servs., Inc.*, 951 A. 2d 384, 391-92 (Pa. Super. Ct. 2008) (affirming order granting judgment on the pleadings dismissing a separate count for breach of a duty of good faith because (a) there was already an existing claim for breach of contract and (b) Pennsylvania does not recognize an independent action for breach of the covenant of good faith). Accordingly, Count Six must be dismissed.

(vii) Count Seven, Unjust Enrichment, Must Be Dismissed

Under Pennsylvania law, the elements of unjust enrichment are: (1) a benefit conferred on defendant by plaintiff, (2) appreciation of such benefits by defendant, and (3) acceptance and

retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. Ct. 2006). As to TCCC, Plaintiff does not allege that he took any action, much less conferring a benefit on it. As to the Keystone Coca-Cola Defendants, Plaintiff only alleges that he did his job and was paid a wage. In so doing, Plaintiff does not allege any fact which would make plausible the conferring of a special benefit which it would be unjust to retain.

(viii) Count Eight, Bailment, Must Be Dismissed

A cause of action for breach of a bailment agreement arises if the bailor can establish that personalty has been delivered to the bailee, a demand for return of the bailed goods has been made, and the bailee has failed to return the personalty. *Price v. Brown*, 680 A. 2d 1149, 1151-52 (Pa. 1996). Even if Plaintiff's "personal information" were considered personalty, he does not allege that he gave it to the Keystone Coca-Cola Defendant Employer with any instructions, much less with the expectation of "redelivery". Plaintiff does not allege that he demanded "redelivery" of his personal information, nor that any Defendant failed to return it. Similar claims sounding in bailment have been uniformly rejected with prejudice by other courts considering post-breach class actions. *See, e.g., In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 974-75 (S.D. Cal. 2012) ("the Court is hard pressed to conceive of how Plaintiffs' Personal Information could be construed to be personal property so that Plaintiffs somehow 'delivered' this property to Sony and then expected it be returned") and *In re Target Corp. Data Sec. Breach Litig.*, No. MDL 14-2522, 2014 WL 7192478, at *21 (D. Minn. Dec. 18, 2014) ("This dismissal is with prejudice, because there is no indication that Plaintiffs can plausibly allege the existence of a bailment in this case").

(ix) Count Nine, Conspiracy/Concert, of Action Must Be Dismissed

In Count Nine, Plaintiff alleges that "the Coke Defendants and their co-conspirators . . . engaged in a continuing conspiracy to misrepresent and/or omit the truth, and defraud Plaintiff and the Class." *Complaint* at ¶ 135. Because Plaintiff's conspiracy claim is premised on fraud, in order for this claim to survive a motion to dismiss, the underlying fraud claim must meet the heightened pleading standard of Rule 9(b). *See Lum*, *supra*, 361 F.3d at 217 (affirming dismissal of RICO and Sherman Act conspiracy to defraud claims because Plaintiff failed to sufficiently plead fraud pursuant to Rule 9(b)), *abrogated in part on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2006) (requiring even more specificity than *Lum*; finding factual allegations of parallel conduct alone do not suffice to plead conspiracy). As discussed above, Plaintiff's fraud claim utterly fails to meet the heightened pleading requirements of Rule 9(b). Therefore, his conspiracy to defraud claim must also fail. *Lum*, 361 F.3d at 228.

Additionally, Plaintiff fails to properly plead the underlying elements of civil conspiracy even under the Rule 8 pleading standard. Under Pennsylvania law, in order to state a cause of action for civil conspiracy, Plaintiff must plead: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. *Gagliardi v. Experian Info. Solutions, Inc.*, No. 08-892, 2009 WL 365647, at *4 (W.D. Pa. Feb. 12, 2009), *aff'd*, 357 F. App'x. 413 (3d Cir. 2009) (citing *Morilus v. Countrywide Home Loans, Inc.*, 651 F. Supp. 2d 292, 312-13 (E.D. Pa. 2008)).

The complaint must describe basic facts regarding the substance and formation of the agreement to conspire. *See Gagliardi*, 2009 WL 365647 at *4 (dismissing conspiracy claim for failure to plead when the agreement was formed or when each of the defendants joined the conspiracy). The complaint must show that the defendants acted with malice and solely to injure

plaintiff. *See Morilus*, 651 F. Supp. 2d at 313 (dismissing conspiracy claim where defendants were guided by personal interests rather than with the intent to injure plaintiff).

Plaintiff's conspiracy allegations do not meet any of these foundational requirements. Plaintiff alleges that the Coca-Cola Defendants (lumped together as a group) and unnamed co-conspirators entered into a conspiratorial agreement sometime in the nearly-decade between July 2006 and January 23, 2014. Plaintiff does not allege any step that any Coca-Cola Defendant took to enter into this alleged agreement, nor any action that anyone took in furtherance of this alleged agreement. Plaintiff does not allege that any Coca-Cola Defendant had an intent to injure the Plaintiff. Plaintiff's conspiracy claims must be dismissed.

IV. CONCLUSION

For all of the reasons set forth above, this putative class action should be dismissed with prejudice and final judgment should be entered as to the Coca-Cola Defendants.

Respectfully submitted,

By: *s/ Mark S. Melodia*
Mark S. Melodia
Attorney I.D. No. 53515
Email: mmelodia@reedsmith.com
Nipun J. Patel
Attorney I.D. No. 208130
Email: npatel@reedsmith.com
REED SMITH LLP
Three Logan Square
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
(215) 851-8100

Counsel for Defendants The Coca-Cola Company; Coca-Cola Refreshments USA, Inc.; Keystone Coca-Cola and Bottling and Distribution Corporation; Keystone Coca-Cola Bottling Company, Inc.; and Keystone Coca-Cola Bottling Corporation

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